

STATE OF WEST VIRGINIA

AIR QUALITY BOARD

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TUCKER UNITED, WEST VIRGINIA*

HIGHLANDS CONSERVANCY, and * Appeal No.

SIERRA CLUB, * 25-02-AQB

Appellants *

vs. *

DIRECTOR, DIVISION OF AIR *

QUALITY, DEPARTMENT OF *

ENVIRONMENTAL PROTECTION, *

Appellee *

and *

FUNDAMENTAL DATA, LLC *

Permittee/Intervenor *

* * * * *

BEFORE: J. MICHAEL KOON, Chair

Grant Bishop, Member

Robert C. Orndorff, Member

R. Thomas Hansen, Member

Leonard Knee, Member

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Jason Frame, Member

HEARING: Wednesday, November 5, 2025

8:40 a.m.

LOCATION: WV Department of Environmental Protection

601 57th Street, SE

Charleston, WV 25304

WITNESSES: None offered

Reporter: Chassidy E. Bays

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CHAIR: Once again then, I'll formally call this hearing to order. I'm Mike Koon. I'm the Chairman of the Air Quality Board, and we're here this morning to hear an argument in Appeal Number 25-02-AQB, Tucker United West Virginia Highlands Conservancy and Sierra Club versus Director, Division of Air Quality, Department of Environmental Protection.

Today we're going to hear arguments on, first, the Appellant's request for additional discovery. And second, the Appellee's motion for partial dismissal of the appeal.

The Board is here with me this morning. We have several members here and a couple on the Zoom. I'm going to ask each one of them to introduce themselves so we'll have it on the record, starting with Mr. Hansen here, please.

MR. HANSEN: My name is R. Thomas Hansen.

MR. ORNDORFF: I'm Bob Orndorff.

MR. BISHOP: Grant Bishop, West Virginia Department of Agriculture.

CHAIR: And on Zoom, we have Mr. Leonard Knee. Leonard, can you introduce yourself?

1 MR. KNEE: Yeah, I'm Leonard Knee. I'm a
2 member of the Board. I'm doing this by Zoom. I spent a
3 large part of my life practicing environmental law.

4 CHAIR: And we have Jason Frame. Jason,
5 can you?

6 MS. DERAIMO: He must have gotten dropped
7 off. He's joining again.

8 CHAIR: Okay.

9 MS. DERAIMO: Okay.

10 Mr. Frame, are you back in the hearing
11 room?

12 MR. FRAME: Yes, I had to log in, log back
13 in. I'm here now.

14 MS. DERAIMO: Okay.

15 CHAIR: Okay.

16 Thank you. And our Counsel.

17 ATTORNEY GRAY: John Gray, Deputy Attorney
18 General.

19 CHAIR: Before we go any further and
20 introduce the Counsel on the other side, let me just
21 remind everybody that's on Zoom, we have, I understand,
22 about 30 people on Zoom. For people in the room, so
23 you'll know that. You need to make sure that what you
24 have, your unit, that you're muted so that that noise

1 doesn't come across the system. If we hear noise that is
2 just basic background noise, we'll have to move you out
3 of the --- the line. So please make sure that your unit
4 is --- is muted while you're listening in.

5 At this point, I'd like to have the
6 Counsel for the various parties to introduce themselves,
7 starting with the Appellants.

8 ATTORNEY BECHER: Good morning, Board
9 members, Chairman Koon. My name's Mike Becher for the
10 Appellants.

11 CHAIR: Okay.

12 ATTORNEY DRIVER: Scott Driver for
13 Appellee, West Virginia Department of Environmental
14 Protection.

15 ATTORNEY YAUSSY: Dave Yaussy, Spilman
16 Thomas and Battle, Counsel for Intervenor, Fundamental
17 Data.

18 ATTORNEY WALLS: And I'm Jim Walls,
19 Spilman Thomas and Battle, Counsel for the Intervenor.

20 CHAIR: All right.

21 ATTORNEY BECHER: And this is my client,
22 rep, Xena Ray (phonetic) from Tucker United.

23 CHAIR: All right.

24 I just want to remind everybody that our

1 operational procedures that we have operates under what's
2 known as the burden of shifting proof. And that means
3 that in order to prevail, the Appellant has the burden to
4 raise the issue with sufficient evidence to support a
5 finding the Appellee's decision was incorrect, that it
6 violated a statute or a regulation, or otherwise should
7 not have issued the permit.

8 The Appellee then must produce evidence
9 demonstrating its reasoning in making the decision. The
10 Appellant then has the opportunity to show that the
11 evidence produced by the Appellee is sufficient or a
12 pretext.

13 The shifting burden of proof that we use
14 is a standard that was set out in the case before the
15 Circuit Court of Kanawha County, Wetzel County Solid
16 Waste Authority versus the Chief Office of Waste ---
17 Waste Management, Division of Environmental protection
18 back in 1999. So that's the operation we've always
19 worked under, so everybody understands.

20 What we're going to do this morning, as I
21 said, is we're going to start with the Appellant's
22 request for additional discovery. So what we'll do in
23 that is that we will have the Appellant first to issue
24 their information, then we'll go to the Appellee, and

1 then we'll go to the Intervenor. And then each side will
2 have an opportunity for rebuttal. And at that point, if
3 the Board members have any questions, we'll ask questions
4 as well. Okay? Board members, of course, could ask
5 questions at any point, but more than likely will reserve
6 questions to the end to address all three of you. But
7 we'll see how that goes.

8 The other thing to remind everybody is
9 just as we go into this, that all hearings before the Air
10 Quality Board are de novo, meaning that we consider the
11 evidence as a fresh set of eyes and are not bound by
12 anything that --- that is in the certified file or
13 anything of the sort. We can basically explore whatever
14 we need to explore. Okay.

15 With that, I'm going to ask Mr. Becher to
16 go ahead and start us off.

17 ATTORNEY BECHER: Thank you, Mr. Chairman.
18 And --- and one procedural point. The attorneys have
19 been discussing it, and we understand this is the opening
20 of the hearing session. The Board will recess and ---
21 and come back at a later date. And we're only focused on
22 two motions today. We would like to postpone opening
23 arguments on the merits until the --- the time in which
24 we come back.

1 CHAIR: Yeah, I --- I should have
2 mentioned that. I'm glad you mentioned that. Yes,
3 absolutely. We're only here considering those two
4 motions today. No information. I mean, obviously we'll
5 probably get a little bit of bleed over, but no actual
6 presentation of evidence as part of the evidentiary
7 hearing on the permit itself. Just the two issues, and
8 then we'll have to come back and hear that after we rule
9 on these two motions.

10 ATTORNEY BECHER: Thank you, Mr. Chairman.

11 CHAIR: You have a question?

12 ATTORNEY WALLS: Yes, if I may. I
13 apologize. Just so the record is clear, is it the
14 Board's position that this is the final evidentiary
15 hearing? We're starting the final evidentiary hearing
16 today.

17 CHAIR: We are starting the final
18 evidentiary hearing today to hear these two motions on.
19 Then we will recess to continue the evidentiary hearing
20 after we've ruled on these two motions.

21 ATTORNEY WALLS: Thank you.

22 ATTORNEY BECHER: Thank you, Mr. Chairman.
23 May I first ask, if you prefer? I've not appeared before
24 this Board before, is it okay if I sit?

1 CHAIR: You can sit if you'd like or stand
2 if you'd like, whatever you're more comfortable doing.

3 ATTORNEY BECHER: I'll stand if that's
4 okay.

5 CHAIR: Okay.

6 ATTORNEY BECHER: Thank you. And thank
7 you again, members of the Board, Mr. Chairman, for taking
8 the time to hear this appeal and to appear here today.

9 The introduction, of course, the first
10 motion we're going to come to is our motion for
11 additional discovery. And I want to make clear that
12 we're not here today to ask for this information to be
13 made public. We'll ask for that later when the Board
14 returns to hear the issues on the merits. But today
15 we're solely dealing with the issue of whether the
16 redacted data in the permit application can be used by
17 Appellants for the purposes of this hearing.

18 We're fine with a limited use of that. We
19 believe the Board has the power to order a limited use of
20 that through its power to order a protective order.
21 We're fine with this being seen only by attorneys and
22 experts. And we're fine with an order that makes this
23 information subject to use only for the purposes of this
24 hearing.

1 And with that said, I want to, you know,
2 explain the importance of --- of this information. It's
3 important to us as Appellants so that we can be on an
4 equal footing with the parties during this appeal. It's
5 important as a basic element of fairness. It's important
6 for us to present our case, and it's also important for
7 the Board. You've all seen copies of the certified
8 record. Right now, large portions of that record,
9 including all of the supporting data behind the
10 admissions calculations, is redacted.

11 Now, the Board's rules specify that the
12 Board makes its decision or its review upon DEP's action
13 based upon that certified record. And with those
14 redactions, the Board also is faced with making a
15 decision with a redacted record that is unavailable to
16 the Appellants.

17 Now, a couple of the principal issues in
18 this appeal. The first, embodied in specific objections
19 8 to 11, did DEP properly look at, properly scrutinize
20 the inputs and the assumptions, the calculations that
21 generated these potential emissions calculations, the
22 total emissions calculations upon which the permit and
23 its limits were based?

24 The second, was DEP reasonable within the

1 bounds of the law to permit this facility as a minor
2 source?

3 Now, these two issues are directly
4 connected because the minor source determination depends
5 upon those calculations. I believe, based on the filings
6 that all the parties are in agreement, that the minor
7 source threshold or the major source thresholds upon
8 which this permit and this facility have to operate under
9 include limits of 100 tons per year of any regulated
10 pollutant and ten tons per year of any hazardous air
11 pollutant. You can see from the total emissions if you
12 look at the record that there are certain pollutants that
13 come very close to those thresholds. Nitrous oxides are
14 the principal ones which are just a fraction of a ton
15 below that main threshold.

16 It is important to realize both the minor
17 source determination and the ultimate permit limits are
18 really based upon those calculations. Without seeing
19 those calculations, the Board, the Appellants,
20 Appellant's experts, we can't even check the mathematics
21 to make sure they're correct. All we've got are the
22 total emissions that --- that were put forward by
23 Fundamental or DEP.

