

CHAPTER 5: LIABILITY FOR ILLEGAL SOLID WASTE CONDITIONS – OPEN DUMPING ABATEMENT ACTIONS, RESPONSE ACTIONS, RECOVERY OF OPEN DUMPING ABATEMENT ACTION COSTS AND RESPONSE COSTS:

5.0 Civil Liability for Abatement of an Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance; Recovery of Open Dumping Abatement Action Costs or Response Costs:

- (a) 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 Rule, --
- (1) Any *Person* that creates, has caused or created, or threatens *Imminently* to cause or create an *Open Dump, Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* within Fayette County;
 - (2) Any *Person* that has contributed to, is contributing to, or threatens *Imminently* to contribute to an *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* within Fayette County;
 - (3) Any *Person* that *Knowingly* maintains, has maintained or threatens *Imminently* to maintain an *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* within Fayette County; or
 - (4) Any *Person* that, at any time during the creation or existence of an *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* within Fayette County, was an Owner or Operator of, or that owned or had control over the use of, any real property, site, or *Facility* at, on, in, from, or with which, an *Open Dump, Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* has been, is being, or imminently threatens to be, created or maintained, and, who, regardless of actual knowledge of the existence or nature of the nuisance condition, failed or refused appropriately to abate such *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* within Fayette County;
 - (5) Any *Person*, specifically including the any governmental entity, to the extent permitted by the United States and West Virginia Constitution, and including any past or present generator, past or present transporter, or past or present Owner or Operator of an *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* within Fayette County that has contributed or is contributing: (A) to the past or present handling, *Storage*, treatment, transportation, or *Disposal* of any *Solid Waste* within Fayette County which presents or 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 of any *Natural*

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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; or
(B) Solid Waste to an **Open Dump** within Fayette County;

- (6) Any **Person** that by contract, agreement, or otherwise arranged for **Disposal**, or arranged with a transporter for transport for **Disposal**, of a **Solid Waste** owned or possessed by such **Person** or by any other **Person**, at any **Open Dump** in Fayette County by another party or entity and containing such **Solid Waste**;
- (7) Any **Person** who accepts or accepted any **Solid Waste** for transport to an **Open Dump** in Fayette County selected by such **Person**, which presents or may present an **Open Dumping Public Nuisance**, 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; and
- (8) Any **Person** (including any past or present generator, past or present transporter, or past or present Owner or Operator of an **Open Dump**) that has contributed or is contributing to the past or present **Disposal** in Fayette County of any **Solid Waste** which presents, or which may present, an **Open Dumping Public Nuisance** or **Solid Waste Public Nuisance** and;

is liable for:

- (A) timely and effective performance at their cost of all **Open Dumping Abatement Actions** or **Response Actions** required by this Code of Rules appropriately to address, or respond to, or abate the **Open Dump**, **Open Dumping Public Nuisance** or **Solid Waste Public Nuisance** within Fayette County that is at issue;
 - (B) timely reimbursement to FCSWA of all **Open Dumping Abatement Action Costs** or **Response Costs** incurred or to be incurred by the FCSWA with respect to such **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance**, non-exclusively including all **Open Dumping Abatement Action Costs** incurred by the FCSWA to undertake, or to cause or compel any **Liabe Person** or **Potentially Liabe Person** to undertake, any **Open Dumping Abatement Action** or **Response Action** in compliance with the requirements of this Code of Rules, regardless of whether such costs are incurred prior to, during or following promulgation of this Code of Rules;
 - (C) such monitoring, testing, analysis and reporting at their cost as may be ordered by the FCSWA pursuant to **Rule 3.2** of this Code of Rules;
 - (D) such other damages to which FCSWA may be entitled by law.
- (b) **Affirmative defenses to liability:** There shall be no liability under **Rule 5.0(a)** of this Code of Rules 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 **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** giving

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rise to the liability at issue:

- (1) with respect to any *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance*, all of the acts or omissions of the Potentially Liable *Person* with regard to the *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* which cause that *Person* to fall within any of the categories of liable *Persons* set forth in Paragraphs (1) through (8), inclusive, of Subsection (a) of this Rule 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 Potentially Liable *Person* or of another Potentially Liable *Person*, or other than by one whose act or omission occurs in connection with a *Contractual Relationship*, existing directly or indirectly, with the Potentially Liable *Person* if the Potentially Liable *Person* 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 *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance*, taking into consideration the characteristics of such *Solid 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).

