

WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

TUCKER UNITED,
WEST VIRGINIA HIGHLANDS
CONSERVANCY, and
SIERRA CLUB
Appellants,

v.

Appeal No. _____

DIRECTOR, DIVISION OF AIR
QUALITY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION
Appellee,

NOTICE OF APPEAL

Action Complained of: Appellants respectfully assert that they are aggrieved by the Appellee's issuance, on August 15, 2025, of the attached permit to Fundamental Data LLC for its Ridgeline Facility under the West Virginia Air Pollution Control Act. Specific objections are set forth in more detail in separate numbered paragraphs attached to this notice. Generally, Appellants complain that Appellee inappropriately determined that critical information relevant to the permit could be protected as confidential information, that the Appellee permitted the facility as a synthetic minor source, that the Appellee failed to require necessary emissions monitoring, that the Appellee failed to require pollution modelling, and that the permit as issued does not meet the overall objectives and purposes of the West Virginia Air Pollution Control Act, as described in W.Va. Code § 22-5-1.

Relief Requested: Appellants respectfully request that the Board disapprove Appellee's issuance of the attached West Virginia Air Pollution Control Act permit, issued on August 15, 2025 to Fundamental Data for its Ridgeline Facility.

Specific Objections; The specific objections, including those of fact and law are set forth in more detail in separate numbered paragraphs attached hereto.

Appellants reserve the right to amend this Notice of Appeal with leave of the Board and for good cause shown

Dated this 12th day of September, 2025



J. Michael Becher (W.Va. Bar# 10588)
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CERTIFICATE OF SERVICE

I, J. Michael Becher hereby certify that I served the foregoing Notice of Appeal, Specific Objections, Questions of Law and Fact and where required a copy of the permit by certified mail or hand delivery to the following:

By Hand Delivery (original and 8 copies)

West Virginia Air Quality Board
c/o Kenna M. DeRaimo, Clerk of the Board
601 57th Street S.E.
Charleston, WV 25304

By Hand Delivery

Director, WVDEP Division of Air Quality
601 57th Street SE
Charleston, WV 25304

By Certified Mail

Fundamental Data, LLC
c/o Casey L. Chapman, Responsible Official
125 Hirst Rd. Suite 1A
Purcellville, VA 20132


J. Michael Becher (W.Va. Bar No. 10588)

STATEMENT OF FACTS AND SPECIFIC OBJECTIONS

I. Statement of Facts

1. Appellants are citizen organizations opposed to the Appellee's issuance of a West Virginia Air Pollution Control Act to Fundamental Data for its proposed Ridgeline Facility. Each of the Appellant organizations has members who reside and/or recreate in the areas of Tucker County, West Virginia that will be negatively affected by the issuance of this permit. Additionally, each organization includes as member individuals who submitted public comments on the draft permit as proposed by the West Virginia Department of Environmental Protection.

2. Tucker United, is a coalition of Tucker County residents and allies who demand the power to shape their collective future and protect their community, families, natural resources, and economy. Tucker United's mission is to ensure that Tucker County remains a vibrant, healthy, and beautiful place where they can live, work, and play for generations to come. Tucker United Works through collective action, civic and community engagement, and public education. They ensure that all local voices are heard and that economic development honors the unique ecological, rural, and cultural heritage of the region.

3. The West Virginia Highlands Conservancy is a West Virginia non-profit organization dedicated to the preservation and wise management of West Virginia's natural resources. West Virginia Highlands Conservancy focuses primarily on the Highlands Region of West Virginia, which includes Tucker County. Their work is for the cultural, social, educational, physical health, spiritual and economic benefit of present and future generations of residents and visitors to the Highland Regions of West Virginia. West Virginia Highlands Conservancy works for government policies and actions that protect, encourage and enforce laws for the health and well-being of the natural world and her inhabitants.

