

FAYETTE COUNTY, WV ORDINANCE NO. 2017- 002

AN ORDINANCE DECLARING THE PUBLIC NECESSITY FOR, AND AUTHORIZING, AND ESTABLISHING PROCEDURES TO GOVERN THE EXERCISE OF, FORMAL CIVIL INVESTIGATION PROCEEDINGS BY THE COUNTY COMMISSION, AND CIVIL INVESTIGATION DEMAND AUTHORITY FOR THE FAYETTE COUNTY PROSECUTING ATTORNEY TO: (1) INVESTIGATE ANY ACT OR CONDITION WHICH MAY PRESENT, OR IMMINENTLY THREATEN TO PRESENT, A PUBLIC NUISANCE WITHIN FAYETTE COUNTY, OR AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE PUBLIC HEALTH, SAFETY, WELFARE, OR THE ENVIRONMENT WITHIN FAYETTE COUNTY; (2) REQUIRING PERSONS PROPERLY SERVED WITH THE PROCESS REQUIRED BY THIS ORDINANCE TIMELY TO PRODUCE DOCUMENTS AND RECORDS, AND INFORMATION RELEVANT TO SUCH PUBLIC NUISANCE OR ENDANGERMENT; (3) AUTHORIZING COMMENCEMENT OF FORMAL INVESTIGATIVE PROCEEDINGS BEFORE THE COUNTY COMMISSION FOR TAKING OF LIVE TESTIMONY AND RELATED EVIDENCE RELEVANT TO ANY SUCH EXISTING OR THREATENED PUBLIC NUISANCE OR ENDANGERMENT TO THE PUBLIC HEALTH, SAFETY, WELFARE, OR THE ENVIRONMENT WITHIN OR ADVERSELY AFFECTING FAYETTE COUNTY, WEST VIRGINIA; (4) PROVIDING PROCEDURES FOR RECOVERY OF PUBLIC COSTS OF INVESTIGATION, ATTORNEYS' FEES AND LITIGATION COSTS, INCLUDING EXPERT WITNESS FEES AND COST INCURRED BY FAYETTE COUNTY TO COMPEL TIMELY COMPLIANCE WITH THE REQUIREMENTS OF THIS ORDINANCE; (5) PROVIDING FOR INSUANCE OF APPROPRIATE INJUNCTIVE RELIEF TO COMPEL COMPLIANCE WITH THE REQUIREMENTF OF THE ORDIANANCE AND, WHEN APPROPRIATE, AUTHORITY TO IMPOSE CIVIL AND CRIMINAL PENALTIES; AND (6) PROVIDING AN EFFECTIVE DATE FOR THIS ORDINANCE.

WHEREAS, the Fayette County Commission is authorized and empowered by West Virginia Code Section 7-1-3kk 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 Fayette County Commission is also authorized and granted plenary power by West Virginia Code Section 7-1-3-ff to enact ordinances regulating the removal and clean-up 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, the Fayette County Commission has determined that the timely and proper protection of the Public Health, Safety, Welfare, and the Environment within Fayette County, and the timely, adequate, and effective identification, prevention and abatement of any existing or imminently threatened Public Nuisance or Imminent and Substantial Endangerment to the Public Health, Safety,

Welfare, or the Environment within or affecting the Fayette County public requires that Fayette County have in place adequate investigatory legal authority and procedures timely to acquire the relevant information necessary adequately to respond to any such Public Nuisance or Endangerment, and timely and competently to determine and implement or cause to be implement appropriate abatement of any such Public Nuisance or Endangerment within or adversely impacting Fayette County; and

WHEREAS, the provisions, requirements and prohibitions hereinafter contained and enacted in this Ordinance are declared, as a matter of legislative fact and public policy, to be necessary and appropriate 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, requirements, and prohibitions hereinafter contained and enacted are in pursuance of, and for the purpose of securing for the benefit to present and future generations of the Public within Fayette County, of timely and appropriate abatement of Public Nuisances within Fayette County and 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 IS INTENDED TO BE, AND IS HEREBY, ORDAINED, ORDERED AND DECLARED TO BE, A LAWFUL ORDINANCE OF FAYETTE COUNTY, WEST VIRGINIA:

Section 1 - Title:

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

Section 2 - Applicability:

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

Section 3 - 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 activity(ies) that is or may be necessary to respond to an existing or imminently threatened Public Nuisance, specifically including, but not limited to, all the following activities:

(1) The investigation, study, analysis, or assessment of the nature and extent of any known or suspected nuisance 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 and implementation 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 Fayette County Commission, or any agent authorized by it, to be necessary or appropriate to the effective conduct of a remedial investigation by the County, or to the effective oversight and monitoring of a remedial investigation being performed by or on behalf of any Person(s) liable for the Public Nuisance, and the creation, finalization, and implementation of the comprehensive work plan for the appropriate remedial investigation approved by the Fayette County Commission, or any agent authorized by it;
- (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(s) 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 Fayette County Commission, or any agent authorized by it;
- (4) The development and implementation of a Public Nuisance/Public Health Endangerment Abatement Action Plan that adequately protects, or restores to the maximum extent practicable, the public health, safety, welfare, and the Environment, natural resources, and 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 Fayette County Commission, or any agent authorized by it, to implement, and to evaluate the effectiveness of, any of the activities listed in subparagraphs (1) through (4) of this Section 3(a), whether those activities were implemented in whole or in part by Fayette County, or by any other Person;
- (6) Such actions as are necessary and proper for the Fayette County Commission, or any agent authorized by it, 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 Fayette County Commission, a Hearing Officer appointed by the County Commission, or any agent authorized by the Fayette County Commission, 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 Fayette County effectively to coordinate and cooperate with the lawful actions of appropriate agencies of federal, state or other county government in responding to any Public Nuisance;
- (8) All enforcement activities determined the Fayette County Prosecuting Attorney to be necessary and proper to effectuate the public purposes of the Ordinance, or to secure the effective or enforceable performance of any Abatement Action ordered or sought by the Fayette County Commission.

