

ENVIRONMENTAL HEARING BOARD
2nd Floor, Rachel Carson State Office Building
400 Market Street, Post Office Box 8457
Harrisburg, Pennsylvania 17105-8457

CLEAN AIR COUNCIL, Appellant,
135 South 19th Street, Suite 300
Philadelphia, PA 19103
(215) 567-4004

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,
Appellee,

and

ROBINSON POWER COMPANY, LLC,
Permittee.

EHB Docket No. _____

ELECTRONICALLY FILED

NOTICE OF APPEAL

NOTICE OF APPEAL FORM

APPEAL INFORMATION

1. Name, address, telephone number, and email address (if available) of Appellants:

Clean Air Council
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2. Describe the subject of your appeal:

(a) What action of the Department do you seek review?

(NOTE: If you received written notification of the action, you must attach a copy of the action to this form.)

Appellant seeks review of the Department of Environmental Protection's ("Department") purported revival of a superseded version of Plan Approval No. 63-00922D issued October 23, 2020 (the "2020 Plan Approval") to **Robinson Power Company, LLC** ("Robinson Power"), 563 Route 18, PO Box 127, Burgettstown, PA 15021-2120 in a letter from the Department to Robinson Power dated August 23, 2021 ("August Letter") and, to the extent the superseded 2020 Plan Approval is deemed thereby revived, the 2020 Plan Approval. The 2020 Plan Approval is attached hereto as Exhibit A and the August Letter as Exhibit B. The Department sent Appellant notice of this action by email at 4:45 p.m., August 23, 2021. That email is attached hereto as Exhibit C. The email also contains a memorandum regarding the Department's action attached hereto as Exhibit D.

(b) Which Department official took the action?

Mark R. Gorog, P.E., Program Manager, Bureau of Air Quality, Southwest Regional Office, sent the August Letter purporting to revive the 2020 Plan Approval.

(c) What is the location of the operation or activity which is the subject of the Department's action (municipality, county)?

The proposed facility would be located in Robinson Township, Washington County, PA.

(d) How, and on what date, did you receive notice of the Department's action?

Appellant received actual notice of the Department's action upon reading the attachments to the August 23, 2021 email attached as Exhibit C.

3. Describe your objections to the Department's action in separate, numbered paragraphs.

(NOTE: The objections may be factual or legal and must be specific. If you fail to state an objection here, you may be barred from raising it later in your appeal. Attach additional sheets if necessary.)

Relevant Background

- A. On June 14, 2021, the Department issued Plan Approval 63-00922D to Robinson Power, giving the company its blessing to construct and temporarily operate a major emissions source—a gigawatt-rated, gas-fired power plant. This plan approval superseded and reflected major changes to Robinson Power's previous plan approval by the same number, which had been extended by the Department on October 23, 2020.
- B. Clean Air Council timely appealed Plan Approval 63-00922D on July 14, 2021.
- C. On August 20, 2021, in what appears to be an attempt to moot out that appeal, the Department wrote a letter to Robinson Power terminating the appealed plan approval, and purporting to resurrect the defunct plan approval for the site without following any of the required regulatory processes.
- D. The Department was careful to couch the language in the August Letter in such a way that its action sounds plausible. The Department states that, "[i]n accordance with your request, the Department hereby terminates authorization ID 1261667 and the authorization is deemed null and void." That authorization ID refers to the Department's action on June 14, 2021 issuing modified Plan Approval 63-00922D (the "2021 Plan Approval"). Clean Air Council does not appeal or object to the Department's termination of the Plan Approval 63-00922D.
- E. However, the Department continues in the August Letter to recite the following: "This termination does not affect the authorization under PA-63-00922D, authorization ID 1329351, most recently extended on October 23, 2020, and expiring on March 28, 2022." This cannot be true.
- F. A facility can only have one plan approval at a time, and only one Plan Approval 63-00922D existed when the Department terminated it per the August Letter. The Department cannot put a new plan approval in place without following all regulatory processes for the issuance of a new plan approval, regardless of whether the new plan approval is identical to a previous plan approval. As a result, Plan Approval 63-00922D has been terminated, the Department's attempt to instate another plan approval is without effect, and Robinson Power has no plan approval for its proposed power plant.
- G. The Department itself explains the issue best in a memorandum it filed with the Board in 2018 in the context of another Clean Air Council major emissions source plan approval appeal: "The 2017 Plan Approval replaced the 2016 Plan Approval as the one final plan approval covering [the permittee's] project at its [] facility. There can only be one final applicable plan approval for any one project. [The permittee's] operators and the Department's inspectors cannot be required to examine two different plan approvals issued in different years to determine what [the permittee's] obligations are. **A revised,**

amended, or modified plan approval always supersedes and replaces the previous one covering the same project. The reason for changing, modifying, or amending a plan approval is to create a new different plan approval to replace the original one. ... **The Department and [the permittee] stopped using the 2016 Plan Approval because it ceased to exist legally** on March 28, 2017. It is simply a matter of common sense that anytime the Department issues a revised, amended, or modified plan approval or permit it must replace the old one.” See Department’s Memorandum of Law in Reply to Clean Air Council’s Response to the Department’s Motion to Dismiss as Moot, Docket No. 2016-073-L, available at <https://ehb.courtapps.com/efile/documentViewer.php?documentID=41023>.

