

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

**TUCKER UNITED
WEST VIRGINIA HIGHLANDS
CONSERVATORY, and
SIERRA CLUB,**

Appellants,

v.

Appeal No. 25-02-AQB

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

Appellee,

and

FUNDAMENTAL DATA LLC,

Intervenor & Permittee.

MEMORANDUM OF DECISION AND FINAL ORDER

On September 12, 2025, Tucker United, West Virginia Highlands Conservancy, and Sierra Club (hereinafter, collectively “Appellants”) filed a notice of appeal (the “Appeal”) objecting to the West Virginia Department of Environmental Protection’s, Division of Air Quality’s (hereinafter “Appellee” or “WVDAQ”) decision to issue synthetic minor air pollution construction permit No. R13-3713 (the “Permit”) to Fundamental Data LLC, (hereinafter “Intervenor” or “Fundamental Data”) for its proposed Ridgeline gas power station (the “Facility”) to be located near the towns of Davis and Thomas, West Virginia.

In its Appeal, Appellants listed seventeen (17) specific objections to the Permit itself and/or the permitting process. In summary, those objections include the following:

1. WVDAQ's decision to grant the Permittee the right to have certain information contained in Fundamental Data's permit application (the "Application") redacted as confidential business information ("CBI") and/or trade secrets pursuant to W.Va. CSR §45-31-2.3. Appellants assert that these CBI decisions were arbitrary, and capricious or otherwise in violation of law. *See Specific Objections Nos. 1-6 and 10.*
2. WVDAQ's violated W.Va. CSR §22-5-10(c) when it continued processing the Application after appeal no. 25-01-AQB was filed. *See Specific Objections No. 7.*
3. WVDAQ's failure to fully consider fugitive emissions sources as well as all possible pollutants. *See Specific Objections Nos. 8 and 9.*
4. WVDAQ's processes used to determine the facility's Potential to Emit ("PTE") pollutants. *See Specific Objections No. 11.*
5. WVDAQ failed to consider that synthetic minor source power plants are "ill-suited" to power data center(s). *See Specific Objections No. 12.*
6. WVDAQ's decision to permit the facility as a synthetic minor source. Appellants allege that this decision was arbitrary, and capricious or otherwise in violation of law because the facility would have the capability of operating in a manner that could exceed the limits set in the permit. *See Specific Objections Nos. 13 and 14.*
7. WVDAQ's failure to include adequate compliance testing requirements in the Permit. *See Specific Objections No. 15.*
8. WVDAQ's decision to grant a permit. Appellants allege that this decision is in violation of the West Virginia Air Pollution Control Act's, W.Va. Code §22-5-4-1 purpose and policy because of "the unique ecological,

geographical, and economic situation of Tucker County” and the surrounding area. *See* Specific Objections Nos. 16 and 17.

On October 13, 2025, Fundamental Data sought, and was granted, the right to intervene in this Appeal.

On October 17, 2025, Appellants filed a Request for Additional Discovery, and on October 23, 2025, Appellee filed a Motion for Partial Dismissal of this Appeal. The Air Quality Board (“AQB” or “Board”) began the evidentiary hearing in this Appeal on November 5, 2025, to address both requests. At that hearing, the Board asked Appellants, Appellee, and the Intervenor (hereinafter the “Parties” of this appeal) to meet, confer, and discuss whether they could agree on terms and conditions that would allow the redacted CBI to be disclosed to Appellants. The Parties reached an accord and on November 19, 2025, the AQB issued a protective order granting Appellants counsel and their expert access to the redacted CBI contained in the permit application. With respect to Appellee’s request, the Board granted partial dismissal of some of Appellants specific objections.

On December 3 and 4, 2025, the AQB continued the evidentiary hearing on this Appeal. At that time, the Board listened to all the evidence presented, and arguments asserted by counsel for the parties. After due deliberations and pursuant to Rule 52 of the West Virginia Rules of Civil Procedure, the Board hereby finds and orders as follows:

FINDINGS OF FACT

(Background and Procedural History)

1. Fundamental Data seeks to build a data center powered by a natural gas/diesel power facility to be located near the towns of Davis and Thomas, in Tucker County, West Virginia. CR¹ at 103.

2. On March 18, 2025, Fundamental Data submitted a permit application (“the Application”) to WVDAQ to construct a proposed natural gas and diesel fired

¹ As used herein, “CR” means or refers to the Certified Record in this matter, and the numerals following CR refer to the applicable page number in the Certified Record.

turbine power plant. CR at 2-79. In the Application, Fundamental Data asked that its Facility be permitted as a New Source Review (NSR) and as a Title V synthetic minor source as is allowed under relevant federal and state statutes. The purpose of seeking a synthetic minor source permit is to have enforceable emission limitation in the permit such that the facility does not incur the more costly and onerous requirements that are imposed in Title V permits. *See* Findings of Fact No. 10 (describing for the emission limitations required in a synthetic minor source permit).

3. In its Application, Fundamental Data claimed that certain information included therein should be treated as “trade secrets” or “confidential business information” that is exempt from public review pursuant to W.Va. CSR §45-31. More specifically, Fundamental Data stated that the configuration of the proposed facility as well as turbine-specific manufacturer and technical information for both the turbines and the control devices were protected CBI.

4. Therefore, Fundamental Data submitted both a CBI and a redacted version of the Application to WVDAQ. CR at 103. Accordingly, WVDAQ made the redacted version of the Application available for the public to review. *Id.*, *also see, e.g.*, CR at 33, 35, 37, 54, 56-59, Attachment N & O. Fundamental Data made the unredacted data separately available to WVDAQ. That submittal was accompanied by summary of the bases for Fundamental Data’s claims of confidentiality. CR at 3-4.

5. On April 25, 2025, during the permit reviewing process, The West Virginia Department of Environmental Protection’s (“WVDEP”) General Counsel requested further justification from Fundamental Data regarding its CBI claim due to concerns raised by public comments. CR at 180-81 and 314-315.

6. On May 7, 2025, Fundamental Data submitted a letter to WVDAQ explaining and justifying its claim for CBI protections. CR 184-86 and 366-70. In that letter, Fundamental Data stated:

We understand that public interest in the project has increased, and we are committed to engaging constructively with local stakeholders. Our confidentiality

claims are not intended to obscure our operations from the public but are necessary to protect sensitive, proprietary data from our competitors, as the regulations correctly allow. The public should not assume that redacting information from the public version of our application is an attempt to hide relevant data; rather, such redactions are necessary to protect innovation from theft....

We remain confident that the redacted materials meet the statutory definition of "trade secrets" under §45-31-2.3....

CR at 185 and 367. This letter was made available to the public.