- (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 or its authorized agent(s) are determined to be necessary or proper in performing or preparing to perform an Abatement Action, and shall include, but shall not be limited to, the following costs incurred or to be incurred by the County:
- (1) for expert assistance in health, law, engineering and Environmental science, expert witness services and legal fees (including, but not limited to, costs of the County Prosecuting Attorney and the legal fees and cost of any retained legal counsel deemed necessary and proper at the sole discretion of the County Commission, any investigator or agent authorized by the Fayette County Commission, or the Fayette County Prosecuting Attorney) to study, investigate, abate, remove, remediate or respond to an actual or threatened Public Nuisance or any endangerment to the public health, welfare or the Environment that may be presented by an actual or threatened Public Nuisance;
 - (2) to investigate or respond to the existence, or threat of a Public Nuisance or Endangerment to the Public Health;
 - (3) 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) 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) 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 such costs, 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. The rate of interest on the outstanding unpaid balance of such costs recoverable under this Ordinance shall be the same rate as is specified for prejudgment interest determined in accordance with the provisions of West Virginia Code § 56-6-31.
- (c) 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.
- (d) The term "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any Waste into or on any land or water so that such Waste or any constituent thereof may enter the Environment or be emitted into the air or discharged into any waters, including ground waters.
- (e) The term "Environment" means any surface water, groundwater, soil water, drinking water supply, soil, land surface, subsurface strata, or ambient air within Fayette County.
- (f) 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, landfill, storage container, motor vehicle, rolling stock or aircraft; or
 - (2) Any site or area where Hazardous Waste or a Prohibited Hazardous Substance has been deposited, stored, disposed of, or placed, or otherwise has come to be located, but does not include any consumer product in consumer use.
- (g) The term "Governmental entity" means any officer, agency, department, including the

executive, legislative and judicial departments, division, bureau, board, instrumentality, and commission of the United States or any State; 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.

- (h) 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 term 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.
- (i) The term "Hazardous Waste" shall mean 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 (3) the term shall non-exclusively include any 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 duly issued pursuant to the West Virginia Hazardous Waste Management Act (hereinafter: "WV HWMA"), Article 22-18 of the West Virginia Code.
- (j) The term "Indemnitor or Insurer" means any Person who provides by contract or otherwise any indemnification of any liable party or potentially liable party, specifically including any duty to defend or provide partial or full indemnification to a potentially liable party, that does or may provide coverage for any claims of Fayette County pursuant to any applicable law against any liable Person or potentially liable Person as a result of such Person's act, omission or occurrences 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 or any Endangerment to the public health, safety, welfare or the Environment within Fayette County.
- (k) The term "Knowingly" imports only a knowledge that the facts exist which brings the act or omission within the any applicable provision of 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.
- (l) 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.
- (m) The term "Person" means an individual, a deceased individual (or the Estate of a decedent) to the extent of his available insurance assets and undistributed non-insurance assets, trust, firm, joint stock company, corporation, including a governmental corporation, a dissolved or bankrupt corporation to the extent of its available insurance assets and undistributed non-

insurance assets, 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, as well as the estate of a deceased individual to the extent of: (1) any undistributed assets; and (2) available insurance assets.

(n) The term "Proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court of competent jurisdiction, the Fayette County Commission, a Hearing Officer appointed by the Fayette County Commission, or any other Person authorized by law) in which, pursuant to law, specifically including this Ordinance, testimony can be compelled to be given or documents or evidence of any kind can be compelled to be produced.

(o) The term "Public Nuisance" shall mean any of the following within Fayette County, or that does or may adversely affect the Public Health, Safety, Welfare, or the Environment within Fayette County:

- (1) any condition(s), act(s), event(s) or activity(ies) defined or held to be a "Public Nuisance" by state law, including the any Final Order, Judgment, or Final Decision of any circuit court of West Virginia, or of the West Virginia Supreme Court of Appeals;
- (2) any condition(s), act(s), event(s) or activity(ies) lawfully declared to be a Public Nuisance by any duly-enacted Resolution, Order or Ordinance enacted by the County Commission of Fayette County, West Virginia, or by the City Council (or a municipal agency lawfully authorized by the City Council) of any West Virginia Municipality properly acting pursuant to its authority under the West Virginia Code, as the same may be amended from time to time;
- (3) any condition(s), act(s), event(s) or activity(ies) that presents, may present, or imminently threatens to present an imminent and substantial endangerment to the Public Health, Safety, Welfare, or the Environment within Fayette County;
- (4) any condition(s), act(s), event(s) or activity(ies) that is, or imminently threatens to be, detrimental to any beneficial uses within Fayette County of any natural resource owned by the State or held in public or private trust for the benefit of present and future generations of the public;
- (5) the Release into the Environment of any Hazardous Substance, which presents, 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 any beneficial uses within Fayette County of any natural resource owned by the State or held in trust for the benefit of present and future generations of the public; or
- (6) the Disposal of any Waste or Hazardous Waste, which: (i) presents, or which may present, an imminent and substantial endangerment to the Public Health, Safety, Welfare, or the Environment within Fayette County, or (ii) is, or imminently threatens to be, detrimental to any beneficial uses within Fayette County of any natural resource owned by the State or held in trust for the benefit of present and future generations of the public.

(p) 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 known as the

“Federal Hazardous Waste Management Act”), 42 U.S.C. §§ 6901-6992k.

- (q) 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), 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 USCS § 2210]; and (4) the normal application of fertilizer.
- (r) The term “Remedial Action” shall have the same meaning set forth in CERCLA Section 104(24), 42 U.S.C. Section 9601(24), as that term has been construed and interpreted by the decisions of the Courts of the United States having jurisdiction to interpret the provisions of CERCLA.
- (s) The term “Removal Action” shall have the same meaning as is provided in CERCLA section 104(23), 42 U.S.C. Section 9601(23), as that term has been interpreted and construed by the decisions of the courts of the United States having jurisdiction to interpret the provisions of CERCLA.
- (t) The term “Storage,” when used in connection with Waste, means the containment of Waste, either on a temporary basis or for a period of years, in such a manner as not to constitute Disposal of such Waste.
- (u) 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 and agricultural operations and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the federal Water Pollution Control Act, as amended, or source, special nuclear or by-product material as defined by the federal Atomic Energy Act of 1954, as amended.

Section 4 -- Authority of Fayette County Prosecuting Attorney to Conduct Civil Investigations Into, and to Inspect Real Property and Premises Pertaining to, a Known or Reasonably Suspected Public Nuisance:

(a) Public Nuisance Civil Investigation Authorized; Scope and Confidential Nature of On-going Investigation by Fayette County Prosecuting Attorney: If the Fayette County Prosecuting Attorney has a reasonable basis to believe that Public Nuisance exists, or may exist within Fayette County, he may, and shall, upon request of the Fayette County Commission, make a timely and thorough investigation into any act or condition that may present a Public Nuisance in Fayette County, the scope and extent of which investigation may, as determined necessary and proper by the Fayette County Prosecuting Attorney, extend to all matters reasonably calculated to lead to the discovery of admissible evidence relevant to any of the following matters:

- (1) whether a Public Nuisance exists within Fayette County;

