WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

TUCKER UNITED, FRIENDS OF BLACKWATER, and WEST VIRGINIA HIGHLANDS CONSERVANY,

Appellants,

Appeal No. 25-01-AQB

v.

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

Appellee.

APPELLEE'S MOTION TO DISMISS

Laura M. Crowder, Director, Division of Air Quality, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, hereby moves the Board for entry of an order dismissing the above-styled matter with prejudice, striking it from the docket of the Board. WVDEP so moves because the Notice of Appeal ("Appeal") raises no issue ripe for appeal, there being no appealable order, permit, or official action of WVDEP bringing the matter within the Board's subject matter jurisdiction. Accordingly, pursuant to W. Va. Code § 22B-1-7 and the Board's procedural rules, 52 CSR 1-2.2, the Appeal raises no issue ripe for appeal, is prematurely filed, and must be dismissed without consideration of any allegedly material argument.

PROCEDURAL HISTORY

On March 18, 2025, Fundamental Data LLC ("Applicant") submitted to WVDEP an application ("Application") for Permit No. R13-3713 ("Permit"). The Applicant made a claim that certain information constituted "trade secrets" or "confidential business information" exempt from public review. Accordingly, this information was redacted from the copy of the Application provided to the public for review.

On April 25, 2025, during the permit reviewing process, WVDEP's General Counsel sent correspondence ("Initial Correspondence", attached as Exhibit 1) to the Applicant indicating that WVDEP had some concerns regarding the Applicant's CBI claim and that justification would be required.

On May 7, 2025, the Applicant replied with correspondence ("Justification", attached as Exhibit 2) to WVDEP providing justification for its CBI claim.

On May 12, 2025, WVDEP sent correspondence ("Determination Correspondence", attached as Exhibit 3) to the Applicant indicating that the redacted information in the Application would remain redacted as CBI.

On June 12, 2025, the Appellants filed the Appeal.

ARGUMENT FOR DISMISSAL

W. Va. Code 22B-1-7(b) states that the Board has subject matter jurisdiction over appeals from "an order, permit, or official action of the chief of air quality[.]" If the CBI determination was not an order, permit, or official action, the Board does not have jurisdiction in this case.

Similarly, the Procedural Rules Governing Appeals Before the Air Quality Board state, at 52 CSR 1-2.2(b), that the Board has subject matter jurisdiction over appeals from "an order, permit or official action[.]" Again, if the CBI determination was not an order, permit, or official action, the Board has no jurisdiction.

1. The Initial Correspondence is not an order, permit, or official action.

The Initial Correspondence is clearly not and does not purport to be an order, permit, or official action. Counsel states that "the information claimed as CBI *may not* qualify for such designation" (emphasis added) and that "there is also some concern" regarding the claim.

The Initial Correspondence further states that WVDEP explicitly seeks only further justification for the CBI claim:

> At this time the [Office of General Counsel] 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 [the Applicant] having a full opportunity to justify the claims of CBI and the opportunity to have a full consultation with the WVDEP over this matter.* (Emphasis added.)

In the course of its review of permit applications, WVDEP frequently asks applicants to provide additional information. Upon receipt, WVDEP determines whether that information is sufficient and continues with the review process accordingly. Exhibit 4 is attached as an example of this request and submission exchange.

The Initial Correspondence is signed by General Counsel, not by the Director of the Division of Air Quality. It makes clear in no uncertain terms that it is not an official order, permit, or action, instead literally stating that the Applicant will be afforded "a full opportunity to justify the claims of CBI and the opportunity to have a full consultation with the WVDEP over this matter" and that "the technical review of the permit application will continue[.]"

2. The Determination Correspondence is not an order, permit, or official action.

The Determination Correspondence indicates that WVDEP had "request[ed] additional information." Again, the correspondence explicitly states:

> [WVDEP's] technical review of the permit application was not affected by the change of application status and is [ongoing], 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.

Again, the Determination is signed by General Counsel, not by the Director, and makes clear that the Application remains under review. It is not, and does not purport to be, an official order, permit, or action.