24 We're unable to challenge specific

1 assumptions, and to this point we know the manufacturer
2 specific information was used for a number of pollutants,
3 including most if not all of the criteria pollutants, and
4 notably formaldehyde as --- as one of the only --- as the
5 only hazards pollutant that used manufacturer specific
6 information rather than the standard AP42 emissions
7 figures.

8 We have no way to evaluate, to compare
9 that to other figures or to otherwise assess the
10 reasonableness of that factor without knowing the
11 manufacturer, without knowing what that emissions factor
12 is. Neither can the Board.

13 And so, we are hindered in many ways in
14 presenting our case if we can't get access to those
15 numbers. First of all, we have our witness that we
16 intend to put on who's --- who's assessing these
17 pollutant limits, has trouble developing his case. We're
18 trying to work around that the best we can to come up
19 with surrogates and the best assumptions we can make.
20 But obviously, it's far more direct, far more pertinent
21 if we can actually evaluate those numbers.

22 Cross examination. We have the statutory
23 right under the Administrative Procedures Act to be able
24 to cross examine witnesses such as the DEP permit rider

1 who wrote this permit. We're unable to ask him specific
2 questions about those assumptions, those emissions
3 factors, other considerations or other factors that they
4 may have considered without knowing what those factors
5 were.

6 This Board's authorizing statute prevents
7 an easy way to get around these thorny problems. And I
8 would emphasize that these problems go to a basic element
9 of fairness, go to the procedural due process that's
10 guaranteed by the Administrative Procedures Act and
11 others, and also go to this Board's duty to have a clear
12 record upon which it bases its decision. It's easy to
13 allow this through the issuance of protective order which
14 limits this information to attorney's eyes only and to
15 use by expert witnesses.

16 Now, in Intervenor's response, the first
17 argument is one of the merits, that this was properly
18 identified as trade secrets. I will say that's beyond
19 the scope of this motion. We'll address that later. I
20 will say the stated concern was that a competitor could
21 access this information and get an advantage. We're not
22 talking about competitors here. We're talking about
23 parties to an appeal before this Board and the Board
24 itself. And by limiting this information to the

1 Appellant's Counsel, to the Appellant's expert, we can
2 ensure that it's not going to competitors.

3 I can't help but say also that
4 competitors, when it comes to the emissions factors for
5 these specific turbines or products, if they're
6 interested, they can call the manufacturers themselves.
7 They're not likely to prevent the customers from having
8 basic knowledge like the emissions factors or the
9 electrician --- the electric generation capacity of the
10 turbines they're purchasing.

11 Intervenor's main argument, though, is
12 that these final figures are all that we really need.
13 That these final figures are, you know, what is going to
14 be embodied in the permit limits. What is dependent on
15 the permit limits. And the ultimate question is going to
16 be one of compliance, whether they comply with --- with
17 the permit or not. But we don't believe that's the case.
18 This is a challenge to the issuance of the permit and
19 whether those permit limits are set correctly.

20 As I will show, and as I think is --- is
21 demonstrable by the certified record, the whole permit is
22 structured around those calculations. The limits
23 themselves are based upon those calculations. The main
24 monitoring reporting requirements are based upon

1 monitoring fuel consumption and type, operating hours,
2 things of that nature, which then require those
3 calculations to come up with the --- the amount that is
4 being generated from the stack. The only direct
5 monitoring that is being done is a single test for
6 certain pollutants that's done onetime at the beginning
7 of the permit at a range of time in a range of operating
8 factors that are at the Permittee's discretion.

9 If I may illustrate what I'm --- what I'm
10 getting to. May I approach? I would like to point out
11 two parts of the administrative record --- the certified
12 record.

13 CHAIR: Sure.

14 ATTORNEY BECHER: And again ---.

15 CHAIR: Sure, wait a second. Counsel
16 Appellant --- Appellee, are we okay with this?

17 ATTORNEY DRIVER: Yes, Mr. Chairman.

18 ATTORNEY BECHER: And again Mr. Chairman,
19 members of the Board, these are portions of the certified
20 record that are already part of the Board's docket. You
21 can see the --- the stamp number at the bottom. Yes, Mr.
22 Gray.

23 ATTORNEY GRAY: For the purposes of the
24 Board members that are on Zoom, would you make sure you

1 reference exactly what you're talking about so that they
2 can look at it?

3 ATTORNEY BECHER: Sure.

4 ATTORNEY GRAY: At their discretion?

5 ATTORNEY BECHER: The --- the first
6 document here I have is attachment N to the permit
7 application, and it can be found beginning at certified
8 record page 55 of 653. And if you look at the
9 information on the pages following that title sheet, you
10 can see that we get the total turbine emissions. We get
11 emissions from diesel tanks. We get emissions from paved
12 roadways. There are different calculation sheets for
13 operations under diesel and natural gas, but I'll support
14 those calculations are redacted and in a black box that's
15 inaccessible in the record into these ballots.

16 Now, the Intervenor points to the fact
17 that there are pollutant limits in the permit. The other
18 part of the record here is from the final permit itself,
19 and it begins on page 497 of the certified record. And
20 you'll see there are limits on hourly emissions for
21 various pollutants. On the next page, 4.15, maximum
22 annual emissions per year. But if you flip a few pages
23 and go to the monitoring requirements on 4.2, you'll see
24 that to determine compliance with these conditions, the

1 permittee shall monitor the operation type, startup
2 shutdowns, hours of operations on a daily basis. That's
3 four. It includes 4.3, the hourly limitations, 4.5, the
4 annual limitations, as well as various others.

5 If you look through the monitoring
6 requirements, you'll see that the main monitoring methods
7 here. And if you flip to 4.4, the record keeping
8 requirements which require the records of operating
9 hours. I believe they include the use of fuel pipe.
10 You'll see there's no direct monitoring of emissions
11 here. These numbers, these applicable limits, they're
12 directly tied to the calculations that we can't see. And
13 that's why this is important. These pollutant
14 calculations, if you look again at 4.15 on certified
15 record page 498, the maximum annual emissions. These are
16 the same total emissions that you'll find in the previous
17 exhibit, only we can't see how they're calculated. So
18 essentially what we're left with is monitoring
19 requirements which look at total hours of operations
20 which look at fuel use, but then are entirely dependent
21 upon the supporting calculations emissions to see if
22 those permit limits are actually met.

23 In the same way, these maximum annual
24 emissions are the way in which this Board determines

1 whether it was properly permitted as a synthetic minor
2 source. Looking at the first one on 4.15, nitrous
3 oxides. They're not allowed to emit more than 100 tons
4 per year before they're considered a major source.
5 You'll see that the projected annual emissions are just a
6 fraction of a ton below that. And that, that narrow
7 window between major and minor source here is part of the
8 reason that these deserve scrutiny. Not just these final
9 numbers, but the assumptions, the inputs, the
10 calculations themselves.

11 So this whole permit is really structured
12 around those emissions calculations which we cannot see.
13 Again, just to be fair, there are testing requirements in
14 page 4.3 which requires a one-time test for certain
15 pollutants. But those tests can be performed anywhere
16 from 60 to 190 days after the beginning of operation in a
17 range of operations within 25 percent of 100 percent peak
18 load. And so the permittee has discretion there on when
19 and what operating parameters they can --- they can
20 conduct that test. And it's a one-time test.

21 So we believe that these calculations
22 underline the whole --- underlie the whole permit.
23 Underlie the whole decision by the DEP to permit this as
24 a minor source.

1 Intervenor says we don't need these
2 calculations. We don't need these calculations because
3 the DEP wrote them. They're going to stay under limits.
4 But that's not something that we should have to accept on
5 appeal. Again, there is an easy procedure to get to
6 these issues, to allow the Board to review these issues
7 and for us to be able to properly present evidence on
8 these issues. And that's the use of a protective of
9 order. So that's what we're asking for here. Not to
10 make this information public, not to give it to
11 competitors, but allow us to use it for the limited
12 purposes of this hearing by allowing myself as attorney
13 for the Appellants and our expert to review this
14 information, make evaluations and present evidence to the
15 Board. Thank you.

16 CHAIR: Thank you. Mr. Diver (sic).

17 ATTORNEY DRIVER: With the Board's
18 indulgence, I'm going to remain seated.

19 CHAIR: That's perfectly fine.

20 ATTORNEY DRIVER: Well, first of all, let
21 me say this is new ground for me. I don't know if it is
22 for other counsel. I've been appearing in front of the
23 environmental boards for 13 years. I've never had a CBI,
24 and for the court reporter, CBI refers to confidential

1 business information. I've never had a trade secrets or
2 CBI case come up. I realize procedurally and
3 logistically this one's a mess, as I'm sure everyone else
4 has figured out.

5 But the threshold for the motion for
6 additional discovery is whether the Appellants and the
7 Board can determine the proprietary --- the propriety of
8 the permit without analysis of the unredacted
9 application. As you're aware, there's a specific statute
10 that states what comprises permissible discovery in front
11 of the Board. It's quite limited and narrow.

12 Now it has a by road going off of it where
13 if additional discovery is necessary to, is appropriate
14 and necessary to identify or refine the issues, the Board
15 can issue additional discovery. It's our position that
16 it is not appropriate and necessary to identify or refine
17 the issues. Both the Appellants and the Board have
18 access to all the necessary information to allow for a
19 decision without the redacted data.

20 This is a minor source permit. The
21 facility is demonstrably and explicitly permitted to
22 operate only as a minor source. Accordingly, it must
23 operate as a minor source. The Appellants and the Board
24 have access to all of the information necessary to

1 determine if the permit was properly issued as a minor
2 source permit.

3 If we could refer to 45 CSR 31(b), and
4 Madam Court Reporter, if I go too fast, let me know. The
5 title of that section is what information constitutes
6 emission data. Normally, admission --- emissions data
7 would fall under the rubric of things that would have to
8 be disclosed. However, there is a clause in there that
9 says the Secretary may approve non confidential
10 alternatives through the use of aggregation,
11 categorization --- categorization, surrogate parameters,
12 emissions monitoring or sampling, or parametric
13 monitoring, provided that such use is consistent with
14 applicable rules and standards and results in a
15 practically enforceable method of determining emissions.