- (2) the origin, nature, extent, and options (including their related costs) for abatement of any endangerments to the Public Health, Safety, Welfare, or the Environment within Fayette County that are or may be presented by such existing or imminently threatened Public Nuisance;
- (3) the identity and location of person(s) with potential legal liability to abate Public Nuisance, and their knowledge of, nexus to, and action(s) or failure(s) to act with respect to any known or suspected Public Nuisance within Fayette County;
- (4) the source, identification, nature, concentrations, characteristics, or quantity of any Waste(s), Hazardous Waste(s), Hazardous Substance(s) or pollutant or contaminant which have been released, are being released, or imminently threaten to be released into the Environment at any place where they do or may cause, create or contribute to a Public Nuisance within Fayette County;
- (5) Any information relating to the ability of any person who does or may have legal liability to abate a Public Nuisance to pay for or to perform a cleanup; non-exclusively including the complete contents of, and available limits of liability under, any insurance or indemnification policy or agreement (including any riders, endorsements, alterations, cancellations, or side agreements relating to such policy or agreement) pursuant to which an insurance business or other indemnitor may be liable to satisfy all or part of a possible judgment or other compulsory process of law against any person who does or may have legal liability to abate a Public Nuisance, or to indemnify or reimburse for payments made to satisfy any possible judgment against such person
- (6) the identity and location of any person(s) who has or may have information relevant to any matter within the scope of investigation authorized by this Section 4;

(b) The Fayette County Prosecuting Attorney shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in any on-going investigation, but this subsection does not apply to disclosures lawfully required in any civil or criminal actions before any court or enforcement proceedings pursuant to this chapter.

Section 5 -- Authority of Fayette County Prosecuting Attorney to Issue and Enforce Civil Investigation Demand:

(a) Access to and Production of Information, Document, Record, or Thing: By service of a Civil Information Demand in compliance with the requirements of this Ordinance, the Fayette County Prosecuting Attorney may require any person who has or may have any information relevant to any matter within the scope of investigation authorized by Section 4 of this Ordinance to furnish at the time and place specified in the Civil Information Demand, which time shall be at least twenty-one (21) days from the date of service of the Civil Information Demand, unless exigent circumstances require a shorter period of time, all such requested information, document(s), record(s), or thing(s) of any kind which is relevant to such investigation for inspection and copying by the Fayette County Prosecuting Attorney, or his designated Assistant or agent, non-exclusively including any matter relevant to the existence, description, nature, custody, condition and location of any book(s), record(s), document(s), substance(s), or other tangible thing(s) and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of evidence relevant to any matter within the scope of investigation authorized by Section 4 of this Ordinance that is in the possession, care, custody, or control of the Person named in and served with the Civil Information Demand, its agents, representatives, employees,

directors, partners, consultants, parent corporations or other entities, subsidiaries, and all Persons acting on its behalf or in concert with it, and to the full extent they are or can be available to that Person, all such books, records, documents and things that are in the possession, care, custody, or control of that Person's predecessors and successors-in-interest.

- (1) If the information, document(s), record(s), or thing(s) specified in a Civil Information Demand are located outside this State, a person properly served with a Civil Information Demand pursuant to this Section 5 at his option shall either make them available to the Fayette County Prosecuting Attorney at the time and place within this County specified in the Civil Information Demand, or pay the reasonable and necessary expenses for the Fayette County Prosecuting Attorney or his representative to examine and copy them at the place where they are maintained. The Fayette County Prosecuting Attorney may designate a representative, non-exclusively including comparable officials of the state or unit of local government in which the records are located, to inspect and copy them on his behalf.
- (2) If any of the information, document(s), or record(s) specified in a Civil Information Demand authorized by this Section 5(a) are electronically stored, the following requirements apply to such electronically stored information:
 - (i) A respondent must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
 - (ii) If the Civil Information Demand does not specify a form for producing electronically stored information, the person named in and served with the Civil Information Demand must produce such electronically stored information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
 - (iii) the person named in and served with the Civil Information Demand need not produce the same electronically stored information in more than one form.

(b) **Demand for Inspection of Real Property and Premises:** The Fayette County Prosecuting Attorney, by service of a Civil Information Demand in compliance with the requirements of this Ordinance, may require any person to permit entry by the Fayette County Prosecuting Attorney or any agent authorized by him onto designated land or other property possessed or controlled by the responding party at which any evidence within the scope of investigation authorized by Section 4 of this Ordinance may be found, so that the Fayette County Prosecuting Attorney or his authorized agent may inspect, measure, survey, photograph, test, or sample the property or any designated object(s), structure(s), machine(s), apparatus, device(s), equipment, material(s), operation, or **Environmental** media on, in, above or under it, on the date and at the time specified in the Civil Information Demand, which time shall be at least seventy-two (72) hours from the date and time of service of the Civil Information Demand, unless exigent circumstances require a shorter time.

(c) **When Personal Appearance Required:** A Person commanded to furnish and permit inspection and copying of designated information, document(s), record(s) or tangible thing(s), or inspection of premises pursuant to this Section 5 need not appear in person at the place of production or inspection unless that Person had been properly served with a Civil Information Order pursuant to Section 7 of this Order commanding him to appear for hearing before the Fayette County Commission or its appointed Hearing Officer.

(d) **Confidential Nature of On-Going Public Nuisance Investigation:** The Fayette County Prosecuting Attorney, any Fayette County Assistant Prosecuting Attorney, any Fayette County

employee, officer, or agent, or any employee or agent of any federal, state, or local governmental office or agency working in concert or cooperation with the Fayette County Prosecuting Attorney, or any of his Assistants or agents shall not make public: (1) the name or identity of a Person whose knowledge, act(s) or conduct is being investigated by the Fayette County Prosecuting Attorney pursuant to this Section 5; (2) any fact(s) discovered in the course of such investigation; or (3) the name or identifying information about any confidential source of information to the Office of the Fayette County Prosecuting Attorney, but this Subsection (d) of this Section 5 does not apply to disclosures of any public information expressly authorized by applicable federal or state law, or to the disclosure of any information in any proceeding before the Fayette County Commission, or the disclosure of any information in compliance with applicable Rules and Orders of the Court and the West Virginia Rules of Professional Conduct during the course or in connection with a civil or criminal action(s) or enforcement proceeding(s) pursuant to this Ordinance.

Section 6 – Required Response to Civil Investigation Demand:

(a) **Verified Response to Demand for Access to and Production of Information Required:** Any Person named in and required to respond by a Civil Information Demand authorized by Section 5(a) of this Ordinance and properly served pursuant to this Ordinance shall, on or before the date and time set forth in the Civil Information Demand for production, deliver to the Fayette County Prosecuting Attorney, or his designated Assistant or agent identified in the Civil Information Demand, if any, 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:

- (1) that the information provided, if any, is truthful and complete;
- (2) that the information, record(s), document(s), or thing(s) produced, if any, together with those withheld from production as privileged or for any other reason and for which the information required by Section 6(b) 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, document(s), record(s) and thing(s) demanded; and
- (3) that all information, record(s), document(s) and thing(s) responsive to the Civil Investigation Demand have been produced or identified in a log required by and timely submitted in compliance with the requirements of Subsection (b) of this Section 6.

