

# Flaherty<sup>SM</sup>

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Erica M. Baumgras, Esq.  
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304-347-4241

May 24, 2021

Michelle Holly  
Fayette County Clerk  
100 Court Street, Suite 1  
P.O. Box 569  
Fayetteville, WV 25840-0307

**Re: FCCEA FINAL & BINDING TIME-SENSITIVE ABATEMENT ACTION  
ORDER NO. 2021-002-9.5(b)-001**

Dear Clerk Holly:

Enclosed please find the **Request of Respondents, Markel Insurance Company and TIG Insurance Company, for Conference**, along with the **Certificate of Service** for filing in the above referenced matter. A copy of the same has been served upon counsel for the Fayette County Code Enforcement Agency.

Should you have any questions, or if I may be of any assistance, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,



Erica M. Baumgras

cc: Michael O. Callaghan, Esq.

**FAYETTE COUNTY CODE ENFORCEMENT AGENCY  
FAYETTE COUNTY, WEST VIRGINIA**

**IN RE:**

**National Grid NE Holdings 2 LLC,**  
a Massachusetts Limited Liability Company,  
[successor in interest to the remedial liabilities  
of: Eastern Gas and Fuel Associates (l/k/a  
Eastern Associates) incurred as a result of its  
status, acts or omissions prior to January 1,  
1966, a Massachusetts Business Trust, arising  
out of its mining operations and mining waste  
disposal practices conducted within Fayette  
County, West Virginia, et al.,

**Fayette County Code  
Enforcement Agency  
Matter No. 2019-002**

**FINAL & BINDING  
TIME-SENSITIVE  
ABATEMENT ACTION ORDER  
NO. 2021-002-9.5(b)-001**

**Respondents.**

**REQUEST OF RESPONDENTS, MARKEL INSURANCE COMPANY  
AND TIG INSURANCE COMPANY, FOR CONFERENCE**

COMES NOW Markel Insurance Company, successor in interest to the Insurance Company of Evanston ("Markel"), and TIG Insurance Company, successor in interest to Ranger Insurance Company ("TIG"), named as Respondents in the present matter solely to the extent of coverage available pursuant to liability insurance policies expressly providing coverage to Eastern Gas and Fuel Associates or any of its subsidiaries, Eastern Consolidated Coal Corporation (now a defunct corporation), or Coal Properties Corporation (now a defunct corporation), during the period of 1963 through 1987, by counsel. Markel and TIG hereby request a conference with an authorized representative of the Fayette County Code Enforcement Agency ("FCCEA") to discuss the Final & Binding Time-Sensitive Abatement Action Order No. 2021-002-9.5(b)-001 (the "Order"), including but not limited to its applicability, the factual findings, the determinations upon which it is based, the appropriateness of any actions these

Respondents are ordered to take, and other relevant and material issues or contentions these Respondents may have regarding the Order, pursuant to Section IX(a)(1) of the Order. Markel and TIG also request the opportunity to submit written comments or a statement of their position in addition to requesting a conference five (5) days after the conference, pursuant to Section IX(a)(2) and (b) of the Order. This request for a conference and for the opportunity to submit written comments or a statement of their position should not be deemed to be a waiver or estoppel of their right to assert any defense, including but not limited to any defense available under Fayette County, West Virginia Ordinance No. 2018-001<sup>1</sup> or any other applicable law, or to seek any relief available under the law.

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<sup>1</sup> Section VIII of the Order provides that in a Notice of Intent to Comply, the Respondent shall describe any defense, non-exclusively including any "just and sufficient cause" defense(s) claimed by such Respondent under Sections IX.V(e) and XX(e) of FCoWV Ordinance 2018-001. The web address provided in Paragraph 1 of the Order, Notices to Respondents, for a "complete and verified version of FCoWV Ordinance 2018-001 of <https://fayettecounty.wv.gov/commission/Pages/Enacted-Ordinances.aspx> leads to the following message: "The page you're looking for doesn't exist." Moreover, upon review of a copy of the Ordinance, once located, shows that Section IX.V(e) concerns "Civil penalties applicable to violations of a Final and Binding Time-Sensitive Abatement Action Order" and states only that "[u]pon 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." (Emphasis added.) Section XX(e) of the Ordinance concerns the "Recovery of punitive damages by Fayette County" and states only that "[i]f 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 Actions Costs incurred or to be incurred by or on behalf of Fayette County . . ." (Emphasis added.) Although both sections use the phrase "just and sufficient cause," neither identifies any defenses. In addition, these sections of the Ordinance apply if a person violates an order or fails or refuses to provide abatement action, whereas the applicable section of the Order is for Respondents who are providing notification of their intent to comply with the Order.

MARKEL INSURANCE COMPANY  
AND TIG INSURANCE COMPANY,  
By Counsel,

*Erica M. Baumgras*

Jeffrey M. Wakefield (WV Bar No. 3894)

Erica M. Baumgras (WV Bar No. 6862)

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**FINAL & BINDING  
TIME-SENSITIVE  
ABATEMENT ACTION ORDER  
NO. 2021-002-9.5(b)-001**

**Respondents.**

**CERTIFICATE OF SERVICE**

I, Erica M. Baumgras, counsel for the Respondents, Markel Insurance Company and TIG Insurance Company, do hereby certify that the foregoing **REQUEST OF RESPONDENTS, MARKEL INSURANCE COMPANY AND TIG INSURANCE COMPANY, FOR CONFERENCE** was submitted, pursuant to Section IX(d) of the Final & Binding Time-Sensitive Abatement Action Order No. 2021-002-9.5(b)-001, on this the 24th day of May, 2021, by email and by placing true copies thereof in the U.S. Mail, first class, postage prepaid, in envelopes addressed as follows:

Michael O. Callaghan, Esq.  
Chief Assistant Fayette County Prosecuting Attorney  
Environmental and Public Health Protection Unit  
c/o Neely and Callaghan  
1337 Virginia Street, East  
Suite 200  
Charleston, WV 25301-3011  
[mcallaghan@neelycallaghan.com](mailto:mcallaghan@neelycallaghan.com)

*Erica M. Baumgras*

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