

FAYETTE COUNTY SOLID WASTE AUTHORITY
(an Agency and Instrumentality of the State of West Virginia)

CODE OF RULES

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CHAPTER 2: DEFINITIONS:

RULE 2.0 The following definitions shall apply for purposes of, and shall govern, interpretation, application, and enforcement of this **Fayette County Solid Waste Authority** Code of Rules, and shall be understood and construed, together with the context in which these defined terms are used in this Code of Rules, to set forth the intent of the **Fayette County Solid Waste Authority** (“FCSWA”). 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. **Terms that are defined in this Rule are indicated throughout this Code of Rules by both bolding and initial capitalization of each operative word, and are intended to have the meaning assigned to them in this Rule.**

2.1 Applicable Requirement: The term "**Applicable Requirement**" means those site or *Facility* cleanup, *Abatement Action*, or *Response Action* criteria, standards of control, and other substantive legal requirements, criteria, or limitations set forth in federal or West Virginia statutes, or in regulations duly promulgated pursuant to rulemaking authority conveyed by a federal or West Virginia environmental or public health protection or facility siting law that specifically address requirements for any *Response Action* to or for any site or *Facility* at or from which there is a *Release* or threatened *Release* of a *Hazardous Substance*, *Solid Waste*, or *Pollutant and Contaminant*, or at or from which an *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* is or may be presented or from which any such **Public Nuisance** is or may be emanating, non-exclusively including for those *Abatement Action(s)* or *Response Action(s)* that are subject to the requirements set forth in **Chapter 6** of this Code of Rules, all of the requirements of **Chapter 6** of this Code of Rules applicable to any such Action(s).

2.2 Binding Settlement: The term "**Binding Settlement**," as used in this Code of Rules, means a good faith settlement of all, or any part, of any liability or obligation that arose, is arising, or may arise, in whole or in part, pursuant to this Code of Rules, which settlement, considering all appropriate factors and circumstances, has been:

- (a) negotiated in good faith;
- (b) is fair and reasonable under all attendant circumstances;
- (c) properly effectuates the remedial purposes and goals of West Virginia Solid Waste Management Plan that has been approved by the U.S. Environmental Protection Agency pursuant to **RCRA** Subtitle D, 42 U.S.C. §§ 69441 – 4949a, and its principal statutory and regulatory components, the W. Va. Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15, the W. Va. County and Regional Solid Waste Authorities Act, W. Va. Code, Chapter 22C, Article 4, the W. Va. Solid Waste Management Rule,

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W. Va. C.S.R., Chapter 33, Series 1, and the duly adopted Fayette County Solid Waste Authority Comprehensive Plan; and

(d) has either been:

- (1) reduced to, and is wholly contained in, a writing subscribed to by all parties to the settlement; or
- (2) all material terms of the settlement have been recited on the record and agreed to on the record by all parties to the settlement before either:
 - (i) a duly noticed Public Meeting of the FCSWA; or
 - (ii) a public session of a court of record of competent jurisdiction in a civil action in which the FCSWA has asserted claims pursuant to any provisions of this Code of Rules, whichever is applicable.

2.3 CERCLA: Consistent with its meaning in federal law, the term "**CERCLA** means 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, as the same may be amended from time to time.

2.4 CLASS 1 OPEN DUMP: The term "**Class 1 Open Dump**" means any *Open Dump*, the majority of the spatial area of which is located within Fayette County or that causes, or contributes to an *Imminent* and *Substantial Endangerment* to the Public Health, Safety, Welfare or the *Environment* within Fayette County, with respect to which the FCSWA has reasonable grounds to believe:

- (a) the *Open Dump* has resulted in or contributed to, or which is resulting in or contributing to, the *Release* of a *Hazardous Substance*, *Toxic Solid Waste*, or *Leachate* containing any constituent of such *Hazardous Substances*, or *Toxic Solid Waste* into:
 - (1) any surface *Waters of the State*; or
 - (2) into the *Environment*, specifically including any groundwaters, beyond the boundaries of the parcel(s) of the real property upon which such *Open Dump* is located; or
- (b) the *Open Dump* has resulted in or contributed to, or which is resulting in or contributing to an *Open Dumping Public Nuisance* or within Fayette County.

2.5 CLASS 2 OPEN DUMP: The term "**Class 2 Open Dump**" means any *Open Dump*, the majority of the spatial area of which is located within Fayette County, or that causes, or contributes to an *Open Dumping Public Nuisance* within Fayette County, with respect to which the FCSWA has reasonable grounds to believe such *Open Dump* has resulted in or contributed to, or which is resulting in or contributing to, the *Release* of *Hazardous Substances*, *Solid Waste*, or *Leachate* containing any constituent of such *Hazardous Substances*, or *Solid Waste* into the *Environment* or *Waters of the State*, all known or reasonably suspected significant impact of which is likely to be realized before the time required to complete adequate abatement of such *Open Dump* solely within the boundaries of

the parcel(s) of real property upon which such *Open Dump* is located.

- 2.6 CLASS 3 OPEN DUMP:** The term “**Class 3 Open Dump**” means any *Open Dump*, the majority of the spatial area of which is located within Fayette County, or that causes, or contributes to an *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* within Fayette County, which the FCSWA has reasonable grounds to believe is composed in any significant part by *Toxic Solid Waste* or *Toxic Pollutants and Contaminants*, but with respect to which *Open Dump* the FCSWA neither knows nor has reasonable grounds to suspect that it has caused or is causing any significant *Release(s)* of such *Toxic Solid Waste* or *Toxic Pollutants and Contaminants* into *Waters of the State* or into the *Environment* beyond the boundaries of the parcel(s) of real property upon which such *Open Dump* is located.
- 2.7 CLASS 4 OPEN DUMP:** The term “**Class 4 Open Dump**” means any *Open Dump*, the majority of the spatial area of which is located within Fayette County or that causes, or contributes to an *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* within Fayette County, which the FCSWA neither knows nor has no reasonable grounds to suspect:
- (a) contains any significant amount of any *Hazardous Substances*, or *Toxic Solid Waste*; and
 - (b) has been the source of, or has contributed to, any significant past *Release* of any *Hazardous Substances*, or *Toxic Solid Waste*.
- 2.8 Clean Water Act or CWA:** Consistent with their meaning in federal law, the terms “**Clean Water Act**” or “**CWA**” each means the Federal Water Pollution Control Act, as amended by the Clean Water Act, 33 U.S.C. §§ 1251 – 1388.
- 2.9 Compliance Schedule or Compliance Order** The terms “**Compliance Schedule**” and “**Compliance Order**” each means a “**Compliance Schedule**” issued by the *Secretary* pursuant to the W. Va. Solid Waste Management Act, W. Va. Code § 22-15-10 and in compliance with the W. Va Solid Waste Management Rule, W. Va. C.S.R. § 33-1-7.3., authorizing a solid waste facility to operate without a solid waste permit.
- 2.10 Confirmed Settlement:** The term “**Confirmed Settlement**” means a *Binding Settlement* that fully and finally resolves all, or any part, of any joint and several liability or obligation that arose, is arising, or may arise, in whole or in part, pursuant to this Code of Rules reached between the FCSWA, acting alone or in cooperation with the West Virginia Department of Environmental Protection, the Fayette County Commission, Fayette County Code Enforcement Agency, Fayette County Board of Health, or Fayette County Urban Redevelopment Authority, and any responsible or potentially responsible party in connection with either of the following:
- (a) *Extra-Judicial Claims or Matters:* The settlement applies to any site or matter with respect to which any related claims of FCSWA are **not** then pending before any court of

competent jurisdiction, and the material terms of such settlement have been:

- (1) reduced to, and is wholly contained in, a writing by all parties to the settlement; or
- (2) recited on the record and agreed to on the record by all parties to the settlement before a duly noticed, public meeting of the **FCSWA**, or

(b) **Judicial Claims or Matters:** The settlement applies to any site or matter with respect to which any related claims of the **FCSWA** arising under this Code of Rules are pending before any court of record of competent jurisdiction, and the material terms of such settlement have been:

- (1) reduced to, and are wholly contained in, a writing subscribed to by all parties to the settlement; or
- (2) recited and agreed to on the record before such court in open and public session;

Whether confirmation of such **Binding Settlement** is pending before the **FCSWA** or a court of competent jurisdiction, prior to formally moving either the **FCSWA** or a court of competent jurisdiction for formal confirmation of the settlement as a **Confirmed Settlement**, the settling parties have timely completed all of the following:

- (A) the parties to the settlement for which confirmation is sought have lodged a complete copy of the written settlement, or, if the settlement has not been reduced to writing, a complete copy of the record of proceedings reflecting the recitation of the material terms of the settlement with either the **FCSWA** or the Clerk of the Court, whichever is applicable; and
- (B) the settling parties have provided appropriate public notice in at least one (1) newspaper of general circulation in Fayette County of the commencement of a public comment period of not less than ten (10) days during which any interested member of the public may submit comments on the proposed settlement to either the **FCSWA** or the court and the settling parties (or, if any of them are represented by legal counsel, the legal counsel of record for such settling party) which notice, at a minimum, contains all of the following information:
 - (i) a concise summary of the material terms of the proposed settlement;
 - (ii) a concise description of the legal effect, if any, that formal confirmation of the proposed settlement of the proposed settlement would have on any non-settling, jointly and severally liable or potentially liable **Person**;
 - (iii) if the proposed settlement is pending before the **FCSWA**, notification of the right of any **Person** claiming an interest relating to the proposed settlement who is so situated that the approval of the proposed settlement may as a practical matter impair or impede the ability of such **Person** to protect its interest, to request by appropriate motion leave to intervene as a party in the proceedings before the **FCSWA** (or before a Hearing Officer appointed by **FCSWA**) to consider approval of the proposed settlement; and

- (iv) if the proposed settlement is pending before a court of competent jurisdiction, notification of the right of any *Person* to seek, by appropriate motion to the court and such proof of their entitlement to any relief requested as may be required pursuant to the applicable rules of civil procedure, leave to intervene, either on a permissive basis or as a matter of right, as a party to the proceedings before the court regarding the proposed settlement.

At or before the time they request either the **FCSWA** or a court of competent jurisdiction, whichever is appropriate, to formally confirm the proposed settlement as a **Confirmed Settlement** pursuant to this Code of Rules following a noticed, public hearing on such request, the settling parties have provided the **FCSWA** or the court with a "Responsiveness Summary," which set forth a complete and concise summary of all public comments on the proposed settlement timely received and, as appropriate, the concise response of the settling parties to public comments received, and provide to the **FCSWA** or to the court proof of the service of that "Responsiveness Summary" on the parties to the proceeding and on each **Person** who timely submitted a public comment on the proposed settlement.

2.11 Contractual Relationship:

- (a) For the purposes of Rule 2.0(b)(1)(C) of this Code of Rules, the term "**Contractual Relationship**," includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the **Open Dump** or **Solid Waste Facility** concerned is located was acquired by the defendant after the **Disposal** or placement of the **Solid Waste** on, in, or at the **Open Dump** or **Solid Waste Facility**, and one or more of the circumstances described in Paragraphs (1) through (3) of this Subsection (a), inclusive, is also established by the respondent/defendant by a preponderance of the evidence:
 - (1) at the time the defendant acquired the **Facility** the defendant did not know and had no reason to know that any **Solid Waste** to which any part of the **Abatement Action** is addressed was disposed of on, in, or at the **Open Dump** or **Solid Waste Facility**;
 - (2) the defendant is a **Government Entity** which acquired the **Open Dump** or **Solid Waste Facility** by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation;
 - (3) the defendant acquired the **Open Dump** or **Solid Waste Facility** by inheritance or bequest.
- (b) In addition to establishing the elements set forth in Subsection (a) of this Rule, the defendant must establish that it has satisfied the requirements of Rule 2.0(b)(1)(C)(i) and (ii), provides full cooperation, assistance, and **Facility** access to the **FCSWA** and all **Persons** that are authorized by the **FCSWA** to conduct **Response** actions at the **Facility** (including the cooperation and access necessary for the installation, preservation of the integrity, operation, and maintenance of any complete or partial **Response** action at the

Open Dump or *Solid Waste Facility*), is in compliance with any land use restrictions established or relied on in connection with the *Response* action at an *Open Dump* or *Solid Waste Facility*, and does not impede the effectiveness or integrity of any *Institutional Control(s)* employed at the *Facility* in connection with an *Open Dumping Abatement Action*.

- (c) "Reason to know," as that term is used in **Subsection (a)(1)** of this Rule, means that the defendant can establish by clear and convincing evidence that it had no reason to know of the matter described in Subsection **(a)(1)** of this Rule:
- (1) on or before the date on which the defendant acquired the *Open Dump* or *Solid Waste Facility*, the defendant carried out all appropriate inquiries pursuant to the standards and requirements set forth in 40 CFR, Part 312, *Standards for Conducting All Appropriate Inquiries*, as the same may be amended or re-promulgated from time to time; and
 - (2) the defendant took reasonable steps to:
 - (A) stop any continuing *Release*;
 - (B) prevent any threatened future *Release*; and
 - (C) prevent or limit any human, environmental, or natural resource exposure to any previously *Released Solid Waste*.

2.12 Discharge: Consistent with its definition in the federal Hazardous Waste Management regulations codified at 40 C.F.R. § 260.10, the term “**Discharge**,” as used in this Code of Rules, means the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a *Solid Waste, Pollutant or Contaminant*, or *Leachate* into or on any land or water.