7. On May 12, 2025, WVDAQ determined that Fundamental Data had adequately justified its claim of CBI and that the redacted information in the Application would remain as protected CBI. CR at 187-88 and 374-75. In that letter, WVDAQ stated:

Concerning your further justification of the CBI claims, the WVDEP has reviewed the information provided and has determined that there are non-confidential alternatives through the use of aggregation, categorization, surrogate parameters, emissions monitoring or sampling, or parametric monitoring that result in a practically enforceable method of determining emissions from the proposed facility (as provided for under §45-31B-4.1). These alternatives may include, but are not limited to, the use of aggregate hours operation tracking, aggregate heat input limitations, aggregate emission units, aggregate fuel throughputs, and categorized fuels. These non-confidential alternatives are consistent with applicable rules and standards and will result in a practically enforceable method of determining emissions., etc. Further, the WVDEP has determined that, pursuant to §45-31-4.1(b) and 4.1(c), there are not reasonable means to obtain the information claimed as CBI by using the publicly available aggregated data. It is therefore the WVDEP's determination that the information claimed by Fundamental Data, LLC as CBI in Permit Application R13-3713 satisfies the necessary requirements to be deemed confidential and will be maintained as such.

CR at 188 and 375.

(Appeal No. 25-01-AQB)

8. The following facts relate to appeal no. 25-01-AQB which predates this Appeal. That appeal was filed by the same Appellants in this Appeal. The following facts are not a part of the certified record in this Appeal. They are included in this Decision solely for the purpose of providing context to this Appeal. The base issues raised in appeal no. 25-01-AQB were also raised in this Appeal.

- i. On June 10, 2025, before WVDAQ even issued a draft permit, Appellants filed an appeal no. 25-01-AQB seeking to challenge WVDAQ's authority to grant Fundamental Data the right to redact certain information in its Application.

- ii. On July 18, 2025, WVDAQ (the Appellee in appeal 25-01-AQB) filed a Motion to Dismiss the appeal asserting that the AQB lacked subject matter jurisdiction. WVDAQ alleged that the AQB's jurisdiction is limited to "an order, permit, or official action of the chief of air quality." W.Va. Code §22B-1-7(b), *see also* W. Va. Code St. R. § 52-1-2.2(b) (same).
- iii. On September 3, 2025, the AQB held a hearing on WVDAQ's Motion to Dismiss.
- iv. On September 4, 2025, the Board granted WVDAQ's Motion to Dismiss appeal no. 25-01-AQB (1) finding that it was based on a draft permit and (2) concluding that a draft permit is not an official action because, by its very nature, draft decisions may be modified before a final agency action is taken. Therefore, the AQB held that it lacked subject matter jurisdiction to hear the appeal. *See* Order Granting Appellee's Motion to Dismiss appeal no. 25-01-AQB.
- v. Following the Board's decision, the Appellants appealed the AQB's decision to the West Virginia Intermediate Court of Appeals as Appeal No. 25-ICA-391.
- vi. Issues related to WVDAQ's CBI decisions and actions are currently pending before the Intermediate Court of Appeals and the parties to that case are briefing the merits of that controversy.

(Permits, Motions, and Appeal No. 25-02-AQB)

9. On June 18, 2025, WVDAQ issued a draft pre-construction synthetic minor air pollution control permit to Fundamental Data and made it available to the public for comment. CR at 80-99, 138.

10. On August 15, 2025, WVDAQ issued the pre-construction synthetic minor air pollution control permit No. R13-3713 to Fundamental Data LLC. CR at 485-512. Although a synthetic minor source has the ability to emit excess amounts of pollutants, the Permit requires the facility to limit its emissions to less than (i) 10 tons per year ("tpy") of any single hazardous air pollutant (HAPs), (ii) 25 tpy of aggregated HAPs pollutants, and (iii) 100 tpy of any other regulated pollutant (major source thresholds). If the Facility

exceeds any of these Permit limits, then WVDAQ would issue a notice of violation to the Facility. Evidentiary Hearing Transcript (hereinafter “EHT²”) at p.261. l.3 to p.262, l.16, p.452, l.13 to p.453, l.11.

11. On September 12, 2025, Appellants appealed the final Permit to the Board.³

12. On October 13, 2025, Fundamental Data sought, and was granted, the right to intervene in this Appeal.⁴

13. On October 17, 2025, Appellants filed a Request for Additional Discovery with the Board. Specifically, Appellants sought to discover the redacted CBI contained in the permit application.⁵

14. On October 23, 2025, Appellee filed a Motion for Partial Dismissal with the Board.⁶ Specifically, Appellee argued that it has no authority to consider the issues Appellants raised in Specific Objections 8, 12, and 16. Appellee asserted that it only has those authorities granted to it by the State Legislature and that those three (3) specific objections involved considerations that are outside of WVDAQ’s regulatory framework and jurisdiction.

15. On November 5, 2025, the AQB had its first day of the evidentiary hearings in this Appeal.⁷ The hearing that day was limited to hearing arguments related to resolving the two (2) requests described in Findings of Fact 13 and 14.

i. The Board first heard Appellants Request for Additional Discovery; to disclose all the information in the Application that was granted CBI protection. HT⁸ at p.13, l.6 to

² As used herein, “EHT” means or refers to the official transcript of the evidentiary hearing in this matter held on December 3-4, 2025.

³ See AQB Appeal Details at <https://aqb.wv.gov/AppealsDocuments/2025.09.12.%2025-02-AQB.%20Notice%20of%20Appeal.pdf>.

⁴ *Id.* at <https://aqb.wv.gov/AppealsDocuments/2025.10.17.%2025-02-AQB.%20D%20Yaussy%20Ltr%20RE%20Permittee%20is%20intervening%20in%20appeal.pdf>.

⁵ *Id.* at <https://aqb.wv.gov/AppealsDocuments/2025.10.17.%2025-02-AQB.%20Appellants%20Request%20for%20Additional%20Discovery.pdf>.

⁶ *Id.* at <https://aqb.wv.gov/AppealsDocuments/2025.10.23.%2025-02-AQB.%20Appellee%20WVDEP's%20Motion%20for%20Partial%20Dismissal.pdf>.

⁷ *Id.* at <https://aqb.wv.gov/AppealsDocuments/2025.11.05.%2025-02-AQB.%20Hearing%20Transcript%20Day%201.pdf> (Hearing transcript)

⁸ As used herein, “HT.” means or refers to the official transcript of the November 5, 2025, evidentiary hearing in this matter.

p.59, l.14. After deliberation, the Board asked Appellants, Appellee, and the Intervenor (hereinafter the “Parties” of this appeal) to meet, confer, and discuss whether they could agree on terms and conditions under which the redacted CBI to be disclosed to Appellants. HT at p.60, l.5-18. The Parties subsequently informed the Board that they reached an accord.

- ii. Afterwards, the Board heard Appellee’s Motion for Partial Dismissal that sought to dismiss Appellants Specific Objections 8, 12, and 16. The Parties had an opportunity to present and rebut the issues raised in Appellee’s Motion. HT at p.61, l.23 to p.77, l.20. After the Board had an opportunity to deliberate, it granted Appellee’s Motion to Dismiss Specific Objection 8 to the extent it addressed mobile sources (HT at p.78, l.6-8, p.78, l.19 to p.79, l.18), Specific Objection 12 in total (HT at p.78, l.9-11), and it denied Appellee’s Motion to Dismiss Specific Objection 16 (HT at p.78, l.12-17).