3. Precedent dictates that neither the Initial Correspondence nor the Determination Correspondence is an order, permit, or official action.

On May 22, 2008, the Environmental Quality Board ("EQB") entered an order in *Wheeling-Pittsburgh Steel Corporation and Mountain State Carbon, LLC v. Director, Division of Water Resources, Department of Environmental Protection*, Appeal No. 08-01-EQB (May 22, 2008),

dismissing an appeal on the motion of WVDEP. The EQB dismissed the appeal on the basis that a Notice of Violation ("NOV") is not an order subject to the jurisdiction of the Board. (See Exhibit 5.)

In so doing, the EQB cited *Benedict v. Capitol Cement Corporation*, Civil Action No. 02-AA-129 (January 29, 2004), an administrative appeal in the Circuit Court of Kanawha County involving this Board. In this case, the Court ruled that an NOV is not an appealable "implied cease and desist order," noting that statutory denial language did not appear within the NOV in question, that the word "order" did not appear in the NOV, that the NOV was clearly labeled as such rather than an order, and that there were no required findings of fact contained in the NOV. Therefore, as the NOV displayed and did not purport to display the characteristics of an order, the Court ruled that this Board erred in determining that the NOV was an order. (See Exhibit 6.)

Similarly, neither the Initial Correspondence nor the Determination Correspondence display the characteristics of an order, permit, or official action. They are signed by General Counsel, not the Director. The word "order" does not appear, and they do not halt the review process. Like other requests for additional information and determination of sufficiency during the permitting process, the correspondence simply asks for justification and determines whether the justification is sufficient. By law and by precedent, this is not appealable.

CONCLUSION

The Appeal is not ripe and is therefore prematurely filed. Because neither the Initial Correspondence nor the Determination Correspondence are orders, permits, or official actions, neither the relevant statute nor the Board's procedural rules confer subject matter jurisdiction on the Board. There is no issue for the Board to adjudicate.

Upon issuance or denial of the Permit, which is currently in its public notice period, the Appellants or any other person is statutorily entitled to judicial review before the Board by a timely filed appeal. A final permitting action falls squarely within the Board's purview. However, at this stage, the current Appeal must be dismissed as premature.

PRAYER FOR RELIEF

Accordingly, WVDEP hereby moves the Board for entry of an order dismissing the above-styled matter with prejudice, striking it from the docket of the Board, along with such other relief as is deemed just and appropriate.

Respectfully Submitted,
LAURA M. CROWDER
By Counsel

C. Scott Driver, W.Va. Bar ID #9846
Office of Legal Services
West Virginia Department of
Environmental Protection
601 57 th Street SE
Charleston WV 25304
Telephone: (304) 926-0499 x41221
E-mail: charles.s.driver@wv.gov

EXHIBIT 1

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

EXHIBIT 2

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

EXHIBIT 3

west virginia department of environmental protection

Office of Legal Services
601 57th Street, SE
Charleston, WV 25304
(304) 926-0460

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

EXHIBIT 4

Kessler, Joseph R

From: Kessler, Joseph R
Sent: Thursday, December 10, 2020 3:15 PM
To: Lars Scott; Jon Erickson
Cc: Kessler, Joseph R
Subject: R13-3509

Per our discussion on December 10:

1. What is the nominal max daily natural gas input rate (including methanol production feedstock and power plant fuel)?

2. Please provide additional information on the process of hose disconnects during methanol loading that mitigates fugitive release of emissions.

3. Please provide additional information on the natural gas desulfurization step and include any information on expected sulfur content (especially H2S) in the fuel gas.

4. Please provide the MDHI of the HTCR main burner when combusting only n/g during startup.

Thanks,

Joe Kessler, PE
Engineer
West Virginia Division of Air Quality
601-57th St., SE
Charleston, WV 25304
Phone: (304) 926-0499 x41271
Joseph.r.kessler@wv.gov

Kessler, Joseph R

From: Jon Erickson <Jon@GlobalImperiumGroup.com>
Sent: Sunday, December 13, 2020 8:21 PM
To: Kessler, Joseph R
Cc: lscott@westvirginiamethanol.com
Subject: [External] FW: R13-3509

CAUTION: External email. Do not click links or open attachments unless you verify sender.