2.13 Disposal: Consistent with its definition in *RCRA* § 1004(23), 42 U.S.C. § 6903(23) and in Section 2.43 of the W. Va. Solid Waste Management Rule (“WVSWMR”), W. Va. C.S.R. § 33-1-2.43, the term “**Disposal**,” as used in this Code of Rules, means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any *Solid Waste* into or on any land or water so that such *Solid Waste* or any constituent thereof may enter the *Environment* or be emitted into the air or *Discharged* into any waters, including ground waters.

2.14 Environment: The term "**Environment**," as used in this Code of Rules, means any surface water, groundwater, soil water, drinking water supply, soil, land surface, subsurface strata, or ambient air within Fayette County, West Virginia.

2.15 Facility: Consistent with its definition in *CERCLA* § 101(9), 42 U.S.C. § 9601(9), the term "**Facility**," as used in this Code of Rules, means:

- (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, cave, tunnel, mine, mine shaft, landfill, storage container, motor vehicle, rolling stock, ship, boat, vessel, barge, or aircraft; or

- (b) any site or area where a *Solid Waste*, or *Pollutant or Contaminant* has been deposited, stored, *Disposed* of, placed, or otherwise has come to be located, but does not include any consumer product in consumer use.

2.16 Fayette County Solid Waste Authority: The terms “**Fayette County Solid Waste Authority**” and “**FCSWA**” each means the agency and instrumentality of the State of West Virginia created by W. Va. Code § 22C-4-3(a) and authorized by the General Law of West Virginia as set forth in W. Va. Code, Chapter 22C, Article 4 to exercise its jurisdiction within the territorial boundaries of Fayette County, West Virginia.

2.17 Hazardous Substance: Consistent with its definition in *CERCLA* § 101(14), 42 U.S.C. § 9601(14), the term "**Hazardous Substance**," as used in this Code of Rules, means:

- (a) any substance designated pursuant to *CWA* § 311(b)(2)(A), 33 U.S.C. § 1321(b)(2)(A);
- (b) element, compound, mixture, solution, or substance designated pursuant to *CERCLA* § 102, 42 U.S.C. § 9602;
- (c) any *Hazardous Waste* having the characteristics identified under or listed pursuant to RCRA § 3001, 42 U.S.C. § 6921, (but not including any waste the regulation of which under *RCRA* has been suspended by Act of Congress);
- (d) any toxic pollutant listed under *CWA* § 307(a), 33 U.S.C. § 1317(a);
- (e) any hazardous air pollutant listed under Section 112 of the federal Clean Air Act, 42 U.S.C. § 7412; and
- (f) any imminently hazardous chemical substance or mixture with respect to which the Administrator of the United States Environmental Protection Agency has taken action pursuant to Section 7 of the Toxic Substances Control Act, 15 U.S.C. § 2606;

The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *Hazardous Substance* under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). However, the term does include all combinations or mixtures of, or compounds of, a *Hazardous Substance*, as the definition of 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*.

2.18 Imminent. The term "**Imminent**," when modifying the terms "*Endangerment*," "*Open Dumping Public Nuisance*," "*Solid Waste Public Nuisance*," "threat," "threaten" or "risk" within this Code of Rules means:

- (a) an *Endangerment*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* that is present or is currently realized; or

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(b) an *Endangerment, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* that may become present or may be realized, even if such *Endangerment* may not become present or be realized in the near future.

The term “**Imminent**,” as used in this Code of Rules, does not require a showing that actual harm is occurring or will occur either immediately or in short order, so long as the risk of threatened harm is present or may be realized in the future.

2.19 Indemnitor or Insurer: The terms "**Indemnitor or Insurer**" each means any **Person** who provides by contract or otherwise any guarantee or indemnification of any liable or potentially liable party, or who provides partial or full defense or indemnification to a potentially liable party, which guarantee, indemnification, or policy of insurance does or may provide coverage for any claims of the FCSWA against any liable **Person** or potentially liable **Person** as a result of such **Person's** act, omission or legal liability with respect to any occurrence(s) that gives rise to the liability or potential liability of such **Person** under this Code of Rules 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 damages of any kind recoverable by the FCSWA with respect to any *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*, or any *Imminent and Substantial Endangerment* to the Public Health, Safety, Welfare or the *Environment* within Fayette County arising, in whole or in any substantial part from any such *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*.

2.20 Institutional Controls: The term "**Institutional Controls**" means non-engineered instruments, such as legislative, administrative, or judicial legal controls, that help to minimize the potential for human or adverse ecological exposure to contamination or protect the integrity and effectiveness of an *Open Dumping Abatement Action* by limiting land or resource use. Examples of **Institutional Controls** include easements and restrictive covenants, zoning restrictions, special building permit requirements, and well drilling restrictions or prohibitions.

2.21 Knowingly: The term "**Knowingly**" means only a knowledge that the facts exist which brings the act, omission, or condition within any applicable provision of this Code of Rules. As used in this Code of Rules, 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 Code of Rules, a **Person** acts knowingly if he proceeds without knowledge of any fact which the law, including any provision of this Code of Rules, imposes an affirmative obligation to know or ascertain.

2.22 Leachate: Consistent with its definition in 40 C.F.R. § 257.2 and in WVSWMR Section 2.66, W. Va. C.S.R. § 33-1-2.66, the term "**Leachate**" means any liquid that has come into contact with, passed through or emerged from *Solid Waste* and contains soluble, suspended,

or miscible materials removed from such waste.

2.23 National Contingency Plan or NCP: Consistent with their meaning in federal, state and local environmental and public health protection laws, the terms "**National Contingency Plan**" or "**NCP**" each means the National Oil and Hazardous Substances Pollution Contingency Plan formally promulgated by the U.S. Environmental Protection Agency in accordance with **CWA** § 311, 33 U.S.C. § 1321, and **CERCLA** § 105, 42 U.S.C. § 9605, and codified at 40 C.F.R., Part 300, as the same may be amended or repromulgated from time to time, which plan, as referenced in and for purposes of construing and applying the provisions of this Code of Rules, shall be interpreted, read and understood, unless the context unambiguously requires otherwise, as the **FCSWA** having the discretion therein assigned to the U.S. Environmental Protection Agency (or any Officer or Agent of it), and being and acting in every regard as the "Lead Agency."

2.24 The term "**Natural Resources**" shall mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources within Fayette County belonging to, managed by, held in trust by, appertaining to, or otherwise controlled or protected by the State of West Virginia or Fayette County, or subject, in whole or in part, to the jurisdiction of the State of West Virginia or Fayette County, excepting only:

- (a) such natural resources within Fayette County with respect to which the Governor of West Virginia, acting pursuant to his lawful authority under **CERCLA** § 107(f)(2)(B), 42 U.S.C. § 9607(f)(2)(B) or the Constitution and statutes of the State of West Virginia, is acting on behalf of the public as a trustee, or has appointed anyone, other than the **FCSWA** exclusively to act on behalf of the public with respect to the assessment and collection of natural resource damages under **CERCLA** or the laws of the State of West Virginia with respect to such natural resources; and
- (b) such natural resources within Fayette County with respect to which the General Law of West Virginia vests exclusive authority to act on behalf of the public with respect to the protection of, or the assessment and collection of damages for loss of or injury to, such natural resources in a **Person** other than the **FCSWA**, and which General Law evidences a legislative intent that such exclusive authority can or should be exercised outside the traditional context of the Public Trust Doctrine.

2.25 Open Dump: Consistent with its definition in **RCRA** § 1004(14), 42 U.S.C. § 6903(14), 40 C.F.R. § 257.2, and in Section 2.84 of the W. Va. Solid Waste Management Rule ("WVSWMR"), W. Va. C.S.R. § 33-15-2.84, the term "**Open Dump**" means:

- (a) any **Facility** or site where **Solid Waste** is **Disposed** of which is not a sanitary landfill that meets the criteria set forth in 40 C.F.R., Part 257, non-exclusively including any **Facility(ies)** failing to satisfy any of the criteria in 40 C.F.R. §§ 257.1 through 257.4 or §§ 257.5 through 257.30 or §§ 257.50 through 257.107, as the same may be amended or repromulgated from time to time, and which is not a **Facility** that requires a permit for **Disposal** of hazardous waste; or

- (b) any *Solid Waste Disposal Facility* or site that does not have a permit under *W. Va. Code §22-15-1 et seq.*, and is not otherwise authorized by an order of the *Secretary*; or is in violation of state law, non-exclusively including the *W. Va. Solid Waste Management Rule, W. Va. C.S.R., Chapter 33, Series 1*; or where *Solid Waste* is disposed in a manner that does not protect the environment.

2.26 Open Dumping Abatement Action: The term "**Open Dumping Abatement Action**" means any *Response* action, non-exclusively including any *Removal Action* or *Remedial Action*, or other activities undertaken to *Respond* to an existing or *Imminently* threatened *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*, to the *Release* or threatened *Release* of any *Solid Waste, or Pollutant or Contaminant* into the *Environment* at, from, or in connection, in whole or in any part, with an *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* in or adversely effecting Fayette County, non-exclusively including all the following activities:

- (a) the investigation, study, analysis, or assessment of the nature and extent of any known or suspected *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*, within or affecting Fayette County;
- (b) the analysis, selection, design, implementation and periodic review of suitable methodology and technology for the conduct of a comprehensive remedial investigation in compliance with the requirements of this Code of Rules, the assessment of the qualifications of, and retention of, appropriate scientific, legal, and technical personnel determined by the *FCSWA* to be necessary or appropriate to the effective conduct of a remedial investigation by the *FCSWA* or to the effective oversight and monitoring by the *FCSWA* of a remedial investigation being performed by or on behalf of any *Person(s)* Liable for investigation and abatement of an *Open Dump or Open Dumping Public Nuisance or Solid Waste Public Nuisance*, and the creation, review, finalization, and implementation of the comprehensive work plan for the appropriate remedial investigation approved by the *FCSWA* or, where appropriate, a court of competent jurisdiction;
- (c) 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 Code of Rules; 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 *FCSWA*, or to the effective oversight and monitoring of a feasibility study being performed by or on behalf of any *Person* liable for the investigation and abatement of an *Open Dump, Open Dumping Public Nuisance or Solid Waste Public Nuisance*, and the creation, development through the review and comment process determined appropriate by the *FCSWA*, finalization, and implementation of the comprehensive work plan for the appropriate feasibility study approved by the *FCSWA* or, where appropriate, a court of

competent jurisdiction;

- (d) The development and implementation of an *Open Dump, Open Dumping Public Nuisance* or *Solid Waste Public Nuisance*/Public Health *Endangerment Abatement Action* Plan that adequately and timely protects, or restores to the maximum extent practicable:
 - (1) adequate protection of the public health, safety, welfare, and the *Environment*;
 - (2) the reasonable, customary, and safe uses and enjoyments of natural resources within Fayette County; and
 - (3) current and potential beneficial uses of environmental media within Fayette County owned or held in trust for the benefit of present and future generations of the public;
- (e) Such actions as are necessary and proper for the FCSWA to implement, and to evaluate the effectiveness of, any of the activities listed in this Rule or Chapter 6 of this Code of Rules, whether those activities were implemented, in whole or in part, by the FCSWA or by any other *Person*;
- (f) Such actions as are necessary and proper in the judgment of the FCSWA or, where appropriate, a court of competent jurisdiction to provide comprehensive and effective oversight and monitoring of the performance of any *Open Dumping, Open Dumping Public Nuisance* or *Solid Waste Public Nuisance Abatement Action(s)* being undertaken by a liable *Person* that has been approved by the FCSWA as capable of implementing an approved *Removal Action* or *Remedial Action* as part of a *Response* to an *Open Dump, Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance*, or that has been ordered by a court to perform an *Open Dumping Abatement Action*, or both such actions, with respect to any *Open Dump, Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* within or affecting Fayette County;
- (g) Such actions as are necessary and proper for the FCSWA or, where appropriate, a court of competent jurisdiction effectively to coordinate and cooperate with the lawful actions of appropriate agencies of the United States, West Virginia, or Fayette County governments in responding to any *Open Dump, Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* within or affecting Fayette County;
- (h) All enforcement activities determined by the FCSWA to be necessary or proper to effectuate the remedial purposes of this Code of Rules, or to secure the timely and effective performance of any *Open Dumping Abatement Action* pursuant to this Code of Rules.

