

IN THE COUNTY COMMISSION OF PUTNAM COUNTY, WEST VIRGINIA

**IN RE: Putnam County Ordinance Declaring the Storage or Disposal of Designated Hazardous Wastes and Prohibited Hazardous Substances in Putnam County, West Virginia to be a Public Nuisance**

The Putnam County Commission sitting in regular session this 12<sup>th</sup> day of August 2014, does hereby declare and ordain as follows:

- (1) THE DISPOSAL, THE LAND DISPOSAL, AND THE EXISTENCE OF ANY PERMANENT LAND DISPOSAL OF ANY HAZARDOUS WASTES AT ANY PLACE WITHIN PUTNAM COUNTY;
- (2) THE LAND DISPOSAL OR THE STORAGE BY CONDITIONS CONSTITUTING LAND DISPOSAL OF ANY PROHIBITED HAZARDOUS SUBSTANCE AT ANY PLACE IN PUTNAM COUNTY;
- (3) THE DISPOSAL IN PUTNAM COUNTY OF ANY PROHIBITED HAZARDOUS SUBSTANCE AT ANY SITE, LOCATION OR FACILITY OTHER THAN ONE WHICH IS DULY LICENSED PURSUANT TO EITHER:
  - (A) RCRA SECTIONS 3004 AND 3005, 42 U.S.C. §§ 6924 AND 6925, (OR, WHERE APPLICABLE, IN COMPLIANCE WITH THE TOXIC SUBSTANCES CONTROL ACT (15 U.S.C. § 2601 *ET SEQ.*), OR
  - (B) THE PROVISIONS OF WEST VIRGINIA LAW THAT OPERATE, PURSUANT TO RCRA § 3006, 42 U.S.C. § 6906, "IN LIEU OF" RCRA SECTIONS 3004 AND 3005, 42 U.S.C. §§ 6924 AND 6925AND WHICH SITE, LOCATION OR FACILITY IS OPERATING IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF SUCH PERMIT, AND OTHER APPLICABLE FEDERAL LAWS, AND ALL APPLICABLE STATE LAWS AND REGULATIONS

TO BE FOR ALL PURPOSES A PUBLIC NUISANCE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Putnam County Commission is authorized and empowered by State Law to enact ordinances, issue orders and take other appropriate and necessary actions for the elimination of hazards to public health and safety, and to abate or cause to be abated anything which the County Commission determines to be a public nuisance; and

WHEREAS, the Putnam County Commission is also authorized and empowered by State Law to enact ordinances regulating the removal and clean up of any accumulation of refuse or debris, or toxic spillage or toxic seepage located on private lands which is determined by the County Commission to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare, whether the result of natural or manmade force or effect; and

WHEREAS, in order to assure adequate protection of public health and the healthfulness of the environment, the permanent land disposal of any Prohibited Hazardous Substances at disposal sites or facilities other than at a facility with either: (1) a valid federal Hazardous Waste treatment or disposal permit properly issued pursuant to the provisions of Subtitle C of the federal Solid Waste Management Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended by the Hazardous and Solid Waste Amendments of 1984, as further amended, 42 U.S.C. §§ 6901-6992k; or (2) a duly issued and valid state Hazardous Waste treatment, or disposal permit issued pursuant to the WV Hazardous Waste Management Act, Article 22-18 of the West Virginia Code, has already been banned by Congress for any such Hazardous Substances that result in whole or in part from the remediation of remote sites performed by or pursuant to the national Hazardous Substance remediation program embodied in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, 100 Stat. 1613, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009, 42 U.S.C. §§ 9601--9675; and

WHEREAS, the County Commission has determined that the storage or land disposal of Prohibited Hazardous Substance as defined in this Ordinance within Putnam County, regardless of by whom such storage or disposal has been or is being conducted poses an unwarranted endangerment to public health, safety, and the healthfulness of the Environment within Putnam County and should be, and by this Ordinance is, declared to be a Public Nuisance; and