(b) **Privilege Log Information Required:** Any Person named in a Civil Information Demand authorized by and properly served pursuant to this Ordinance who, based in whole or in part upon a claim of privilege or for work product protection: (1) fails or refuses to produce and allow inspection and copying of any information, document(s), record(s) or thing(s) demanded pursuant to Section 5(a) of this Ordinance; (2) fails or refuses to permit the entry and inspection demanded pursuant to Section 5(b) of this Ordinance, must file with the Office of the Fayette County Prosecuting Attorney and under seal with the Office of the Fayette County Clerk on or before the date on which a response to a Civil Information Demand is required pursuant to Subsection (a) of this Section 6 a concise written statement setting forth all facts supporting the claim of privilege or other asserted basis for withholding the demanded production or refusing the demanded access, and all of the asserted legal authority upon which the failure or refusal to produce is based. The concise written statement required by this Subsection 6(b) must, at a minimum, include the following as to each piece of information, document, record or tangible thing withheld:

- (1) the identity of the author thereof, and of any other Person who participated or assisted in

- its preparation, creation, and modification, if any;
- (2) the name, title or other identifying data;
- (3) the date of the creation of the information, document, record or thing, or, if no date appears thereon, the approximate date;
- (4) a summary of the nature (e.g. letter, memo, invoice, etc.) and content of the information, document, record or thing sufficient to identify it;
- (5) 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 information, document, record or thing has been disclosed, sent, or otherwise shared;
- (6) if such information, document, record or thing was, but is no longer, in the possession or control of the Person from whom the information, document, record 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 information, document, record or thing was transferred, or who disposed of the information, document, record or thing, as well as the date, time, place and mode or method of transfer or disposal; and
- (7) the precise, current location of the information, document, record or thing and the complete name and address of its current custodian.

Section 7 – Fayette County Commission Formal Investigation Proceeding to Take Live Testimony and Receive Evidence Pertaining to a Known or Suspected Public Nuisance within or Adversely Affecting Fayette County:

(a) **Commencement and Scope of Fayette County Commission Formal Public Nuisance Investigation Proceeding:** Upon motion of any member of the Fayette County Commission, upon formal request of the Fayette County Board of Health, or upon filed petition of the Fayette County Prosecuting Attorney, the Fayette County Commission may by Formal Resolution commence before it, or before a joint formal proceeding with the Fayette County Board of Health, a Formal **Public Nuisance Investigation Proceeding** to take live testimony and obtain and receive evidence pertaining to a known or suspected **Public Nuisance** within or adversely affecting Fayette County. In the formal resolution commencing such Formal Investigation Proceeding, the Fayette County Commission may Order that all related hearings be held or conducted during the course of the Formal **Public Nuisance Investigation Proceeding** to take live testimony, receive evidence, and hear and determine in the first instance any motions or objections relating to such hearings, testimony or evidence be held and conducted directly before the County Commission or before a Fayette County Hearing Officer appointed by the Fayette County Commission. The Formal Resolution commencing such Formal **Public Nuisance Investigation Proceeding** shall describe in reasonable detail the known or suspected **Public Nuisance(s)** to be investigated. The scope of any Formal **Public Nuisance Investigation Proceeding** conducted pursuant to this Ordinance shall be limited to matters reasonably calculated to lead to the discovery of admissible evidence relevant to any of the issues or matters delineated in Section 4(a) through (f), inclusive, of this Ordinance as they relate to or pertain to the known or suspected **Public Nuisance(s)** described in the Formal Resolution commencing the Formal **Public Nuisance Investigation Proceeding**.

(b) **County Commission Civil Investigation Orders:**

(1) **Civil Investigation Orders Authorized in the Course of a Formal Public Nuisance Investigation Proceeding:** For the purpose of conducting any Formal **Public Nuisance Investigation Proceeding** commenced pursuant to this Ordinance, the Fayette County Commission, or any Hearing Officer appointed by it, may, *sua*

sponte, and, upon motion of the Fayette County Prosecuting Attorney, shall, issue any one or more of the following Investigative Orders to any Person who the County Commission, or its appointed Hearing Officer has reasonable grounds to believe does or may have knowledge of any fact, matter or issue relevant to and within the scope of the subject-matter of Formal **Public Nuisance** Investigation Proceeding as set forth in Section 4 of this Ordinance:

- (A) a Civil Investigation Order requiring the production of information, document(s), record(s), or tangible thing(s) relevant to and within the scope of the subject-matter of Formal **Public Nuisance** Investigation Proceeding;
 - (B) a Civil Investigation Order requiring that access to property be granted to: (i) the Fayette County Commission, and any of its members, (ii) any Hearing Officer appointed by the Fayette County Commission, (iii) any authorized agent(s) or investigator(s) designated by the Fayette County Commission or by any Hearing Officer appointed by it, (iv) the Fayette County Prosecuting Attorney and any authorized agent(s) or investigator(s) designated by him for the purpose conducting inspections, making copies of relevant data, taking samples, or taking photographs relevant to and within the scope of the subject-matter of Formal **Public Nuisance** Investigation Proceeding;
 - (C) an Order directing that written answers be submitted under oath to written interrogatories, or that written responses be submitted under oath to written requests for admissions, set forth in the Order; or
 - (D) an Order directing the attendance and testimony of any Person who does or may have knowledge of any fact, matter or issue relevant and within the scope of the Formal **Public Nuisance** Investigation Proceeding at a hearing before the Fayette County Commission or a Hearing Officer appointed by it.
- (2) **Service of a Civil Investigation Order:** Service of Civil Investigation Order issued in connection with any Fayette County Commission Formal **Public Nuisance** Investigation Proceeding shall be accomplished in the manner provided in Rule 45(b)(1) and (2) of the West Virginia Rules of Civil Procedure.
- (3) **Required Time Periods for Compliance with Civil Investigation Order:** A Civil Investigation Order described in Subsections (b)(1)(A) through (C), inclusive, of this Section 7 shall provide a minimum of fourteen (14) days following receipt of service within which to comply with the requirements of the Order, unless exigent circumstances require a shorter time period. A Civil Investigation Order described in Subsection (b)(1)(D) of this Section 7 shall be served upon the Person(s) named in the Order at least ten (10) days prior to the commencement of the hearing at which the Respondent's attendance is required if such Civil Investigation Order does not also require that Person to produce specified information, document(s), record(s) and tangible thing(s), and at least fourteen (14) days prior to the commencement of the hearing at which the Respondent's attendance is required if such Order requires production of any specified information, document(s), record(s) and tangible thing(s).
- (4) **Verified Response to Civil Investigation Order for Access to and Production of Information Required:** Any Person named in and required to respond by a Civil Information Order authorized by Subsections (b)(1)(A) through (C), inclusive, of this Section 7 and properly served pursuant to this Ordinance shall, on or before the date and time set forth in the Civil Information Demand for production,

file with the Fayette County Clerk and deliver or cause to be delivered a copy to the Fayette County Prosecuting Attorney, or his designated Assistant or agent identified in the Civil Information Demand, if any, 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:

- (1) that the information provided, if any, is truthful and complete;
- (2) that the information, record(s), document(s), or thing(s) produced, if any, together with those withheld from production as privileged or based any assertion of work product protection, and for which the information required by Subsection (c) of this Section 7 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, document(s), record(s) and thing(s) demanded; and
- (3) that all information, record(s), document(s) and thing(s) responsive to the Civil Investigation Order have been produced or identified in a log required by and timely submitted in compliance with the requirements of Subsection (c) of this Section 7.

