

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
CHARLESTON, WEST VIRGINIA**

**CLEVELAND-CLIFFS WEIRTON LLC**

**Appellant,**

**v.**

**Appeal No. 22-06-EQB**

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

**Appellee.**

**ORDER**

Appeal No. 22-06-EQB and the accompanying Motion for Stay was filed with the West Virginia Environmental Quality Board (hereinafter “Board”) on August 30, 2022. Oral arguments on Appellant Cleveland-Cliffs Weirton LLC’s (hereinafter “Appellant” or “CC Weirton”) Motion for Stay were held via teleconference before this Board’s Chairman and Counsel on September 8, 2022. Appellant was represented by Marc C. Bryson, Marissa G. Nortz, and the law firm of Steptoe & Johnson PLLC. Appellee West Virginia Department of Environmental Protection (hereinafter “Appellee” or “WVDEP”) was represented by Charles S. Driver, Esq.

Appellant seeks a Stay of certain terms and conditions of West Virginia/National Pollutant Discharge Elimination System Permit No. WV000336 (hereinafter “Permit”) as issued by Appellee on August 2, 2022. Specifically, Appellant seeks a Stay of: (1) the renewed Permit’s numeric fecal coliform effluent limits; (2) the renewed Permit’s numeric aluminum effluent limits; and (3) the renewed Permit’s requirement that Appellant measure through-screen intake velocity at Outlet 097. Upon consideration of Appellant’s Motion for Stay and the oral arguments presented

by both Parties, this Board hereby GRANTS Appellant's Motion for Stay in part and DENIES Appellant's Motion for Stay in part.

**I. Standard of Review**

In evaluating a Motion for Stay, this Board has adopted the four-part standard from the Supreme Court of Appeals of West Virginia's decision in *Camden-Clark Memorial Hospital v. Turner*, 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*. There the Court opined that:

In making this "balancing" inquiry, we have followed the lead of the Fourth Circuit Court of Appeals: Under the balance of hardship test the [lower] court must consider, in "flexible interplay," the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

*Camden-Clark Memorial Hospital v. Turner*, 212 W. Va. 752, 756, 575 S.E.2d 362, 366 (2002) (citing *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)) (additional citations omitted). Thus, in order to prevail on a Stay before this Board, a Party must show: (1) that it will likely prevail on the merits of the appeal; (2) that it will suffer irreparable harm if the Stay is denied; (3) that other parties will not be substantially harmed by the granting of a Stay; and (4) that the public interest will be served by the granting of a Stay.

**II. Discussion**

**A. The Renewed Permit's Fecal Coliform and Aluminum Effluent Limits**

**1. Likelihood of Irreparable Harm to Appellant**

This Board finds that Appellant has satisfied the requirements to receive a Stay of the renewed Permit's numeric effluent limits for fecal coliform and aluminum. Appellant will suffer an immediate and irreparable harm if a Stay is not granted as it relates to these Permit conditions, as Appellant will be required to immediately expend resources to install control measures to attain compliance with these numeric limits prior to a hearing on the merits of Appellant's Appeal. Appellant will be unable to recoup these resources if it is successful before this Board. Further, if a Stay is not granted Appellant faces immediate compliance concerns, as Appellant has demonstrated that it is unable to immediately comply with the renewed Permit's effluent limits for fecal coliform and aluminum. Appellant's inability to comply with these limits subjects Appellant to the possibility of costly enforcement actions and third-party citizens suits, which could result in the expenditure of resources by Appellant prior to a hearing on the merits of its Appeal. For these reasons, this Board finds that Appellant will suffer an irreparable harm, and a Stay of the renewed Permit's fecal coliform and aluminum numeric effluent limits must be granted. Appellant shall be subject to "report only" monitoring requirements for fecal coliform and aluminum until a Final Order is entered by this Board after the completion of the December 8, 2022, evidentiary hearing, and post-hearing briefing, if any, of this matter.