WHEREAS, the County Commission has determined that permanent disposal of Hazardous Waste as defined in this Ordinance within Putnam County, other than in complete compliance with the terms of this Ordinance, poses an unwarranted endangerment to the public health, safety, and the healthfulness of the Environment within Putnam County and should be, and by this Ordinance is, declared to be a Public Nuisance; and

WHEREAS, the necessity, in the public interest, for the provisions and prohibitions hereinafter contained and enacted is declared as a matter of legislative determination and public policy, and it is further declared that the provisions and prohibitions hereinafter contained and enacted are in pursuance of and for the purpose of securing adequate protection of the public health, safety, welfare, and the healthfulness of the Environment within Putnam County and the persons therein.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNTY COMMISSION OF PUTNAM COUNTY, WEST VIRGINIA THAT:

**Section 1 - Title:**

This Ordinance may be known and cited as the "Ordinance Declaring the Storage or Disposal of Designated Hazardous Wastes and Prohibited Hazardous Substances in Putnam County, West Virginia to be a Public Nuisance".

**Section 2 - Applicability:**

This Ordinance shall apply to and be enforceable in Putnam County.

**Section 3 - Definitions:**

The following definitions shall apply in the interpretation and enforcement of this Ordinance, and shall be understood and construed to set forth the legislative intent of this Ordinance. When not inconsistent with the context, words used in the present tense include the future; words used in the singular include the plural, and the plural the singular. The word "shall" or "must" is always mandatory and not merely directory. The word "may" is permissible and not mandatory. The masculine gender shall include the feminine or neutral gender.

- (a) The term "**Action Level or Advisory Level**" ("**AL**") means the maximum level established by valid legal authority of the United States or of the State of West Virginia at which a hazardous constituent may lawfully be present in a drinking water supply and also remain protective of both human health and the environment.
- (b) The term "**CERCLA**" shall mean the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, 100 Stat. 1613, and as further amended by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub.L. 104-208, 110 Stat. 3009 (also sometimes known as the "federal Superfund Act"), 42 U.S.C. §§ 9601-9675.
- (c) The term "**Dilution and Attenuation Factor**" ("**DAF**") shall mean a factor that is used to estimate the dilution and attenuation for toxic constituents contained in a Waste as they travel from the point of leachate generation in a landfill through the subsurface to the point of human or environmental exposure, such as, a drinking water well, discharge into a POTW, or an aerated leachate collection pond. [Note: The U.S. EPA uses chemical specific DAFs to determine if toxic contaminants listed in the National Drinking Water Standards are present in Waste to identify the waste stream as a "Hazardous Waste listed or identified by the Administrator" of U.S. EPA pursuant to Subtitle C of RCRA using the U.S. EPA Toxicity Characteristic Leachate Procedure ("TCLP"). An identical process is followed by Secretary of the West Virginia DEP in determining if toxic

contaminates listed in the National Drinking Water Standards are present in **Waste** to identify the waste stream as a regulated Hazardous Waste under the WV Hazardous Waste Management Act, Article 22-18 of the West Virginia Code. The U.S. EPA uses a maximum DAF of 100 unless other information exists to use a different DAF.]