Joe,

Please see the response below **(in bold)** submitted on behalf of West Virginia Methanol, Inc.

Regards,
Jon

Jon C. Erickson
Global Imperium Group
+1 913-440-0757 O | +1 816-805-0139 M

From: Kessler, Joseph R <Joseph.R.Kessler@wv.gov>
Sent: Thursday, December 10, 2020 2:15 PM
To: Lars Scott <LScott@westvirginiamethanol.com>; Jon Erickson <Jon@GlobalImperiumGroup.com>
Cc: Kessler, Joseph R <Joseph.R.Kessler@wv.gov>
Subject: R13-3509

Per our discussion on December 10:

1. What is the nominal max daily natural gas input rate (including methanol production feedstock and power plant fuel)?

The nominal maximum natural gas input for the entire plant is on the order of 1500 MMBtu/h. This can vary dependent upon environmental conditions, natural gas quality, remaining catalyst life and other factors.

2. Please provide additional information on the process of hose disconnects during methanol loading that mitigates fugitive release of emissions.

The plant will use a dry disconnect by OPW Engineered Systems or equivalent. The dry disconnect coupling devices have been proven as successful technology to help protect workers and the environment in the transfer of materials. For information on the product please see: catalog-dry-disconnects.pdf (opwglobal.com).

3. Please provide additional information on the natural gas desulfurization step and include any information on expected sulfur content (especially H2S) in the fuel gas.

Sulfur compounds if present in the gas will be combusted to form SO2. Attachment N, page 135, shows the calculation basis of SO2 from the HTCR. As described in the application, the process includes a desulfurization step. It is necessary to remove sulfur compounds in the syngas prior to the methanol synthesis step so as to prevent methanol catalyst poisoning. Sulfur constituents are removed down to the ppmv/ppbv levels making the resulting SO2 emission level negligible. The note on page 135 says 0 per HT (the designer) plus AP-42, Table 1.4-2 which is untreated pipeline natural gas number which serves as the margin.

4. Please provide the MDHI of the HTCR main burner when combusting only n/g during startup.

The nominal maximum design heat input for a HTCR Burner (for one unit) on natural gas is 180.7 MMBtu/h

Thanks,

Joe Kessler, PE
Engineer
West Virginia Division of Air Quality
601-57th St., SE
Charleston, WV 25304
Phone: (304) 926-0499 x41271
Joseph.r.kessler@wv.gov

Kessler, Joseph R

From: Jon Erickson <Jon@GlobalImperiumGroup.com>
Sent: Sunday, December 13, 2020 8:21 PM
To: Kessler, Joseph R
Cc: lscott@westvirginiamethanol.com
Subject: [External] FW: R13-3509

CAUTION: External email. Do not click links or open attachments unless you verify sender.

Joe,

Please see the response below **(in bold)** submitted on behalf of West Virginia Methanol, Inc.

Regards,
Jon

Jon C. Erickson
Global Imperium Group
+1 913-440-0757 O | +1 816-805-0139 M

From: Kessler, Joseph R <Joseph.R.Kessler@wv.gov>
Sent: Thursday, December 10, 2020 2:15 PM
To: Lars Scott <LScott@westvirginiamethanol.com>; Jon Erickson <Jon@GlobalImperiumGroup.com>
Cc: Kessler, Joseph R <Joseph.R.Kessler@wv.gov>
Subject: R13-3509

Per our discussion on December 10:

1. What is the nominal max daily natural gas input rate (including methanol production feedstock and power plant fuel)?

The nominal maximum natural gas input for the entire plant is on the order of 1500 MMBtu/h. This can vary dependent upon environmental conditions, natural gas quality, remaining catalyst life and other factors.

2. Please provide additional information on the process of hose disconnects during methanol loading that mitigates fugitive release of emissions.

The plant will use a dry disconnect by OPW Engineered Systems or equivalent. The dry disconnect coupling devices have been proven as successful technology to help protect workers and the environment in the transfer of materials. For information on the product please see: catalog-dry-disconnects.pdf (opwglobal.com).

