

## FAYETTE COUNTY, WEST VIRGINIA

### ORDINANCE NO. 2018- 001

ENACTING AN ORDINANCE DECLARING, PROHIBITING, AND ESTABLISHING PROCEDURES FOR INVESTIGATING AND ABATING ANY PUBLIC NUISANCE WITHIN OR ADVERSELY EFFECTING FAYETTE COUNTY, WEST VIRGINIA; PROHIBITING AS A PUBLIC NUISANCE THE DISPOSAL OF “DESIGNATED HAZARDOUS WASTES” AND “PROHIBITED HAZARDOUS SUBSTANCES” AT ANY PLACE WITHIN FAYETTE COUNTY; DECLARING THE EXISTENCE OF ANY PERMANENT LAND DISPOSAL OF ANY SUCH HAZARDOUS WASTES OR PROHIBITED HAZARDOUS SUBSTANCES AT ANY UNPERMITTED PLACE WITHIN FAYETTE COUNTY TO BE A PUBLIC NUISANCE; PROVIDING DEFINITIONS; DECLARING LEGISLATIVE INTENT; PROVIDING FOR EXEMPTIONS; PROVIDING FOR METHODS OF INVESTIGATION, ENFORCEMENT, AND ABATEMENT OF PUBLIC NUISANCES AND ANY IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE PUBLIC HEALTH, SAFETY, WELFARE OR THE ENVIRONMENT WITHIN FAYETTE COUNTY; PROVIDING PROCEDURES FOR RECOVERY OF PUBLIC NUISANCE ABATEMENT ACTION COSTS INCURRED OR TO BE INCURRED BY FAYETTE COUNTY FROM A PERSON LIABLE FOR THE PUBLIC NUISANCE CONDITION; ESTABLISHING LIMITED REPORTING AND DOCUMENT RETENTION REQUIREMENTS; PROVIDING FOR CIVIL AND CRIMINAL PENALTIES; AND PROVIDING AN EFFECTIVE DATE.

**WHEREAS**, pursuant to West Virginia Code Section 7-1-3-ff, the Fayette County Commission has plenary legal authority to enact ordinances regulating the removal and cleanup of any accumulation of refuse or debris, or toxic spillage or toxic seepage located on private lands which is determined by the County Commission to be unsafe, unsanitary, dangerous, or detrimental to the public safety or welfare, whether the result of natural or manmade force or effect; and

**WHEREAS**, pursuant to West Virginia Code Section 7-1-3kk, the Fayette County Commission has plenary legal authority 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 County Commission determines to be a public nuisance; and

**WHEREAS**, the County Commission has determined that permanent disposal of “Hazardous Waste,” as that term is defined in this Ordinance, within Fayette County, other than in complete compliance with the terms of this Ordinance, poses an unwarranted and unacceptable

endangerment to the public health, safety, welfare and the environment within Fayette County, and should be, and by this Ordinance is, declared to be a Public Nuisance; and

**WHEREAS**, the necessity, in the public interest, for the provisions and prohibitions hereinafter contained and enacted in this Ordinance is declared, as a matter of legislative determination and public policy, to be necessary and proper to the adequate prohibition and abatement of public nuisance acts, omissions and conditions and to the provision of adequate protection of the public health, safety, welfare, and the environment within Fayette County; and it is further declared that the provisions and prohibitions hereinafter contained and enacted are in pursuance of, and for the purpose of securing for the benefit of present and future generations of the Public within Fayette County, adequate protection of the public health, safety, welfare, and of the environment within Fayette County;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNTY COMMISSION OF FAYETTE COUNTY, WEST VIRGINIA THAT THE FOLLOWING SHOULD BE, AND IS HEREBY, ORDAINED, ORDERED AND DECLARED TO BE A LAWFUL ORDINANCE OF FAYETTE COUNTY, WEST VIRGINIA:

#### Section I - Title:

This Ordinance shall be known, and may be cited, as the "Fayette County Comprehensive Public Nuisance Abatement Ordinance."

#### Section II - Applicability:

This Ordinance shall apply within and throughout Fayette County, West Virginia.

#### Section III - Definitions:

The following definitions shall apply for purposes of, and shall govern, the interpretation and enforcement of this Ordinance, and shall be understood and construed, together with the context in which these defined terms are used in this Ordinance, to set forth the legislative intent of this Ordinance. When not inconsistent with the context, words used in the present tense include the future; words used in the singular include the plural, and the plural the singular. The word "shall" or "must" is always mandatory and not merely directory. The word "may" is permissible and not mandatory. The masculine gender shall include the feminine or neutral gender.

- (a) The term "**Abatement Action**" means any **Response** action, non-exclusively including any **Removal Action** or **Remedial Action**, or other activities undertaken to the extent practicable in compliance with the requirements of this Ordinance construed liberally to accomplish its remedial purposes that are or may be necessary or appropriate in the judgment of the Fayette County Commission, the Fayette County Prosecuting Attorney, or the Fayette County Code Enforcement Agency, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency to respond to an existing or imminently threatened **Public Nuisance** or to the **Release** or threatened **Release** of any **Hazardous Substance**, **Hazardous Waste**, **Waste**, or **Pollutant** or **Contaminant** into the **Environment** within

or adversely effecting Fayette County, non-exclusively including all the following activities:

- (1) The investigation, study, analysis, or assessment of the nature and extent of any known or suspected nuisance act or condition, including, but not limited to, any known or potential **Endangerments** to the Public Health, Safety, Welfare, or to the **Environment** resulting from, contributed to by, or that may be presented by such nuisance within or affecting Fayette County;
- (2) The analysis, selection, design, implementation and periodic review of suitable methodology and technology for the conduct of a comprehensive remedial investigation in compliance with the requirements of this Ordinance, the assessment of the qualifications of, and retention of, appropriate scientific, legal, and technical personnel determined by the Code Enforcement Agency to be necessary or appropriate to the effective conduct of a remedial investigation by the County, or to the effective oversight and monitoring by the Code Enforcement Agency of a remedial investigation being performed by or on behalf of any **Person** liable for the **Public Nuisance**, and the creation, finalization, and implementation of the comprehensive work plan for the appropriate remedial investigation approved by the Code Enforcement Agency;
- (3) The analysis and selection of suitable methodology and technology for the conduct of a comprehensive feasibility study (including any appropriate **Endangerment** analysis or treatability studies) in compliance with the requirements of this Ordinance; the assessment of the qualifications of, and retention of, the scientific, legal, and technical personnel necessary or appropriate to the conduct of a feasibility study (including any necessary or appropriate **Endangerment** analysis or treatability studies) by the County, or to the effective oversight and monitoring of a feasibility study being performed by or on behalf of any **Person** liable for the **Public Nuisance**, and the creation, development through the review and comment process determined appropriate by the County, finalization, and implementation of the comprehensive work plan for the appropriate feasibility study approved by the Code Enforcement Agency;
- (4) The development and implementation of a **Public Nuisance/Public Health Endangerment** Abatement Action Plan that adequately and timely protects, or restores to the maximum extent practicable: (A) adequate protection of the public health, safety, welfare, and the **Environment**; (B) the reasonable, customary, and safe uses and enjoyments of natural resources within Fayette County; and (C) all current and potential beneficial uses of environmental media owned or held in trust for the benefit of present and future generations of the public within the Fayette County **Environment**;
- (5) Such actions as are necessary and proper for the Code Enforcement Agency, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency to implement, and to evaluate the effectiveness of, any of the activities listed in this Section **III(a)**, whether those activities were implemented in whole or in part by the Code Enforcement Agency, or by any other **Person**;
- (6) Such actions as are necessary and proper in the judgment of the Code Enforcement Agency, or in the judgment of any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency, to provide comprehensive and effective oversight and

monitoring of the performance of any **Abatement Action(s)** being undertaken by a liable **Person** that has been approved by the Code Enforcement Agency as capable of implementing an approved **Removal Action** or **Remedial Action**, or that has been ordered by a court to perform an **Abatement Action**, or both such actions, with respect to any **Public Nuisance** within or affecting Fayette County;

(7) Such actions as are necessary and proper for the Fayette County Commission, Code Enforcement Agency, the Fayette County Prosecuting Attorney, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency effectively to coordinate and cooperate with the lawful actions of appropriate agencies of federal, state or other county governments in responding to any **Public Nuisance**;

(8) All enforcement activities determined by the Fayette County Commission, the Code Enforcement Agency, the Fayette County Prosecuting Attorney, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency to undertake enforcement activities with respect to **Public Nuisance** acts, omissions or conditions within Fayette County necessary or proper to effectuate the remedial purposes of this Ordinance, or to secure the timely and effective performance of any action specified in Sections **III(a)(1)** through **(8)** of this Ordinance.

(b) The term "**Abatement Action Costs**" means any fees and costs incurred and to be incurred by Fayette County that in the judgment of the Fayette County Commission, Code Enforcement Agency, the Fayette County Prosecuting Attorney, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency are necessary or proper in performing or preparing to perform an **Abatement Action**, and shall non-exclusively include, the following costs incurred or to be incurred by Fayette County:

(1) costs for expert assistance in health, law, engineering, geology, and environmental science, expert witness services and legal fees (including, but not limited to, directly related internal costs to Fayette County, non-exclusively including overhead and related administrative costs of the Fayette County Prosecuting Attorney's Office and the Code Enforcement Agency, and the fees and costs of any retained legal counsel, scientific, engineering, or technical expert or assistant(s) deemed necessary and proper in the judgment of the Fayette County Commission, Code Enforcement Agency, the Fayette County Prosecuting Attorney, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency to study, investigate, abate, remove, remediate or respond to an actual or threatened **Public Nuisance** or any **Endangerment** to the Public Health, Welfare, Safety, or the **Environment** that may be presented by an actual or threatened **Public Nuisance**, or to seek enforcement of any law, specifically including any provision of this Ordinance, to secure adequate protection of the Public Health, Safety, Welfare or the **Environment** within Fayette County with respect to any actual or threatened **Public Nuisance** or any existing or imminently threatened **Endangerment** to the Public Health, Welfare, Safety, or the **Environment** within or adversely effecting Fayette County, non-exclusively including all enforcement costs incurred or to be incurred by Fayette County related thereto;

(2) costs to investigate or respond to the existence, or threat of a **Public Nuisance** or



- Endangerment** to the Public Health, Safety, Welfare, or the **Environment** within Fayette County;
- (3) costs to monitor, assess or evaluate a **Public Nuisance** or any **Endangerment** to the public health, safety, welfare, or to the **Environment** that may be presented by an actual or threatened Public Nuisance;
  - (4) costs to prevent, minimize, or mitigate a **Public Nuisance** or any **Endangerment** to the public health, safety, welfare or to the **Environment** that may be presented by an actual or threatened **Public Nuisance**; or
  - (5) costs to oversee and monitor the performance by any responsible party of any investigation or **Abatement Action** in response to a condition which is or may be a **Public Nuisance**;
  - (6) interest on the outstanding unpaid balance of such costs at the same rate as is specified for prejudgment interest determined in accordance with the provisions of West Virginia Code § 56-6-31, which interest shall accrue from the later of:
    - (i) the date payment of a specified amount is demanded in writing, or
    - (ii) the date of the expenditure concerned.
- (c) The term “**Action Level or Advisory Level**” (“**AL**”) means the maximum level established by valid legal authority of the United States or of the State of West Virginia at which a hazardous constituent may lawfully be present in a drinking water supply and also remain adequately protective of both human health and the **Environment**.
- (d) The term “**Applicable Requirement**” means those site or **Facility** cleanup or **Abatement Action** criteria, standards of control, and other substantive legal requirements, criteria, or limitations set forth in federal or West Virginia statutes, or in regulations duly promulgated pursuant to rulemaking authority conveyed by a federal or West Virginia environmental or facility siting laws that specifically address a **Hazardous Substance, Hazardous Waste, Waste, or Pollutant or Contaminant, Remedial Action, Abatement Action, Facility**, location, or other circumstance found at any site or location at or from which a **Public Nuisance** is or may be presented or from which a **Public Nuisance** is or may be emanating.
- (e) The term “**Binding Settlement**” means a good faith settlement of all, or any part, of any liability or obligation that arose, is arising, or may arise, in whole or in part, pursuant to this Ordinance, which settlement, considering all appropriate factors and circumstances, has been:
  - (1) negotiated in good faith;
  - (2) is fair;
  - (3) properly effectuates the remedial purposes and goals of West Virginia Public Nuisance Abatement law and this Ordinance; and
  - (4) has either been:
    - (A) reduced to, and is wholly contained in, a writing subscribed to by all parties to the settlement; or
    - (B) all material terms of the settlement have been recited on the record and agreed to on the record by all parties to the settlement before either a public meeting of the Fayette County Commission, or a public session of a court of record of competent jurisdiction, whichever is applicable.
- (f) The term “**Bona fide prospective purchaser**:”

- (1) **In general:** The term '*bona fide* prospective purchaser' means, with respect to a **Facility**:
- (A) a **Person** who:
    - (i) acquires ownership of the **Facility** after the effective date of this Ordinance; and
    - (ii) establishes by a preponderance of the evidence each of the criteria described in clauses (i) through (viii) of subparagraph (B); and
  - (B) a **Person**:
    - (i) who acquires a leasehold interest in the **Facility** after the effective date of this Ordinance;
    - (ii) who establishes by a preponderance of the evidence that the leasehold interest is not designed to avoid liability under this Ordinance by any **Person**; and
    - (iii) with respect to whom any of the following conditions apply:
      - (I) The owner of the **Facility** that is subject to the leasehold interest is a person described in subparagraph (A) of subsection III(e)(1).
      - (II) (AA) The owner of the **Facility** that is subject to the leasehold interest was a person described in subparagraph (A) of subsection III(e)(1) at the time the leasehold interest was acquired, but can no longer establish by a preponderance of the evidence each of the criteria described in subparagraphs (1) through (8) of subsection III(e)(2)(B) due to circumstances unrelated to any action of the **Person** who holds the leasehold interest; and
      - (BB) the **Person** who holds the leasehold interest establishes by a preponderance of the evidence each of the criteria described in subparagraphs (1), (3), (4), (5), (6), (7), and (8) of Paragraph (2) of this subsection III(e);
    - (iv) the **Person** who holds the leasehold interest establishes by a preponderance of the evidence each of the criteria described in clauses (1) through (8) of paragraph (2) of this subsection III(e).
- (2) **Criteria:** The criteria described in this subparagraph are as follows:
- (A) **Disposal prior to acquisition:** All disposal of **Hazardous Substances, Hazardous Wastes, or Pollutants or Contaminants** at the **Facility** occurred before the **Person** acquired the **Facility**.
  - (B) **Inquiries:**
    - (i) *In general:* The **Person** made all appropriate inquiries into the previous ownership and uses of the **Facility** in accordance with generally accepted good commercial and customary standards and practices in accordance with subclauses (ii) and (iii);
    - (ii) *Standards and practices:* the standards and practices referred to in Section III(i)(2)(A) and (B) shall be considered to satisfy the requirements of this clause;
    - (iii) *Residential use:* In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a **Facility** inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this clause.
- (3) **Notices:** The **Person** provides all legally required notices with respect to the discovery or **Release** of any **Hazardous Substances, Hazardous Wastes** at the **Facility**.

- (4) **Care:** The **Person** exercises appropriate care with respect to **Hazardous Substances** or **Hazardous Waste** found at the **Facility** by taking reasonable steps to:
  - (A) stop any continuing **Release**;
  - (B) prevent any threatened future **Release**; and
  - (C) prevent or limit human, environmental, or **Natural Resource** exposure to any previously released **Hazardous Substance** or **Hazardous Waste**.
- (5) **Cooperation, assistance, and access:** The **Person** provides full cooperation, assistance, and access to **Persons** that are authorized to conduct **Response** actions or **Natural Resource** restoration at a **Facility** (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial **Response** actions or **Natural Resource** restoration at the **Facility**).
- (6) **Institutional control:** The **Person**:
  - (A) is in compliance with any land use restrictions established or relied on in connection with any **Response** action at a **Facility**; and
  - (B) does not impede the effectiveness or integrity of any institutional control employed at the **Facility** in connection with a **Response** action;
- (7) **Requests; Information Demands or Orders; subpoenas:** The **Person** complies with any Demand for Production of Information issued pursuant to Section VIII of this Ordinance, any Civil Information Demand or Civil Investigation Order issued pursuant to the Fayette County Public Nuisance Civil Investigation Ordinance, Fayette County Ordinance # 2017-002, effective December 15, 2017, and any Compliance Order issued pursuant to this Ordinance.
- (8) **No affiliation:** The **Person** is not:
  - (A) potentially liable, or affiliated with any other **Person** that is potentially liable, for **Abatement Action Costs** at a **Facility** through:
    - (i) any direct or indirect familial relationship; or
    - (ii) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the **Facility** is conveyed or financed, by a tenancy, by the instruments by which a leasehold interest in the **Facility** is created, or by a contract for the sale of goods or services); or
  - (B) the result of a reorganization of a business entity that was or is potentially liable.
- (g) The term “**CERCLA**” shall mean the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (also sometimes known as the “federal Superfund Act”), 42 U.S.C. §§ 9601-9675.
- (h) The term “**Confidential Information**” shall mean:
  - (1) records, reports, information or data, or a particular portion thereof, that reveal a **Trade Secret**, contain protected information relating to homeland security, or are subject to another exemption provided by the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1, *et seq.*; and
  - (2) records, reports or information, or a particular portion thereof, that if made public would:
    - (A) Divulge production or sales figures or methods, processes, or production unique to the submitting **Person**;

- (B) Otherwise tend to adversely affect the competitive position of a **Person** by revealing trade secrets, including intellectual property rights; or
- (C) Present a credible threat to the safety and security of any water supply, including information concerning water supply vulnerability assessments.

(i) **Confirmed Settlement** shall mean a **Binding Settlement** that:

(1) fully and finally resolves all, or any part, of any **joint and several liability or obligation** that arose, is arising, or may arise, in whole or in part, pursuant to this Ordinance reached between the Fayette County, non-exclusively including the Fayette County Code Enforcement Agency, Fayette County Board of Health, or Fayette County Solid Waste Authority, with the advice and written consent of the Fayette County Prosecuting Attorney, and any responsible or potentially responsible party in connection with either of the following:

(A) *Extra-Judicial Claims or Matters*: The settlement applies to any site or matter with respect to which any related claims of Fayette County are **not** then pending before any court of competent jurisdiction, and the material terms of such settlement have been: (i) reduced to, and is wholly contained in, a writing by all parties to the settlement; or (ii) recited on the record and agreed to on the record by all parties to the settlement before a public meeting of the Fayette County Commission, or

(B) *Judicial Claims or Matters*: The settlement applies to any site or matter with respect to which any related claims of Fayette County arising under this Ordinance are pending before any court of record of competent jurisdiction, and the material terms of such settlement have been: (i) reduced to, and are wholly contained in, a writing subscribed to by all parties to the settlement; or (ii) recited and agreed to on the record before such court in open and public session; and

(2) Prior to formally moving either the Fayette County Commission or a court of competent jurisdiction for formal confirmation of the settlement as a **Confirmed Settlement**, the settling parties have timely done and provided all of the following:

(A) the parties to the settlement for which confirmation is sought lodged a complete copy of the written settlement, or, if the settlement has not been reduced to writing, a complete copy of the record of proceedings reflecting the recitation of the material terms of the settlement with either the Fayette County Clerk or the Clerk of the Court, whichever is applicable; and

(B) the settling parties have provided appropriate public notice in at least one (1) newspaper of general circulation in Fayette County of the commencement of a public comment period of not less than ten (10) days during which any interested member of the public may submit comments on the proposed settlement to either the Commission or the court and the settling parties (or, if any of them are represented by legal counsel, the legal counsel of record for such settling party) which notice, at a minimum, contains all of the following information:

- (j) a concise summary of the material terms of the proposed settlement;
- (ii) a concise description of the legal effect, if any, that formal confirmation of the proposed settlement of the proposed settlement would have on any non-settling, jointly and severally liable **Person**;
- (iii) if the proposed settlement is pending before the Fayette County Commission, notification of the right of any person claiming an interest relating to the proposed settlement who is so situated that the approval of the proposed

settlement may as a practical matter impair or impede the ability of such **Person** to protect its interest, to request by appropriate motion leave to intervene as a party in the proceedings before the Fayette County Commission (or before a Fayette County Hearing Officer appointed by Fayette County Commission) to consider approval of the proposed settlement; and

- (iv) if the proposed settlement is pending before a court of competent jurisdiction, notification of the right of any **Person** to seek, by appropriate motion to the court and such proof of their entitlement to any relief requested as may be required pursuant to the applicable rules of civil procedure, leave to intervene, either on a permissive basis or as a matter of right, as a party to the proceedings before the court regarding the proposed settlement.
- (v) at or before the time they request either the Fayette County Commission or a court of competent jurisdiction, whichever is appropriate, to formally confirm the proposed settlement as a **Confirmed Settlement** pursuant to this Ordinance following a noticed, public hearing on such request, the settling parties have provided the County Commission or the court with a "Responsiveness Summary," which set forth a complete and concise summary of all public comments on the proposed settlement timely received and, as appropriate, the concise response of the settling parties to public comments received, and provide to the Fayette County Commission or to the court proof of the service of that "Responsiveness Summary" on the parties to the proceeding and on each **Person** who timely submitted a public comment on the proposed settlement.

(j)(1) The term "**Contractual Relationship**", for the purpose of Section VI(b)(1)(C) of this Ordinance, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the **Facility** concerned is located was acquired by the defendant after the disposal or placement of the **Hazardous Substance, Hazardous Waste, Waste, or Pollutant or Contaminant** on, in, or at the **Facility**, and one or more of the circumstances described in subparagraphs III(i)(1)(A) through (C), inclusive, is also established by the defendant by a preponderance of the evidence:

- (A) At the time the defendant acquired the **Facility** the defendant did not know and had no reason to know that any **Hazardous Substance, Hazardous Waste, Waste, or Pollutant or Contaminant** to which any part of the **Abatement Action** is addressed was disposed of on, in, or at the **Facility**.
- (B) The defendant is a **Government Entity** which acquired the **Facility** by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
- (C) The defendant acquired the **Facility** by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that it has satisfied the requirements of Section VI(b)(1)(C)(i) and (ii), provides full cooperation, assistance, and **Facility** access to the **Persons** that are authorized to conduct **Response** actions at the **Facility** (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial **Response** action at the **Facility**), is in compliance with any land use restrictions established or relied on in connection with the **Response** action at a **Facility**, and does not impede the effectiveness or integrity of any institutional control employed at the **Facility** in connection with an **Abatement**



**Action.**

- (2) "Reason to know" as that term is used in Paragraph (1) of this subsection III(i) means that the defendant can establish by clear and convincing evidence that it had no reason to know of the matter described in subparagraph (1)(A) of this subsection III(i):
- (A) on or before the date on which the defendant acquired the **Facility**, the defendant carried out all appropriate inquiries pursuant to the standards and requirements set forth in 40 CFR, Part 312, *Standards for Conducting All Appropriate Inquiries*, as the same may be amended or re-promulgated from time to time; and
  - (B) the defendant took reasonable steps to:
    - (i) stop any continuing release;
    - (ii) prevent any threatened future release; and
    - (iii) prevent or limit any human, environmental, or natural resource exposure to any previously released **Hazardous Substance, Hazardous Waste, Waste, or Pollutant or Contaminant**.
- (k) The term "**Dilution and Attenuation Factor**" ("**DAF**") shall mean a factor that is used to estimate the dilution and attenuation for **Toxic** constituents contained in a **Waste** as they travel from the point of leachate generation in a landfill through the subsurface to the point of human or environmental exposure, such as, a drinking water well, discharge into a publicly owned treatment works ("**POTW**"), or an aerated leachate collection pond. [First Explanatory Note: The U.S. EPA uses chemical specific DAFs to determine if toxic contaminants listed in the National Drinking Water Standards are present in Waste to identify the waste stream as a "Hazardous Waste listed or identified by the Administrator" of U.S. EPA pursuant to Subtitle C of **RCRA** using the U.S. EPA Toxicity Characteristic Leachate Procedure ("**TCLP**").] [Second Explanatory Note: An identical process is followed by the Secretary of the West Virginia Department of Environmental Protection ("**WV DEP**") in determining if toxic contaminants listed in the National Drinking Water Standards are present in Waste to identify the waste stream as a regulated Hazardous Waste under the WV Hazardous Waste Management Act, Article 22-18 of the West Virginia Code.] [Third Explanatory Note: The U.S. EPA uses a maximum **DAF** of 100 unless other information exists to use a different **DAF**.]
- (l) The term "**Disposal**" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste** into or on any land or water so that such **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste**, or any constituent thereof, may enter the **Environment** or be emitted into the air or discharged into any **Waters of the State** within Fayette County, including ground waters.
- (m) The term "**Endangerment**" means a threatened or potential harm. For all purposes of and relating to this Ordinance, proof of an **Endangerment** does not require a showing of an actual harm, and an **Endangerment** need not necessarily lead to an actual harm.
- (n) The term "**Environment**" means any surface water, groundwater, soil water, drinking water supply, soil, land surface, subsurface strata, or ambient air within Fayette County.
- (o) The term "**Facility**" means:
  - (1) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, cave, tunnel, mine, mine shaft, landfill, storage container, motor

- vehicle, rolling stock, ship, boat, vessel, barge, or aircraft; or
- (2) any site or area where a **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste** has been deposited, stored, disposed of, placed, or otherwise has come to be located, but does not include any consumer product in consumer use.
- (p) The term "Fiduciary" means:
- (1) a **Person** acting for the benefit of another party as a *bona fide*:
- (A) trustee;
  - (B) executor;
  - (C) administrator;
  - (D) custodian;
  - (E) guardian of estates or guardian *ad litem*;
  - (F) receiver;
  - (G) conservator;
  - (H) committee of estates of incapacitated persons;
  - (I) personal representative;
  - (J) trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or
  - (K) representative in any other capacity that the Code Enforcement Agency, after providing public notice and allowing receipt and consideration of public comments, determines to be similar to the capacities described in subclauses (A) through (J) of this subsection III(o)(1); and
- (2) does not include:
- (A) a **Person** that is acting as a **Fiduciary** with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person; or
  - (B) a **Person** that acquires ownership or control of a **Facility** with the objective purpose of avoiding liability of the person or of any other **Person**.
- (q) The term "**Fiduciary Capacity**" means the capacity of a **Person** in holding title to a vessel or **Facility**, or otherwise having control of or an interest in the **Facility**, pursuant to the exercise of the responsibilities of the person as a **Fiduciary**.
- (r) The term "**Generator**," when used in connection with **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste**, means any **Person**, by site, whose act or process produces the **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste** at issue, or whose act first causes a **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste** to become subject to regulation by any **Governmental entity**.
- (s) The term "**Governmental entity**" means any officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board, instrumentality, trust, and commission of the United States, any State, or any county or local government; and any other body, including any municipality, which is created by state or local governmental authority or which is primarily funded by or pursuant to state or local

governmental authority.