- (d) The term "**Disposal**" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any Waste into or on any land or water so that such **Waste** or any constituent thereof may enter the Environment or be emitted into the air or discharged into any waters, including ground waters.
- (e) The term "**Environment**" means any surface water, groundwater, soil water, drinking water supply, soil, land surface, subsurface strata, or ambient air within Putnam County.
- (f) The term "**Facility**" means:
  - (1) Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft; or
  - (2) Any site or area where **Hazardous Waste** or a **Prohibited Hazardous Substance** has been deposited, stored, disposed of, or placed, or otherwise has come to be located, but does not include any consumer product in consumer use.
- (g) The term "**Governmental entity**" means every officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission of the United States or any State; and any other body which is created by state or local governmental authority or which is primarily funded by state or local governmental authority.
- (h) The term "**Hazardous Substance**" shall have the same meaning as is provided in **CERCLA** section 104(14), 42 U.S.C. § 9601(14), as that term has been construed and interpreted by the decisions of the Courts of the United States having jurisdiction to interpret and apply the provisions of **CERCLA**.
- (i) The term "**Hazardous Waste**" shall mean a Waste or combination of Wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics may:
  - (1) cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
  - (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed; and which also meets any one or more of the following criteria:
    - (A) it is a **Waste** or **Wastes** the lawful management or **Disposal** of which requires a federal hazardous waste treatment, storage or disposal permit issued pursuant to Subtitle C of RCRA, or a West Virginia hazardous waste treatment, storage or disposal permit duly issued pursuant to the West Virginia Hazardous Waste Management Act (hereinafter: "WV HWMA"), Article 22-18 of the West Virginia Code; or
    - (B) it is a Waste producing a "TCLP Liquid Extraction" containing any chemical constituent which has or has had an "AL" that has not been invalidated by any lawful administrative or judicial order, and a

concentration greater than the product of the DAF and the reported concentration in the waste stream; or

- (C) it is a Waste producing a "TCLP Liquid Extraction" containing any chemical constituent which has a concentration greater than the product of the DAF and three times the Odor Detection Threshold determined for the chemical constituent.
- (j) The term "**Knowingly**" imports only a knowledge that the facts exist which brings the act or omission within the any applicable provision of this Ordinance. It does not require any knowledge of the unlawfulness of such act or omission, nor does it require any knowledge of any requirement in law that a **Person** affirmatively conduct any inquiry or assessment; however, for purposes of this Ordinance, a **Person** acts knowingly if he proceeds without knowledge of any fact which the law, including this Ordinance, imposes an affirmative obligation to know or ascertain.
- (k) The term "**Land Disposal**" means disposal in or on the land, including placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave, or placement in a concrete vault or bunker intended for disposal purposes.
- (l) The term "**Odor Detection Threshold**" shall mean the lowest concentration of a given odor compound that is perceivable by the human sense of smell. [Note: The National Secondary Drinking Water Standards recommend that drinking water should not contain chemical constituents that exceed three times the "Odor Detection Threshold."]
- (m) The term "**Person**" means an individual, trust, firm, joint stock company, corporation, including a governmental corporation, dissolved or bankrupt corporation to the extent of its available insurance assets or undistributed non-insurance assets, bankruptcy trustee, debtor in possession under the federal bankruptcy laws, partnership, association, consortium, joint venture or commercial entity. The term also includes any municipality, county, commission, district, any state, any department or agency thereof or any political subdivision thereof, any interstate body, or the United States, and any of its agencies or instrumentalities to the extent authorized by law, as well as the estate of a deceased individual to the extent of available insurance assets.
- (n) The term "**Prohibited Hazardous Substance**" shall mean a **Hazardous Substance** that resulted or is resulting in whole or in part from a **Removal Action** or **Remedial Action** undertaken at any site wherever located from which such **Hazardous Substance** has been or is being transferred from such site for **Disposal** at any location within Putnam County, and such term shall include any environmental media or other material contaminated in whole or in any part with such Hazardous Substance.
- (o) The term "**Public Nuisance**" shall mean any of the conditions, acts, events and activities defined and declared to be a Public Nuisance in Section 5 of this Ordinance.
- (p) The term "**RCRA**" shall mean the federal Solid Waste Management Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended by the Hazardous and Solid Waste Amendments of 1984, as further amended (also



sometimes known as the "federal Hazardous Waste Management Act"), 42 U.S.C. §§ 6901-6992k.