16. On November 19, 2025, based upon the agreement reached by the Parties and to resolve Appellants Motion for Additional Discovery, the Board issued a protective order granting Appellants counsel and their expert access to the redacted CBI contained in the permit application.⁹

17. The unredacted information was provided to Appellants as required by the Order.

(The Evidentiary Hearing on the Merits)

18. On December 3 and 4, 2025, the Board held a hearing on the merits of the appeal portions of which were heard confidentially (without the presence of the public).

19. The following witnesses were called by the parties at the evidentiary hearing:

⁹ See AQB Appeal Details at <https://aqb.wv.gov/AppealsDocuments/2025.11.19.%2025-02-AQB.%20Protective%20Order%20Concerning%20Intervenor's%20Redacted%20Permit%20Application.pdf>.

Witnesses Called by the Appellants

20. James Kotcon, a resident of Morgantown, West Virginia, testified as a standing witness. Mr. Kotcon testified that although he lived about 65 miles from the proposed Facility, he visits the area frequently. EHT at p.39, l.11 – p.40, l.8. He testified as a lay witness, that he is concerned that the Facility will contribute to “haze” which will impact the visibility of scenic areas. He also testified that, in his personal opinion, “[t]he area is already heavily impacted” by haze. EHT at p.40, l.19 – p.43, l.3. Mr. Kotcon testified that he is the current Chair of the West Virginia Chapter of Appellant Sierra Club, and he believes that haze degrades the outdoor experience. EHT at p.43, l.4-24. He also wrote the first draft of the public comments which Appellant Sierra Club submitted about Fundamental Data’s permit application. EHT at p.44, l.11-20.

21. Amy Margolies, a resident of Tucker County, testified as a standing witness. Ms. Margolies testified that (1) she lives about an eight (8) minute drive from the proposed site for the Facility, (2) her children’s school is less than a mile and a half from the proposed site, and (3) the soccer field on which her children practice is right next to the proposed site. EHT at p.64, l.11 to p.65, l.3. Ms. Margolies testified that she and her husband chose to live in Tucker County because they wanted their family to have outdoor opportunities and experiences. EHT at p.65, l.13-22; p.66, l.9-19. Finally, she testified that she is concerned that any air pollution from the proposed Facility will have an adverse impact on the health of her family. EHT at p.67, l.5-15. Finally, Ms. Margolies testified that she is a member of Appellant Tucker United. EHT at p.70, l.19-24.

22. Marilyn Shoenfeld, a resident of area, testified as a standing witness. Ms. Shoenfeld testified that her home is situated about eight (8) miles from the site of the proposed Facility but that the towns of Davis and Thomas, where she shops and attends church, are less than a mile from the proposed site. EHT at p.91, l.6-15. Ms. Shoenfeld testified that she believes that both her health and her enjoyment of the area will be impacted by any air pollution emitted from the proposed Facility. EHT at p.91, l.17 to

p.92, l.11. Ms. Shoenfeld testified that she president of Appellant West Virginia Highlands Conservancy. EHT at p.93, l.1-6.

23. Alan Tomson, mayor of the Town of Davis, testified as a fact witness about the economic drivers for the Town of Davis. Mayor Tomson testified that the region's economy "focuses on outdoor recreation;" it is a "tourist-based economy." EHT at p.103, l.21 to p.104, l.3. Mayor Tomson further testified that while he is not generally opposed to either data centers or power plants, he is opposed to the siting of this Facility because it is near his town and he fears the potential impact of air pollution on the community. EHT at p.106, l.2-13. Mayor Tomson testified that in his opinion, the proposed location of this Facility "was dangerous to the community, harmful to the public, and it threatened the wellbeing of the economics of - of the area." EHT at p.111, l.8-11. Mayor Tomson further testified that he would have fewer complaints if the proposed site was next to the Mount Storm power plant. EHT at p.112, l.23 to p.113, l.7. Finally, Mayor Tomson testified that in his opinion the mere existence of this Facility at the proposed site will be harmful to his community even if it never violates its permit. EHT at p.114, l.17 to p.115, l.6.

24. Dr. Ranajit Sahu testified as an expert witness for Appellants in (1) the combustion of fuels generating air pollutants, (ii) air pollution emissions, and (iii) the calculation of potential air pollution emissions. EHT at p.137, l.4-7 and l.17-20. After voir dire, the Board granted Dr. Sahu's designation as an expert in the three categories that Appellants identified. EHT at p.155, l.12-17.

25. On direct examination, Dr. Sahu testified that, in his expert opinion, certain pollutants were underestimated in the Permit because formaldehyde and other hazardous air pollutants are produced in greater quantities during startup and shutdown events due to incomplete combustion and less effective pollution controls at low temperatures and during low loads. EHT at p.174, l.24 to 175, l.23.

26. Dr. Sahu also testified that the Permit wrongly relies on steady-state formaldehyde emissions rates and should have included specific calculations for formaldehyde emissions during startup and shutdown events. EHT at p.175, l.24 to p.176, l.10. Dr. Sahu testified that he addressed this issue by assuming a direct correlation between carbon monoxide (CO) and formaldehyde emissions. Using publicly available information, Dr. Sahu calculated emissions using CO as a surrogate to estimate formaldehyde emissions during startup and shutdown. EHT at p.180, l.21 to p.181, l.11. Using the information available to the public, Dr. Sahu created a table (Appellants Exhibit 3¹⁰) representing his estimate of emissions of formaldehyde and all other hazardous air pollutants (“HAP”) during normal and during startup and shutdown conditions for this proposed Facility. EHT at p.187, l.4-8.

27. Dr. Sahu testified that, in his expert opinion, the Permit should require the use of continuous emission monitoring systems (CEMS) for every relevant pollutant for which a CEMS is available. EHT at p.222, l.2 to p.223, l.10.

28. Dr. Sahu testified that, in his expert opinion, manufacturer data is unreliable and should not be relied upon because it does not account for variability in emissions under varying operational conditions. EHT at p.252, l.23 to p.253, l.8.

29. Dr. Sahu also testified that that, in his expert opinion, stack testing is also unreliable because it is done at full load and therefore does not consider variability in operating conditions. EHT at p.276, l.16-22.

30. Dr. Sahu did concede that, in determining emissions, Fundamental Data used the most conservative estimates provided by the manufacturer’s data but also stated that nothing is guaranteed by the manufacturer. EHT at p.290, l.6-24.

31. Jerry Williams, a former WVDAQ employee, was called as a fact witness first by the Appellants to discuss the Permit. After Appellants closed their case in chief,

¹⁰ See AQB Appeal Details at https://drive.google.com/file/d/1uHfJ_wZ-SJX-F4AvG1CTCofkAxIyUzh4/view?usp=sharing

Mr. Williams was called as Appellee's first witness; also, to discuss his review of the Permit.

32. Mr. Williams testified that he was (i) part of the team that wrote the final Permit, (ii) wrote the engineering evaluation for the Permit, and (iii) wrote responses to public comments. EHT at p.312, l.20 to p.313, l.11. Mr. Williams testified that his role was to review "the Permit Application for the equipment that was part of the application". EHT at p.322, l.20-22.

