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WV DEP / DIV OF AIR QUALITY

WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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

v.

Appeal No. 25-01-AQB

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

NOTICE OF APPEAL

Action complained of: Appellants respectfully assert that they are aggrieved by Appellee's finding regarding Permit Application R13-3713, dated May 12, 2025, that numerous redactions contained therein qualify as "confidential business information" ("CBI") or "trade secrets," pursuant to § 45-31-2.3, and are therefore exempt from disclosure.

Relief requested: Appellants pray that the Board review this matter and reinstate Appellee's previous finding of April 25, 2025, that the redacted portions of the permit application do not qualify as "CBI" or "trade secrets," but rather fall under the definition of "Types and Amounts of Air Pollutants Discharged," under § § 45-31-6 and 45-31-2.4, and that these redacted portions further do not meet the eligibility requirements for confidentiality under § 45-31-4.1(b) and (c).

Specific objections: The specific objections, including those of fact and law, are set forth in more detail in separate, numbered paragraphs attached hereto. Objections may be factual or legal.

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

Dated this 10th day of June, 2025.

J. Brent Easton, W.Va. Bar #12400
Brent Easton Attorney at Law PLLC
PO Box 267
Davis, West Virginia 26260
(304) 940-2627 (p)
(304) 441-5387 (f)

CERTIFICATE OF SERVICE

I, John Brent Easton, on behalf of Appellants, certify I have duly served the foregoing document, as well as all required copies, upon the following parties on June 10, 2025, by hand delivery or certified mail.

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

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

J. Brent Easton, W.Va. Bar #12400

1. STATEMENT OF FACTS

(a) Tucker United, Friends of Blackwater, and West Virginia Highlands Conservancy ("Appellants") challenge the findings made by WVDEP ("Appellee") on May 12, 2025, in regard to Permit Application R13-3713 ("permit application"), submitted by applicant Fundamental Data.

(b) Appellants are grassroots, citizen organizations comprised of residents and property owners of Tucker County directly affected by the "Ridgeline" project, a proposed power plant and subject of the permit application, as well as West Virginia citizens who visit and recreate in the area of the proposed power plant. Their aesthetic and recreational interests will be negatively affected by the pollution emitted from the facility, the noise generated from the facility, and by the operation of the facility in a region that relies heavily on outdoor recreation as a source of economic revenue. As a result of the redactions of the permit application, it is impossible for Appellants to adequately evaluate and comment on the emissions and operations of the facility. These and other aesthetic, recreational, and procedural injuries would result directly from the permitting and subsequent operation of the proposed facility without appropriate public evaluation and input. They are redressable by a determination from the Board that information was inappropriately redacted from the permit application.

(c) Appellants' concerns include, but are not limited to, (1) environmental impacts (air pollution, water use and pollution, habitat destruction, and harm to endangered species); (2) compliance with environmental laws (i.e. Clean Air Act, Endangered Species Act); (3) economic impacts (decline in the area's tourism-based economy, diminished property values); (4) nuisance (encroachment upon residential areas, noise, light, and heavy industrial traffic); (5) human health

and safety (diminished air quality and water quality, extremely close proximity of the proposed project to schools, industrial traffic on local roads); and (6) overall damage to the character of the area and quality of life for residents and visitors.

(d) According to Attachment G of Fundamental Data's permit application, a proposed large-scale, off-grid power plant run by natural gas and diesel-powered turbines would be constructed in Tucker County. Total turbine hours per year would amount to 61,320 for natural gas operation, while diesel-powered hours would amount to 25,000. Three 12.5 million gallon tanks would be constructed on site to hold the diesel fuel. Attachment B of the permit application indicates that the physical location of the power plant would be on land presently owned by Western Pocahontas Properties between the towns of Davis and Thomas, approximately one mile from residences, schools, and businesses. Since the filing of the permit application, Fundamental Data disclosed that the purpose for the proposed power plant is to run numerous data centers on a campus of up to 10,000 acres, making it one of the largest, if not the largest, in the world.[1]

(c) On April 25, 2025, Appellee notified Fundamental Data in regard to its permit application that

> information 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(c).

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[1] Maher, K. (2025, May 18). 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

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

(d) 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 asserted that "'trade secrets' includes plans, patterns and processes, such as the identity, number, and configuration of power sources."[2]

Fundamental Data continued that

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

Moreover, Fundamental Data asserted that "the redacted portions of our application pertain solely to specific equipment identification and our system configuration, which do not constitute emissions data. Even without redacted material, the Department has sufficient information to set verifiable limits on the collective emissions from this equipment, which cumulatively constitute the source," further indicating that the permit application otherwise provided all required information under § 45-31-2.4.a.3 and a.4.