- (t) The term "**Hazardous Substance**" shall have the same meaning as is provided in **CERCLA** section 104(14), 42 U.S.C. § 9601(14), as that definition has been construed and interpreted by the decisions of the courts of the United States having jurisdiction to interpret and apply the provisions of **CERCLA**.
- (u) The term "**Hazardous Waste**" shall mean:
- (1) a **Waste** or combination of **Wastes**, which because of its quantity, concentration or physical, chemical, or infectious characteristics:
    - (1) may cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
    - (2) pose a substantial present or potential hazard to human health or the **Environment** when improperly treated, stored, transported, disposed of or otherwise managed; and
  - (2) any of the following specific **Waste** or **Wastes**:
    - (A) a **Waste** or **Wastes** the lawful management or **Disposal** of which requires a federal hazardous waste treatment, storage or disposal permit issued pursuant to Subtitle C of **RCRA**, or a West Virginia hazardous waste treatment, storage or disposal permit pursuant to the West Virginia Hazardous Waste Management Act (hereinafter: "**WVHWMA**"), Article 22-18 of the West Virginia Code;
    - (B) a **Waste** producing a **TCLP Liquid Extraction** containing any chemical constituent which has or has had an "**AL**" that has not been invalidated by any lawful administrative or judicial order, and a concentration greater than the product of the **DAF** and the highest reported concentration in the waste stream; or
    - (C) it is a **Waste** producing a **TCLP Liquid Extraction** containing any chemical constituent which has a concentration greater than the product of the **DAF** and three times the **Odor Detection Threshold** determined for the chemical constituent.
- (v) The term "**Imminent**," when modifying the terms "**Endangerment**," "**Public Nuisance**" or "**risk**" means:
- (1) an **Endangerment** or **Public Nuisance** that is present or is currently realized; or
  - (2) an **Endangerment** or **Public Nuisance** that may become present or may be realized, even if such **Endangerment** may not become present or be realized in the near or immediate future.
- The term as used in this Ordinance shall not require a showing that actual harm is occurring or will occur either immediately or in short order, so long as the risk of threatened harm is present or may be realized in the near or immediate future.
- (w) The term "**Indemnitor or Insurer**" means any **Person** who provides by contract or otherwise any guarantee or indemnification of any liable or potentially liable party or potentially liable party, or who provides partial or full indemnification to a potentially liable party, which guarantee, indemnification, or policy of insurance does or may provide coverage for any claims of Fayette County against any liable **Person** or potentially liable **Person** as a result of such **Person's** act, omission or legal liability with respect to any occurrence(s) that gives rise to the liability or potential liability of such **Person** under this Ordinance or under applicable law for any **Abatement Action**, **Removal Action**, **Remedial Action**, recovery of **Abatement Action Costs**, litigation costs, attorneys' fees and costs, or any penalties or damages of any kind recoverable by Fayette County with respect to any **Public Nuisance**, any **Endangerment** to the Public Health, Safety,

Welfare or the **Environment**, or any property damage or injury to, or for any loss of use by or on behalf of the public of, any **Natural Resource** within Fayette County.

- (x) The term "**Knowingly**" imports only a knowledge that the facts exist which brings the act, omission, or condition within the any applicable provision of this Ordinance. As used in this Ordinance, the term does not require any knowledge of the unlawfulness of such act or omission, nor does it require any knowledge of any requirement in law that a **Person** affirmatively conduct any inquiry or assessment; however, for purposes of this Ordinance, a **Person** acts knowingly if he proceeds without knowledge of any fact which the law, including this Ordinance, imposes an affirmative obligation to know or ascertain.
- (y) The term "**Land Disposal**" means disposal in or on the land, including placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave, or placement in a concrete vault or bunker intended for disposal purposes.
- (z) The term "**National Contingency Plan**" or "**NCP**" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan formally promulgated by the U.S. Environmental Protection Agency and codified at 40 C.F.R., Part 300, in accordance with Section 105 of **CERCLA**, 42 U.S.C. § 9605, as the same may be amended or re-promulgated from time to time, which plan, as referenced in and for purposes of construing and applying the provisions of this Ordinance, shall be interpreted, read and understood, unless the context unambiguously requires otherwise, as the Fayette County Code Enforcement Agency having the discretion therein assigned to the U.S. EPA, and being and acting in every regard as the "Lead Agency."
- (aa) The term "**Natural Resources**" shall mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources within Fayette County belonging to, managed by, held in trust by, appertaining to, or otherwise controlled or protected by the State of West Virginia or Fayette County, or subject, in whole or in part, to its jurisdiction, excepting only: (1) such natural resources within Fayette County with respect to which the Governor of West Virginia, acting pursuant to his lawful authority under **CERCLA** § 107(f)(2)(B), 42 U.S.C. § 9607(f)(2)(B) or the Constitution and statutes of the State of West Virginia, is acting on behalf of the public as a trustee, or has appointed anyone, other than the Fayette County Commission, or any Officer, Board, Agency or Authority of Fayette County, exclusively to act on behalf of the public with respect to the assessment and collection of natural resource damages under **CERCLA** or the laws of the State of West Virginia with respect to such natural resources; and (2) such natural resources within Fayette County with respect to which the general law of West Virginia vest exclusive authority to act on behalf of the public with respect to the assessment and collection of damages for loss of or injury to such natural resources in a **Person** or **Governmental Entity** other than the Fayette County Commission, or any Officer, Board, Agency or Authority of Fayette County, and evidence a legislative intent that such exclusive authority can or should be exercised outside the context of the Public Trust Doctrine.
- (bb) The term "**Odor Detection Threshold**" shall mean the lowest concentration of a given odor compound that is perceivable by the human sense of smell. [Explanatory Note: The National Secondary Drinking Water Standards recommend that drinking water should not contain chemical constituents that exceed three (3) times the "Odor Detection Threshold."]

(cc) (1) The term "**Owner or Operator**" means:

- (A) in the case of a **Facility**, any **Person** owning or operating such **Facility**, and
- (B) in the case of any **Facility**, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any **Person** who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

Such term does not include a **Person**, who, without participating in the management of a **Facility**, holds indicia of ownership primarily to protect his security interest in the **Facility**.

(2) In the case of a **Public Nuisance** resulting in whole or in part from **Disposal** or a **Release of a Hazardous Substance, Hazardous Waste, Pollutant or Contaminant**, or **Waste** that has been accepted for transportation by a common or contract carrier, and except as provided in Sections VI(a)(6) or (7) of this Ordinance, the term "owner or operator" shall mean:

- (A) such common carrier or other *bona fide* for hire carrier acting as an independent contractor during such transportation; and
- (B) notwithstanding any other provision of this Ordinance, the shipper of such **Hazardous Substance, Hazardous Waste, Pollutant or Contaminant**, or **Waste** shall not be considered to have caused or contributed to any **Public Nuisance** resulting solely from a **Release** during such transportation which resulted solely from circumstances or conditions beyond his control.

(3) In the case of a **Public Nuisance** resulting in whole or in part from **Disposal** or **Release of a Hazardous Substance, Hazardous Waste, Pollutant or Contaminant**, or **Waste** that has been delivered by a common or contract carrier to a disposal or treatment **Facility**, and except as provided in Sections VI(a)(6) or (7) of this Ordinance:

- (A) the term "**Owner or Operator**" shall not include such common or contract carrier, and
- (B) such common or contract carrier shall not be considered to have caused or contributed to any **Public Nuisance** solely as the result of a **Release** at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(4) The term "**Owner or Operator**" does not include a unit of State, County, or local government, non-exclusively including any Land Use Agency created or that in the future may be created by the Fayette County Commission pursuant to its authority under Chapter 31, Article 18E of the West Virginia Code, which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign or as authorized by the sovereign pursuant to a valid and applicable statute or regulation. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened **Release of a Hazardous Substance, Hazardous Waste, Pollutant or Contaminant**, or **Waste** from the **Facility**, and such a State or local government shall be subject to the provisions of this Ordinance, to the maximum extent, if any, allowed by West Virginia law, in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under Section VI of this Ordinance.

(5) **Exclusion of Lenders not participants in management:**



- (A) *Indicia of ownership to protect security*: The term "**Owner or Operator**" does not include a **Person** that is a **Lender** that, without participating in the management of a **Facility**, holds indicia of ownership primarily to protect its security interest in the **Facility**.
- (B) *Foreclosure*: The term "**Owner or Operator**" does not include a **Person** that is a **Lender** that did not participate in management of **Facility** prior to **Foreclosure**, notwithstanding that the **Person**--
  - (i) forecloses on the **Facility**; and
  - (ii) after **Foreclosure**, sells, re-releases (in the case of a lease finance transaction), or liquidates the **Facility**, maintains business activities, winds up operations, undertakes a **Abatement Action** in compliance with this Ordinance or under the direction of an on-scene coordinator appointed under the **National Contingency Plan**, with respect to **Facility**, or takes any other measure to preserve, protect, or prepare the **Facility** prior to sale or disposition, if the **Person** seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the **Person** of the **Facility** at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.
- (6) *Participation in management*: For purposes of section III(bb)(5) of this Ordinance:
  - (A) the term "participate in management" means:
    - (i) actually participating in the management or operational affairs of a **Facility**; and
    - (ii) does not include merely having the capacity to influence, or the unexercised right to control, vessel or **Facility** operations;
  - (B) a **Person** that is a **Lender** and that holds indicia of ownership primarily to protect a security interest in a **Facility** shall be considered to participate in management only if, while the borrower is still in possession of the **Facility** encumbered by the security interest, the **Person**--
    - (i) exercises decision making control over the environmental compliance related to **Facility**, such that the person has undertaken responsibility for the **Hazardous Substance, Hazardous Waste, Pollutant or Contaminant** handling or disposal practices relating to the **Facility**; or
    - (ii) exercises control at a level comparable to that of a manager of the **Facility**, such that the person has assumed or manifested responsibility:
      - (aa) for the overall management of the **Facility** encompassing day-to-day decision-making with respect to environmental compliance; or
      - (bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the **Facility** other than the function of environmental compliance;
  - (C) the term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in **Facility**; and
  - (D) the term "participate in management" does not include--
    - (i) holding a security interest or abandoning or releasing a security interest;
    - (ii) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

- (iii) monitoring or enforcing the terms and conditions of the extension of credit or security interest;
  - (iv) monitoring or undertaking one or more inspections of the **Facility**;
  - (v) requiring an **Abatement Action** or other lawful means of addressing the release or threatened release of a **Hazardous Substance, Hazardous Waste, or Pollutant or Contaminant** in connection with a **Facility** prior to, during, or on the expiration of the term of the extension of credit;
  - (vi) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the **Facility**;
  - (vii) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;
  - (viii) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or
  - (ix) conducting an **Abatement Action** in compliance with the requirements of this Ordinance, or under the direction of an on-scene coordinator appointed under the **National Contingency Plan**, if the actions do not rise to the level of participating in management (within the meaning of Subsection **III(bb)(6)(A)** or **(B)** of this Ordinance).
- (7) **Other terms:** As used in this Ordinance:
- (A) *Extension of credit:* The term "extension of credit" includes a lease finance transaction--
    - (i) in which the lessor does not initially select the leased **Facility** and does not during the lease term control the daily operations or maintenance of the **Facility**; or
    - (ii) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813, or with regulations issued by the National Credit Union Administration Board, as appropriate.
  - (B) *Financial or administrative function:* The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.
  - (C) *Foreclosure or foreclose:* The terms "foreclosure" and "foreclose" mean, respectively, acquiring, and to acquire, a **Facility** through--
    - (i) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;
    - (ii) a deed in lieu of foreclosure, or similar conveyance from a trustee; or (cc) repossession, if the vessel or facility was security for an extension of credit previously contracted;
    - (iii) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or
    - (iv) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a location or **Facility** in order to protect the security interest of the person.
  - (D) *Lender:* The term "lender" means--

- (i) an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813;
  - (ii) an insured credit union (as defined in section 101 of the Federal Credit Union Act, 12 U.S.C. § 1752;
  - (iii) a bank or association chartered under the Farm Credit Act of 1971, 12 U.S.C. § 2001, *et seq.*;
  - (iv) a leasing or trust company that is an affiliate of an insured depository institution;
  - (v) any **Person** (including a successor or assignee of any such **Person**) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated **Person**;
  - (vi) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a *bona fide* manner buys or sells loans or interests in loans;
  - (vii) a **Person** that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated **Person**; and
  - (viii) a **Person** that provides title insurance and that acquires the site or **Facility** as a result of assignment or conveyance in the course of underwriting claims and claims settlement.
- (E) *Operational function*: The term "operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.
- (F) *Security interest*: The term "security interest" includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a **Person** to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.
- (dd) The term "**Person**" means an individual, a deceased individual (or the Estate of a decedent) to the extent of available insurance assets and undistributed non-insurance assets, trust, firm, joint stock company, corporation, including a governmental corporation, a dissolved, defunct or bankrupt business entity to the extent of its available insurance assets and undistributed non-insurance assets, a bankruptcy trustee, debtor in possession under the federal bankruptcy laws, partnership, association, consortium, joint venture, limited liability company, limited liability partnership, or commercial entity. The term also includes any municipality, county, commission, district, any state, any department, or agency thereof, or any political subdivision thereof, any interstate body, or the United States, and any of its agencies or instrumentalities to the extent authorized by law.
- (ee) The term "**Pollutant or Contaminant**" shall mean dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into any water, including groundwater. This term does not mean:
- (1) sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces of the United States (within the meaning of 33 U.S.C. § 1322) or of the State of West Virginia;
  - (2) water, gas, or other material which is injected into a well to facilitate production of

- oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well is used either to facilitate production or for disposal purposes and is lawfully approved by authority of the State of West Virginia, and if the State of West Virginia has determined that such injection or disposal will not, when operated in compliance with applicable regulations and permit terms and conditions, result in the degradation of ground or surface water resources within Fayette County; provided, however, that such well is maintained and operated in compliance with all such applicable regulations and permit terms and conditions;
- (3) petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a **Hazardous Substance** under subparagraphs (A) through (F) of CERCLA § 101(14), 42 U.S.C. § 9601(14); or
  - (4) natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).
- (ff) The term "**Proceeding**" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court of competent jurisdiction, the Fayette County Commission, the Code Enforcement Agency, or any other **Governmental Entity** or **Person** authorized by law) in which, pursuant to law, specifically including this Ordinance, testimony can be compelled to be given or documents, evidence, or access to property of any kind can be compelled to be produced or allowed.
- (gg) The term "**Prohibited Hazardous Substance**" means a **Hazardous Substance** that resulted, is resulting, or will result in whole or in part, from an **Abatement Action**, specifically including any **Response Action** pursuant to CERCLA, in process or undertaken at any site wherever located from which such **Hazardous Substance** has been, is being, or is proposed to be transferred, directly or indirectly, from such site for **Disposal** at any location within Fayette County, and such term shall include any environmental media or other material contaminated in whole or in any part with any such **Hazardous Substance**.
- (hh) The term "**Public Nuisance**" shall mean any of the conditions, acts, omissions, events and activities defined, declared, or acknowledged to be a **Public Nuisance** in Section V of this Ordinance, as the same may be amended from time to time.
- (ii) The term "**RCRA**" shall mean the federal Solid Waste Management Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended (also sometimes known as the "federal Hazardous Waste Management Act"), 42 U.S.C. §§ 6901-6992k.
- (jj) The term "**Record**" shall mean all recorded information or graphic or sonic material, regardless of form or characteristics, non-exclusively including information or graphic or sonic material created, manipulated, communicated, or stored in analog, digital or electronic form.
- (kk) The term "**Release**" shall mean means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the **Environment** (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any **Hazardous Substance**, **Hazardous Waste** or **Pollutant or Contaminant**), but excludes:
- (1) any release which results in exposure to **Persons** solely within a workplace, with respect to a claim which such **Persons** may assert against the employer of such **Persons**,

- (2) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, or vessel,
  - (3) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, 42 USCS §§ 2011 *et seq.*, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act, 42 U.S.C. § 2210; and
  - (4) the normal application of fertilizer.
- (ll) The term “**Remedial Action**” shall have the same meaning set forth in **CERCLA** Section 104(24), 42 U.S.C. § 9601(24), as that definition has been construed and interpreted by the decisions of the Courts of the United States having jurisdiction to interpret the provisions of **CERCLA**.
- (mm) The term “**Removal Action**” shall have the same meaning as is provided in **CERCLA** section 104(23), 42 U.S.C. § 9601(23), as that definition has been interpreted and construed by the decisions of the courts of the United States having jurisdiction to interpret the provisions of **CERCLA**.
- (nn) The term “**Respond**” or “**Response**,” when used in this Ordinance in connection with any act, action, or activity, shall have the same meaning as is provided in **CERCLA** § 104(25), 42 U.S.C. § 9601(25), as that definition has been interpreted and construed by the decisions of the courts of the United States having jurisdiction to interpret the provisions of **CERCLA**, and shall also specifically include any **Abatement Action**, and all enforcement activities related thereto.
- (oo) The term “**Storage**,” when used in connection with **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste**, means the containment of any of them, either on a temporary basis or for a period of years, in such a manner as not to constitute **Disposal**.
- (pp) The term “**Substantial**,” when used in this Ordinance to modify either the term “**Endangerment**” or “**risk**” means not imaginary, illusory or predominately unsupported or unsupportable by reference to credible authority, and neither insignificant nor *de minimis*.
- (qq) The term “**TCLP Liquid Extraction**” means the liquid phase of a **Waste** that is obtained using the U.S. EPA Method 1311.
- (rr) The term “**Toxic**,” when used in this Ordinance to modify any of the terms “**spillage**,” “**seepage**,” “**Pollutant or Contaminant**,” “**substance**” or “**Waste**” shall mean those substances, including disease-causing agents, which after accumulation, discharge, **Disposal**, or **Release** into the **Environment** and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the **Environment** or indirectly by ingestion through food chains:
- (1) causes, on the basis of reliable, scientific information, death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; or
  - (2) presents or may present, on the basis of reliable, scientific information, a substantial risk of death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical



deformations, in such organisms or their offspring.

For all purposes of this Ordinance, the term “**toxic**” shall non-exclusively include any substance listed by the United States Environmental Protection Agency in exercise of its authority under section 307(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1317(a).

- (ss) The term “**Toxicity Characteristic Leaching Procedure**” (“TCLP”) shall mean the EPA Method 1311, Toxicity Characteristic Leaching Procedure designed to determine the mobility of both organic and inorganic analytes present in liquid, solid, and multi-phasic **Wastes**.
- (tt) The term “**Trade Secrets**” shall mean any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information, that is not patented; and which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value; and gives its users an opportunity to obtain business advantage over competitors.
- (uu) The term “**Treatment**,” when used in connection with **Hazardous Waste** or **Hazardous Substance**, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any such waste or substance so as to neutralize such waste or substance, or so as to render such waste or substance nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of any **Hazardous Waste** or **Hazardous Substance** so as to render it nonhazardous.
- (vv) The term “**Waters of the State**” means any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state, or bordering this state and within its jurisdiction and includes, without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds, impounding reservoirs, springs, wells, watercourses and wetlands; provided however, that the term does not include farm ponds, industrial settling basins and ponds, and waste treatment facilities.
- (ww) The term “**Waste**” means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining, agricultural operations, or from community activities, but does not include:
  - (1) solid or dissolved material in domestic sewage;
  - (2) any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment;
  - (3) solid or dissolved materials in irrigation return flows;
  - (4) industrial discharges which are point sources subject to permits under Section 402 of the federal Water Pollution Control Act, as amended;
  - (5) materials subjected to in-situ mining techniques which are not removed from the ground as part of the extraction process;
  - (6) source, special nuclear or by-product material as defined by the federal Atomic Energy Act of 1954, as amended.

#### Section IV – **Public Nuisances** prohibited within Fayette County:

No **Person** shall cause, contribute to, harbor, commit, or maintain, or suffer to be caused, contributed to, harbored, committed or maintained, or threaten imminently to cause, contribute to, harbor, commit or maintain any **Public Nuisance** as defined by this Ordinance or applicable West Virginia law at any place within Fayette County.

#### Section V – **Public Nuisances** declared and enumerated:

(a) Each of the following are hereby defined and declared to be a **Public Nuisance**, and each day any of the following acts, omissions are committed, or conditions maintained or allowed to exist within Fayette County shall constitute a separate offense:

(1) an act done, committed, aided, or assisted to be done or committed, or a condition created, contributed to, or maintained by any **Person** that presents or may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment**, or that is detrimental to any beneficial uses within Fayette County of any **Waters of the State**, or any **Natural Resource** owned by the State of West Virginia or Fayette County, or held by either of them in trust for the benefit of present and future generations of the public;

(2) conduct of any business, trade or activity within Fayette County whereby noisome stenches and odors or noxious gasses arise or are generated;

(3) the **Land Disposal**, or the **Storage** by conditions constituting **Land Disposal**, in Fayette County of any **Prohibited Hazardous Substance** at any site, location or **Facility** other than one which strictly complies with the requirements set forth in subparagraph (A) of this Section V(a)(3), and which meets all of the requirements set forth in subparagraphs (B) and (C) of this Section V(a)(3):

(A) it is a site, location, or **Facility** duly licensed pursuant to either:

(i) **RCRA** sections 3004 and 3005, 42 U.S.C. §§ 6924 and 6925, (or, where applicable, in compliance with the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*), and which location or **Facility** is operating in compliance with the terms and conditions of such permit, and other applicable Federal laws, and all applicable State laws and regulations, or

(ii) the provisions of West Virginia law that, pursuant to **RCRA** § 3006, 42 U.S.C. § 6906, operate within the State of West Virginia “in lieu of” **RCRA** sections 3004 and 3005, 42 U.S.C. §§ 6924 and 6925, and which location or **Facility** is operating in complete compliance with the terms and conditions of such permit, and other applicable Federal laws, and all applicable State laws and regulations;

(B) the unit at any site, location, or **Facility** described in Section V(a)(3)(A) of this Ordinance to which the **Hazardous Substance** or **Pollutant** or **Contaminant** is transferred is not releasing any **Hazardous Substance**, **Hazardous Waste**, or **Toxic Pollutant** or **Contaminant**, constituent of any thereof, into the groundwater or surface water or soil; and

(C) all releases of any **Hazardous Waste**, or constituent thereof, from other units at the site, location, or **Facility** described in Section V(a)(3)(A) are being controlled by a corrective action program approved either by the Administrator of the United State Environmental Protection Agency under subtitle C of the

Solid Waste Disposal Act, 42 U.S.C. §§ 6921 – 6939g, or by a State authorized pursuant to RCRA § 3006, 42 U.S.C. § 6926, to administer within that State a corrective action program that operates “in lieu of” the corrective actions requirements of RCRA, whichever is applicable.

- (D) As regards any **Hazardous Substance** or **Pollutant** or **Contaminant** transferred or proposed for transfer from any site, location, or **Facility** to which the provisions of **CERCLA** apply, the final decision of the President of the United States (as such decision-making authority may be properly delegated pursuant to law) concerning the factors set forth in subsections **V(a)(3)(B)** and **(C)** of this Ordinance, as that decision may be altered or amended pursuant to such judicial review proceedings as are authorized pursuant to federal law, shall be binding and conclusive with respect to those factor for all purposes of this Ordinance.
- (4) the **Release** within Fayette County into, or the delivery to any **Person** within Fayette County through, any conveyance of a public water supply within Fayette County of any **Hazardous Waste, Hazardous Substance, or Pollutant or Contaminant**, or any substance consisting of or containing any **Hazardous Waste, Hazardous Substance, or Pollutant or Contaminant**, that presents or may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment**;
- (5) the **Release** into the **Environment** within Fayette County of any **Hazardous Substance**, which presents, or which may present, an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment**, or which is detrimental to or impairs any beneficial uses within Fayette County of any **Natural Resource**.
- (6) the **Disposal** of any **Waste, or Hazardous Waste**, which: (A) presents or may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment** within Fayette County, or (B) which is detrimental to or impairs any beneficial uses within Fayette County of any **Waters of the State** or other **Natural Resource**;
- (7) the **Disposal** of any **Toxic** substance within Fayette County other than in complete compliance with the terms and conditions of a permit validly issued by the United States, the State of West Virginia, or Fayette County, non-exclusively including the Fayette County Solid Waste Authority;
- (8) an act or omission done, committed, aided, or assisted to be done or committed, or a condition created, contributed to, or maintained by the use of any property of any kind, real or personal, by any **Person** that unreasonably interferes with the reasonable and comfortable use and enjoyments within Fayette County of any public property, **Waters of the State**, or other **Natural Resource** held in trust for the use and benefit of present and future generations of the public by any **Person**;
- (9) any accumulation of refuse or debris, overgrown vegetation, **Toxic** spillage or **Toxic** seepage located on private lands within Fayette County, which is determined to be unsafe, unsanitary, dangerous or detrimental to the Public Health, Safety or Welfare, whether the result of natural or manmade force or effect;
- (10) the **Release** or **Disposal** of any **Hazardous Waste, Hazardous Substances, Waste, or Pollutant or Contaminant** at, under, or emanating from any **Facility** which causes, creates, or contributes to any of the following conditions within Fayette

County:

- (1) distinctly visible floating or settleable solids, suspended solids, scum, foam or oily slicks in the receiving **Waters of the State**;
- (2) deposits or sludge banks on the bottom of any receiving **Waters of the State**;
- (3) offensive taste or odor in or emanating from any receiving **Waters of the State**;
- (4) distinct change in the visible color of any **Waters of the State**;
- (5) algae blooms or concentrations of bacteria which may impair or interfere with any beneficial or designated uses of the affected **Waters of the State**; and
- (6) the presence in any **Waters of the State** within Fayette County of any **Pollutant** or **Contaminant** at elevated levels that may present a significant, adverse impact to the chemical, physical, hydrologic, or biological components of any impacted aquatic ecosystems or drinking water source, non-exclusively including the presence in any of the following categories of **Waters of the State** within Fayette County of the following elements or substances that exceed any of the following levels:
  - (i) 0.14 µg/L of total mercury in any unfiltered surface water sample;
  - (ii) 1.0 mg/L total manganese in surface waters;
  - (iii) 50 µg/L of total manganese in groundwater;
  - (iv) 1.0 mg/l of total iron in “trout streams” (*i.e.*, stream category B2 as defined by 47 CSR §§ 6.3.b and 2.19);
  - (v) 1.5 mg/L of total iron in all surface **Waters of the State**, except “trout streams” (*i.e.*, stream category B2 as defined by 47 CSR §§ 6.3.b and 2.19);
  - (vi) 300 µg/L of total iron in groundwater;
  - (vii) 15 µg/L of total lead in groundwater;
  - (viii) 5 µg/L of selenium in surface **Waters of the State**;
  - (ix) pH values below 6.0 or above 9.0 that are not due to photosynthetic activity;
  - (x) Dissolved Aluminum in surface **Waters of the State**:
    - (aa) that are trout streams falling within stream category B2 as defined by 47 CSR §§ 6.3.b and 2.19, 87 µg/L of water with a pH value below 6.5 or above 9.0;
    - (bb) that are not trout streams falling within stream category B2 as defined by 47 CSR §§ 6.3.b and 2.19, 750 µg/L of water with a pH value below 6.5 or above 9.0;
    - (cc) with pH equal to or greater than 6.5 or equal to or less than 9.0 measured on the four-day average concentration of dissolved aluminum determined by the following equation [Explanatory Note # 1: this equation recognizes the effect of hardness on aluminum toxicity to aquatic life]:  $Al = e(1.3695 [\ln(\text{hardness})] + 0.9121) \times 1.00$ ;
  - (xi) Fecal Coliform in streams classified as Surface Water Contact

Recreation (as defined in 47 CSR § 6.4) exceeding 200/100 ml as a monthly geometric mean based on not less than 5 samples per month;

(xii) Fecal Coliform in streams classified as Surface Water Contact Recreation (as defined in 47 CSR § 6.4) exceeding 400 /100 ml in more than ten percent of all samples taken during the month.

- (11) any obstruction(s) caused or permitted on any street or sidewalk to the danger or annoyance of the public, and all stones, rubbish, dirt, filth, slops, vegetable matter or other articles thrown or placed by any person on or in any street, sidewalk or other public place, which in any way may cause any injury or annoyance to the public or which presents or may present an **Endangerment** to the Public Health, Safety or the **Environment** within Fayette County;
  - (12) any open, unguarded or unprotected excavation(s), refrigerator(s) with intact doors, swimming pool(s) or building(s) within Fayette County which, when abandoned or left open or otherwise unprotected, may prove dangerous to life or limb;
  - (13) any abandoned, open, uncovered or otherwise unprotected wells, cesspools, cisterns or catchbasins within Fayette County;
  - (14) any infected or infested bedding or clothing, or any putrid or unsound meat, beef, pork, fish, hides or skins of any kind, decayed or unsound vegetables or fruit or any other articles which present or may present an **Endangerment** to the health of inhabitants or visitors to Fayette County;
  - (15) all emissions within Fayette County of dense smoke from the smokestack of any stationary engine, steam roller, steam derrick, piledriver, tar kettle, or other similar machine or contrivance, or from the smokestack or chimney of any building or premises, except for a period aggregating not to exceed seven minutes in any one hour, during which period the fire box is being cleaned or a new fire is being built in the box. For the purpose of grading the density of smoke pursuant to this Section **V(a)(13)**, the Ringelmann smoke chart, as published and used by the Federal Bureau of Mines, a copy of which is on file in the office of the Fayette County Clerk, and which is incorporated in and made a part of this subsection, shall be the standard of comparison. For purposes of this subsection, smoke shall be considered dense when it is of greater density than the number 3 of such chart;
  - (16) any emissions of dense smoke from any source, non-exclusively including the stack of any locomotive, for a period of more than 75 seconds, except for a period aggregating not to exceed twelve (12) minutes in any one hour, during which period the fire box is being cleaned or a new fire is being built in the box. For the purpose of grading the density of smoke pursuant to this Section **V(a)(13)**, the Ringelmann smoke chart, as published and used by the Federal Bureau of Mines, a copy of which is on file in the office of the Fayette County Clerk, and which is incorporated in and made a part of this subsection, shall be the standard of comparison. For purposes of this subsection, smoke shall be considered dense when it is of greater density than the number 3 of such chart; and
  - (17) knowingly allowing any illegal activity on, or knowingly permitting the use for any illegal activity, act, or omission of, any property within Fayette County.
- (b) The nuisances described and declared in Section **V(a)** of this Ordinance are not intended to be, and shall not be construed as, exclusive, and any act of commission or omission, and any condition which constitutes a nuisance by statute or common law of the State of



West Virginia, when committed, omitted or existing within Fayette County, is declared to constitute a **Public Nuisance**.