2.27 The term "**Open Dumping Abatement Action Costs**" means any fees and costs incurred and to be incurred by the FCSWA that in the judgment of the FCSWA are necessary or proper in performing or preparing to perform an *Abatement Action*, which shall non-exclusively include, the following costs incurred or to be incurred by FCSWA:

- (a) costs incurred for expert assistance in health, law, engineering, geology, and environmental science, expert witness services and legal fees (including, but not limited

to, directly related internal costs to FCSWA, non-exclusively including overhead and related administrative costs of the FCSWA, and the fees and costs of any retained legal counsel, scientific, engineering, or technical expert or assistant(s) deemed necessary and proper in the judgment of the FCSWA to study, investigate, abate, **Remove**, remediate or **Respond** to an actual or threatened **Open Dump**, **Open Dumping Public Nuisance**, **Solid Waste Public Nuisance**, or any **Endangerment** to the Public Health, Welfare, Safety, or the **Environment** that may be presented by an actual or threatened **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance**, or to seek enforcement of any law, specifically including any provision of this Code of Rules, to secure adequate protection of the Public Health, Safety, Welfare or the **Environment** within Fayette County with respect to any actual or threatened **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance**, any existing or imminently threatened **Endangerment** to the Public Health, Welfare, Safety, or the **Environment** that is presented or may be presented, in whole or in part, by any **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** within or adversely effecting Fayette County, non-exclusively including all FCSWA enforcement costs incurred or to be incurred related thereto;

- (b) costs incurred to investigate or respond to the existence or imminent threat of an **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** within Fayette County;
- (c) costs incurred to monitor, assess or evaluate an **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** or any condition that presents or may present an **Endangerment** to the public health, safety, welfare, or to the **Environment** arising, in whole or in any **Substantial** part, from **Release**, **Discharge** or **Disposal** of **Solid Waste**;
- (d) costs incurred to prevent, minimize, or mitigate any **Endangerment** to the public health, safety, welfare or the **Environment** that may be presented by an actual or threatened **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** within, or adversely impacting on the public or any **Natural Resources** within, Fayette County;
- (e) costs incurred to oversee and monitor the performance by any Liable or Potentially Liable **Person** of any investigation of, or **Abatement Action** in **Response** to, a condition that presents or may present any **Endangerment** to the public health, safety, welfare, or to the **Environment** arising, in whole or in any **Substantial** part, from an **Open Dump** or **Open Dumping Public Nuisance** or **Solid Waste Public Nuisance** within, or adversely impacting on the public or any **Natural Resources** within Fayette County; and
- (f) interest on the outstanding unpaid balance of such costs at the same rate as is specified for prejudgment interest determined in accordance with the provisions of W. Va. Code § 56-6-31, which interest shall accrue from the later of:
 - (1) the date payment of a specified amount is demanded in writing, or
 - (2) the date of the expenditure concerned.

2.28 Open Dumping Public Nuisance: The term “**Open Dumping Public Nuisance,**” as used in this Code of Rules, means:

- (a) any existing or *Imminently* threatened *Open Dump*; or
- (b) any past or present handling, *Storage*, treatment, transportation, or *Disposal* of any *Solid Waste* which presents or may present an *Imminent* and *Substantial Endangerment* to the Public Health, Safety, Welfare or the *Environment* within Fayette County or to the beneficial uses of any *Natural Resource* within Fayette County held in trust by the State of West Virginia or by Fayette County for the use and benefit of present and future generations of the public,

either of which exists, or arises, in whole or in any *Substantial* part, at the site of, from, or which results in any of the following:

- (1) the *Release, Discharge, or Disposal* into any environmental media, non-exclusively including any air or *Waters of the State*, of:
 - (A) any *Hazardous Substance, Toxic Solid Waste, or Toxic Pollutant or Contaminant*; or
 - (B) *Leachate* from any *Open Dump* containing any *Hazardous Substance, Toxic Solid Waste, or Toxic Pollutant or Contaminant*; or
- (2) the accumulation in an *Open Dump* on private property of any:
 - (A) *Hazardous Substance*; or
 - (B) *Toxic Solid Wastes* in *Toxic* quantities, concentrations or amounts.

2.29 Overburden: Consistent with its definitions in the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. §§ 1201 – 1328, regulation promulgated by the U.S. Department of the Interior and codified at 30 C.F.R. § 701.5, and in the *CWA* regulation relating to *Discharges* of Storm Water promulgated by the U.S. Environmental Protection Agency and codified at 40 C.F.R. § 122.26(b)(10), the term “**Overburden,**” as used in this Code of Rules, means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil and mining waste containing ore or minerals resulting from the extraction, beneficiation, or processing of coal.

2.30 Person or Persons: Consistent with their definition in the West Virginia Solid Waste Management Act, W. Va. Code § 22-15-2(24), the terms “**Person**” or “**Persons,**” as used in this Code of Rules, each means any industrial user, public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country; State of West Virginia; governmental agency, including federal facilities; political subdivision; county commission; municipal corporation; industry; sanitary district; public service district; drainage district; soil conservation district; watershed improvement district; partnership; trust; estate; person or individual; group of persons or individuals acting individually or as a group; or any legal entity whatever, non-exclusively including the estate of a decedent or a dissolved or defunct business entity.

2.31 Point Source: The term "**Point Source**," as used in this Code of Rules, means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill *Leachate* collection system, vessel or other floating craft from which pollutants are or may be *Discharged* into "Waters of the United States," as that term is defined in 40 C.F.R. § 40.122.2 This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

2.32 Pollutant or Contaminant: Consistent with its definition in *CERCLA* § 101(33), 42 U.S.C. § 9601 (33), the term "**Pollutant or Contaminant**," as used in this Code of Rules, includes, but is not limited to:

- (a) any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

Also, consistent with its definition in *CWA* § 502(6), 33 U.S.C. § 1362(6), the term "**Pollutants or Contaminants**," as used in this Code of Rules, means:

- (b) dredged spoil, *Solid Waste*, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste *Discharged* into water.

Notwithstanding the foregoing provisions of this Rule, the term "**Pollutant or Contaminant**," as used in this Code of Rules, does not include:

- (1) sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces of the United States (within the meaning of 33 U.S.C. § 1322) or of the State of West Virginia;
- (2) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and *Disposed* of in a well, if the well is used either to facilitate production or for *Disposal* purposes and is lawfully approved by authority of the State of West Virginia, and if the State of West Virginia has determined that such injection or *Disposal* will not, when operated in compliance with applicable regulations and permit terms and conditions, result in the degradation of ground or surface water resources; provided, however, that such well is maintained and operated in compliance with all such applicable regulations and permit terms and conditions;
- (3) petroleum, including crude oil or any fraction thereof that is not otherwise

- specifically listed or designated as a *Hazardous Substance* under subparagraphs (A) through (F) of *CERCLA* § 101(14), 42 U.S.C. § 9601(14); or
- (4) natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

2.33 RCRA: The term "**RCRA**" means the federal Solid Waste Management Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended (also sometimes known as the "federal Solid and Hazardous Waste Management Act"), 42 U.S.C. §§ 6901 - 6992k, as it may be amended or re-enacted from time to time.

2.34 Release: Consistent with its definition in *CERCLA* § 101(22), 42 U.S.C. § 9601(22), the term "**Release**," as used in this Code of Rules, 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*, *Solid Waste*, or *Pollutant or Contaminant*), but excludes:

- (a) 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*;
- (b) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, or vessel;
- (c) 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 U.S.C. §§ 2011 *et seq.*, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under Section 170 of such Act, 42 U.S.C. § 2210; and
- (d) the normal application of fertilizer.

2.35 Remedial Action: Consistent with its definition in *CERCLA* § 104(24), 42 U.S.C. § 9601(24), the term "**Remedial Action**," as used in this Code of Rules, means those actions consistent with permanent remedy taken instead of, or in addition to, *Removal Actions* in the event of a *Release* or threatened *Release* of a *Hazardous Substance*, *Solid Waste*, or *Pollutant or Contaminant* into the *Environment* at, from, or in connection, in whole or in any part, with the investigation or abatement of an *Open Dump* or *Open Dumping Public Nuisance* in or adversely effecting Fayette County, to prevent or minimize the *Release* of *Solid Wastes* or *Leachate* from a *Solid Waste Storage* or *Disposal Facility* within Fayette County into the *Environment* at, from, or in connection, in whole or in any part, with the investigation or abatement of an *Open Dump* or *Open Dumping Public Nuisance* in or adversely effecting Fayette County so that they do not migrate to cause *Substantial* danger to the present or future public health, safety, welfare or the *Environment* within Fayette County. The term includes, but is not limited to, such actions at the location of such *Release* or threatened *Release* as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of *Solid Waste* or *Leachate* from a *Solid Waste Storage* or *Disposal Facility* within Fayette County and associated contaminated materials,

recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of *Leachate* and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health, safety, welfare and the *Environment*. The term includes the costs of permanent relocation of residents and businesses and community facilities where the FCSWA determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of *Solid Waste* or environmental media contaminated with *Solid Waste* or *Leachate* from a *Solid Waste Storage* or *Disposal Facility* within Fayette County, or may otherwise be necessary to protect the public health, safety, welfare or the *Environment*; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of *Solid Waste* and associated contaminated materials.

2.36 Remove or Removal Action: Consistent with its definition in *CERCLA* section 104(23), 42 U.S.C. § 9601(23), the terms "**Remove**" and "**Removal Action**" mean the cleanup or removal from the *Environment* of *Released Hazardous Substance, Hazardous Waste, Solid Waste, or Pollutant or Contaminant* at, from, or in connection, in whole or in any part, with the investigation or abatement of an *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* within or adversely effecting Fayette County, such actions as may be necessary taken in the event of the threat of *Release* into the *Environment* of *Hazardous Substances, Solid Wastes, or Pollutants or Contaminants* at, from, or in connection, in whole or in any part, with the investigation or abatement of an *Open Dump or Open Dumping Public Nuisance* in or adversely effecting Fayette County, such actions as may be necessary to monitor, assess, and evaluate the *Release* or threat of *Release* of *Hazardous Substances, Solid Wastes, or Pollutants or Contaminants* at, from, or in connection, in whole or in any part, with the investigation or abatement of an *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance* in or adversely effecting Fayette County, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health, safety, or welfare or to the *Environment*, which may otherwise result from such a *Release* or threat of *Release*. The term non-exclusively includes security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, and any emergency assistance which may be necessary in the judgment of the FCSWA.

2.37 Respond or Response Action: Consistent with its definition in *CERCLA* § 104(25), 42 U.S.C. § 9601(25), the terms "**Respond**" or "**Response**" means *Remove, Removal Action, Remedy, and Remedial Action*, all such terms (including the terms "*Removal*" and "*Remedial Action*") include enforcement activities related thereto.

2.38 Secretary: The term “**Secretary**” means the Cabinet Secretary of the W. Va. Department of Environmental Protection (“WVDEP”), or such other person to whom such Cabinet Secretary lawfully has delegated authority or duties pursuant to W. Va. Code, Chapter 22, Article 1.

2.39 Solid Waste: Consistent with its definitions in *RCRA* § 1004, 42 U.S.C. § 1003, and in the Section 2.119 of the W. Va. Solid Waste Management Rule (“WVSWMR”), W. Va. C.S.R. § 33-1-2.119, the term “**Solid Waste**,” as used in this Code of Rules, means either of the following:

- (a) 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 *CWA* § 402, 33 U.S.C. § 1342, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*; or
- (b) any garbage, paper, litter, refuse, cans, bottles, waste processed for the express purpose of incineration; sludge from a waste treatment plant, water supply treatment plant or air pollution control facility; and other discarded materials, including carcasses of any dead animal or any other offensive or unsightly matter; solid, liquid, semisolid, or contained liquid or gaseous material resulting from industrial, commercial, mining or agricultural operations and community activities.

For purposes of Subsection (b) of this Rule, the term "**Solid Waste**" does not include:

- (1) Solid or dissolved materials in sewage;
- (2) Solid or dissolved materials in irrigation return flows;
- (3) Industrial discharges that are point sources and have permits under *W. Va. Code* §22-11-1 *et seq.*, or are subject to permit under 33 U.S.C. §1342;
- (4) Source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended, (42 U.S.C. §2014) including any nuclear or by-product material considered by federal standards to be below regulatory concern;
- (5) A hazardous waste either identified or listed under *W. Va. Code* §22-18-1 *et seq.* and the rules promulgated thereunder;
- (6) Refuse, slurry, overburden, or other wastes or material -- resulting either from coal-fired electric power or steam generation, or from the exploration, development, production, storage, and/or recovery of coal, oil and gas and/or other mineral resources - that are placed or disposed of at a facility that is regulated by *W. Va. Code* §§22-2-1 *et seq.*, 22-3-1 *et seq.*, 22-4-1 *et seq.*, 22-6-1 *et seq.*, 22-7-1 *et seq.*

22-8-1 et seq., 22-9-1 et seq., 22-10-1 et seq., 22A-1-1 et seq., 22C-2-1 et seq., 22C-7-1 et seq., 22C-8-1 et seq., or 22C-9-1 et seq., so long as such placement or disposal is in conformance with a permit issued pursuant to such chapters; and

- (7) Materials that are recycled by being used or reused in an industrial process to make a product, as effective substitutes for commercial products, or are returned to the original process as substitutes for raw material feedstock.

2.40 Solid Waste Facility: Consistent with its definition in WVSWMA Section 2.34, W. Va. Code § 22-15-2(34), the term “**Solid Waste Facility**” means any system, **Facility**, land, contiguous land, improvements on the land, structures or other appurtenances or methods used for processing, recycling or disposing of **Solid Waste**, including landfills, transfer stations, materials recovery **Facilities**, mixed waste processing **Facilities**, sewage sludge processing **Facilities**, commercial composting **Facilities** and other such **Facilities** not herein specified, within Fayette County, but not including land upon which sewage sludge is applied in accordance with W. Va. Code § 22-15-20. For purposes of this Code of Rules, such **Facility** shall be deemed to be situated in Fayette County if the majority of the spatial area of such **Facility** is located within Fayette County; provided however, that a salvage yard licensed and regulated pursuant to the terms of W. Va. Code § 17-23-1, et seq., is not a **Solid Waste Facility**.