Lastly, Fundamental Data stated

> Your [Appellee] letter references potential deficiencies under § 45-31-4.1(b) and 4.1(c), which relate to the applicant's efforts to maintain confidentiality. We are uncertain what 'concern' exists in this regard, as we have taken and continue to take robust measures to

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[2] Notably, while the text of § 45-31-2.3 includes "plans, patterns, and processes," it patently does not include "the identity, number, and configuration of power sources," as Fundamental Data represented in its May 7, 2025 response.

protect the confidentiality of out trade secrets. If WVDEP has reason to believe otherwise, we respectfully request the detailed and specific factual basis for such concern so we may address it directly.

(e) On May 12, 2025, Appellee responded to Fundamental Data in writing, reversing its earlier findings. Specifically, Appellee stated that

> the WVDEP as 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 of 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.

(f) Appellee's May 12, 2025 finding thus allows Permit Application R13-3713 to proceed in its original, highly-redacted form.

2. SPECIFIC OBJECTIONS

(a) Appellant objects to Appellee's May 12, 2025 finding, inasmuch as that it lacks any meaningful analysis or scrutiny, but instead accepts and adopts the assertions contained in Fundamental Data's May 7, 2025 response as fact.

(b) Appellant objects to Appellee's May 12, 2025 finding, inasmuch as that it effectively reverses Appellee's April 25, 2025 finding that the redacted portions of the Permit Application do not qualify as "CBI" and/or "trade secrets" as defined by § 45-31-2.3. Similarly, Appellant further objects to the idea that § 45-31-2.3 categorically includes "the identity, number,

and configuration of power sources" as a type of "CBI" and/or "trade secret," as suggested by Fundamental Data in its May 7, 2025 response. This objection involves questions of law and fact.

(c) Appellant objects to Appellee's May 12, 2025 finding, inasmuch as that it effectively reverses Appellee's April 25, 2025 finding that the redacted portions of the Permit Application fall under the definition of 'Types and Amounts of Air Pollutants Discharged,' as excluded under § 45-31-6 and defined under § 45-31-2.4. This objection involves questions law and fact.

(d) Appellant objects to Appellee's May 12, 2025 finding, inasmuch as that it fails to address the Board's stated "concern" that the claimed "CBI" and/or "trade secrets" may not meet the eligibility requirements under § 45-31-4.1(b) and 4.1(c), nor is Appellee's May 12, 2025 finding reached with any justification or explanation provided by Fundamental Data in its May 7, 2025 response that the redacted portions do in fact meet the aforementioned eligibility requirements. This objection involves questions of law and fact.

(e) Appellant objects to Appellee's May 12, 2025 finding, inasmuch as that it concludes that the redacted information can be "CBI" because it is not necessary to the determination of emission limits, and/or rather that "non-confidential alternatives throughout 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)." Here, Appellant asserts that the redacted information, including but not limited to the size and number of turbines, is

necessary to the determination of emission limits and their impact on human health. This objection involves questions of law and fact.

west virginia department of environmental protection

Division of Air Quality
601 57th Street, SE
Charleston, WV 25304
(304) 926-0475

Harold D. Ward, Cabinet Secretary
dep.wv.gov

April 25, 2025

Mr. Casey Chapman
Responsible Official
Fundamental Data LLC
cchapman@fundamentaldata.com

Re: Confidential Business Information
Fundamental Data LLC
Permit Number: R13-3717
Facility ID Number: 093-00034

Mr. Chapman:

On March 18, 2025, Fundamental Data LLC (FD) submitted an air permit application (R13-3713) that contained information claimed as confidential business information (CBI). A redacted copy of the permit application was provided that has been made available for public review. As you are aware, the Division of Air Quality (DAQ) has received hundreds of public comments concerning the proposed project, many of which have specifically requested release of the information that has been redacted in the public version of the application. These written requests for release of information currently redacted have triggered a review of the CBI claims by the DEP's Office of the General Counsel (OGC). This review is governed by the applicable WV Legislative Rules 45CSR31, 31a, and 31b. At this time, the review has determined that the information claimed as CBI 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(c).