Section VI - **Persons** liable for appropriate abatement of **Public Nuisance** and for reimbursement to Fayette County of all **Abatement Action Costs** incurred and to be incurred with respect to such **Public Nuisance**; scope of and defenses to liability; settlement of liability:

(a) **Civil Liability for Abatement of a Public Nuisance; recovery of Abatement Action**

**Costs:** Notwithstanding any other provision of county or municipal law within Fayette County, and subject only to the affirmative defenses set forth in subsection (b) of this section VI, --

- (1) Any **Person** that creates, has caused or created, or threatens imminently to cause or create a **Public Nuisance** within Fayette County;
- (2) Any **Person** that has contributed to, is contributing to, or threatens imminently to contribute to a **Public Nuisance** within Fayette County;
- (3) Any **Person** that **Knowingly** maintains, has maintained or threatens imminently to maintain a **Public Nuisance** within Fayette County; or
- (4) Any **Person** that, at any time during the creation or existence of a **Public Nuisance**, was an **Owner or Operator** of, or that owned or had control over, any real or personal property, site, or **Facility** at, on, in, from, or with which a **Public Nuisance** has been, is being, or imminently threatens to be, created, contributed to, or maintained within Fayette County, and, who, regardless of actual knowledge of the existence or nature of the nuisance condition, failed or refused appropriately to abate the **Public Nuisance**;
- (5) Any **Person**, including the United States and any other **Governmental entity**, to the extent permitted by the United States Constitution, and including any past or present generator, past or present transporter, or past or present **Owner or Operator** of a **Hazardous Waste** or **Waste** treatment, storage, or disposal **Facility**, that has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any **Waste** or **Hazardous Waste** which may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment** within Fayette County, or which is detrimental to or impairs any beneficial uses within Fayette County of any **Waters of the State** or any **Natural Resource** owned by the State of West Virginia or Fayette County, or held in trust by either of them for the benefit of present and future generations of the public;
- (6) Any **Person** that by contract, agreement, or otherwise arranged for **Disposal** in Fayette County, or arranged with a transporter for transport for **Disposal** in Fayette County, of a **Hazardous Waste, Hazardous Substance, or Pollutant or Contaminant** owned or possessed by such **Person**, by any other party or entity, at any **Facility** owned or operated in Fayette County by another party or entity and containing such **Hazardous Waste, Hazardous Substances, or Pollutant or Contaminant**;
- (7) Any **Person** who accepts or accepted any **Hazardous Waste, Hazardous Substance, or Pollutant or Contaminant** for transport to a disposal or treatment **Facility**, or site selected by such **Person**, from which there is a **Release**, or a threatened Release which presents or may present a **Public Nuisance**, or which may present an **Imminent and Substantial Endangerment** to the Public Health, Safety,

Welfare or the **Environment**, within Fayette County, or which is detrimental to or impairs any beneficial uses within Fayette County of any **Waters of the State** or any **Natural Resource** owned by the State of West Virginia or Fayette County, or held in trust by either of them for the benefit of present and future generations of the public;

- (8) Any **Person** (including any past or present generator, past or present transporter, or past or present **Owner or Operator** of a **Facility**) that has contributed or is contributing to the past or present **Disposal** in Fayette County of any **Waste, Hazardous Waste, Hazardous Substance, or Pollutant or Contaminant** which presents, or which may present, a **Public Nuisance** within Fayette County, and;
- (9) Any **Person** that through any act or omission presents or may present any **Public Nuisance**: (i) declared in Section **V(a)** of this Ordinance within Fayette County, or (ii) which is detrimental to or impairs any beneficial uses within Fayette County of any **Waters of the State** or any **Natural Resource**

is liable for:

- (A) timely and effective performance at their cost of all **Abatement Actions** required by this Ordinance appropriately to address, or respond to, or abate the **Public Nuisance** within Fayette County that is, or may be, presented in whole or in part, directly or indirectly, by their act or omission;
  - (B) timely reimbursement to Fayette County of all **Abatement Action Costs** incurred or to be incurred by the County with respect to such **Public Nuisance**, non-exclusively including all **Abatement Action Costs** incurred by Fayette County to undertake, or to cause or compel any **Responsible Party** or **Potentially Responsible Party** to undertake, any **Abatement Action** in compliance with the requirements of this Ordinance, regardless of whether those costs are incurred prior to, during or following enactment of this Ordinance;
  - (C) such monitoring, testing, analysis and reporting at their cost as may be lawfully ordered by the Code Enforcement Agency pursuant to Section **VIII(b)** of this Ordinance;
  - (D) such civil penalties as may be lawfully imposed pursuant to this Ordinance;
  - (E) damages for injury to, destruction of, or loss of **Natural Resources**, including the reasonable costs of assessing such injury, destruction, or loss resulting from a **Public Nuisance** within Fayette County; and
  - (F) such other damages to which Fayette County may be entitled by law with respect to any **Public Nuisance**:
- (b) **Affirmative defenses to liability**: There shall be no liability, civil or criminal, under this Ordinance for any **Person** otherwise liable who can establish by a preponderance of the evidence every element of any of the following affirmative defenses applicable to the **Public Nuisance** giving rise to the liability at issue:
- (1) with respect to any **Public Nuisance**, all of the acts or omissions of the potentially liable party with regard to the **Public Nuisance** which cause that **Person** to fall within any of the categories of liable **Persons** set forth in subsections (1) through (9), inclusive, of Section **VI(a)** were caused solely by:
    - (A) an act of God;
    - (B) an act of war;
    - (C) an act or omission of a third party, other than an employee or agent of the liable party or potentially liable party, or other than by one whose act or omission

occurs in connection with a **Contractual Relationship**, existing directly or indirectly, with the liable party or potentially liable party if the liable party or potentially liable party establishes by clear and convincing evidence that:

- (i) it exercised due care with respect to the acts, omissions, events or conditions giving rise to the **Public Nuisance**, taking into consideration the characteristics of such **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant or Waste**, in light of all relevant facts and circumstance, and
  - (ii) it took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (D) any combination of the foregoing subparagraphs (A) through (C).
- (2) with respect only to the **Public Nuisance** declared and defined in Section V(a)(3) of this Ordinance, either or both of the following:
- (A) that prior to their disposal at any place in Fayette County the **Prohibited Hazardous Substance** was or will be subject to a **Remedial Action** in which treatment that permanently and significantly reduces the volume, toxicity, or mobility of the **Prohibited Hazardous Substance(s)** is a principal element; or
  - (B) in the absence of the treatment described in Section VI(b)(2)(A) of this Ordinance, that no other practicable treatment technologies are available for the **Prohibited Hazardous Substance**, and that the disposal within Fayette County of such **Prohibited Hazardous Substance** is subject to acceptable on-going monitoring sufficient to allow early detection and correction of any release of such substance (or any media contaminated with such substance) into the **Environment**, and is accompanied by the posting of surety reasonably acceptable to the Fayette County Code Enforcement Agency to guarantee adequate and timely performance of required monitoring and corrective action that may be required with respect to such disposed **Prohibited Hazardous Substance**.

(c) **Liability arising out of rendering care or advice:**

- (1) ***In general:*** Except as provided in paragraph (2), no **Person** shall be liable under this Ordinance for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice regarding any existing or imminently threatened **Public Nuisance** in Fayette County: (A) in accordance with the **National Contingency Plan** or at the direction of an on-scene coordinator appointed under such plan; or (B) at the direction of the Fayette County Commission, the Fayette County Prosecuting Attorney or the Fayette County Code Enforcement Agency or any authorized agent of any of them, with respect to an incident creating a danger to public health or welfare or the **Environment** within Fayette County. This Paragraph (1) shall not preclude liability for costs or damages as the result of gross negligence on the part of such **Person**.
- (2) ***State and local governments:*** No State or local government shall be liable under this Ordinance for costs or damages as a result of actions taken in response to an emergency created by any existing or imminently threatened **Public Nuisance** within Fayette County generated by or from a **Facility** owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the

purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

- (3) **Savings provision:** This subsection VI(c) shall not alter the liability of any **Person** established by the provisions of Sections VI(a)(1) through (4), inclusive, with respect to the **Public Nuisance** concerned.
- (d) **Liability of subsequent owner or operator:** A subsequent owner of, or **Person** controlling, any real or personal property or **Facility** described in subsection VI(a)(4) of shall be liable to the same extent as the **Person** who owned or controlled such **Facility** at the time when such **Public Nuisance** was created, contributed to, or maintained, so long as such **Public Nuisance** or any **Endangerment** of the Public Health, Safety, Welfare, or the **Environment** within Fayette County resulting, in whole or in part, from such **Public Nuisance** remains unabated.
- (e) **Standard of civil liability:** Unless otherwise expressly indicated, the standard of civil liability imposed by this Ordinance is strict liability, without regard to any element of *mens rea*, fault, negligence, knowledge, or other wrongdoing.
- (f) **Scope of civil liability:** When two or more **Persons** liable for a **Public Nuisance** declared pursuant to this Ordinance or any other ordinance of Fayette County, which **Public Nuisance** presents or imminently threatens to present a single, indivisible harm to the Public Health, Safety, Welfare, or the **Environment**, or to any beneficial use within Fayette County of any **Natural Resource**, for which there is no reasonable and reliable basis for apportioning among those liable or potentially liable **Persons** the harm presented or imminently threatened by the **Public Nuisance**, each such **Person** shall be jointly and severally liable for appropriate abatement of the **Public Nuisance**, reimbursement to the County of all **Abatement Action Cost** incurred and to be incurred by Fayette County with respect to such **Public Nuisance**, and for all nuisance and natural resource damages to which the County may be entitled by law. Any potentially liable party seeking to apportion such harm must prove by a preponderance of the evidence that:
- (1) the component of the harm which is sought to be apportioned is scientifically and technologically susceptible to reasonable and reliable apportionment;
  - (2) that there is a reasonable and practicable basis for apportioning the harm; and
  - (3) that the separate abatement activity proposed for that harm or portion of the harm is at least as practicable, safe, efficient, reliable and cost-effective in providing the degree of protection of the Public Health, Safety, Welfare, and the **Environment** as the abatement activity or activities, if any, proposed by the County.
- (g) **Civil liability for, and recovery of, future Abatement Action Costs:** In any action by the County to recover **Abatement Action Costs** from a liable party in which the County has prevailed or substantially prevailed, the court shall enter a declaratory judgment on liability for future **Abatement Action Costs** to be incurred by the County with respect to the **Public Nuisance(s)** at issue that will be binding on any subsequent action or actions to recover further response costs or damages, unless all **Abatement Actions** with respect to the **Public Nuisance** at issue have been completed and all related **Abatement Actions Costs** have been presented to the Court or their recovery expressly waived by the County. Any subsequent action for recovery of further **Abatement Action Costs** with respect to the **Public Nuisance(s)** may be maintained at any time during the **Abatement Action** but must be commenced no later than 2 years after the date of completion of all **Abatement**

Actions with respect to the **Public Nuisance**.

**(h) Natural Resources damage liability:**

**(1) *Authorized recovery by Fayette County Commission as Trustee:*** In the case of an injury to, destruction of, or loss of **Natural Resources** under **Section VI(a)(1-9)(E)**, liability shall be to the Fayette County Commission as trustee on behalf of present and future generations of the public for **Natural Resources** damages: *Provided, however,* that no liability shall be imposed under this **Section VI(a)(1-9)(h)** of this Ordinance where the **Person** sought to be charged has demonstrated by clear and convincing evidence that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of a **Natural Resources** in an environmental impact statement, or other comparable environmental analysis, and the decision of a governmental authority of competent jurisdiction to grant a permit or license lawfully authorizes such commitment of those **Natural Resources**, and the facility or project was otherwise operating within the terms and conditions of its permit or license. The Fayette County Commission shall act on behalf of the public as trustee of **Natural Resources** to recover for such damages. Sums recovered by Fayette County as trustee under this subsection shall be retained in a segregated public account of Fayette County, without further appropriation, for use by the Fayette County Commission **only** to restore, replace, or acquire the equivalent of such **Natural Resources**. There shall be no recovery under the authority of this **Section VI(a)(1-9)(h)** where such damages have occurred wholly before the enactment of this Ordinance.

**(2) *Measure of Damages:*** The measure of damages in any action under this **Section VI(a)(1-9)(h)** shall not be limited by the sums which can be used to restore or replace such **Natural Resources**.

**(3) *Double recovery prohibited:*** There shall be no double recovery under this Ordinance for **Natural Resource** damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same **Natural Resource** damages recovered under federal or West Virginia law.

**(4) *Rebuttable presumption:*** Any determination or assessment of damages to **Natural Resources** for the purposes of this Ordinance made by the Fayette County Code Enforcement Agency in substantial compliance with the regulations promulgated under CERCLA § 301(c), 42 U.S.C. § 9651(c), construed and applied as Fayette County acting on behalf of the public as trustee, and subsequently approved by the Fayette County Commission at a noticed, public meeting, shall have the force and effect of a rebuttable presumption on behalf of the trustee in any proceeding before the Fayette County Commission, or any judicial proceeding under this Ordinance.

**(i) Effect of indemnification, hold harmless, etc., agreements; subrogation rights:**

**(1)** No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the **Owner or Operator** of any **Facility** or from any **Person** who may be liable for a **Public Nuisance** under this Ordinance, to any other **Person** the liability imposed under this Ordinance. Nothing in this subsection **(i)** shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Ordinance.

**(2)** Nothing in this Ordinance, including the provisions of paragraph **(1)** of this subsection **(i)**, shall bar a cause of action that an **Owner or Operator** or any other **Person** subject

to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any **Person**.

**(j) Direct action against Indemnitor or Insurer of a Liable or Potentially Liable Person:**

**(1) *Allowed in certain cases:*** In any case or circumstance identified in Paragraph (4) of this Subsection VI(j) any liability of such **Person** arising under this Ordinance may be asserted directly against the **Indemnitor or Insurer** of any such **Person**; provided, however:

**(A)** in the case of any claim or action pursuant to this section VI(j) of this Ordinance, such **Indemnitor or Insurer** is entitled to invoke or assert all rights, claims, and defenses: **(i)** which would have been available to such liable or potentially liable **Person** if such action had been brought directly against the liable or potentially liable **Person** by Fayette County; and **(ii)** which would have been available to the **Indemnitor or Insurer** if an action had been brought against the **Indemnitor or Insurer** by such liable **Person** or potentially liable **Person** as a putative indemnitee or insured; and

**(B)** the total liability of any **Indemnitor or Insurer** of any such liable or potentially liable **Person** under this Ordinance is limited to the aggregate amount provided to, or on behalf of, the indemnitee or insured pursuant to the indemnification contract or decree, or the insurance contract or policy, specifically including any amount of coverage for any Remedial Investigation/Feasibility study obligation that is or may be available pursuant to the duty to defend afforded to the insured by any such indemnification agreement or policy of insurance. Nothing in this subparagraph (B) limits any statutory, contractual or common law liability under any other state or federal law of a guarantor or insurer to its guarantee or insured, including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim.

**(2) *Judgment enforceable only against available proceeds or limits of coverage; exception:*** Unless properly joined with a claim authorized by Paragraph (3) of this Section VI(j), a judgment in the favor of Fayette County Commission in any action brought directly against the **Indemnitor or Insurer** of any deceased individual or the estate of any decedent pursuant to this subsection VI(j) is enforceable only from the indemnification proceeds or available insurance coverage, and not against other property of such **Person**.

**(3) *Joinder with other specified claims authorized:*** Any claim asserting any liability arising under this Ordinance directly against the **Indemnitor or Insurer** of any deceased individual or the estate of any decedent pursuant to this Section VI(j) may be joined with a claim under applicable state law seeking recovery of any undistributed assets, other than insurance assets or third-party indemnification proceeds, of the estate of the decedent.

**(4) *Cases in which a Direct Action is authorized:*** A Direct Action authorized by this Subsection VI(j) may be brought by the Fayette County Prosecuting Attorney, or by the Code Enforcement Agency, with the advice and consent of the Fayette County Prosecuting Attorney, and shall be brought in the name of the Fayette County Commission by the Fayette County Prosecuting Attorney when directed by the Fayette County Commission, only in any case or circumstance where a **Person** liable or potentially liable under this Ordinance is:

- (i) in bankruptcy reorganization, or arrangement pursuant to the federal bankruptcy code;
  - (ii) is a dissolved or defunct business organization of any kind;
  - (iii) is a deceased individual or the estate of a decedent; or
  - (iv) where (with reasonable diligence) jurisdiction in any state or federal court cannot be obtained over such liable **Person** or potentially liable **Person** likely to be solvent at the time of judgment.
- (5) Nothing in this subsection VI(j) diminishes the liability of any **Person** under other applicable law.

**(k) Settlement of joint and several civil liability imposed by this Ordinance; effect of settlement:**

- (1) ***Protection Against Contribution Claims for Matters Addressed by a Binding Settlement:*** A **Person** who is alleged to be, or has been found to be, jointly and severally liable pursuant to this Ordinance, and who has resolved all or any portion of such joint and several liability in an **Binding Settlement** shall not be liable for claims for contribution, specifically including any claims for comparative equitable indemnity, or any other "fair share" claims seeking any recovery of any damages, apportionment of any **Abatement Action Costs**, or equitable relief arising under this Ordinance, regardless of how such claims, costs, damages, or apportionment of any equitable relief may be denominated, that arise out of, or relate directly or indirectly to the Matters Addressed by an **Binding Settlement**, brought by any party to the proceeding giving rise to the settlement. Such settlement does not discharge any of the other potentially liable **Person(s)** unless its terms so provide, but it reduces the potential liability of the other jointly and severally liable **Persons** by the amount of the settlement.
- (2) ***Protection Against Contribution Claims for Matters Addressed by a Confirmed Settlement:*** A **Person** who is alleged by the County to be, or has been found to be, jointly and severally liable pursuant to this Ordinance, and who has resolved its liability to the County in an **Confirmed Settlement** shall not be liable for claims for contribution, specifically including any claims for comparative equitable indemnity, or any other "fair share" claims seeking any recovery of any damages, apportionment of any **Abatement Action Costs**, or apportionment of any equitable relief arising under this Ordinance, regardless of how such claims, costs, damages, or equitable relief may be denominated, brought by any **Person** that arise out of, or relate directly or indirectly to the Matters Addressed by an **Confirmed Settlement**. Such settlement does not discharge any of the other potentially liable **Person** unless its terms so provide, but it reduces the potential liability of the other jointly and severally liable **Person(s)** by the amount of the settlement.
- (3) ***Rights of Settling Party:*** A **Person** who has resolved its liability to Fayette County, non-exclusively including the Code Enforcement Agency or the Fayette County Environmental and Public Health Protection Special Settlement Account, for some or all of an **Abatement Action**, or for recovery of some or all of the **Abatement Action Costs** with respect to a **Public Nuisance** in a **Confirmed Settlement** may seek contribution from any jointly and severally liable **Person** who is not party to an **Confirmed Settlement**.
- (4) ***Rights of Settling Party Subordinate to County's Rights:*** In any action seeking contribution, "fair share" recovery, or comparative equitable indemnity with respect

to any liability imposed pursuant to this Section VI, the rights of any **Person** who has resolved its liability to Fayette County shall be subordinate to the rights of Fayette County.

(l) **Bona Fide Prospective Purchaser and windfall lien:**

- (1) **Limitation on liability.** Notwithstanding Section VII(a) of this Ordinance, a **Bona Fide Prospective Purchaser** whose potential liability for abatement of a **Public Nuisance** caused or contributed to by, or resulting in whole or in part from, a **Release** or threatened **Release** of a **Hazardous Substance, Hazardous Waste, Pollutant or Contaminant** or **Waste** is based solely on the **Bona Fide Prospective Purchaser** being considered to be an **Owner or Operator** of a **Facility** shall not be liable as long as the **Bona Fide Prospective Purchaser** does not impede the performance of an **Abatement Action** or **Natural Resource** restoration.
- (2) **Lien.** If there are unrecovered **Abatement Action Costs** incurred by Fayette County at a **Facility** for which an owner of the **Facility** is not liable by reason of Section VII(l)(1), and if each of the conditions described in paragraph (3) is met, Fayette County shall have a lien on the **Facility**, or may by agreement with the owner, obtain from the owner a lien on any other property or other assurance of payment satisfactory to the Code Enforcement Agency acting with the advice and consent of the Fayette County Prosecuting Attorney, for the unrecovered **Abatement Action Costs**.
- (3) **Conditions.** The conditions referred to in paragraph (2) of this Section VI(l) are:
  - (A) **Abatement Action.** An **Abatement Action** for which there are unrecovered **Abatement Action Costs** of Fayette County has been or is being carried out at the **Facility**.
  - (B) **Fair market value.** The **Abatement Action** increases the fair market value of the **Facility** above the fair market value of the **Facility** that existed before the **Abatement Action** was initiated.
- (4) **Amount; duration.** A lien owned and held by and in favor of Fayette County under paragraph (2):
  - (A) shall be in an amount not to exceed the increase in fair market value of the property attributable to the **Abatement Action** at the time of a sale or other disposition of the property;
  - (B) shall arise at the time at which costs are first incurred by or behalf of Fayette County, non-exclusively including the Fayette County Environmental and Public Health Protection Special Settlement Account, with respect to a **Abatement Action** at the **Facility**;
  - (C) shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection VI(l) as are afforded under West Virginia law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. The notice of the lien created and imposed by this Section VI(l) of this Ordinance shall be filed by the Code Enforcement Agency



with the advice and consent of the Fayette County Prosecuting Attorney in the Office of the Clerk of the Fayette County Commission. In the event the **Facility** lies in more than one county, then such notice shall be filed in all counties in which the real property subject to such lien is situated; and

- (D) shall continue until the earlier of--
  - (i) satisfaction of the lien by sale or other means; or
  - (ii) notwithstanding any statute of limitations under Section VI.V of this Ordinance, recovery of all **Abatement Action Costs** incurred by or on behalf of Fayette County, non-exclusively including the Fayette County Environmental and Public Health Protection Special Settlement Account, at or in connection with a **Response** action regarding a known or suspected **Public Nuisance** at the Facility.
- (5) *Action in rem*. The unrecovered **Abatement Action Costs** constituting the lien created and imposed by this Section VI(I) may be recovered in an action *in rem* brought in the name of the Fayette County Commission by the Fayette County Prosecuting Attorney in a court of competent jurisdiction. Nothing in this subsection shall affect the right of the Fayette County Commission to bring an action against any **Person** to recover all **Abatement Action Costs** and damages for which such person is liable under West Virginia law and the provisions of this and any other duly enacted Ordinance of Fayette County.

**(m) Owners of Contiguous properties:**

**(1) *Not considered to be an owner or operator:***

(A) *In general:* Notwithstanding Section VI(a) of this Ordinance, a **Person** that would otherwise be liable for a **Public Nuisance** pursuant to Section VI(a) of this Ordinance solely because that **Person** owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a **Release** or threatened **Release** of a **Hazardous Substance, Hazardous Waste, Waste or Pollutant or Contaminant** from, real property that is not owned by that **Person** shall not be considered to be an “**Owner or Operator**” of site or **Facility** for purposes of subsection VI(a) of this Ordinance solely by reason of the contamination if:

- (i) the **Person** did not cause, contribute, or consent to the **Release** or threatened **Release**;
- (ii) the **Person** is not:
  - (I) potentially liable, or affiliated with any other **Person** that is potentially liable, for **Abatement Action Costs** at the **Facility** through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or
  - (II) the result of a reorganization of a business entity that was potentially liable;
- (iii) the **Person** takes reasonable steps to:
  - (I) stop any continuing **Release**;
  - (II) prevent any threatened future release; and
  - (III) prevent or limit human, environmental, or natural resource exposure to any **Hazardous Substance, Hazardous Waste, Waste or Pollutant or Contaminant** released on or from property owned by that **Person**;

- (iv) the **Person** provides full cooperation, assistance, and access to the Code Enforcement Agency and to any Persons that are authorized to conduct Abatement Actions or natural resource restoration at the **Facility** from which there has been a **Release** or threatened **Release** (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial **Response Action** or natural resource restoration at the vessel or facility);
  - (v) the **Person**:
    - (I) is in compliance with any land use restrictions established or relied on in connection with the **Response Action** at the **Facility**; and
    - (II) does not impede the effectiveness or integrity of any institutional control employed in connection with a **Response Action**;
  - (vi) the **Person** is in compliance with any Demand for Production of Information issued pursuant to Section VIII of this Ordinance, any Civil Information Demand or a Civil Investigation Order issued pursuant to the Fayette County Public Nuisance Civil Investigation Ordinance, Fayette County Ordinance # 2017-002, effective December 15, 2017, and any Compliance Order issued pursuant to this Ordinance;
  - (vii) the person provides all legally required notices with respect to the discovery or **Release** of any **Hazardous Substance, Hazardous Waste, Waste or Pollutant or Contaminant** at the **Facility**; and
  - (viii) at the time at which the **Person** acquired the property, the **Person**:
    - (I) conducted all appropriate inquiry within the meaning of Section III(i)(2) with respect to the property; and
    - (II) did not know or have reason to know that the property was or could be contaminated by a **Release** or threatened **Release** of one or more hazardous substances from other real property not owned or operated by the **Person**.
- (B) *Demonstration*: To qualify as a **Person** described in Paragraph (1) of this subsection III(m), a **Person** must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of Paragraph (1) of this subsection III(m) have been met.
- (C) *Bona fide Prospective Purchaser*: Any **Person** that does not qualify as a **Person** described in this subsection III(m) because the **Person** had, or had reason to have, knowledge specified in subparagraph IV(m)(1)(A)(viii) at the time of acquisition of the real property may qualify as a **Bona Fide Prospective Purchaser** under subsection III(m) if the **Person** is otherwise described in that subsection.
- (D) *Ground water*: With respect to a **Hazardous Substance, Hazardous Waste, Waste or Pollutant or Contaminant** from one or more sources that are not on the property of a **Person** that is a contiguous property owner that enters ground water beneath the property of the **Person** solely as a result of subsurface migration in an aquifer, subparagraph VI(m)(1)(A)(iii) shall not require the **Person** to conduct ground water investigations or to install ground water remediation systems, except in accordance with the policy of the United States Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.
- (2) *Effect of law*: With respect to a **Person** described in this subsection VI(m), nothing

in this subsection:

- (A) limits any defense to liability that may be available to the **Person** under any other provision of law; or
  - (B) imposes liability on the **Person** that is not otherwise imposed pursuant to this Ordinance.
- (3) **Assurances:** The Code Enforcement Agency may:
- (A) issue a written assurance that no enforcement action under this Ordinance will be initiated against a **Person** described in paragraph (1) of this subsection **VI(m)**; and
  - (B) after providing public notice of its intent to grant contribution protection pursuant to this subparagraph **VI(m)(3)(B)** and providing for a public comment period substantially equivalent to that required pursuant to Section **III(h)(3)**, grant a **Person** described in paragraph (1) of this subsection **VI(m)** protection against a cost recovery or contribution action seeking to impose or apportion any liability imposed by this Ordinance. Any **Person** aggrieved by a Final Order of the Code Enforcement Agency granting contribution protection pursuant to this subsection **VI(m)** may seek review of such Final Order of the Code Enforcement Agency by the Fayette County Commission by filing a petition for review with the Clerk of the County Commission no later than the close of business twenty-one business days after the Code Enforcement Agency gives public notice on its website page and by posted public notice in the Office of the Fayette County Clerk of its issuance of its Final Order. The time period for seeking review by the Fayette County Commission of a Final Order of the Code Enforcement Agency granting contribution protection set forth in the subparagraph **VI(m)(3)(B)** is jurisdictional and may not be waived or continued.