2.41 Solid Waste Public Nuisance: The term “**Solid Waste Public Nuisance**” means:

- (a) any of the conditions, acts, omissions, events or activities defined, declared, or acknowledged to be a Public Nuisance by any valid West Virginia statute or regulation that addresses or involves any uncontrolled, inadequately controlled, or improper collection, transportation, processing or **Disposal** of **Solid Waste**, or that causes, or contributes to an **Imminent** and **Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment** within Fayette County that was caused, in whole or in part, or contributed to by any past or present uncontrolled, inadequately controlled, or improper collection, transportation, processing or **Disposal** of **Solid Waste** within Fayette County, non-exclusively including the past or present:
 - (1) creation, ownership, or operation of an **Open Dump**, the majority of the spatial area of which is located within Fayette County, on or after either the effective date of **RCRA** § 4005(a) or the effective date of W. Va. Code § 22-15-10(a), other than in accord with: (A) a **Compliance Schedule** issued by the **Secretary** in accord with the provisions of the W. Va. Solid Waste Management Rule, W. Va. C.S.R. § 33-1-7.3; or (B) an **FCSWA** Open Dumping Abatement Order issued pursuant to this Code of Rules;
 - (2) allowance or allowing by any real property owner, mineral rights owner, or surface rights owner of real property within West Virginia of the existence of an **Open Dump**, the majority of the spatial area of which is located within Fayette County, on

any real property within West Virginia subject to such *Person's* ownership or control, other than in accord with: (A) a *Compliance Schedule*; or (B) an FCSWA *Open Dumping Abatement Action* Order issued pursuant to this Code of Rules;

(3) maintenance of an *Open Dump*, the majority of the spatial area of which is located within Fayette County, by any *Person* with authority or legal responsibility to control the use of the surface of real property upon which such *Open Dump* exists;
or

(b) any of the conditions, acts, omissions, events or activities declared by the County Commission of Fayette County, acting pursuant to its statutory authority under W. Va. Code §§ 7-1-3ff or 7-1-3kk, to be a Public Nuisance within Fayette County in **Section V** of Fayette County, WV Ordinance No. 2018-01, as the same may be amended from time to time, that involved or involves any uncontrolled, inadequately controlled, or improper collection, transportation, processing or *Disposal* of *Solid Waste* within Fayette County.

2.42 Storage: The term "**Storage**," when used in connection with *Solid Waste*, means the containment of any such *Solid Waste*, either on a temporary basis or for a period of years, in such a manner as not to constitute *Disposal*.

2.43 Substantial: The term "**Substantial**" as used in this Code of Rules to modify either the terms "*Endangerment*," "risk," or "impairment" means not imaginary, illusory or predominately unsupported or unsupported by reference to credible authority, and neither insignificant nor *de minimis*.

2.44 Toxic: The term "**Toxic**," when used in this Code of Rules to modify any of the terms "*Leachate*," "spillage," "seepage," "*Pollutant or Contaminant*," "*Solid Waste*," "substance" or "waste" shall mean those substances, including disease-causing agents, which after accumulation, *Discharge*, *Disposal*, or *Release* into the *Environment* and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the *Environment* or indirectly by ingestion through food chains:

(a) causes, on the basis of reliable, scientific information, death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; or

(b) presents or may present, on the basis of reliable, scientific information, a *Substantial* risk of death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

For all purposes of this Code of Rules, the term "**Toxic**" non-exclusively includes any substance listed by the U.S. Environmental Protection Agency in exercise of its authority under CWA § 307(a), 33 U.S.C. § 1317(a).

2.45 Waters of the State: The term "**Waters of the State**" means any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within the State of West Virginia, or bordering the State of West Virginia and within its jurisdiction and includes, without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds, impounding reservoirs, springs, wells, watercourses and wetlands; provided however, that the term does not include farm ponds, industrial settling basins and ponds, and waste treatment facilities.

**CHAPTER 3: INSPECTIONS, INFORMATION GATHERING, AND
OPEN DUMP ABATEMENT AND ENFORCEMENT:**

**3.1 FAYETTE COUNTY SOLID WASTE AUTHORITY (“FCSWA”) INFORMATION
GATHERING AUTHORITY:**

- (a) **Required public purposes for authorized FCSWA Information Gathering:** In order to accomplish within Fayette County identification and appropriate abatement of any *Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*, or other non-compliance with any requirement of this Code of Rules, and to assure adequate protection of the Public Health, Safety, Welfare or the *Environment* resulting, in whole or in part, from a failure or refusal to comply with any requirement of this Code of Rules or any order issued pursuant to it, and in order competently to carry out the remedial purposes of this Code of Rules, any authorized agent of the FCSWA, upon presenting appropriate credentials to the person(s) present at or in charge of the location or premises, is authorized to exercise the authority granted in this Rule at the locations specified in either **Subsection (a)(1) and (2)** of this Rule only if there is a reasonable basis to believe:
- (1) there is or may be at the location evidence of an *Open Dump, Open Dumping Public Nuisance, Solid Waste Public Nuisance*, or other noncompliance with this Code of Rules within or adversely effecting Fayette County; or
 - (2) that there is or may be at the location any act or condition detrimental to any beneficial uses within Fayette County of any *Natural Resource* that has resulted or is resulting from the past or present handling, treatment, *Storage*, transportation or *Disposal* of *Solid Waste*, and then only for the purposes of determining the need for an *Open Dumping Abatement Action* or *Response Action*, specifically including all or any part of choosing or taking any *Open Dumping Abatement Action* or *Response Action* under this Code of Rules.
- (b) **How FCSWA Information Gathering actions may be taken:** Any action under **Subsections (b), (c), or (d)** of this Rule (or any combination thereof) may be exercised at any **Facility**, site, real property, or location designated in this **Subsection (c)** of this Rule either:
- (1) ***With Consent:*** with the written consent (which may be conveyed by E-Mail or facsimile transmission) of the owner or any *Person* in charge of such premises or *Facility* to enter without advance notice, at reasonable times, and in the manner least disruptive and least inconvenient to the occupants of the premises, if any, that is consistent with the faithful, competent and effective conduct of the investigation required to inspect and investigate, during regular working hours and at other reasonable times, given the nature and timing of the known or suspected *Open Dump, Open Dumping Public Nuisance, Solid Waste Public Nuisance* or other noncompliance with this Code of Rules, and within reasonable limits and in a

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reasonable manner;

- (2) **By Warrant:** pursuant to the terms and conditions of an Inspection Warrant or Search Warrant issued by a court of competent jurisdiction;
 - (3) **By Demand Pursuant to this Rule:** pursuant to either a demand issued by the FCSWA or an authorized representative of the FCSWA pursuant to **Subsection (d)** of this Rule or an FCSWA Compliance Order issued pursuant to **Subsection (e)** of this Rule.
- (c) **Where FCSWA Information Gathering actions may be taken:** The FCSWA may undertake Information Gathering actions authorized by this Rule at any of the following locations:
- (1) where a known or suspected **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance**, or other noncompliance act or condition exists, or is reasonably suspected to exist;
 - (2) at any **Facility**, site, real property or location at, from or to which any **Solid Waste** relevant to any known or suspected **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance** within Fayette County may be or is being or has been handled, generated, **Stored**, treated, **Disposed** of, or transported;
 - (3) at, from or to which there is or has been a **Release** or threatened **Release** of a **Solid Waste** or **Leachate** within or adversely effecting Fayette County;
 - (4) where any known or reasonably suspected **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance** activity or condition within or adversely effecting Fayette County has occurred or is or may be occurring;
 - (5) where information relevant to the existence, nature or extent of materials comprising, resulting from, or contributing to a known or reasonably suspected **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance** within or adversely effecting Fayette County may be obtained;
 - (6) where information may be found regarding:
 - (A) any **Endangerment(s)** that are or may be presented by any **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance**, or other noncompliance within or adversely effecting Fayette County; or
 - (B) the proper abatement of any **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance** or other noncompliance within or adversely effecting Fayette County;
 - (7) where information regarding the identity, current location, or available insurance or non-insurance assets of any **Person** that is or may be liable for abatement of an **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance**, or other noncompliance pursuant to this Code of Rules may be obtained; or
 - (8) with respect to any action described in **Subsections (c) or (d)** of this Rule, at any **Facility**, site, real property, or location which is adjacent to any **Facility**, site, real property or location described in this Subsection (c) of this Rule.

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(d) **FCSWA required production of information:**

- (1) ***By Written Demand:*** Any authorized agent of the FCSWA may require, by service in a manner consistent with the requirements of Rule Four of the W. Va. Rules of Civil Procedure, of a written Demand for Production of Information upon any ***Person*** who has or may have information relevant to any of the following timely to furnish, upon reasonable advance notice, all non-privileged information or ***Records*** within the possession, care, custody or control of such ***Person*** or any agent or attorney of such ***Person*** that contain, comprise, relate to, or may reasonably be calculated to lead to the discovery of information about any of the following matters:
- (A) the creation of, any contribution to, any maintenance of, any failure or refusal to abate, or the knowledge of any ***Person*** regarding any act or condition that:
 - (i) presents or may present, or that has or may have created or contributed to, an ***Open Dump, Open Dumping Public Nuisance*** or ***Solid Waste Public Nuisance***, or other noncompliance with a requirement of this Code of Rules within or adversely impacting Fayette County or any substantial number of ***Persons*** within it; or
 - (ii) presents or may present any ***Endangerment*** to the Public Health, Safety, Welfare or the ***Environment*** within Fayette County;
 - (B) the identification, nature, source, and quantity of materials that are or may be, in whole or in part, contributing to, comprising, or resulting from an ***Open Dump, Open Dumping Public Nuisance*** or ***Solid Waste Public Nuisance***, or other noncompliance with this Code of Rules, which materials have been or are generated, treated, stored, or disposed of at a ***Facility***, or transported to a ***Facility***, site, real property or location within or adversely affecting the Public Health, Safety, Welfare or ***Environment***, in Fayette County;
 - (C) the nature or extent of a ***Release*** or threatened ***Release*** of ***Solid Waste*** or ***Leachate*** at or from a ***Facility***, site, real property or location within or adversely affecting the Public Health, Safety, Welfare or ***Environment*** in Fayette County;
 - (D) information relating to the ability of a ***Person*** potentially liable under this Code of Rules to pay for or to perform an ***Open Dumping Abatement Action*** or ***Response Action*** pursuant to the requirements of this Code of Rules, or to reimburse the FCSWA for ***Open Dumping Abatement Action Costs*** or ***Response Costs*** it has incurred or may incur, including information regarding the assets, ability, liability and responsibility of any guarantor, indemnitor, or insurer of (or providing any benefits to) any ***Person*** who is or may be a liable party pursuant to this Code of Rules, to perform or pay for the performance of any ***Open Dumping Abatement Action*** or ***Response Action***, or to pay the required costs of, indemnify for, or reimburse the FCSWA for the all costs it has or may incur with respect to, any potentially responsible party's performance of an ***Open Dumping Abatement Action*** or ***Response Action***, or

reimbursement of any *Open Dumping Abatement Action Costs* or *Response Costs* incurred or to be incurred by FCSWA;

- (E) the identification, location, nature and extent of any assets (including any sums that are or may be available pursuant to any guarantee, indemnity or insurance agreements, contracts or policies of any kind), or information pertaining to the identity, legal structure or status, financial condition, and names and locations of officers, employees and agents of any *Person* who is or may be a *Person* liable for the abatement of an *Open Dump*, *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* within or adversely affecting the Public Health, Safety, Welfare or the *Environment* in Fayette County as defined by this Code of Rules.
- (2) **By Granting Access to the FCSWA:** In addition to or in lieu of requesting production of information pursuant to **Paragraph (1)** of this **Subsection (d)**, an authorized agent of the FCSWA:
 - (A) may require that any such *Person* grant to any authorized representative of the FCSWA access at all reasonable times to any vessel, *Facility*, site, real property, or location to inspect and copy all *Records* relating to the matters described in **Paragraph (1)** of this **Subsection (d)**; or
 - (B) shall allow, at the option and expense of any *Person* authorized to produce such information, such *Person* timely to copy and furnish to the authorized representative of the FCSWA all such *Records*.
- (3) **By FCSWA Entry:** Any authorized representative of the FCSWA is authorized to enter at reasonable times any of the locations described in **Subsection (c)** of this Rule, and any such entry shall be made in a manner as to cause the least practical inconvenience to the persons in possession consistent with accomplishing the remedial purposes of the entry and investigation.
- (4) **By FCSWA Inspection and Sampling:**
 - (A) **Authority:** Any authorized representative of the FCSWA is authorized to inspect and obtain samples from any *Facility*, site, real property or location referred to in **Rule 3.1(c)** of this Code of Rules or from any location of any known or suspected *Release of Solid Waste* or *Leachate* within Fayette County. Any such authorized representative of the FCSWA is also authorized to inspect and obtain samples of any containers or labeling for known or suspected *Solid Waste* or substances which, when discarded or intended to be discarded, are or will become a *Solid Waste*. Each such inspection shall be completed in a reasonable manner and with reasonable promptness.
 - (B) **Split Samples:** If such authorized representative of the FCSWA obtains any samples, before leaving the premises, he shall give to the owner, operator, tenant, or other *Person* in charge of the place from which the samples were obtained a written receipt describing generally the sample obtained and provide, if

requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other *Person* in charge, if such person can be located.