16 The permit as it issued does provide
17 alternative means for determining the emissions from the
18 facility, and the information necessary to reach this
19 determination's already included in the certified record.
20 Terms and conditions of the permit include exhaustive
21 amount of monitoring, record keeping, reporting, and
22 testing information that would be provided to DAQ and
23 would be made available to the public. This includes
24 initial performance testing, operating hours of the

1 turbines, what kind of fuels they're using, whether
2 they're using natural gas or diesel as a backup. Total
3 amount of hours that each turbine is operating, every
4 startup and shutdown event, any diesel fuel unloading,
5 daily inspection of the haul roads, monitoring of energy
6 output. There's four entire pages detailing exactly what
7 information the facility has to collect and provide.
8 This gives us the information to determine the emissions.

9 As the Board is aware, the Department of
10 Air Quality by definition is concerned with air quality
11 and not any side issues. As the --- as the Board, and I
12 do not know the composition in 2017, but this Board ruled
13 in the US Methanol case, which I provided as Exhibit A to
14 our motion to dismiss. The Board can't order DAQ to do
15 anything that it is not statutorily enabled to do. It
16 says the Secretary shall issue a permit if these criteria
17 are met. If that information is sufficient to determine
18 whether the permit --- the permit was issued
19 appropriately, that's what the Board and that's what the
20 Appellants need. Both the Appellants and the Board can
21 conduct an appropriate analysis of the propriety of the
22 permit without the requirement of the redacted data.

23 It's also important to note here,
24 regardless of what sort of source the facility is

1 permitted as, it has terms and conditions by which it may
2 apply. If the emissions from this facility were to go
3 above minor source thresholds, DAQ will, has, and does
4 apply enforcement measures up to and including a cease
5 and desist order. In other words, if the facility is not
6 operating as a minor source, DEP and DAQ have ample
7 measures to enforce the law and force them to come into
8 compliance.

9 The issue of whether or not the Appellants
10 can proceed gets complicated. If this CBI information is
11 released, multiple people are going to have hours to
12 review this, including an expert. They're going to have
13 a chance to review these trade --- those trade secrets.
14 Genie's out of the bottle. You know, and I have no
15 reason in my years of working with him to believe that
16 Mr. Becher would in any way even contemplate violating a
17 seal. However, there is going to be an independent
18 expert retained by him who is going to have out to look
19 at this. And his testimony is going to be presumably and
20 foundationally predicated on the information, the
21 redacted information in the unredacted application.

22 It's hard to keep between the rails. If
23 they are predicated their case on whether or not data
24 included in the unredacted application proves or

1 disproves their position, I don't understand how an
2 expert does that without referring to that information in
3 open court.

4 Accordingly, we would ask that the
5 certified record and the information that the Board and
6 the Appellants have access to not contain the unredacted
7 application. I do not believe that it is something that
8 either the Board or the Appellants needs access to, to
9 make its decision. Emissions data is what is --- what
10 matters here, or emissions data collecting. We have non-
11 confidential means that are in the permit to collect that
12 information.

13 We care about what's coming out of that
14 facility. We have ample means. Four Pages in the
15 certified --- in the permit to monitor that. They have
16 to keep exhaustive records. They have to report to us.
17 This information will be publicly available. And that is
18 exactly what DAQ is charged to do. Now if they operate
19 outside of those parameters, we come down on them
20 frankly, up to and including a cease and desist order.

21 I think that the Board, the Appellants
22 have everything that they need to prosecute the case and
23 make a determination on the Board's part. So our
24 position is that the unredacted application and the trade

1 secrets therein should remain out of consideration. I'm
2 going to leave it there, and I will pass to the Board or
3 the Intervenor.

4 CHAIR: Mr. Yaussy.

5 ATTORNEY YAussy: Thank you Mr. Chairman,
6 members of the Board.

7 The Appellants want to see the redacted
8 data basically because they want to confirm this is a
9 minor source. But they've made absolutely no showing
10 that they need the redacted data for that purpose. First
11 of all, this is a minor source permit we've applied for.
12 We're entitled to do that, and we know what the limits
13 are for a minor source permit. That would be under 100
14 tons nitrate pollutants in this particular case. And
15 that's what the limits are set at.

16 We do have limits. We did have the DEP
17 look at the --- the requirements for those turbines, the
18 data, the specifications, and they confirmed that yeah,
19 they could, that the --- that Fundamental could achieve
20 those limits as a minor source based upon what the data
21 was provided by the manufacturers. But that isn't the
22 way that we're going to determine whether it's going to
23 be in compliance with those permit limits.

24 The way we determine compliance with the

1 permit limits is exactly what we've heard today. Go
2 through the permit and see what's required once
3 everything is up and running. Once everything is up and
4 running, Fundamental will be required to do stack testing
5 on each individual turbine. They're going to have to
6 determine what the exact emissions are. They're not
7 going to look at what the manufacturer said. We're going
8 to find out what those emissions are for that turbine for
9 NOx, for CO, for other --- formaldehyde, for --- for
10 basically the things that are limited under the permit.

11 Fundamental's going to have to keep track
12 of how often they're running, what they're --- how often
13 they're running, what they're using to run, gas or
14 diesel, hours of operation, whether it be it's a shut up
15 --- startup or shutdown or steady operation. Everything,
16 everything that --- that could be needed to determine
17 whether the actual emissions are meeting the minor source
18 limits. There's nothing left out here.

19 Mr. Becher's expert is perfectly capable
20 of looking at all the data that will be provided to the
21 public and determining whether we're staying within our
22 minor source limits. If we're not, Mr. Driver's told you
23 what will happen. We'll be subject to enforcement, we'll
24 be subject to having to get a major source permit. But

1 the question isn't whether there's going to be enough
2 data to make that determination. The redacted data is
3 not needed at all because we'll be working on actual
4 data.

5 We have a real concern about handing out
6 the redacted data because it's extremely competitive in
7 the industry getting these turbines. If competitors know
8 what --- what turbines are available or where we might
9 have a chance to --- to make a purchase work, they can
10 gain an upper hand on us in obtaining turbines and
11 obtaining equipment for these types of projects. So
12 we're --- we're very interested in maintaining, subject
13 to our nondisclosure agreements with various
14 manufacturers and other --- other parties, in maintaining
15 confidentiality about these matters.

16 If it were necessary for the DAQ to impose
17 limits on us so that the public would have absolute
18 confidence in what we're doing, that would be a different
19 situation. As we look through the permit, as we look at
20 in the record 499, the requirement for selective
21 catalytic reduction function. Each one of those has to
22 be tested and finetuned. Operating hours, fuel
23 throughput, operation type, continuously recorded. NOx
24 emissions, well all the emissions have to be stack tested

1 from --- from the turbines.

2 Appellants are going to have measured
3 emissions coming from each turbine determined by a stack
4 test, the number of hours of operation fuel. They'll
5 have everything that they need. From that, any competent
6 expert can --- can determine whether we are complying,
7 whether our emissions comply with the permit limit. If
8 they feel that there's further information that's needed
9 in the permit for verification of our compliance, well
10 that's a matter for the appeal. They can say well, they
11 should put another factor into the --- into the permit.
12 They should require something else. But they don't need
13 the redacted data in order to make that argument because
14 we're dealing with what happens after the fact, not with
15 that, not --- not the prior calculation potential to
16 emit.

17 The manufacturer's data is really only
18 needed for, to determine the potential to emit, but we've
19 already agreed to eliminate our potential to emit way
20 below that data, way below the 100 ton limit. It's just
21 not needed.

22 All we're asking is to --- is to keep
23 confidential the number of turbines, the way they're
24 configured, and the data about those specific turbines

1 that might give a competitor an advantage in acquiring
2 them or others like them. We're not trying to hide any
3 of the emissions that will actually be admitted by these
4 turbines. And they're going to have the same compliance
5 in this permit that Mr. Becher provided you. These are
6 the same requirements that apply regardless of whether
7 there would be redacted data or not. We always have to,
8 as a --- as a source, have to provide proof to you, to
9 the DAQ, to the public that we're complying with the
10 permit limits. The redacted data is completely
11 irrelevant for that purpose.

12 I do, just have a second here. Mr. Becher
13 said that the minor source determination depends on the
14 calculations based upon what is in the turbine data, the
15 specifications. And that's not --- not the case.
16 Regardless of what's in that redacted data, we agreed to
17 accept certain limits. The DAQ may have calculated hours
18 of operation from that, but those hours of operation do
19 not control how long we --- how long we can operate. The
20 only thing that controls whether we can operate is
21 whether we meet those minor source limits that are
22 calculated separately from the hours of operation. So
23 there is nothing in the redacted data needed to set up
24 the permit limits or to determine compliance with them.

1 Mr. Chairman, I believe I --- I hope that
2 I made my point that for this, for this particular
3 permit, there's no need for the redacted data.

4 CHAIR: Mr. Gray has a question.

5 ATTORNEY GRAY: I got a couple more for
6 the lawyers to make sure the record is clear. The motion
7 for additional discovery really isn't saying go out and
8 find me something new. The motion for the additional
9 discovery is they gave redacted data. The discovery has
10 already been made to the state. And all they're saying
11 is, we --- we don't want that to be redacted and for
12 whatever thing. So it's not truly traditional additional
13 discovery. It's we want the unredacted discovery.

14 For purposes of the record, would you
15 agree with that characterization? So how would you all
16 describe it?

17 ATTORNEY BECHER: Is my motion --- yes. I
18 think it is additional discovery that is very easy to
19 provide because it is information that was in front of
20 the DEP. But I think it is additional discovery in the
21 fact that that is information that is not in the record.
22 It is not currently available to us.

23 ATTORNEY DRIVER: And Mr. Gray, I --- I
24 would disagree with the characterization of this as

1 something that is already discovery. As you know,
2 discovery is a term of art. Discovery is essentially the
3 discovery closure of discoverable information. By
4 definition, confidential business information and trade
5 secrets, absent some finding by the Board, do not fall
6 within the Board's specific discovery rule or statute.

7 ATTORNEY GRAY: But for purposes of appeal
8 and for any further review of the record, what we're
9 talking about here is provide me the unredacted
10 information in whole or in part. I'm not even going to
11 go walk down that pathway. But unlike asking for
12 additional testing or asking for new information that has
13 not been received to DEP, we're talking about information
14 that is currently in DEP's possession, but for purposes
15 of the record and everything else is in a redacted form.