Section VI.V – Period within which certain civil actions pursuant to this Ordinance may be brought:

- (a) **Actions for Natural Resource damages:** No action may be commenced for damages pursuant to Section **VI(a)(1-9)(E)** of this Ordinance, unless that action is commenced within three (3) years after the date of the discovery of the entire injury or loss and its causal connection with the **Public Nuisance** in question.
- (a) **Actions for recovery of Abatement Action Costs** An initial action for recovery of **Abatement Action Costs** referred to in Sections **VI(a)(1-9)(A)** through (C), inclusive, must be commenced within two (2) years of the completion of the appropriate abatement of the **Public Nuisance** at issue.

Section VII – Code Enforcement Agency; inspections and investigations:

- (a) **Fayette County Code Enforcement Agency:** Solely for the purposes of securing the adequate protection of the public health, safety, welfare and the **Environment** within Fayette County from an existing or threatened **Public Nuisance** or any **Endangerments** of the Public Health, Safety, Welfare, or the **Environment** addressed in, and otherwise enforcing, this Ordinance and the provisions of West Virginia Code § 7-1-3ff, there is hereby created within the Fayette County Government the Fayette County Code Enforcement Agency (herein: “Code Enforcement Agency”). This Code Enforcement Agency shall be composed of the County Administrator, the County Engineer (or other

technically qualified county employee or consulting engineer designated by the County Engineer or by the County Commission), the County Health Officer or his or her designee, a fire chief from a county fire company, the county litter control officer, the Director of the Fayette County Solid Waste Authority, and two (2) at large member appointed by the Fayette County Commission for two (2) year terms. One (1) of the two (2) at large members first appointed the Code Enforcement Agency shall be appointed to an initial term of one (1) year, and, thereafter, any person appointed to that position shall be appointed for a two (2) year term. A Fayette County Administrator or Assistant County Administrator appointed by the Fayette County Commission shall serve as Chairperson of the Fayette County Code Enforcement Agency but shall have no vote on any matter coming before the Fayette County Code Enforcement Agency except if the other members entitled to vote on any matter be equally divided.

- (b) **Fayette County Sheriff charged with enforcing orders of County Commission:** The Fayette County Sheriff shall serve as an *ex officio* member of the Code Enforcement Agency and shall be the county officer charged with enforcing, with the advice and consent of the Fayette County Prosecuting Attorney, the orders of the Code Enforcement Agency or the County Commission issued pursuant to this Ordinance, or those orders issued in pursuance of its authority under West Virginia Code § 7-1-3ff.
- (c) **Investigations when directed by the County Commission:** When so directed by the County Commission, any member or authorized agent of the Code Enforcement Agency shall make inspections and investigations, or cause inspections and investigations to be made, under their direction and control, of such places, conditions, locations, structures, objects or activities from time to time at any place in Fayette County as the County Commission may designate to determine whether any condition exists or activity is being engaged in which constitutes a **Public Nuisance** as defined and declared in Section V of this Ordinance or as the same may be defined under state law or other county ordinance.
- (d) **Duty of County Officers acting on their authority under this Ordinance:** Any authorized member or agent of the Code Enforcement Agency from time to time may make inspections and investigations, or cause inspections and investigations to be made, under their direction and control, of such places, conditions, locations, structures, objects or activities within or affecting Fayette County where there exists reasonable grounds for suspecting that any condition exists or activity is being engaged in that constitutes or may constitute a **Public Nuisance** as defined and declared in Section V of this Ordinance.
- (e) **Duty of County Officers acting on receipt of responsible complaint:** Upon receipt by the Code Enforcement Agency of a report in writing made by any responsible **Person** who has reasonable grounds to conclude, believe, or suspect that: (1) there exists at any place in Fayette County a **Public Nuisance** as defined by this Ordinance, by state law, or other county ordinance; or (2) that any **Person** may be in imminent danger of physical harm by reason of a known or suspected **Public Nuisance**; any authorized member or agent of the Code Enforcement Agency as may be designated by the Fayette County Commission or authorized by formal resolution of the Code Enforcement Agency shall timely and competently make, or cause to be made, inspections and investigations of such places, conditions, locations, or activities at any place in Fayette County that are the subject of the complaint to determine whether any condition exists or activity is being engaged in which constitutes a **Public Nuisance**, as defined and declared in Section V of this Ordinance or under state law or other county ordinance, provided, that such report

is signed by the **Person** requesting the inspection and alleges in sufficient detail:

- (1) the facts believed to constitute a **Public Nuisance** as defined and declared in this Ordinance or by operation of state law;
- (2) the place or places where the **Public Nuisance** condition exists, or the **Public Nuisance** activity is being engaged in; and
- (3) if known, the names of the **Persons** causing, creating, maintaining, committing, or contributing to the **Public Nuisance** as defined and declared in this Ordinance, and the name of the owner(s) of the property upon which the **Public Nuisance** condition exists or **Public Nuisance** activity is being.

Section VIII – Information gathering, authority to conduct or require monitoring, testing or investigations, and to inspect real property and premises pertaining to a known or suspected **Public Nuisance**:

**(a) Information Gathering:**

(1) **Actions authorized:** In order to assure adequate protection of the Public Health, Safety, Welfare and the **Environment** from activities, omissions or conditions constituting a **Public Nuisance** as defined and declared by this Ordinance, state law or other Fayette County law, and in order competently to carry out the remedial purposes of this Ordinance, any authorized member or agent of the Code Enforcement Agency, upon presenting appropriate credentials to the person(s) present at or in charge of the location or premises, is authorized to exercise the authority granted in this subsection **VIII** at the locations specific is Paragraphs (A) and (B) of this subsection **VIII(a)(1)** only if there is a reasonable basis to believe: **(A)** there is or may be a **Public Nuisance** within or adversely effecting Fayette County; or **(B)** that there is or may be an act or condition detrimental to any beneficial uses within Fayette County of any **Natural Resource**, and then only for the purposes of determining the need for a **Response** action, specifically including all or any part of an **Abatement Action**, or choosing or taking any **Response** action under this Ordinance.

**(A)** Any action under paragraph (2), (3), or (4) of this subsection **VIII(a)** (or any combination thereof) may be exercised at any **Facility**, establishment, place, property, or location designated in this subparagraph (A) either: **(i)** with the consent of the owner or any **Person** in charge of such premises or **Facility** to enter without advance notice, at reasonable times, and in the manner least disruptive and least inconvenient to the occupants of the premises that is consistent with the faithful, competent and complete conduct of the investigation required to inspect and investigate, during regular working hours and at other reasonable times, given the nature and timing, if any of the known or suspected **Pubic Nuisance** condition or event, and within reasonable limits and in a reasonable manner; or **(ii)** pursuant to the terms and conditions of valid Inspection Warrant or Search Warrant issued by a court of competent jurisdiction:

- (i)** where a suspected **Public Nuisance** condition exists, or is reasonably suspected to exists;
- (ii)** at any **Facility**, establishment, or other place or property where any **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant**, or **Waste** may be or has been generated, stored, treated, disposed of, or transported from;

- (iii) from or to which there has been a release or threatened release of a **Hazardous Substance, Hazardous Waste, or Pollutant or Contaminant** within or adversely effecting Fayette County;
  - (iv) where a known or reasonably suspected **Public Nuisance** activity within or adversely effecting Fayette County is being conducted;
  - (v) where information relevant to the existence, nature or extent of materials comprising, resulting from, or contributing to a **Public Nuisance** may be obtained;
  - (vi) where information may be found regarding: (aa) the **Endangerment(s)** presented by; or (bb) the proper abatement of, a **Public Nuisance** within or adversely effecting Fayette County; or
  - (vii) where information regarding the identity, current location, or available insurance or non-insurance assets of any **Person** that is or may be liable for abatement of a **Public Nuisance** pursuant to this Ordinance may be obtained.
- (B) Any action described in Paragraph (3) or (4) of this Section **VIII(a)** may also be taken at any **Facility**, establishment, place, property, or location which is adjacent to any **Facility**, establishment, place, property, or location described in subparagraph (A) of this Section **VIII(a)(1)**.
- (2) **Access to information:** Any officer, employee, or representative of Fayette County described in Paragraph **VIII(a)(1)** may require, by service of a written Demand for Production of Information in a manner consistent with the requirements set forth in Rule Four of the West Virginia Rules of Civil Procedure, any **Person** who has or may have information relevant to any of the following timely to furnish, upon reasonable advance notice, all non-privileged information or **Records** within the possession, care, custody or control of such **Person** or any agent or attorney of such **Person** that contain, comprise, directly or indirectly relate to, or may reasonably be calculated to lead to the discovery of information about any of the following matters:
- (A) the creation of, any contribution to, any maintenance of, any failure or refusal to abate, or the knowledge of any **Person** regarding any act or condition that: (i) presents or may present, or that have or may have caused or contributed to, a **Public Nuisance** within or adversely effecting Fayette County; or (ii) presents or may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment** within Fayette County;
  - (B) the identification, nature, source, and quantity of materials that are or may be, in whole or in part, contributing to, comprising, or resulting from a **Public Nuisance**, which materials have been or are generated, treated, stored, or disposed of at a **Facility**, or transported to a **Facility** within or adversely affecting the Public Health, Safety, Welfare or **Environment** in Fayette County;
  - (C) the nature or extent of a release or threatened release of a **Hazardous Substance, Hazardous Waste, or Pollutant or Contaminant** at or from a **Facility** within or adversely affecting the Public Health, Safety, Welfare or **Environment** in Fayette County;
  - (D) information relating to the ability of a **Person** potentially liable under this Ordinance to pay for or to perform a **Response Action**, specifically including all or any part of an **Abatement Action**, pursuant to the requirements of this Ordinance, or to reimburse Fayette County for **Abatement Action Costs** it has incurred or may incur, including information regarding the assets, ability,

liability and responsibility of any guarantor, indemnitor, or insurer of (or providing any benefits to) any **Person** who is or may be a liable party pursuant to this Ordinance, to perform or pay for the performance of any **Abatement Action**, or to pay, indemnify, or reimburse for the costs of any potentially responsible party's performance of an **Abatement Action** or payment of **Abatement Action Costs** incurred or to be incurred by Fayette County;

- (E) the identification, location, nature and extent of any assets (including any sums that are or may be available pursuant to any guarantee, indemnity or insurance agreements, contracts or policies of any kind), or information pertaining to the identity, legal structure, financial condition, and officers, employees and agents of any **Person** who is or may be a **Person** liable for the abatement of a **Public Nuisance** within or adversely affecting the Public Health, Safety, Welfare or the **Environment** in Fayette County as defined by this Ordinance or by state law;

In addition, upon reasonable notice, such **Person** shall either:

- (i) grant any such officer, employee, or representative access at all reasonable times to any vessel, **Facility**, establishment, place, property, or location to inspect and copy all **Records** relating to such matters; or
- (ii) timely copy and furnish to the officer, employee, or representative all such **Records**, at the option and expense of such **Person**.

- (3) **Entry:** Any officer, employee, or representative described in section VIII(a)(1) is authorized to enter at reasonable times any of the locations described in section VIII(a)(1)(A) and (B) of this Ordinance, and any such entry shall be made in a manner as to cause the least possible inconvenience to the persons in possession consistent with accomplishing the remedial purposes of the entry and investigation.

(4) **Inspection and samples:**

(A) **Authority:** Any officer, employee or representative described in Paragraph VIII(a)(1) is authorized to inspect and obtain samples from any **Facility**, establishment, or other place or property referred to in Paragraph VIII(a)(3) or from any location of any suspected **Hazardous Substance, Hazardous Waste, Pollutant, or Contaminant**. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling for suspected **Hazardous Substance, Hazardous Waste, or Pollutant or Contaminant**. Each such inspection shall be completed in a reasonable manner and with reasonable promptness.

(B) **Samples** If such officer, employee, or representative obtains any samples, before leaving the premises, he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

- (5) **Failure or refusal to allow inspection; Inspection Warrants:** In addition to or in lieu of any other actions authorized by this Ordinance or by West Virginia law, if:

- (A) the Fayette County Prosecuting Attorney, in his or her sole judgment, determines that it is in the best interests of Fayette County in effecting the remedial purposes of this Ordinance that any entry or inspection authorized by this Ordinance should take place under authority of a judicial warrant; or
- (B) any **Person** required by this Ordinance to produce information or to allow access

and inspection refuses to consent to, attempts to limit, interfere with, or prevent the County Sheriff or any Deputy Sheriff acting upon written authorization from the Code Enforcement Agency, or any authorized member or agent of the Code Enforcement Agency from conducting an investigation and inspection authorized by Section VIII(a)(1) of this Ordinance, the Fayette County Commission may direct, or the Fayette County Administrator, acting on behalf of the Code Enforcement Agency, may request, the Fayette County Prosecuting Attorney to apply for, or with the consent of the Fayette County Prosecuting Attorney, the Fayette County Sheriff or any authorized member or agent of the Code Enforcement Agency may apply for, an Inspection Warrant from the Magistrate Court or Fayette County Circuit Court, or, at the option of the Fayette County Prosecuting Attorney, from any other court of competent jurisdiction.

(6) **Compliance orders:**

- (A) *Issuance:* If consent is not granted to any Demand for Production of Information or request under paragraph (2), (3), or (4) of this section VIII(a) of this Ordinance made by an officer, employee, or representative described in Paragraph VIII(a)(1) of this Ordinance, the Code Enforcement Agency may issue an Order directing compliance with the request. Such Compliance Order may be issued after such notice and opportunity for informal consultation with the Code Enforcement Agency as is reasonably appropriate under the circumstances.
- (B) *Compliance Enforcement:* In addition to or in lieu of issuance of a Compliance Order authorized by subsection VIII(a)(6)(A) of this Ordinance, the Fayette County Commission may require, or the Code Enforcement Agency may request, the Fayette County Prosecuting Attorney to commence a civil action in the name of the Fayette County Commission in a court of competent jurisdiction to compel compliance with any Demand for Production of Information, request or Order referred to in Section VIII(a)(6)(A). Where there is a reasonable basis to believe there is or may be a **Public Nuisance**, or there is or may be a condition that may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment** within Fayette County, the court shall take the following actions:
- (i) in the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
- (ii) In the case of information or document requests or Orders, the court shall enjoin interference with such information or document requests or Orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
- (C) *Civil Penalties:* Upon motion by the Fayette County Prosecuting Attorney in any civil action commenced pursuant to Section VIII(a)(6)(B), the court may assess a civil penalty not to exceed Five thousand dollars (\$5,000) for each day of noncompliance against any **Person** who unreasonably fails or has failed to comply with the provisions of paragraph (2), (3), or (4) or an order issued



pursuant to subparagraph (6)(A) of this subsection VIII(a). In assessing any such civil penalty, the court shall consider and apply, as appropriate, the standards and factors relevant to the assessment of civil penalties specified in Section XXIII(d) of this Ordinance.

(7) ***Other authority:*** Nothing in this subsection shall preclude the Code Enforcement Agency from securing access or obtaining information in any other lawful manner.

(8) ***Confidentiality of information:***

(A) Except to the extent that they qualify for protection pursuant to Section X of this Ordinance as **Confidential Information**, or, except upon a showing satisfactory to the Code Enforcement Agency (or the Fayette County Commission, as the case may be) by any person that records, reports, or information, or particular part thereof (other than health or safety effects data), to which the Fayette County Commission, the Code Enforcement Agency or the Fayette County Prosecuting Attorney has access under this section, if made public would divulge information entitled to protection under 18 U.S.C. § 1905, any **Records**, reports, or information obtained from any **Person** under this section (including records, reports, or information obtained by representatives of the County Commission or Code Enforcement Agency) shall be available to the public.

(b) ***Monitoring, Testing, Analysis, and Reporting:***

(1) ***Issuance:***

(A) *When properly issued:* With reasonable grounds to believe that a **Public Nuisance** exists, or may exist within or adversely affecting the Public Health, Safety, Welfare, or the **Environment** within Fayette County, the Code Enforcement Agency may issue an Order pursuant to this subsection VIII(b) against any **Person** described in section VI(a) of this Ordinance that is liable with respect to such **Public Nuisance**, requiring such **Person** to conduct such monitoring, testing, analysis, and reporting regarding any aspect of such **Public Nuisance** as the Code Enforcement Agency deems necessary and proper:

- (i) timely and reliably to ascertain the existence, nature, or extent of a **Public Nuisance** and the nature and extent of any **Endangerment(s)** to the Public Health, Safety, Welfare, or the **Environment** that may be presented by it; or
- (ii) timely, properly and competently to select or assess the effectiveness of all or any portion of an **Abatement Action** with respect to such **Public Nuisance** that complies with the requirements of section IX of this Ordinance.

(B) *How issued; consultation, authority to modify proposal:* Any Order under paragraph (1) of this subsection VIII(b) shall be filed with the County Clerk and served in a manner consistent with requirements of Section XII(c) for service of a complaint of the Code Enforcement Agency, and shall require any **Person** to whom the Order is issued to submit to the Code Enforcement Agency within thirty (30) days, or, if exigent circumstances require, within a shorter, specified period of time, from the issuance of such order a detailed proposal for carrying out the required monitoring, testing, analysis, and reporting. The Code Enforcement Agency may, after providing such **Person** with an informal opportunity to confer with the Code Enforcement Agency respecting such proposal, require such **Person** to carry out such monitoring, testing, analysis, and reporting in accordance with such proposal, and may impose such modifications to the proposal as the Code Enforcement Agency deems necessary and proper

fully and competently to:

- (i) ascertain the nature and extent of the actual or threatened Endangerment to the Public Health, Safety, Welfare, or the **Environment**; or
  - (ii) select or to assess the effectiveness of an **Abatement Action** with respect to such **Public Nuisance** that complies with the requirements of Section **IX** of this Ordinance.
- (C) *When Code Enforcement Agency may conduct activity pursuant to this Subsection VIII(b)*: If the Code Enforcement Agency determines that no responsible party is able to conduct monitoring, testing, analysis or reporting reasonably satisfactory to the Code Enforcement Agency, or if the Code Enforcement Agency determines that any such action carried out by the responsible party to be unsatisfactory, the Code Enforcement Agency may conduct appropriate monitoring, testing or analysis (or any combination thereof) which the Code Enforcement Agency deems reasonable to ascertain the nature and extent of the hazard associated with the actual or threatened **Public Nuisance** at issue.
- (D) *Reimbursement of Response costs; oversight & monitoring*: The Code Enforcement Agency may further require, by order issued pursuant to this Section **VIII(b)** served and filed in compliance with Section **IX(b)** of this Ordinance, that the responsible party referred to in paragraph (1) of this subsection **VIII(b)** timely reimburse Fayette County for **Abatement Action Costs** incurred and to be incurred by Fayette County, non-exclusively including the Fayette County Environmental and Public Health Protection Special Settlement Fund:
- (i) with respect to any necessary and proper activity of Fayette County, non-exclusively including the Fayette County Prosecuting Attorney, Code Enforcement Agency, Fayette County Board of Health, or Fayette County Solid Waste Authority pursuant to this subsection **VIII(b)**;
  - (ii) in connection with any necessary and proper activity of Fayette County, non-exclusively including the Fayette County Prosecuting Attorney, Code Enforcement Agency, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency in reviewing, commenting on, and revising a responsible party's plans and reports submitted pursuant to this subsection **VIII(b)**; or
- (C) in connection with overseeing and monitoring the performance of any responsible party's activities required pursuant to this subsection **VIII(b)**.
- (2) *Compliance Enforcement; Civil penalties*:
- (A) *Civil Enforcement Action authorized*: The Fayette County Commission may require, or the Code Enforcement Agency may request, the Fayette County Prosecuting Attorney to commence a civil action in the name of the Fayette County Commission in a court of competent jurisdiction to compel compliance with any Order referred to in Section **VIII(b)**. When, in course of any such civil action, Fayette County has established to the court by a preponderance of the evidence that: (1) there is a reasonable basis to believe there is or may be a **Public Nuisance**, or there is or may be a condition that may present an **Imminent** and **Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment** within Fayette County resulting, in whole or in

part from a **Public Nuisance**; (2) that the respondent named in the Order is a **Person** described in Section **VIII(b)(1)** of this Ordinance with liability for that **Public Nuisance** or **Imminent and Substantial Endangerment**; and (3) that the Order authorized by Section **VIII(b)(1)**, is not arbitrary and capricious and is otherwise in accordance with law, the court shall enter appropriate injunctive relief compelling timely and competent compliance by the respondent with all terms and conditions of the Order properly issued pursuant to Section **VIII(b)**. In any such civil action, it shall not be necessary for the Code Enforcement Agency to allege or prove at any stage of the proceeding that irreparable damage will occur should the requested injunctive relief not be issued; or that any remedy at law is inadequate, and any temporary restraining order, preliminary injunction, or permanent injunction shall issue as otherwise provided by this Ordinance without any requirement for such allegations and without such proof.

- (B) Upon proper pleading and motion by the Fayette County Prosecuting Attorney in any civil action commenced pursuant to Section **VIII(b)(2)(A)** of this Ordinance, the court, upon proper proof, shall assess against any **Person** to whom an Order was lawfully issued pursuant to this Section **VIII(b)** who, without good cause, willfully failed or fails to comply with an Order issued pursuant to this Section **VIII(b)** a civil penalty of not less than Five thousand dollars (\$5,000) but not to exceed Ten thousand dollars (\$10,000) for each day of noncompliance. In assessing any such civil penalty, the court shall consider and apply the standards and factors relevant to the assessment of civil penalties specified in Section **XXIII(d)** of this Ordinance.
- (C) Any cause of action authorized by this Section **VIII(b)(2)** may be joined with a civil action brought pursuant to Section **XXII** of this Ordinance.

(c) **Requirement to appear and give testimony:** If the Code Enforcement Agency determines that it is necessary and proper to the complete and competent investigation of any known or suspected **Public Nuisance** to secure the appearance and testimony of any witness, it may by formal motion request the Fayette County Commission to commence a formal Fayette County Commission Public Nuisance Investigation Proceeding pursuant to Section 7 of the Fayette County Public Nuisance Civil Investigation Ordinance.

(d) **Requirements applicable to demand for access to information or document:** Any demand issued pursuant to the authority set forth in Section **VIII(a)(2)** of this Ordinance may require, upon twenty (20) days advance notice or such shorter notice as may be necessary and appropriate to the timely investigation and abatement of any known or suspected **Public Nuisance** considering all relevant circumstances, any **Person** identified in Section **VIII(a)(2)**, regardless of where such **Record** or thing is or may be found, to produce to the Code Enforcement Agency or its designee on the date, time and at the place set forth in the demand:

- (1) truthful and complete, written responses to the Code Enforcement Agency's written demand for information contained in the Investigative Order submitted under oath and personally attested to before a Notary Public; and
- (2) timely production as and when demanded of any properly demanded, non-privileged **Record**, information, or thing.
- (3) Any **Person** required to produce information, or to produce any thing, or any **Record** identified in Section **VIII(a)(2)** shall, on or before the date and time set forth in the

demand, deliver a written certification, signed under oath administered before a notary public or other official authorized by law to administer such an oath attesting to the following:

- (A) that the written information provided, if any, is truthful and complete;
- (B) that the **Record(s)**, other documents, or things produced, if any, together with those withheld from production as privileged or for any other reason and for which the information required by Section **VIII(d)** of this Ordinance has been timely produced, if any, constitutes the truthful and complete results of a diligent search, conducted in good faith, for the information and thing(s) demanded; and
- (C) that all **Record(s)**, documents and things responsive to the Investigative Order to produce that are in the possession, care, custody, or control of: (i) that **Person**; (ii) that **Person's** agents, representatives, employees, directors, partners, consultants, or agents; (iii) that **Person's** parent corporation(s) (or other form of business entity) and subsidiaries; (iv) to the full extent they are available to that **Person**, any **Record(s)**, documents and things responsive to the Investigative Order that are in the possession, care, custody, or control of that **Person's** predecessors or successors-in-interest; and (v) any and all **Persons** acting on its behalf or in concert with it, have been produced as required by the demand of the Code Enforcement Agency.

**(e) Materials required to support assertions of privilege or other legal basis for failure or refusal to produce:**

(1) ***Privilege log information required:*** In order to allow the Code Enforcement Agency and the Fayette County Prosecuting Attorney adequately to assess the validity of any assertion of any legal privilege or other grounds asserted for the purposes of determining whether public resources should be expended to pursue production of any withheld document, any **Person** from whom any **Record(s)**, or things are demanded pursuant to Section **VIII(a)(2)** who fails or refuses to produce any demanded **Record**, information, document, or thing(s) based in whole or in part upon a claim of privilege, or for any other reason must file with the County Clerk and with the office of the Fayette County Prosecuting Attorney on or before the date set forth in the demand for production a concise written statement setting forth all facts supporting the claim of privilege or other asserted basis for withholding the demanded production of each **Record** or thing, and the asserted legal authority upon which the failure or refusal to produce is based. The concise written statement required by this Section **VIII(d)** must, at a minimum, include the following as to each demanded item of information and each document or thing withheld:

- (D) the identity of the author thereof, any other **Person** who participated or assisted in its preparation;
- (E) the title or other identifying data;
- (F) the date of the creation of the **Record** or other document or, if no date appears thereon, the approximate date;
- (G) A summary of the nature (*e.g.*, letter, ledger, spreadsheet, *etc.*) and content of the **Record** or other document sufficient to identify it;
- (H) the name and location of each **Person** having or last having possession, care, custody or control of the original and of each copy thereof, and the

names of all **Persons** to whom the **Record** or other document has been disclosed, sent, or otherwise shared;

- (I) if such document or thing was, but is no longer, in the possession or control of the **Person** from whom the document or thing is requested, the disposition that was made of it, including but not limited to the name and address of the **Person** to whom the **Record** or other document or thing was transferred, or who disposed of the **Record** or other document or thing, as well as the date, time, place and mode or method of transfer or disposal; and
  - (J) the precise, current location of the **Record** or document or thing and the complete name and address of its current custodian.
- (2) **Effects of failure timely to provide required privilege log information:** Any **Person** required by Section VIII(d)(1) to provide the concise written statement described therein who failed or refused timely to file a complete, concise written statement that fully complies with the requirements of Section VIII(d), thereafter, in any proceeding before the Fayette County Commission, or any civil or criminal action in which the County or the Fayette County Prosecuting Attorney acting on behalf of the County Commission, is seeking to enforce any provision of this Ordinance, to abate any **Public Nuisance** condition, or to recover any **Abatement Action Costs**, or other fees, costs or penalties pursuant to this Ordinance, shall be barred from asserting or relying upon any privilege for which a compliant statement of supporting factual basis and legal authority was not timely filed, and shall further be barred from withholding, based upon any assertion of any such privilege, any demanded **Record**, item of information, document or thing for which all of the details required by Section VIII(d)(1) were not timely provided. The bar established by this Section VIII(d)(2) shall apply only to the assertion of any privilege or other asserted legal basis for withholding the demanded item of information, document, or thing with respect to which claim of privilege this Ordinance required the filing of a concise written statement pursuant to Section VIII(d)(1), but for which no compliant statement was timely filed. Such bar shall not apply to any failure or refusal to produce such documents based upon the claimed application with *prima facie* validity of the privilege against self-incrimination.

- (f) **Timing of review of any demand, request or order issued pursuant to this Section VIII:** Any **Person** to whom any demand for production of information, or order issued pursuant to this Section VIII of this Ordinance has been properly issued and served may only seek any legal or equitable relief that would as a practical matter have the effect of invalidating, dismissing, staying, quashing (in whole or in part), or modifying all or any part of any such demand, request, or order properly served pursuant to this Section VIII in one of the following **Proceedings:** (1) in a civil action brought by the Fayette County Prosecuting Attorney in a court of competent jurisdiction before which the Fayette County Prosecuting Attorney is prosecuting against such **Person** a claim pursuant to Section VIII of this Ordinance seeking enforcement of, civil penalties relating to, the same Demand or Order issued and served pursuant to this Section VIII; (2), in a civil action brought by the Fayette County Prosecuting Attorney in a court of competent jurisdiction before which the Fayette County Prosecuting Attorney is prosecuting against such **Person** a claim for abatement of, or recovery of **Abatement Action Costs** or civil penalties regarding, the same **Public Nuisance**

act or condition that is at issue in the Demand or Order issued and served pursuant to this Section VIII; or (3) in a proceeding commenced by the Fayette County Prosecuting Attorney or by the Code Enforcement Agency before the Fayette County Commission pursuant to Section XXIII(c) of this Ordinance seeking recovery of civil penalties regarding the same **Public Nuisance** act or condition that is at issue in the Demand or Order issued and served pursuant to this Section VIII.