4. The Sierra Club is a national non-profit organization with an active and dedicated chapter in West Virginia. The Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of Earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

5. On March 18, 2025, Fundamental Data submitted a permit application for a West Virginia Air Pollution Control Act permit for its proposed Ridgeline Facility gas power station. Although this is a large plant, with a maximum heat design input of more than 5,600 MMBtu/hr the permit application proposed that the facility be permitted as a synthetic minor source of pollution with operating limits of 61,320 cumulative hours of turbine operation if powered by natural gas, and 25,000 hours if powered by diesel.

6. The permitted facility would be located on the land between the towns of Davis and Thomas, West Virginia just north of US Route 48 and near the Tucker County Landfill.

7. The permit application contains large amounts of redacted material, including information necessary to determine how projected emissions were calculated. This includes all inputs and assumptions that were used to generate emissions calculations—making it impossible for the public to review, check, verify, or understand these emissions calculations. All of the relevant calculations are literally contained in a “black box” available only to the permittee and the Department of Environmental Protection (“Department”).

8. In addition to emissions data, the permit application omits more general information such as the number of turbines and brand/manufacturer of turbine. Redactions on the number of turbines makes it impossible for any reviewer, including Appellants or the public, from understanding the practical effect of the hourly operational limits that are critical to the permitting

of the Ridgeline facility as a synthetic minor source. The lack of manufacturer's information likewise makes it impossible for any review including Appellants of the public, to look up information regarding efficiency of combustion factors for the facility.

9. On April 25, 2025, Appellee notified Fundamental Data:

[I]nformation claimed as CBI (confidential business information) may not qualify for such designation, as it falls under the definition of "Types and Amounts of Air Pollutants Discharged," as excluded under § 45-31-6 and defined under § 45-31-2.4 (and further defined under 45CSR31b). There is also some concern that the claimed CBI may not meet the eligibility requirements under § 45-31-4.1(b) and 4.1(e).

On account of this finding, the permit application was deemed to be incomplete and was returned to Fundamental Data for supplementation.

10. On May 7, 2025, Fundamental Data responded in writing, asserting that "the redacted materials meet the statutory definition of 'trade secrets' under § 45-31-2.3." Fundamental data further stated,

The redacted information can be CBI because it is not necessary to the determination of emissions limits. Verifiable limits can be developed without the redacted material, based on general knowledge of the turbine operations, permissible fuel sources, hours of operations and other factors that can be specified in the permit. The proposed project is one where alternatives to CBI, such as the use of "aggregation, categorization, surrogate parameters, emissions monitoring and sampling, or parametric monitoring" can result in a "practically enforceable method of determining emissions." § 45-31-B-4.1.

Moreover, Fundamental data proffered that "[e]ven without the redacted material, the Department has sufficient information to set verifiable limits on the collective emissions from this equipment, which cumulatively constitute the source."

11. On May 12, 2025, Appellee responded to Fundamental Data reversing its earlier findings and allowed the application to proceed as a complete application.

12. On or about June 10, 2025, citizen groups including Tucker United and The West Virginia Highlands Conservancy appealed the Department's confidential business information decision to the Board. That appeal was docketed as 25-AQB-1.

13. On or about June 18, 2025, Appellee issued a draft permit for the Ridgeline Facility and initiated the public comment period for that draft permit. During the public comment period Appellants Tucker United, West Virginia Highlands Conservancy, and Sierra Club each commented and/or had members who provided comments on the draft permit.

14. Appellee received more than 1,600 comments regarding the draft permit, overwhelmingly opposed to the permitting of the Ridgeline Facility.

15. On or about August 15, 2025, Appellee issued the final permit to Fundamental Data for its Ridgeline Facility. On the same day, the Appellee released a response to comments and a final engineering determination for the permit. The final permit allows for the construction and operation of the Ridgeline Facility as a synthetic minor source of pollution.

16. On or about September 4, 2025, the Air Quality Board dismissed the appeal at issue in 25-AQB-1. The Board noted "that dismissal [was] granted because the appeal was based upon a draft permit and the Board concludes that a draft permit is not an official action of the West Virginia Department of Environmental Protection, by its very nature a draft permit can be modified before the actual permit is issued."