33. Mr. Williams testified that he was not qualified or empowered to opine about what information creates competitive advantages or disadvantages. EHT at p.325, l.7-18. Mr. Williams testified that when a permit applicant makes a request that certain information be treated as CBI, WVDAQ initially accepts the applicant's representations that certain information is a trade secret if the request is in accordance with W.Va. CSR §45-31. EHT at p.326, l.3 to p.327, l.17. Mr. Williams then testified that in the case of this Application, WVDAQ reached out to WVDEP legal to review the CBI claims and WVDEP's General Counsel did sent a request to Fundamental Data to provide further information. EHT at p.327, l.24 to p.328, l.14; *see also* Findings of Fact 5-7 above (discussing same). Finally, Mr. Williams agreed with the characterization that Fundamental Data was "vehemently vocal" about maintaining the confidentiality of the claimed CBI information. EHT at p.337, l.20 to p.338, l.7.

Witnesses Called by the Appellee

34. Jerry Williams, a former WVDAQ employee, was called as a fact witness by Appellee to discuss the Permit. Mr. Williams testified that the emissions-related information submitted with the Application (i) is turbine-specific and provided by the manufacturer and (ii) was represented as being the worst-case emission limit. EHT at p.340, l.14 to p.341, l.15. He also agreed that basing a permit's emission limits (either annual or hourly) using worst-case assumptions is inherently conservative. EHT at p.341, l.16-21.

35. Mr. Williams testified that using parametric monitoring (*i.e.*, hours of operations and the tracking of startups and shutdowns) is "a reasonable and practical method of continuous compliance demonstration." He also testified that it is common to rely on initial stack-testing to demonstrate compliance with emissions limits. EHT at p.342, l.3-11.

36. With respect to formaldehyde, Mr. Williams testified that the permit Section 4.3.5 (*see* CR at 503) requires stack testing to be performed at twenty-five (25) percent of peak load (*i.e.*, between 75% and 100% of peak load) and that this requirement and other testing requirements are directly out of the United State Environmental Protection Agency's ("USEPA") New Source Performance Standards found in 40 CFR 60 Subpart KKKK which establishes emission standards and compliance schedules for the control of emissions from stationary combustion turbines that commenced construction, modification or reconstruction after February 18, 2005. EHT at p.343, l.24 to p.345, l.23 and p.350, l.22 to p.351, l.2; *see also* Section 40 CFR 60.4300. He also testified that he is unaware of any Federal rule that requires formaldehyde emission limits to be set for startup and shutdown for the type of turbines to be used that this Facility. EHT at p.360, l.2-6.

37. Mr. Williams testified (in contravention of Dr. Sahu's expert opinion), that he has found manufacturer emission data to be mostly reliable and to be more reliable than using general AP42 emissions data. EHT at p.346, l.17 to p.347, l.5.

38. Mr. Williams testified that he believed the Permit to be both a reasonable and enforceable synthetic minor permit. He further testified that the testing requirements, the parametric monitoring, and the predictive emission monitoring requirements that are in part 4.2 and 4.4 of the Permit (*see* CR at 502 and 504) not only create sufficient limits to ensure that Facility stays a synthetic minor facility, but that Fundamental Data will also be able to demonstrate permit compliance to WVDAQ. EHT at p.348, l.5 to p.349, l.4.

39. With respect to the Facility using both natural gas and diesel to power the turbines at the facility during the 12-month period, Mr. Williams testified that, for compliance purposes, the Permit's hourly restrictions would not apply and that compliance with the Permit's annual emission limits would be determined based exclusively upon (i) the number of hours a turbine was operated for each fuel source, (ii) its operating mode (*i.e.*, steady-state, startup or shutdown), and (iii) the types of fuel that was used during that operating mode. EHT at p.369, l.13 to p.375, l.1.

40. Joseph Kessler, WVDAQ's New Source Review ("NSR") program manager, was called as a fact witness by Appellee. Mr. Kessler testified that, in his career as an engineer, he reviewed over 450 air permit applications and over 600 permitting actions. EHT at p.379, l.4-11.

41. Mr. Kessler testified that it is not unusual to include parametric monitoring in an air permit. Parametric monitoring is the use of parameters, other than direct emissions measurements (*i.e.*, hours of operation in this Permit), to show compliance. Mr. Kessler testified that parametric monitoring is the "backbone" of air permitting because you cannot directly measure emissions from many types of sources (*e.g.*, flares).

EHT at p.380, l.19 to p.382, l.5. Further, parametric monitoring is accepted by USEPA.

EHT at p.386, l.5 to p.387, l.8.

42. With respect to requiring the use of CEMS across all emission units where a CEMS exists, Mr. Kessler testified that use of CEMS, as described, would drastically change program administration. But he declined to speculate on the extent the change would increase costs or cause delays to the business community. EHT at p.383, l.16 to p.384, l.1. The use of CEMS, as described, is not currently required by state or Federal regulations, and WVDAQ would have to determine how and when to compel their use in a manner that was not legally arbitrary and capricious as it applied to enforcement. EHT at p.384, l.3 to p.385, l.20.

43. Mr. Kessler testified that this Permit was sent to USEPA and that it provided some comments that are in the record to which WVDAQ responded. EHT at p.390, l.14-18.

Witness Called by the Intervenor

44. Leah Blinn, an employee of Civil and Environmental Consultants, Inc., was called to testify as an expert witness for the Intervenor in the areas of (i) air pollution permitting, and (ii) the permitting of natural gas turbines, including emissions from combined cycle turbines. EHT at p.406, l.20-24; p.409, l.6-12.

45. Ms. Blinn is the person who calculated the emissions information that Fundamental Data used in the Application. She used manufacturer's data to calculate emissions information for all criteria pollutants (other than SO₂) and for Formaldehyde. She used EPA's AP42 data to calculate the emissions information for SO₂ and all other HAPS. EHT at p.413, l.5-12.

46. Ms. Blinn testified that the turbine manufacturer provided emissions data for four (4) different temperature scenarios. From those four, she chose to use the scenario with worst emission factor because it represented the worst-case scenario. For nitrogen oxides, or NO_x, the worst-case emission factor in a pounds of pollutant per hour

rate was at 0-degree Fahrenheit temperature. She then multiplied that number by the total number of turbines at the proposed Facility. This same method was used to calculate emissions information for steady-state, startups, and shutdowns. EHT at p.413, l.13 to p.415, l.22; *see also* EHT p.416, l.8-14.

47. Ms. Blinn testified that, in her expert opinion, NO_x is the limiting pollutant for the issuance of the Permit as a synthetic minor source. Thus, in her expert opinion, if the Facility is in compliance with the NO_x emission limit, then the Facility will be in compliance with the other permit parameters. EHT at p.415, l.23 to p.416, l.6.