5.1 Liability Arising Out of Rendering Care or Advice:

- (a) **In general:** Except as provided in Subsection (c) of this Rule, no *Person* shall be liable to the FCSWA under this Code of Rules for any **Open Dumping Abatement Action**, recovery of any **Open Dumping Abatement Action Costs** or civil penalties as a result of actions taken or omitted in the course of rendering care, assistance, or advice regarding any existing or imminently threatened *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* in Fayette County:
 - (1) in accordance with the *National Contingency Plan* or **Chapter 6** of this Code of Rules or at the direction of an On-scene Coordinator or Site Project Manager appointed under such plan by the *Secretary*, the FCSWA, the Fayette County Code Enforcement Agency, or a court of competent jurisdiction; or
 - (2) at the direction of the Fayette County Commission, the Office of 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 or occurrence creating a

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danger to public health or welfare or the *Environment* within Fayette County. This **Paragraph (2)** shall not preclude liability imposed as the result of gross negligence on the part of such agent.

- (b) **State and local governments:** No State or local government shall be liable under this Code of Rules for an **Open Dumping Abatement Action, Response Action**, or recovery of **Open Dumping Abatement Action Costs, or Response Costs** as a result of actions taken in response to an emergency created by any existing or imminently threatened **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** within Fayette County generated by or from or in connection with an **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** a **Solid Waste Public Nuisance** owned, created, or contributed to by another *Person*. This Subsection (b) shall not preclude such liability 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.
- (c) **Savings provision:** This **Rule 5.1** shall not alter the liability of any *Person* liable pursuant to the provisions of **Rule 5.0(a)(1)** through **(4)**, inclusive, with respect to the **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** concerned.

5.2 Liability of Subsequent Owner or Operator: A subsequent Owner of, or *Person* with the authority to control the use of, any real property or *Facility* described in **Rule 5.0(a)(4)** of this Code of Rules shall be liable to the same extent as the *Person* who owned or controlled such real property, site or *Facility* at the time when such **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** in Fayette County was created, so long as such **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** in Fayette County or any *Endangerment* of the Public Health, Safety, Welfare, or the *Environment* within Fayette County resulting, in whole or in part, from such **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** in Fayette County remains unabated.

5.3 Standard of Civil Liability: Unless otherwise expressly indicated, the standard of civil liability imposed by this Code of Rules is strict liability, without regard to any element of *mens rea*, fault, negligence, knowledge, or other wrongdoing.

5.4 Scope of Civil Liability: When two or more *Persons* liable for abatement of an **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** in Fayette County pursuant to this Code of Rules, which **Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance** in Fayette County 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 *Person* for such **Open**

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Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance in Fayette County the harm(s) presented or imminently threatened by the *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* in Fayette County, each such *Person* shall be jointly and severally liable for appropriate abatement of the *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* in Fayette County, reimbursement to the FCSWA of all *Open Dumping Abatement Action Costs* or *Response Costs* incurred and to be incurred by the FCSWA with respect to such *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* in Fayette County. Any Potentially Liable *Person* seeking to apportion such harm must prove by a preponderance of the evidence that:

- (a) the component of the harm which is sought to be apportioned is scientifically and technologically susceptible to reasonable and reliable apportionment;
- (b) that there is a reasonable and practicable basis for apportioning the harm; and
- (c) 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 FCSWA.

5.5 Effect of indemnification, Hold Harmless, etc. Agreements on Liability Imposed by this Code of Rules; Subrogation Rights:

- (a) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from any Owner or Operator of any *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* in Fayette County or any *Facility*, site, or real property described in Rule 5.0(4), or from any *Person* who is or may be liable under this Code of Rules, to any other *Person* the liability imposed under this Code of Rules. Nothing in this Rule shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Code of Rules.
- (b) Nothing in this Code of Rules, including the provisions of **Subsection (a)** of this Rule, shall bar a cause of action that an Owner or Operator or any other *Person* subject to liability under this Code of Rules, or a guarantor or insurer of any such *Person*, has or would have, by reason of subrogation or otherwise against any *Person*.

