

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

**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 affecting 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 valid 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, 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 **Open Dump** 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 has been a **Release** or threatened **Release** of a **Solid Waste** within or adversely effecting Fayette County;
  - (4) where any known or reasonably suspected **Solid Waste Public Nuisance** activity or condition within or adversely effecting Fayette County 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 **Solid Waste Public Nuisance** within or adversely effecting Fayette County may be obtained;
  - (6) where information may be found regarding:
    - (A) the **Endangerment(s)** presented by any **Open Dump, Solid Waste Public Nuisance**, or other noncompliance within or adversely effecting Fayette County;  
or
    - (B) the proper abatement of any **Open Dump, 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, 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.
- (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 West Virginia Rules of Civil Procedure, of a written Demand for Production of Information upon any

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**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, directly or indirectly 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, 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 an **Imminent and Substantial 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, 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 a **Solid Waste** 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

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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**, 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 Paragraph VIII(a)(3) or from any location of any known or suspected, **Released Solid Waste** 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:

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- (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 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. In the event of the commencement of any such civil actions, the **FCSWA** may, pursuant to its authority under W. Va. Code § 7-4-1(a), request the Fayette County Prosecuting Attorney to attend to that civil action. Where there is a reasonable basis to believe there is or may be an **Open Dump, Solid Waste Public Nuisance**, or other noncompliance, 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

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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 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;

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- (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 concise written statement described Subsection (e)(1) of this Rule that failed or refused timely to file a complete, concise written statement that fully complies with the requirements of Subsection (e)(1) of this Rule, thereafter, in any civil or criminal action or any proceeding before the Fayette County Commission 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.
- (1) 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.
  - (2) 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

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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 West Virginia Freedom of Information Act, W. Va. Code § 29B-1-4.

### **3.2 FCSWA ORDERS 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 **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 requirements of Rule Four of the West Virginia 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:

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- (1) ascertain the nature and extent of the actual or threatened Endangerment to the Public Health, Safety, Welfare, or the Environment; or
  - (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 determines that no responsible party is able to conduct monitoring, testing, analysis or reporting reasonably satisfactory to the FCSWA, or if the FCSWA determines that any such action carried out by the responsible party to be unsatisfactory, the FCSWA may conduct appropriate monitoring, testing or analysis (or any combination thereof) which the FCSWA 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 may further require, by order issued and served in compliance with the requirements of this Rule, that the responsible party(ies) 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, non-exclusively including the FCSWA Open Dumping Response and Settlement Fund:
- (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 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, 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. In the event of the commencement of any such civil actions, the FCSWA may, pursuant to its authority under W. Va. Code § 7-4-1(a), request the Fayette County Prosecuting Attorney to attend to that civil action. 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

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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 AND OPEN DUMPING ENFORCEMENT AUTHORITY:**

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, 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**, or at or in an **Open Dump**, either of which presents or may present an **Imminent** and **Substantial Endangerment** to the Public Health, Safety, Welfare or the **Environment** within 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:

- (a) 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;
- (b) Issue in compliance with Rule 3.4 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

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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;

- (c) 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;
- (d) Either request the Attorney General of West Virginia pursuant to W. Va. Code § 22C-4-9(a), or direct the 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 assert the 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 effectuate the enforcement and remedial purposes of this Code of Rule; or
- (e) Pursuant to W. Va. Code § 7-4-1(a), request the Fayette County Prosecuting Attorney to bring an appropriate criminal action(s) pursuant to West Virginia Solid Waste Management Act, W. Va. Code § 22-15-15(b), either alone or in addition to other applicable West Virginia law properly imposing 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 4.2(a) 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 West Virginia Rules of Civil Procedure. If any current Owner(s) or Operator(s) of any **Open Dump**, any site or location at which 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

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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 West Virginia 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 authorized by Subsection (b) of this Rule to request a hearing on a 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:** Notwithstanding any other provision of this Code of Rules and before, in

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conjunction with, or in lieu of either requesting the Attorney General of West Virginia, or directing legal counsel properly retained by the FCSWA pursuant to W. Va. Code § 22C-4-9(a), to bring an appropriate civil action authorized in Rule 4.1(d) of this Code of Rules, whenever the FCSWA has reasonable grounds to believe that there is or may be an **Open Dumping 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 **Imminent and Substantial Endangerment** to the Public 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 **Abatement Actions** 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 **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.

- a. **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 West Virginia 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.
- b. **Authority to require for 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, nonexclusively including the FCSWA Solid Waste Abatement Action Settlement Fund:
  - (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;

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- (2) in connection with any **Abatement Action** deemed necessary and proper by the **FCSWA** in reviewing, commenting on, and revising a responsible party'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 responsible party required by the order.
- (c) **Timing of review of any Final and Binding Time-Sensitive Abatement Action Order issued pursuant to this Rule 4.2:** 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 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, West Virginia solid waste 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**

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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 ATTORNEYS' FEES AND 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, 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 **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 **Abatement Action** or **Response Action** unless the objecting party can demonstrate, on the Administrative Record, that the decision was arbitrary and capricious or subject to any

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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 **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 **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 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 (“FCoWVCEA”) 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 FCoWVCEA, 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 and coordinated enforcement, avoid duplication of effort and unnecessary expenditure of

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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 **FCoWVCEA** 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 or re-enacted 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 Paragraphs (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 **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 **FCoWVCEA** 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 **FCoWVCEA** 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 **Abatement Action** or **Response Action** 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 **FCoWVCEA** that it acknowledges that the cleanup requirements set forth in Rule 6 of the Code of

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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 Fayette County Commission, 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 **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 **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 **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***

**FCoWVCEA:** 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 **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 **Abatement Action** or **Response Action**; or
- (E) commences or formally requests commencement of any enforcement action related to any **Abatement Action(s)** or **Response Action(s)** authorized by such Resolution before the Fayette County Commission 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 **FCoWVCEA**, one (1) member of the **FCoWVCEA** 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 an attorney authorized to practice law before the highest court of any state, a professional engineer licensed in the State of West Virginia, or an environmental site remediation specialist. If the first two (2) members are unable to agree upon a qualified third (3<sup>rd</sup>) member, such third (3<sup>rd</sup>) member shall be, without regard to qualifications otherwise required for such 3<sup>rd</sup> member, the Executive Director of the Fayette County Department of Health or her/his designee or 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 **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 West Virginia Solid Waste Management Board, take any formal or informal enforcement action or enter into any settlement agreement concerning either

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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 West Virginia Solid Waste Management Act, W. Va. Code, Chapter 22, Article 15, and is 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 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** 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** or **Solid Waste**

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