(e) **Failure or refusal to allow access or inspection; Inspection Warrants:**

- (1) ***FCSWA Application for Inspection Warrants Authorized:*** In addition to or in lieu of any other actions authorized by this Code of Rules or by West Virginia law, if:
 - (A) the Attorney General of West Virginia or the Fayette County Prosecuting Attorney, in his or her professional judgment, determines that it is in the best interests of FCSWA in effecting the remedial purposes of this Code of Rules that any entry or inspection authorized by this Code of Rules should take place under authority of a judicial warrant; or
 - (B) any *Person* required by this Rule to produce information or to allow access and inspection refuses to consent to, attempts to limit, interfere with, or prevent any officer of the West Virginia State Police, the Fayette County Sheriff or any Deputy Sheriff acting upon written authorization from the FCSWA, or any authorized agent of the FCSWA from conducting an investigation and inspection authorized by this Rule, the FCSWA, or if exigent circumstances require action before a meeting of the FCSWA may be properly noticed and convened, the President of the FCSWA, may request the Attorney General of West Virginia or the Fayette County Prosecuting Attorney to apply for, or with the consent of the Attorney General of West Virginia or the Fayette County Prosecuting Attorney, any authorized agent of the FCSWA may apply for, an Inspection Warrant from the Magistrate Court or Fayette County Circuit Court, or, at the option of the Attorney General of West Virginia or the Fayette County Prosecuting Attorney, from any other court of competent jurisdiction.
- (2) ***Final Compliance Order Authorized:*** If any *Person* fails or refuses to comply with any Information Gathering demand or request authorized by this Rule, the FCSWA may issue a Final Order directing compliance with such request or demand. Such Compliance Order may be issued after such notice and opportunity for informal consultation with the FCSWA as is reasonably appropriate under the circumstances.
- (3) ***Compliance Enforcement Action Authorized:*** If any *Person* fails or refuses to comply with any Information Gathering demand or request authorized by this Rule, the FCSWA, in addition to or in lieu of issuance of a Compliance Order, may request the Attorney General of West Virginia, the Fayette County Prosecuting Attorney, or its owned retained legal counsel to commence a civil action in the name of the FCSWA in a court of competent jurisdiction seeking a court order compelling compliance with any such Demand for Production of Information, request or Order properly issued and served pursuant to this Rule. Where there is a reasonable basis to believe there is or may be an *Open Dump, Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* or other noncompliance with any requirement or

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prohibition of this Code of Rules, or there is or may be a condition that may present an *Imminent* and *Substantial Endangerment* to the Public Health, Safety, Welfare or the *Environment* within Fayette County arising, in whole or in substantial part, from the past or present handling, treatment, *Storage*, transportation or *Disposal* of *Solid Waste*, the court shall, upon appropriate proof, take the following actions:

- (A) in the case of interference with entry or inspection authorized by this Rule, the court shall enjoin such interference or direct compliance with such requests for entry and inspection and prohibit interference with such entry or inspection, unless, under the circumstances of the case, the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) in the case of a failure or refusal to comply with an information or document production demand, request or order authorized by this Rule, the court shall enjoin any further failure or refusal to comply with such information or document production demand, request or order, and direct compliance with such demand, requests or orders to provide such information or documents, unless, under the circumstances of the case, court determines that the demand, request or order for production of information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

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

(1) ***Privilege Log information required:*** In order to permit the FCSWA and its legal counsel adequately to assess the validity of any assertion of any legal privilege or other grounds for non-production asserted for the purposes of determining whether public resources should be expended to pursue production of any withheld document or information, any *Person* from whom any record(s), information, documents, or things are required to be produced pursuant to this Rule who fails or refuses to produce any demanded record, information, document, or thing(s) based in whole or in part upon a claim of legal privilege or for any other reason must file with the FCSWA on or before the date set forth in the demand for production a concise written statement setting forth all facts supporting each claim of privilege or other asserted basis for withholding the production of such *Record*, thing or information, and the asserted legal authority upon which the failure or refusal to produce is based. The concise written statement required by this **Subsection (f)** must, at a minimum, include the following information as to each demanded item of information and each record, document or thing withheld:

- (A) the identity of the author or creator thereof, and any other *Person* who participated or assisted in its preparation;
- (B) the title or other identifying data;
- (C) the date of the creation of the *Record*, document or thing, or, if no date appears

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- thereon, the approximate date;
- (D) a summary of the nature (*e.g.*, letter, ledger, spreadsheet, *etc.*) and content of the record, other document or thing sufficient to identify it;
 - (E) the name and location of each *Person* currently having or last having possession, care, custody or control of the original and of each copy thereof, and the names of all *Persons* to whom the record, other document or thing has been disclosed, sent, or otherwise shared;
 - (F) if such document or thing was, but is no longer, in the possession or control of the *Person* from whom the document or thing is requested, the disposition that was made of it, including but not limited to the name and address of the *Person* to whom the record or other document or thing was transferred, or who disposed of the *Record* or other document or thing, as well as the date, time, place and mode or method of transfer or disposal; and
 - (G) the precise, current location of the *Record*, document or thing and the complete name and address of its current custodian.
- (2) ***Effects of failure timely to provide required Privilege Log information:*** Any *Person* required by this Rule to provide the written statement described **Subsection (e)(1)** of this Rule that failed or refused timely to file a written statement that fully complies with the requirements of **Subsection (e)(1)** of this Rule, thereafter, in any civil or criminal action before a Court of the United States or any State thereof, or in any proceeding before the County Commission of Fayette County, WV in which the FCSWA, the United States of America, the Administrator of the U.S. Environmental Protection Agency, the State of West Virginia, the *Secretary*, or the Fayette County Code Enforcement Agency is seeking to enforce any provision of *RCRA*, the W. Va. Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15, W. Va. Code § 7-1-3ff, the Fayette County Comprehensive Public Nuisance Abatement Ordinance, Fayette County Ordinance No. 2-18-001, or this Code of Rules to seek abatement of, or otherwise address, any conditions at, or matters that pertain to, the site, *Facility(ies)* or conditions address by the FCSWA Information Demand issued pursuant to this Code of Rules shall be barred from asserting or relying upon any legal privilege for which a compliant statement of supporting factual basis and legal authority was not timely filed, and shall further be barred from withholding, based upon any assertion of any such privilege, any demanded record, item of information, document or thing for which all of the details required by **Subsection (f)(1)** of this Rule were not timely provided.
- (A) The bar established by this **Subsection (f)(2)** shall apply only to the assertion of any privilege or other asserted legal basis for withholding the demanded record, information, document, or thing with respect to which claim of privilege this **Subsection (f)** required the filing of a concise written statement, but for which no compliant statement was timely filed.

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(B) The bar established by this **Subsection (f)(2)** shall not apply to any failure or refusal to produce such record, document, information or thing based upon the claimed application with *prima facie* validity of the privilege against self-incrimination.

- (g) **Other authority:** Nothing in this Rule shall preclude the FCSWA from securing access or obtaining information in any other lawful manner.
- (h) **Confidentiality of information:** Except upon a showing satisfactory to the FCSWA by any *Person* that records, reports, or information, or particular part thereof (other than health or safety effects data), to which the FCSWA or its legal counsel has access under this Rule, if made public, would divulge any of the information described in Paragraphs (1) or (2) of this **Subsection (h)**, any records, reports, or information obtained from any *Person* under this Rule (including *Records*, reports, or information obtained by authorized representatives of the FCSWA) shall be available to the public.
- (1) information entitled to protection under 18 U.S.C. § 1905; or
 - (2) any records, reports or information exempt from disclosure pursuant to the W. Va. Freedom of Information Act, W. Va. Code § 29B-1-4.

3.2 FCSWA ORDER REQUIRING MONITORING, TESTING, ANALYSIS, AND REPORTING:

- (a) **When properly issued:** If the FCSWA has reasonable grounds to believe that an *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* exists or may exist within or adversely affecting the Public Health, Safety, Welfare, or the *Environment* within Fayette County, it may issue an Order pursuant to this Rule against any *Person* liable for such *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* pursuant to **Rule 5.0** of the Code of Rules requiring such *Person* to conduct any monitoring, testing, analysis, and reporting regarding any aspect of such known or reasonably suspected *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* as the FCSWA deems necessary and proper:
- (1) timely and reliably to ascertain the existence, nature, or extent of an *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance*, and the nature and extent of any *Endangerment(s)* to the Public Health, Safety, Welfare, or the *Environment* that may be presented by it; or
 - (2) timely, properly and competently to select, or assess the effectiveness of, all or any portion of an *Abatement Action* or *Response Action* with respect to such *Open Dump*, *Open Dumping Public Nuisance*, or *Solid Waste Public Nuisance* that complies with the requirements of **Chapter 6** of this Code of Rules.
- (b) **How issued; Consultation, Authority to modify proposal:** Any order under **Subsection (a)** of this Rule shall be posted on the publicly-accessible FCSWA official website and served on each *Person* named in the Order in a manner consistent with

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requirements of Rule Four of the W. Va. Rules of Civil Procedure, and shall require any **Person** to whom the order is issued to submit to the FCSWA within thirty (30) days, or, if exigent circumstances require, within a shorter, specified period of time from the issuance of such order, a detailed proposal for carrying out the required monitoring, testing, analysis, and reporting. The FCSWA may, after providing such **Person** with an informal opportunity to confer with the FCSWA respecting such proposal, require such **Person** to carry out such monitoring, testing, analysis, and reporting in accordance with such proposal, and may impose such modifications to the proposal as the FCSWA deems necessary and proper fully and competently to:

- (1) ascertain the nature and extent of the known or reasonably suspected **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance**, or the nature and extent of any actual or threatened **Endangerment** to the Public Health, Safety, Welfare, or the **Environment** that are or may be presented by **Releases of Solid Waste, Pollutants or Contaminants**, or **Leachate** at or from any known or suspected **Open Dump, Open Dumping Public Nuisance** or **Solid Waste Public Nuisance**;
 - (2) select or to assess the effectiveness of an **Open Dumping Abatement Action** or **Response Action** with respect to such **Open Dump, Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** that complies with the requirements of **Chapter 6** of this Code of Rules.
- (c) **When FCSWA may conduct activity(ies) pursuant to this Rule:** If the FCSWA (or where appropriate, a court of competent jurisdiction) determines that no Liable **Person** is able to conduct monitoring, testing, analysis or reporting reasonably satisfactory to the FCSWA or the court, or if the FCSWA determines that any such action carried out by the responsible party to be unsatisfactory, the FCSWA may conduct, or the court may authorize and direct the FCSWA to conduct appropriate monitoring, testing or analysis (or any combination thereof) which the FCSWA or the court deems reasonable to ascertain the nature and extent of the hazard associated with the actual or threatened **Open Dump, Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** at issue.
- (d) **Reimbursement of FCSWA Open Dumping Abatement Action Costs or Response Costs; Oversight & Monitoring:** The FCSWA or, where appropriate, a court of competent jurisdiction, may further require, by Order issued and served in compliance with the requirements of this Rule, that the Liable **Person(s)** properly named in the Order timely reimburse the FCSWA for the following **Open Dumping Abatement Action Costs** or **Response Costs** incurred and to be incurred by FCSWA:
- (1) costs for any necessary and proper activity of the FCSWA, nonexclusively including any enforcement costs incurred or to be incurred to secure compliance with the requirements of this Rule;
 - (2) costs for any necessary and proper FCSWA activity reviewing, commenting on, or revising a responsible party's plans and reports submitted pursuant to this Rule; or
 - (3) in connection with overseeing and monitoring the performance of the activities of any

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responsible party determined by the FCSWA to be necessary and proper to accomplishment of the remedial purposes of this Rule.

(e) **Compliance enforcement:**

(1) ***Civil Enforcement Action authorized:*** The FCSWA may request the Attorney General of West Virginia, the Fayette County Prosecuting Attorney, or its own retained legal counsel properly employed by it pursuant to W. Va. Code § 22C-4-9(a) to commence a civil action in the name of the FCSWA in a court of competent jurisdiction to compel compliance with any Order issued pursuant to this Rule. The court, in the due course of any such civil action, shall, upon appropriate proof, enter appropriate injunctive relief compelling timely and competent compliance by the respondent(s) with all terms and conditions of the Order properly issued pursuant to Rule upon proof by the FCSWA by a preponderance of the evidence that:

- (A) there is a reasonable basis to believe there is or may be an actual or threatened ***Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*** existing within Fayette County or adversely affecting the Public Health, Safety, Welfare or the ***Environment*** within Fayette County;
- (B) that the respondent named in the Order is a ***Person*** Liable pursuant to ***Rule 5.0*** of this Code of Rules with respect to such actual or threatened ***Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance***; and
- (C) that the order authorized by Rule, is not arbitrary and capricious and is otherwise in accordance with law.

(f) Any cause of action authorized by this Code of Rule may be joined with any other causes of action brought by the FCSWA pursuant to this Code of Rules.