48. Regarding stack testing, Ms. Blinn testified that its use is approved by USEPA and that stack testing is commonly used by states to determine permit compliance. EHT at p.422, l.5-15. Stack testing is used to demonstrate compliance by showing that the hourly emission rate being tested is below the hourly rate allowed by the permit. In addition, a facility will have track hours of operation, and it will have to calculate emissions on a rolling 12-month total. That must occur monthly to ensure that the facility remains in compliance by emitting less than the allowed 100 tons of NO_x emission during any 12-month period (i.e., a rolling 12-month period). EHT at p.424, l.7-24. Stack testing is to be performed on every turbine at a facility. EHT at p.425, l.1-12. Ms. Blinn does not dispute Appellants expert, Dr. Sahu's, contention that stack testing is not exact and there can be variability (i.e., "numbers could vary"), but she notes that USEPA created regulations will be followed when using stack testing as a method to demonstrate permit compliance. EHT at p.426, l.15 to p.427, l.-12.

(Other Findings of Fact)

49. In a submission to this Board, Appellee proffered the following factual statement with which this Board agrees:

[S]tack testing is an appropriate and effective method for compliance determination. It is inherently verifiable and quantifiable for emissions calculations and, in conjunction with the other terms and conditions of the Permit, provides WVDEP with a practically enforceable means of determining whether the facility is operating beneath the major source threshold. It provides sufficient assurance of compliance by a minor source

without the cost and complexity of CEMS and is appropriate for minor sources, synthetic or not. In conjunction with other operational monitoring, stack testing is sufficient and appropriate.

CONCLUSIONS OF LAW

1. The Board has subject matter jurisdiction over this appeal pursuant to W.Va. Code §22B-1-7.

2. The Board's review of the appeal is conducted *de novo*. W.Va. Code St. R. § 52-1-6.8.

3. As a matter of policy and to assure fairness, the appeals process before the Board is guided by the appropriate West Virginia Rules of Civil Procedure. 52 CSR 1.6.13.

4. Under the West Virginia Rules of Civil Procedure, if, during a trial by a jury,

a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

W.Va. R. Civ. P. 50(a)(1). Motions for judgment as a matter of law can be made at any time before submission of the case to the jury, and the motion may be renewed if previously denied. W.Va. R. Civ. P. 50(a)(2) and (b).

5. On its face, Rule 50 appears to apply only to jury trials. However, Rule 50 applies to non-jury trials as well, if the court, or in this case the Board, makes findings of fact and conclusions of law pursuant to Rule 52 of the West Virginia Rules of Civil Procedure. *See Parks v. Mutual Benefit Group*, 245 W.Va. at 663, 865 S.E.2d at 65; *Beverly v. Thompson*, 229 W.Va. 684, 687, 735 S.E.2d 559, 562 (2012); *Waddy v. Riggleman*, 216 W.Va. 250, 255, 606 S.E.2d 222, 227 (2004); *Heitz v. Clovis*, 213 W.Va. 197, 199-200, 578 S.E.2d 391, 393-94 (2003).

6. The Board treats the motions of both the Appellee and the Intervenor as a motion for judgment as a matter of law under Rule 50 of the West Virginia Rules of Civil

Procedure. See *Parks v. Mut. Benefit Grp.*, 245 W.Va. 660, 661 n.1, 865 S.E.2d 62, 63 n.1 (2021) (“Respondent sought ‘directed verdict and ... judgment in its favor.’ Following the 1998 amendments to the West Virginia Rules of Civil Procedure, a directed verdict is now known as judgment as a matter of law. W. V. R. C. P., Rule 50 and W. V. R. C. P., Rule 52. ‘As a result of amendments to the West Virginia Rules of Civil Procedure in 1998, the legal phrase ‘directed verdict’ has been replaced ... by the phrase ‘judgment as a matter of law.’” *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 10 n.4, 511 S.E.2d 117, 121 n.4 (1998). “[W]e note that these vestigial terms continue to occasionally litter both this Court's opinions and the arguments of attorneys.” *Fredeking v. Tyler*, 224 W.Va. 1, 4, 680 S.E.2d 16, 19 (2009). We will use the proper legal phrase contemplated by Rules 50 and 52 throughout this opinion.”).

7. The Board’s authority to affirm, modify, or vacate this Permit is set forth in W.Va. Code § 22B-1-7(g)(1) which states:

(g) After such hearing and consideration of all the testimony, evidence, and record in the case:

(1) The [Board] shall make and enter a written order affirming, modifying, or vacating the order, permit, or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued;

8. The basis for the issuance, denial, or modification of an air quality permit is given under West Virginia Legislative Rule 45, CSR 13 – “Permits for Construction, Modifications, Relocation, etc.”, which provides, in relevant part, as follows:

The Secretary may impose any reasonable condition as part of a granted administrative update, construction, modification, existing stationary source operating permit or relocation permit. Such condition may include, but not be limited to, the submission of periodic progress, operation or emissions reports, the provisions for a suitable emissions sampling site and the installation of air pollutant monitoring devices. The Secretary shall impose or incorporate, consistent with all applicable rules, enforcement conditions which assure that all emission limitations contained within the permit are quantifiable, permanent and practicably enforceable. The Secretary may, on the basis of information provided in a permit application or with the agreement of the permit applicant, impose source-specific emission limitations, limits on the hours of operation or production rates,

or other constraints to minimize air pollutant discharges or establish enforceable emission caps for a stationary source not otherwise specifically required by a rule of the Secretary promulgated pursuant to W.Va. Code § 22-5-1, et seq. Any portions of the permit application, other than plans and specifications, that are to be made permit conditions must be specifically identified in the permit itself.

45 CSR 13.5.10.

9. During this hearing, the burden was initially on Appellants to provide sufficient evidence to support each of the 17 specific objections it raised in its Notice of Appeal. If Appellants do provide sufficient evidence as to an objection, then the burden shifts and Appellee WVDAQ and Intervenor Fundamental Data and they must produce evidence demonstrating sufficient reason for WVDAQ's decision. If Appellee and Intervenor do produce sufficient reasoning, then the burden shifts again, and the Appellants are given the opportunity to show that the evidence produced by the Appellee and/or Intervenor is a pretext or otherwise deficient. This shifting burden of proof standard was used in *Wetzel County Solid Waste Authority v. Chief Office of Waste Management, Division of Environmental Protection*, Civil Action No. 95-AA-3, Circuit Court of Kanawha County, West Virginia (1999). While *Wetzel County* was an appeal from a decision of the West Virginia Environmental Quality Board, the West Virginia Air Quality Board has adopted this shifting burden of proof standard. See *Abshire v. Director, Division of Air Quality, Department of Environmental Protection*, Appeal No. 02-10-AQB, Sept. 16, 2002, Final Order.

10. WVDEP is only allowed to exercise the authority granted to it by express rule. W.Va. CSR §45-13-5.7 prescribes the limits of WVDAQ's authority to deny a permit. It states:

The Secretary shall issue such permit or registration unless he or she determines that the proposed construction, modification, registration or relocation will violate applicable emission standards, will interfere with attainment or maintenance of an applicable ambient air quality standard, cause or contribute to a violation of an applicable air quality increment, or be inconsistent with the intent and purpose of this rule or W.Va. Code § 22-5-1, et seq. (emphasis added).

