

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
CHARLESTON, WEST VIRGINIA

Environmental Quality  
Board

CLEVELAND-CLIFFS WEIRTON LLC

Appellant,

v.

Appeal No. 22-06-50B

DIRECTOR, DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

MOTION FOR STAY

NOW COMES Cleveland-Cliffs Weirton LLC ( hereinafter “Appellant” or “CC Weirton”), by counsel, Marc C. Bryson, Marissa G. Nortz, and the law firm of Steptoe & Johnson PLLC, and hereby moves the West Virginia Environmental Quality Board (hereinafter “Board”), pursuant to West Virginia Code § 22B-1-7(d) and West Virginia Code of State Rules § 46-4-5.5, for a stay of certain terms and conditions of West Virginia/National Pollutant Discharge Elimination System Permit No. WV0003336 (hereinafter “Permit”), as issued by Appellee West Virginia Department of Environmental Protection, Division of Water and Waste Management (hereinafter “Appellee” or “WVDEP”). The renewal permit was dated July 27, 2022 and received by CC Weirton via electronic mail on August 2, 2022. See WV/NPDES Permit No. WV0000132, Attachment C to CC Weirton’s Notice of Appeal as filed contemporaneously herewith.

Specifically, CC Weirton moves for a stay of the renewed Permit’s terms and conditions as it relates to the following parameters:

- Fecal coliform numeric effluent limits from Outlet 002;
- Aluminum effluent limits from Outlet 002; and
- Requirements to measure through screen intake velocity at Outlet 097.

In support of this Motion, CC Weirton states as follows:

1. CC Weirton has timely appealed certain terms and conditions of the renewed Permit.
2. CC Weirton has timely filed this Motion for Stay, as it has been filed concurrently with CC Weirton's Notice of Appeal dated August 30, 2022.
3. In its Notice of Appeal, CC Weirton has objected to WVDEP's imposition of revised, more stringent, effluent limitations for fecal coliform and aluminum from Outlet 002 and the imposition of requirements related to the measurement of flow through the river water intake at Outlet 097. *See* Notice of Appeal Question of Fact and Law No. 1 through 3.
4. Pursuant to West Virginia Code § 22B-1-7(d), if this Board determines that an "unjust hardship to the appellant will result from the execution or implementation of [the appealed agency action] [it] may grant a stay or suspension of the . . . permit . . . and fix its terms."
5. CC Weirton's Motion for Stay is narrowly tailored to specific terms and conditions of the renewed Permit, and CC Weirton seeks only a narrowly tailored stay for the terms and conditions of the specific parameters and requirements subject to appeal. As such, all other terms and conditions of the 2022 renewal Permit shall remain in full force and effect.
6. When reviewing a Motion for Stay, this Board has adopted the four-part standard from the Supreme Court of Appeal of West Virginia's decision in *Camden Clark Memorial Hospital v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002), which is derived from the United States Court of Appeals for the Fourth Circuit's analysis in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*. Under this standard, "a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay. *Crab Orchard-MacArthur*

*Public Service District v. Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection*, Order Granting Motion to Stay, Appeal No. 14-14-EQB (Aug. 6, 2014) (citing *Long v. Robertson*, 432 F.2d 977, 979 (4th Cir. 1970); *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987)).

7. This Motion for Stay, which is again narrowly tailored to address only three specific parameters, satisfies each of the stay requirements.
8. The first and most critical factor that must be analyzed when considering CC Weirton's Motion for Stay is whether CC Weirton will suffer direct and immediate irreparable harm if the renewed Permit's terms and conditions for fecal coliform and aluminum from Outlet 002 and the imposition of the requirement related to the measurement of flow through the cooling water intake at Outlet 097 are not stayed.
9. If the terms and conditions of these parameters are not stayed, CC Weirton will be required to comply with those conditions immediately, something that it is not immediately able to do. A review of CC Weirton's historical discharges of these parameters over the term of its last permit cycle reveals that it would have regularly exceeded the numeric effluent limits for fecal coliform and aluminum. CC Weirton is also unable to comply with the requirements for Outlet 097 without constructing and installing new equipment.
10. The imposition of these more stringent numeric effluent limits, without an interim compliance period, could immediately subject CC Weirton to enforcement actions, civil penalties, and could potentially expose CC Weirton to costly citizen suits under both the federal Clean Water Act and the West Virginia Water Pollution Control Act.
11. Further, CC Weirton will be required to immediately expend resources to quickly develop a plan of compliance to stem the onslaught of Permit exceedances, which may require it to

expend additional resources that would normally not be required under a compliance schedule that provides adequate time to determine, develop, and implement long-term compliance plans and capital improvements. If CC Weirton is successful on the merits of the appeal, which it believes it will be, the expenditure of these resources and the likelihood of noncompliance will not be nearly as extensive and may be eliminated entirely. Subjecting CC Weirton to likely noncompliance and the harm of that noncompliance, coupled with the immediate need to expend resources to try to comply with the effluent limits prior to the resolution of this appeal will result in a direct and immediate irreparable harm. As such, a stay of these specific Permit terms should be granted.

12. Second, the issuance of a stay as it relates to these specific parameters will result in no harm to WVDEP or any other party. Notably, WVDEP has previously agreed to the removal of fecal coliform limits in both an agreed-upon settlement to Appeal No. 14-09-EQB and the repeated amendment of Administrative Order 8055. The Agency also removed numeric effluent limits for fecal coliform in a draft permit modification that was issued for public comment on March 11, 2019, but never finalized. Accordingly, fecal coliform from Outlet 002 has been a “report only” parameter since March of 2014.
13. Additionally, WVDEP retains full authority to continue compliance monitoring and enforcement of the West Virginia Water Pollution Control Act and its accompanying regulations, and WVDEP is free to take all actions necessary to ensure that discharges are protective of human health and the environment.
14. Finally, this Board must consider whether the public interest will be served by the issuance of a stay in this matter. The granting of a stay in this matter will serve the public interest by ensuring that a vital West Virginia facility remains in operation and continues to provide

employment for many West Virginia residents. Without a stay, continued operations could be threatened. Further, the public interest will be served by providing for a full and fair hearing on the merits before CC Weirton is faced with enforcement actions for issues it believes can be directly remedied by this Board. As such, a stay is appropriate.

**WHEREFORE**, for the reasons set forth more fully above, Appellant Cleveland-Cliffs Weirton LLC respectfully requests that this Board GRANT its Motion for Stay as it relates to the specific terms and conditions discussed herein and ORDER that CC Weirton be subject to “report only” limits for fecal coliform and the prior Permit’s terms and conditions for aluminum and requirements to measure through screen intake velocity at Outlet 097.

**Respectfully submitted,**

**Cleveland-Cliffs Weirton LLC**

**By counsel:**



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AUG 30 2022

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Appellee,


CERTIFICATE OF SERVICE

I, Marc C. Bryson, counsel for Appellant Cleveland-Cliffs Weirton LLC, do hereby certify that I have filed an original and two (2) copies of the foregoing Motion for Stay with the West Virginia Environmental Quality Board and have served true and exact copies of the same upon Appellee, Kathy Emery, Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection, and to the West Virginia Department of Environmental Protection Office of Legal Services by hand delivery and U.S. Mail, postage prepaid, on this 30<sup>th</sup> day of August, 2022.

Kenna DeRaimo, Clerk  
West Virginia Environmental Quality Board  
601 57<sup>th</sup> Street SE  
Charleston, West Virginia 25304

Office of Legal Services  
WV Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

Katheryn Emery, Acting Director  
Division of Water and Waste Management  
West Virginia Department of Environmental Protection  
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