16 That's solely what we're talking about,
17 and this is just purposes for clarification for the
18 record. And I think we're all in agreement on that.

19 The other thing I want to clarify for
20 purposes of the record is the basis for the CBI. We've
21 talked here trade secrets. Typically trade secrets and
22 other things in law oftentimes have, are terms of art and
23 has lots of --- trade secrets are usually protected by
24 the owner of said trade secrets, say like a patent or

1 something of that. That's not what we're talking about
2 here. If I'm understanding this correctly, the trade
3 secrets is not a case of confidential information that is
4 currently owned by the Intervenor. It is --- it is more
5 of a competitive nature if I understand it. If this
6 information gets out that Intervenor will be harmed by
7 their competitors having access to that information. And
8 that is the basis for that, and I think I've heard that a
9 couple times. It's been called trade secrets. I don't
10 care what you call it. It's information that was not
11 created by Intervenor. It's --- it's information that
12 is in Intervenor's hands, and that if it gets made
13 publicly available, Intervenor's position is that we will
14 be harmed competitively by --- competitively. Let's just
15 leave it at that.

16 Is that accurate for that? Or --- and
17 this is probably more for the Intervenor than anybody
18 else.

19 ATTORNEY BECHER: I'll take the first one
20 because it goes to our request of whether we're seeking
21 something outside of the record or, you know, simply an
22 unredacted form of the record. We are simply asking for
23 an unredacted form of the record just so that is
24 abundantly clear from this proceeding.

1 ATTORNEY DRIVER: And Mr. Gray, if I
2 could? But if I'm not cutting off Mr. Yaussy.

3 ATTORNEY YAUSSY: Sure.

4 ATTORNEY DRIVER: The relevant main stat
5 --- the relevant main rule that is not an interpretive
6 rule, the --- the core rule is 45 CSR 31. And in
7 subsection 2.3 it defines trade secrets and it says that
8 they may include, but are not limited to, any formula,
9 plan, pattern, process, tool, mechanism, compound,
10 procedure, and then additional inclusions and trade
11 secrets, which is not patented and which is known only to
12 certain individuals within a commercial concern who are
13 using it to fabricate, produce, or compound an article or
14 trade or service or to locate minerals or other
15 substances having commercial value and which gives its
16 users an opportunity to obtain business advantage over
17 competitors.

18 ATTORNEY GRAY: And I think you would
19 agree with me that nine out of ten times, we're talking
20 about, I'm just going to pick on GE, creating something.
21 We're talking about some company going out and exploring
22 for whatever. Usually the owner of, or the asserter of a
23 trade secret is the person who if, here --- here the
24 manufacturer clearly gave that information out to

1 somebody else.

2 I'm saying that in this particular case,
3 just for the record is clear, what we're talking about
4 here, and that's why I want you to do it. We're talking
5 about information that is not owned and does not belong,
6 but what's given to the Intervenors.

7 ATTORNEY DRIVER: Yeah.

8 ATTORNEY GRAY: And the Intervenors ---
9 Intervenors are protective of that information for their
10 competitive purpose. In this case, what their setup is
11 at their power plant. I'm not trying to belittle or
12 expand it. I'm trying to clarify, because this is a
13 confusing area.

14 ATTORNEY DRIVER: Mr. Gray, if I could,
15 before I pass over to Mr. Yaussy. The trade secrets
16 doesn't just go to what mechanisms or equipment they are
17 using. It goes to, and I'm going to quote the ones that
18 matter, plans, processes, and procedures. Those are
19 explicitly under 45 CSR 312.3. Those explicitly fall
20 under the definition of trade secrets.

21 ATTORNEY GRAY: And go through that with
22 the plans?

23 ATTORNEY DRIVER: Plans, and I'm only
24 quoting the relevant parts.

1 ATTORNEY GRAY: Right.

2 ATTORNEY DRIVER: This isn't the entire
3 subsection. Plan, process, procedure.

4 ATTORNEY GRAY: Where --- where in that
5 list is manufacturer of equipment?

6 ATTORNEY DRIVER: Tool or mechanism.

7 ATTORNEY GRAY: So a tool, I typically
8 think of a saw, not the maker of the saw. And the
9 mechanism, and again, the purposes for this question is
10 for the record, for any future review, to make sure we're
11 all on the same page of what we're talking about. That's
12 solely it. I'm not trying to put any words. I think
13 Mister ---.

14 ATTORNEY DRIVER: I'll go ahead and go to
15 Mr. Yaussy.

16 ATTORNEY GRAY: Yeah, I think Mr. Yaussy
17 --- this really is more for you because you said that
18 this was, the secretiveness was of a competitive nature.
19 That if other people, if your competitors knew this, that
20 you all would be put at a disadvantage for purposes of
21 CBI, potential for future review. Would you just espouse
22 a little bit more?

23 ATTORNEY YAUSSY: Yeah. I think you're
24 well aware of the competitive nature right now in the

1 development of power systems and power plants, the huge
2 demand for turbines. The manner in which you configure
3 your turbines, the manner in which you operate a plant is
4 what we're trying to protect here as much as information
5 about the turbines themselves so they don't get stolen
6 from us. Because what we have, what we are putting
7 together, is something we're structuring in a way that's
8 valuable for us. And that's the plan, and that's the
9 process. And that's independent of the turbines
10 themselves.

11 The turbines are important, too, but also
12 the way in which we have this set up and arranged and I
13 plan to set it up and arrange. And that's an advantage
14 to us, provides us a competitive advantage. And we want
15 to protect that. More than just the --- more than just
16 the turbines.

17 ATTORNEY BECHER: May I respond? And I
18 will say, you know, this is --- this is also another
19 issue on the merits, the appropriateness of the CBI
20 designation for the public and everyone. In this
21 context, we're not looking to make this public. We can
22 maintain the confidentiality of this information by
23 limiting the people that can view it and the use of it to
24 this hearing. That's --- that's, I believe, what we're

1 talking about today.

2 Now, as an aside, I agree with you, Mr.
3 Gray. I don't understand why a competitor couldn't call
4 up GE or another manufacturer and say, what's the
5 emission factor you use for formaldehyde? What's the
6 emission factor on your turbines for NOx? What's the
7 time in which we could order seven turbines, 12 turbines
8 if we needed them to build the power plant?

9 What I'm hearing from Mr. Yaussy is that
10 it is the plant layout that somehow is the protected
11 pattern and practice. And if that's the case, I think we
12 can agree that the primary information we're looking for
13 is exactly what we showed you. Those emissions
14 calculations, those turbine specific factors that led to
15 --- to the pollutant emissions calculations. If the
16 Board is more comfortable with that, we can --- we can go
17 with the redactions that doesn't include the --- the
18 plant layout, and --- and we can be --- be fine with
19 that.

20 Let me also say, you know, to Mr. Driver's
21 point, saying this is somehow, you know, unusual or the
22 genie would be out of the bottle. That's the reason that
23 I cited a number of Circuit Court, even US District Court
24 opinions on the use of protective orders. This is not an

1 uncommon practice. I --- I haven't had a case in, well,
2 I would say the majority of my cases involve protective
3 orders on some form of confidential data. I would
4 imagine the majority of Mr. Yaussy's cases involve the
5 majority --- the use of some kind of protective order to
6 protect confidential data. I'm sure Mr. Driver has dealt
7 with this before in other venues.

8 I've dealt with it not just in courts, but
9 in for --- before other administrative bodies in West
10 Virginia, for other administrative bodies in different
11 states. This is something that is a common practice
12 amongst adjudicatory boards like this Board. And the
13 Board is specifically vested with the power to enter
14 those protective orders. It's not like the --- the
15 statute didn't contemplate this Board dealing with
16 confidential information.

17 Again, all --- all that we are asking for
18 is that we be able to use it for the purposes of this
19 hearing and limit its distribution not to competitors,
20 not to the public. We'll talk about whether that's
21 appropriate later. But to myself and my expert, and
22 that's something that is commonly done.

23 I'll also note that I didn't hear any
24 agreement, disagreement with my main premise. Yes, there

1 are one time stack tests, I --- I admitted that. But
2 that's a single data point in time. It's done at a time
3 and in a manner of the permittee's choosing. There are
4 no other data points that are going to be available for
5 this permit that directly measure emissions. The
6 operating hours, whether it's operating at steady state
7 or ramping up and ramping down during shutdowns and
8 restarts, the hours of unloading. All that information
9 goes into the calculations that we can't see to determine
10 what pollutants are being emitted. It's all, you know,
11 essentially math based, and the math is unreviewable
12 unless we get that redacted information.

13 In the same way, the Board can't assess
14 the appropriatenesses of the determination that this
15 plant, under the operational threshold it emits, is
16 likely to emit 99.35 tons of nitrous oxide and not 101
17 tons per year of nitrous oxide, which would put it over
18 the threshold. We'll get into this later in --- in the
19 next session of this hearing. By that I mean December, I
20 presume, but the formaldehyde calculations. There were a
21 number of commenters that focused on formaldehyde and the
22 --- the imprecision with which the various emissions
23 factors actually calculate formaldehyde. We do have real
24 data, we do have real life studies of actual formaldehyde

1 emissions from plants like this. Obviously, that's a lot
2 more useful if we can compare apples to apples, the same
3 turbines, the same manufacturers, and present real world
4 data. Those emissions factors are likely wrong, are
5 likely understating the amount of formaldehyde that's
6 going to be issued, and those should be the relevant
7 inquiries of this appeal.

8 Was this permit properly issued? Were
9 these limits properly set? Was this decision that this
10 plant can operate under a synthetic minor threshold and
11 operational limits appropriate? Was DEP correct in their
12 assessment? And to Mr. Yaussy's point, the DEP saw this
13 information. That in this context doesn't matter. I ---
14 I am glad the DEP was able to check it, but the Board is
15 not required to blindly defer the DEP's decision. That's
16 why the appeal is allowed. That's why we're here. That
17 was the role that the Board was statutorily created to
18 fulfill.

19 ATTORNEY DRIVER: And if I could, Chairman
20 Koon, unless the Board has words?

21 CHAIR: Let me check. That was your
22 rebuttal, right?

23 ATTORNEY BECHER: That was my rebuttal,
24 thank you.

1 CHAIR: Now you can do your rebuttal.

2 ATTORNEY DRIVER: This is going to be
3 brief. The Board, you have to read this in the context
4 of the Board actually having a discovery statute which is
5 22B18, which is there for a reason. To help conduct
6 orderly hearings. That is why the discovery statute is
7 there.