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4. Please provide the MDHI of the HTCR main burner when combusting only n/g during startup.

The nominal maximum design heat input for a HTCR Burner (for one unit) on natural gas is 180.7 MMBtu/h

Thanks,

Joe Kessler, PE
Engineer
West Virginia Division of Air Quality
601-57th St., SE
Charleston, WV 25304
Phone: (304) 926-0499 x41271
Joseph.r.kessler@wv.gov

Kessler, Joseph R

From:	Kessler, Joseph R
Sent:	Monday, December 21, 2020 2:11 PM
To:	Lars Scott; Jon Erickson
Cc:	Kessler, Joseph R
Subject:	R13-3509 Permit Application Status

RE: Application Status: Complete
West Virginia Methanol, Inc.
Pleasants County Methanol Plant
Facility ID No. 073-00040
Application No. R13-3509

Mr. Scott,

Your application for a construction permit was received by the Division of Air Quality (DAQ) on November 23, 2020 and assigned to the writer for review. Upon a review of the information originally submitted and the additional information submitted upon request of the writer, the application has been deemed complete as of the date of this e-mail. The ninety (90) day statutory time frame began on that day.

This determination of completeness shall not relieve the permit applicant of the requirement to subsequently submit, in a timely manner, any additional or corrected information deemed necessary for a final permit determination.

Should you have any questions, please contact me at (304) 926-0499 ext. 41271 or reply to this email.

Thank You,

Joe Kessler, PE
Engineer
West Virginia Division of Air Quality
601-57th St., SE
Charleston, WV 25304
Phone: (304) 926-0499 x41271
Joseph.r.kessler@wv.gov

Kessler, Joseph R

From: Scott, Kimberly A (DEP)
Sent: Tuesday, November 24, 2020 12:21 PM
To: Kessler, Joseph R; Ernest, Nicole D; Mink, Stephanie R
Subject: RE: WV METHANOL INC/PLEASANTS CO - PERMIT APP FEE

CR 2100037676 deposited 11/23/2020

From: Scott, Kimberly A (DEP)
Sent: Monday, November 23, 2020 3:38 PM
To: Kessler, Joseph R <Joseph.R.Kessler@wv.gov>; Ernest, Nicole D <Nicole.D.Ernest@wv.gov>; Mink, Stephanie R <Stephanie.R.Mink@wv.gov>
Subject: WV METHANOL INC/PLEASANTS CO - PERMIT APP FEE

This is the receipt of payment for:

WV Methanol Inc - $2000 credit card

WV Methanol Inc
Pleasants Co

R13-3509
ID: 073-00040

I will send CR # later.

Kim Scott
WV Dept. of Environmental Protection
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UC Defaulted Accounts Search Results

Sorry, no records matching your criteria were found.

FEIN:
Business name: WV METHANOL, INC.
Doing business as/Trading as:

Please use your browsers back button to try again.

WorkforceWV	Unemployment Compensation	Offices of the Insurance Commissioner

UC Defaulted Accounts Search Results

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FEIN: 82-339606
Business name:
Doing business as/Trading as:

Please use your browsers back button to try again.

WorkforceWV	Unemployment Compensation	Offices of the Insurance Commissioner

EXHIBIT 5

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

WHEELING-PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC

APPELLANT,

v. **Appeal No. 08-01-EQB**

DIRECTOR, DIVISION OF WATER RESOURCES, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

APPELLEE.

ORDER

Wheeling-Pittsburgh Steel Corporation and Mountain State Carbon, LLC ("Appellant") filed the above-styled appeal on March 26, 2008, seeking the Board to vacate and set aside Notice of Violation No. W-NW-SFC-112807-003 ("NOV"), issued November 28, 2007, by the West Virginia Department of Environmental Protection ("WVDEP") Division of Water and Waste Management.

On April 28, 2008, the Appellee filed a Motion to Dismiss arguing that an NOV is not an Order subject to the jurisdiction of the Board pursuant to West Virginia Code §22-11-21 and therefore the Board should dismiss the appeal from its docket. The Appellant filed a response and stated that it did not oppose the Motion but requested the Board to make a ruling on the matter.

