

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Aug 26 2026
02:16PM EDT
Transaction ID 80465553

Tucker United,
West Virginia Highlands Conservancy
and Sierra Club,
Appellants Below, Petitioners

v.) No. 26-ICA-92

Laura Crowder, in her official capacity as
Director, Division of Air Quality
Department of Environmental Protection,
Appellee Below, Respondent

and

Fundamental Data, LLC
Intervenor Below, Respondent

ORDER

On August 26, 2026, the Intermediate Court of Appeals of West Virginia made and entered the following order, in vacation:

On March 6, 2026, Petitioners, Tucker United, West Virginia Highlands Conservancy and Sierra Club, by counsel J. Michael Becher, Appalachian Mountain Advocates, presented a notice of appeal from an order of the West Virginia Air Quality Board (“WVAQB”) entered on February 5, 2026 (Case No. 25-02-AQB).

In their notice of appeal, Petitioners note that “there are conflicting provisions of the West Virginia Code governing appeals from decisions of the WVAQB.” As a result, on March 10, 2026, the Court issued a scheduling order that required the parties to file supplemental briefing addressing this Court’s jurisdiction over this appeal. On March 16, 2026, Petitioners filed their supplemental brief which argued that jurisdiction is proper in this Court. On March 20, 2026, Respondent Fundamental Data, LLC, by counsel Roger G. Hanshaw, Marc F. Mignault, and William M. Lorensen, Bowles Rice LLP, and Laura Crowder, in her official capacity as Director, Division of Air Quality Department of Environmental Protection, by

counsel Charles Scott Driver, filed their joint supplemental brief, which argued that appellate jurisdiction over this matter lies with the Supreme Court of Appeals of West Virginia.

However, on April 17, 2026, Judge Charles O. Lorensen filed a letter addressed to the Chief Justice of the Supreme Court of Appeals of West Virginia seeking his voluntary recusal from this matter. Likewise, on April 20, 2026, Chief Judge Daniel W. Greear filed his letter also seeking voluntary recusal from this matter. On June 11, 2026, the Supreme Court of Appeals of West Virginia issued administrative orders granting the voluntary recusals of Chief Judge Greear and Judge Lorensen and appointing Judge Shawn D. Nines and Judge Gregory L. Howard, Jr., to sit on this matter by temporary assignment.

The Court, now having a quorum, upon consideration and review, determines that it lacks jurisdiction over this matter. Pursuant to West Virginia Code § 22B-1-9(a), appeals from orders of the environmental boards of the State of West Virginia are governed by West Virginia Code § 29A-5-4, with the caveat that the exceptions set forth in West Virginia Code § 22B-2-3, § 22B-3-3, and § 22B-4-3 apply.

West Virginia Code § 29A-5-4(b) provides that “proceedings for judicial review of any final order or decision [of an administrative agency] issued after June 30, 2022, must be instituted by filing an appeal to the Intermediate Court of Appeals as provided in § 51-11-1 *et seq.* of this code[.]”¹ However, Petitioners’ notice of appeal was filed pursuant to West Virginia Code § 22B-2-3(a), which governs cases involving an order denying an application for a permit, or approving or modifying the terms and conditions of a permit. West Virginia Code § 22B-2-3 is an exception to West Virginia Code § 29A-5-4 and states, in pertinent part, that the petition for review “shall be filed in the Supreme Court of Appeals within 30 days of the board’s order: Provided, That, if all parties consent to it, the proceedings may continue in the Circuit Court of Kanawha County[.]”²

¹ Likewise, West Virginia Code § 51-11-4(b)(4) states that the Intermediate Court of Appeals has jurisdiction over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to § 29A-5-4 or any other provision of this code[.]”

² Respondents have indicated in their supplemental briefing that they do not consent to proceeding in the Circuit Court of Kanawha County.

While West Virginia Code § 29A-5-4(b) and § 51-11-4(b)(4) seem to indicate that the legislature intended for administrative appeals of orders entered post June 30, 2022, to be filed with this Court, the Court must construe these statutes along with § 22B-1-9 and § 22B-2-3 so as to give effect to each. *See* Syl. Pt. 4, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958). Therefore, while West Virginia Code § 29A-5-4 is applicable to this appeal by virtue of West Virginia Code § 22B-1-9, the exception to the provisions of § 29A-5-4 found in § 22B-2-3 are applicable and dictate that this appeal lies with the Supreme Court of Appeals of West Virginia. Accordingly, this matter is dismissed as improvidently docketed. Each party is to bear their own costs.

While this Court, as an inferior appellate court, cannot order the Supreme Court of Appeals of West Virginia to accept and docket an appeal, the Court notes that given the delay in this proceeding that occurred through no fault of the parties, this Court would find good cause to grant a motion to file a notice of appeal regarding the underlying matter out of time.³ Further, the parties may, of course, appeal this order to the Supreme Court of Appeals of West Virginia.

Chief Judge Daniel W. Greear, not participating. Judge Shawn D. Nines, sitting by temporary assignment.

Judge Charles O. Lorensen, not participating. Judge Gregory L. Howard, Jr., sitting by temporary assignment.

A True Copy

Attest: /s/ Ashley N. Deem
Chief Deputy Clerk of Court



3 The Court notes that pursuant to its supplemental briefing, Respondent Fundamental Data:

does not dispute that (i) Petitioners enjoy a right to judicial review under W. Va. Code § 22B-1-9(a); (ii) Petitioners filed timely Notices of Appeal; and (iii) the West Virginia Rules of Appellate Procedure are “construed . . . to do substantial justice” under W. Va. R. App. P. 2.