17. Appellants are raising issues regarding confidential business information in this appeal of the final issued permit as a result of the Board's order and dismissal of the prior appeal.

18. Upon information and belief, the use of different assumptions or inputs into projected emission calculations would have increased total projected emissions above that which would have allowed the Ridgeline Facility to be permitted as a minor source.

19. The final permit and associated documents illustrate that Appellee and the permittee used manufacturer specific information to calculate projected emissions for pollutants including but not limited to NO_x and formaldehyde.

20. Upon information and belief, in evaluating the permit the Appellee did not consider fugitive NO_x emissions from any source, including but not limited to trucks using a haul road unloading diesel at the facility.

21. Upon information and belief, the design capacity of the Ridgeline Facility would make it one of the three for four largest electric power generation facilities in the state of West Virginia.

22. Upon information and belief, no other state has permitted a facility with as large a design heat input as the Ridgeline Facility as a minor source of pollution, synthetic or otherwise.

23. The permit does not require periodic visual emissions testing or weight emissions testing.

24. During the permitting process, the Appellee did not require the permittee to undertake any pollutant dispersion modeling, or other modeling that could be used to determine the location and effects of pollution from the Ridgeline Facility on residents, visitors, or the environment of Tucker County and other potentially affected areas.

25. During the permitting process Appellee did not require any pollution dispersion modelling analyzing the effects of the Ridgeline Facility on the environment or public health in Tucker County and other potentially affected areas.

26. Upon information and belief, Tucker County relies heavily on tourism for its economic base. Most tourism opportunities in the county are centered on outdoor activities and taking advantage of Tucker County's unique geological and ecological features. Two state parks,

national forest, and a wilderness area—Dolly Sods—are located all or in part within Tucker County.

27. Because of Tucker County’s high elevation and unique geography within the state, it is subject to regular temperature inversions which trap pollutants close to the surface, reducing their dispersion and often leading to higher concentrations of air pollutants in the affected area.

28. Fundamental Data has publicly stated that the Ridgeline Facility will be associated with a large data center and/or data centers, which will be among the largest data center campuses in the world.¹

29. Fundamental Data stated in comments to the Appellee in correspondence regarding its claim of confidential business information:

The Ridgeline project arises at a time of extraordinary technological transformation and global competition. The United States faces growing pressure from foreign adversaries, particularly in areas of artificial intelligence and advanced computing. The essential infrastructure to support this innovation, particularly reliable power generation, has lagged nationwide due to regulatory and permitting delays. Policymakers in West Virginia, including Governor Morrissey and the Legislature, should be commended for their foresight in enacting the Power Generation and Consumption Act of 2025 (the “Power Act”), which positions the State to capitalize on this fleeting opportunity. Our project directly supports West Virginia’s stated goal and represents more than a power generation resource — it is a strategic investment in national and economic security.

The only logical interpretation of these statements, including the references to artificial intelligence, advanced computing and the Power Generation and Consumption Act of 2025, is that the Ridgeline Facility is being constructed and will be operated with the intent to power a data center or multiple data centers.

¹ See e.g. Maher, K. (May 18, 2025) Small-Town Locals and Newcomers Unite Against a Common Foe: Data Centers. *The Wall Street Journal*, <https://www.wsj.com/us-news/climate-environment/west-virginia-data-centers-2f9c9ece>. See also, Public Comment Period Open on Air Quality Permit for Tucker County Microgrid Facility, West Virginia Public Broadcasting (June 23, 2025) <https://wvpublic.org/story/energy-environment/public-comment-open-on-air-quality-permit-for-tucker-county-microgrid-facility/>.

30. Upon information and belief, data centers operate continuously or nearly continuously 24 hours a day, 7 days a week, and 365 days a year. This means they need a consistent source of power, which a synthetically limited generation facility cannot provide.

31. Upon information and belief, the Ridgeline Facility will be built with the capacity to operate at thresholds above the synthetic minor limitations and emit pollutants above the limits for a minor source.

32. Upon information and belief, operating the Ridgeline Facility above synthetic minor thresholds and above the pollution limits on a minor source would allow the facility to provide more consistent and reliable power to any associated data center or data centers.