The NOV appears to have been issued pursuant to West Virginia Code §22-11-6 and not an implied cease and desist order issued pursuant to §22-11-12. The language of §22-11-12 does not appear within the NOV. The word "Order" does not appear in the NOV. The NOV is

clearly labeled "NOTICE OF VIOLATION" and the WVDEP made no findings of fact associated with this NOV.

A Notice of Violation without the requisite language, Order, and findings of fact required in §22-11-12 does not constitute an Order conferring the jurisdiction of this Board pursuant to §22-11-21. Therefore the Board finds it necessary and proper to **GRANT** the Appellee's Motion to Dismiss and hereby DISMISSES Appeal No. 08-01-EQB from its docket.

ENTERED and ORDERED this 22nd day of May, 2008.

Environmental Quality Board

Dr. Edward Snyder, Chairperson

EXHIBIT 6

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOHN BENEDICT, Director,
Division of Air Quality, Department of
Environmental Protection,
Petitioner,

v.

Civil Action No. 02-AA-129
Judge Charles E. King, Jr.

CAPITOL CEMENT CORPORATION,
Respondent.

And

CAPITOL CEMENT CORPORATION,
Petitioner,

v.

Civil Action No. 02-AA-130
Judge Charles E. King, Jr.

JOHN BENEDICT, Director,
Division of Air Quality, Department of
Environmental Protection,
Respondent.

And

JOHN BENEDICT, Director,
Division of Air Quality, Department of
Environmental Protection,
Petitioner,

v.

Civil Action No. 02-AA-168
Judge Charles E. King, Jr.

CAPITOL CEMENT CORPORATION.
Respondent.

FINAL ORDER REVERSING DECISION OF BOARD

The Director of the Division of Air Quality, Department of Environmental Protection (hereinafter "Director") filed action number 02-AA-129 with this Court on October 16, 2002. Each of the above actions has been consolidated and all are posted as action number 02-AA-129.

This appeal is based on a decision rendered by the Air Quality Board (hereinafter "Board") on August 7, 2002 in favor of Capitol Cement Corporation (hereinafter "Capitol Cement").

Having reviewed the record below, the petition, the memoranda and the pertinent law, the Court is of the opinion, as more fully explained herein, that the Board's Decision should be reversed.

STANDARD OF REVIEW

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the Petitioner or Petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:

(1) In violation of constitutional or statutory provisions; or
(2) In excess of the statutory authority or jurisdiction of the agency; or
(3) Made upon unlawful procedures; or
(4) Affected by other error of law; or
(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ISSUES AND DISCUSSION

The heart of this appeal surrounds a notice of violation (hereinafter "NOV") letter sent from the Director to Capitol Cement on April 19, 2002. Capitol Cement filed a notice of appeal with the Board on May 23, 2002 asking it to set aside the NOV. The Director moved to dismiss Capitol Cement's appeal on the grounds that there was no statutory authority for an appeal of a NOV. The Board denied the Director's motion to dismiss Capitol Cement's appeal and gave three reasons for finding that the Director's NOV was appealable. First, the Board found that the

NOV was an implied cease and desist order, hence appealable pursuant to W. Va. Code § 22-5-5. Second, the Board found that the requirement in the notice that the corporation prepare a written response to the notice, was an order. Third, the Board found that Capitol Cement had a constitutional procedural due process right to appeal the NOV. These reasons form the three issues before this Court.

The first issue before this Court is whether the Board erred when it determined that the NOV issued by the Director to Capitol Cement was an implied cease and desist order. The Director contends that the letter was a NOV and that such document was *not* appealable to the Board. Thus, Director asserts that the Board did not have jurisdiction to render a decision. Capitol Cement contends that the Board was correct, that such document was an implied cease and desist order and that such letter *was* appealable to the Board. Therefore, Capitol Cement asserts that the Board had jurisdiction to render a decision.

