

## APPENDIX A – RULES OF APPELLATE PROCEDURE

### NOTICE OF APPEAL

Intermediate Court of Appeals

Supreme Court of Appeals of West Virginia

ATTACH  
COPIES OF ALL  
ORDERS BEING  
APPEALED

**1. COMPLETE CASE TITLE AND CASE NUMBERS IN LOWER TRIBUNAL**

(Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary)

Tucker United, Friends of Blackwater, and West Virginia Highlands Conservancy

v.

Director, Division of Air Quality, Department of Environmental Protection

**2. COUNTY OR LOWER TRIBUNAL APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)** (If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

WV Air Quality Board

J. Michael Koon, Chairperson

**3. PETITIONER(S)** (list all parties who join in the appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address, phone number, and e-mail address.)

Tucker United, Friends of Blackwater, and West Virginia Highlands Conservancy

c/o

J. Brent Easton, Esq.

PO Box 267

Davis, WV 26260

(304) 940-2627

brent@brenteastonpllc.com

**4. RESPONDENT(S)** (list all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. For self-represented parties provide an address, phone number, and e-mail address.)

Director, Division of Air Quality, Department of Environmental Protection

by counsel, C. Scott Driver, Esq.

601 57th St., SE

Charleston, WV 25304

(304) 926-0499

charles.s.driver@wv.gov

**5. NON-PARTICIPANT(S)** (list any parties to the lower tribunal action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address, and telephone number of any self-represented litigant who was a party to the lower tribunal action but is not participating in the appeal.)

n/a

## APPENDIX A – RULES OF APPELLATE PROCEDURE

CASE NAME: Tucker United, et al. v. Director, Division of Air Quality, DEP

### 6. DATE OF ENTRY OF JUDGMENT ON APPEAL

9/4/2025

### DATE OF ENTRY OF JUDGMENT ON POST-TRIAL MOTIONS, IF ANY

n/a

### 7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

n/a

8. **ABUSE AND NEGLECT CASES:** On an extra sheet, provide a brief list of the names, ages, and parent's names of all minor children, a description of the current status of the parental rights of each parent as of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian ad litem appointed in the case.

9a. Is the order or judgment appealed a final decision on the merits as to all issues and all parties? ☒ YES / ☐ NO

If your answer is no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? ☐ YES / ☒ NO

If your answer is no, you must attach a brief explanation as to why the order or judgment being appealed is proper for the court to consider.

9b. Is the family court order entered under W. Va. Code 48-9-203(f)? ☐ YES / ☐ NO

10. Has this case previously been appealed? ☐ YES / ☒ NO

If yes, provide the case name, docket number and disposition of each prior appeal.

11. Are there any related cases currently pending in the Intermediate Court or Supreme Court or in a lower tribunal? ☒ YES / ☐ NO If yes, cite the case, provide the status, and provide a description of how it is related.

An appeal of the final air quality permit, raising separate issues, is pending before the air quality board.

12. Is any part of the case confidential? ☐ YES / ☒ NO

If yes, identify which part and provide specific authority for confidentiality.

13. If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

14. Do you know of any reason why one or more of the Intermediate Court Judges or Supreme Court Justices should be disqualified from this case? ☐ YES / ☒ NO If yes, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

## APPENDIX A – RULES OF APPELLATE PROCEDURE

CASE NAME: Tucker United, et al. v. Director, Division of Air Quality, DEP

### NOTICE OF APPEAL

15. Is a transcript of proceedings necessary for the Court to fairly consider the assignments of error in the case?

☐ YES / ☒ NO If yes, you must complete the appellate transcript request form on page 4 of this form.

16. **NATURE OF THE CASE, RELIEF SOUGHT, and OUTCOME BELOW** (Limit to two double-spaced pages; please attach.)

17. **ASSIGNMENTS OF ERROR** (Express the assignments in the terms and circumstances of the case but without unnecessary detail. Separately number each assignment of error and for each assignment: (1) state the issue; (2) provide a succinct statement as to why the court should review the issue. Limit to eight pages double-spaced; please attach.)