3.3 FCSWA SOLID WASTE MANAGEMENT AND OPEN DUMPING ABATEMENT AND ENFORCEMENT AUTHORITY:

(a) **FCSWA authorized Solid Waste management and Open Dumping enforcement actions:** If the FCSWA, upon inspection or investigation by a duly authorized representative or through other means, specifically including receipt of a formal Finding and Recommendation of the ***Secretary***, the W. Va. Solid Waste Management Board, the County Commission of Fayette County, WV; the Fayette County Code Enforcement Agency, the Fayette County Board of Health, or the Fayette County Urban Renewal Authority, observes, discovers or learns of reasonable cause to believe that there may exist within Fayette County or adversely impacting on the Public Health, Safety, Welfare or the ***Environment*** within Fayette County: (i) an ***Open Dump***; (ii) an existing or ***Imminently*** threatened ***Open Dumping Public Nuisance*** or ***Solid Waste Public Nuisance***; (iii) a ***Facility*** or site within Fayette County at which the past or present handling, ***Storage***, treatment, transportation, or ***Disposal*** of any ***Solid Waste*** which presents or may present any ***Endangerment*** to the Public Health, Safety, Welfare or the ***Environment*** within

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Fayette County; or (iv) a violation of this Code of Rules, it shall, if determined necessary and proper by majority vote of its Members at a duly noticed meeting, take one or more of the following actions:

- (1) Issue a Proposed Order against any *Person(s)* liable or potentially liable under **Rule 5.0** of this Code of Rules stating with reasonable specificity the nature of the alleged violation(s), or the nature of the alleged events, acts, omissions or occurrences that the **FCSWA** asserts result in abatement liability pursuant to **Rule 5.0** of this Code of Rules. A Proposed Order under this **Subsection (a)** may include, but is not limited to, any or all of the following: a Cease and Desist Order; an Order requiring Liable or Potentially Liable *Person(s)* to take specific interim or final **Open Dumping Abatement Action(s)**, or both such interim or final actions; an order requiring Liable or Potentially Liable *Person(s)* to take specific interim or final **Response Actions**, or both such interim and final actions;
- (2) Issue in compliance with **Rule 3.4** of this Code of Rules a Final and Binding Time-Sensitive Abatement Action Order against any *Person(s)* Liable or Potentially Liable under **Rule 5.0** of this Code of Rules stating with reasonable specificity the nature of the alleged violation(s), or the nature of the alleged events, acts, omissions or occurrences that the **FCSWA** asserts result in abatement liability pursuant to **Rule 5.0** of this Code of Rules, and the specific **Open Dumping Abatement Actions** or **Response Actions** required of each respondent to the Order;
- (3) Pursuant to W. Va. Code § 22C-4-23(1), commence a civil action in the name of the **FCSWA** and seek therein a Temporary Restraining Order, Preliminary Injunction, or Permanent Injunction, or any combination thereof, to secure any legal remedy or relief authorized by this Code of Rules;
- (4) Either request the Attorney General of West Virginia pursuant to W. Va. Code § 22C 4 9(a), request the Fayette County Prosecuting Attorney pursuant to W. Va. Code § 7-4-1(a), or direct its legal counsel properly retained by the **FCSWA** pursuant to W. Va. Code § 22C-4-9(a), to bring an appropriate civil action in the name of the **FCSWA** to recover appropriate civil penalties pursuant to WWSWMA Section 15(d), W. Va. Code § 22-15-15(d), for violations of the WWSWMA, WWSWMR, or any permit or Order issued by **Secretary** pursuant to the provisions of the WWSWMA;
- (5) Either request the Attorney General of West Virginia pursuant to W. Va. Code § 22C 4 9(a), request the Fayette County Prosecuting Attorney pursuant to W. Va. Code § 7-4-1(a), or direct its legal counsel properly retained by the **FCSWA** pursuant to W. Va. Code § 22C-4-9(a), to bring an appropriate civil

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action in the name of the **FCSWA** to assert the civil claims available to the **FCSWA** under applicable federal law, West Virginia law, or this Code of Rules, or any combination thereof, determined to be necessary and proper by the **FCSWA** to secure compliance with the requirement and prohibitions of, and to effectuate enforcement of the remedial purposes of, this Code of Rule; or

- (6) Request the Fayette County Prosecuting Attorney to bring an appropriate criminal action(s) pursuant to WWSWMA Section 15(b), W. Va. Code § 22.15-15(b), either alone or in addition to other applicable West Virginia law properly seeking imposition of applicable criminal sanctions.

3.4 SERVICE OF FCSWA PROPOSED ORDER; RIGHT TO REQUEST HEARING:

- (a) **Service of FCSWA Proposed Order:** Service of each Proposed Order issued by the **FCSWA** pursuant to **Rule 3.3(a)(1)** of this Code of Rules on each Respondent named in the Proposed Order shall be accomplished in the manner consistent with the requirements of Rule Four of the W. Va. Rules of Civil Procedure. If any current Owner(s) or Operator(s) of any ***Open Dump***, any site or location at which an ***Open Dumping Public Nuisance*** or a ***Solid Waste Public Nuisance*** exists or is ***Imminently*** threatened to be created, or any site or premises upon which alleged noncompliance with a requirement imposed by this Code of Rules is taking place or is ***Imminently*** threatened at issue in the Proposed Order are not named in the **FCSWA's** Proposed Order as a respondent to the Proposed Order for some or all of the relief proposed in such order, the **FCSWA** shall serve an informational copy of the Proposed Order upon all such Owner(s) or Operator(s) then known to the **FCSWA**, or that could reasonably be ascertained by the **FCSWA** from examination of readily available public records. In addition, each **FCSWA** Proposed Order shall be placed on the **FCSWA** publicly-accessible website promptly after issuance of the Proposed Order.
- (b) **Hearing on Proposed Order before FCSWA upon timely request:** Any respondent named in an **FCSWA** Proposed Order or any ***Person*** aggrieved by any portion of the relief set forth in the Proposed Order may request a hearing before the **FCSWA** by filing with the **FCSWA** within twenty-one (21) days of receipt of the Proposed Order a written request for a hearing. Upon timely receipt of a request for hearing filed in compliance with the requirement of this Rule, the **FCSWA** shall issue an order either setting the matter down for hearing before the **FCSWA** within twenty-eight (28) days of receipt of the written request for a hearing, or enter a formal Order referring the matter for hearing before a Hearing Officer duly appointed by the **FCSWA**. All proceedings shall be on the record, recorded either by electronic device or by court reporter, and shall be conducted in compliance with the requirements set forth in the W. Va. Administrative Procedures Act, W. Va. Code, Chapter 29A, Article 5.
- (c) **Effect of failure timely to request a hearing before the FCSWA:** If a ***Person***

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authorized by **Subsection (b)** of this Rule to request a hearing on a **FCSWA** Proposed Order fails timely to file a request for a hearing before the **FCSWA**, such Proposed Order will immediately be and become a final, binding and enforceable Order of the **FCSWA**, subject only to such modification or revocation, if any:

- (1) that the **FCSWA** *sua sponte* may order; or
- (2) the **FCSWA** may order upon a Delinquent Request for Discretionary Review brought pursuant to Subsection **(d)** of this Rule, if and only if the respondent is eligible for the discretionary relief authorized by Subsection **(d)** of this Rule.

- (d) **Effect of untimely request for hearing on FCSWA Proposed Order; FCSWA options:** If any request for a hearing on any **FCSWA** Order is received from a **Person** authorized to request a hearing under subsection **(b)** of this Rule or from any **Person** aggrieved by an Proposed Order granting contribution protection pursuant to this Code of Rules after the applicable filing deadline set forth in subsection **(b)** of this Rule, such Applicant may, by filing with the **FCSWA** a written Delinquent Request for Discretionary Review that sets forth all facts upon which the applicant relies to support its contention that the **FCSWA** should excuse the delayed filing of the request, seek discretionary review of the Order(s) at issue by the **FCSWA**. In its Order responding to any such filed Delinquent Request for Discretionary Review, the **FCSWA**, in its sole discretion, may take any of the following actions:
- (1) summarily deny the request;
 - (2) for good cause shown, grant the request, with or without a Stay of all or any portion of the provisions of the order(s) at issue pending the decision of the **FCSWA** at or following the hearing on the delinquent request for discretionary review; or
 - (3) for good cause shown, grant the request in part, with or without a Stay of all or any portion of the order(s) under review, pending the decision of the **FCSWA** following the public hearing, and with or without limiting the scope of the hearing granted to specific issues identified by **FCSWA**.

3.5 FCSWA FINAL AND BINDING TIME-SENSITIVE ABATEMENT ACTION ORDERS:

- (a) **When a Final and Binding Time -Sensitive Abatement Action Order may be issued:** Notwithstanding any other provision of this Code of Rules and before, in conjunction with, or in lieu of either requesting action by the Attorney General of West Virginia or the Fayette County Prosecuting Attorney, or directing legal counsel properly retained by the **FCSWA** pursuant to W. Va. Code § 22C-4-9(a), to bring an appropriate civil or criminal action, whenever the **FCSWA** has reasonable grounds to believe that there is or may be an **Open Dump**, **Open Dumping Public Nuisance**, or **Solid Waste Public Nuisance** within Fayette County, or that there exists a **Facility** or site within Fayette County at which the past or present handling, **Storage**, treatment, transportation, or **Disposal** of any **Solid Waste** that presents or may present an **Endangerment** to the Public

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Health, Safety, Welfare or the *Environment* within Fayette County that in the judgment of the FCSWA requires expeditious abatement, the FCSWA may take any other action or actions authorized by this Code of Rules and may also issue a Final and Binding Time-Sensitive Abatement Action Order to any **Person(s)** liable pursuant to **Rule 5.0** of this Code of Rules with respect to such *Open Dumping Public Nuisance* or such site or *Facility* requiring the timely and competent performance of such *Open Dumping Abatement Action* or *Response Actions* as it deems necessary and proper to secure adequate protection of the Public Health, Safety, Welfare and the *Environment* within Fayette County. Any such *Open Dumping Abatement Action* or *Response Action* so ordered by the FCSWA shall, to the extent practicable and consistent with the need for time-sensitive abatement, be not inconsistent with the requirements of **Chapter 6** of this Code of Rules. Each Order issued pursuant to this Rule shall require any **Person(s)** to whom the Order is issued to comply with the requirements of the Order and any timetables or schedules appended thereto effective upon receipt of compliant service of the Final and Binding Time-Sensitive Abatement Action Order, or upon such later effective date specified in the Order.

- (b) **Service of Final and Binding Time-Sensitive Abatement Action Order:** Service of each Final and Binding Time-Sensitive Abatement Action Order issued by the FCSWA pursuant to this Rule on each Respondent named in the Order shall be accomplished in the manner consistent with the requirements of Rule Four of the W. Va. Rules of Civil Procedure. In addition, any Final and Binding Time-Sensitive Abatement Action Order issued by the FCSWA shall be placed on the publicly-accessible website of the FCSWA promptly following issuance of the Order.
- (c) **Authority to require reimbursement of Open Dumping Abatement Action Costs or Response Costs incurred or to be incurred by the FCSWA:** Any Final and Binding Time-Sensitive Abatement Action Order issued pursuant to this Rule may include a requirement that the responsible party(ies) properly served with such an Order timely and periodically reimburse the FCSWA for *Open Dumping Abatement Action Costs* or *Response Costs*, or both, incurred and to be incurred by the FCSWA:
- (1) in connection with any *Open Dumping Abatement Action* or *Response Action* deemed necessary and proper by the FCSWA, non-exclusively including any such costs incurred or to be incurred in the investigation of the site or *Facility* at issue in the Order; or in the investigation of a Respondent's liability pursuant to this Code of Rules at issue in the Order;
 - (2) in connection with any **Abatement Action** deemed necessary and proper by the FCSWA in reviewing, commenting on, and revising a Liable *Person's* plans and reports submitted or required to be submitted by the Order; or
 - (3) in connection with overseeing and monitoring the performance of any activities of a Liable *Person* required by the Order.

(d) **Timing of review of any Final and Binding Time-Sensitive Abatement Action Order issued pursuant to this Rule 3.5:** Any *Person* to whom a Final and Binding Time-Sensitive Abatement Action Order is properly issued pursuant to this Rule may **only** seek any relief that would as a practical matter have the effect of invalidating, dismissing, staying, quashing (in whole or in part), or modifying all or any part of any Final and Binding Time-Sensitive Abatement Action Order properly issued and served pursuant to this Rule in one of the following **Proceedings:**

- (1) in a civil action brought in the name of the **FCSWA** by either the Attorney General of West Virginia, the Fayette Co. Prosecuting Attorney, or its own retained legal counsel properly employed by it pursuant to W. Va. Code § 22C-4-9(a) in a court of competent jurisdiction before which a claim pursuant to this Code of Rules seeking enforcement of the same Final and Binding Time-Sensitive Abatement Action Order is asserted against such *Person(s)*; or
- (2) in a civil action brought in the name of the **FCSWA** by either the Attorney General of West Virginia or by its own legal counsel properly retained by it pursuant to W. Va. Code § 22C-4-9(a) in a court of competent jurisdiction before which a claim pursuant to this Code of Rules for abatement of, or the recovery of *Open Dumping Abatement Action Costs* or *Response Costs* relating to, the same *Facility*, site, condition or matter that is at issue in the Final and Binding Time-Sensitive Abatement Action Order against is asserted against such **Person(s)**.

3.6 INJUNCTIVE RELIEF AVAILABLE TO THE FCSWA: The **FCSWA** may commence a civil action in its own name either or both to enforce any requirement set forth in, or to obtain any relief authorized by, this Code of Rules, and therein seek appropriate injunctive relief against any *Person* alleged to be in violation of any provisions of this Code of Rules or any Final Order or Final and Binding Time-Sensitive Abatement Order issued pursuant to this Code of Rules. In addition, the **FCSWA** may commence a civil action under *CERCLA* §§ 107 or 310, 42 U.S.C. §§ 9607 or 9659, or both such sections, *RCRA* § 7002, 42 U.S.C. § 6972, W. Va. Solid Waste Management or public nuisance abatement law, or this Code of Rules, or any combination thereof determined to be necessary and proper by the **FCSWA**, to secure appropriate abatement of, or to recover *Response Costs* or *Open Dumping Abatement Action Costs* incurred or to be incurred in connection with the investigation or abatement of any known or reasonably suspected violation of this Code of Rules, any *Open Dump*, *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance*, or any 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. In seeking any injunctive relief or equitable recovery of *Open Dumping Abatement Action Costs* or *Response Costs* pursuant to this Code of Rules, it is not necessary for the **FCSWA** to post bond nor to allege

or prove at any stage of the proceeding that irreparable injury will occur if the requested equitable relief is not issued, or that the available remedies at law are inadequate. An application by or on behalf of the FCSWA for injunctive relief or commencement of a civil action to recover *Response Costs* or *Open Dumping Abatement Action Costs* incurred or to be incurred by the FCSWA under this Code of Rules may be filed and relief granted notwithstanding the fact that all administrative remedies provided for in this Code of Rules have not been exhausted or invoked against the *Person* or *Persons* against whom relief is sought.