II. Specific Objections

1. Appellee inappropriately concluded that redacted information in Fundamental Data's permit application—including but not limited to, information relevant and necessary to calculate potential emissions, the number of turbines that would be installed at the facility, and the manufacturer of such turbines—was properly withheld as confidential business information and/or trade secrets pursuant to W.Va. CSR § 45-31-1 *et seq.* or other relevant law.

2. Appellee incorrectly concluded that information withheld in Fundamental Data's permit application constituted trade secrets pursuant to W.Va. CSR § 45-31-2.3.

3. Appellee incorrectly concluded that information redacted in Fundamental Data's permit application did not fit the definition of "Types and amounts of air pollutants discharged" as defined in W.Va. CSR § 45-31-2.4.

4. Appellee incorrectly concluded or did not give appropriate weight to the necessary consideration that information such as manufacturer's air emissions factors or EPA compiled

emissions factors under AP-42 could be obtained by other persons without Fundamental Data's consent pursuant to W.Va. CSR § 45-31-4.

5. Appellee's determination that redacted information in Fundamental Data's permit application was confidential business information was arbitrary, capricious, or otherwise in violation of the law and thus a violation of the West Virginia Administrative Procedure Act.

6. Appellee erroneously determined that confidential business information claimed by Fundamental Data could remain confidential despite the provision of W.Va. CSR § 45-31-6, which provides "[n]o person shall claim as confidential, information concerning the types and amounts of air pollutants discharged."

7. The Appellee violated W.Va. Code § 22-5-10(c)² by determining that Fundamental Data's permit application was complete and proceeding to issue a draft permit, open a period for public comment, and by issuing a final permit when there was an ongoing appeal of its determination of confidential business information.

8. Appellee erred when it failed to consider fugitive emissions from sources including but not limited to trucks transporting and unloading diesel and haul roads when it determined that the Fundamental Data Ridgeline Facility could be permitted as a minor source. Examples of other fugitive emissions sources not included in the calculations at all are fire suppression equipment, ammonia tanks or reservoirs for the Selective Catalytic Reduction controls or cooling equipment. This failure to assess emissions from fugitive sources is in violation of W.Va. CSR § 45-14-2.43.e.

² This provision provides in relevant part, "[a]ny person adversely affected by a determination, by order or otherwise, regarding information confidentiality under this article may appeal the determination to the air quality board pursuant to the provisions of article one, chapter twenty-two-b of this code. The filing of a timely notice of appeal shall stay any determination, by order or otherwise, to disclose confidential information pending a final decision on the appeal."

9. Appellee erred when it failed to consider fugitive emissions from sources including but not limited to trucks transporting and unloading diesel and haul roads when it determined the operational limits and pollution limits for the Fundamental Data Ridgeline Facility. Examples of other fugitive emissions sources not included in the calculations at all are fire suppression equipment, ammonia tanks or reservoirs for the Selective Catalytic Reduction controls or cooling equipment.

10. Appellee erred when it used redacted information specific to the equipment manufacturer for calculations of potential pollutant emissions—including but not limited to emissions of NO_x, particulate, and formaldehyde.

11. Appellee erred by failing to appropriately scrutinize the assumptions and inputs supplied by Fundamental Data to determine potential pollutant emissions.

12. Appellee erred by failing to adequately consider the fact that the Fundamental Data Ridgeline Facility would be used to power a large data center or data centers which are ill-suited to rely on power generated by a synthetically limited source of electricity.

13. Appellee erred by permitting the Ridgeline Facility as a minor source considering the maximum design heat input disclosed by the applicant and the fact that few if any comparable power stations of this size have been permitted as minor sources of pollution.

14. Appellee's permitting of the Ridgeline Facility as a minor source of pollution was arbitrary, capricious, or otherwise contrary to law given the facts available to the Department.

15. The final permit erroneously omits requirements for periodic visual or weight-based emissions testing as required pursuant to W.Va. CSR § 45-2A-5.

