

**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' RESPONSE TO WVDEP'S MOTION FOR PARTIAL DISMISSAL

INTRODUCTION

Appellants, Tucker County United, West Virginia Highlands Conservancy, and Sierra Club, respectfully respond that it is premature to dismiss Specific Objections contained in paragraphs 8, 12, and 16 of the Appellants Notice of Appeal. Appellants understand that the Board is by nature an entity created and bound by statute and subject to validly promulgated regulations. Appellants argument and evidence will all be rooted in the statutory and regulatory concerns that are within the Boards discretion. Appellants emphasize that the Notice of Appeal, as its name plainly states, is a *notice* to the Board, and all parties, of the issues that will be encompassed within the appeal. It does not comprise the record on which the Board should ultimately decide the merits of its decision. As more fully explained below, each of the disputed objections will be presented in a manner that will allow the Board to decide disputed issues within its statutory and regulatory authority.

Appellants also emphasize that the partial motion to dismiss does not attempt to challenge any of the other 14 Specific Objections contained within the Notice of Appeal—some of which are related to the challenged paragraphs. *See e.g.* Notice of Appeal at ¶ 16 (challenged); *id.* at ¶ 17 (unchallenged). While Appellants assert that all of the Specific Objections are properly asserted, a decision on this motion should not extend further than the challenged paragraphs.

ARGUMENT

Appellants do not dispute that the Board may not exceed its statutory authority or create law out of whole cloth, as was demonstrated in its decision in *People Concerned About Chemical Safety, Inc. v. Director, Division of Air Quality, Department of Environmental Protection and U.S. Methanol, LLC*, Appeal No. 17-092-AQB (“*U.S. Methanol*”). Even a cursory review of that opinion, however, reveals that the appeal asked the Board to issue a decision on matters well-outside the scope of the West Virginia Air Pollution Control Act (“the Act”). *See e.g. U.S. Methanol* at 5, 9. The appellant in that case also sought to enforce levels of air quality more stringent than those required by the plain text of the rules promulgated pursuant to the West Virginia Air Pollution Control Act. Appellants in this action, in contrast, ask the Board to consider the WVDEP’s permitting action at issue and determine whether the WVDEP complied with its duties, made reasonable and defensible assumptions, and avoided decisions which were arbitrary, capricious or otherwise contrary to law.

1. The Board Should Consider Fugitive Emissions 45-14-2.43.e.

Pursuant to rules promulgated under the Act fugitive emissions from listed categories of stationary sources should be included in determining whether it is a major stationary source. W. Va. C.S.R. § 45-14-2.43.e. (“The fugitive emission of a stationary source shall not be included in

determining whether it is a major stationary source *unless* the source is listed in Table 1”) (emphasis added). Those listed sources in Table 1 include “Fossil-Fuel Steam Electric Plants Greater Than 250 Million Btu/Hour Heat Input. *Id.* The facility at issue is an electric generating plant fueled by natural gas and/or diesel with a heat input of 5,649.6 MMBtu/hr (Natural Gas) and 4,503.3 MMBtu/hr (Diesel). Certified Record (“C.R.”) at 488. Indeed, WVDEP recognized this in the Engineering Evaluation/Fact Sheet it promulgated along with its review of the application. C.R. at 117 (recognizing the facility fits within the category of “Fossil Fuel-fired Steam Electric Plants of More than 250 Million Btu/hr Heat Input.”) The WVDEP was therefore required to evaluate fugitive emissions in their determination of whether this facility should be permitted as a major source.

Appellants Notice of Appeal ¶ 8 contains a citations to the applicable rules (W.Va. C.S.R. § 45-14-2.43.e) and provides examples of equipment that would be necessary and expected at a competently and legally operated power station, including fire suppression equipment and ammonia tanks or reservoirs for the Selective Catalytic Reduction controls, none of which were included in emissions calculations. Regarding diesel truck traffic, the WVDEP did consider a subset of emissions during periods of loading and unloading, and haul roads, but did not consider the contributions of these sources for other pollutants. C.R. at 115. Notably absent were any calculations of fugitive emissions for NO_x—a pollutant category for which the proposed facility is only a fraction of a ton below the major source threshold. Appellants expect to present evidence through testimony that fugitive emissions from necessary equipment were not included, and that diesel combustion contributes to pollutant types not included in the WVDEP’s calculations concerning truck loading/unloading and paved haul roads. The decision of the

WVDEP to include certain, but limited, sources of fugitive emissions and pollutants—but not others—is squarely and properly before the Board.