8 Now the, again, the offroad there that
9 leads into the award of additional discovery is only
10 insofar as it is appropriate and necessary to identify or
11 refine the issues. I believe the issues here have been
12 identified. I don't believe there is any need to refine
13 them to any further level of precision. I think we --- I
14 think the Board and all the parties know exactly what the
15 issues are. That is the predicate on which the Board can
16 award additional discovery.

17 So this is not just controlled by a case
18 law that goes to confidential business information or
19 trade secrets in a vacuum. It also implicates the
20 Board's own statute by which the Board's bound. Unless
21 we hit the threshold of appropriate and necessary to
22 identify or refine the issues, then it doesn't fall
23 within the --- the Board's capacity to award additional
24 discovery.

1 And I will go ahead and pass to the Board
2 or Mr. Yaussy.

3 CHAIR: Mr. Yaussy.

4 ATTORNEY YAUSSY: Mr. Chairman, the ---
5 Mr. Becher states that the, calls into question the stack
6 testing and the method under which it's done. But this
7 is a classic, this is a typical means of stack testing
8 that is in DAQ permits. I mean, regardless of whether
9 there's redacted information or not, whether CBI is
10 involved or not, you do stack testing after an
11 operation's up and running to determine what the actual
12 emissions are.

13 I don't think he was suggesting that we
14 would be dishonest in what we do, but he's saying there
15 was a range that we could use. Well, there's always a
16 range that --- that you test under. I mean, it has to be
17 a range in what you test. So there's nothing unusual
18 about this. That information then gives him and his
19 expert everything that they'll need to determine whether
20 we're going to actually be in compliance. We'll look at
21 the emissions per hour, the number of hours operating
22 and, you know whether you've met your limits or not.

23 He said you can't defer to the DEP to ---
24 to make the correct evaluation. That --- that you have

1 to --- he wants to be able to verify their calculations.
2 Their calculations using the redacted data really have
3 nothing to do with A, either setting the limits
4 themselves, which are just minor source limits. They
5 don't depend on any kind of redacted data to determine
6 you want to stay under 100 tons. And the redacted data
7 has nothing to do, isn't used at all in determining
8 whether you comply with those limits.

9 So the DEP did look at the --- at the
10 manufacturer's data and say, yeah, it's possible that.
11 Certainly --- it's certainly possible that you could meet
12 minor source limits with these, using this kind of data.
13 But we're not going to rely on that. We're going to make
14 you test it and demonstrate to everybody that you're
15 compliant.

16 So there's just, if they needed the
17 redacted data, that would be one thing. But they're not
18 deprived of anything by not having it. If they believe
19 that the permit's not strong enough and they don't have
20 enough information to determine whether we're in
21 compliance, well, that's something they ought to bring up
22 on appeal and they ought to suggest other changes to the
23 permit for additional testing. We'll probably disagree,
24 but that's the time to raise it, not to look through that

1 data.

2 CHAIR: All right.

3 Board members, questions? Go down the
4 line. Let's go to the Zoom. Mr. Knee, do you have any
5 questions you'd like to pose?

6 MR. KNEE: No, I don't.

7 CHAIR: All right, Mr. Frame?

8 MR. FRAME: None for me, thank you.

9 CHAIR: Okay.

10 I've got a couple I'm going to throw out
11 here. You argue, the last thing you said was the data
12 was not necessary, that the DEP didn't even need the
13 data, that they could set the limits based upon what the
14 limits were for the synthetic minor?

15 ATTORNEY YAUSSY: Yes.

16 CHAIR: Okay.

17 So they could just randomly pick figures
18 out of the air and say, this is the limit we're going to
19 come up to? We don't care what the calculations show?

20 ATTORNEY YAUSSY: No, what they can do is
21 use the redacted data and say, given these number of
22 hours of operation, can they hit --- stay below 100 tons?
23 Yes.

24 CHAIR: Okay.

1 So why --- why then cannot we look at that
2 data to see what the numbers are?

3 ATTORNEY YAUSSY: Because that is just an
4 estimate as to what's going to happen. It has no bearing
5 on what actually happens, which we're going to actually
6 measure at a later time. If we're wrong and we can't
7 meet the manufacturer's data, then we're going to be in
8 violation. We need to change our operations.

9 CHAIR: But again, if I'm just looking at
10 this from a, you know, a lay person thing, I'm saying,
11 okay, you want a synthetic permit, we're going to
12 synthetically figure out what the permit limits are going
13 to be. Calculations don't mean any difference. Because
14 we're going to set the limits without the calculations.

15 ATTORNEY YAUSSY: They determined hours of
16 operation.

17 CHAIR: Based on the calculation.

18 ATTORNEY YAUSSY: Based on those
19 calculations.

20 CHAIR: So the calculations are based on
21 the number of turbines and the emissions from the
22 turbines?

23 ATTORNEY YAUSSY: Correct.

24 CHAIR: Okay.

1 So how is the Board to look at that
2 information if it's redacted?

3 ATTORNEY YAUSSY: The hours of operation
4 are not the only thing that keeps them, limits them to
5 being a minor source. So all they're doing is basically
6 saying yes, you could, maybe, looks like you could
7 achieve those --- those limits. And if you emit the same
8 level that's in the redacted data, then you will under
9 these hours of operation. But we're not going to rely on
10 that. We're going to force you to prove you're in
11 compliance. So the redacted data may be used to show
12 yeah, we think you can hit the limit, but they've got to
13 hit the limit.

14 CHAIR: After --- after the facility's
15 constructed.

16 ATTORNEY YAUSSY: They have to do this
17 ---.

18 CHAIR: After --- after the permit's
19 issued.

20 ATTORNEY YAUSSY: That --- that's true,
21 that's true. But they have to do it well before they'd
22 ever run up against that hundred ton limit or if they go
23 over it, then they're subject to violation. They're
24 subject to citizen suits, they're subject to all kinds of

1 penalties if they don't meet their limits. Of course,
2 they had to show everybody what they're doing.

3 CHAIR: Mr. Driver, the requirements you
4 mentioned having to do with the aggregate and so forth,
5 is that in the unredacted portion? Can we see what the
6 DEP used in the aggregate to determine the similar
7 emissions?

8 ATTORNEY DRIVER: I believe so, Mr.
9 Chairman. I'm actually looking through the.

10 CHAIR: I haven't found it. I've looked
11 for it. I have not found it.

12 ATTORNEY DRIVER: Well, if you look at, I
13 believe it's the interpretive rule 31B. It is non-
14 confidential, and that information's available ---
15 available to everyone, including the DEP. My
16 understanding from reading the engineering report is that
17 all of that information has been made available to the
18 DEP or will be made available to the DEP during
19 operations.

20 CHAIR: That's not what I asked you. You,
21 you're claiming that they, and where's the wording here?
22 The aggregate? Basically the, and I don't know the exact
23 wording, so pardon me. You're saying that we --- that
24 the unredacted information, I'm sorry, redacted

1 information is not necessary for public view because
2 there is similar aggregate information that can be drawn
3 to make the comparison, to say that they are within the
4 limits?

5 ATTORNEY DRIVER: That is correct.

6 CHAIR: Okay.

7 So where is that similar information?

8 ATTORNEY DRIVER: I'm not --- I'm sorry to
9 be obtuse. I don't think I understand the question,
10 Chairman.

11 CHAIR: Well, I think you do, because I
12 think that the answer is that you haven't explained, you
13 haven't given it to us. We don't know what the aggregate
14 information is that you're using. You're saying this
15 aggregate information out there is being used, but
16 nowhere is that aggregate information actually available.

17 ATTORNEY YAUSSY: Mr. Chairman, are you
18 talking about the aggregate emissions for all the
19 turbines?

20 CHAIR: The aggregate, supposedly there's
21 aggregate information which would --- which, in the way
22 that I'm reading the --- the previous responses, is that
23 there is similar information from other operations, other
24 --- other turbine, electric generating facilities, that

1 is being used as the basis for this permit. Now, if
2 that's not the case, then we need some clarification.

3 ATTORNEY DRIVER: Again, I am --- I am
4 being genuinely obtuse here, I'm sure. I believe what
5 you're asking, Mr. Chairman, is whether or not this
6 aggregation data would be available to the Board? With
7 --- with the redacted application without viewing the
8 unredacted data?

9 CHAIR: Yeah, I'm not --- let me see if I
10 can find it for you. Just bear with me for a second.

11 ATTORNEY GRAY: Ideally, it'd be their
12 response.

13 CHAIR: I don't know where it is.

14 ATTORNEY GRAY: Yeah, you have it.

15 CHAIR: Well, I'll tell you what, Counsel.
16 Let's just go on without it.

17 ATTORNEY DRIVER: Well, Mr. Chairman, I am
18 hoping this might answer your question. Again, I --- I
19 want to make sure that I'm precisely getting what the
20 question is. So, correct me if I've got it wrong, but on
21 page 105 of the certified record, that is page four of an
22 engineering evaluation and fact sheet. It lists the
23 specifically approved, non-confidential alternatives that
24 can be found in the associated draft permit and the

1 following permit conditions. That is in the permit.
2 That information is not --- it's obviously not
3 confidential. All of that information is contained
4 within the draft permit.

5 ATTORNEY BECHER: Sorry Mr. Driver, can
6 you state the page numbers for me again?

7 ATTORNEY DRIVER: I apologize. It is page
8 105 of the certified record, which is page four of an
9 engineering report.

10 CHAIR: Technical question is for you
11 also, Mr. Driver, is why, when things are redacted, do
12 you redact the headers for the --- the DEP tables?
13 That's something I thought was ---.

14 ATTORNEY DRIVER: That I don't have the
15 answer to, Mr. Chairman. That's something I would have
16 to have a witness for.

17 CHAIR: Yeah, but that's what I'm talking
18 about. We can't even tell what those headers are.

19 ATTORNEY DRIVER: I would have to check on
20 that, Mr. Chairman. As a non-technical person, that's
21 not knowledge that I have immediate access to.

