

OCT 17 2025

AIR QUALITY BOARD

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

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

v.

Appeal No. 25-02-AQB

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

and,

**Fundamental Data LLC
Permittee.**

APPELLANTS' REQUEST FOR ADDITIONAL DISCOVERY

Pursuant to W.Va. Code § 22B-1-8, Appellants respectfully request additional discovery in this matter. Specifically, Appellants request an unredacted version of the permit application submitted by Fundamental Data LLC ("Fundamental Data") for its Ridgeline facility, which was the basis for the permit issued by the West Virginia Department of Environmental Protection ("WVDEP"). Appellants, by counsel, represent that they would agree to any reasonable protective order that the Board may issue or the Parties may negotiate to ensure the confidential nature of this information is maintained.

Factual Background

On March 18, 2025, Fundamental Data submitted a permit application for a West Virginia Air Pollution Control Act permit for its proposed Ridgeline Facility gas power station. The permit application contains large amounts of redacted material. *See e.g.* C.R. at 35, 37, 42 54,

56–59, 70, 78. This includes all inputs and assumptions that were used to generate the total emissions figures that were relied upon by Fundamental Data and the WVDEP.

In addition to redacting details of emissions calculations, the permit application omits more general information such as the number of turbines and brand/manufacturers. *See e.g.* C.R. at 59. The final issuance of the permit and associated documents show that Fundamental Data and the WVDEP used manufacturer specific information to calculate projected total annual emissions for pollutants including but not limited to NO_x and formaldehyde. *See* C.R. at 23 (specifying NO_x as a criteria pollutant); C.R. at 9 (showing calculations of criteria pollutants based on manufacturer’s information); C.R. at 530 (recognizing the use of manufacturer data in calculation of formaldehyde). The version of the Certified Record in this appeal available to Appellants is redacted in the same way as the public version of the permit application.

ARGUMENT

1. Discovery of redacted portions of the permit application is necessary to give Appellants a fair opportunity at hearing and provide the Board an appropriate record for review

In this appeal, Appellants have specifically challenged the designation of specific information in the permit application as “confidential.” While Appellants believe that the restriction of information from the public was an error, limiting a party’s ability to obtain information relevant to a hearing in a contested case such as this one is an even more serious matter. Redactions contained in the permit application include all of the air emissions calculations used as a basis for projecting total annual pollutant emissions. Those total annual air emissions are the basis upon which the WVDEP determined that the Ridgeline Facility could be permitted as a minor source of air pollution. That determination must be based on a finding that the facility (as limited by hourly and technology-based operational limits and emissions limits) will emit less than 100 tons

per year of any regulated pollutant. *See* W.Va. Code R. § 45-14-2.43 (definition of “Major Stationary Source” including “Fossil Fuel-fired Steam Electric Plants of More than 250 Million Btu/hr Heat Input” that emit more than 100 tons per year of a regulated pollutant). The emissions calculations included in the permit show that the Ridgeline Facility is approximately one ton below that 100 ton per year threshold. C.R. at 56 (showing NO_x emissions of 98.98 tons/year when turbines are fueled by natural gas), 57 (showing NO_x emissions of 99.35 tons/year when the turbines are operated with diesel).

The Ridgeline Facility only falls below the major source thresholds because of hourly operational restrictions and technological controls. C.R. at 497–500 and 504. As a result, the Ridgeline Facility is a “synthetic minor.”¹ As EPA has clearly stated, in order for a synthetic minor permit to avoid major source requirements for PSD pollutants – such as NO_x– or HAPs emissions, the minor source permit must include sufficient terms and conditions such that the source cannot lawfully exceed the limit.² An emission limit can only be relied upon to restrict a source’s Potential to Emit if it is legally and practicably enforceable, which means the permit must specify “how emissions will be measured or determined for purposes of demonstrating compliance with the limit.”³ The terms must also make it possible for regulators *and the public* to determine a facility’s compliance with those terms and bring legal action for any noncompliance.⁴ If a synthetic minor source permit does not have adequate permit limitations,

¹ Where a facility relies on such physical or operation limits to reduce its PTE below major source permitting threshold under either the PSD or Title V permitting program, the resulting permit is usually referred to as a synthetic minor permit.