11. No rule exists that grants WVDEP the discretion to deny a permit for reasons other than set forth in statutes or regulations.

Standing.

12. Standing requirements for bringing this Appeal are set forth in W.Va. Code

§22-5-14. It states:

[a]ny person whose interest may be affected, including, but not necessarily limited to, the applicant and **any person who participated in the public comment process**, by a permit issued, modified, or denied by the secretary, or construction authorization pursuant to section eleven-a of this article, may appeal such action of the secretary to the air quality board pursuant to article one, chapter twenty-two-b of this code. (emphasis added).

13. The Board concludes that all Appellants had standing to bring this Appeal because each of their standing witnesses testified that they either (i) lived near the Facility, (ii) enjoyed the outdoors in the vicinity of the Facility, and/or (iii) participated in the public comment process for the permitting of this Facility.

Specific Objections Nos. 1-6.

14. In each of above six (6) Specific Objections, Appellants complain, in some form or fashion, that WVDAQ wrongly granted Fundamental Data's claim that certain identified information the permittee provided to WVDAQ in its Application was legally protected CBI that is exempt from public review pursuant to W.Va. CSR §45-31. The certified record reflects that WVDAQ did not just accept Fundamental Data's CBI claims. The CBI claims were not granted until after WVDEP's General Counsel got involved and had further discussions with Fundamental Data. *See Findings of Fact Nos. 5-7.*

15. Appellants first made these, or substantially similar, objections to the AQB on June 10, 2025, when it filed appeal no. 25-01-AQB with the Board. That filing occurred after WVDEP's General Counsel agreed to allow Fundamental Data's CBI claims but before WVDAQ had issued either the draft or the final permit to Fundamental Data. *See Findings of Fact Nos. 5-7.*

16. As set forth more completely in Findings of Fact No. 8, these same Appellants formally filed appeal no. 25-01-AQB asserting that WVDAQ erred when it

issued it May 12, 2025, letter granting Fundamental Data's CBI claims. Appellee WVDAQ filed a motion to dismiss that Appeal on the grounds that the AQB lacked subject matter jurisdiction. The AQB held an evidentiary hearing during which it allowed all parties in that appeal to present their case. After deliberation, the Board agreed with Appellee that it lacked subject matter action at the time Appellants filed their appeal. It then filed an order dismissing appeal no. 25-01-AQB. Appellants subsequently appealed the AQB's decision to dismiss the appeal to the West Virginia Intermediate Court of Appeals where it is identified as Appeal No. 25-ICA-391. The Parties to that Appeal are preparing brief on the merits.

17. For the following reasons, the Board concludes in this Appeal that WVDAQ's decisions and actions (i) did not violate any rule or regulation, and (ii) to the extent that Appellants' arguments have merit, any violations were cured by this Board's actions.

- i. Specific objections Nos. 1-6 in this Appeal are substantially similar to the specific objections asserted in appeal no. 25-01-AQB; which is currently under review by the Intermediate Court of Appeals. The Board views these objections as being primarily legal in nature and only tangentially related to air pollution regulations. The Board is very concerned that it should wait until after the Intermediate Court of Appeals rules on Appeal No. 25-ICA-391 before addressing the substantially same issues.
- ii. However, the Board concludes that these objections raise a fundamental question related to the CBI-issue that this Board concludes it must decide: "Did WVDAQ's decision to grant CBI protection to certain information contained in the Application prevent Appellants from being able to fully and fairly prepare for, and present, their case to the Board?" The Board concludes that Appellants were able to fully present their case to the AQB. The terms and conditions contained in the AQB's November 19, 2025, agreed protective order provided Appellants with all the information they needed to fully and fairly prepare and present their case to the Board. That order

granted both Appellants counsel and Dr. Sahu, Appellants expert witness, full access to all the CBI-at-issue. Consequently, Appellants had complete access to all the information contained in the Application that was redacted as CBI; the very information they objected to being redacted as CBI in Specific Objections Nos. 1 – 6. Accordingly, Appellants, represented by their counsel, had every opportunity to fully and fairly make their case based on the full, unredacted record.

- iii. Finally, the Board concludes that any violation of law or regulation alleged by Appellants in Specific Objection Nos. 1-6 were cured by the November 29, 2025, protective Order.

Specific Objections No. 7.

18. Appellants assert that WVDAQ violated W.Va. CSR §22-5-10(c) when it continued processing Fundamental Data's Application after Appellants filed appeal no. 25-01-AQB. The Board concludes that this objection is without legal support or merit for the following reasons:

- i. W.Va. CSR §22-5-10(c) expressly states that its applicability is contingent on appellants meeting all the requirements of W.VA Code §22B-1; including W.Va Code §22B-1-7(b). Subsection b sets forth the AQB's subject matter jurisdiction. The relevant part of 7(b) limits the AQB to only hearing appeals that request the Board to review an "order, permit, or official action of the chief of air quality." *Id.*
 - a. The AQB dismissed appeal no. 25-01-AQB because it concluded that at the time that appeal was filed, WVDAQ had neither issued an order, a permit, nor taken an official act with respect to CBI. For that reason, the AQB lacked jurisdiction to hear the appeal.
- ii. The Board further concludes that even if appeal 25-01-AQB was properly filed, W.Va. CSR §22-5-10(c) would still not apply to the facts before the Board.
 - a. The "stay" of the WVDAQ proceedings that Appellants claim was required by W.Va. CSR §22-5-10(c) occurs only in those situations where WVDAQ decides to

disclose a CBI to a third-party. It does not apply when WVDAQ denies the request to inspect and copy. The relevant language in 10(c) states: “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.” (emphasis added).

- iii. Finally, the Board concludes that Appellants waived this objection because at no time during this Appeal’s pendency did Appellants file a motion with the AQB seeking this specific relief.

Specific Objections No. 8.

19. In this objection, Appellants assert that in issuing the Permit as a minor source, WVDAQ failed to adequately consider fugitive emissions from (i) mobile sources, (ii) fire suppression equipment, (iii) ammonia leaks, and (iv) reservoirs for emissions control and cooling equipment.

20. Appellee filed a motion to dismiss this objection as a matter of law.¹¹ A hearing was held on November 5, 2025. *See* Findings of Fact No. 15. At that hearing Appellee asserted that WVDAQ lacks authority under the relevant regulations to consider pollution emission from sources regulated by USEPA under subchapter 2 of the Clean Air Act. WVDAQ has the discretion to consider such sources of pollutants under other rules, but it is not mandated to consider emission from these sources. HT at p.65, l.1-23. Appellants offered no evidence to rebut Appellee’s position and instead argued that because WVDAQ decided to consider fugitive emission from some sources that they should be required to consider fugitive emission from all sources. HT at p.70, l.20 to p.71, l.21.

21. The Board dismissed this objection to the extent it addresses mobile sources. *See* Findings of Fact No. 15(ii).

¹¹ *See* AQB Appeal Details at <https://aqb.wv.gov/AppealsDocuments/2025.10.23.%2025-02-AQB.%20Appellee%20WVDEP's%20Motion%20for%20Partial%20Dismissal.pdf>.