At this time the OGC is requesting further justification (beyond that which is given on the CBI cover document) that the information claimed as CBI is not defined as "Types and Amounts of Air Pollutants Discharged" and also does not conflict with the eligibility requirements under §45-31-4.1(b) and 4.1(c). Please note that no information will be released without both FD having a full opportunity to justify the claims of CBI and the opportunity to have a full consultation with the WVDEP over this matter.

While the technical review of the permit application will continue, this request for additional information will pause the statutory review clock and place the permit application in a status of incomplete. Please provide a written response within fifteen (15) days of receipt of this request to facilitate the continued review of Permit Application R13-3713.

Sincerely,

Jason Wandling

Jason Wandling,
WVDEP General Counsel

cc: Lewis Reynolds, lreynolds@fundamentaldata.com
Leah Blinn, CEC, lblinn@cecinc.com

FUNDAMENTAL DATA

May 7, 2025

Jason Wandling
General Counsel
WV Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

Re: Confidential Business Information
Permit Number: RB-3717
Facility ID Number: 093-00034

Dear Mr. Wandling,

We write in reply to your letter dated April 25, 2025, concerning the West Virginia Department of Environmental Protection's (WVDEP) purported rescission of its prior completeness determination for our permit application. We address the confidentiality claims contained in our application and to reaffirm the basis for the redaction of certain proprietary information, which is critical to the Ridgeline project and, by extension, to the broader success of innovative initiatives in the State of West Virginia.

We respond in the spirit of constructive dialogue and cooperation; however, we respectfully assert that the Department's decision appears inconsistent with applicable administrative procedures. We reserve all rights available to us in law and equity.

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.

In this environment, Rule 31 plays a critical role in protecting confidential business information (CBI) and trade secrets from disclosure to the public and to Fundamental's

competitors. The proper interpretation and application of Rule 31 will determine whether West Virginia can compete successfully for next-generation technology and energy infrastructure. The ability to maintain the confidentiality of proprietary business information is not only vital to our company's competitiveness but is also a key factor considered by other investors evaluating projects within the State. If the State cannot protect confidential business information in a manner consistent with its laws, the State will chill investment and drive away businesses the Power Act intends to attract.

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. Although not directly relevant to the Department's position here, we emphasize the following to provide some comfort to the public:

1. Ridgeline does not plan any consumption or use of water resources from or discharge of wastewater to local rivers, streams, or municipal systems.

2. If advanced, the project will result in the creation of substantial, high-paying, permanent jobs and generate unprecedented tax revenue for local jurisdictions.

3. The plant is sited in a lowland area surrounded by hills that should substantially limit and may even completely obscure visibility of the plant from public roadways or populated areas.

4. The facility expects to operate at noise levels below the threshold requiring hearing protection under OSHA regulations and is physically more than one mile from the nearest occupied structure and is buffered by topography and forest.

Turning to the core issue of confidentiality: while your letter does not explicitly reference a Freedom of Information Act (FOIA) request, §45-31 suggests that a determination under Rule 31 was initiated upon receipt of a public records request under §29B-1-1. We presume, therefore, that such a request has been made and request a copy of all such requests.

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

> *"trade secrets" may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or*

other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.

Note that "trade secrets" includes plans, patterns and processes, such as the identity, number and configuration of power sources that provide an advantage over competitors. With that in mind, the redacted materials in our application fall within two categories:

1. Information governed by binding confidentiality and non-disclosure agreements with third-party vendors, and

2. Proprietary data constituting trade secrets under applicable law.

Your letter states that your

> *"review has determined that the information claimed as CBI 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 45CSR31 b). There is also some concern that the claimed CBI may not meet the eligibility requirements under §45-31-4.l(b) and 4.l(c)."*

The above reflects claims that the redacted information may constitute "types and amounts of air pollutants discharged," which cannot be claimed as confidential under §45-31-6 and the definitions provided in §45-31-2.4 and 45CSR31B. However, this interpretation is not supported by the text of §45-31-2.4, which reads as follows:

> *2.4.a.1. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;*
>
> *2.4.a.2. Emission data necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and*
>
> *2.4.a.3. A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).*

As we are a proposed new facility and have not yet emitted any pollutants, §45-31-2.4.a.1 is inapplicable. We have duly provided all the required information under §45-31-2.4.a.2 and §45-31-2.4.a.3. The redacted portions of our application pertain solely to specific equipment identification and our system configuration, which donot constitute emissions data. Even 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. A "stationary source" is defined in §45-13-2.24 as "any building, structure, facility, installation, or emission unit, or combination thereof . . . ." This definition supports our position that emissions data requirements need not extend to the disclosure of sub-emissions from individual components of a source but rather pertain to the source in its entirety. The rule contemplates disclosure of emissions from the "source," not necessarily from each subcomponent of a source, where total emissions can be effectively limited by reasonable permit conditions. The source is broadly defined under §45-13-2.24 as including combinations of emission units, further reinforcing this point. The public, therefore, has full access to all required emissions data as defined, without compromising sensitive technical information.