22 CHAIR: Okay.

23 But does it sound logical to redact the
24 headers?

1 ATTORNEY GRAY: Can you think of a legal
2 reason to redact the headers of your own tables as
3 confidential?

4 ATTORNEY DRIVER: I can't opine on that
5 until I talk to somebody more technically adept than
6 myself.

7 ATTORNEY GRAY: And specifically ---

8 ATTORNEY DRIVER: Which may be ---.

9 ATTORNEY GRAY: --- it's page 56 and 57 of
10 the application on the record. The certified record page
11 56, 57 of 653. And you can see where the headers at the
12 top of the table have been redacted as confidential
13 business information of.

14 ATTORNEY DRIVER: Understood.

15 ATTORNEY GRAY: Yeah.

16 ATTORNEY DRIVER: I don't have the answer
17 for you, Mr. Gray.

18 ATTORNEY YAUSSY: I don't have the answer
19 either. My guess is it was just something in the
20 computer program that may ---.

21 ATTORNEY GRAY: Cut and paste?

22 ATTORNEY YAUSSY: Cut and pasted, yes.

23 ATTORNEY GRAY: So if they looked at it,
24 you would not object to having that unredacted?

1 ATTORNEY YAUSSY: I don't ---.

2 ATTORNEY GRAY: I mean obviously subject
3 to you're looking at it and seeing what it actually says.

4 ATTORNEY YAUSSY: Right.

5 ATTORNEY GRAY: On its face.

6 ATTORNEY YAUSSY: Correct.

7 ATTORNEY GRAY: Yeah.

8 ATTORNEY DRIVER: I mean Mr. Gray, I'm ---
9 I'm obligated to tell the tribunal. Obviously if I don't
10 have the answer to something ---

11 ATTORNEY GRAY: True.

12 ATTORNEY DRIVER: --- I don't have it.

13 ATTORNEY GRAY: Sure. Understandable.

14 ATTORNEY DRIVER: So that's, I mean I
15 don't have the answer to that. It is something I can
16 find out, but I don't have it at hand.

17 ATTORNEY GRAY: But would you agree as a
18 general rule, DEP's tables that have to be filled in are
19 not deemed confidential as a general rule?

20 ATTORNEY DRIVER: Are you talking about
21 the tables and applications?

22 ATTORNEY GRAY: The table format, the
23 table headers. The table --- that as compared to the
24 information that is placed in said tables.

1 ATTORNEY DRIVER: In general Mr. Gray, it
2 is correct that the --- that the table header would not
3 be redacted, but neither would anything else.

4 ATTORNEY GRAY: Understand.

5 ATTORNEY DRIVER: And I apologize for
6 being caught flat footed.

7 CHAIR: No.

8 ATTORNEY DRIVER: But you got me.

9 ATTORNEY YAUSSY: I don't --- I don't know
10 the answer to that --- to the question.

11 ATTORNEY GRAY: And you won't be able to
12 tell the answer until you know what exactly is under the
13 black?

14 ATTORNEY YAUSSY: Conceptually, I would
15 agree if it's a standard form and it's not information we
16 filled in.

17 ATTORNEY GRAY: Yeah, conceptually.

18 ATTORNEY YAUSSY: Conceptually.

19 ATTORNEY GRAY: Yeah.

20 ATTORNEY DRIVER: And I believe the
21 Board's directive would be that there would be
22 deliberations today, but there would not be an order
23 issued?

24 CHAIR: That's correct.

1 ATTORNEY DRIVER: That is something that I
2 can look into, and if appropriate I can --- I can
3 supplement with a version that doesn't have those headers
4 blacked out. I just really have to talk to my technical
5 people.

6 CHAIR: And --- and the reason I'm asking
7 the question is that without even knowing what the header
8 is, we don't know what was redacted. It was not --- it's
9 not a huge thing, but it's a category of redaction.

10 ATTORNEY DRIVER: Understood.

11 CHAIR: So we don't know whether it's
12 emission data, whether some of the things that fit in.
13 Because what you're mentioning is that the aggregate is
14 here. You did cite it. Thank you, I found it. So, but
15 we don't know whether that's consistent with that at all,
16 but I've seen the header at least.

17 ATTORNEY DRIVER: Understood. That is
18 information that I can uncover. And then can't make any
19 representation of what I'll tell you, but I can --- if I
20 can tell you, I'll tell you something.

21 CHAIR: Appreciate that. Okay.

22 Any other questions to the Board?
23 Response or anything? No? All right.

24 What we're going to do then is we are

1 going to recess. We want to talk about this --- this
2 issue while it's fresh. We're going to recess. We will
3 have some discussion. Our intention is that we will not
4 issue a final order today. We will --- we will --- we'll
5 come up with a decision and then send a written order
6 out. But when we come back to recess, we'll clarify that
7 so everybody's clear where the next step is.

8 We'll come back from recess then, and then
9 we'll consider the motion for partial dismissal. Okay?
10 So at this stage, we're going to recess. We will ---
11 we'll go to the. The deliberation room and you all may
12 stay here or do whatever you wish to do for a while. I
13 can't tell you how long it's going to be, but we'll be
14 back when we can.

15 ---
16 (WHEREUPON, A SHORT BREAK WAS TAKEN DURING THE
17 PROCEEDING.)

18 ---
19 CHAIR: All right.

20 We will go back in session then. All
21 right. This is obviously a little bit different
22 situation than what the Board has faced in the past as
23 everybody's aware. You know, typically we would --- we
24 would have gone through an appeal. We would allow both

1 parties to supply information, and then we would come up
2 with our --- our final order based upon the information
3 that's submitted.

4 This is not the final appeal. This is
5 simply the motion that we've got going forward. The
6 Board, as we indicated before, is going to issue an order
7 of some sort of. But what we would really like to have
8 happen is for the Appellant and the Appellee and the
9 Intervenor to perhaps get together in the next week, and
10 see if there is a protective order that everybody could
11 agree with. That may be optimistic, but it may be
12 possible. We'll see.

13 We'd like to give you one week and see if
14 you come up with something. If not, we will go forward
15 with whatever we're going to do. But if you all could
16 get together and see if there's something that you could
17 agree to before we do that, it would probably make life
18 simpler for everybody.

19 ATTORNEY DRIVER: November 12th, Mr.
20 Chairman?

21 CHAIR: That sounds like a good date, yes.
22 Close --- close of business on the 12th.

23 ATTORNEY GRAY: Assuming the room's
24 available, and all the other typical admin things. That

1 sounds like a good date.

2 CHAIR: Well, we're not coming back
3 together. We don't need to worry about the rooms.

4 ATTORNEY GRAY: Okay.

5 Is it just --- let us know.

6 CHAIR: To let us know.

7 ATTORNEY GRAY: Okay, yeah.

8 CHAIR: And.

9 ATTORNEY GRAY: And if it's clear earlier
10 than that, let us know when it's obvious, you guys.

11 CHAIR: And then we will issue an order as
12 soon as we can after that, probably within a few days,
13 certainly more than a week after that, we'll --- we'll
14 issue a final order so that people can be prepared for
15 the next step of the year. Okay.

16 ATTORNEY DRIVER: And is an email report
17 acceptable, or would you like a hard copy?

18 CHAIR: Absolutely. Email is perfectly
19 okay. As long as --- as long as we have an indication
20 of, you know, agreement or disagreement, whatever the
21 case may be. So we know where we're going forward.
22 Okay. All right.

23 Next step of this, then, is that we are
24 going to look at the Appellee's motion for partial

1 dismissal. Again, we're only hearing the motion for
2 partial dismissal. We're not getting into any issues on
3 evidentiary hearing at this point. And the process will
4 follow, obviously, is that we'll start with Mr. Driver,
5 then we'll go to Mr. Yaussy's response, and then Mr.
6 Becher, and then again we'll follow back with the
7 rebuttal possibility.

8 ATTORNEY YAUSSY: Mr. Chairman, could I
9 defer to Mr. Walls for the response?

10 CHAIR: Sure.

11 ATTORNEY YAUSSY: Thank you.

12 CHAIR: Is there a reason we couldn't do
13 all three at one time? Do we need to do each one
14 separately or? How --- how do you want to present ---
15 present it, Mr. Driver?

16 ATTORNEY DRIVER: I can do them
17 collectively. I can just do them at once.

18 CHAIR: Okay. All right. All right.
19 Your floor.

20 ATTORNEY DRIVER: And Mr. Chairman, I
21 anticipate mine being fairly short and simple compared to
22 the last motion that the Board was considering. I've
23 moved at this point to dismiss only three counts of the
24 Appellee's notice of appeal. And those are specific

1 objections. Paragraphs 8, 12, and 16, moving to bar them
2 from further consideration by the Board. Dismiss them,
3 get rid of them. And in large part, that's predicated on
4 a 2017 order that was issued by this Board in the US
5 methanol appeal.

6 And the Board made clear in that appeal,
7 as I believe is clear elsewhere, that DAQ is a statutory
8 and regulatory creature. It derives its authority from
9 statute and rule. To the extent that it is not
10 specifically vested with the authority to do something,
11 it cannot do something. If there is a shall in a rule or
12 a statute, then it shall do things and it's not --- not
13 discretionary.

14 That was the main predicate of US Methanol
15 which stated explicitly the permitting program is the
16 sole source of DEP DAQ's authority to regulate air
17 pollution and delineates the way it may do so. DAQ is
18 not allowed to do more or less than the rules allow.

19 And then one of the arguments in US
20 Methanol was that as --- as a broad proposition, the DAQ
21 had to adhere specifically to those policy statements
22 made in 2251, which is essentially a broad policy
23 statement. It, at the very start of that particular
24 section of the code, it lays out why that particular

1 section of the code has been developed.

2 In that particular case, again, the Board
3 was very clear. DAQ's tasked with more broadly
4 protecting health and safety. But it's --- it's
5 authorized to, quote, achieve and maintain such levels of
6 air quality as will protect human health and safety. The
7 means to accomplish those levels of air quality are
8 provided for in the Code. Those aims are pursued through
9 the promulgation of rules, and I'm quoting in relevant
10 part. There's more to it.