2. The Board May Consider the Reasonableness of the WVDEP’s Assumptions in Calculation Potential Emissions

The WVDEP argues that the precedent of *U.S. Methanol* precludes the Board from considering the publicly known purpose of this facility in its assessment of the WVDEP’s permitting assumptions. *U.S. Methanol*, however, is not so limiting. As explained in the introduction, *U.S. Methanol* addressed an appeal where the Board was asked to consider issues well outside the scope of the Act, and to impose air quality standards more stringent than those contained in regulations based on a general policy. That is far different than the Specific Objection raised by Appellants. Appellants Specific Objection 12 goes directly to the reasonableness of WVDEP’s assessment that the facility will not exceed the major source threshold.

WVDEP concluded that this facility would not be subject to regulatory Title V Operating Permit requirements established in 40 C.F.R. § 70 and W.Va. C.S.R. § 33 as a result of synthetic operating limits that would prevent emissions from exceeding 10 tons per year of any single hazardous air pollutants, 25 tons per year of aggregate hazardous air pollutants, and 100 tons per year of any criteria pollutant. C.R. at 234. The reasonableness of the calculations, inputs and assumptions underlying this “synthetic minor” determination are appropriate issues for this appeal.

The record is already clear that as permitted, this facility will be built with the practical ability to emit pollutants far in excess of those allowed by a “synthetic minor” source. C.R. at

58–59.¹ Appellants plan to submit evidence that the WVDEP was well aware that this facility is being proposed as a power source for a data center, and that data centers require a constant and steady supply of electricity. As described in Specific Objection 12, the WVDEP failed to consider these practical realities when it allowed the facility to be permitted as synthetic minor.

Unlike the objections in *U.S. Methanol*, the issues presented in Objection 12 pertain squarely to WVDEP’s permitting decision to exempt this facility from existing regulatory requirements contained within 40 C.F.R. Part 70 and W.Va. CSR 45-33-1 et seq.

3. WVDEP Overstates *U.S. Methanol*’s Restriction on the Purpose and Policy of the Act.

U.S. Methanol did not hold that the purpose and policy of the Act should not be considered by the Board or by the WVDEP, simply that the “WVDEP is only allowed to exercise the authority that it is given by express rule. . .” *U.S. Methanol* at 7. As illustrated particularly by Specific Objection 17 (which is not subject to challenge) some of those rules specifically require the WVDEP to take into account the purposes and policies of the Act when making discretionary decisions. See e.g. W.Va. C.S.R. § 45-13-7 (authorizing the WVDEP to undertake modeling to be consistent “with the intent and purpose of this rule or W.Va. Code § 22-5-1.”). Similarly, as explained in the preceding section, the WVDEP and the Board should not be ignorant to the purposes and policies of the Act when deciding whether to ignore known practicalities when evaluating a permit application and ultimately issuing a permit. (Such as a disclosed end use.)

In this matter, even the certified record shows that WVDEP knew or should have known that this facility was being permitted as a source of electricity for an associated data center. C.R. at

¹ Here it is worth noting that without unredacted information Appellants can only evaluate total restricted vs unrestricted emissions and cannot see the underlying calculations and inputs that were used to derive those total emissions numbers. The redacted nature of those calculations are part of unchallenged specific objections in the Appellants’ Notice of Appeal.

434. Appellants plan to present additional evidence, including WVDEP's statements at public hearings. In consideration of what information it required from the applicant and how it chose to evaluate the reasonableness of the calculations resulting in the facility's synthetic minor determination, the agency should have used its discretion in a manner consistent with the purposes and policies of the Act.

Appellants are not attempting to use the purposes and policies of the Act as an independent source of authority, as was the case in *U.S. Methanol*. Rather they assert that it should be a guidepost for the agency's discretionary decisions required under the Act and its implementing regulations. Consequently, Specific Objection 16 should not be dismissed.

CONCLUSION

For the reasons explained above, Appellants respectfully request that this Board deny the WVDEP's Motion for Partial Dismissal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. Michael Becher, hereby certify that I served a copy of the foregoing “Appellants’ Response to WVDEP’s Motion for Partial Dismissal, on October 31, 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:

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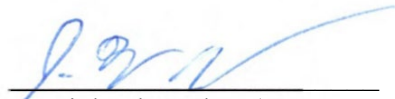
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