(c) **Assertion of Privilege in Response to Civil Investigation Order:** Any Person named in a Civil Investigation Order who, based in whole or in part upon a claim of privilege or for work product protection, fails or refuses timely to comply with any provision of such Civil Investigation Order authorized and described in Subsections (b)(1)(A) through (C) of this Section 7 must file with the Office of the Fayette County Clerk and with the Office of the Fayette County Prosecuting Attorney on or before the date on which a response to such Civil Information Order is required a concise, verified written statement setting forth privilege log details that fully complies with the requirements set forth in Section 6(b) of this Ordinance.

(d) **Presiding Officer of Formal Public Nuisance Investigation Proceeding:** With respect to any Formal Public Nuisance Investigation Proceeding to take live testimony directly before the Fayette County Commission, the Fayette County Commission shall designate a qualified court reporter and, from among its members, a Presiding Officer for the Formal Public Nuisance Investigation Proceeding, who shall be the President of the Fayette County Commission, unless the County Commission by unanimous vote appoints another person deemed qualified by the County Commission. The Presiding Officer shall control the course of the Formal Public Nuisance Investigation Proceeding to take live testimony, and shall rule, in the first instance, on all evidentiary objections and assertions of privilege or work product protection presented during the course of the proceeding before him.

(e) **Interrogation of Respondents or Other Witnesses:** With respect to any Formal Public Nuisance Investigation Proceeding to take live testimony directly before the Fayette County Commission, the Fayette County Commission shall designate a Lead Interrogator authorized to question the witness on behalf of County Commission. Unless Council by unanimous vote appoints one of its own members as Lead Interrogator, the Lead Interrogator shall be the Fayette County Prosecuting Attorney, or any Assistant Fayette County Prosecuting Attorney appointed by either the Fayette County Prosecuting Attorney or the Fayette County Commission.

(f) **Interrogation by Members of the Fayette County Commission:** Notwithstanding appointment by the Fayette County Commission of a Lead Interrogator for any Formal Public Nuisance Investigation Proceeding to take live testimony directly before the Fayette County Commission, any member of Fayette County Commission present at the Formal Public Nuisance Investigation Proceeding shall be entitled to question any witness with respect to any matter(s)

within the scope of, and on matters or issues pertinent to, the Formal Public Nuisance Investigation Proceeding, subject only to the overall responsibility and authority of the Presiding Officer to control the order of the proceeding, including its scope, course and duration.

Sec. 8 - Appeal of Ruling of Presiding Officer or Hearing Officer:

(a) **Right to Appeal Ruling of Presiding Officer or Hearing Officer:** The Fayette County Prosecuting Attorney, any respondent to a Civil Information Demand or Civil Information Order issued pursuant to this Ordinance, or any witness before any Fayette County Commission Formal Public Nuisance Investigation proceeding aggrieved by any Ruling or Order issued by a Hearing Officer appointed by the Fayette County Commission on or in connection with any motion made pursuant to the provisions of Section 10 of this Ordinance, or by any Ruling or Order issued by the Presiding Officer during the course of, or in connection with, any proceeding to take live testimony or receive evidence pursuant to a Civil Investigation Order issued pursuant to this Ordinance may appeal such Ruling or Order to the Fayette County Commission only by filing a written Notice of Appeal in strict compliance with the time-frames and terms and conditions set forth in this Section 8.

(b) **Notice of Appeal; Deadline for Filing; Required Contents:** Strict compliance with the requirements set forth in this Subsection (b) of this Section 8 regarding the time for filing and content of any Notice of Appeal any ruling authorized by Subsection (a) of this Section 8 is required, and is intended to be, and shall be interpreted and applied so as to be, jurisdictional to the authority of the Fayette County Commission to review any such ruling.

(1) **Timeframe for Filing Notice of Appeal:** A written notice of appeal that fully complies with the requirements of Subparagraphs (2) and (3) of this Subsection 8(b) must be filed with the Office of the Fayette County Clerk on or before the following required filing dates and times:

(A) **Appeal of Ruling of the Presiding Officer:** A notice of appeal of any Ruling or Order of the Presiding Officer in any Fayette County Commission Formal Public Nuisance Investigation proceeding authorized by Subsection (a) of this Section 8 must be filed or before the end of the regular business hours of the Office of the Fayette County Clerk three (3) business days after the designated court reporter of the relevant Fayette County Commission Formal Public Nuisance Investigation proceeding to take live testimony or receive evidence pursuant to Section 7 of this Ordinance files with the County Clerk an initial, complete transcript of the proceedings, whether in electronic form or in hard copy, of the proceeding in which the challenged ruling was made;

(B) **Appeal of Ruling of the Hearing Officer:** A notice of appeal of any Ruling or Order of the Hearing Officer authorized by Subsection (a) of this Section 8 must be filed or before the end of the regular business hours of the Office of the Fayette County Clerk five (5) business days after: (i) the date of the hearing or proceeding in which the challenged Ruling or Order was made orally on the record of such hearing or proceeding, or (ii) the date the aggrieved person first receives service of Hearing Officer's written Ruling or Order, if such Ruling or Order was first made in such written Ruling or Order.

(2) **Required Content of Notice of Appeal:** The Notice of Appeal required by this Section 8 shall specify with particularity the Ruling(s) and Order(s) to be challenged in the appeal, including specific references to the transcript of proceedings or record,

and providing a succinct summary of the legal and factual grounds that will be advanced in support of the appeal.

- (3) **Service of Notice of Appeal:** The Notice of Appeal filed with the Office of the Fayette County Clerk required by this Section 8 must include a written certification that the Notice of Appeal has been served on all parties to the proceeding that gave rise to the challenged Ruling or Order, each Presiding Officer or Hearing Officer that made the challenged Ruling or Order, and the Office of the Fayette County Prosecuting Attorney, if Fayette County or the Fayette County Prosecuting Attorney is not the appellant. If the relevant Presiding Officer is or was a member of the Fayette County Commission at the time of such Ruling or Order, service on such Presiding Officer shall be accomplished by serving a separate copy of the Notice of Appeal on the Office of the Fayette County Clerk.