11 DEP is expressly limited to the measures
12 provided for in those rules. The Board rejected the
13 proposition that the general purposes of that policy
14 statement section created any specific authority for DEP
15 to require information regarding effects on human health
16 and safety. Definitionally, the division of air quality
17 is concerned with air quality. Again from US Methanol,
18 DEP is only allowed to exercise the authority it's given
19 by express rule. No such rule exists that allows the
20 agency to deny an application for a permit because it
21 allegedly fails to protect human health and safety. Goes
22 on to state later, DEP's authority and permissible
23 considerations are strictly, I got to be careful how I
24 say that, circumscribed.

1 Now if we get to the first count that I am
2 asking that the Board dismiss, the Appellants have
3 alleged that fugitive emissions are something that DEP
4 has failed to consider. In particular, note ---
5 particularly noted in that specific objection are mobile
6 source emissions. But DEP lacks the authority
7 specifically under the --- the relevant regulation to do
8 so. That states this rule does not apply to non-road
9 engines, non-road vehicles, motor vehicles, or other
10 emission sources regulated under Subchapter 2 of the
11 Federal Clean Air Act. However, the Secretary may
12 regulate such sources pursuant to another rule
13 promulgated for that purpose.

14 There's not a requirement there for DEP to
15 consider mobile emissions from those particular sources.
16 There is a discretionary element there, but it is not
17 mandatory. And without a mandate, DAQ cannot be forced
18 to do something. The discretion is there. If it's
19 before a tribunal, you know you should have done
20 something. That discretionary portion I do not
21 personally believe is within the purview of a tribunal.
22 I believe the purview of the tribunal is to look at what
23 the rule specifically allows or mandates.

24 So the Board order in Methanol says that

1 DEP's sole authority initially denying --- or denying the
2 permit at issue is 4513.1. Accordingly, I think that
3 counting the appeal must be dismissed. I do not think
4 that a may in a statutory or regulatory construction with
5 that discretionary element is within the purview of basis
6 for a denial of a permit.

7 Next thing I've got. In paragraph 12 of
8 the specific objections, the Appellants are claiming that
9 DEP did not adequately consider the fact that this
10 facility might be used as a data center. Again, the
11 precedent that was set in US Methanol applies here.
12 Denial of a permit based on speculation of the use of a
13 facility is outside of DEP's authority. There's not a
14 statute or rule that confers on DEP a unilateral
15 authority to demand justification that is not there in a
16 statute or a rule. This is not information that DEP is
17 delegated the authority to consider. If somebody applies
18 for a permit for a facility and it meets through the
19 permitting requirements, the Secretary shall issue a
20 permit. DEP cannot unilaterally cause a permit applicant
21 to come in and justify what the --- what kind of business
22 they want to run.

23 We, if we don't have a specific authority
24 for denial, we can't deny it. We can't rule by fiat.

1 We're a statutory creature, regulatory creature. If
2 we're not given the authority to consider a particular
3 element, we don't have that authority. If we don't have
4 the vested authority to deny a permit based on that
5 particular factor, then we don't --- we don't have the
6 authority if it's not given to us. So accordingly, we're
7 asking for that account to be dismissed.

8 And finally, in paragraph 16 of the
9 specific objections, again, I believe this was gone to in
10 US Methanol and I know the Appellants disagree. But the
11 Appellants have alleged that DEP erred by failing to
12 adhere to the purpose of 2251, which again is the general
13 policy statement contained at the beginning of that
14 chapter.

15 Methanol explicitly states that the aims
16 of that policy section are pursued through promulgation
17 of rules. Under that precedent, the way that we pursue
18 that policy is under legislatively approved rules. If we
19 are not afforded authority by a statute or a rule, then
20 we can't pursue other vague policy claims. We get ---
21 the only way that we get to pursue the policy aims of the
22 legislature in that policy statement are through the
23 promulgation of the rules. The rules are the guardrails
24 that we operate within. If they don't give us authority,

1 we can't do it.

2 Again, I promised this would be short and
3 I will go ahead and pass over to, I believe the order of
4 presentation ---

5 CHAIR: Intervenor.

6 ATTORNEY DRIVER: --- was to the
7 Intervenor. Thank you.

8 ATTORNEY WALLS: Mine will be shorter,
9 much shorter in my opinion. For the reasons that DEP
10 outlined in its brief and those Mr. Driver just
11 discussed, we think specific objections 8, 12, and 15
12 seek regulatory actions beyond the Board's statutory
13 authority would think that they are foreclosed by both
14 legislative rules and Board precedent in US Methanol ---
15 in the US Methanol case. And for those reasons, we join
16 in with DEP's motion for partial dismissal.

17 ATTORNEY BECHER: Yeah, and a slight
18 correction and --- and correct me if you have a
19 misunderstanding, either Mr. Driver or Mr. Walls, but I
20 believe this is going to 8, 12, and 16?

21 ATTORNEY WALLS: Sixteen (16). I think we
22 both said 15. I apologize. Yes.

23 ATTORNEY DRIVER: My apologies if I
24 miscommunicated.

1 ATTORNEY BECHER: And first I would like
2 to say and point out that this partial dismissal is only
3 for selected counts 8, 12, and 16. If you read our
4 notice of appeal, there are a lot of interrelated
5 specific objections here. And I think as we explained
6 with, you know, the issues surrounding the permitting of
7 the synthetic minor as well as the calculation of
8 emissions limits that there are a lot of interconnected
9 issues here. Because this only asks for the striking of
10 8, 12, and 16, I would respectfully ask the Board not to
11 go beyond that.

12 I also would like to say I believe that
13 the reliance on US Methanol is overstated here. We
14 understand that the Board is rooted in statutory and
15 regulatory powers. I would emphasize, however, that the
16 Board's review of these issues is de novo. The Board is
17 considering the decisions of the DEP, but it's ultimately
18 making its own decision. And that --- that's the Board
19 with its own discretion, its own responsibility to look
20 and view the evidence.

21 When we go to the arguments, the first
22 one, the objection eight deals with the --- the use of
23 fugitive emissions in the potential emissions
24 calculations. These were the --- these potentials to

1 emit were the, for the ultimate pollution limits, the
2 ultimate projections that we were talking about in the
3 --- in the previous session. There's, in fact, a
4 specific regulatory requirements to consider fugitive
5 emissions for certain characters of sources. And those
6 fugitive emissions calculations can and should be
7 considered when determining whether that source will
8 exceed the minor source threshold and go into to a major
9 source threshold.

10 And if you look at specific objections
11 eight and nine, we list a number of examples of fugitive
12 emission sources that were not taken into account by the
13 permit writer, the permit reviewer. And we believe those
14 because of the regulatory requirement to consider
15 fugitive emissions should be properly considered. Now
16 the objection, as --- as I understand it from the
17 Appellee, the Department, is that certain categories of
18 fugitive emissions should not be considered mobile
19 emissions.

20 Well, as we point out in our brief, the
21 Department did actually calculate fugitive emissions for
22 certain pollutants from diesel trucks using paved haul
23 roads, not off road haul roads, but paved haul roads and
24 specific pollutant emissions for the time when diesel

1 trucks would be unloading at the facility. Our problem
2 with this calculation --- with the fugitive emissions
3 issue is one that sources of fugitive emissions that
4 should have been considered that are going to be
5 practically required for this plant, things like ammonia
6 tanks that are required to store ammonia for use in the
7 --- the pollution control emissions weren't --- weren't
8 considered, and we believe they should be.

9 Similarly, certain pollutants. And again
10 here, we come back to the nitric oxides which is just a
11 fraction of a ton below the major source limit in this
12 permit. Certain pollutants were not included in the
13 calculation of fugitive emissions from diesel trucks on
14 paved haul roads and during loading and unloading. And
15 while the DEP considered certain select other pollutants,
16 our view is if you're going to look at a category of
17 operations, you need to consider all the pollution coming
18 from those fugitive sources, that source of operations,
19 not just a small few. And certainly, you should be
20 looking at pollutants approaching the threshold like
21 nitrous oxides.

22 Now getting to the --- the other aspects
23 of this claim, objection 12 essentially asks this Board
24 to recognize the reality of this situation. It is known

1 publicly that this facility is going to be used for a
2 data center. It's even been mentioned during these
3 proceedings, or at least alluded to, that data centers
4 are a large driver of the purchase of power plants. And
5 it was alluded to in the brief.

6 There are statements that DEP made
7 publicly that this was going to be used for a data
8 center, and they were well aware of that. There were
9 statements made by the company that are in the certified
10 record that allude to the data centers and the importance
11 of plants like this for supporting the data center
12 industry and issues of national security. And finally,
13 we know and can present evidence at hearing that DEP made
14 statements during public hearings that this facility was
15 being proposed to operate a data center.

16 Now the --- the issue for this Board is
17 given all those realities, given that this is public
18 information, given that it's recognized by DEP, given by
19 that it's at least very strongly applied by the
20 permittee, it should be a consideration of this Board.
21 This is a plant that is being given a synthetic minor
22 status because of certain operational restrictions,
23 certain hourly restrictions on how it can and how often
24 it can run. And we believe that the Board should be able

1 to consider that and the reasonableness of those
2 assumptions, the reasonableness of those limits, given
3 the known practical context in which this facility
4 arises.

5 On the last point, the purpose and policy
6 of the Act. This is again where there are some
7 interrelated objections. There's a non-challenged
8 objection where the regulation specifically says you can
9 do additional modeling if you think it complies with the
10 purpose or in order to comply with the purposes and
11 policies of the Act. And that regulation specifically
12 refers back to the policy statements that Mr. Driver
13 referred to, 25-2.1, which set out the purposes and
14 policies of the Act. We think that is particularly
15 appropriate here because of some of the unique features,
16 the unique topography, the unique weather conditions,
17 unique economy of the area in which this plant will be
18 located.

19 And unlike US Methanol, if you read US
20 Methanol, you can see there are six or seven different
21 issues that were before the Board. Many of them dealt
22 with issues that have nothing to do with air quality,
23 delving into the corporate structure of an organization,
24 things like that, which --- which simply don't go to air

1 quality and air pollution.

2 Unlike those kinds of situations, we here
3 are focusing on the statutes and their implications for
4 air quality from this plant. The --- we believe the
5 Board as well as DEP should be guided by those purposes
6 and policies when it's making those discretionary
7 decisions, when it's exercising authority. It's not
8 that, as the case was in US Methanol. In US Methanol,
9 the purpose and policy was used to say, look, you need to
10 be regulating pollutants below what the regulations
11 require. You need to be more stringent than the explicit
12 regulations.