- (q) The term "**Remedial Action**" shall have the same meaning set forth in **CERCLA** section 104(24), 42 U.S.C. Section 9601(24), as that term has been construed and interpreted by the decisions of the Courts of the United States having jurisdiction to interpret the provisions of **CERCLA**, and specifically includes every such Remedial Action regardless of whether undertaken pursuant to **CERCLA** or otherwise.
- (r) The term "**Removal Action**" shall have the same meaning as is provided in **CERCLA** section 104(23), 42 U.S.C. Section 9601(23), as that term has been interpreted and construed by the decisions of the Courts of the United States having jurisdiction to interpret the provisions of **CERCLA**, and specifically includes every such Removal Action regardless of whether undertaken pursuant to **CERCLA** or otherwise.
- (s) The term "**Storage**," when used in connection with **Waste**, means the containment of **Waste**, either on a temporary basis or for a period of years, in such a manner as not to constitute **Disposal** of such **Waste**.
- (t) The term "**TCLP Liquid Extraction**" means the liquid phase of a **Waste** that is obtained using the U.S. EPA Method 1311.
- (u) The term "**Toxicity Characteristic Leaching Procedure**" ("**TCLP**") shall mean the USEPA Method 1311, Toxicity Characteristic Leaching Procedure designed to determine the mobility of both organic and inorganic analytes present in liquid, solid, and multi-phasic wastes.
- (v) The term "**Waste**" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the federal Water Pollution Control Act, as amended, or source, special nuclear or by-product material as defined by the federal Atomic Energy Act of 1954, as amended.

#### Section 4 – Public Nuisances prohibited within Putnam County:

No Person shall cause, contribute to, harbor, commit or maintain or suffer to be caused, contributed to, harbored, committed or maintained, or imminently threaten to cause, contribute to, harbor, commit or maintain any Public Nuisance as defined by this Ordinance at any place within Putnam County.

#### Section 5 – Public Nuisances declared and enumerated:

- (a) **Declaration of Public Nuisances:** Subject only to the provisions of Subsection (b) of this Section 5, each of the following are hereby defined and declared to be for all purposes a Public Nuisance:

- (1) The Storage, Disposal or Land Disposal of Hazardous Waste at any place in Putnam County;
- (2) The **Land Disposal** or the Storage by conditions constituting Land Disposal of any **Prohibited Hazardous Substance** at any place in Putnam County;
- (3) The Disposal in Putnam County of any Prohibited Hazardous Substance at any site, location or facility other than one which is duly licensed pursuant to either:
  - (A) **RCRA** sections 3004 and 3005, 42 U.S.C. §§ 6924 and 6925, (or, where applicable, in compliance with the Toxic Substances Control Act 15 U.S.C. § 2601 *et seq.*), or
  - (B) the provisions of West Virginia law that operate, pursuant to **RCRA** § 3006, 42 U.S.C. § 6906, "in lieu of" **RCRA** sections 3004 and 3005, 42 U.S.C. §§ 6924 and 6925

and which is operating in compliance with the terms and conditions of such permit, and other applicable Federal laws, and all applicable State laws and regulations.

- (b) **Affirmative defenses to liability:** There shall be no liability, civil or criminal, under this Ordinance for any Person otherwise liable with respect to a **Public Nuisance** defined and declared in Subsection (a) of this Section who can establish by clear and convincing evidence any of the following affirmative defenses applicable to the **Public Nuisance** giving rise to the liability involved:
- (1) with respect only to the **Public Nuisance** declared and defined in Section 5(a)(1), that the **Hazardous Waste** is being stored or disposed of at facility duly licensed pursuant to, and operating in full compliance with its license issued pursuant to, in compliance with the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*), or **RCRA** sections 3004 and 3005, 42 U.S.C. §§ 6924 and 6925, (or, where applicable, in compliance with the provisions of West Virginia law that operate, pursuant to **RCRA** § 3006, 42 U.S.C. § 6906, "in lieu of" **RCRA** sections 3004 and 3005, 42 U.S.C. §§ 6924 and 6925, (or, where applicable, in compliance with the federal Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*) or other applicable Federal law, and all applicable State law requirements.
  - (2) with respect only to the **Public Nuisance** declared and defined in Section 5(a)(2), either or both of the following:
    - (A) that prior to their disposal at any place in Putnam County where this Ordinance is applicable the **Prohibited Hazardous Substance(s)** have been or will be subject to a Remedial Action in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the **Prohibited Hazardous Substance(s)**, pollutants, and contaminants is a principal element; or
    - (B) in the absence of the treatment described in subsection (b)(2)(A) of this Section 5, that no other practicable treatment technologies are available for the **Prohibited Hazardous Substances**.