(b) **Procedures on Appeal:** Following filing of a compliant Notice of Appeal pursuant to subsections (a) and (b) of this Section 8, the Fayette County Commission will issue and the Fayette County Clerk will serve on each party to the appeal, a schedule applicable to the appellate proceeding, which schedule will include the required filing dates for the brief(s) of each party to the proceeding. In compliance with the timeframe established in such Schedule, each appellant shall file with the Office of the Fayette County Clerk and serve on all parties to the appeal a brief not to exceed fifteen (15) pages in a form that complies with the requirements of Rule 6 of the West Virginia Rules for Trial Courts promulgated by the West Virginia Supreme Court of Appeals. Each appellee in each appeal shall file with the Office of the Fayette County Clerk and serve on all parties its responsive brief not to exceed fifteen (15) pages in a form that complies with the requirements of Rule 6 of the West Virginia Rules for Trial Courts promulgated by the West Virginia Supreme Court of Appeals with the Office of the Fayette County Clerk on or before the end of the regular business hours of the Office of the Fayette County Clerk five (5) business days after the appellant files his opening brief.

(c) **Oral argument discretionary with County Commission:** On the cover page of its brief each Appellant and Appellee to an appeal pursuant to this Section 7 shall state whether that party is requesting an opportunity to present an oral argument before the Fayette County Commission. At the conclusion of the briefing on each appeal, the Fayette County Commission will determine whether in its judgment oral argument will aid the County Commission in a just and expeditious resolution of the appeal. If the request for oral argument is granted by the County Commission, the parties to the appeal will be notified by the Fayette County Clerk of the date and time scheduled for County Commission to hear oral arguments.

Section 9 – Effect of Failure Timely to Provide Required Privilege Log information:

(a) **Assertion of Privilege or Work Product Protection After Failure Timely to Provide Compliant Privilege Log Details Barred:** Except as provided in Subsection (c) of this Section 8, any Person required by either Section 6(b) or Section 7(b)(4) of this Ordinance to provide the concise written statement described therein who failed or refused timely to file a complete and compliant, concise written statement that fully complies with the requirements of this Ordinance, thereafter shall be barred from asserting or relying upon any privilege or claim for work product protection with respect to any demanded information, document(s), record(s) or tangible thing(s) for which a compliant statement of supporting factual basis and legal authority was required by this Ordinance, but not timely filed, in any proceeding before the Fayette County Commission, or in any civil or criminal action in which Fayette County or the Fayette County Prosecuting Attorney acting on behalf

of the County Commission, is seeking to enforce any provision of this Ordinance or any Civil Investigation Demand or Civil Investigation Order issued pursuant to it, to abate any Public Nuisance condition, or to recover any Abatement Action Costs, or other fees, costs or penalties pursuant to this or any other Ordinance of Fayette County now or hereafter enacted. Such Person shall further be barred from withholding, based upon any assertion of any such privilege or asserted work product protection, access to and production of any demanded information, document, record, or thing, or permission for entry and inspection demanded in any Demand or Order properly served on such Person pursuant to this Ordinance for which all of the details required by subsection (c) of this Section 6 were not timely provided.

(b) Scope of Bar on Assertion of Privilege or Work Product Protection: The bar established by this subsection (a) of this Section 8 shall apply only to the assertion by such Person, or any agent or representative of such Person, of any privilege or work product protection respecting any information, document(s), record(s), or tangible thing(s) sought by any provision of a Civil Information Demand or Civil Information Order properly served on such Person pursuant to this Ordinance, with respect to which assertion this Ordinance required the filing of a concise written statement pursuant to either Section 6(b) or 7(b)(4) of this Ordinance, but for which no such compliant statement was timely filed.

(c) Bar Not Applicable to Privilege Against Self-Incrimination: Notwithstanding any provision of this or any other Ordinance of Fayette County, the Bar imposed pursuant to Subsection (a) of this Section 9 shall not apply to any failure or refusal to produce such information, document, record, or thing, or to permit demanded entry and inspection based upon the claimed application of the privilege against self-incrimination.

Section 10 - Motion to Quash or Modify a Civil Information Demand or Civil Information Order Issued Pursuant to this Ordinance Authorized; Procedures before County Commission, or Its Appointed Hearing Officer, upon Filing of Such Motion; actions by County Commission upon Timely Request for Hearing:

(a) Motion to Quash or to Modify Allowed; Time Period for Filing: Any Person who has been named as a respondent in a Civil Information Demand or Civil Information Order served pursuant to this Ordinance may file a motion with the Fayette County Commission seeking an Order to quash or to modify all or any portion of any such Demand or Order by timely filing a written motion that fully complies with the requirements set forth in Rule 6.01 of the West Virginia Trial Court Rules not to exceed, without prior leave from the County Commission, twenty (20) pages setting forth concisely the relief requested and all of the law and facts which the respondent/movant contends entitles it/them to the relief requested. Notice of the Respondent's intent to file any such motion seeking relief with respect to any Civil Information Demand served pursuant to this Ordinance must be filed under seal with the Office of the Fayette County Clerk and served on the Fayette County Prosecuting Attorney on or before the tenth (10th) day following the Respondent's receipt of service of the Civil Information Demand. Respondent's motion seeking any relief authorized by this Section 10 with respect to such Demand must be filed under seal with the Office of the Fayette County Clerk and served on the Fayette County Prosecuting Attorney on or before the fourteenth (14th) day following the Respondent's receipt of service of the Civil Information Demand. The Fayette County Prosecuting Attorney may file a response or opposition to any such motion filed pursuant to this Subsection 10(a) on behalf of Fayette County within ten (10) days following the filing of Respondent's motion.

(b) Time Requirement for Filing of Motion Deemed Jurisdictional: The time-period requirement within which a Respondent may file a motion authorized by this Section 10 shall be deemed jurisdictional, and may not be waived other than by express written Order of the Fayette County Commission upon showing of manifest and compelling good cause for delayed filing. Upon timely receipt of a motion which complies with the requirements of this Section 10, the Fayette County Clerk shall refer the matter to the Fayette County Commission for further proceedings as set forth in this Ordinance.

(c) Hearing before County Commission upon timely request: Any respondent named in an a Civil Information Demand or Civil Information Order served pursuant to this Ordinance that has timely filed a motion authorized by this Section 10 that complies with the requirements of this Section 10 may on or before the required filing date for it motion request a hearing before the County Commission by filing a written request for hearing, which request shall state whether the requested hearing is for purposes of advancing oral argument, introduction of testimony and live evidence, or both, and, if an evidentiary hearing is requested, shall set forth in summary fashion the name of persons who may give evidence during such hearing and a brief summary of the evidence to be offered by each witness. Upon timely receipt of a request for hearing filed in compliance with the requirement of this Section 10, the County Commission shall issue an order either setting the matter down for hearing within thirty (30) days before the Fayette County Commission, or referring the matter for hearing before a Hearing Officer appointed by the Fayette County Commission. Hearings shall be recorded by electronic device or by court reporter. The West Virginia Rules of Evidence do not apply to the proceedings, but each party has the right to present evidence and examine and cross-examine all witnesses.