3.7 RECOVERY OF FCSWA LITIGATION COSTS: Except only to the extent that the FCSWA's litigation costs, non-exclusively including its reasonable attorney's fees and costs, expert witness fees and costs, and court costs incurred in any civil action, including any appellate proceeding arising out any such civil action, brought by the FCSWA pursuant to this Code of Rules has been awarded to the FCSWA as an *Open Dumping Abatement Action Cost* or *Response Cost*, in any civil action brought pursuant to this Code of Rules, the FCSWA, if it prevails or substantially prevails, shall be entitled to an award of its litigation costs, non-exclusively including its reasonable attorney's fees and costs, expert witness fees and costs, and court costs incurred. For purposes of this Rule and WVSWMA Section 15(g), W. Va. Code § 22-15-15(g), the FCSWA has substantially prevailed if it has obtained relief through either of the following:

- (a) a judicial order, or an enforceable written agreement, consent decree, or consent judgment; or
- (b) a voluntary or unilateral change in position by the respondent or defendant, if the FCSWA's claim is not insubstantial.

3.8 JUDICIAL REVIEW OF FCSWA RECOMMENDED OR SELECTED ABATEMENT ACTION OR RESPONSE ACTION:

- (a) **Limitation:** In any judicial action challenging an *Open Dumping Abatement Action* or *Response Action* taken or required by the FCSWA under this Code of Rules, judicial review of any issues concerning the adequacy or appropriateness of any *Open Dumping Abatement Action* or *Response Action* taken or ordered by the FCSWA shall be limited to the Administrative Record. Otherwise applicable principles of West Virginia administrative law, including the W. Va. Administrative Procedures Act, W. Va. Code, Chapter 29A, shall govern whether any supplemental materials properly may be considered by the court.
- (b) **Standard:** In considering objections to any *Open Dumping Abatement Action* or *Response Action* taken or required by the FCSWA under this Code of Rules raised in any judicial action, the court shall uphold the FCSWA's decision in selecting the *Open Dumping Abatement Action* or *Response Action* unless the objecting party can

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demonstrate, on the Administrative Record, that the decision was arbitrary and capricious or subject to any of the legal error or fault set forth in W. Va. Code § 29A-5-4(g).

- (c) **Remedy:** In deciding any objection to the selection or recommendation by the FCSWA of any *Open Dumping Abatement Action* or *Response Action* pursuant to this Code of Rules, the court shall apply the standard of decision set forth in W. Va. Code § 29A-5-4(g) and shall approve only such **Actions** and award recovery of only such **Costs** as are set forth in this **Subsection (c)(1) and (2)** of this Rule:
- (1) only the *Open Dumping Abatement Actions*, *Open Dumping Abatement Action Costs*, *Response Actions* or *Response Costs* that have been or will be incurred by the FCSWA in a manner not inconsistent with the valid requirements of this Code of Rules and not subject to any substantial degree to any of the legal faults or errors set forth in W. Va. Code § 29A-5-4(g); and
 - (2) such other relief as is consistent with the valid requirements of this Code of Rules and not subject to any of the legal faults or errors set forth in W. Va. Code § 29A-5-4(g).
- (d) **FCSWA Procedural errors:** In reviewing alleged procedural errors by FCSWA in the selection or recommendation of any *Open Dumping Abatement Action* or *Response Action* pursuant to this Code of Rules, the court may disallow recovery of *Open Dumping Abatement Action Costs* or *Response Costs* incurred or to be incurred by the FCSWA only if the FCSWA procedural errors were so serious and related to matters of such central relevance to the **Action** at issue that such **Action** would have been significantly changed had such errors not been made.

3.9 FCSWA AUTHORITY TO COOPERATE WITH THE FAYETTE CO. CODE ENFORCEMENT AGENCY IN INVESTIGATION OF AND RESPONSE TO AN OPEN DUMP, OPEN DUMPING PUBLIC NUISANCE OR SOLID WASTE PUBLIC NUISANCE; JOINT RESPONSE ACTION COORDINATING COMMITTEE:

- (a) **Joint Site Investigations/Response Actions with Fayette County Code Enforcement Agency:** In exercise of its authority pursuant to W. Va. Code §§ 22C-4-23(13) and (17) and in recognition of the authority and responsibility for identification and abatement of Public Nuisances within Fayette County delegated by West Virginia law to the Fayette County Commission and the Fayette County Code Enforcement Agency (“F_{Co}WV CEA”) by W. Va. Code §§ 7-1-3, 7-1-3ff and 7-1-3kk, the FCSWA, in compliance with the requirements of this Rule, may, jointly with the F_{Co}WV CEA, undertake all or any part of an *Open Dumping Abatement Action(s)* or *Response Action(s)* to address any known or reasonably suspected *Open Dump*, *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance*, non-exclusively including the joint planning or conduct of any enforcement action that the FCSWA is authorized to undertake by this Code of Rules.
- (b) **Joint Response Action Resolutions – When Authorized:** In order to promote timely

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and coordinated enforcement, avoid duplication of effort and unnecessary expenditure of public resources, and to promote efficient and cost-effective responses to any endangerments to the Public Health, Safety, Welfare or the *Environment* within Fayette County, upon reasonably concluding that any known or suspected *Open Dump, Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* under this Code of Rules does or may also constitute a Public Nuisance declared by **Section V** of the Fayette County Comprehensive Public Nuisance Abatement Ordinance, Fayette County Ordinance 2018-001, as the same may be amended or re-enacted from time to time, the FCSWA may, by majority vote of its Members at duly-noticed public meeting, enter into a single Joint Response Action Resolution with the FCoWV CEA addressing the planning, conduct, and enforcement of all or any part of any *Open Dumping Abatement Action* or *Response Action* authorized by this Code of Rules at any designated site(s) or any designated Operable Units of any sites at which there exists or may exist any known or suspected *Open Dump, Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* that also is or is reasonably suspected to be a Public Nuisance declared by **Section V** of the Fayette County Comprehensive Public Nuisance Abatement Ordinance, Fayette County Ordinance 2018-001, as it may be amended from time to time.

(c) **Joint Response Action Resolutions – Required and Allowable Provisions:** Each Joint Response Action Resolution entered into by the FCSWA pursuant to this Rule shall designate with reasonable specificity the site(s), matter(s) or the Operable Unit(s) of any site or matter to which Resolution applies, shall create a Joint Response Coordinating Committee that complies with the requirements of this Rule, shall comply with all of the requirements set forth in **Paragraph (1)** of this **Subsection (c)**, and may contain any provision authorized by **Paragraph (2)** of this **Subsection (c)** of this Rule.

(1) ***Required Provision of a Joint Response Action Resolution:*** Each Joint Response Action Resolution shall comply with each of the following requirements:

- (A) it shall, with reasonable specificity, describe the principal *Open Dumping Abatement Action(s)* or *Response Action(s)* authorized to be jointly undertaken;
- (B) it shall designate a single qualified professional to serve as the Site Project Manager for both the FCSWA and the FCoWV CEA for all tasks or matters authorized to be jointly undertaken pursuant to such Resolution;
- (C) unless exigent circumstances require a shorter period of advance notice, it shall require the Site Project Manager to notify both the FCSWA and FCoWV CEA in writing at least seventy-two (72) hours in advance of each “Major Action or Decision,” as defined by **Subsection (c)(3)** of this Rule, proposed to be made or taken by the Site Project Manager pursuant to such Resolution;
- (D) it shall require any *Open Dumping Abatement Action* or *Response Action*

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jointly undertaken at or concerning a *Class 1 Open Dump* or an *Open Dumping Public Nuisance* to comply with the requirements of **Rule 6.2(a)** of this Code of Rules; and

- (E) it shall require a binding commitment from the **FCoWV CEA** that it acknowledges that the cleanup requirements set forth in **Rule 6** of the Code of Rules are, with respect to any *Open Dump*, *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance* subject to this Code of Rules, each an “Applicable Requirement” as that term is used in the **NCP**, and that it will use its best efforts to advance and support that position in any proceeding commenced or conducted pursuant to such Resolution before the County Commission of Fayette County, WV, any **FCSWA** hearing officer, any court of competent jurisdiction in such position is, should be, or may be relevant.
- (2) **Allowable Provisions of a Joint Response Action Resolution:** Each Joint Response Action Resolution may contain any of the following provisions:
 - (A) a provision substituting the Joint Response Coordinating Committee for the **FCSWA** as the entity authorized to act as “Lead Agency” with respect to any *Open Dumping Abatement Action(s)* or *Response Action(s)* authorized by such Resolution their **NCP** compliance and consistency for purposes of this Code of Rules; and
 - (B) a provision that authorizes any *Open Dumping Abatement Action(s)* or *Response Action(s)* authorized to be required or undertaken by the Joint Response Coordinating Committee pursuant to such Resolution to be either additional to or more stringent than the requirements than that would or might apply pursuant to the **NCP**, if any, whenever the Joint Response Coordinating Committee determines that such additional or more stringent requirement(s) are feasible and are necessary or appropriate to secure adequate protection against, or appropriate abatement of, such *Open Dump*, *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance*, or are feasible and necessary or appropriate to protect or restore approved land uses consistent with any applicable, approved public plan(s) of Fayette County;
 - (C) a provision that, should any Respondent(s) to any Order issued by the Joint Response Coordinating Committee willfully violate, or fail or refuse to comply with such Order, the Joint Response Coordinating Committee may unilaterally carry out any action required by such Order. Instead of, or in addition to, unilaterally carrying out any actions required by this Order, such provision may also authorize the Joint Response Coordinating Committee to seek immediate judicial enforcement of this Order pursuant to either or both this Code of Rules and the Fayette County Comprehensive

Public Nuisance Abatement Ordinance, Fayette Co. Ordinance 2018-001 as it may be amended from time to time. In addition, such provision may authorize the Joint Response Coordinating Committee to pursue against any Respondent(s) to such Order who fails or refuses without just and sufficient cause properly and timely to provide any ***Open Dumping Abatement Action*** or ***Response Action*** required by any Order issued by the Joint Response Coordinating Committee any or all remedies authorized by this Code of Rules or by Fayette County Comprehensive Public Nuisance Abatement Ordinance, Fayette Co. Ordinance 2018-001.

- (3) ***Major Action or Decision requiring advance notice to the FCSWA and the FCoWV CEA:*** For purposes of applying the requirements of **Subsection (c)(1)(C)** of this Rule, the term “Major Action or Decision” means any of the following action(s) or decision(s) of the Site Project Manager that:

- (A) finally approves, approves as modified, or rejects a workplan for the conduct of a Remedial Investigation/Feasibility Study;
- (B) finally approves or rejects a final Remedial Investigation or Feasibility Study report;
- (C) requires development and submission of a workplan for any ***Removal Action*** or interim ***Open Dumping Abatement Action*** or interim ***Remedial Action***;
- (D) finally approves, approves as modified, or rejects a workplan for the conduct of any ***Removal Action*** or interim ***Open Dumping Abatement Action*** or ***Response Action***; or
- (E) commences or formally requests commencement of any enforcement action related to any ***Open Dumping Abatement Action(s)*** or ***Response Action(s)*** authorized by such Resolution before the County Commission of Fayette County, WV or any court of competent jurisdiction.

- (d) **Required composition of any Joint Response Coordinating Committee:** Each Joint Response Coordinating Committee shall be composed of one (1) member of the **FCSWA** who is not also a member of the **FCoWV CEA**, one (1) member of the **FCoWV CEA** who is not also a member of the **FCSWA**, and a third member to be selected by the first two (2) members, who shall have professional education or experience relevant to remedial environmental matters and who shall be: (1) a Board-certified Epidemiologist; (2) professional, qualified Toxicologist; (3) a professional certified in the field of Public Health by the National Board of Public Health Examiners; (4) an attorney authorized to practice law before the highest court of any state with significant, professional experience in the field of remedial environmental law; (4) a professional engineer licensed in the State of West Virginia with significant experience in the field of environmental engineering; or (5) a certified West Virginia environmental site remediation specialist. If the first two (2)

members are unable to agree upon a qualified third (3rd) member, such third (3rd) member shall be, without regard to qualifications otherwise required for such 3rd member, the Executive Director of the Fayette County Department of Health or her/his designee of any professional employee of the Environmental Health Division of the Fayette County Board of Health. No member of the Joint Response Coordinating Committee shall have or be party to any disqualifying conflict of interest with regard to any matter or any liable or potentially liable party likely to be at issue in any ***Open Dumping Abatement Action(s)*** or ***Response Action(s)*** authorized by such Resolution.

- (e) **Savings provision:** Nothing in this Rule is intended to, or shall be construed to, constitute the basis of, or an element of, any defense to any liability imposed by this Code of Rules.