22. With respect to other sources of fugitive emissions, Dr. Sahu agreed that WVDAQ “did take account of certain fugitive emissions” on page 14 of the engineer’s evaluation of the Permit (CR at 226). Dr. Sahu’s states that in his opinion, WVDAQ focused too much on leaks related to natural gas and/or diesel and not enough on ammonia. EHT at p.212, l.1-9. Dr. Sahu further opined that the Permit should also have included potential ammonia fugitive emissions from the data center’s cooling systems and not be limited to just emissions from the power plant. EHT at p212, l.10 to p.213, l.11.

23. The Board concludes that WVDAQ did adequately consider fugitive emissions when determined the Facility could be permitted as a minor source. It further concludes that WVDAQ did not violate any regulation by not including potential fugitive emissions from the data center into the Permit,

Specific Objections No. 9.

24. Specific Objection No. 9 is also about fugitive emissions. In this Specific Objection, Appellants assert that when determining the operational limits and pollution limits for the Facility, WVDAQ failed to adequately consider fugitive emissions from (i) mobile sources, (ii) fire suppression equipment, (iii) ammonia leaks, and (iv) reservoirs for emissions control and cooling equipment.

25. During Dr. Sahu’s testimony, he was never asked to directly opine on this objection. See Conclusions of Law No. 9; EHT p.15, l.13p.16, l.4 (describing the Board’s “shifting burden of proof” standard). Instead, Dr. Sahu agreed that WVDAQ “did take account of certain fugitive emissions” on page 14 of the engineer’s evaluation of the Permit (CR at 226). Dr. Sahu also testified that, in his expert opinion, WVDAQ focused too much on leaks related to natural gas and/or diesel and not enough on ammonia leaks. EHT at p.212, l.1-9. Dr. Sahu further opined that WVDAQ should not have limited its review to fugitive emissions being released from the power plant and that WVDAQ should have also included potential ammonia fugitive emissions from the data center’s cooling systems as part of its review. EHT at p212, l.10 to p.213, l.11.

26. The Board concludes that WVDAQ did adequately consider fugitive emissions when it determined the operational limits and pollution limits in the Permit. It further concludes that WVDAQ did not violate any regulation by not including potential fugitive emissions from the data center into the Permit.

Specific Objections No. 10.

27. In this objection, Appellants assert that WVDAQ incorrectly used the redacted manufacturer's data when it calculated the potential emissions of NO_x, particulate, and formaldehyde. Appellants relied on Dr. Sahu to present evidence that the manufacturer data is unreliable. *See* Findings of Fact No. 28 (setting forth Dr. Sahu's expert opinion).

28. Both the Appellee and the Intervenor presented evidence through Mr. Williams and Ms. Blinn to rebut Dr. Sahu's opinion. *See* Conclusions of Law No. 9; EHT p.15, l.13p.16, l.4 (describing the Board's "shifting burden of proof" standard). Mr. Williams testified that in his experience as a permit writer, he has found manufacturer emission data to be mostly reliable and to be more reliable than using general AP42 emissions data. *See* Findings of Fact No. 37. Ms. Blinn, Intervenor's expert witness, testified that she calculated the emissions information that Fundamental Data provided to WVDAQ using the manufacturer's data and that of the four (4) different temperature scenarios provided by the manufacturer, she chose to use the scenario with worst emission factor because it represented the worst-case emissions scenario. *See* Findings of Fact Nos. 45 and 46. Appellants did not call any witnesses to address this rebuttal testimony.

29. The Board concludes that WVDAQ decision to rely on manufacturers data when calculating the potential emission from NO_x, particulate, and formaldehyde was neither incorrect nor did it violate any rule or regulation.

Specific Objections No. 11.

30. In this objection, Appellants assert that WVDAQ failed to “appropriately scrutinize the assumptions and inputs supplied by Fundamental Data to determine potential pollutant emissions.” The Board concludes that this specific objection is vague and provides no details about which assumptions or inputs WVDAQ failed to “appropriately scrutinize.” In his testimony, Dr. Sahu appears to provide some clarity regarding the use of assumptions in the permitting process.

31. In his expert opinion, Dr. Sahu testified generally about his dislike of assumptions because they have not been tested and because of inherent variability in operating equipment. *See e.g.*, EHT at p.210, l.8-21, p.222, l.2-24, and p.258, l.13-24. He testified that it is wrong to assume that manufacturer data is reliable. *See Findings of Fact No. 28.* He testified similarly about stack testing; stating that it was wrong to assume that it is reliable for purposes of determining compliance, arguing that stack testing does not consider variability in operating conditions. *See Findings of Fact No. 29.* For these reasons, Dr. Sahu opined that CEMS should be required wherever feasible. *See Findings of Fact No. 27.*

32. Neither Dr. Sahu nor any other witness provided any testimony that WVDAQ violated any rule, regulation, or policy by relying on assumptions. Instead, Dr. Sahu essentially opined that WVDAQ acted incorrectly because, in his expert opinion, accepting assumptions was not the best practice. *See e.g.*, EHT p.170, l.11 to p.171, l.11 .

33. The Board concludes that Appellants failed to provide sufficient evidence to support a conclusion that WVDAQ’s decision to rely on the assumptions and inputs provided by Fundamental Data to determine potential pollutant emissions was incorrect or that it violated a statute or regulation. Thus, under this Board’s standards, the burden of proof on this specific objection never shifted to WVDAQ. *See Conclusions of Law No. 9; EHT p.15, l.13p.16, l.4* (describing the Board’s “shifting burden of proof” standard). Alternatively, the Board dismisses this objection for its vagueness.

34. Nonetheless, the Board does have concerns that compliance with this Permit is predicated solely upon one round of stack testing to demonstrate that each turbine is operating as claimed by the manufacturer data (on which this Permit is based) which is to be performed shortly after the Facility's operational startup.

35. Given that this is a synthetic minor permit, and that as-built, this Facility's potential to emit pollutants greatly exceeds the limits contained in the Permit (*see* Findings of Fact No. 10), the Board concludes that the Permit should be modified to require additional stack testing of each turbine in the future. *See* Findings of Fact Nos. 47 and 48 (discussing the value and efficacy of Stack testing requirement). This modification will provide both WVDAQ and the public demonstrable proof that the Facility is continuing to comply with the Permit's emission limits. The Board further concludes that should future stack testing demonstrate any potential turbine-specific compliance concerns, it will provide both WVDAQ and Fundamental Data with the knowledge to adequately and appropriately address and resolve those emission concerns.

36. Therefore, the Board directs WVDAQ to include two (2) additional stack testing events into the Permit's requirements. The first event should be scheduled to occur sometime after the first year of the facility's operation but before the start of its third year of operation (*i.e.*, during the second year of operation). The second event should be scheduled to occur after the fifth year of operation but before the start of its seventh year of operation (*i.e.*, during the sixth year of operation). The Board further directs WVDAQ to add details to these permit requirements as it decides are relevant and appropriate.

Specific Objections No. 12.