Furthermore, §45-31-2.4.a.2 refers to "emission data necessary to determine the identity, amount, frequency, concentration or other characteristics" of the emission source, meaning that the information necessary to development of emission limits cannot be CBI. The redacted information can be CBI because it is not necessary to the determination of emission limits. Verifiable limits can be developed without the redacted material, based on general knowledge of turbine operations, permissible fuel sources, hours of operation and other factors that can be specified in the permit. The proposed project is one where alternatives to CBI, such as use of "aggregation, categorization, surrogate parameters, emissions monitoring or sampling, or parametric monitoring", can result in "a practically enforceable method of determining emissions." §45-31B-4.1.

Finally, your letter references potential deficiencies under §45-31-4.1(b) and 4.1(c), which relate to the applicant's efforts to maintain confidentiality. We are uncertain what "concern" exists in this regard, as we have taken and continue to take robust measures to protect the confidentiality of our trade secrets. If WVDEP has reason to believe otherwise, we respectfully request the detailed and specific factual basis for such a concern so we may address it directly.

The Department has an unredacted version of the application before it and its review should continue without pause. The number of inquiries about the project received by the Department does not affect the nature of the information redacted. We respectfully submit that our redactions are correct, consistent with applicable law, and are absolutely crucial to our competitive position in our field.

We trust this response clarifies the basis for our confidentiality designations and supports a determination by Secretary Ward that the information in question qualifies for CBI protection under Rule 31. Should that not be the case, we request further and immediate clarification

of the Department's position without release of any redacted material to the general public. In the event of a disagreement between the Department and an applicant regarding CBI, the Department might suspend permitting, but there is no authority for the Department to release information.

Please contact me if you would like to further discuss this response or the project that we have proposed.

Respectfully submitted,

Casey Chapman

Casey Chapman

west virginia department of environmental protection

Office of Legal Services
601 57th Street, SE
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Harold D. Ward, Cabinet Secretary
dep.wv.gov

May 12, 2025

Mr. Casey Chapman
Responsible Official
Fundamental Data LLC
cchapman@fundamentaldata.com

Re: Confidential Business Information
Fundamental Data LLC
Permit Number: R13-3713
Facility ID Number: 093-00034

Mr. Chapman:

The WVDEP appreciates your timely response to the letter from the WVDEP's Office of the General Counsel ("OGC") sent to you on April 25, 2025. To be clear, as stated in the OGC's letter, while the review of your confidential business information ("CBI") claims was triggered by the public comments received that requested additional information to be released, the subsequent letter was sent under the authority granted to the Secretary under 45CSR13, Sections 5.4 and 5.8 relating to the information required for a complete application. It is important to note that all public comments received by the WVDEP are part of the public record and available for your review upon request.

Further, 45CSR13 grants the Secretary the authority to determine when a permit application is complete (§45-13-5.8), and is explicit that such a designation does not preclude the WVDEP from requesting additional information (language that was included in your completeness e-mail sent on April 9, 2025). Clearly, if additional information is requested, the application can no longer be considered complete, and the WVDEP believes that a reasonable interpretation of 45CSR13 allows for the Secretary to have discretion when requesting additional information to pause (or in some cases even later restart) the statutory clock. If this is not the case, an applicant could control the review process through delay in submitting additional information or, detrimental to the regulated community, strip the WVDEP of the flexibility and time to work with applicants to provide a complete application. However, as stated in the OGC's letter, the DAQ's technical review of the permit application was not affected by the change of application status and is on-going, and WVDEP remains as before committed to a full and complete review, pursuant to the rules governing such a review, and done in a timely manner.

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 of 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.

As noted above, the WVDEP has received a significant number of comments from concerned citizens. Accordingly, the WVDEP encourages sensitivity to those concerns and the exercise of transparency to the greatest extent possible regarding information not claimed as confidential.

Please note that this determination is specific to Permit Application R13-3713 and does not necessarily apply to any changes to the current application or modifications in the future without additional review. With this response, the statutory clock shall restart and will be backdated to the date of submission of the response letter on May 7, 2025.

Sincerely,

C. Scott Driver,
Chief, Office of Legal Services