The parties dispute as to which W. Va. Code statute governs the NOV. The Director asserts that W. Va. Code § 22-5-6 governs while Capitol Cement proposes that W. Va. Code § 22-5-5 is the applicable statute. The pertinent provisions of both statutes are as follows:

> If, from any investigation made by the director or from any complaint filed with him or her, the director is of the opinion that a person is violating the provisions of this article, or any rules promulgated pursuant thereto, *he or she shall make and enter an order directing the person to cease and desist the activity, unless the director determines the violation is of a minor nature or the violation has been abated. The director shall fix a reasonable time in such order by which the activity must stop or be prevented. The order shall contain the findings of fact upon which the director determined to make and enter the order*. § 22-5-5. (emphasis added).

> Any person who violates any provision of this article, any permit or any rule or order issued pursuant to this article or article one [§§ 22B-1-1 et seq.], chapter twenty-two-b of this code is subject to a civil penalty not to exceed ten thousand dollars for each day of such violation, which penalty shall be recovered in a civil action brought by the director in the name of the state of West Virginia in the circuit court of any county wherein the person resides or is engaged in the activity complained of or in the circuit court of Kanawha County. The amount of the penalty shall be fixed by the court without a jury:

> Provided, That any person is not subject to civil penalties unless the person has been given *written notice* thereof by the director: Provided, however, That for the first such minor violation, if the person corrects the violation within the time as was specified in the *notice of violation* issued by the director, no civil penalty may be recovered: Provided further, That if the person fails to correct a minor violation or for any serious or subsequent serious or minor violation, the person is subject to civil penalties imposed pursuant to this section from the first day of the violation notwithstanding the date of the issuance or receipt of the *notice of violation*. The director shall, by rule subject to the provisions of twenty-nine-a [§§ 29A-1-1 et seq.] of this code, determine the definitions of serious and minor violations. The amount of any penalty collected by the director shall be deposited in the general revenue of the state treasury according to law. § 22-5-6(a) (emphasis added).

The Board concluded that the notice received was an implied order to cease and desist, hence § 22-5-5 governed the April 19, 2002 letter. However, the Board was incorrect. Substantial and logical evidence, factors and circumstances lead to the conclusion that such document is clearly a NOV. First, as correctly established, the violation was minor and upon discovery was immediately corrected. According to § 22-5-5 a cease and desist order should *not* be made, in the current situation, because such statute suggests that if the director is of the opinion that a violation is occurring then he or she "shall make and enter an order directing the person to cease and desist . . . *unless* the director determines the violation is of minor nature or the violation has been abated." (emphasis added). In this situation, the violation was minor and was abated, hence a cease and desist order should *not* be made. On the other hand, a NOV should have been issued due to the necessity of Capitol Cement completing remedial measures. The NOV clearly puts Capitol Cement on notice that correction of the violation *may* not have been fully satisfied. Hence, a NOV is necessary to inform Capitol Cement of such ongoing violation(s). The NOV states that "DAQ [or Division of Air Quality] requires . . . written confirmation stating that the remedial measures have been completed." § 22-5-6 permits NOV's to assert such information as the violation, the time in which to correct the violation, the potential for civil penalty and the possibility of avoiding such penalty.

Second, according to § 22-5-5 if the director "is of the opinion that a person is violating the provisions of this article . . . he or she shall make and enter an order directing the person to cease and desist the activity." In this situation, the violations were immediately remedied, hence the Director *cannot* demand Capitol Cement to cease and desist if such violation has already been allegedly halted and subsequently corrected. However, one may question as to how a Director can issue a NOV if the violation has been corrected. It has already been established that remedial measures were not complete and that a cease and desist order was not appropriate in this situation; hence the issuance of a NOV was, in deed, proper.

Further, a careful reading of § 22-5-6(a) suggests that the statutory language reveals that a notice of violation is to be sent before a violation can be corrected. Here, between the inspection date of February 14, 2002 and the date that Capitol Cement informed the Director that such violation was corrected, February 26, 2002, the situation was already remedied. The Director had not yet sent a NOV due to Capitol Cement quickly responding to the violation. There is no statute which governs a document sent in-between this questionable period. Further, there is no statute which governs the actual issuance or contents of a NOV. Therefore, § 22-5-5, which governs the issuance of cease and desist orders must initially be examined. § 22-5-5 requires that cease and desist orders must *order* and direct persons to *cease and desist the activity*. Further, such order "shall contain the findings of fact upon which the director determined to make and enter the order." In this situation, the NOV never ordered Capitol Cement to stop or haut any activity nor did it contain findings of fact.