13 We're not doing that. We're saying that
14 the purposes and policies of the Act should be guideposts
15 in the decision making. That the agency and the Board
16 should keep in mind the persons and policies of the Act
17 when exercising their discretion, when asking the
18 permittee for more information, deciding what is
19 necessary to fulfill their duties, and ultimately in
20 rendering their decision.

21 CHAIR: Thank you. Mr. Driver, any
22 rebuttal?

23 ATTORNEY DRIVER: First of all, I want to
24 say that Mr. Becher's correct that the motion only

1 addresses 8, 12, and 16. That's undisputed.

2 As for the equity of whether or not we
3 should have considered that this was going to be a data
4 center, DAQ is not a creature of equity and this is not a
5 tribunal of equity. We're bound by the regulations and
6 the statutes. We can only consider and perform actions
7 that we've been delegated the authority to consider or
8 perform. The fact that there may be some perceived
9 inequity, somebody may not like the way things are going.
10 They may not like the character of it being used,
11 potentially used as a data center, they may not like data
12 centers in general.

13 Those aren't considerations that we are
14 empowered to use as a basis for denying a permit. Simply
15 put, I mean, we as Methanol, as US Methanol said, we
16 can't do more or less than we are specifically instructed
17 to do. Accordingly, I believe that although there may be
18 understandable concerns by anybody who lives near any
19 kind of potential industrial facility, we understand. We
20 are creatures of statute, and this is not a consideration
21 that we will take into account.

22 I would also note that especially since
23 the Board will have more time now to consider motions and
24 still conduct an orderly hearing, that there may be more

1 dispositive motions at some point. I can assure the
2 Board we will do that as promptly as necessary to give
3 the Board time to consider it before the currently
4 scheduled December 5th time to convene. But Mr. Becher's
5 correct, 8, 12, and 16 are all, from our perspective,
6 that's all that's in play right now.

7 And with that, I'll pass to the Board or
8 the Intervenors.

9 CHAIR: Anything?

10 ATTORNEY WALLS: Nothing further, Mr.
11 Chairman.

12 CHAIR: Any Board questions?

13 ATTORNEY BECHER: And may I just respond
14 on? I'll keep it within 30 seconds. I --- I just want
15 to say, you know, we don't view this as a fact of matter.
16 I'm sorry, may I continue?

17 CHAIR: Yes.

18 ATTORNEY BECHER: Okay.

19 We --- we don't consider this just a
20 matter of equity. It's a matter of common sense. There
21 are known practicalities around this that were known to
22 the Department. Again, this is an operation that's
23 synthetically limited. We think those synthetic limits
24 don't make any sense given the end power user here. And

1 --- and we think the Board should be able to consider
2 this in the context of the practical reality surrounding
3 the plant and everything that was known to the DEP and
4 the public and the permittee with the issuance of this
5 permit.

6 CHAIR: Now, is there any questions from
7 the Board? Sorry, I didn't hear any rebuttal. Mr. Knee,
8 do you have anything, or Mr. Frame?

9 MR. KNEE: This is Mr. Knee. I don't have
10 any questions.

11 MR. FRAME: This is Jason. I don't
12 either. Thank you.

13 CHAIR: Okay. All right.

14 Then what we will do is we're going to
15 recess and deliver --- deliberate, sorry. It is our
16 intention to come back in and --- and rule on these three
17 motions so we'll know where we go from here for sure,
18 okay? So if you all just bear with us for a little bit,
19 we'll come back and give you a determination on that. So
20 we're in recess.

21 ---

22 (WHEREUPON, A SHORT BREAK WAS TAKEN DURING THE
23 PROCEEDING.)

24 ---

1 CHAIR: All right.

2 We'll go back into session then. The
3 Board has deliberated on the three motions for partial
4 dismissal and come to the following decisions. In regard
5 to the paragraph, make sure I get the right one since
6 we're going back and forth. Paragraph eight. In regard
7 to paragraph eight, the Board is going to grant the
8 motion for partial dismissal on paragraph eight.

9 In regard to paragraph 12, the Board is
10 going to grant the motion for partial dismissal on grant
11 --- on paragraph 12.

12 In regard to paragraphs 15, 16? Sixteen
13 (16), get the right one. In regard to paragraph 16, the
14 Board is at this time denying the motion for partial
15 dismissal, but taking it under advisement to sort of rule
16 on during the evidentiary hearing when evidence comes up.
17 We'll take into consideration arguments at that point.

18 Okay? Questions?

19 ATTORNEY BECHER: Let me ask a clarifying
20 question as regards to eight. Is that the entire
21 objection or just as it relates to mobile emissions?

22 CHAIR: Mobile emissions was the --- was
23 the issue. Is there anything else in there that I'm
24 missing?

1 ATTORNEY BECHER: Yes, there were other.
2 Other sources of fugitive emissions.

3 ATTORNEY GRAY: Okay.

4 The objection, what was --- was your
5 objection to total or ---?

6 CHAIR: The objection was total, well.

7 ATTORNEY DRIVER: Actually I'll, let me
8 pull it up. But I'm pretty sure that it was to the
9 extent that it implicates.

10 CHAIR: I think it was. All fugitive
11 emissions I believe was what you.

12 ATTORNEY DRIVER: So to the --- to the
13 extent that this objection alleges that DEP errored in
14 failing to consider local source emissions.

15 ATTORNEY GRAY: Right. So it's limited to
16 mobile source emissions.

17 ATTORNEY DRIVER: Right, right.

18 CHAIR: Okay, other questions? All right.

19 Before we move to adjourn, are there any
20 motions anybody wants to enter at this point?

21 ATTORNEY GRAY: I want to raise just one
22 housekeeping. This building is under construction. The
23 likelihood that the hearing will be held in this building
24 in December, I'm not the controller or the keeper of the

1 books, but my crystal ball says it's slim to none, which
2 means that they, we will have to find a room of
3 sufficient size to put it into. That leaves a little bit
4 of the unknown in there. Just be aware of that. I'm not
5 expecting it to, you know, upend the December hearing.
6 It's just the location will probably. Will probably, not
7 necessarily, absolutely, but will probably change. Just
8 to be aware of that.

9 ATTORNEY DRIVER: And Mr. Gray, if I
10 could? If the Board is willing to entertain the idea of
11 meeting off site, I believe I can secure us a room of
12 sufficient size.

13 ATTORNEY GRAY: That's what we figure will
14 have to happen, but where the off site is.

15 ATTORNEY DRIVER: I think I've got a
16 pretty good idea.

17 ATTORNEY GRAY: Okay.

18 ATTORNEY BECHER: And if I may, just
19 because I've got an email about scheduling something in
20 early December that came through. Is the 3rd the
21 anticipated date?

22 CHAIR: We anticipate evidentiary hearing
23 being the 3rd, subject to finding an appropriate room.
24 That's the schedule for the Board right now, the 3rd.

1 And we are holding the 4th in abeyance.

2 ATTORNEY GRAY: And here's the question
3 from the parties. Do you think it'll take one or two
4 days? What is your, given what you intend to offer and
5 all that. What does your crystal ball tell you?

6 ATTORNEY DRIVER: Mr. Gray, I believe, and
7 I don't --- I have not consulted with the Intervenor,
8 but on the part of DEP, I believe we were going to
9 stipulate to standing. So that will knock out part of
10 the time. From our end, I expect to put on two
11 witnesses. I disclosed three. I believe it's going to
12 be two witnesses. So I --- I don't know how long it'll
13 take to cross or to present and cross Mr. Becher's
14 expert. I personally think a day sufficient. The
15 Appellant and Intervenor may differ.

16 ATTORNEY BECHER: I --- I would think two
17 days would be safe. I think it'll probably take the bulk
18 of the day, if not --- not exceed it somewhat.

19 CHAIR: Okay.

20 Based --- based on my past experience with
21 things like this, I believe we need to hold a second day
22 in abeyance. Ones like this typically end up with some
23 complications and we normally have to run over. We
24 prefer to plan to run over rather than going to eight or

1 nine o'clock at night, which would be the alternative.
2 But I don't think anybody wants a day that goes pretty
3 late, so. Hopefully you all will try to keep it as brief
4 as you can. We much prefer one day if we can, but we
5 need to be --- need to be thinking beyond that just in
6 case.

7 ATTORNEY DRIVER: And Mr. Chairman, the
8 only thing I've got, which I alluded to earlier, is that
9 there's a possibility now that we have got more time for
10 the Board to consider things that DEP may, if
11 appropriate, file for a motion. But we will do that with
12 plenty of time for the Board to consider.

13 CHAIR: Okay, appreciate that.

14 ATTORNEY WALLS: Mr. Chairman, before we
15 go off the record, could I note something on the record?

16 CHAIR: Absolutely.

17 ATTORNEY WALLS: Fundamental respectfully
18 objects to today's hearing being designated as a hearing
19 on Appellant's appeal of DEP's issuance of the permit to
20 Fundamental for the purposes of West Virginia Code
21 Section 22B-1-7(f). Today's hearing was not a hearing on
22 Appellant's appeal of DEP's issuance of the permit.
23 Today's hearing was on, one, a discovery issue and two, a
24 pretrial motion to dismiss. So we respectfully object to

1 today's hearing being designated as a hearing on the
2 appeal.

3 CHAIR: Noted. Anything else for the good
4 of the order? Okay, we stand adjourned then. We will
5 reconvene on December 3rd at a location to be determined.
6 All parties will be notified as soon as we know. And
7 again, if we have to change, we'll notify you then as
8 well. Thank you. And --- and we need responses, don't
9 forget, on the other issue by next week. Thank you.
10 We're adjourned.

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12 HEARING CONCLUDED AT 11:37 A.M.

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1 CERTIFICATE

2
3 I hereby certify, as the stenographic reporter,
4 that the foregoing proceedings were taken
5 stenographically by me, and thereafter reduced to
6 typewriting by me or under my direction; and that this
7 transcript is a true and accurate record to the best of
8 my ability.

9
10 I certify that the attached transcript meets the
11 requirements set forth within article twenty-seven,
12 chapter forty-seven of the West Virginia Code.

13
14 
15 Chassidy E. Bays,

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17 Court Reporter
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