16. Appellee failed to adhere to the purpose of the West Virginia Air Pollution Control Act, as described in W. Va. Code § 22-5-1,³ when it permitted Fundamental Data's Ridgeline Facility as a synthetic minor source of pollution.

17. Appellee's decision not to require air dispersion or other modelling that would inform an assessment of the pollution impacts resulting from Fundamental Data's Ridgeline Facility in accordance with W.Va. CSR § 45-13-7—particularly considering the unique ecology, geography, natural resources, and economy of Tucker County and other affected areas—was arbitrary and capricious and inconsistent with the purpose and policy behind the West Virginia Air Pollution Control Act.

³ That provision provides in relevant part, "[i]t is hereby declared to be the public policy of this state and the purpose of this article to achieve such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state and facilitate the enjoyment of the natural attractions of this state.

Questions of Law and Fact

1. Did Appellee inappropriately determine that information redacted from Fundamental Data's permit application was properly withheld from the public pursuant to W.Va. CSR § 45-31-1 *et seq.*? (This is primarily a question of law.)
2. Does the redacted information in Fundamental Data's permit application qualify as "trade secrets" pursuant to W.Va. CSR § 45-31-2.3? (This is primarily a question of law.)
3. Does the redacted information in Fundamental Data's permit application constitute "Types and amounts of air pollutants discharged" as defined in W.Va. CSR § 45-31-2.4? (This is primarily a question of law.)
4. Was the Appellee's consideration of proposed confidential business information pursuant to W.Va. CSR § 45-31-4, arbitrary, capricious, or otherwise contrary to law? (This is a mixed question of both law and fact.)
5. Is the information redacted in Fundamental Data's permit application "information concerning the types and amounts of air pollutants discharged?" (This is a mixed question of both law and fact.)
6. Did Appellee violate W.Va. Code § 22-5-10(c) when it determined Fundamental Data's permit application was administratively complete and proceeded to issue a draft permit, open public comment and issue a final permit while a challenge to its determination of confidential business information was pending? (This is primarily a question of law.)
7. Did Appellee appropriately consider fugitive emissions from all appropriate sources and for all appropriate pollutants when it permitted the Ridgeline Facility as a synthetic minor source? (This is a mixed question of both law and fact.)

8. Did Appellee appropriately consider fugitive emissions from all appropriate sources and for all appropriate pollutants when it established limits for the Ridgeline Facility? (This is a mixed question of both law and fact.)

9. Did the Appellee use the appropriate inputs and assumptions, or appropriately scrutinize the inputs and assumptions provided by Fundamental Data when it calculated potential emissions for all pollutants for the Ridgeline Facility? (This is a mixed question of both law and fact.)

10. Was the Appellee determination not to consider the fact that the Ridgeline Facility will be used to power a large data center or data centers arbitrary, capricious, or otherwise in violation of the law? (This is a mixed question of both law and fact.)

11. Was the Appellee's determination to permit the Ridgeline Facility as a synthetic minor source arbitrary, capricious, or otherwise contrary to the law given the ability (and likelihood) of the facility to operate well above the limits established, the maximum design heat input, and other characteristics of the facility—particularly when comparable electric power generation facilities are typically permitted as major sources? (This is a mixed question of both law and fact.)

12. Was the Appellee's permitting of the Fundamental Data's Ridgeline Facility consistent with the purpose and policy of the West Virginia Air Pollution Control Act as described in W.Va. Code § 22-5-1? (This is a mixed question of both law and fact.)

13. Was the Appellee's decision not to require dispersion or other modelling of pollutants pursuant to W.Va. CSR § 45-13-7, consistent with the purpose and policy of the West Virginia Air Pollution Control Act as described in W.Va. Code § 22-5-1? (This is a mixed question of both law and fact.)

14. Was the Appellee's decision not to consider the unique ecological, geographical, and economic situation of Tucker County and other potentially affected areas consistent with the purpose and policy of West Virginia Air Pollution Control Act as described in W.Va. Code § 22-5-1? (This is a mixed question of both law and fact.)