If the NOV does *not* fit within the parameters of the "issuance of a cease and desist order" statute we can only conclude that the NOV was *not* a cease and desist order, but simply a "notice of violation" or another document other than an order. Nevertheless, the NOV at issue,

simply stated the facts along with pertinent information, in compliance with 22-5-6, the closest statute which governs NOV's. The NOV included that such violation was detected, that Capitol Cement may be subject to civil penalties, that Capitol Cement's letter had been received, that remedial measures had been acknowledged and that any further measures be submitted to the Director within ten days. § 22-5-6(a) shows that this information is correctly within the parameters of a NOV letter. Therefore, in drafting a NOV, the director can include the nature of the violation, the possibility of civil penalties *and* a specified time for any corrections without being labeled a cease and desist order.

Finally, to make it more apparent that this document was a NOV, issued pursuant to § 22-5-6 and not an appealable implied cease and desist order issued pursuant to §22-5-5, it cannot be forgotten that § 22-5-5 language does *not* appear within the NOV, that the word *"order"* does *not* appear in the NOV, that the NOV is clearly labeled "NOTICE OF VIOLATION, that there are no findings of fact within the NOV which are required by §22-5-5; and that §22-5-6(b)(1) and (b)(2) represent the closure of the NOV. Hence, the Board erred when it determined that the NOV issued by the Director to Capitol Cement was an implied cease and desist order. Likewise, the Board lacked jurisdiction to hear Capitol Cement's appeal because administrative agencies only have the authority given to them by statute and there is no statutory authority for the Board to hear an appeal of a NOV.

The second issue before this Court is whether the Board erred when it determined that the requirement in the notice that the corporation prepare a written response to the notice, was an order. The NOV requested Capitol Cement to file written responses to several questions or to submit a "written confirmation stating that the remedial measures have been completed with the

actual completion date(s)." Due to this requirement, the Board *incorrectly* concluded that such notice, was an order. According to W. Va. Code § 22-5-4(a)(14)

> *[t]he director is authorized: [t]o require* any and all persons who are directly or indirectly discharging air pollutants into the air to file with the director *such information as the director may require in a form or manner prescribed by him or her* for such *purpose*, including, *but not limited to*, location, size and height of discharge outlets, *processes employed*, fuels used and the nature and time periods of duration of discharges. Such information shall be filed with the director, when and in such a reasonable time, and in such a manner as the director may prescribe[.] (emphasis added).

~~Thus, the director has discretion to demand the information he requested. If a director~~ requests such information one cannot translate it to represent an appealable cease and desist order. W. Va. Code § 22-5-4(a)(14) authorizes the director to request such information at his discretion. The statute does not suggest that such request is equivalent to a cease and desist order nor does it suggest that such request is appealable. The Board contends that merely because the NOV requested a "written confirmation stating that the remedial measures have been completed with the actual completion date(s)" suggests that an implied cease and desist order was issued. However, the Board is incorrect. Such information requested by the Director is clearly within his authority and judgment per W. Va. Code § 22-5-4(a)(14). The director is unquestionably authorized to request such information concerning any procedures employed, completed or any improvements or such *processes employed* without having the request be labeled a cease and desist order or an appealable document. As a result, the Board erred when it determined that the requirement in the notice that Capitol Cement prepare a written response to the notice, was an order.

The third, and final, issue before this Court is whether the Board erred when it determined that Capitol Cement had a constitutional due process right to appeal the NOV. The Board held that Capitol Cement "has a due process right to appeal a NOV that is the equivalent

of a Cease and Desist Order." The Director specifically asserts that it was error to find that the NOV was appealable due to the constitutional right to *procedural* due process. However, on page 25 of its brief, Capitol Cement contends that the Board was correct because Capitol Cement "would lose its . . . right to challenge the state's conclusion as to its non-compliance and its right to continue to operate without fear of a conclusion of knowingly violating the agency's unreviewable determination as to its status of non-compliance."