Section VIII.V – Recordkeeping requirements; waiver of Record retention requirements:

(a) **Prospective Recordkeeping requirement:** Beginning with the effective date of this Ordinance, for fifty (50) years thereafter or for fifty (50) years after the date of establishment of a **Record** (whichever is later), or at any such earlier time as a waiver if obtained under subsection (d) of this Section VIII.V, it shall be unlawful for any **Person** identified in subsection (b) of this Section VII.V:

- (1) knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any **Record** or other information identified with respect to such **Person** in subsection (c) of this Section VII.V, or
- (2) to authorize, or having the authority to do so, fail or refuse to prevent, any officer, director, agent or attorney of such **Person** from destroying, mutilating, erasing, disposing of, concealing, or otherwise rendering unavailable or unreadable or falsifying any **Record** identified with respect to such **Person** in subsection (c) of this Section VII.V that is within such **Person's** possession, care, custody or control, or that of any director, officer, agent or attorney of such **Person** identified in subsection (c) of this Section VIII.V.

(b) **Persons subject to Recordkeeping requirement:**

- (1) *Respondent to Demand for Production of Information issued pursuant to Section VIII(a)(2) of this Ordinance:* Any **Person** properly served with a Demand for Production of Information pursuant to Section VIII(a)(2) of this Ordinance shall be subject to the requirements of subsection (a) of this Section VIII.V from the date of its receipt of service of such Demand with respect to any **Record** or other information;
- (2) *Respondent to a Civil Information Demand or Civil Investigation Order:* Any **Person** served with a Civil Information Demand or Civil Investigation Order pursuant to the Fayette County Public Nuisance Civil Investigation Ordinance, Fayette County Ordinance 2017-002, duly enacted on December 15, 2017 shall be subject to the requirements of subsection (a) of this Section VIII.V from the date of its receipt of service of such Civil Information Demand or Civil Investigation Order;
- (3) *Respondent to an Order of the Code Enforcement Agency requiring the conduct of monitoring, testing, analysis, and reporting regarding any aspect of an identified or suspected Public Nuisance pursuant to Section VIII(b) of this Ordinance:* Any **Person** served with an Order of the Code Enforcement Agency issued pursuant to Section VIII(b) of this Ordinance requiring the conduct of any monitoring, testing, analysis, and reporting regarding any aspect of an identified or suspected **Public Nuisance** shall be subject to the requirements of subsection (a) of this Section VIII.V from the date of its receipt of service of such order.
- (4) *Each Owner or Operator of a site or Facility served with an informational copy of*

*the Code Enforcement Agency's complaint pursuant to Section VII(c) of this Ordinance:* Any **Owner** or **Operator** of a site or **Facility** served with an informational copy of a complaint issued by the Code Enforcement Agency pursuant to Section **VII (c)** of this Ordinance shall be subject to the requirements of subsection (a) of this **Section VIII.V** from the date of its receipt of service of such informational copy.

- (c) **Records and information subject to recordkeeping requirement:** Any **Person** identified in subsection (b) of this **Section VII.V** shall be subject to the requirements of subsection (a) of this **Section VIII.V** with respect to each of the following **Records** or information:
- (1) any **Records** or information production of which is expressly addressed by any Demand for Production of Information issued to such **Person** pursuant to **Section VIII(a)(2)** of this Ordinance, or a Civil Information Demand or Civil Investigation Order issued to such **Person** pursuant to the Fayette County Public Nuisance Civil Investigation Ordinance, Fayette County Ordinance 2017-002, duly enacted on December 15, 2017;
  - (2) Any **Record** or information that relates directly or indirectly to the acts, omissions or conditions that did or may have created, caused, contributed to, or resulted from, or that are or may be creating, causing, contributing to, or resulting from the alleged **Public Nuisance** addressed:
    - (A) in a Demand for Production of Information, a Civil Information Demand or a Civil Investigation Order to which such **Person** is a Respondent;
    - (B) in the Order of the Code Enforcement Agency issued pursuant to **Section VIII(b)** of this Ordinance; or
    - (C) in an informational copy of a complaint issued by the Code Enforcement Agency pursuant to **Section VII (c)** of this Ordinance served on such **Owner** or **Operator**;
  - (3) any **Record** or information that relates directly or indirectly to the existence or non-existence, nature or extent of any **Endangerment** to the public health, safety, welfare or the **Environment** that has or may have resulted in whole or in part from the alleged **Public Nuisance**:
    - (A) addressed in a Demand for Production of Information, Civil Information Demand, or Civil Investigation Order to which such **Person** is a Respondent; or
    - (B) that is at issue in an informational copy of a complaint issued by the Code Enforcement Agency pursuant to **Section VII (c)** of this Ordinance served on such **Owner** or **Operator**;
  - (4) any **Record** or information that relates directly or indirectly to the past or present ownership or operation of any site or **Facility**:
    - (A) that is expressly addressed in any Demand for Production of Information, Civil Information Demand, or Civil Investigation Order to which such **Person** is a Respondent; or
    - (B) at or from which the alleged **Public Nuisance(s)** that is at issue in an informational copy of a complaint issued by the Code Enforcement Agency pursuant to **Section VII (c)** of this Ordinance served on such **Owner** or **Operator** is alleged to exist or have previously existed;
  - (5) any **Record** or information that relates directly or indirectly to the act, omissions, knowledge, current location, assets, liabilities, indemnification, insurance coverage

for liabilities, or financial resources of any **Person** alleged in any Demand for Production of Information, Civil Information Demand, Civil Investigation Order, or Order of the Code Enforcement Agency issued pursuant to Section **VIII(b)** of this Ordinance served on a **Person** described in subsection **(b)** of this Section **VIII.V** to be legally responsible for any **Public Nuisance** within Fayette County;

**(d) Waiver of Record Retention Requirement:** At any time prior to the date which occurs fifty years after the effective date of this Ordinance, any **Person** identified in subsection **(b)** of this Section **VIII.V** may apply to the Code Enforcement Agency for a waiver of the requirements set forth in subsection **(a)** of this Section **VIII.V**. The Code Enforcement Agency is authorized to grant such waiver if it determines such waiver would not unreasonably interfere with the attainment of the purposes and remedial goals of this Ordinance. The Code Enforcement Agency shall, after providing appropriate public notice of, and opportunity for public comment on, any proposed rules and regulations, promulgate rules and regulations regarding such a waiver application so as to inform the parties and the public of the proper application procedures and conditions for approval of such a waiver. Once formally promulgated, any such final rule or regulation shall be filed with the Office of the Fayette County Clerk. The rules and regulations promulgated pursuant to this Section **VIII.V(d)** shall non-exclusively provide reasonable timeframes and procedures pursuant to which any **Person** aggrieved by the granting or denial of such waiver may obtain review of the decision of the Code Enforcement Agency regarding such waiver application by the Fayette County Commission.

**(e) Discretionary authority to impose Record retention requirement:** Notwithstanding any other provision of this Section **VIII.V**, the Code Enforcement Agency in its discretion and with the advice and consent of the Fayette County Prosecuting Attorney may require by formal Order served in the manner consistent with the requirements set forth in Rule Four of the West Virginia Rules of Civil Procedure, any **Person** to retain any designated **Record** or other information identified in subsection **(c)** of this Section **VIII.V** for any designated time period, which time period may be longer than that specified in subsection **(a)** of this Section **VIII.V**, as the Code Enforcement Agency determines to be necessary to secure adequate protection of the public health, safety, welfare or the **Environment** within Fayette County, or to accomplish the remedial purposes of this Ordinance. Any respondent to a formal Order of the Code Enforcement Agency issued pursuant to this Section **VIII.V(e)** or any **Person** aggrieved by such an Order may obtain review of the Order by the Fayette County Commission by filing with the Fayette County Clerk within twenty-one (21) days of the respondent's receipt of such order a written petition for such review, which petition must contain a certificate verifying that a copy of the petition has been provided to the Code Enforcement Agency and the Office of the Fayette County Prosecuting Attorney. Such petition shall succinctly set forth the relief requested, and the facts and legal authorities relied upon by the petitioner in support of the relief requested.

#### Section IX – Abatement Actions; remediation standards and requirements:

**(a) Required Abatement Actions for a Public Nuisance declared in Section V:**

**(1) *Selection and Approval of Abatement Action for any Public Nuisance declared in Section V(a)(2), (9), and (11) through (16), inclusive, of this Ordinance:*** Whenever the County Commission, the Code Enforcement Agency, or any court determines that



there is or may be an existing or imminently threatened **Public Nuisance** declared in Section V(a)(2), (9), and (11) through (16), inclusive, of this Ordinance in Fayette County, the County Commission, Code Enforcement Agency, or court shall require one or more of the liable parties to undertake in a timely manner, in full compliance with the requirements of this Ordinance, and under the oversight and monitoring of the Code Enforcement Agency, an appropriate **Abatement Action** that, considered, in compliance with the requirements of subsection (c) of this Section IX, without regard to the cost of any such action, will:

- (A) fully complies with **Applicable Requirements**, if any
- (B) to the extent possible secure timely, competent and adequate abatement of the harms and **Endangerments** to the Public Health, Safety, Welfare, or the **Environment** presented or that may be presented, in whole or in part by, or that are arising or may arise directly or indirectly from, the **Public Nuisance**; and
- (D) if the **Abatement Action** at issue is an interim **Response Action** or **Abatement Action** not expected to be or intended as the final **Abatement Action** respecting the **Public Nuisance** at issue, achieve to the maximum extent practicable significant risk reduction quickly, or that will expedite the completion of total abatement of the **Public Nuisance** at issue.

(b) *Selection and Approval of Abatement Action for any Public Nuisance other than those governed by subsection (a) of this Section IX of this Ordinance:* Whenever the County Commission, the Code Enforcement Agency, or any court determines that there is or may be either an existing or imminently threatened **Public Nuisance** declared in Section V(a) of this Ordinance, other than one governed by the provisions of subsection (a) of this Section IX in Fayette County, or a **Public Nuisance** declared in Section V(b) that presents or may present an **Imminent** and **Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment** within Fayette County, the County Commission, Code Enforcement Agency, or court shall require one or more of the liable parties to undertake in a timely manner, in full compliance with the requirements of this Ordinance, and under the oversight and monitoring of the Code Enforcement Agency, an appropriate **Abatement Action** that, considered, in compliance with the requirements of subsection (c) of this Section IX, without regard to the cost of any such action, is:

- (1) except when otherwise expressly authorized by this Ordinance, to the maximum extent deemed practicable by the Code Enforcement Agency not inconsistent with the requirements of the **National Contingency Plan** (interpreted and applied with the Code Enforcement Agency serving as and exercising the discretion therein assigned to the “USEPA/Lead Agency”);
- (2) notwithstanding any contrary provision of the **NCP**, fully compliant with **Applicable Requirements**;
- (3) notwithstanding any contrary provisions of the **NCP**, to the maximum extent deemed feasible by the Code Enforcement Agency, one that give preference to **Abatement Action(s)** in which treatment that permanently and significantly reduces the volume, toxicity or mobility of any **Hazardous Substances, Hazardous Waste, Waste, or Pollutant or Contaminant** addressed by the **Abatement Action** is a principal element;
- (4) notwithstanding any contrary provision of the **NCP**, not one in which offsite transport and disposal of any **Hazardous Substances, Hazardous Waste, Waste, or Pollutant or Contaminant** to any location within Fayette County would be authorized without implementation of treatment that permanently and significantly reduces the volume,

toxicity or mobility of the any **Hazardous Substances, Hazardous Waste, Waste, or Pollutant or Contaminant** addressed by the **Abatement Action**; and

- (5) to the maximum extent deemed practicable by the Code Enforcement Agency, one that provides for restoration of the beneficial uses of, and that provides appropriate protection for, **Natural Resources** within Fayette County.

(c) **Proper consideration of cost effectiveness of a selected or approved Abatement**

**Action**: Provided that it first meets the applicable requirements of subsection (a) or (b) of this Section IX, each **Abatement Action** selected or approved by the County Commission, Code Enforcement Agency, or court pursuant to this Section IX shall also be cost-effective. For all purposes under this Ordinance, the cost-effectiveness required by this subsection IX(c) shall be determined by application in a manner not inconsistent with the NCP of the criteria set forth in the NCP, 40 CFR § 300.430(f)(1)(ii)(D).

(d) **Abatement Action Enforcement Procedures**:

In addition to any other action taken by federal, state, or other local government, whenever the Code Enforcement Agency determines that there is reasonable grounds to believe either: (i) that there is an existing or threatened **Public Nuisance** in any place in Fayette County, or (ii) that there is or may be an **Endangerment** to the Public Health, Safety, Welfare, the **Environment**, or to the beneficial use within Fayette County, or to the adequate protection of, **Natural Resources** held in trust for public arising out of, in whole or in part, an existing or threatened **Public Nuisance**, the Code Enforcement Agency may proceed in any of the following ways:

- (1) In accord with the provisions of Section XII or XIII of this Ordinance, file with the County Commission and serve on such potentially responsible parties as the Code Enforcement Agency deems appropriate a complaint in the form of a Proposed Public Nuisance Abatement Order that would, if it became final and binding, require designated responsible parties to undertake partial or comprehensive **Abatement Actions** consistent with the requirements of this Section IX so as to provide adequate protection of public health, safety, welfare, the **Environment**, or adequate protection of, and restoration to beneficial use of, any **Natural Resources** within Fayette County; or
- (2) Request that the Fayette County Prosecuting Attorney, pursuant to the authority conveyed by Sections XX or XXII of this Ordinance, promptly seek from a court of competent jurisdiction such relief with respect to the existing or threatened **Public Nuisance** as is authorized by this Ordinance and applicable federal and state law, as deemed appropriate by the Fayette County Prosecuting Attorney, or
- (3) Only when authorized by Section IX.V of this Ordinance, and then only in the event that the Code Enforcement Agency, following its application of the considerations set forth in Section IX.V(h), determines it to be appropriate, issue and serve on such potentially responsible parties as the Code Enforcement Agency deems appropriate a Final and Binding Time-Sensitive Abatement Action Order that complies with the requirement of Section IX.V of this Ordinance;
- (4) At its discretion, and with the advice and consent of the Fayette County Prosecuting Attorney, both file and serve either a complaint/Proposed Public Nuisance Abatement Action Order pursuant to Section IX(b)(1) or a Final and Binding Time-Sensitive Abatement Action Order pursuant to Section IX.V, and request that the Fayette County Prosecuting Attorney seek the judicial relief authorized by Section XXII of this Ordinance and applicable federal and state law, as deemed appropriate by the

Fayette County Prosecuting Attorney.

- (e) **When Abatement Action requirements may be more stringent than NCP:** Notwithstanding subsection (a) of this Section IX, the Code Enforcement Agency may order additional or more stringent requirements for an **Abatement Action** than those that would or might apply pursuant to this Section IX whenever the Code Enforcement Agency determines that there is or may be within Fayette County an **Endangerment** to the Public Health, Welfare, or the **Environment**, or to the adequate protection of the beneficial use within Fayette County of any Natural Resources arising out of, or resulting from, in whole or in part, an existing or threatened **Public Nuisance**, and the Code Enforcement Agency determines that such additional or more stringent requirements are feasible and are necessary or appropriate to secure adequate protection against, or appropriate abatement of, such **Public Nuisance**, or are feasible and necessary or appropriate to protect or restore approved land uses consistent with the applicable, approved plans of Fayette County.
- (f) **Waiver of any requirements of this Section IX for Abatement Action:**
- (1) *When Code Enforcement Agency may waive a requirement for an Abatement Action imposed by this Section IX:* Except as provided in paragraph of this subsection IX(f), the Code Enforcement Agency on its own initiative may order less stringent requirements for an **Abatement Action** than those that would or might apply pursuant to this Section IX whenever the Code Enforcement Agency determines that the such a waiver would result in an **Abatement Action** that will provide timely and adequate protection of the Public Health, Safety, Welfare, and the **Environment** and of **Natural Resources**, and restore and protect their beneficial uses within Fayette County, after considering the following factors:
- (A) adequate protection of the Public Health, Safety, Welfare, the **Environment** and all beneficial uses of **Natural Resources** in light of the existing or threatened **Endangerments** presented and the public and private resources that are, or are likely to be, available to meaningfully and appropriately respond to such **Endangerments**;
  - (B) restoration to the fullest extent practicable of the use and enjoyment of land within Fayette County, consistent with its General Plan or any other governmental land use or resource protection plan lawfully and publicly adopted, including, but not limited to, such plans addressing commercial, industrial, recreational, and residential uses and related development;
  - (C) safety of any public water supply;
  - (D) provision of adequate protection of the future Public Health, Safety, Welfare, and the **Environment** within Fayette County, considering Fayette County existing land use plans, and development potential provided for within any such plan; and
  - (E) preservation and restoration of the Public Health, Safety, Welfare and the **Environment** so as to preserve and expand, where and when appropriate, the aesthetic interests addressed by the consistent with its General Plan or any other governmental land use or resource protection plans lawfully and publicly adopted, including, but not limited to, such plans addressing commercial, industrial, recreational, and residential uses and related development within Fayette County.
- (2) *When a respondent to a Binding Public Nuisance Abatement Order may request a waiver of any requirement for an Abatement Action imposed pursuant to this Section IX:* Except as provided in paragraph of this subsection IX(f), upon timely and appropriately supported application for waiver by a liable or potentially liable

party to any Binding Public Nuisance Abatement Order issued pursuant to this Ordinance, other than a Final and Binding Time-Sensitive Abatement Action Order, the Code Enforcement Agency may order less stringent requirements for an **Abatement Action** than those that would or might apply pursuant to this Section IX whenever the Code Enforcement Agency determines that the such a waiver, either as requested or as granted by the Code Enforcement Agency, would result in an **Abatement Action** that will provide timely and adequate protection of the Public Health, Safety, Welfare, and the **Environment** and of **Natural Resources** within Fayette County, and restore and protect their beneficial uses within Fayette County, after considering the factors set forth in subparagraphs (1) through (4) of paragraph **IX(f)(1)** of this Ordinance.

- (A) *Time requirement applicable to required notice of intent to apply for waiver:* Any applicant for a waiver pursuant to paragraph **IX(f)(2)** of this Ordinance must give written notice to the Code Enforcement Agency of its intent to apply for such a waiver within ten (10) days of the date it first received service of the Binding Abatement Action Order, non-exclusively including a Temporary, Preliminary, or Final and Binding Time-Sensitive Abatement Action Order, that imposed the requirement for which it seeks a waiver. The time period for giving the notice of intent to apply for a waiver required by this subsection **IX(f)(2)(A)** is jurisdictional and may not be waived or continued by the Code Enforcement Agency.
- (B) *Required contents of required notice of intent to apply for waiver:* The notice of intent to apply for a waiver required by subsection **IX(f)(2)(A)** must identify: (i) the Binding Abatement Action Order that imposes the requirement(s) sought to be waived; (ii) each requirement imposed by the Binding Abatement Action Order for which a waiver is being sought; (iii) the identity of each applicant/respondent that intends to submit the waiver application; (iv) the identity, including the full name and professional license or registration number, if any of each scientific or environmental professional, non-exclusively including each engineer, geologist, environmental scientist, public health professional, toxicologist, epidemiologist, or medical practitioner, that will be supporting the applicant's waiver application; and (v) the full name, contact details and Bar Registration number of each attorney, if any, that will be representing any applicant with respect to all or any portion of the waiver application.
- (C) *Time requirement for submission of complete application for waiver:* Unless the Code Enforcement Agency, upon a showing by the respondent/applicant of good cause, grants an extension, a complete application for a waiver pursuant to paragraph **IX(f)(2)** of this Ordinance that includes all documents, reports, and related materials upon which the applicant will rely to support its application for waiver must be submitted to the Code Enforcement Agency on or before the close of business on thirtieth (30<sup>th</sup>) day following the date the respondent/applicant first received service of the Binding Abatement Action Order that imposed the requirement(s) for which it seeks a waiver. (In the event such date should fall on a weekend or holiday, the required submission date shall be the close of business on the next following business day.)
- (3) *Limitations on availability of waiver pursuant to paragraph **IX(f)(2)**:* Notwithstanding any other provision of this Ordinance, the Code Enforcement Agency:

- (A) may not waive the requirement imposed by Section **IX(b)(4)**;
- (B) shall summarily reject any application for waiver of any requirement imposed by a Binding Abatement Action Order issued pursuant to this Ordinance that was, prior to the issuance of that Order, subject to the public comment and public participation requirements of the NCP and which waiver application seeks to utilize or apply, in whole or in part, any remedial option that: (i) the respondent/applicant could have through the exercise of reasonable diligence proposed for consideration during the **Remedial Action** selection process set forth in the NCP, 40 CFR § 300.430 that preceded the issuance of the Binding Abatement Action Order at issue; or (ii) the was specifically considered and rejected by the Code Enforcement Agency during the **Remedial Action** selection process set forth in the NCP, 40 CFR § 300.430 that preceded the issuance of the Binding Abatement Action Order at issue; provided, however, that Code Enforcement may, in its sole discretion, consider as a request for modification of a selected Final Remedial Action such a waiver application that is, in the judgement of the Code Enforcement Agency, supported by reliable and compelling new data, newly available technology or information relevant to the requirement at issue as a request for modification of a selected Final Remedial Action.

(4) **Right to appeal the granting or denial of waiver application:** Any Person aggrieved by the granting of any waiver application pursuant to paragraph IX(f)(2) or Any liable or potentially liable party whose application for a waiver pursuant to subsection IX(f)(2) has been denied in whole or in any significant part may seek review by the County Commission of the decision of the Code Enforcement Agency by filing with the County Clerk a petition for review within ten (10) days of receipt of the decision of the Code Enforcement Agency for which review is sought. Any such petition must set forth in detail the grounds supporting the challenge of the decision of the Code Enforcement Agency and must be served on the Code Enforcement Agency and the Fayette County Prosecuting Attorney. Following its review of the filed petition for review of the decision of the Code Enforcement Agency, the County Commission will, by order, schedule such further briefings, hearings, or other proceedings, if any, with respect to the appeal as the Commission deems necessary and proper to the just resolution of the appeal. The County Commission will issue a final written decision on any petition for review filed pursuant to this subsection IX(e).

(g) **Administrative record:** With respect to any **Response** actions to any **Public Nuisance** governed by the provisions of Section IX(b) of this Ordinance, unless, and then only to the extent that, exigent circumstances require otherwise, the Code Enforcement Agency shall develop and supplement as appropriate an Administrative Record that documents the basis for its selection of the appropriate **Abatement Action(s)** that complies with the requirements of this Section IX, and upon which it shall base the selection of any **Response** or **Abatement Action** authorized by this Ordinance. With respect to any **Response** actions to any **Public Nuisance** governed by the provisions of Section IX(b) of this Ordinance, the Administrative Record shall be developed and maintained by the Code Enforcement Agency to the maximum extent practicable in accord with the applicable provisions of the NCP respecting the development and required contents of an Administrative Record. The Administrative Record shall be available to the public at the

Office of the Fayette County Clerk. The Code Enforcement Agency also may place duplicates of the administrative record at any other location.

- (h) **Exhaustion of County remedies required:** Any respondent to a proposed or Binding Abatement Action Order that is not subject to the provision of Section IX.V(g) of this Ordinance, or any liable party or potentially liable party seeking either (1) a waiver of any of the requirements for an **Abatement Action** set forth in Section IX of this Ordinance; or (2) seeking to have any **Abatement Action** imposed or to be imposed pursuant to this Ordinance by the Code Enforcement Agency, the County Commission, or by any court, regardless of by whom the action before any court was commenced, incorporate any standard or requirement less stringent than, or not consistent with, the requirements set forth in this Section IX must first raise the request for such relief by filing with the Code Enforcement Agency a request for waiver or for imposition of any standard or requirement less stringent than that required by this Section IX pursuant to Section IX(f) of this Ordinance, and, thereafter, exhaust all of the remedies provided by Sections IX(g) and XVII of this Ordinance with respect to such a request for waiver. Failure of any liable party or potentially liable party under this Ordinance to exhaust the county remedies available to pursuant to Sections IX and XVII shall bar: (1) any request to any court or agency for administrative or judicial review of any **Abatement Action** selected, ordered, or imposed pursuant to this Ordinance; and (2) imposition of any **Abatement Action** that does not at a minimum comply with the requirements of Section IX of this Ordinance.

Section IX.V – Authority to order time-sensitive abatement of certain Public Nuisance act, omissions or conditions:

- (a) **Commencement of time-sensitive abatement action:** In addition to any other action taken by a State or local government, when the Fayette County Commission or Code Enforcement Agency determines that there is or may be within Fayette County a **Public Nuisance** to which the provisions of Sections IX(b) of this Ordinance would apply which presents or may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment** within Fayette County that in the judgment of the Fayette County Commission or Code Enforcement Agency requires expeditious abatement, the Fayette County Commission may require, or the Code Enforcement Agency may request, that the Fayette County Prosecuting Attorney forthwith commence and diligently prosecute an action pursuant to Section XXII of this Ordinance to secure on the most accelerated basis available such relief as may be necessary to abate such danger or threat to the maximum extent practicable in compliance with the requirements of Section IX of this Ordinance.
- (b) **Authority of Code Enforcement Agency to issue Final and Binding Time-Sensitive Abatement Action Order:** Notwithstanding any other provision of this Ordinance, when the Code Enforcement Agency determines that there is or may be a **Public Nuisance** to which the provisions of Sections IX(b) of this Ordinance would apply which presents or may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment** within Fayette County that in the judgment of the Code Enforcement Agency requires expeditious abatement, either before or in lieu of making the request to the Fayette County Prosecuting Attorney authorized in subsection (a) of this Section IX.V, the Code Enforcement Agency may

take any other action or actions authorized by this Ordinance, and may also issue a Final and Binding Time-Sensitive Abatement Action Order to any **Person(s)** with liability pursuant to Section **VI(a)** with respect to such **Public Nuisance** requiring the timely and competent performance of such **Abatement Actions** as it deems necessary and proper to protect the Public Health, Safety, Welfare and the **Environment** within Fayette County. Any such **Abatement Action** so ordered by the Code Enforcement Agency shall be, to the extent practicable and consistent with the need for time-sensitive abatement, not inconsistent with the requirements of Section IX of this Ordinance and shall be final and binding immediately upon receipt of proper service pursuant to subsection (c) of this Section IX.V upon the respondent(s).

**(c) Issuance and Service of Final and Binding Time-Sensitive Abatement Action Order;**

**Informal Consultation:** Any Final and Binding Time-Sensitive Abatement Action Order issued by the Code Enforcement Agency pursuant to subsection (b) of this Section IX.V shall be filed with the County Clerk and served in manner consistent with the requirements of Section **XII(c)** for service of a complaint by the Code Enforcement Agency, and shall require any **Person** to whom the Order is issued to comply with the requirements of the Order and any timetables or schedules appended thereto effective upon receipt of proper service of the Final and Binding Time-Sensitive Abatement Action Order. The Code Enforcement Agency may, after providing such **Person** with an informal opportunity to confer with the Code Enforcement Agency respecting the requirements of the order, require such **Person** timely and competently to carry out at their sole cost and under the comprehensive oversight and monitoring by the Code Enforcement Agency such **Abatement Actions** as the Code Enforcement Agency deems necessary and proper fully and competently to respond to such **Public Nuisance** and any **Endangerments** to the Public Health, Safety, Welfare or the Environment that are or may be presented by it. Additionally, the Code Enforcement Agency may include in any Final and Binding Time-Sensitive Abatement Action Order a requirement that the responsible party properly served with such an order timely and periodically reimburse Fayette County for **Abatement Action Costs** incurred and to be incurred by Fayette County, non-exclusively including the Fayette County Environmental and Public Health Protection Special Settlement Fund:

- (i) in connection with any **Abatement Action** deemed necessary and proper by Fayette County, non-exclusively including the Fayette County Prosecuting Attorney, Code Enforcement Agency, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency to undertake such **Abatement Actions**, in: (aa) the investigation of the site or **Facility** at issue in the order; and (bb) the investigation of the respondent's liability pursuant to this Ordinance for the **Public Nuisance** at issue in the order;
- (ii) in connection with any **Abatement Action** deemed necessary and proper by Fayette County, non-exclusively including the Fayette County Prosecuting Attorney, Code Enforcement Agency, or any Fayette County Officer, Board, Agency or Authority authorized by state law or by the Fayette County Commission or Code Enforcement Agency to undertake such **Abatement Actions**, in reviewing, commenting on, and revising a responsible party's plans and reports submitted required to be submitted by the order;
- (iii) in connection with overseeing and monitoring the performance of any responsible party's activities required by the order.

