

WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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JUL 31 2025

AIR QUALITY BOARD

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.

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS

Tucker United, Friends of Blackwater, and West Virginia Highlands Conservancy, by counsel, hereby move that the Board DENY Appellee's *Motion to Dismiss*, served on July 18, 2025. Appellants assert that the issues raised are indeed ripe for appeal, because WVDEP's findings and conclusions that the information redacted by Fundamental Data ("Applicant") in its permit application are an "official action" and/or "order" as contained in W.Va. Code 22B-1-7.

PROCEDURAL HISTORY

Appellants do not dispute the procedural history laid out by Appellee in its *Motion to Dismiss*, and hereby incorporate the same by reference.

ARGUMENT

The May 12, 2025 WVDEP correspondence ("Determination Correspondence," contained as Exhibit 3 to Appellee's *Motion to Dismiss*), while admittedly not a "permit," is without question an "official action," and likely also qualifies as an "order," making the present appeal ripe and bringing it under the Board's jurisdiction.

According to W.Va. Code 22B-1-7(b), the Board has subject matter jurisdiction over appeals from “an order, permit, or official action of the chief of air quality.” W.Va. Code 22B-1-2 contains statutory definitions for terms used in Chapter 22B, however, it does not contain definitions for “order,” “permit,” or “official action.” These terms are also not defined by 52 CSR 1, et seq., Procedural Rules Governing Appeals Before the Air Quality Board. In an attempt to define the term “order,” Appellant, in its *Motion*, cites two W.Va. Supreme Court of Appeals cases regarding notices of violations (“NOV”), however, these cases provide no definitive or analogous relevance to the present issue.

That said, although the W.Va. Supreme Court of Appeals has never defined “official action” through its written opinions, the U.S. Supreme Court did so rather recently. According to the Court,

In sum, an “official act” is a decision or action on a “question, matter, cause, suit, proceeding or controversy.” The “question, matter, cause, suit, proceeding or controversy” must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a **determination before an agency**, or a hearing before a committee. It must also be something specific and focused that is “pending” or “may by law be brought” before a public official. To qualify as an “official act,” the public official must make a decision or take an action on that “question, matter, cause, suit, proceeding or controversy,” or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an “official act,” or to advise another official, knowing or intending that such advice will form the basis for an “official act” by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of “official act.” *McDonnell v. United States*, 136 S. Ct. 2355, 195 L. Ed. 2d 639 (2016).

With this definition in mind, it is important to review exactly what transpired in the present instance. In the April 25, 2025 correspondence (“Initial Correspondence,” contained as Exhibit 1 to Appellee’s *Motion to Dismiss*), WVDEP General Counsel Jason Wandling requested that Applicant provide justification for its numerous redactions, which Applicant previously

asserted were “confidential business information.” This correspondence was on WVDEP letterhead, which included the name of Cabinet Secretary Harold D. Ward and also indicated that it was mailed from the Division of Air Quality. Upon receipt of Applicant’s May 7, 2025 correspondence, Mr. Wandling sent the Determination Correspondence, again on the aforementioned letterhead, which stated that although the Initial Correspondence was “triggered by the public comments received,” that letter was “sent under the authority granted to the Secretary under 45 CSR 13, Sections 5.4 and 5.8 relating to the information required for a complete application.” This language is notable, in that it clearly indicates where the authority to make the determination originated and that it was required as part of the application process.


Following a brief summary of Applicant’s stated justification for the application redactions, the Determination Correspondence further states, “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.” (Emphasis added). Thus, the Determination Correspondence, while not only referred to as a “determination” by Appellant in its *Motion*, quite obviously has the look of a “determination before an agency” as contemplated in *McDonnell*. As such, the Determination Correspondence meets the best available definition of an “official action.”

Moreover, rather than containing any substantive argument, Appellee’s *Motion* merely makes a play on the semantics of “order, permit, or official action of the chief of air quality,” terms the W.Va. Code, applicable rules, and state court precedent neglect to define. Similarly, for Appellant to assert that either letter carries merely the position of Mr. Wandling since it contains his signature, without bonding WVDEP to the information conveyed therein, is absurd. It is

specifically the job of general counsel to act as agent and extend official communications for the WVDEP and its subsidiaries.

WHEREFORE, given the U.S. Supreme Court's definition of "official action," coupled with common sense, Appellants respectfully move that the Board DENY Appellee's *Motion to Dismiss* and further find that the May 12, 2025 Determination Correspondence be properly deemed an "official action" and "order" ripe for appeal and within the Board's jurisdiction.

Dated this 28th day of July, 2025.

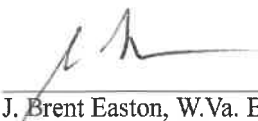


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CERTIFICATE OF SERVICE

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 party on July 28, 2025, by email and certified mail.

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