² *In the Matter of Yuhuang Chemical, Inc., Order on Petition No. VI-2015-03* (Aug. 31, 2016; “Yuhuang I Order”), at 13, available at https://www.epa.gov/sites/default/files/2016-09/documents/yuhuang_response2015_0.pdf. *See also* EPA Office of Inspector General Report, *EPA Should Conduct More Oversight of Synthetic Minor-Source Permitting to Assure Permits Adhere to EPA Guidance* (7/8/21) (“EPA 2021 OIG Report”), available at https://www.epa.gov/system/files/documents/2021-07/_epaoig_20210708-21-p-0175.pdf

³ *Yuhuang I Order* at 14.

⁴ *See id.* and EPA 2021 OIG Report at 4.

the facility would be considered a major source and subject to the more stringent requirements of the major-source permitting programs.⁵

Because the Ridgeline Facility is a synthetic minor, and its synthetic minor source status depends on restrictions that the public cannot assess without the unredacted application, the Appellants need to see the unredacted application. Without seeing information concerning how emissions limits were calculated and will be applied, the Appellants are deprived of their right to determine whether the facility complies with the requirements of the Clean Air Act.⁶ As a result, Appellants should be permitted access to the unredacted application.

Further complicating this problem is that the permit application used manufacturer specific information for all criteria pollutants and, also, for the hazardous pollutant formaldehyde. *See* C.R. at 9, 23, 530. Because both the manufacturer of the equipment and number of turbines is redacted, Appellants have no way of repeating these calculations or assessing the reasonableness of this input. *See e.g.* C.R. at 43 (Comment that “The methods used to calculating formaldehyde is significantly lower than AP-42 methods and EPA studies on actual gas turbine operation. . . . Using published data, formaldehyde emissions could be 5-10 times higher than shown in the preliminary permit, easily pushing the rate above the 10 tons/year minor source limit.”)

While Appellants have retained an expert to assist them in this matter, that expert is unable to check the emissions calculations relied upon by the WVDEP in this issuance of this permit without access to the confidential data. In addition, that expert is unable to evaluate the reasonableness of assumptions used to calculate total annual emissions figures relied upon by the WVDEP to permit this facility as a synthetic minor source or to assess the practical impacts of

⁵ Id. at 3. *See also*, C.R. at 502 (Permit Requirement 4.2.1, showing that limits will be measured by recording hours of operation in start-up shut/down and steady state).

⁶ *Yuhang Order I* at 14; *See also EPA 2021 OIG Report* at 3-4.

such hourly limitations. Finally, that expert is unable to assess the reasonableness of the hourly operations limits contained in the permit.

In addition to limiting Appellants ability to prepare and present evidence in this matter, the inability to use confidential information will make it difficult to cross examine WVDEP and Fundamental Data witnesses at hearing. Appellants will be restricted from eliciting testimony during cross examination regarding their calculations and inputs if that information remains confidential. The state Administrative Procedure Act guarantees the right of parties to cross-examination during a contested case as well as the ability to submit rebuttal evidence. W.Va. Code § 29A-5-2(c). Because of the limitations on ability to cross-examine witnesses and submit rebuttal evidence, Appellants will be denied their appropriate procedural due process rights under the Administrative Procedure Act if discovery of confidential information is not allowed.

Finally, the redacted nature of the permit application in the certified record limits the development of a full record in this matter. Under the Board's rules the certified record "shall be evidence of the agency's consideration of the matter that is appealed, and shall form the basis of the board's review of the matter." W.Va. Code St. R. 52-1-3.3. If an unredacted version of the application in the certified record is not offered the Board itself will be forced to determine the appropriateness of the WVDEP's consideration without access to its calculations, inputs, assumptions, and other details. If an unredacted version of the certified record is made available to the Board but not the Appellants, the Board will be put in a position on deciding the appropriateness of the WVDEP's approval of the permit that was not available to Appellants in their challenge—raising further concerns of procedural due process.

In summary, the redacted information that is sought is highly relevant to the matter at hand and not allowing Appellants access threatens to severely disadvantage them in this appeal. As

explained below, the Board has appropriate tools, through a protective order to safely protect confidential information while still allowing Appellants access to that information.