- (d) **Enforcement of Final and Binding Time-Sensitive Abatement Action Order:** The Fayette County Commission may require, or the Code Enforcement Agency may request, the Fayette County Prosecuting Attorney to commence a civil action in the name of the Fayette County Commission in a court of competent jurisdiction to compel compliance with any Final and Binding Time-Sensitive Abatement Action Order properly issued and served pursuant to Section **VIX.V**. When, in course of any such civil action, Fayette County has established to the court by a preponderance of the evidence that: (1) the Final and Binding Time-Sensitive Abatement was authorized by and issued and served in compliance with the requirements of Section **IX.V(b)**; (2) that the respondent named in the Order is a **Person** described in Section **VI(a)** of this Ordinance with liability for the **Public Nuisance** or **Imminent and Substantial Endangerment** at issue; and (3) that the Final and Binding Time-Sensitive Abatement Action Order authorized by Section **IX(b)** is not arbitrary and capricious and is otherwise in accordance with law, the court shall enter appropriate injunctive relief compelling timely and competent compliance by the respondent with all terms and conditions of the Final and Binding Time-Sensitive Abatement Action Order. In any such civil action, it shall not be necessary for the Code Enforcement Agency to allege or prove at any stage of the proceeding that irreparable damage will occur should the requested injunctive relief not be issued; or that any remedy at law is inadequate, and any temporary restraining order, preliminary injunction, or permanent injunction shall issue as otherwise provided by this Ordinance without any requirement for such allegations and without such proof.
- (e) **Civil penalties applicable to violations of a Final and Binding Time-Sensitive Abatement Action Order:** Upon motion by the Fayette County Prosecuting Attorney in any civil action commenced pursuant to Section **IX(c)** of this Ordinance, the court, upon proper proof, shall assess against any **Person** who, without just and sufficient cause, willfully violates, or fails or refuses to comply with, any provision of any Final and Binding Time-Sensitive Abatement Action Order a civil penalty of not less than Five thousand dollars (\$5,000) nor more than Ten thousand dollars (\$10,000) for each day in which such violation occurs or such failure to comply continues. In assessing any such civil penalty, the court shall consider and apply the standards and factors relevant to the assessment of civil penalties specified in Section **XXIII(d)** of this Ordinance.
- (f) Any cause of action authorized by this Section **IX.V** may be joined with a civil action to recover **Abatement Action Costs**, non-exclusively including all enforcement and litigation cost incurred by Fayette County with respect to the **Public Nuisance** act or condition at issue in the Final and Binding Time-Sensitive Abatement Action Order, brought pursuant to Section **XXII** of this Ordinance.
- (g) **Timing of Review of Any Final and Binding Time-Sensitive Abatement Action Order Issued Pursuant to this Section IX.V:** Any **Person** to whom any Final and Binding Time-Sensitive Abatement Action Order is issued pursuant to this Section **IX.V** of this Ordinance may only seek any relief that would as a practical matter have the effect of invalidating, dismissing, staying, quashing (in whole or in part), or modifying all or any part of any Final and Binding Time-Sensitive Abatement Action Order properly issued and served pursuant to this Ordinance in one of the following **Proceedings**:
- (1) in a civil action brought by the Fayette County Prosecuting Attorney in a court of competent jurisdiction before which the Fayette County Prosecuting Attorney is



- prosecuting against such **Person** a claim pursuant to this Section IX.V seeking enforcement of the same Final and Binding Time-Sensitive Abatement Action Order;
- (2) in a civil action brought by the Fayette County Prosecuting Attorney in a court of competent jurisdiction before which the Fayette County Prosecuting Attorney is prosecuting against such **Person** a claim for abatement of, or the recovery of **Abatement Action Costs** relating to, the same **Public Nuisance** act or condition that is at issue in the Final and Binding Time-Sensitive Abatement Action Order;
  - (3) in a criminal action brought by the Fayette County Prosecuting Attorney in a court of competent jurisdiction before which the Fayette County Prosecuting Attorney is prosecuting against such **Person** an alleged violation of Section XXIV(a)(6) of this Ordinance regarding the same Final and Binding Time-Sensitive Abatement Action Order; or
  - (4) a proceeding commenced by the Fayette County Prosecuting Attorney or by the Code Enforcement Agency before the Fayette County Commission pursuant to Section XXIII(c) of this Ordinance.
- (h) **Controlling considerations to govern exercise of Code Enforcement Agency's discretion Pursuant to this Section IX.V:** Wholly without regard to the length of time that any **Public Nuisance** condition or any **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment** has or may have existed, the Code Enforcement Agency shall exercise the discretion granted to it to elect to pursue any of the Time-Sensitive Enforcement options conveyed to it in this Section IX.V by consideration and application of all of the following factors:
- b. the nature and severity of the **Endangerment** to the Public Health, Safety, Welfare, or the **Environment** that is or may be presented the **Public Nuisance** at issue;
  - c. the extent to which expeditious response may prevent further harm or meaningfully ameliorate the **Imminent and Substantial** risk of harm to the Public Health, Safety, Welfare, or the **Environment** that is or may be presented by the **Public Nuisance**;
  - d. whether, and the extent to which, expeditious response could contribute to a meaningful reduction in the overall costs of responding to and abating the **Public Nuisance** at issue;
  - e. the extent, if any, to which expeditious response could promote early consideration of the implementation of institutional controls, either alone or in context of re-use, re-purposing or redevelopment of any adversely-impacted property, so as to minimize the overall costs of securing adequate protection of the Public Health, Safety, Welfare or the **Environment** with respect to the **Public Nuisance** at issue.

Section X – Trade secrets; claims of confidentiality:

- (a) **Claim of Confidentiality: time limits for asserting claim:** Any **Person** required by this Ordinance to submit information that such **Person** believes in good faith to constitute confidential information may assert a confidentiality claim in accordance with this Section X. Such claim must be made as soon as practicable, but in no event later than ten (10) days from the date the information was submitted. If a claim of confidentiality is not made within ten (10) days of submission, the Code Enforcement Agency may make the information available to the public without further notice.
- (b) **Submission of information claimed to be confidential:**
  - (1) ***Confidential Information –Hardcopy Submissions:*** All information that is claimed to be confidential and which is submitted to the Code Enforcement Agency pursuant

to the requirements of this Ordinance in hardcopy form must be submitted on colored paper in order to readily identify such information. The claimant must mark each page containing **Confidential Information** "CONFIDENTIAL COPY." The claimant must clearly underscore or highlight by shading the text of all information in the confidential copy that the claimant asserts to be confidential in a manner that will be clearly visible on photocopies of the confidential copy.

- (2) **Redacted submission of information claimed to be confidential for public disclosure:** For each hardcopy submission of information, any portion of which is claimed to be confidential, a complete set of the information must be submitted simultaneously on uncolored paper with the information claimed to be confidential redacted, and with the words "REDACTED COPY" marked clearly on each page, so that a set of information is suitable for public disclosure and provides notice to the public that a claim of confidentiality has been made.
- (3) **Confidential information – electronics submissions:** For electronic submissions containing information claimed to be confidential, the claimant must submit a cover document and the written justification as required under Section X(c), regardless of whether that document is submitted in electronic or hardcopy form. Upon the request of the Code Enforcement Agency, the claimant must submit a redacted form of the information.
- (4) The claimant may assert that multiple pieces of data which do not individually qualify as Confidential Information could be pieced together to form **Confidential Information** if made publicly available. The Code Enforcement Agency shall assess such "mosaic effect" claims on a case-by-case basis, and take such action, if any, as is appropriate to affect the protections intended by this Section X.

(c) **Cover document:**

- (1) **Designee:** Each submission of information to the Code Enforcement Agency, any portion of which is claimed to be confidential, must be supported by a cover document that identifies the name and address of the claimant and designates a person as the proper addressee of communications from the Code Enforcement Agency or the County Commission regarding information gathering under the Act, the name, address, and telephone number of the designated person; and a request that all County inquiries and communications regarding information claimed as confidential (oral and written) be directed to the designee. The cover document must be submitted within the time frame specified under Section X(a) when a claim of confidentiality is made.
- (2) **Justification for claimed confidentiality in cover document:** In addition to the information required under subdivision (1) of this Section X(c), the cover document must, at a minimum, include the following:
  - (A) a statement that the information is being submitted pursuant to the "Fayette County Comprehensive Public Nuisance Investigation and Abatement Ordinance;"
  - (B) identification of each segment of information within each page that is submitted as confidential; and the period of time for which the confidential treatment is desired by the claimant (e.g., until a certain date, until the occurrence of a specified event, or permanently); and
  - (C) a detailed justification for each segment of information that is claimed confidential. The justification must address the criteria set forth in subsection (e)(1) of this Section X and must include the following information:

- (i) if the reason for the claim of confidentiality is that the information would reveal a Trade Secret, a description of the substantial harmful effects which disclosure of the **Confidential Information** would have upon the claimant's competitive position, an explanation of why such harmful effects are substantial, and an explanation of the causal relationship between disclosure and such harmful effects;
  - (ii) if the **Confidential Information** consists of information other than Trade Secrets, the claimant must provide a description of the information and an explanation as to how it meets the definition of **Confidential Information** set forth in Section **III(h)** of this Ordinance; and
  - (iii) any other substantiation that is relevant in establishing that the asserted **Confidential Information** is confidential.
- (3) **Redacted Version:** If the cover document contains **Confidential Information**, the claimant must provide a redacted version, which will be available for public disclosure.
- (4) **Cover Document as Basis for Review:** The cover document justifying the claim of confidentiality will form the basis for the Code Enforcement Agency's review of the confidentiality claim. If the claimant submits additional information to support the confidentiality claim pursuant to Section **X(f)(3)**, the additional submission will also be considered.

**(d) Formal Submission to Code Enforcement Agency:**

- (1) **Confidential Copy:** The claimant must seal the confidential copy in an envelope displaying the word "CONFIDENTIAL" in bold type or stamp on both sides. This envelope must be enclosed in another envelope for transmittal to the Code Enforcement Agency. The outer envelope must bear no markings indicating the confidential nature of the contents.
- (2) **Method of Delivery:** The claimant must send the package containing all required information to the Code Enforcement Agency by certified mail, return receipt requested, or by other means providing a verifiable receipt for delivery.

**(e) Determination of Confidentiality:** In the course of making a determination of confidentiality, the Code Enforcement Agency shall consider the following criteria in addition to the required justification under subsection **X(c)(2)** of this Ordinance:

- (1) the claim of confidentiality has not expired by its terms, nor been waived or withdrawn;
- (2) the claimant has satisfactorily shown that it has taken reasonable measures, and intends to continue taking such measures, to prevent disclosure of the information to others;
- (3) the information claimed to be confidential is not, and has not been, reasonably obtainable without the claimant's consent by other **Persons** (other than by lawful means available to governmental bodies) by use of legitimate means; for example, the information is not contained in materials which are routinely available to the general public, including without limitation material in administrative or judicial proceedings/decisions, press releases, copies of speeches, pamphlets and educational materials;
- (4) the extent to which the information has been disclosed to others, and whether it was disclosed to other **Persons** either by the claimant (except in a manner which protects the confidentiality of the information) or without the consent of the

claimant (other than by subpoena or by discovery based on a showing of special need in a judicial proceeding, arbitration, or other proceeding in which the claimant was required to disclose the information to such other **Persons**, as long as the information has not become available to **Persons** not involved in the proceeding), and the precautions taken to prevent further disclosure;

- (5) if the U.S. Environmental Protection Agency, any department, agency or instrumentality of the State of West Virginia or of any other state, or any other department, agency or instrumentality of the United States has previously made a confidentiality determination relevant to the pending confidentiality claim, copies of all such confidentiality determinations; and
- (6) no law, regulation or order by a court or other tribunal of competent jurisdiction specifically requires disclosure of the information or provides that the information is not Confidential Information.

**(f) Notice of Determination by the Code Enforcement Agency:**

- (1) If, after review of all the information submitted, the Code Enforcement Agency determines that the information is not confidential, the Code Enforcement Agency will notify the claimant by certified mail, return receipt requested. The notice will state the basis for the determination and that it constitutes the final decision of the Code Enforcement Agency concerning the confidentiality claim.
- (2) If, after review of all the information submitted, the Code Enforcement Agency determines that the information is confidential, Fayette County will treat such information as confidential in accordance with the provisions set out in Section VI. The Code Enforcement Agency will send written notice of the determination to the claimant. This notice will state the basis for the determination and that it constitutes the final decision of the Code Enforcement Agency. The Code Enforcement Agency shall send the notice of its decision to the claimant by certified mail, return receipt requested.
- (3) If a determination has not been made prior to the time that a request for information is received from the public, the Code Enforcement Agency will, after allowing the claimant up to ten (10) days to claim the information as confidential in accordance with this Section X, proceed expeditiously to make a final determination in accordance with this Section X. Before making such determination, the Code Enforcement Agency will provide notice to the claimant that a request for the Confidential Information has been received and provide the claimant a period of five (5) business days to submit a written response to the Code Enforcement Agency.
- (4) All requests to inspect or copy documents submitted under the Ordinance must state with reasonable specificity the documents or type of documents sought to be inspected or copied. Within ten (10) business days of the receipt of a request, the Code Enforcement Agency will:
  - (A) Advise the **Person** making the request in writing of the time and place where the **Person** may inspect and copy the documents which, if the request addresses information claimed as confidential, may not be sooner than twenty (20) days following the date of the determination to disclose, unless an earlier disclosure date is agreed to by the claimant; or
  - (B) Deny the request, stating in writing the reasons for denial.
- (5) If the request addresses information claimed as confidential, the Code

Enforcement Agency will provide notice of the action taken pursuant to this Section X(f) to the claimant by certified mail, return receipt requested.

(6) *Treatment of information pending confidentiality determination:* The Code Enforcement Agency will treat asserted Confidential Information as confidential in accordance with the provisions of Section X(h) of this Ordinance until the Enforcement Agency has made its final determination that the asserted information is not confidential.

(g) **Appeal of confidentiality determination:** Any Person adversely affected by a determination regarding Confidential Information under this Ordinance may appeal the determination of the Code Enforcement Agency to the County Commission. An appeal to the County Commission of the final determination of the Code Enforcement Agency must be filed with County Clerk within fifteen (15) days after the date upon which the aggrieved Person received notice of the final decision of the Code Enforcement Agency. The filing of a timely notice of appeal will stay any determination to disclose Confidential Information pending a final decision on the County Commission on appeal. Upon the timely filing of a notice of appeal the Code Enforcement Agency shall compile a record of all documents and other information which it considered, and all documents and other information submitted to it by the claimant with respect the decision that is the subject of the appeal. The Code Enforcement Agency shall forthwith transmit the compiled record to the County Commission. The scope of review on appeal to the County Commission is limited to the question of whether the portion of the records, reports, data or other information sought to be deemed confidential, inspected or copied is entitled to be treated as confidential under this Ordinance. The Code Enforcement Agency and the County Commission will take all measures to afford evidentiary protection in appeals necessary to protect the confidentiality of the information at issue, including the use of *in camera* proceedings before the County Commission and the sealing of records when appropriate.

(h) **Treatment of confidential and asserted Confidential Information:**

(1) *Handling of Confidential Information by authorized personnel:* Only those County Employees and Attorneys under the supervision and control of members of the Code Enforcement Agency, or of the Office of the County Clerk whose activities necessitate access to information for which a confidentiality claim has been made may open and handle any envelope or file which is marked "CONFIDENTIAL."

(2) *Storage of records:* The County Administrator shall assure that his office or the Office of the County Clerk stores any records containing confidential or asserted Confidential Information only in secure, access-controlled rooms, provided that if such records are in a form which is not amenable to such storage, the County Administrator shall assure that such records are stored in a manner which similarly restricts access by Persons to whom disclosure of the Confidential Information in question is restricted. With regard to confidential electronic data, the County Administrator will take every reasonable precaution to safeguard the integrity of the data.

(3) *Confidential Information clearly identified:* Any records made, possessed, or controlled by the Code Enforcement Agency or County Commission and containing confidential or asserted Confidential Information, will contain indicators clearly identifying the confidential or asserted Confidential Information.

(4) *Record of Persons accessing Confidential Information:* The County Administrator shall assure that the Code Enforcement Agency and Office of the County Clerk maintain a record of all **Persons** obtaining access to confidential or asserted Confidential Information, including the date and time of, and the reasons for, the access.

(5) *Unauthorized Use or Disclosure Prohibited:* No **Person** shall access, use or disclose all or any part of Confidential Information other than authorized by this Ordinance.

(i) **Release of Confidential Information to other Governmental Entities:** Information designated as confidential may be released to **Governmental Entities**, their authorized employees and agents as may be necessary to discharge their responsibilities under any legislation that expressly authorizes access to or review of Confidential Information. Any **Governmental entity** or **Person** requesting information designated as confidential must, prior to receiving such information, complete the "Description of Intent" form attached as Appendix A to this Ordinance and agree to be bound by the terms of the "Non-Disclosure Agreement" attached as Appendix B to this Ordinance. Any **Governmental Entity** or **Person** receiving information designated confidential shall take appropriate measures to safeguard such information and to protect against its improper disclosure.

(j) **Use of Confidential Material by the Code Enforcement Agency:** A claim of confidentiality will in no way limit the Code Enforcement Agency in the exercise of its powers or duties under this Ordinance or any Order of the County Commission promulgated pursuant to this Ordinance.

#### Section XI - Actions and reports by County Officers:

(a) **Admonition in the absence of an imminent hazard:** At any time any member or authorized agent of the Code Enforcement Agency, the Fayette County Sheriff or any Deputy Sheriff of the County finds a condition to exist or an activity being engaged in which constitutes or may constitute a **Public Nuisance**, but that does not in their reasoned judgment present an immediate and substantial hazard to the Public Health, Safety, Welfare or the **Environment**, he or she shall advise any **Person** who owns, operates or is in charge of the site or **Facility** at which the **Public Nuisance** does or may exist and who is present or readily on call of:

- (1) the existence and general nature of the reporting, abatement and remedial liability requirements of this Ordinance,
- (2) that a complete copy of this Ordinance may be reviewed or obtained at the Office of the Fayette County Clerk;
- (3) that failure to make any reports or timely and competently to undertake any **Abatement Action** required pursuant to this Ordinance may result in appropriate legal action against any liable **Person** as defined in this Ordinance; and (iv) that if it becomes necessary or appropriate for the County to abate the **Public Nuisance**, any **Person** with liability under this Ordinance may be liable to the County for required abatement of the **Public Nuisance** and for reimbursement of all **Abatement Action Costs** incurred by Fayette County, as well as for possible civil and criminal penalties.

(b) **Conditions, activities, or omissions that may present an Imminent and Substantial**

**Endangerment to Public Health, Safety, Welfare, or the Environment:** If it appears to such member, agent or officer that the any discovered condition may present a **Public Nuisance** that constitutes an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare or to the **Environment**, or presents and imminent fire hazard, such officer shall forthwith:

- (1) take such lawful action within his capabilities as may be necessary to negate or ameliorate the hazard, and to clear the endangered area of persons, and
- (2) notify the chairperson of the Code Enforcement Agency by the most expeditious means of communication.

- (c) **Reporting:** All members or authorized agents of the Code Enforcement Agency, the County Sheriff and any deputy sheriffs shall report to the chairperson of the Code Enforcement Agency the relevant facts as to any known or suspected **Public Nuisance** found by them upon investigation, and the action, if any, taken by them pursuant to this Sections **XI**, together with recommendations as to the manner of abatement, the time limit for abatement and such other professional recommendations and comment as they may deem pertinent.

Section XII – Commencement of enforcement action before County Commission:

- (a) **Commencement of Action before County Commission for Public Nuisance**

**Abatement Action Order:** After conducting such investigation as is necessary and proper to conclude that there are reasonable grounds to believe that any of the conditions set forth in Paragraphs (1) through (3) of this Subsection **XII(a)** does or may exist, the Code Enforcement Agency may file a complaint against one or more of the parties liable or potentially liable for abatement of such condition(s) pursuant to the provisions of this Ordinance before the County Commission in the form of a “Complaint/Proposed Public Nuisance Abatement Action Order,” or a “Complaint/Proposed Order Imposing Civil Penalties,” or both:

- (1) that a **Public Nuisance** does or may exists or is or may be imminently threatened to be created at any place in Fayette County, and the **Public Nuisance** and any existing or threatened **Endangerments** to the Public Health, Safety, Welfare, or the **Environment** should be properly assessed, investigated, or abated; or
- (2) a civil penalty pursuant Section **XXIII** of this Ordinance should be imposed upon one or more of the parties alleged to be liable for the **Public Nuisance**, or
- (3) that the provisions of subsections (1) and (2) of this Section **XII(a)** are applicable.

- (b) **Required contents of Complaint before County Commission:** The complaint filed by the Code Enforcement Agency before the County Commission shall be written, shall include, as appropriate, the proposed **Abatement Action Order** to be issued, the proposed civil penalty to be assessed, or both, and shall be directed against one or more **Persons** alleged to be liable for abatement of the **Public Nuisance**, or for civil penalties, or both, as the Code Enforcement Agency may deem appropriate. Any such complaint filed and served by the Code Enforcement Agency pursuant to this section shall include a statement of the factual and legal grounds that the Code Enforcement Agency contends support the issuance of the Proposed Abatement Action Order, and shall set forth the proposed findings of fact and conclusions of law that the Code Enforcement Agency asserts support the appropriateness of the **Abatement Actions**, or civil penalties, or both,

sought, and may include a schedule for completion of specific actions. A complaint filed with the County Commission pursuant to subsection (a) of this Section XII shall on its first page in prominent text contained in a highlighted text box specifically advise the **Person(s)** to whom it is issued: (1) of the right to contest the allegations of the complaint and the **Abatement Action**, civil penalties, or both, sought in the complaint; (2) the right to request a hearing as provided for in Section XXIV(e) of this Ordinance; and (3) that unless the owner or owners of the property file with the Fayette County Clerk a written request for a hearing within ten (10) days of receipt of the complaint, an Final Order may be issued by the Fayette County Commission implementing the **Abatement Action Order** sought by the Fayette County Code Enforcement Agency.

- (c) **Service of Complaint:** Service of the Code Enforcement Agency's complaint on each Respondent named in the complaint shall be accomplished in the manner consistent with the requirements set forth in Rule Four of the West Virginia Rules of Civil Procedure. If any **Owner(s) or Operator(s)** of any sites or premises upon which such alleged **Public Nuisance** activity has taken, or is taking place, or upon which such alleged **Public Nuisance** condition exists, or that will be directly affected by the proposed Abatement Action, if any, are not named in the Code Enforcement Agency's complaint as respondent liable parties for some or all of the relief requested, the Code Enforcement Agency shall serve an informational copy of the Code Enforcement Agency's complaint upon all such **Owner(s) or Operator(s)** then known to the Code Enforcement Agency, or that could reasonably be ascertained by the Code Enforcement Agency from examination of readily available public records.

Section XII.V – Exclusive, mandatory procedure required for all complaints asserting certain alleged Public Nuisance as defined in Section V(a)(9):

Notwithstanding any other provision of this Ordinance, any **Proceeding** concerning an allegation by the Code Enforcement of, any proposed Abatement Action Order by the Code Enforcement Agency addressing, or any complaint brought in the name of Fayette County Commission that alleges the existence of a **Public Nuisance** as defined in Section V(a)(9) of this Ordinance that does not also expressly allege that the **Toxic** spillage or **Toxic** seepage at issue therein also constitutes a **Public Nuisance** as defined in one or more of subsections (a)(1), or (4) through (8), inclusive, or (10) of Section V of this Ordinance must be commenced only by a complaint filed before the Fayette County Commission in compliance with the requirements of Section XII.

Section XIII - Procedure on application by Code Enforcement Agency for either a temporary or preliminary Public Nuisance Abatement Action Order:

- (a) **Temporary or preliminary Public Nuisance Abatement Action Order:** By filing with the County Commission a verified complaint that complies with the requirements of Section XII of this Ordinance and that alleges the existence at any place in Fayette County of a **Public Nuisance** which may present an **Imminent** and **Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment**, or presents an **Imminent** hazard to the health or safety of any person within or near the premises upon which such **Public Nuisance** exists or where the **Public Nuisance** activity is occurring, the Code Enforcement Agency may apply to the County Commission for issuance in full compliance with the requirements of this Section XII of either or both a



Binding Temporary Public Nuisance Abatement Action Order or a Binding Preliminary Public Nuisance Abatement Action Order.

(b) **Required Showing for Temporary or Preliminary Public Nuisance Abatement Action Order:** No Binding Temporary or Binding Preliminary Public Nuisance Abatement Action Order shall issue unless the Code Enforcement Agency establishes on the record before the County Commission by preponderance of the evidence, and to the satisfaction of the County Commission each of the following elements:

- (1) that the conditions constituting, arising out of, or emanating from the alleged **Public Nuisance** present or may present an **Imminent** and **Substantial Endangerment** to Public Health, Safety, Welfare, or the **Environment**, or presents or may present an **Imminent** hazard to the health or safety of any **Person** within or near the place or premises upon which such **Public Nuisance** exists or where the **Public Nuisance** activity is threatened to occur;
- (2) unless consolidation as authorized in Section XIII (d)(2) has been granted, that the **Abatement Action** requested in the Code Enforcement Agency's application is no more extensive than necessary to provide adequate protection of the Public Health, Safety, Welfare, or the **Environment** or of the **Person** or **Persons** within or near the premises involved until the County Commission can hear the merits of the Code Enforcement Agency complaint pursuant to Section XII;
- (3) that there is a likelihood that the Code Enforcement Agency will prevail on the merits of the following required elements of its complaint:
  - (A) a **Public Nuisance** exists or is imminently threatened to be created in Fayette County;
  - (B) that one or more of the named respondents are a liable **Person** as defined by Section VI this Ordinance, with respect to the **Public Nuisance** at issue;
  - (C) the **Abatement Action** requested by the Code Enforcement Agency complies with the requirements of Section IX of this Ordinance;
  - (D) the **Abatement Action** requested by the Code Enforcement Agency meets the requirements of Section IX of this Ordinance.

(c) **Temporary Public Nuisance Abatement Action Order; notice; hearing; duration:**

A final and binding Temporary Public Nuisance Abatement Action Order may be granted by the Fayette County Commission upon written request of the Code Enforcement Agency, the Fayette County Board of Health, the Fayette County Solid Waste Authority, or, with the advice and consent of the Fayette County Prosecuting Attorney, by any other Officer, Board, Agency, Authority or Office of Fayette County, without written or oral notice to the alleged liable party or that party's attorney **only** if:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that a condition of **Public Nuisance** that may present an **Imminent** and **Substantial Endangerment** to Public Health, Safety, Welfare, or the **Environment**, or that presents an imminent hazard to the health or safety of any **Person** or **Persons** within or near the premises upon which such **Public Nuisance** exists or where the **Public Nuisance** activity is threatened to occur and immediate injury, loss, or damage may result to the Public Health, Safety, Welfare, or the **Environment** before the alleged liable party or that party's attorney can be heard in opposition; and
- (2) the Fayette County Prosecuting Attorney certifies to the County Commission in writing the efforts, if any, which have been made to give the notice of the application for a Temporary Abatement Action Order to the potentially responsible party, or

their legal counsel, if known to the Fayette County Prosecuting Attorney, or the compelling reasons supporting the claim of the Code Enforcement Agency or the Fayette County Prosecuting Attorney that notice should not be required.