~~The Board merely held that Capitol Cement had a due process right to appeal a NOV or~~ the "implied cease and desist order." However, the Board not only failed to explain its decision but it also failed to clarify as to what process was due and as to if Capitol Cement was truly deprived of a right.

Within the parties memoranda they mutually determined that the Board was referring to *procedural* due process as oppose to *substantive* due process. It has long been established that procedural due process claims do not implicate the egregiousness of the action itself, but only question whether the process accorded prior to the deprivation was constitutionally sufficient. In addition, although the existence of a "protected" right must be the threshold determination, the focus of the inquiry centers on the *process* provided, rather than on the nature of the *right*. Hence, in actuality the Board is initially suggesting that the *process* afforded to Capitol Cement was not constitutionally sufficient or that the process of the received fair hearing, notice, etc. was not constitutionally adequate. The Board is incorrect. It is evident that Capitol Cement has been afforded constitutionally sufficient procedural due process as Capitol Cement has clearly been given the same opportunities as the Director and each has been heard in a meaningful manner. It is commonly known that the goals of procedural due process are to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that one has a

participatory role in the process. There is no evidence, nor has Capitol Cement put forth any evidence, that they were not given the above or afforded adequate procedural due process.

Further, Capitol Cement has *not* been deprived of a life, liberty or property interest. It must be remembered that procedural due process violations must "deprive" an individual of a "protected" interest. In this situation, Capitol Cement was not deprived of a constitutional right or interest. The Director correctly points out that there was no due process right to appeal the notice of violation because the notice did not take away or limit any liberty or property interest. The NOV does not have the status of law, there is no penalty for its violation and does not affect the rights of the Capitol Cement. Capitol Cement is free to ignore the NOV and if the Director wishes to enforce it, he must take other separate enforcement actions where Capitol Cement will have the right to defend itself on all issues.

Aside from all else, due process represents fundamental fairness and such was afforded to Capitol Cement. Hence, the Board's determination that Capitol Cement had a constitutional due process right to appeal the NOV was in error because the process provided to Capitol Cement was constitutionally sufficient and the NOV did not affect any liberty or property right(s) of Capitol Cement.

After due and mature consideration of the memoranda, the record, the pertinent law and the decision of the Board, the Court is of the opinion that a hearing on this matter is not necessary for the Court to render its decision. The decision is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. The decision is contrary to law, specifically W. Va. Code §§ 22-5-6(a); 22-5-5; and 22-5-4(a)(14).

DECISION

For the reasons set forth herein, the Court hereby **ORDERS** that the decision, dated August 7, 2002, is hereby **REVERSED** and that this action is **DISMISSED** and **STRICKEN** from the open docket of this Court.

The Court hereby **REMANDS** this case back to the Board to reverse their order denying the Director's motion to dismiss Capitol Cement's notice of appeal and to grant the motion on the grounds that the Board had no jurisdiction to hear the appeal for reasons consistent with this Court's decision.

The objection of any party aggrieved by the entry of this Order is hereby noted and preserved.

The Clerk of the Court is **DIRECTED** to close this file in conformity with the directions set forth above. In addition, the Clerk of the Court is **DIRECTED** to forward a certified copy of this Order to the following:

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Stephanie Timmermeyer
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7012 McCorkle Avenue, SE
Charleston, West Virginia 25304

ENTERED this 29TH day of Jan. 2004.

Charles E. King

CHARLES E. KING, JR. Circuit Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 2ND DAY OF FEBRUARY 2004
Cathy S. Gatson CLERK

WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

TUCKER UNITED, FRIENDS OF BLACKWATER, and WEST VIRGINIA HIGHLANDS CONSERVANY,

Appellants, **Appeal No. 25-01-AQB**

v.

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

Appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 17, 2025, a true copy of the attached Appellee's Motion to Dismiss was served on the parties below by electronic mail and by United States Postal Service first-class mail, prepaid.

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