### 18. ATTACHMENTS

Attach to this notice of appeal the following documents in order: (1) extra sheets containing supplemental information in response to sections 1-14 of this form; (2) a double-spaced statement of the nature of the case, not to exceed two pages, as material required by section 16 of this form; (3) a double-spaced statement of the assignments of error not to exceed eight pages as required by section 17 of this form; (4) a copy of the lower tribunal's decision or order from which you are appealing; (5) a copy of any order deciding a timely post-trial motion; (6) a copy of any order extending the time period for appeal; and (7) the statutory docket fee of \$200 (made payable to the State of West Virginia if made by check or money order); or a copy of the lower court's granting of the application for fee waiver in this case. The statutory docket fee does not apply to criminal cases, appeals from the Workers' Compensation Board of Review or original jurisdiction actions. The statutory docket fee does not apply to appeals from family court to the Intermediate Court of Appeals; however, the statutory docket fee applies to appeals from family court to the Supreme Court of Appeals, whether taken directly or after an appeal to the Intermediate Court of Appeals.

### NOTICE:

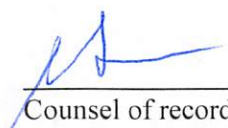
You must file a separate affidavit and application anytime your financial situation no longer meets the official guidelines or anytime the court orders you to do so.

### CERTIFICATIONS

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and that the contents of the Notice of Appeal are accurate and complete.

10/06/25

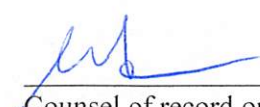
Date

  
Counsel of record or self-represented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

10/06/25

Date

  
Counsel of record or self-represented party

## APPENDIX A – RULES OF APPELLATE PROCEDURE

CASE NAME: Tucker United, et al. v. Director, Division of Air Quality, DEP

### APPELLATE TRANSCRIPT REQUEST FORM

#### INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested.
2. Specify each portion of the proceedings that must be transcribed for purposes of appeal. *See* Rule of Appellate Procedure 9(a).
3. A separate request form must be completed for each court reporter from whom a transcript is requested. If you are unsure of the court reporter(s) involved, contact the circuit clerk's office for that information.
4. Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

Name of Court Report, ERO, or Typist: n/a

Address of Court Reporter: \_\_\_\_\_

Case No.: 25-01-AQB County: \_\_\_\_\_ Date of Final Order: \_\_\_\_\_

Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Portions Previously Prepared
09/03/25	motion to dismiss	0.2 hr	Air Quality Board	no

#### CERTIFICATIONS

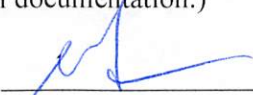
I hereby certify that the transcripts requested herein are necessary for a fair consideration of the issues set forth in the Notice of Appeal.

I hereby further certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made as follows:

- ☒ Private funds. (Deposit of \$\_\_\_\_\_ enclosed with court reporter's copy. Attach documentation.)
- ☐ Criminal or habeas corpus appeal with fee waiver (Attach order appointing counsel or order stating defendant is eligible.)
- ☐ Abuse and neglect or delinquency appeal with fee waiver (Attach order appointing counsel.)
- ☐ Advance payment waived by court reporter (Attach documentation.)

n/a

Date mailed to court reporter

  
Counsel of record or self-represented party

## APPENDIX A – RULES OF APPELLATE PROCEDURE

### NOTICE OF APPEAL – EXTRA SHEET

**CASE NAME:** Tucker United, et al. v. Director, Division of Air Quality, DEP

Response to SECTION: 16:

On March 18, 2025, Fundamental Data LLC, a Virginia-based company, submitted to WVDEP a heavily-redacted air quality permit application (No. R13-3713). The numerous redactions were claimed to be "trade secrets" and/or "confidential business information" (CBI). WVDEP initially questioned whether the redacted information qualified as "trade secrets/CBI," requesting that Fundamental Data provide further support for the claim. Fundamental Data replied in timely fashion and WVDEP approved the claim of "trade secrets/CBI" without debate, later issuing a draft permit. Thereafter, Petitioners filed their appeal of the draft permit to WVDEP/Air Quality Board (AQB), citing numerous grounds, including but not limited to the "trade secrets/CBI" issue.