Every Binding or proposed Temporary Public Nuisance Abatement Action Order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the County Clerk's office and entered of record; shall define the injury and state why it may present an **Imminent and Substantial Endangerment** to Public Health, Safety, Welfare, or to the **Environment**, or presents an imminent hazard to the health or safety of any **Person or Persons** within or near the premises upon which such **Public Nuisance** exists or where the **Public Nuisance** activity is occurring, and why the Order was granted without notice; and shall expire by its terms within such time after entry, not to exceed twenty (20) days, as the County Commission fixes, unless within the time so fixed the Order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a final and binding or proposed Temporary Public Nuisance Abatement Action Order is granted without notice, the Code Enforcement Agency's motion for a Preliminary Public Nuisance Abatement Action Order shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the Code Enforcement Agency shall proceed with the application for a Preliminary Public Nuisance Abatement Action Order and, if the Code Enforcement Agency does not do so, the County shall dissolve the Temporary Public Nuisance Abatement Action Order. On two (2) business days' notice to the party alleged to be liable, to the Code Enforcement Agency, and to the Fayette County Prosecuting Attorney or on such shorter notice as the County Commission may prescribe, the party alleged to be liable may appear and move for the dissolution or modification of the Temporary Public Nuisance Abatement Action Order, and in that event the County Commission shall proceed to hear and determine such motion as expeditiously as its calendar and the ends of justice require.

**(d) Preliminary Public Nuisance Abatement Action Order:**

- (1) **Notice:** No Binding or proposed Preliminary Public Nuisance Abatement Action Order shall be issued without notice to each alleged liable party.
- (2) **Consolidation of hearing with trial on merits:** Before or after the commencement of the hearing of the Code Enforcement Agency's application for a Preliminary Public Nuisance Abatement Action Order, the County may order the trial of the action on the merits of the Code Enforcement Agency's complaint to be advanced and consolidated with the hearing of the application for a Preliminary Public Nuisance Abatement Action Order. Even when this consolidation is not ordered, any evidence received upon an application for a Preliminary Public Nuisance Abatement Action Order which would be admissible upon the hearing on the permanent Public Nuisance Abatement Action Order of the Code Enforcement Agency's complaint becomes part of the record on the trial and need not be repeated upon the hearing on the permanent Public Nuisance Abatement Action Order.

Section XIV - Procedures before County Commission upon filing of Code Enforcement Agency complaint; actions by County Commission upon timely request for hearing:

- (a) **Required Answer to Complaint of Code Enforcement Agency:** Any **Person** who has been named as a respondent in a complaint filed and served by the Code Enforcement Agency pursuant to this Ordinance that contests all or any part of the liability asserted in the complaint, or seeks to challenge any findings of fact or conclusions of law, civil penalty, **Abatement Action**, or recovery of **Abatement Action Costs** sought in the complaint must file a timely Answer to the complaint as set forth in this Section XIV, and may join with that Answer any request for relief with respect to the matters addressed by the complaint filed and served by the Code Enforcement Agency. An Answer must be in writing and filed with the Office of the Fayette County Clerk and served on the Code Enforcement Agency and the Office of the Fayette County Prosecuting Attorney on or before the end of regular business hours on the twenty-first (21<sup>st</sup>) day following receipt of service of the Code Enforcement Agency's complaint/Proposed Order.
- (b) **Required contents of Answer:** The Answer required by Section XIV(a) shall set forth in short and plain terms the respondent's defenses to each claim asserted in the complaint of the Code Enforcement Agency and shall admit or deny the averments upon which the Code Enforcement Agency relies. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an averment, the respondent shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a respondent intends in good faith to deny only a part or a qualification of an averment, the respondent shall specify so much of it as is true and material and shall deny only the remainder. Unless the respondent intends in good faith to controvert all the averments of the Code Enforcement Agency's complaint/Proposed Order, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the respondent expressly admits; but, when the pleader does so intend to controvert all its averments, the pleader may do so by general denial subject to the provisions of Section XIV(d) of this Ordinance.
- (c) **Time requirement for Answer deemed jurisdictional:** The time requirement for filing the Answer required by this Section XIV shall be deemed jurisdictional and may not be waived. Upon timely receipt of an Answer which complies with the requirements of this section, the County Clerk shall refer the matter to the County Commission for further proceedings as set forth in this Ordinance.
- (d) **Affirmative matters required in Answer of respondent:** The Answer of each respondent required by Section XIV(a) must set forth in writing with reasonable particularity all of the following, where applicable:
- (1) if the respondent intends to contest liability, all facts then known or reasonably available to respondent, any parent or subsidiary entity of respondent, any agent or attorney of respondent, or **Person** or entity under the control or direction of respondent, or acting in concert with respondent upon which the respondent will rely at the public hearing to contest liability;
  - (2) if the complaint seeks to impose joint and several liability upon the respondent, and the respondent intends to assert at the public hearing that the imposition of joint and several liability is inappropriate because the harm(s) presented by the **Public Nuisance** is properly divisible pursuant to the provisions of Section VI(f) of this Ordinance, all facts then known or reasonably available to respondent, any parent or subsidiary entity of respondent, any agent or attorney of respondent, or **Person** or

entity under the control or direction of respondent, or acting in concert with respondent upon which the respondent intends to rely to establish that the harm is divisible; and

- (3) if the respondent intends to assert at the public hearing that an alternative **Abatement Action, Removal Action or Remedial Action** is more appropriate than the Abatement Action sought in the complaint/Proposed Order, all facts then known or reasonably available to respondent, any parent or subsidiary entity of respondent, any agent or attorney of respondent, or **Person** or entity under the control or direction of respondent, or acting in concert with respondent supporting the adequacy, appropriateness, and costs of any alternative **Remedial Action(s)** the respondent intends to be present at the public hearing.
- (e) **Hearing before County Commission upon timely request:** Any respondent named in a Code Enforcement Agency's complaint that has timely filed an Answer complying with the requirements of this Section XIV may on or before the required filing date for an Answer pursuant to Section XIV(a) request a hearing before the County Commission. Upon timely receipt of a request for hearing filed in compliance with the requirement of this Section XIV, the County Commission shall issue an order either setting the matter down for hearing before the Fayette County Commission within twenty (20) days, or enter a formal Order referring the matter for hearing before a Fayette County Hearing Officer duly appointed by the Fayette County Commission pursuant to the duly enacted Ordinances of Fayette County, specifically including Section XX of this Ordinance within twenty (2) days. All proceedings shall be on the record and recorded either by electronic device or by court reporter. The West Virginia Rules of Evidence shall not apply to the proceedings, but each party has the right to present relevant and reliable evidence and reasonably and appropriately examine and cross-examine all witnesses.
- (f) **Effect of failure to timely and properly file an Answer and request a public hearing:** If a respondent properly served with a complaint/Proposed Nuisance **Abatement Action Order** fails to timely file a request for a hearing that complies with the requirements of this Section XIV, such Proposed Nuisance **Abatement Action Order** will immediately be and become a final, binding and enforceable Order, subject only to such modification or revocation, if any:
- (1) that the Fayette County Commission *sua sponte* may order; or
  - (2) the Fayette County Commission may order upon a motion brought by a Respondent to the Abatement Action Order at issue pursuant to Section XIV(g), if and only if the respondent is eligible for the discretionary relief authorized by Section XIV(g) of this Ordinance.
- (g) **Effect of untimely request for hearing on Proposed Nuisance Abatement Action Order; County Commission options:** If any request for a public hearing on a proposed Nuisance Abatement Action Order or request for review of a Final Order of the Code Enforcement Agency granting contribution protection pursuant Section VI(m)(3) of this Ordinance is received from a **Person** authorized to request a public hearing under Section XIV(a) or from a **Person** aggrieved by a Final Order granting contribution protection pursuant to Section VI(m)(3) is filed with the Fayette County Clerk after the applicable jurisdictional filing date set forth in this Ordinance, may, by filing with the Fayette County Clerk a Delinquent Request for Discretionary Review that sets forth all facts upon which the applicant relies to support the its contention that Fayette County Commission

should excuse the delayed filing of the request, seek discretionary review by the Fayette County Commission. In its Order responding to any such filed Delinquent Request for Discretionary Review, the Fayette County Commission, in its sole discretion, may take any of the following actions:

- (1) summarily deny the request;
- (2) for good cause shown, grant the request, with or without a Stay of all or any portion of the provisions of the Proposed Nuisance **Abatement Action Order** or Final Order granting contribution protection pending the decision of the County Commission at or following the public hearing on the Delinquent Request for Discretionary Review; or
- (3) for good cause shown, grant the request in part, with or without a Stay of all or any portion of the Order(s) under review, pending the decision of the County Commission following the public hearing, limiting the scope of the public hearing to specific issues identified by County Commission.

**(h) Signing of pleadings, motions and other papers; representations to County Commission or its appointed Hearing Officer; sanctions:** Every pleading, motion and other paper submitted to the County Commission in the course of a proceeding conducted pursuant to this Ordinance shall be signed by at least one attorney of record for each party in the attorney's individual name, or, if the respondent or other party is not represented by an attorney, shall be signed by that respondent or other party. Each paper shall state the signer's address and phone number, and the West Virginia State Bar identification number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

**(1) *Representations to or before the County Commission or its appointed Hearing Officer.*** By presenting to the County Commission (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances:

- (A)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (B)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (C)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (D)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

**(2) *Sanctions:*** If, after notice and a reasonable opportunity to respond, the Fayette County Commission determines that any of certifications set forth in subparagraph (1) of this subsection **XIV(h)** has been falsely given, the Fayette County Commission, subject to the conditions stated below, and in addition to or in lieu of the contempt fine it is empowered to impose pursuant to West Virginia Code § 7-1-6, may impose an appropriate sanction upon the attorneys, law firms, or parties that have falsely certified any of the matters identified in subparagraph (1) of this subsection **XIV(h)** or are responsible for the violation.

**(A) *Initiated by motion:*** A motion by any party to any **Proceeding** under this

Ordinance before the County Commission or its appointed Hearing Officer for imposition of sanctions pursuant to this subsection XIV(f) shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subparagraph (2) of this subsection XIV(f). Such motion shall be filed with the County Clerk and shall be served on the Fayette County Prosecuting Attorney and all parties to the proceeding or their attorney but shall not be presented to the County Commission unless, within ten (10) days after service of the motion (or such other period as the County Commission may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the County Commission may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

- (B) *Initiated on instance of the County Commission:* The County Commission, *sua sponte*, may enter an order describing the specific conduct that it asserts has been falsely certified pursuant to Section XIV(h)(1) and directing an attorney, law firm, or party to show cause why it has not violated subparagraph (2) of this subsection XIV(f) with respect thereto.
- (4) *Nature of sanction; limitations:* A sanction imposed for violation of subparagraph (1) of this subsection XIV(h) shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, and an order to pay a penalty into the appropriate County Fund as directed by the County, or, if imposed on motion of a party and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
- (5) *No Sanction against represented party:* Monetary sanctions may not be awarded against a represented party for a violation of subparagraph XIV(h)(1)(B).
- (6) *Order to Show Cause to precede dismissal or settlement:* Monetary sanction may not be awarded on the initiative of the County Commission unless the County Commission issues an order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.
- (7) *Required content of Order imposing sanction:* When imposing sanction pursuant to this Section XIV(h)(2), the Fayette County Commission shall describe the conduct determined to constitute a false certification under Section XIV(h)(1) and explain the basis for the sanction imposed.
- **Burdens of Proof and Persuasion:** At any hearing held before the County Commission upon a complaint by the Code Enforcement Agency pursuant to this Ordinance, the Code Enforcement Agency has the burden of proving its allegations by a preponderance of the evidence and has the duty to go forward with the evidence on every material element of its claims. The respondent has burden of proving any affirmative defense or matter in mitigation asserted by it by a preponderance of the evidence and has the duty to go forward with the evidence on every material element of each affirmative defense and matter in mitigation asserted by it.

- (j) **Conduct of hearing:** At any hearing held before the Fayette County Commission upon a complaint by the Code Enforcement Agency pursuant to this Ordinance, the West Virginia Rules of Civil Procedure and the West Virginia Rules do not directly apply. A member of the Fayette County Commission will be designated as the Presiding Officer for each such public hearing, and the Presiding Officer so designated will control and direct, on behalf of the Fayette County Commission, the course of proceedings, and the introduction of testimony and evidence before it so as to secure the fair, reliable and efficient administration of justice. The Presiding Officer or the Fayette County Commission may, to that end, incorporate, with or without modification, one or more principles and procedures reflected in either or both the West Virginia Rules of Civil Procedure or the West Virginia Rules of Evidence as applicable to any given **Proceeding** before the Fayette County Commission.
- (k) **Findings of facts, determinations, and conclusions of law:** At the conclusion of the hearing the County Commission shall make findings of fact, determinations and conclusions of law as to whether:
- (1) a **Public Nuisance** exists in Fayette County;
  - (2) whether each respondent is a liable party, as defined and described in Section VI of this Ordinance with respect to a **Public Nuisance** within Fayette County; and
  - (3) whether any **Abatement Action** is necessary and proper to provide adequate protection of public health, safety, welfare, and the **Environment**, and, if so, the appropriate **Abatement Actions** compliant with the requirements of Section IX of this Ordinance to be required, and, if applicable, the amount of **Abatement Action Costs** that Fayette County is entitled to recover pursuant to this Ordinance.

#### SECTION XIV.V - Exhaustion of County and State Law Remedies Required:

- (a) **Exhaustion of remedies requirement:** Any **Person** that has been served with any Order described in subsection (b) of this Section XIV.V that seeks from any court (other than a Court before which the Fayette County Prosecuting Attorney is seeking enforcement of the same Order or abatement of the same **Public Nuisance** act or condition) governmental agency, or tribunal, other than the Fayette County Commission, any relief that would as a practical matter have the effect of staying, quashing (in whole or in part), or modifying all or any part of a such order or proposed order properly served pursuant to this Ordinance must first timely raise such request before the Fayette County Commission, and thereafter exhaust all of the remedies provided by Article three, Chapter fifty-eight of the West Virginia Code with respect to any final ruling by the Fayette County Commission on such requested relief. Failure of any such **Person** under this Ordinance to exhaust the remedies available pursuant to this Ordinance and, thereafter, the remedies available pursuant to Article three, Chapter fifty-eight of the West Virginia Code shall bar any request to any court, governmental agency, or tribunal for any relief that would as a practical matter have the effect of dismissing, staying, quashing, in whole or in part, or modifying all or any part of any Order described in subsection (b) this Section XIV.V.
- (b) **Orders subject to exhaustion of remedies requirement:**
- (1) a Proposed Public Nuisance **Abatement Action Order** issued pursuant to this Ordinance;
  - (2) a Temporary or Preliminary Public Nuisance **Abatement Action Order** issued

pursuant to this Ordinance;

- (3) a Final Order granting contribution protection pursuant to Section VI(m)(3) of this Ordinance; and
- (4) a Final Order of the Fayette County Commission issued pursuant to this Ordinance.

#### Section XV – Representation of, and process available to, Respondent at public hearing:

At any public hearing held pursuant to this Ordinance, the respondents may appear in person or by attorney, either or both, and, upon proper application to the Fayette County Commission or a Hearing Officer appointed by it, may have compulsory process for the attendance of witnesses and the production of pertinent **Records**, if there are any; and other parties in interest may also appear and be heard under oath.

#### Section XVI – Final action by County Commission on Code Enforcement Agency complaint; Issuance of Final Public Nuisance Abatement Action Order:

- (a) **Issuance of Public Nuisance Abatement Action Order:** If, after hearing all relevant and material facts and arguments from all parties on a case commenced before the County Commission on a complaint filed by the Code Enforcement Agency, the County Commission finally determines that a **Public Nuisance** as defined and declared by this Ordinance exists at any place in Fayette County, that one or more respondents are liable with respect to that **Public Nuisance**, and that an **Abatement Action** is appropriate to provide adequate protection of the Public Health, Safety, Welfare, and the **Environment** with respect to such **Public Nuisance**, the County Commission may issue any or all of the following final and binding orders to the liable party as the County Commission deem appropriate and proper:
  - (1) order any **Person** or **Persons** liable for such **Public Nuisance** forthwith to cease and desist, as may be further delineated in the order, any activity causing, creating, contributing to, or maintaining the **Public Nuisance**;
  - (2) order any **Person** or **Persons** liable for such **Public Nuisance** forthwith to proceed with all required speed timely and properly to implement **Abatement Action(s)** with respect to the **Public Nuisance** and any **Endangerments** to Public Health, Safety, Welfare, or the **Environment** that it may present in full compliance with the provisions of the Public Nuisance Abatement Action Order, and within the time period stated in the Public Nuisance Abatement Action Order under the direction of a designated Member or authorized agent of the Code Enforcement Agency;
  - (3) enter against any **Person** or **Persons** liable for such **Public Nuisance** both such Public Nuisance Abatement Action Orders authorized in subsections XVI (a) and (b);
  - (4) in addition to or in lieu of any other relief authorized this Ordinance, order any **Person** or **Persons** liable for such **Public Nuisance** to undertake such further action as may be necessary and proper to remedy any adverse consequences to, or **Endangerments** of, the Public Health, Safety, Welfare, or the **Environment** that may be presented as a result, in whole or in part, of the **Public Nuisance**; or
  - (5) require any **Person** liable for the **Public Nuisance** timely to reimburse Fayette County for the **Abatement Action Costs** that it has incurred and will incur with respect to the **Public Nuisance**.



(b) **Final action by County Commission:** A County Commission action issuing a Final Public Nuisance Abatement Action Order on any matter arising under this Ordinance, dismissing a complaint filed by the Code Enforcement Agency, or granting any stay of proceedings before it with respect to any alleged liable party is a Final Order of the Fayette County Commission.

(c) **Continuing Jurisdiction of County Commission:** Notwithstanding the provisions of subsection (b) of this section XVI, the County Commission shall have continuing jurisdiction to enforce or modify any Public Nuisance Abatement Action Order and any other relief or recovery ordered by it pursuant to this Ordinance.

#### Section XVII – Appeals of Final Orders from the Fayette County Commission:

All appeals from any final and binding Order of the Fayette County Commission or any Final Order of its appointed Hearing Officer that is not subject to further review by the County Commission on matters arising pursuant to this Ordinance, specifically including, but not limited to, any Final Order issued on an appeal pursuant to Section IX(e) of this Ordinance, shall be to the circuit court on the record before the Fayette County Commission in accordance with the provisions of Article three, Chapter fifty-eight of the West Virginia Code, and must be commenced within thirty (30) days of the Final Order of the Fayette County Commission with respect to which judicial review is being sought.

#### Section XVIII - Duty to comply with Public Nuisance Abatement Action Order:

No **Person** who has been properly served as required by this Ordinance or who has otherwise been properly made a party respondent to: (a) any action before the County Commission on or relating to a complaint of the Code Enforcement Agency pursuant to this Ordinance, including any application for a Temporary Public Nuisance Abatement Action Order or Preliminary Public Nuisance Abatement Action Order and who is named as a liable party in any proposed order by a Fayette County Hearing Officer that has not been stayed; (b) any Binding Temporary, Preliminary, or Final Public Nuisance Abatement Action Order properly issued pursuant to this Ordinance; or (c) any Final and Binding Time-Sensitive Abatement Action Order issued and served in compliance with Section IX.V of this Ordinance shall disobey or fail timely to comply with the any requirement, term, or condition of any such order.

Section XIX - County's remedies upon failure or refusal of respondent to comply with Public Nuisance Abatement Action Order; County's recourse; lien created:

(a) **County's option to have required Abatement Actions performed:** If any **Person** named in and properly served with a Proposed Public Nuisance Abatement Action Order fails or refuses to comply with the terms of any Binding Public Nuisance Abatement Action Order that is thereafter issued against such **Person**, the County Commission, after giving reasonable notice to the **Persons** named in the Binding Public Nuisance Abatement Action Order and to the owner, occupant or person in charge of the premises at the which the **Public Nuisance** exists and any premises which will or may be affected the required **Abatement Action** (if such **Persons** are not named as liable **Person(s)** in the Public Nuisance Abatement Action Order), may: (1) direct the appropriate Officer, Board, Agency, Authority or Office of Fayette County, acting with the advice and consent of

the Fayette County Prosecuting Attorney, to abate the **Public Nuisance**; (2) direct the Code Enforcement Agency to cause such **Public Nuisance** to be abated by any lawful process; (3) direct the appropriate Officer, Board, Agency, Authority or Office of Fayette County, acting with the advice and consent of the Fayette County Prosecuting Attorney, to advertise for and seek contractors to undertake the required **Abatement Action**, and may take such other action(s) as may be required timely and completely to secure compliance with the **Public Nuisance Abatement Action Order**.

- (b) **County's options to recover Abatement Action Costs:** Either separately or in connection with a complaint filed by the Code Enforcement Agency under Section **X(a)** of this Ordinance, the Code Enforcement Agency or the Fayette County Prosecuting Attorney may give notice of the County's intention to collect its **Abatement Action Costs** with respect to a **Public Nuisance** from the owner, occupant or person in charge, by distress or sale, in the same manner in which taxes levied upon real estate for the benefit of the County are authorized to be collected, and the County's **Abatement Action Costs** with respect to the **Public Nuisance** shall remain a lien upon premises or part thereof, the same as taxes levied upon real estate; which lien may be enforced by a suit in equity before any court having jurisdiction, as other liens against real estate are enforced. In case of nonresident owners of real estate, such notice may be served upon any tenant, occupant, assignee or rental agent, or by publication thereof once a week for not less than two (2) consecutive weeks in two (2) newspapers of general circulation in the Fayette County.
- (c) **Abatement by or payment to the County not a bar to County's other remedies:** Abatement by the County of any condition which constitutes a **Public Nuisance**, in whole or in part, or reimbursement to the County of **Abatement Action Costs** incurred thereby shall not bar prosecution for creation or maintenance of a **Public Nuisance**, or bar the County from pursuit of any of its civil or criminal remedies.

#### Section XIX.V - Review of **Response** action taken or ordered pursuant to this Ordinance.

- (a) **Limitation:** In any action before the Fayette County Commission or in any judicial action under this Ordinance regarding any **Public Nuisance** to which the provisions of Sections **IX(b)** of this Ordinance would apply, review of any issues concerning the adequacy or appropriateness of any **Response** action taken or ordered pursuant to this Ordinance shall be limited to the Administrative Record required by Section **IX(f)** of this Ordinance. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court. Except as may otherwise be required by the Constitution of either the United States or of the State of West Virginia, or by any applicable general law of West Virginia, judicial review of any such action taken or ordered shall be limited to the issues set forth in subsection (b) of this Section XIX.V.
- (b) **Standard:** In considering objections concerning the adequacy or appropriateness of any **Response** action taken or ordered pursuant to this Ordinance raised in any action before the Fayette County Commission or before a court of competent jurisdiction regarding any **Public Nuisance** to which the provisions of Sections **IX(b)** of this Ordinance would apply, the Fayette County Commission or the court shall uphold the **Response** action

selected by the Code Enforcement Agency (or in the event that the Fayette County Commission in the course of reviewing any **Response** action selected by the Code Enforcement Agency alters or amends any selected **Response** action, the **Response** action selected by the Fayette County Commission), specifically including the issuance of any Order pursuant to Section **VIII(b)** of this Ordinance, unless the objecting party can demonstrate that the decision was arbitrary and capricious or otherwise not in substantial accordance with law.

- (c) **Remedy:** If the Fayette County Commission or the court finds that the selection of the **Response** action was arbitrary and capricious or otherwise not in substantial accordance with law, the Fayette County Commission or the court shall award:
  - (1) only the **Response** costs, **Abatement Action Costs**, or damages that are not inconsistent with Section IX of this Ordinance liberally construed to effect the remedial purposes of this Ordinance; and
  - (2) such other relief as is consistent with the **NCP** and the applicable provisions of this Ordinance construed to accomplish the remedial purposes of this Ordinance.
- (d) **Procedural errors:** In reviewing alleged procedural errors, the Fayette County Commission or the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

Section XX – Judicial enforcement of Public Nuisance Abatement Action Order, recovery of county **Abatement Action Costs** and county enforcement costs:

- (a) **Judicial enforcement of Public Nuisance Abatement Action Order:** As an alternative to or in addition to any other remedies available to the County, whenever any **Person** fails or refuses to comply with a properly served Public Nuisance Abatement Action Order that is or has become a final and binding Order pursuant to the Ordinance, the County Commission may direct the Fayette County Prosecuting Attorney to apply to, or the Fayette County Prosecuting Attorney may *sua sponte* commence before, any court of competent jurisdiction, or to the judge thereof in vacation, for an injunction forthwith to enforce any Binding Public Nuisance Abatement Action Order, non-exclusively including any Binding Temporary or Preliminary Public Nuisance Abatement Action Order, issued pursuant to this Ordinance, and upon proper proof to recover judgment for the **Abatement Action Costs** incurred by the County, and, where appropriate, to seek a declaratory judgment for **Abatement Action Costs** to be incurred by the County as authorized by Section **VI(g)** of this Ordinance. In any such action, upon presentation to the court of proof by a preponderance of the evidence on the required elements of its claims, the court shall award the Fayette County Commission an injunction in the form of a judicial Public Nuisance Abatement Order, requiring the liable party timely and competently to abate the **Public Nuisance** consistent with the terms and conditions of the final and binding Abatement Action Order and applicable requirements of this Ordinance, at their sole cost, under the supervision and oversight of the Code Enforcement Agency or a designated member or authorized agent appointed by it.
- (b) **Judicial imposition and foreclosure of lien to accomplish completion of Abatement Action Order:** At any time after issuance of a final and binding Public Nuisance

Abatement Action Order or Final and Binding Time-Sensitive Public Nuisance Abatement Action Order and the subsequent failure or refusal of any respondent to such an order timely and competently to comply with any of its terms and conditions, the Fayette County Commission may direct the Fayette County Prosecuting Attorney to commence, or the Fayette County Prosecuting Attorney may *sua sponte* commence, a civil proceeding in any court of competent jurisdiction in the name of the Fayette County Commission against the owner or owners of the **Facility** or other liable party that is respondent to a final and binding Public Nuisance Abatement Action Order to seek:

- (1) imposition of a lien for the amount of **Abatement Action Cost** incurred and to be incurred by the County in securing timely and complete compliance with the Public Nuisance Abatement Action Order;
- (2) to order the sale of the private land or property in question to satisfy the lien;
- (3) to order that any authorized member or agent of the Code Enforcement Agency may enter upon the private lands in question as necessary or proper to secure timely and complete compliance with the Public Nuisance Abatement Action Order;
- (4) recovery of any **Abatement Action Costs** incurred by Fayette County with respect to such **Public Nuisance**;
- (5) a declaratory judgment on liability for all future **Abatement Action Costs** to be incurred by the County with respect to the **Public Nuisance**; and
- (6) recovery of the County's enforcement costs in accord with subsection **XX(f)**.

(c) **Equitable criteria for injunctive relief authorized by this Section XX:** The Fayette County Prosecuting Attorney may commence a civil action in any court of competent jurisdiction in the name of the Fayette County Commission to secure any of the relief authorized by this Section XX. In any such civil action in which a temporary restraining order, preliminary injunction, or partial or complete mandatory or prohibitory permanent injunction is sought, it shall not be necessary for the County Commission to allege or prove at any stage of the proceeding that irreparable damage will occur should the temporary restraining order, preliminary injunction, or permanent injunction (including any judicial public nuisance abatement order) not be issued; or that any remedy at law is inadequate, and the temporary restraining order, preliminary injunction, or permanent injunction (including any judicial public nuisance abatement order) shall issue without such allegations and without such proof.

(d) **Availability of remedies before the County Commission not a bar to judicial relief:** An application brought by the Fayette County Prosecuting in the name of the Fayette County Commission for injunctive relief pursuant to Sections XX or XXII of this Ordinance, or for imposition and collection of a civil penalty pursuant to Section XXIII of this Ordinance may be filed and relief requested therein granted notwithstanding the fact that all remedies that may be available from the County Commission pursuant to this Ordinance have not been exhausted or invoked against the **Person** or **Persons** against whom the relief is sought.