5.6 Direct Action Against Indemnitor or Insurer of a Liable or Potentially Liable Person:

- (a) **Allowed in certain cases:** In any case or circumstance identified in **Subsection (d)** of this **Rule 5.6**, the liability of any *Person* arising under this Code of Rules may be asserted directly against the *Indemnitor or Insurer* of such *Person*; provided, however:
 - (1) in the case of any claim or action pursuant to this Rule, such *Indemnitor or Insurer* is entitled to invoke or assert all rights, claims, and defenses:

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- (A) 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 the FCSWA; and
 - (B) 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
- (2) the total liability of any *Indemnitor or Insurer* of any such Liable or Potentially Liable *Person* under this Code of Rules 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 (2) 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.
- (b) **Judgment in Direct Action enforceable only against available proceeds or limits of coverage; Exception:** Unless properly joined with a claim authorized by Subsection (c) of this Rule, a judgment in the favor of the FCSWA in any action brought pursuant to this Rule directly against the *Indemnitor or Insurer* of any Liable or Potentially Liable *Person*, non-exclusively including any deceased individual, the estate of any decedent, or any dissolved or defunct business entity, is enforceable only from the indemnification proceeds or other available insurance coverage, and not against other property of such *Person* or such *Indemnitor or Insurer*.
- (c) **Joinder with other specified claims authorized:** Any claim asserting any liability arising under this Code of Rules directly against the *Indemnitor or Insurer* of any Liable or Potentially Liable *Person*, non-exclusively including any deceased individual, the estate of any decedent, or any dissolved or defunct business entity, may be joined with a claim under applicable law seeking recovery of any undistributed assets, other than insurance assets or third-party indemnification proceeds, of such *Person*.
- (d) **Cases in which a Direct Action is authorized:** A Direct Action authorized by this Rule may be brought by the FCSWA only in any case or circumstance where a *Person* Liable or Potentially Liable under this Code of Rules is:
- (1) in bankruptcy reorganization, or arrangement pursuant to the federal bankruptcy code;
 - (2) is a dissolved or defunct business organization of any kind;
 - (3) is a deceased individual or the estate of a decedent; or

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- (4) 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.
- (e) **Savings Provision:** Nothing in this **Rule 5.6** diminishes the liability of any **Person** under other applicable law.

5.7 Settlement of Joint and Several Civil Liability Imposed by this Code of Rules; Effect of Settlement:

- (a) **Protection against contribution claims for Matters Addressed by a Binding Settlement; Effect of settlement:** A *Person* who is alleged to be, or has been found to be, jointly and severally liable pursuant to this Code of Rules, 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 derivative liability, specifically including any claims for contribution, comparative equitable indemnity, equitable indemnity, or any other "fair share" claims seeking any recovery of any damages, apportionment of any *Open Dumping Abatement Action Costs, Response Costs*, or equitable relief arising under this Code of Rules, or for civil penalties arising under WVSWMA Section 15(d), W. Va. Code § 22-15-15(d), sought by the FCSWA, regardless of how such claims, costs, damages, civil penalties, or apportionment may be denominated, that arise out of or relate directly or indirectly to the "Matters Addressed by a *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.
- (b) **Protection Against Contribution Claims for "Matters Addressed by a Confirmed Settlement;" Effect of Settlement:** A *Person* who is alleged by the FCSWA to be, or has been found to be, jointly and severally liable pursuant to this Code of Rules, and who has resolved its liability to the FCSWA in a *Confirmed Settlement* shall not be liable for claims for derivative liability, specifically including any claims for contribution, comparative equitable indemnity, equitable indemnity, or any other "fair share" claims seeking any recovery of any damages, apportionment of any *Open Dumping Abatement Action Costs, Response Costs*, or civil penalties sought or recovered by the FCSWA, or apportionment of any equitable relief arising under this Code of Rules, regardless of how such claims, costs, damages, civil penalties, or equitable relief may be denominated, brought by any *Person* that arise out of, or relate directly or indirectly to the "Matters Addressed by a *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.
- (c) **Rights of Settling Party:** A **Person** who has resolved its liability to the FCSWA for

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performance of some or all of an *Open Dumping Abatement Action* or *Response Action*, or for recovery of some or all of the *Open Dumping Abatement Action Costs*, *Response Costs* with respect to an *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* in Fayette County in a *Confirmed Settlement* may seek contribution from any jointly and severally liable *Person* that is not party to a *Confirmed Settlement*.

- (d) **Rights of Settling Party Subordinate to FCSWA's Rights:** In any action seeking contribution, "fair share" recovery, or comparative equitable indemnity with respect to any liability imposed pursuant to any provision of this **Chapter 5**, the rights of any *Person* who has resolved its liability to FCSWA shall be subordinate to the rights of the FCSWA.

5.8 Period within which civil actions for recovery of costs incurred or to be incurred by FCSWA may be brought: An initial action for recovery of *Open Dumping Abatement Action Costs* or *Response Costs* pursuant to this Code of Rules must be commenced within two (2) years of the completion of all selected and approved *Open Dumping Abatement Actions* or *Response Actions* for the *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* in Fayette County, or the *Facility*, site or real property being addressed with respect to the *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* in Fayette County at issue.