

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**. 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 Rule **6.0** 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 West Virginia Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15, the West Virginia County and Regional Solid Waste Authorities Act, W. Va. Code, Chapter 22C, Article 4, the West Virginia Solid Waste Management

Rule, 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 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 a **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 a **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 a **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 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 promulgated by the U.S. Environmental Protection Agency and 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), 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**," “threat,” “threaten” or "risk" within this Code of Rules means:

- (a) an **Endangerment** or **Public Nuisance** that is present or is currently realized; or
- (b) an **Endangerment** or **Open Dumping 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** or **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** or **Open Dumping 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 Leachate: Consistent with its definition in 40 C.F.R. § 257.2 and in the West Virginia Solid Waste Management Rule promulgated by the **Secretary** pursuant to authority under the West Virginia Solid Waste Management Act, W. Va. Code § 22-15-5, and codified at 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.

2.22 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."

2.23 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 context of the Public Trust Doctrine.

2.24 **Open Dump**: Consistent with its meaning in **RCRA** § 1004(14), 42 U.S.C. § 6903(14), 40 C.F.R. § 257.2, and in the West Virginia Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15, 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 which does not have a valid permit under W. Va. Code, Chapter 22, Article 11, or is in violation of West Virginia law, non-exclusively including the West Virginia 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**.

2.25 **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 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** or **Open Dumping Public Nuisance** in or adversely affecting 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** or **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**;
 - (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**;
 - (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, 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** 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

FAYETTE COUNTY SOLID WASTE AUTHORITY
(AN AGENCY AND INSTRUMENTALITY OF THE STATE OF WEST VIRGINIA)

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FCSWA as capable of implementing an approved **Removal Action** or **Remedial Action** as part of a **Response** to an **Open Dump** or **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** or **Public Nuisance** within or affecting Fayette County;

- (g) Such actions as are necessary and proper for the FCSWA 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** or **Open Dumping 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.

2.26 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 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** or **Public Nuisance**, or any **Endangerment** to the Public Health, Welfare, Safety, or the **Environment** that may be presented by an actual or threatened **Public Nuisance**, or to seek enforcement of any law, specifically including any provision of this 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** or **Open Dumping Public Nuisance**, or 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 **Public Nuisance** within or adversely effecting Fayette County, non-exclusively including all FCSWA enforcement costs incurred or to be incurred related thereto;
- (b) costs to investigate or respond to the existence, or imminent threat of an **Open Dump** or **Public Nuisance** within Fayette County;
- (c) costs to monitor, assess or evaluate an **Open Dump** or **Open Dumping 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 a **Public Nuisance**;

- (d) costs to prevent, minimize, or mitigate any **Endangerment** to the public health, safety, welfare or to the **Environment** that may be presented by an actual or threatened **Open Dump** or **Public Nuisance** within, or adversely impacting on the public or any natural resources within, Fayette County; or
- (e) costs to oversee and monitor the performance by any liable or potentially responsible **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 **Public Nuisance** within, or adversely impacting on the public or any natural resources within Fayette County;
- (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.

2.27 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 arises, in whole or in any **Substantial** part, at the site of, from, or as result of 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.

2.28 Overburden: Consistent with its definitions in the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 – 1328, (“SMCRA”) 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.

2.29 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.

2.30 Point Source: Consistent with its definition in the CWA regulations promulgated by the U.S. Environmental Protection Agency and codified at 40 C.F.R. § 122.2, 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**. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

2.31 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).

2.32 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.

2.33 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.

2.34 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 **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 **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.

- 2.35 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 **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

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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.

2.36 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.

2.37 Secretary: The term "**Secretary**" means the Cabinet Secretary of the West Virginia Department of Environmental Protection, or such other person to whom such Cabinet Secretary lawfully has delegated authority or duties pursuant to W. Va. Code, Chapter 22, Article 1.

2.38 Solid Waste: Consistent with its meaning in **RCRA** Subtitle D, 42 U.S.C. §§ 6941 – 4949a, and applicable West Virginia law, 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 offensive or unsightly matter, solid, liquid, semisolid or contained liquid or gaseous material resulting from industrial, commercial, mining or community activities, but does not include:
 - (1) solid or dissolved material in sewage;
 - (2) solid or dissolved materials in irrigation return flows;
 - (3) industrial discharges which are **Point Sources** and have permits under W. Va. Code, Chapter 22, Article 11;
 - (4) source, special nuclear or byproduct material as defined by the Atomic Energy Act of 1954, as amended, including any nuclear or byproduct material considered by federal standards to be below regulatory concern;
 - (5) a **Hazardous Waste** either identified or listed under W. Va. Code, Chapter 22, Article 18;

- (6) refuse, slurry, **Overburden** or other wastes or material resulting from coal-fired electric power or steam generation;
- (7) refuse, slurry, **Overburden** or other wastes or material resulting from the exploration, development, production, storage and recovery of coal, oil and gas and other mineral resources placed or **Disposed** of at a **Facility** which is regulated under W. Va. Code, Chapter 22, Article 1, Chapter 22A or 22B, so long as all such placement or **Disposal** is in conformance with a permit issued pursuant to such chapters.

2.39 Solid Waste Facility: Consistent with its definition in the West Virginia Solid Waste Management Act, 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**.

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

- (a) any of the conditions, acts, omissions, events and activities defined, declared, or acknowledged to be a **Public Nuisance** by any valid West Virginia statute or regulation that involved or involves any uncontrolled, inadequately controlled, or improper collection, transportation, processing or **Disposal** of **Solid Waste** 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 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 West Virginia 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 Abatement 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 the 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 § 7-1-3kk, 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.

2.41 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**.

2.42 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 unsupportable by reference to credible authority, and neither insignificant nor *de minimis*.

2.43 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).

2.44 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.