Section 6 - Remedies upon failure or refusal to comply with Public Nuisance Abatement Action Order:

- (a) **Abatement by or payment to the County not a bar to County's other remedies:** Abatement by any person of any condition which constitutes a **Public Nuisance**, in whole or in part, and reimbursement to the person of expenses incurred thereby shall not bar prosecution for creation or maintenance of a **Public Nuisance**, or bar the County from pursuit of any of its applicable civil or criminal remedies.

Section 7 - Arrest for committing or maintaining Public Nuisance not prohibited:

Nothing in this Article shall be construed to prohibit any officer from arresting any Person for committing, contributing to, or maintaining a **Public Nuisance** when such arrest is made pursuant to law.

Section 8 – Judicial abatement of Public Nuisance, recovery of damages, authority of the County:

- (a) **Authority of County Commission:** In addition to or in lieu of any other remedy available to the County, the County Commission may bring a civil action in the in any court of competent jurisdiction, and may seek in any such action any or all of the following forms of relief, and upon presentation to the court of proof by a preponderance of the evidence on the required elements of the claim(s) with respect to actual or imminently threatened Public Nuisance, the court shall award the County:
- (1) a injunction in the form of a judicial Public Nuisance Abatement Order, requiring the liable party(ies) to abate the **Public Nuisance** consistent with the applicable requirements law at their sole cost, under the supervision and oversight of the appropriate County Officer or Officers;
  - (2) recovery of such damages as may be available to the County by law with respect to such **Public Nuisance**.
- (b) **Equitable criteria for injunctive relief authorized by this Section:** In any civil action brought pursuant to this Ordinance by the County Commission, in which a temporary restraining order, preliminary injunction, or partial or complete mandatory or prohibitory permanent injunction or judicial Public Nuisance Abatement Action Order is sought, it shall not be necessary for the County Commission to allege or prove at any stage of the proceeding that irreparable damage will occur should the temporary restraining order, preliminary injunction, or permanent injunction not be issued; or that the remedy at law is inadequate, and the temporary restraining order, preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.
- (c) **Recovery of county litigation costs:** In any civil action brought pursuant to this Ordinance in which the County Commission is a prevailing party or substantially prevailing party, the County Commission shall be awarded its litigation costs, including attorneys fees and expenses, expert witness fees and expenses, and the



fees and expenses of no more than one (1) non-testifying technical or scientific expert to assist the County Commission in the preparation and prosecution of the action.

Section 9 - Effect on municipal ordinances within Putnam County:

- (a) **No General or Field Preemption Intended:** This Ordinance is not intended to, and shall not be construed to, limit, restrict, or in any way preempt the lawful authority of any municipality within Putnam County to define, declare, prohibit or abate any nuisance involving in whole or in part a Hazardous Waste or Prohibited Hazardous Substance; **Provided however**, that such municipal ordinance is at least as comprehensive as this Ordinance in its definition of the terms "**Hazardous Waste**" and "**Prohibited Hazardous Substance**".

Section 10 - Provisions severable:

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

Section 11 - Effective Date:

This Ordinance of Putnam County, West Virginia shall be effective from passage.

ADOPTED this 12<sup>th</sup> day of August 2014.

COUNTY COMMISSION OF  
PUTNAM COUNTY, WEST VIRGINIA

ATTEST:

By   
President

  
Clerk