WVDEP filed a motion to dismiss the appeal. WVDEP argued that the AQB lacked jurisdiction to hear an appeal of a draft permit, asserting that a draft permit is not an "order, permit, or official action" which would bring it under AQB's jurisdiction. Notably, "order, permit, and official action" are not defined in any germane rules or law. Petitioners responded in writing, asserting that while the draft permit was not a final permit, WVDEP's decision to maintain the redacted application information as "trade secrets/CBI" was both an order and official action. Moreover, Petitioners asserted that despite the "draft" permit status, WVDEP's order upholding the redactions in the draft permit materially affected their abilities, as well as those of other citizens, to provide meaningful comment in the permitting process. The public comment period only occurs while a permit is in "draft" status.

A short, telephonic hearing on WVDEP's motion to dismiss was held on September 3, 2025. Following the hearing, AQB entered an order dismissing Petitioner's appeal, finding that "the appeal was based upon a draft permit and the Board concludes that a draft permit is not an official action of the WVDEP because, by its very nature, a draft permit can be modified before the actual permit is issued."

Petitioners appeal that order, seeking a remand for further evidentiary proceedings before AQB.

## APPENDIX A – RULES OF APPELLATE PROCEDURE

### NOTICE OF APPEAL – EXTRA SHEET

**CASE NAME:** Tucker United, et al. v. Director, Division of Air Quality, DEP

**Response to SECTION: 17:**

The issue is whether WVDEP/AQB lacked jurisdiction to hear an appeal of a draft air quality permit on the basis that a draft permit is not an "order, permit, or official action" which would bring it under AQB's jurisdiction. The Court should review the issue because "order, permit, and official action" are not defined in any germane rules or law. AQB's decision was therefore not based in any legal authority.

**WEST VIRGINIA AIR QUALITY BOARD  
CHARLESTON, WEST VIRGINIA**

**TUCKER UNITED, FRIENDS OF BLACKWATER,  
and WEST VIRGINIA HIGHLANDS CONSERVANCY,**

**Appellants,**

**Appeal No.: 25-01-AQB**

**v.**

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

**Appellee.**

**ORDER GRANTING APPELLEE'S MOTION TO DISMISS**

On July 18, 2025, Appellee, Director, Division of Air Quality, Department of Environmental Protection ("Appellee"), by and through its counsel, moved this Board for a dismissal of this appeal. Counsel for Appellants filed a response on July 28, 2025. An oral argument hearing on the motion to dismiss was held on September 3, 2025.

Based upon the representations of counsels' arguments and after a review of the Board's procedural rules and the West Virginia Rules of Civil Procedure, the Board **GRANTS** Appellee's Motion to Dismiss and hereby **ORDERS** that this appeal be **DISMISSED** in its entirety and removed from the docket. The Board notes that dismissal is 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 because, by its very nature, a draft permit can be modified before the actual permit is issued. The Board further **ORDERS** that a copy of this executed Order be mailed to counsel of record.

It is so **ORDERED** and **ENTERED** this 4<sup>th</sup> day of September, 2025.

*J. Michael Koon*

---

J. Michael Koon, Chairperson

**WEST VIRGINIA AIR QUALITY BOARD  
CHARLESTON**

**TUCKER UNITED, FRIENDS OF BLACKWATER,  
and WEST VIRGINIA HIGHLANDS CONSERVANCY,**

**Appellants,**

**Appeal No.: 25-01-AQB**

**v.**

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

**Appellee.**

**CERTIFICATE OF SERVICE**

This is to certify that I, Kenna M. DeRaimo, Clerk for the West Virginia Air Quality Board,  
have this day, the 4<sup>th</sup> day of September, 2025, served a true copy of the foregoing **ORDER  
GRANTING APPELLEE'S MOTION TO DISMISS**, by delivering the same upon the following:

J. Brent Easton, Esq.  
BRENT EASTON ATTORNEY AT LAW PLLC  
Post Office Box 267  
Davis, West Virginia 26260

*Via Certified First-Class U.S. Mail  
and Electronic Mail*

9489 0090 0027 6692 2646 96

Charles S. Driver, Esq.  
WV DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF LEGAL SERVICES  
601 57th Street, S.E.  
Charleston, West Virginia 25304

*Via Interdepartmental Mail  
and Electronic Mail*

  
Kenna M. DeRaimo, Clerk