37. In this objection, Appellants assert that WVDAQ failed to "adequately consider the fact" that this Facility will be used to power a large data center or data centers which appellants assert are "ill-suited" to rely on a synthetically limited source of electrically.

38. Appellee filed a motion to dismiss this objection as a matter of law.¹² A hearing was held on November 5, 2025. At that hearing Appellee asserted WVDAQ lacks authority to deny a permit based on speculation (or actual knowledge) as to who or what the electricity generated at the Facility may be used to power. Appellee asserted that there is neither a statute nor rule that confers on WVDAQ the authority to consider the end use of the electricity to be generated. Without specific authority, WVDAQ may not deny a permit on this basis. HT at p.66, l.7 to p.67, l.6.

39. Appellants sought to justify this objection by arguing that it “essentially asks this Board to recognize the reality of this situation;” that this facility will be used to power a data center. HT at p.71, l.22-24.

40. Appellants offered no legal authority to bolster this objection.

41. The Board dismissed this objection. See Findings of Fact No. 15(ii).

Specific Objections No. 13.

42. In this objection, Appellants assert that WVDAQ erred in granting a synthetic minor permit for this Facility because of (1) the maximum design heat input in the Application and (2) Appellants claim that it is a fact that few if any comparable power stations of this size have been permitted as minor sources of pollution.

43. Dr. Sahu testified that although heat input would be monitored, he does not see the relationship between heat input and emissions because in his opinion, emissions are based upon load which is not required to be monitored. That there is no requirement to monitor heat input during startup and shutdown events. Although heat input must be monitored, in his expert opinion, you cannot translate heat input into estimates of emissions. EHT at p.248, l.5 to p.250, l.7.

¹² See AQB Appeal Details at <https://aqb.wv.gov/AppealsDocuments/2025.10.23.%2025-02-AQB.%20Appellee%20WVDEP's%20Motion%20for%20Partial%20Dismissal.pdf>.

44. Appellants provided no evidence that when WVDAQ granted this Permit it violated any rule or regulation related to monitoring or that WVDAQ was required to consider how other facilities of this size, in West Virginia or in other states, have permitted comparable power plants. See Conclusions of Law No. 9; EHT p.15, l.13p.16, l.4 (describing the Board's "shifting burden of proof" standard).

45. The Board also concludes that WVDAQ's was not wrong when it decided to grant a synthetic minor source Permit for this Facility.

Specific Objections No. 14.

46. In this objection, Appellants assert that WVDAQ acted in an arbitrary, capricious, or as otherwise acted in a manner contrary to law, when it granted the Permit as a synthetic minor source of pollution.

47. Appellants failed to provide any specific evidence related to this objection. See Conclusions of Law No. 9; EHT p.15, l.13p.16, l.4 (describing the Board's "shifting burden of proof" standard). There the Board concludes that the burden never shifted to WVDAQ to provide evidence that it acted reasonably when it decided to grant this Permit.

48. For the above state reasons, and after hearing all the evidence and arguments put forth by the Parties, the Board concludes that WVDAQ did not act in an arbitrary or capricious manner when it granted the Permit and that the granting of the Permit was not contrary to law.

Specific Objections No. 15.

49. In this objection, Appellants assert that the Permit WVDAQ granted does not require "periodic visual or weight-based emissions testing" as required by W.Va. CSR §45-2A-5.

50. Appellants failed to provide any specific evidence related to this objection. See Conclusions of Law No. 9; EHT p.15, l.13p.16, l.4 (describing the Board's "shifting burden of proof" standard). There the Board concludes that the burden never shifted to

WVDAQ to provide evidence that it acted reasonably when it decided not to require these testing provisions in this Permit.

Specific Objections No. 16.

51. In this objection, Appellants assert that WVDAQ failed to consider the “purpose of the West Virginia Pollution Control Act, as described in W.Va. Code §22-5-1, when it permitted the facility as a synthetic minor source of pollution.

52. Appellee filed a motion to dismiss this objection as a matter of law.¹³ A hearing was held on November 5, 2025. At that hearing Appellee asserted the policy and purpose of the state’s air pollution rule and regulations are not amorphous concepts. Instead, they are set forth through the promulgation of legislatively approved rules. To the extent WVDAQ desires to pursue a new or emerging “purpose,” it must do so through the promulgation of new rules which must be approved by the Legislature. Legislative rules are the “guardrails” within which WVDAQ operates. If the Legislature does not grant WVDAQ authority to act, then WVDAQ cannot act. HT at p67, l.8 to p.68, l.1.

53. Appellants argued that the rules specifically give WVDAQ the discretion to require additional modeling and they request the AQB to require additional modeling. HT at p73, l.5 to p.74, l.20.

54. After hearing arguments, the Board concluded that WVDAQ did not violate the Statute’s policy and purpose by not requiring additional modeling. It then dismissed this objection as a matter of law. See Findings of Fact No. 15(ii).

Specific Objections No. 17.

55. Specific Objection No. 17 is also about modeling – air dispersion modeling. In this objection, Appellants assert that WVDAQ acted in a manner that was “arbitrary and capricious, and inconsistent with the purpose and policy behind the West Virginia

¹³ See AQB Appeal Details at <https://aqb.wv.gov/AppealsDocuments/2025.10.23.%2025-02-AQB.%20Appellee%20WVDEP's%20Motion%20for%20Partial%20Dismissal.pdf>.

Pollution Control Act” when it decided not to require Fundamental Data to perform “air dispersion or other modeling” before granting the Permit.

56. At no point during Appellants case in chief did they solicit testimony specifically about modeling. See Conclusions of Law No. 9; EHT p.15, l.13p.16, l.4 (describing the Board’s “shifting burden of proof” standard). Instead, Appellants rely solely on general discussions about the purpose and policies of the Air Pollution Control Act as it generally applies to both the economics of the state and the enjoyment of natural areas. EHT at p.338, l.24 to p.339, l.15.

57. Appellants argued that the rules give WVDAQ the discretion to require additional modeling and they request the AQB to require WVDAQ to insert additional modeling into the Permit provisions. EHT at p.339, l.24 to p.340, l.40.

58. After hearing arguments, the Board concluded that WVDAQ did not violate the Statute’s policy and purpose by not requiring additional modeling. It then dismissed this objection as a matter of law.

WHEREFORE, for the reasons set forth above, the Board hereby **GRANTS** Appellants Specific Objection No. 11 and directs WVDAQ to ensure the Permit contains these mandatory requirements the Board set forth in Conclusions of Law No. 36. The Board **DENIES** Appellants’ other Specific Objections.

It is so **ORDERED** and **ENTERED** this 5th day of February 2025.



J. Michael Koon, Chairman
Air Quality Board

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

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

Appellants,

v.

Appeal No. 25-02-AQB

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

Appellee

and

FUNDAMENTAL DATA, LLC,

Intervenor.

CERTIFICATE OF SERVICE

This is to certify that I, Kenna M. DeRaimo, Clerk for the Air Quality Board, hereby certify that on this day, the 5th day of February, 2026, have served a true copy of the foregoing **MEMORANDUM OF DECISION AND FINAL ORDER** upon the following:

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