(d) Signing of Motions and Other Papers; Representations to County Commission or Its Appointed Hearing Officer; Sanctions:

(1) *Signing of pleadings and other papers.* Every pleading, motion and other paper submitted to the County Commission or to its appointed Hearing Officer 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.

(2) *Representations to or before the County Commission or its appointed Hearing Officer.* By presenting to the County Commission or its appointed Hearing Officer (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying 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.
- (3) **Sanctions:** If, after notice and a reasonable opportunity to respond, the Fayette County Commission or its appointed Hearing Officer, determines that subparagraph (2) of this Section 10(d) has been violated, the County Commission or its Hearing Officer, subject to the conditions stated below, may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subparagraph (2) of this Section 10(d) 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 Section 10(d) shall be made separately from other motions or requests and shall describe with particularity the specific conduct alleged to violate subparagraph (2) of this Section 10(d). 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 or its appointed Hearing Officer unless, within ten (10) days after service of the motion (or such other period as the County Commission or its appointed Hearing Officer may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the County Commission or its appointed Hearing Officer 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 or its appointed Hearing Officer:** On its own initiative, the County Commission or its appointed Hearing Officer may enter an order describing the specific conduct that appears to violate subparagraph (2) of this Section 10(d) and directing an attorney, law firm, or party to show cause why it has not violated Subparagraph (2) of this Section 10(d) with respect thereto.
- (4) **Nature of sanction; limitations:** A sanction imposed for violation of subparagraph (2) of this Section 14(f) 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 Commission or its appointed Hearing Officer, or, if imposed on motion of a party and warranted for effective deterrence, and 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 (2) of this Section 10(d).
- (6) **Order to Show Cause to precede dismissal or settlement.** Monetary sanction may not be awarded on the initiative of the County Commission or its appointed Hearing Officer unless the County Commission or its appointed Hearing Officer 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 subparagraph (2) of this Section 10(d), the County Commission or its appointed

Hearing Officer shall describe the conduct determined to constitute a violation of this subparagraph (2) of this Section 10(d) and explain the basis for the sanction imposed.

(e) Evidentiary Burdens: At any hearing held before the County Commission or its appointed Hearing Officer upon a motion authorized by this Section 10, Fayette County shall have the *prima facie* burden of proving that its Demand or Order is authorized by the terms of this Ordinance, thereafter, the respondent shall have the burdens of proof and persuasion as to its entitlement to the relief requested in its motion and as to any allegation set forth in its motion in support of the requested relief by a preponderance of the evidence and has the duty to go forward with the evidence.

(f) Findings of facts, determinations, and conclusions of law: At the conclusion of the hearing, or as soon thereafter as proper deliberation allows, the County Commission or its appointed Hearing Officer shall make findings of fact, determinations and conclusions of law with respect to all matters properly raised in Respondent's motion. The County Commission or its Appointed Hearing may require parties to Respondent's motion to submit proposed Findings of Fact and Conclusions of Law.

Section 11 – Representation of Respondent or Other Witness at Public Hearing:

At any proceeding held in the course of a **Public Nuisance** Formal Investigation Proceeding before the Fayette County Commission, or before its appointed Hearing Officer, the respondent(s) or any other witness who may give testimony or offer evidence in any such proceeding may appear in person or by attorney, either or both, and, after demonstrating to the satisfaction of the Commission or its Hearing Officer an appropriate, relevant and material need, may have compulsory process for the attendance of witnesses and the production of pertinent books and papers, if there are any. With leave from the Presiding Officer or Hearing Offer, which may be granted for good cause shown, other parties in interest may also appear and be heard under oath.

Section 12 – Final Action by County Commission:

An action by the Fayette County Commission: (a) issuing, declining to issue, or modifying in any way any requirement of a **Public Nuisance** Civil Investigation Order; or (b) issuing a Final Order on a motion filed pursuant to Section 10 of this Ordinance, is a Final Order of the County Commission.

Section 13 – Exhaustion of County and State Law Remedies Required:

Any **Person** who has been named as respondent in a Civil Information Demand or Civil Information Order served pursuant to this Ordinance that seeks from any court, governmental agency, or tribunal any relief that would as a practical matter have the effect of quashing, in whole or in part, or modifying all or any part of a Civil Information Demand or Civil Information Order properly served pursuant to this Ordinance must first timely raise such request before the Fayette County Commission by filing with the Fayette County Clerk a compliant motion pursuant to Section ___ of this Ordinance, and thereafter exhaust all of the remedies provided by law with respect to any ruling on such motion. Failure of any such Person under this Ordinance to exhaust the remedies available pursuant to this Ordinance and, thereafter, and thereafter, the remedies available pursuant to West Virginia law shall bar any request to any court, governmental agency, or tribunal for any relief that

would as a practical matter have the effect of quashing, in whole or in part, or modifying all or any part of a Civil Information Demand or Civil Information Order properly served pursuant to this Ordinance.

Section 14 – Judicial Review of Final Orders from Fayette County Commission:

Any application for judicial review of, and any appeal of, any final and binding decision of the Fayette County Commission on matters arising pursuant to this Ordinance, specifically including, but not limited to, any ruling imposing liability for civil penalties pursuant to Section 16 of this Ordinance, shall be to the Fayette County Circuit Court in accordance with the provisions of Article three, Chapter fifty-eight of the West Virginia Code.

Sec. 15 – Failure or Refusal to Comply with Civil Investigation Demand or Order:

(a) **Equitable Relief to Compel Compliance Authorized:** In case of the failure or refusal of any Person timely and fully to comply with an Civil Investigation Demand or a Civil Investigation Order properly served on such Person pursuant to this Ordinance, the Fayette County Prosecuting Attorney may, *sua sponte*, and shall, when directed by the Fayette County Commission, promptly commence and diligently prosecute a civil action in the name of the Fayette County Commission to invoke the aid of the Fayette County Circuit Court in securing compliance with the requirements of this Ordinance, and requesting the issuance and enforcement of appropriate injunctive and declaratory relief. Upon proper showing, the Fayette County Circuit Court shall issue an order requiring the respondent/defendant forthwith to comply with the Civil Investigation Demand or the Civil Investigation Order.

(b) **Equitable criteria for injunctive relief authorized by this Section 15:** In any civil action brought pursuant to this Section 15 in which a temporary restraining order, preliminary injunction, or partial or complete permanent injunction is sought, it shall not be necessary for Fayette County to allege or prove at any stage of the proceeding that irreparable damage will occur should the requested relief not be issued; or that there exists any absence of an adequate remedy at law, and the equitable relief authorized by this Ordinance shall issue upon proper proof without such allegations and proof of any irreparable injury or the absence of an adequate remedy at law.