3.10 MANDATORY FCSWA COORDINATION OF RESPONSES, REMEDIES AND ENFORCEMENT; COOPERATION WITH THE SECRETARY:

Notwithstanding any other provision of this Code of Rules, the FCSWA shall not, without the advice and consent of the **Secretary** or of the W. Va. Solid Waste Management Board, take any formal or informal enforcement action or enter into any settlement agreement concerning either an ***Open Dump***, ***Open Dumping Public Nuisance***, or a ***Solid Waste Public Nuisance*** within Fayette County, or any past or present handling, ***Storage***, treatment, transportation, or ***Disposal*** of any ***Solid Waste*** within Fayette County that presents or may present an ***Imminent*** and ***Substantial Endangerment*** to the Public Health, Safety, Welfare or the ***Environment*** within Fayette County, if any of the following apply to the ***Open Dump*** or ***Facility***, site, real property, or matter at issue:

- (a) the State of West Virginia or the **Secretary** has earlier commenced and is diligently prosecuting a civil or criminal action in a court of the United States or of West Virginia to require compliance with the W. Va. Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15, and its implementing regulations applicable to such ***Open Dump***, ***Open Dumping Public Nuisance***, or ***Solid Waste Public Nuisance***;
- (b) the State of West Virginia or the **Secretary** is actually engaging in a ***Removal Action*** under ***CERCLA*** §104, 42 U.S.C. § 9604, or a comparable provision of West Virginia law regarding such ***Open Dump***, ***Open Dumping Public Nuisance***, or ***Solid Waste Public Nuisance*** within Fayette County;
- (c) the State of West Virginia or the **Secretary** has incurred costs to initiate a Remedial Investigation and Feasibility Study under ***CERCLA*** § 104, 42 U.S.C. § 9604, or a comparable provision of West Virginia law, and is diligently proceeding with a ***Remedial Action*** under ***CERCLA*** or a comparable provision of West Virginia law regarding such ***Open Dump***, ***Open Dumping Public Nuisance***, or ***Solid Waste Public Nuisance*** within Fayette County;
- (d) The **Secretary** has issued, and the Responsible Party(ies) are timely and diligently

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complying with, a ***Compliance Schedule*** applicable to such ***Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*** within Fayette County;

- (e) The ***Secretary*** is currently involved in and diligently proceeding with the process of issuing a ***Compliance Schedule*** applicable to such ***Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*** within Fayette County;
- (f) The ***Secretary*** is currently and diligently reviewing and considering an application for a ***Compliance Schedule*** that is being currently and diligently prosecuted by a Responsible or Potentially Responsible Party applicable to such ***Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*** within Fayette County; or
- (g) The State of West Virginia or the ***Secretary*** has earlier commenced and is diligently prosecuting available administrative or judicial remedies against a Responsible Party(ies) [or against it or their ***Insurer(s)*** and indemnitor(s) who have provided or may be providing a guarantee or indemnification or other insurance benefit with respect to liability of such Responsible Party(ies)] who has failed or is failing timely and competently to comply with the requirements of any applicable ***Compliance Schedule***, or to perform any required ***Removal Action*** or ***Remedial Action***, regarding such ***Open Dump, Open Dumping Public Nuisance, or Solid Waste Public Nuisance*** within Fayette County.

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 Liabile *Person* or Potentially Liabile *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 Liabile *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.

CHAPTER 6: OPEN DUMPS - CLEANUP STANDARDS:

Rule 6.0 Criteria for Selection of Open Dumping Abatement Action or Response Action: Any interim or final *Open Dumping Abatement Action* or *Response Action* selected, required or approved pursuant to the authority vested or liability imposed by this Code of Rules shall comply with the requirements of this **Chapter 6** of this Code of Rules. With respect to any such Action(s), the FCSWA or the court shall select the appropriate *Open Dumping Abatement Action* or *Response Action* determined to be necessary to be carried out under the Code of Rules which are in accordance with the requirements of this Chapter 6, and which provide for cost-effective abatement or response. In evaluating the cost effectiveness of any proposed alternative, final *Open Dumping Abatement Action* or *Response Action*, the FCSWA or the court shall consider the total short- and long-term costs of such Action(s), including the costs of operation and maintenance for the entire period during which such activities will be required.

6.1 General Site Cleanup Standards:

(a) **Preferred treatment or reprocessing:** With respect to all *Open Dumping Abatement Action* or *Response Action* subject to **Rule 6.0**, Action(s) in which reprocessing or treatment which permanently and significantly reduces the volume, toxicity or mobility of any of the *Hazardous Substance(s)* or *Toxic Pollutant(s) and Contaminant(s)* present at or that have emanated from the site or *Facility* at issue is a principal element are to be preferred over *Open Dumping Abatement Action* or *Response Action* not involving such reprocessing or treatment. The offsite transport and *Disposal of Hazardous Substance(s), Toxic Pollutant(s) or Contaminant(s)* or environmental media contaminated with either *Hazardous Substance(s)* or *Toxic Pollutant(s) and Contaminant(s)* without such reprocessing or treatment should be the least favored alternative *Open Dumping Abatement Action* or *Response Action* where practicable treatment or reprocessing technologies are available. The FCSWA or the court shall conduct, or require the timely and competent conduct of, an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of any *Hazardous Substance* or *Toxic Pollutant(s) and Contaminant(s)*, or both. In making such assessment, the FCSWA or the court shall specifically address, or require that the responsible party(ies) address the long-term effectiveness of various alternatives. In assessing alternative *Open Dumping Abatement Action* or *Response Action*, the FCSWA or the court shall, at a minimum, take into account:

- (1) the long-term uncertainties associated with land disposal;
- (2) the goals, objectives, and requirements of *RCRA* and the W. Va. Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15;
- (3) the persistence, toxicity, mobility, and propensity to bioaccumulate of such *Hazardous Substances, Toxic Pollutant(s) and Contaminant(s)*, or both, and their constituents;

- (4) short- and long-term potential for adverse health effects from human exposure;
 - (5) long-term maintenance costs;
 - (6) the potential for incurrence of future *Open Dumping Abatement Action Costs* or *Response Costs* if the alternative *Open Dumping Abatement Action* or *Response Action* in question were to fail; and
 - (7) the potential threat to Public Health, Safety, Welfare or the *Environment* associated with excavation, transportation, and re-disposal, or containment.
- (b) The FCSWA or the court shall select an *Open Dumping Abatement Action* or *Response Action* that is protective of human health and the *Environment*, that is cost effective, that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable, and that, to the maximum extent practical, is consistent with and promotes the accomplishment of the public goals set forth in the Fayette County Solid Waste Plan and the applicable provisions, if any, of the formally approved Fayette County General Plan, land use and Urban Renewal Plans. If the FCSWA selects or recommends any Interim or Final *Open Dumping Abatement* or *Remedial Action(s)*, other than an Order requiring a Liable *Person(s)* to perform a Remedial Investigation and Feasibility Study with respect to any *Open Dump*, *Open Dumping Public Nuisance* or *Solid Waste Public Nuisance*, not appropriate for a preference under this **Rule 6.1(a)** or **(b)**, the FCSWA shall publish an explanation for public review and comment as to why such *Open Dumping Abatement Action* or *Response Action* involving such reductions was not selected.
- (c) The FCSWA or the court may select an alternative *Open Dumping Abatement Action* or *Response Action* meeting the objectives of this **Rule 6.1** regardless of whether such **Action** has been achieved in practice at any other **Facility** or site that has similar characteristics. In making such a selection, the FCSWA or the court may consider the degree of support for such *Open Dumping Abatement Action* or *Response Action* by the public and the parties interested in such site.

6.2 Site-specific Requirements Applicable to Recommendation, Selection, and Conduct of Open Dumping Abatement Action(s) or Response Action(s):

- (a) **Cleanup and Response requirements applicable to a Class 1 Open Dump or an Open Dumping Public Nuisance:** In addition to complying with the requirements of Rule 6.1, all *Open Dumping Abatement Action* or *Response Action* subject to the requirements of this **Chapter 6** of this Code of Rules taken or required with respect to a *Class 1 Open Dump* or an *Open Dumping Public Nuisance* shall be undertaken in a manner not inconsistent with the *National Contingency Plan* (interpreted and applied with the FCSWA serving as, and exercising the authority and discretion therein assigned to, either the "U.S. Environmental Protection Agency" or the "Lead Agency").
- (b) **Cleanup and Response requirements applicable to a Class 2 Open Dump or a Solid Waste Public Nuisance:** In addition to complying with the requirements of

Rule 6.1, all *Open Dumping Abatement Action* or *Response Action* subject to the requirements of this Chapter 6 of this Code of Rules taken or required with respect to a *Class 2 Open Dump* or *Solid Waste Public Nuisance* shall, to the maximum extent practicable, be undertaken in a manner not inconsistent with the *National Contingency Plan* (interpreted and applied with the FCSWA serving as, and exercising the authority and discretion therein assigned to the "U.S. Environmental Protection Agency" or "Lead Agency"); provided, however, that the FCSWA or the court, *sua sponte* or upon application of any governmental agency with jurisdiction over such site or *Facility* or of any Liable or Potentially Liable *Person(s)* at such site, may waive any specific requirement(s) imposed by this Chapter 6 that is not otherwise required by applicable federal or West Virginia statute or by applicable regulations of any federal agency or any West Virginia agency or authority other than the FCSWA upon a showing by clear and convincing evidence that, if such specific requirement is waived, the resulting *Open Dumping Abatement Action* or *Response Action* will be adequately protective of the Public Health, Safety, Welfare, the *Environment* within Fayette County and of all present and future beneficial uses of *Natural Resources* beyond the boundaries of the parcel(s) of real property upon which such *Class 2 Open Dump* or *Solid Waste Public Nuisance* is located.

- (c) **Cleanup and Response requirements applicable to a Class 3 Open Dump:** If the FCSWA, upon inspection or investigation by a duly authorized representative or through other means, specifically including receipt of a formal Finding and Recommendation of the *Secretary*, the West Virginia Solid Waste Management Board, the Fayette County Commission; the Fayette County Code Enforcement Agency ("FCoWV CEA"), the Fayette County Board of Health, or the Fayette County Urban Redevelopment Authority, observes, discovers or learns of reasonable cause to believe that there exist within Fayette County or adversely impacting on the Public Health, Safety, Welfare or the *Environment* within Fayette County a *Class 3 Open Dump*, it shall, in recognition of the provisions of W. Va. Code § 7-1-3ff(d), refer the matter to the Fayette County Litter Control Officer for appropriate action, or, in recognition of the provisions of W. Va. Code § 7-1-3ff(e) and (f)(1), refer the matter to the FCoWV CEA for appropriate action under Fayette County Ordinance No. 2018-001. Notwithstanding such referral or the fact that the resulting liability with respect to such *Open Dump* may be imposed either pursuant to W. Va. Code, Chapter 22, Article 15, or W. Va. Code § 7-1-3ff and Fayette County Ordinance 2018-001, unless such *Open Dump* is subject to a **Compliance Schedule**, any *Open Dumping Abatement Action* or *Response Action* taken or required by the FCoWVCEA, the Fayette County Commission, or the court with respect to a *Class 3 Open Dump* or *Solid Waste Public Nuisance* shall comply with the substantive and procedural requirements of **Rules 6.1** and **6.3** of this Code of Rules.
- (d) **Cleanup and Response requirements applicable to a Class 4 Open Dump:**
- (1) If the FCSWA, upon inspection or investigation by a duly authorized representative or through other means, specifically including receipt of a formal Finding and

Recommendation of the **Secretary**, the W. Va. Solid Waste Management Board, the Fayette County Commission; the Fayette County Code Enforcement Agency (“**FCoWVCEA**”), the Fayette County Board of Health, or the Fayette County Urban Renewal Authority, observes, discovers or learns of reasonable cause to believe that there exist within Fayette County or adversely impacting the Public Health, Safety, Welfare or the *Environment* within Fayette County a **Class 4 Open Dump**, it may, by majority vote of the members of the **FCSWA**, take any of the following actions:

- (A) in recognition of the provisions of W. Va. Code § 7-1-3ff(d), refer the matter to the Fayette County Litter Control Officer for appropriate action;
 - (B) in recognition of the provisions of W. Va. Code § 7-1-3kk and Fayette County Ordinance 2018-001, refer the matter to the **FCoWV CEA** for appropriate action; or
 - (C) take any other action authorized by this Code of Rules.
- (2) any **Response Action** or **Open Dumping Abatement Action** taken or required with respect to a **Class 4 Open Dump** by the **FCSWA**, **FCoWV CEA**, the Fayette County Commission, or the court shall comply with the requirements of **Rules 6.1(b)** and **(c)** and **6.3** of this Code of Rules;

6.3 Requirements Regarding Any Open Dumping Abatement Action or Response Action Involving the Transfer of Any Hazardous Substance or Toxic Solid Waste Offsite to Any Location within Fayette County: Any interim or final **Open Dumping Abatement Action** or **Response Action** selected, required or approved pursuant to the authority vested or liability imposed by this Code of Rules that involves the transfer offsite to any location within Fayette County of any **Hazardous Substance** or **Toxic Solid Waste** must require that any such **Hazardous Substance** or **Toxic Solid Waste** only be transferred to a **Facility** which is permitted pursuant to, and operating in compliance with, **RCRA** sections 3004 and 3005 and all applicable requirements of West Virginia law. Such **Hazardous Substance** or **Toxic Solid Waste** may be transferred to a land disposal **Facility** within Fayette County only if the **FCSWA** determines that both of the following requirements are met:

- (a) The unit to which the **Hazardous Substance** or **Toxic Solid Waste** is transferred is not **Releasing** any **Hazardous Substances**, **Hazardous Waste**, **Toxic Solid Waste**, or constituent thereof, into the groundwater or surface water or soil; and
- (b) All such **Releases** from other units at the facility are being controlled by a corrective action program approved by the Administrator of the U.S. Environmental Protection Agency under **RCRA** Subtitle C or by the **Secretary** in accord with the W. Va. Hazardous Waste Management Act, W. Va. Code, Chapter 22, Article 18, and the W. Va. Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15.