## **2. Likelihood of Harm to Appellee**

This Board finds that there is no harm to Appellee in issuing a Stay of the renewed Permit's fecal coliform and aluminum effluent limits. Appellant will continue to be subject to the same fecal coliform limits that it has been subject to since the entry of Order No. 8055 on March 18, 2014, and the same aluminum effluent limits as were contained in Appellant's prior Permit. Further, nothing within this Order prevents Appellee from using the authority granted to it under

the West Virginia Water Pollution Control Act to protect human health or the environment, as all in-stream West Virginia water quality standards remain in full force and effect.

### **3. Likelihood of Success on the Merits**

This Board declines to rule on Appellant's likelihood of success on the merits at this early stage of case development. The Certified Record for this matter has just recently been finalized and it would be improper for this Board to make a judgment on Appellant's likelihood of success at this time; however, this Board does note that Appellant has raised Questions of Fact and Law that are proper for consideration by this Board.

### **4. Public Interest**

Finally, this Board finds that the public interest will be served by the entry of a Stay of the renewed Permit's fecal coliform and aluminum effluent limits. As noted above, without a Stay Appellant will suffer an immediate and irreparable harm that could be costly to Appellant's operations. Appellant is a vital West Virginia industry that provides employment to many West Virginia citizens. Without a Stay, Appellant's operations could be jeopardized which could result in harm to Appellant's employees and West Virginia generally.

### **B. The Renewed Permit's Requirement that Appellant Measure Through-screen Intake Velocity at Outlet 097**

This Board denies Appellant's Stay request as it relates to the renewed Permit's requirement that Appellant measure through-screen intake velocity at Outlet 097. The renewed Permit grants Appellant a six (6) month compliance schedule as it relates to this Permit requirement, which this Board believes is sufficient considering the pending December 2022 evidentiary hearing in this matter and alleviates any harm that Appellant might suffer prior to the conclusion of this Appeal.

## **III. Conclusion**

**WHEREFORE**, for the reasons set forth more fully above, this Board hereby **GRANTS** Appellant's Motion to Stay the renewed Permit's fecal coliform and aluminum numeric effluent limits and **DENIES** Appellant's Motion to Stay the renewed Permit's requirement that Appellant measure through-screen intake velocity at Outlet 097. Appellant shall be subject to "report only" monitoring requirements for fecal coliform and aluminum until a Final Order is entered by this Board after the completion of the December 8, 2022, evidentiary hearing, and post-hearing briefing, if any, of this matter. Should the evidentiary hearing in this matter be continued such that an evidentiary hearing is not conducted on December 8, 2022, and any post-hearing briefing does not begin at the conclusion of the evidentiary hearing such that a Final Order can be issued by this Board, the Parties will be required to seek a Motion to Extend Stay in order for the Stay granted herein to continue through the entry of a Final Order for any evidentiary hearing that occurs after December 8, 2022.

It is so **ORDERED** and **ENTERED** this 19<sup>th</sup> day of September 2022

**Environmental Quality Board**

  
Dr. Edward Snyder, Chairman

**Prepared by:**

/s/ Marissa G. Nortz

Marc C. Bryson (W. Va. Bar No. 10589)

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**CERTIFICATE OF SERVICE**

I, Kenna M. DeRaimo, Clerk for the Environmental Quality Board, hereby certify that I have this day, the 19<sup>th</sup> day of September, 2022, served a true copy of the foregoing **ORDER** to the following:

Marc C. Bryson, Esq.  
Marissa G. Nortz, Esq.  
STEPTOE & JOHNSON PLLC  
707 Virginia Street, East  
Charleston, WV 25326  
*Counsel for Appellant  
Cleveland-Cliffs Weirton LLC*

*Via Certified U.S. First Class Mail*  
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*Counsel for WVDEP*

*Via Interdepartmental Mail*

  
Kenna M. DeRaimo, Clerk