2. Confidential information is still subject to discovery

Pursuant to W.Va. Code § 22B-1-8 “[p]arties to a hearing may petition the board to obtain discovery regarding any matter, not subject to privilege, which is relevant to the subject matter involved in the hearing, subject to the procedural rules of the boards and the limitations contained herein.” This provision mirrors the scope of allowable discovery established in the West Virginia Rules of Civil Procedure: “Unless otherwise limited by a court order issued pursuant to Rule 26(b)(3)(B), the scope of discovery is as follows: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the pending action. . .” W.Va. Rules of Civ. P. 26(b)(1).

The West Virginia Rules of Civil Procedure specifically contemplate the disclosure of confidential information and trade secrets during discovery. This is exemplified in Rule 26(c)(1)(g) which provides authority for placing prohibitions, through a protective order, on revealing confidential information that may be disclosed. W.Va. Rules of Civil Procedure 26(c)(1)(g); *see also*, *State ex rel. Johnson v. Tsapis*, 187 W. Va. 337, 338–39 (1992). Indeed, the West Virginia Supreme Court has ruled repeatedly that confidential business information and trade secrets may be relevant and discoverable. *See e.g. State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 247 (1995) (“the fact that business trade secrets are being discovered does not make the information being sought less relevant.”); *Maclay v. Jones*, 208 W.Va. 569, 576 n. 11 (2000) (“the use of protective orders is preferential to the total non-disclosure of requested materials that are otherwise subject to discovery”); *State of West Virginia v. State Farm Mutual Ins. Co.*, 230 W.Va. 517 (2012) (denying action for writ of prohibition on discovery orders and

recognizing the use of protective orders to safeguard confidential information). Interpreting a nearly identical provision of the Federal Rules of Civil Procedure, the U.S. Supreme Court established long ago “there is no absolute privilege for trade secrets and similar confidential information.” *Fed. Open Market Committee of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 (1979); *also compare*, Fed. R. Civ. P. 26(c)(1)(g) with W.Va. R. Civ. P. 26(c)(1)(g).

In short, the confidential nature of documents requested is not a ground for denying discovery. Here the Board is vested with the same tools to protect confidential information as are state and federal courts. *See* W.Va. Code § 22B-1-8(d) (providing authority of the Board to enter a protective order so long as it is not inconsistent with the West Virginia Rules of Civil Procedure). Appellants in this matter would agree to any reasonable limitations on dissemination or use of confidential information as may be required by the Board.

CONCLUSION

For the reasons explained above, Appellants respectfully request that the Board allow them discovery into the redacted information in the permit application. The information is already in the possession of both the WVDEP and Fundamental Data and therefore would not be overly burdensome to produce. A failure to allow such discovery would significantly restrict the Appellants ability to prepare, present evidence, and cross-examine witnesses at hearing.

Respectfully submitted,



J. Michael Becher (W.Va. Bar No. 10588)
Appalachian Mountain Advocates
P.O. Box 11571
Charleston, WV 25339
mbecher@appalmad.org
304-382-4798

*Counsel for Tucker United, West Virginia
Highlands Conservancy, and Sierra Club*

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

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

v.

Appeal No. 25-02-AQB

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

and,

**Fundamental Data LLC
Permittee.**

CERTIFICATE OF SERVICE

I, J. Michael Becher, hereby certify that I served a copy of the foregoing “Appellants Request for Additional Discovery, on October 17, 2025, by mailing a true and correct copy via U.S. Mail, postage prepaid, and by delivering a true and correct copy via email at the addresses below:

David L. Yaussy
Spilmand Thomas & Battle, PLLC
300 Kanawha Blvd. East
Charleston, WV 25301
304-340-3800
dyaussy@spilmanlaw.com

Counsel for Fundamental Data LLC

Charles “Scott” Driver
West Virginia Department of
Environmental Protection
601 57th Street S.E.
Charleston, WV 25304

Charles.s.driver@wv.gov


Counsel for Appellee

The original and 12 copies were filed with the Board via hand delivery on October 17, 2025, at the following location:

West Virginia Air Quality Board
601 57th Street SE
Charleston, WV 25304

and by email to:

Kenna M. DeRaimo
Clerk of the Air Quality Board
Kenna.M.DeRaimo@wv.gov


J. Michael Becher (W.Va. Bar No. 10588)