(e) **Recovery of punitive damages by Fayette County:** If any **Person** who is liable pursuant to this Ordinance or West Virginia law to Fayette County for **Abatement Action Costs** that Fayette County has incurred or will incur with respect to any **Public Nuisance** within Fayette County fails or refuses without just and sufficient cause properly and timely to provide any **Abatement Action** upon being properly served with any final and binding **Abatement Action Order** or Final and Binding Time-Sensitive

Abatement Order, non-exclusively including any Preliminary or Temporary **Abatement Action Order**, or timely and competently to comply with any requirement of a proposed Temporary, Preliminary Public Nuisance **Abatement Action Order** issued pursuant to this Ordinance that was not stayed at the time of the alleged violation, such **Person** shall be liable to Fayette County for punitive damages in an amount equal to, and not more than three (3) times, the amount of any **Abatement Action Costs** incurred or to be incurred by or on behalf of Fayette County, non-exclusively including any **Abatement Action Costs** incurred or paid by in whole or in part by the **Fayette County Environmental and Public Health Protection Special Settlement Fund** created by Formal Order # 2018-001 of the Fayette County Commission issued on January 5, 2018, as a result of such failure timely and properly to take proper action or to comply with any requirement of any such order. The Fayette County Prosecuting Attorney is authorized to commence a civil action in the name of the Fayette County Commission against any such **Person** to recover the punitive damages, which shall be in addition to any civil penalty recovered from such person pursuant to Section XXIII of this Ordinance. Any moneys received by Fayette County pursuant to this subsection **XX(e)** shall be deposited in the **Fayette County Environmental and Public Health Protection Special Settlement Fund** or, if appropriate, in a Site-Specific Sub-Fund of that **Special Settlement Fund**.

- (f) **Recovery of county enforcement costs:** At every significant stage of any proceedings under this Section XX in which the Fayette County is the prevailing party or substantially prevailing party, Fayette County shall be entitled to recover, and the Court shall award to the County, its litigation costs and expenses, including attorneys' fees and expenses, expert witness fees and expenses, and the fees and expenses of not more than one (1) non-testifying technical or scientific expert to assist the Fayette County Prosecuting Attorney in the preparation and prosecution of the action.

Section XXI - Arrest for committing, creating, or maintaining **Public Nuisance** not prohibited:

Nothing in this Ordinance shall be construed to prohibit any peace officer from arresting any person for committing, creating, contributing to, or maintaining a **Public Nuisance** within Fayette County when such arrest is made pursuant to law.

Section XXII – Judicial abatement of **Public Nuisance**, recovery of **Abatement Action Costs** and damages, authority of the Fayette County Prosecuting Attorney:

- (a) **Authority of Fayette County Prosecuting Attorney:** With respect to an actual or imminently threatened **Public Nuisance**, or with respect to any act or condition which is detrimental to any beneficial uses within Fayette County of any **Natural Resource** owned by the State of West Virginia or Fayette County or held in trust by either for the benefit of present and future generations of the public, the Fayette County Prosecuting Attorney may, in addition to or in lieu of any other remedy available to Fayette County, bring a civil action in the name of the Fayette County Commission in any court of competent jurisdiction, and may seek in any such action any or all of the following forms of relief, and upon presentation to the court of the proof required by law on the required

elements of its claims under applicable law, non-exclusively including this Ordinance, the court shall award the Fayette County Commission:

- (1) an injunction in the form of a judicial public nuisance abatement order, requiring the liable party timely and competently to abate the **Public Nuisance** consistent with the applicable requirements of this Ordinance at their sole cost, under the supervision and oversight of the Fayette County Code Enforcement Agency;
- (2) an injunction requiring the liable party timely to comply with any valid order of the Code Enforcement Agency properly issued pursuant to Section VIII(b) of this Ordinance, if any such Order has been issued to such liable party either: (A) prior to the commencement of; (B) before final judgment is rendered in, or (C) in the event any **Abatement Action** is ordered to be performed in any final order issued in a civil action commenced pursuant to this Section XXII, before completion of all such **Abatement Action**;
- (3) recovery of all **Abatement Action Costs** incurred by Fayette County with respect to such **Public Nuisance**;
- (4) recovery of punitive damages available to Fayette County, if any, pursuant to Section XX(e) of this Ordinance;
- (5) imposition of the appropriate civil penalty pursuant to Section XXIII;
- (6) where appropriate, a declaratory judgment on liability for further **Abatement Action Costs** to be incurred by the County with respect to the **Public Nuisance** in accord with the provisions of Section VI(g) of this Ordinance; and
- (7) recovery of such compensatory damages, specifically including **Natural Resource** damages pursuant to Section VI(a)(1-9)(E), as may be available to Fayette County by law with respect to such **Public Nuisance**;

and the Fayette County Prosecuting Attorney shall bring such civil action whenever so directed by Fayette County Commission.

- (b) **Equitable criteria for injunctive relief authorized by this Section XXII:** In any civil action brought pursuant to this Section XXII by the Fayette County Prosecuting Attorney in the name of the Fayette County Commission in which a temporary restraining order, preliminary injunction, or partial or complete mandatory or prohibitory permanent injunction, or judicial Public Nuisance Abatement Order is sought, it shall not be necessary for the County Commission to allege or prove at any stage of the proceeding that irreparable damage will occur should the temporary restraining order, preliminary injunction, or permanent injunction (including any judicial Public Nuisance Abatement Order) not be issued; or that any remedy at law is inadequate, and the temporary restraining order, preliminary injunction, or permanent injunction (including any Public Nuisance **Abatement Action Order**) shall issue as otherwise provided by law without any requirement for such allegations and without such proof.
- (c) **Recovery of County attorney's fees and litigation costs:** At every significant stage of any civil action brought pursuant to this Section XXII in which the Fayette County Commission is a prevailing party or substantially prevailing party on any of its claims for interim or final relief, the Fayette County Commission shall be awarded its litigation costs, including attorneys' fees and expenses, expert witness fees and expenses, and the fees and expenses of no more than one (1) non-testifying technical or scientific expert to assist the Fayette County Prosecuting Attorney in the preparation and prosecution of the action, to the extent that judgment for such fees and costs as **Abatement Action Costs** incurred or to be incurred by Fayette County, non-exclusively including the Fayette County

Environmental and Public Health Protection Special Settlement Fund, has not already been awarded to Fayette County.

Section XXIII – Civil penalties:

- (a) **Liability for Civil Penalties:** Any Person who: (1) violates any requirement of this Ordinance other than a requirement set forth in a Demand or Order properly issued pursuant to Section VIII, or a Time-Sensitive Abatement Action Order issued pursuant to Section IX.V; or (2) any requirement of a Binding Temporary, Preliminary or Permanent Public Nuisance **Abatement Action Order** issued pursuant to this Ordinance (other than a Final and Binding Time-Sensitive Abatement Action Order issued pursuant to Section IX.V) or a proposed Temporary, Preliminary or Permanent Public Nuisance Abatement Action Order issued pursuant to this Ordinance that was not stayed at the time of the alleged violation, shall be liable to Fayette County for the civil penalty determined in accord with the provisions of this Section XXIII to be deposited in the proper County Fund as directed by the County Commission.
- (b) **Amount of Civil Penalty:** The amount of the civil penalty that may be imposed pursuant to this Section XXIII is:
- (1) For any matters not governed by the provisions of subparagraph (2) of this Subsection **XXIII(b)**, not more than five thousand dollars (\$5,000), but not less than one hundred dollars (\$100) per violation per each calendar day of violation;
- (2) for any intentional, knowing or willful violation, not more than ten thousand dollars (\$10,000), but not less than one thousand dollars (\$1,000) per each calendar day of each such violation.
- (c) **Commencement of civil action or County Commission proceeding authorized with respect to Civil Penalties:** Liability for civil penalties under Sections **VIII(b)(2)**, **IX(d)**, and this Section XXIII may be imposed either: (i) in a civil action brought by the Fayette County Prosecuting Attorney in the name of the Fayette County Commission before any court of competent jurisdiction; or (ii) in a proceeding before the Fayette County Commission commenced by complaint filed by the Fayette County Prosecuting Attorney or the Code Enforcement Agency, and served as required by Section **X(c)** of this Ordinance on the parties alleged to be liable for civil penalties pursuant to Section XXIII of this Ordinance. Any such civil action or proceeding seeking imposition of civil penalties may be brought by the Fayette County Prosecuting Attorney upon request of the Code Enforcement Agency and shall be brought by the Fayette County Prosecuting Attorney when so directed by the Fayette County Commission. A claim for imposition and recovery of a civil penalty pursuant to this Section XXIII may be joined with an action for recovery of **Abatement Action Costs**, and any other remedy available to the Fayette County Commission pursuant to law.
- (d) **Determination of Amount of Civil Penalty:** In determining the amount of any civil penalty to be imposed under this Section XXIII, the court or County Commission shall, at a minimum, impose a civil penalty amount not to exceed the maximum penalty allowed by the limits set forth in Section **XXIII(b)**, and that will eliminate all economic benefit which has accrued to, and which is accruing, or will accrue to the liable party by reason of the **Public Nuisance** giving rise to his liability or other noncompliance and which fully reimburses the public for the unrecovered costs incurred and to be incurred to investigate and protect the Public Health, Safety, Welfare, or the **Environment**, if any, as a result of

the liable party's past or present maintenance of the **Public Nuisance** or other noncompliance. Impossibility of substantial compliance, or the impossibility of quantifying the harm to the Public Health, Safety, Welfare, or the **Environment**, does not bar the assessment of a civil penalty under this Section XXIII. In addition, in determining the proper civil penalty to be imposed, the court, or the Fayette County Commission shall consider the liable party's degree of recalcitrance, the absence of good faith cooperation with the County or the Code Enforcement Agency, or any other governmental entities responding to the **Public Nuisance**, the liable party's defiance of, or indifference to, the requirements of the law, and any unusual or extraordinary burdens imposed on the Public Health or Welfare or the public fisc as a result of the maintenance or required abatement of the **Public Nuisance**, or other noncompliance as factors requiring enhancement of the minimum penalty amount. The court or the County Commission may mitigate the total amount of civil penalty calculated under the first sentence of this subsection (d) to reflect any part of the maintenance by the liable **Person** of the **Public Nuisance** or other noncompliance caused by the existence of extenuating circumstances that were wholly beyond the liable party's control, or to recognize *bona fide* efforts by the liable party timely to comply with the requirements of the law and to extend significant and meaningful cooperation to the Code Enforcement Agency, Fayette County and to other governmental enforcing agencies acting within their jurisdiction and responding to the **Public Nuisance**.

#### Section XXIV – Criminal penalties:

- (a) **Imposition of Criminal Penalties**: Any **Person** who has committed any of the following specified offenses is guilty of a misdemeanor and, upon conviction thereof, shall be subject to the following criminal sanctions:
- (1) for the defendant's first violation after the effective date of this Ordinance of Section IV of this Ordinance with respect to a **Public Nuisance** act or condition which neither the County Commission, nor any Court of competent jurisdiction has found and determined in an enforceable order may present an **Imminent** and **Substantial Endangerment** to the Public Health, Safety, Welfare or to the **Environment**, defendant shall be fined not less than five hundred dollars (\$500.00) nor more than twenty-five hundred dollars (\$2,500), or imprisoned for not more than sixty (60) days;
  - (2) for the defendant's second or subsequent violation after the effective date of this Ordinance of Section IV of this Ordinance with respect to a **Public Nuisance** act or condition which neither the County Commission, nor any Court of competent jurisdiction has found and determined in an enforceable order, may present an **Imminent** and **Substantial Endangerment** to Public Health, Safety, Welfare, or the **Environment**, defendant shall be fined not less than twenty-five hundred dollars (\$2,500) nor more than four thousand dollars (\$4,000), or imprisoned for not more than one hundred twenty (120) days, or both fined and imprisoned;
  - (3) for the defendant's violation of Section IV of this Ordinance with respect to a **Public Nuisance** which the County Commission or any Court of competent jurisdiction has found and determined in an enforceable Order issued pursuant to this Ordinance may present an **Imminent** and **Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment**, defendant shall be fined not less than five thousand dollars (\$5,000) nor more than ten thousand dollars (\$10,000), or imprisoned for not



- more than six (6) months; or both fined and imprisoned;
- (4) for defendant's violation of Section XV of this Ordinance with respect to any Binding Order issued pursuant to this Ordinance which does not by its terms find that any **Public Nuisance** addressed in the Order, whether issued by the County Commission or by any court, may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment** shall be fined not less than one thousand dollars (\$1,000) nor more than five thousand dollars for the first offense, and for any second or subsequent offense, shall be fined not less than twenty-five hundred dollars (\$2,500) nor more than seven thousand five hundred dollars (\$7,500), or imprisoned in the county jail not more than six months, or both fined and imprisoned;
  - (5) for defendant's violation of Section XVII of this Ordinance with respect to any Binding Order issued pursuant to this Ordinance which by its terms finds that any **Public Nuisance** addressed in an Final Order may present an **Imminent and Substantial Endangerment** to the Public Health, Safety, Welfare, or the **Environment** shall be fined not less than two thousand five hundred dollars (\$2,500) nor more than seven thousand five hundred dollars (\$7,500) for the first offense, and for any second or subsequent offense, shall be fined not less than Five thousand dollars (\$5,000) nor more than ten thousand dollars (\$10,000), or imprisoned in the county or regional jail not more than one (1) year, or both fined and imprisoned;
  - (6) any **Person** who, without just and sufficient cause, willfully violates the requirements of any Final and Binding Time-Sensitive Abatement Action Order properly issued and served pursuant to Section **IX.V** of this Ordinance that has been properly served on such **Person** shall be fined not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or imprisoned in a county or regional jail not more than one (1) year, or both fined and imprisoned;
  - (7) any **Person** who intentionally misrepresents any material fact in a submission to the Code Enforcement Agency or to the County Commission (or a Hearing Officer appointed by the County Commission) in any record, report, plan or other document filed or required to be maintained, produced or submitted under the provisions of this Ordinance or of any Order issued pursuant to it shall be fined not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or imprisoned in a county or regional jail not more than six (6) months, or both fined and imprisoned;
  - (8) any **Person** who violates the requirements of Section **VIII.V(a)** of this Ordinance shall be fined not less than five thousand dollars (\$5,000) nor more than ten thousand dollars (\$10,000), or imprisoned in a county or regional jail not more than six (6) months, or both fined and imprisoned;
  - (9) any **Person** who violates the requirements of an Order issued pursuant to Section **VIII.V(e)** of this Ordinance that has been properly served on such **Person** shall be fined not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or imprisoned in a county or regional jail not more than six (6) months, or both fined and imprisoned;
  - (10) any **Person** required to make a report pursuant to Section **XXVI(a)** of this Ordinance who fails to make the required report or provide the required information as and when required shall be fined not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or imprisoned in a county or regional jail not more than four (4) months, or both fined and imprisoned;
  - (11) any **Person** required to make a report and provide information pursuant to

Section XXVI(b) of this Ordinance who willfully fails to make the required report or provide the required information as and when required shall be fined not less than five hundred dollars (\$500) nor more than five thousand dollars (\$5,000) or imprisoned in a county or regional jail not more than three (3) months, or both fined and imprisoned.

(b) **Complete defenses to criminal liability:** Any defendant who can prove all facts necessary to establish to the satisfaction of a court of competent jurisdiction the existence of each element of one or more of the affirmative defenses to criminal liability set forth in Paragraphs (1) or (2) of this subsection XXIV(b) shall not be subject to the following, specified criminal liability under this Ordinance:

(1) ***Valid Permit Pursuant to Chapter 22 of the WV Code:*** any criminal liability arising solely out of any act or condition recognized and authorized by a valid permit issued pursuant to Chapter 22 of the West Virginia Code, provided, however, that the defendant holds, and is carrying out a program of pollution abatement or remedial action in compliance with the conditions and terms of that permit; or

(2) ***Bona Fide Owner or Operator without Scienter:*** any criminal liability arising solely by reason of the defendant's ownership or operation of a **Facility** from which there was a **Release** of any **Hazardous Waste, Hazardous Substance, Pollutant or Contaminant, or Waste** into the **Environment** during the period of the defendant's ownership or operation of the that **Facility**; provided, however, that the defendant did not create, contribute to, or fail or refuse to abate the **Public Nuisance** at such **Facility** pursuant to a lawful request or demand for such abatement during the period of the defendant's ownership or operation of the that **Facility**, and, provided further, that the defendant neither knew, nor reasonably should have known, of the existence of the **Release(s)** from such **Facility** during the period of the defendant's ownership or operation of the that **Facility**.

(c) **Courts of competent criminal jurisdiction:** Magistrate courts have concurrent jurisdiction with circuit courts to enforce the provisions of this Section XXIV.

Section XXV - Effect on certain municipal ordinances within Fayette County:

(a) **No General or Field Preemption Intended:** Except as otherwise provided in subsection (d) of this Section XXV, this Ordinance is not intended to, and shall not be construed to, limit, restrict, or in any way preempt the lawful authority of any municipality within Fayette County to define, declare, prohibit or abate any **Public Nuisance**; **provided however**, that any ordinance adopted by any municipality within Fayette County that does, directly or indirectly, in whole or in part, define, declare, prohibit or require abatement of any **Public Nuisance**, to the extent it pertains to any act or condition involving, in whole or in part, a **Hazardous Waste** or **Prohibited Hazardous Substance** within Fayette County, is at least as comprehensive as this Ordinance in its definition of the terms "**Hazardous Waste**" and "**Prohibited Hazardous Substance**;" and **provided further**, that such municipal ordinance is at least as stringent as this Ordinance with regard to requiring that **Abatement Actions** respecting **Hazardous Waste** and **Prohibited Hazardous Substances** comply with the requirements of Section IX of this Ordinance.

(b) **Consultation required on certain municipal determinations regarding consistency**

**with the NCP:** Whenever, in the course of undertaking or requiring any **Abatement Action** pursuant to any municipal law or ordinance within Fayette County regarding a nuisance arising in whole or in part from a **Hazardous Waste** or a **Prohibited Hazardous Substance**, a municipality within Fayette County is considering either: (1) granting a request of one or more liable parties for a waiver from any component of the **Abatement Action** that would be necessary for consistency with the NCP; or (2) undertaking an **Abatement Action** that would not be consistent with the NCP, the municipality prior to authorizing or undertaking any such action must provide the Code Enforcement Agency all relevant information regarding the proposed **Abatement Actions** and all NCP consistency-related issues, and must thereafter meet and confer with the Code Enforcement Agency. If the Code Enforcement Agency determines that the proposed municipal actions would secure adequate protection of the Public Health, Safety, Welfare, or the **Environment** substantially equivalent to that which would be afforded by strict application of the requirements of Section IX(d) of this Ordinance, it shall approve an appropriate waiver under this Ordinance for the municipal **Abatement Action**.

- (c) **Right of municipality to request review by County Commission:** If the Code Enforcement Agency and the municipality cannot reach agreement on the NCP requirements at issue in matter arising under Section XXV(b) of this Ordinance, the governing body of the municipality may seek review by the Fayette County Commission of the Code Enforcement Agency's final determination by filing a request for hearing and review with the County Clerk within ten (10) days of receiving the final determination of the Code Enforcement Agency. Judicial review of any decision rendered by the Fayette County Commission on a municipal request for hearing and review pursuant to this subsection may be sought in accord with the provisions of Section XVII of this Ordinance.
- (d) **Waiver of Municipal NCP consistency granted without compliance with the requirements of this Section are expressly preempted:** Unless the municipality has obtained the concurrence and approval of the Fayette County Code Enforcement Agency or of the Fayette County Commission pursuant to Section XXV(b) or (c), any provision of any municipal law or ordinance regarding a **Public Nuisance** arising in whole or in part from a **Hazardous Waste** or **Prohibited Hazardous Substance**, and any approval of any **Abatement Action** undertaken or authorized pursuant to any such municipal law or ordinance with respect to any such **Public Nuisance**, by any municipality in Fayette County that does not require consistency with the NCP with respect to such **Abatement Action** is expressly preempted.

#### Section XXVI - Reporting obligations:

- (a) **Required reports by Owners and Operators of licensed Waste management facilities:** On and after the effective date of this Ordinance, any **Person** who owns or operates a site or **Facility**, non-exclusively including a "Solid Waste Facility" as that term is defined in West Virginia Code § 22-15-2(34), in Fayette County licensed by any agency or instrumentality of the federal, state, county, or local government to manage, including to treat, store, or dispose of, any **Waste**, including but not limited to a "Solid Waste," as that term is defined in West Virginia Code § 22-15-2(31) or **Hazardous Waste**, shall make the following report(s) and provide the following information to the Code

Enforcement Agency regarding the following **Waste** at least three (3) working days prior to first managing within Fayette County any of the **Waste** that gives rise to the reporting obligation under this subsection:

- (1) ***Wastes generated by a Response Action:*** All available information about the source, quantity, physical, chemical or infectious characteristics of any **Waste** proposed for management or disposal in Fayette County that was generated in whole or in part by a **Removal Action, Remedial Action, Abatement Action** or by an environmental clean-up at any site, regardless of by whom ordered or performed, and the results of any analysis of such **Waste**.
- (2) ***Wastes known or reasonably suspected to be Hazardous Wastes:*** All available information about the source, quantity, physical, chemical or infectious characteristics of any **Waste** proposed for management or disposal in Fayette County that any **Person** described in Section XXVI(a) knows or reasonably suspects to be a **Hazardous Waste** as that term is defined in West Virginia Code § 22-18-3(26);
- (3) ***Wastes requiring modification of any existing license or permit, special permission, waiver, or any Waste-specific action by any governmental authority prior to the management of that Waste in Fayette County:*** All available information about the source, quantity, physical, chemical or infectious characteristics of the **Waste** proposed for management or disposal in Fayette County, which requires any new license or permit, the modification of any existing license or permit, the granting of any special permission, or the waiver of any applicable condition, restriction, or prohibition set forth in any existing permit, or any **Waste-specific** action by any governmental authority prior to the management or disposal of that **Waste** in Fayette County, together with complete copies of any materials, including but not limited to application materials, and reports of any analysis of the **Waste** submitted to any governmental agency with respect to such **Waste**.

(b) **Required reports regarding location and Releases of Hazardous Waste or Prohibited Hazardous Substances within Fayette County:** On and after the effective date of this Ordinance, any **Person** who owns, operates, or is in charge of any site or **Facility** in Fayette County, as soon as he has knowledge of the presence at or on that site or **Facility** of any **Hazardous Waste** or **Prohibited Hazardous Substance** not expressly authorized by a valid permit issued by a governmental agency with appropriate jurisdiction, or of the **Release** into the **Environment** within Fayette County of any **Hazardous Waste** or **Prohibited Hazardous Substance** (other than a **Release** in full compliance with a valid federal or state permit) at or from such site or **Facility** shall forthwith notify the Code Enforcement Agency or the Fayette County Sheriff of the location or **Release** of such **Hazardous Waste** or **Prohibited Hazardous Substance**.

(c) Notification received pursuant to this Section XXVI or information obtained by the exploitation of such notification shall not be used against the reporting **Person** in any criminal case, except a prosecution for perjury or for giving a false statement.

Section XXVII – Option of County Commission to refer certain matters to a Fayette County Hearing Officer:

At its sole discretion, the Fayette County Commission, by entry of a formal Order of Reference to a duly appointed Fayette County Hearing Officer, may require all **Proceedings** on any complaint, application, motion, or request authorized or allowed by this Ordinance to be

filed or commenced before the Fayette County Commission to be conducted in the first instance by and before the duly appointed Fayette County Hearing Officer. In the event of the entry of any such formal Order of Reference, all proceedings regarding the matter so referred, and any request for review by the Fayette County Commission of any proposed findings of fact, proposed conclusions of law, or proposed stay or order issued by a Fayette County Hearing Officer, and all proceedings on any such request for review by the Fayette County Commission that may be granted, shall strictly comply with the procedures and requirements set forth in West Virginia law and the Ordinances of Fayette County.

Section XXVIII -- Provisions severable:

The several sections and subsections of this Ordinance are severable, and if any section or subsection hereof shall be held unconstitutional or otherwise invalid, all the remaining sections and subsections of the Ordinance shall nevertheless remain valid.

Section XXIX - Effective date:

17th This Ordinance of Fayette County, West Virginia shall become effective on the day of August, 2018.

IT IS SO DONE, ORDAINED, ORDERED AND ADOPTED by the Fayette County Commission by majority vote with a quorum present and voting this 17th day of August, 2018.

Fayette County  
Kelvin E Holliday, Clerk  
Instrument 201900002765  
02/22/2019 @ 01:04:51 PM  
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Book 8 @ Page 696  
Pages Recorded 1

COUNTY COMMISSION  
FAYETTE COUNTY, WEST VIRGINIA

By [Signature]  
Hon. Matthew D. Wender, M.B.A.  
Its President

ATTEST:

[Signature: Kelvin Holliday]  
Kelvin Holliday  
Fayette County Clerk



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

OFFICIAL RECORD  
No. 100  
Produced in accordance with  
the provisions of the  
Access to Information Act



**COUNTY COMMISSION  
FAYETTE COUNTY, WEST VIRGINIA**

**AMENDMENT TO PROPOSED ORDINANCE 18-1**

(Fayette County Comprehensive Public Nuisance Abatement Ordinance)

During the public session of the regularly scheduled and noticed meeting of the County Commission of Fayette County, West Virginia, in which the consideration for adoption of the above-referenced proposed Ordinance was on the noticed Agenda, and which matter came properly before the Fayette County Commission for consideration:

**MOVED by Commissioner Scalph:** that the proposed Fayette County Comprehensive Public Nuisance Abatement Ordinance be amended to add a new **Section XXVIII.V** entitled “**Relationship to Other Legal Authority,**” as set forth herein, to make express and confirm the original and continuing purpose and intention of the Fayette County Commission that: (1) the Fayette County Comprehensive Public Nuisance Abatement Ordinance not restrict or impede Fayette County or the Fayette County Prosecuting Attorney in the proper exercise of any other legal authority that provides or may provide adequate protection of the Public Health, Safety, Welfare or the Environment; and (2) the Fayette County Comprehensive Public Nuisance Abatement Ordinance not be interpret or construed to provide for any private right of action or to provide for any legal remedy for any person other than Fayette County and for the provisions of adequate protection to the People of the State of West Virginia, as the Sovereigns of the State of West Virginia pursuant to Article I, Section 2 and Article III, Section 3 of the Constitution of the State of West Virginia.

**PROPOSED NEW SECTION XXVIII.V:**

Section XXVIII.V -- Relationship to other legal authority:

- (a) **No intention to limit or restrict County’s other available remedies on behalf of the Public:** Nothing in this Ordinance shall be construed or interpreted to limit, restrict or in any way impede or condition the authority of Fayette County or of the Fayette County Prosecuting Attorney pursuant to any other federal, state, or county laws, specifically including the authority to assert claims to secure adequate protection of the Public Health, Safety, Welfare, or the Environment within or adversely affecting Fayette County, non-exclusively including any remedy to abate a public nuisance pursuant to the General Laws or common law of the State of West Virginia.
- (b) **No intention to create, or to imply or authorize the creation, of any private right of action:** This Ordinance is solely intended to provide for the adequate protection in a lawful manner of the Public Health, Safety, Welfare and the Environment by Fayette County, and its authorized County Officers, Boards, Agencies and Authorities. Nothing in this Ordinance shall be construed or interpreted to create, or to imply or otherwise authorize the creation of, any private right of action, or any private legal remedy. All references in this Ordinance to any private right to contribution, equitable indemnity or other private “fair share” remedy shall be construed only to refer to such rights, if any, that



exist or may exist under the General Laws of the State of West Virginia or its common law.

**SECONDED** by Commissioner Brenemen.

**ON THE QUESTION RAISED BY THE MOTION:**

Commissioner Brenemen voted: TC \_\_\_\_\_;  
Commissioner Scalph voted: TC \_\_\_\_\_;  
Commissioner Wender voted: Fo. \_\_\_\_\_.

The Motion, having been duly approved and adopted by the Fayette County Commission, the proposed ordinance is **AMENDED** to add the new Section XXVIII.V as set forth above.

**IT IS SO DONE AND RESOLVED** by the Fayette County Commission this 17th day of August 2018.

**COUNTY COMMISSION  
FAYETTE COUNTY, WEST VIRGINIA**

BY: *Matthew Wender*  
Hon. Matthew Wender, M.B.A.  
Its President

**ATTEST:**

*Kelvin Holliday*  
Kelvin E. Holliday  
Fayette County Clerk

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

Fayette County  
Kelvin E. Holliday, Clerk  
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