(c) **Recovery of Fayette County's Attorney Fees and Litigation Costs:** At every significant stage of any civil action brought pursuant to Sections 15 or 16 of this Ordinance in which the Fayette County Commission is a prevailing party or substantially prevailing party on any of its claims for interim or final relief, Fayette County shall be entitled to an award of its reasonable litigation costs, including its 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.

Section 16 – Civil penalties:

(a) **Imposition of Civil Penalties:** Any Person who, after being properly served with a Civil Investigation Order pursuant to this Ordinance, fails or refuses timely and fully to comply with any requirement of this Ordinance or of any Civil Information Order issued pursuant to this Ordinance shall be liable to Fayette County for the civil penalty determined in accord with the provisions of this Section 16 to be credited to and deposited in the proper County Fund as directed by the Fayette County Commission.

(b) **Minimum and Maximum Amount of Civil Penalty:** The amount of the civil penalty

that may be imposed pursuant to this Section 16 is:

- (1) For any matters not governed by the provisions of Subparagraph (2) of this Subsection 16(b), not more than Twenty-five hundred dollars (\$2,500), but not less than five hundred dollars (\$500) per violation per each calendar day of violation;
- (2) for any violation of any provision of a Civil Investigation Order following resolution by the Fayette County Commission of any motion brought pursuant to Section 10 of this Ordinance by the respondent regarding such Order, 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 may be imposed 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 liability for civil penalties pursuant to this Section 16 may be imposed by the County Commission in a public proceeding before the County Commission commenced by the Fayette County Prosecuting Attorney filing a written complaint seeking imposition of civil penalties, and properly served in compliance with the provisions of Rule 4 of the West Virginia Rules of Civil Procedure on the respondent to the Civil Investigation Order alleged to be liable for civil penalties pursuant to this Section 16 of this Ordinance. Any civil action seeking imposition of civil penalties pursuant to this Section 16 may be brought by the Fayette County Prosecuting Attorney, *sua sponte*, and shall be brought by the Fayette County Prosecuting Attorney when so directed by the Fayette County Commission. A claim for imposition of a civil penalty pursuant to this Section 16 may be joined with an action for any other remedy available to the Fayette County Commission pursuant to federal or state law, or pursuant to this or any other Fayette County Ordinance.

(d) Determination of Amount of Civil Penalty: In determining the amount of any civil penalty to be imposed under this Section 16, the court or County Commission shall, at a minimum, impose a penalty amount not to exceed the maximum penalty and not to be less than the minimum penalty set forth in Section 16(b), and that:

- (1) will eliminate all economic benefit which has accrued to, and which is accruing, or will accrue to the liable party by reason of the failure or refusal to comply with the Civil Investigation Order giving rise to his liability and which fully reimburses the public for the harm and damage done to 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 during the period of any delay in the ability of Fayette County properly to respond to such **Public Nuisance** in whole or in part caused by the respondent's failure or refusal to comply with the Civil Investigation Order. Impossibility of substantial compliance, or the impossibility of quantifying the harm to the public health, safety or the **Environment**, does not bar the assessment of a civil penalty under this Section 16;
- (2) will appropriately reflect consideration of the liable party's degree of recalcitrance, the absence of good faith cooperation with the County, 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, safety, welfare or the **Environment**, or upon the public fiscal resources of Fayette County as a result of the need to undertake any enforcement action to achieve compliance with this Ordinance, or other costs, delays or expenses

occasioned by the noncompliance as factors requiring enhancement of the minimum penalty amount; and .

- (3) may mitigate the total amount of civil penalty calculated under subparagraphs (1) and (2) of this subsection (d) to reflect any part of the liable party's maintenance 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 with respect to the investigation and abatement of the known or suspected **Public Nuisance** to Fayette County and to other governmental enforcing agencies acting with their jurisdiction.

Section 17 – Criminal Penalties:

(a) **Imposition of Criminal Penalties:** Any Person committing any of the following specified offenses is guilty of a misdemeanor and, upon conviction thereof, shall be subject to the following criminal sanctions:

- (1) any Person who intentionally or with reckless disregard to the truthfulness of any matter asserted misrepresents any material fact in a response to a Civil Information Demand or Civil Information Order properly served pursuant to this Ordinance, or in any record, report, or other document filed or required to be maintained, produced or submitted under the provisions of this Ordinance or of any Demand or 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.
- (2) Any Person who, without good and proper cause, fails or refuses timely and completely to comply with any requirement of a Civil Investigation Order properly served pursuant to this Ordinance shall be fined not less than five hundred dollars (\$500) nor more than two thousand five hundred dollars (\$2,500), or imprisoned in a county or regional jail not more than sixty (60) days, or both fined and imprisoned.
- (3) Any Person who, without good and proper cause, fails or refuses timely and completely to comply with any requirement of a Civil Investigation Order properly served pursuant to this Ordinance after the Fayette County Commission has entered its Final Order on a motion brought by such Person pursuant to Section 10 of this Ordinance with respect to such Civil Information Order, which Final Order was not Stay issued by a court of competent jurisdiction, shall be fined not less than Five thousand dollars (\$5,000) nor more than seventy-five hundred dollars (\$7,500), or imprisoned in a county or regional jail not more than six (6) months, or both fined and imprisoned.
- (4) Any Person described in Section 5(d) of this Ordinance who discloses any information in violation of the prohibitions set forth in that section shall be fined not less than Five thousand dollars (\$5,000) nor more than ten thousand five hundred dollars (\$10,000), or imprisoned in a county or regional jail not more than nine (9) months, or both fined and imprisoned.

(b) **Courts of competent criminal jurisdiction:** Magistrate courts shall have concurrent jurisdiction with circuit courts to adjudicate matters pursuant to the provisions of this Section 17.

Section 18 - Provisions severable:

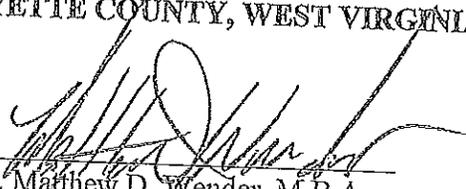
The several sections and subsections of this Ordinance are severable, and if any section or subsection hereof shall be held unconstitutional or otherwise invalid, all the remaining sections and subsections of the Ordinance shall nevertheless remain valid.

Section 19 - Effective Date:

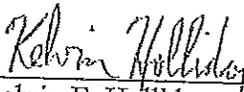
This Ordinance of Fayette County, West Virginia shall become effective on the 15th day of December, 2017

IT IS SO ORDAINED, RESOLVED AND ENACTED by majority vote of the County Commission of Fayette County, West Virginia this 15th day of December, 2017.

COUNTY COMMISSION
FAYETTE COUNTY, WEST VIRGINIA

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

ATTEST:



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