- H. That is precisely what occurred here. The 2020 Plan Approval “ceased to exist legally” upon the Department’s issuance of the 2021 Plan Approval.
- I. Indeed, when a company wants a plan approval and has none—the precise situation of Robinson Power here—it must apply for a plan approval and the Department must follow the normal procedures spelled out in Title 25, Chapter 127 of the Pennsylvania Code. Because the Department did not even attempt to follow those procedures here, its attempt to revive the 2020 Plan Approval by letter is ineffective, and its final determination to allow Robinson Power to proceed in the absence of any plan approval is unlawful and reversible.
- J. To the extent the 2020 Plan Approval is in any manner considered revived or re-issued, Clean Air Council objects not only to that revival, but to the substantive provisions of the 2020 Plan Approval, which are now long outdated and were erroneous at the time of issuance as well.

Objections

- K. The August Letter authorizes construction and temporary operation of a major emissions source without the required plan approval implementing the provisions of the Nonattainment New Source Review and Prevention of Significant Deterioration programs, in violation of the Air Pollution Control Act and the Clean Air Act.
- L. The August Letter authorizes construction and temporary operation of a major emissions source without having followed any of the required procedures of Title 25, Chapter 127 of the Pennsylvania Code, including without having analyzed the effects of its new action, including BAT, LAER, and BACT analyses, and without having solicited comment or feedback from the public, the U.S. Environmental Protection Agency, or any other entity.
- M. The August Letter authorizes construction and temporary operation of a major emissions source in violation of the 2006 Memorandum of Understanding amongst the Pennsylvania Department of Environmental Protection; the Region 3 Air Protection Division of the U.S. Environmental Protection Agency; and the Federal Land Managers of the Shenandoah National Park, National Service; James River Face Wilderness, U.S. Forest Service; Dolly Sods Wilderness and Otter Creek Wilderness, U.S. Forest Service; and the Brigantine Wilderness, U.S. Fish and Wildlife Service, (“Memorandum of

Understanding”), attached as Exhibit E hereto. Additionally, it does not appear as though the Department engaged with the Federal Land Managers nor Region 3 of the Environmental Protection Agency during the 2017 plan approval process and the 2018 modification, as required by the Memorandum of Understanding.

- N. Because construction never actually commenced on Plan Approval 63-00922D, the Department erred in attempting to revive the superseded version of Plan Approval 63-00922D, when the authorization should have lapsed by its own terms in October 2020.
- O. In attempting to revive the 2020 Plan Approval, the Department undid corrections it had made in the 2021 Plan Approval to errors in the 2020 Plan Approval.
- P. The 2020 Plan Approval is an extension of a plan approval issued in 2017, and based on stale control technology analysis more than four years old, resulting in the approval of control technology that does not comply with the requirements of Best Available Control Technology, Lowest Achievable Emission Rate, and Best Available Technology.
- Q. The 2020 Plan Approval contains an erroneous ammonia emissions limit.
- R. The 2020 Plan Approval contains erroneous combustion turbine and facility-wide emissions limits for carbon monoxide, particulate matter, and volatile organic compounds.
- S. The 2020 Plan Approval does not contain adequate work practice standards for the auxiliary boiler.
- T. The Department failed to properly verify the information it used in conducting its BACT and LAER analyses and otherwise erred in conducting its BACT and LAER analyses.
- U. The 2020 Plan Approval does not contain operational requirements sufficient to make the combustion turbine emissions limits specified in the Plan Approval practicably enforceable.
- V. The 2020 Plan Approval does not contain provisions sufficient to ensure the proper operation of the oxidation catalysts.
- W. The Department violated the environmental rights of Appellant and other members of the public, as established in Article I, Section 27 of the Pennsylvania Constitution, by issuing the Plan Approval despite the immense levels of deleterious pollution the construction and operation of the facility would generate in an area already heavily burdened by poor air quality.
- X. The Department violated its trustee duties as established in Article I, Section 27 of the Pennsylvania Constitution by permitting Robinson Power Company, LLC to significantly degrade the natural environment by approving the plan approval for this facility.
- Y. The Plan Approval is otherwise unsupported by fact, contrary to law, arbitrary, capricious, unreasonable, and/or an abuse of discretion.

Z. Appellant reserves the right to amend this Notice of Appeal to include additional objections that may arise during further investigations and discovery in this matter.

4. Specify any related appeal(s) now pending before the Board. If you are aware of any such appeal(s) provide that information.

The appeal docketed at No. 2021-068-R is closely related to this appeal.

SIGNATURE PAGE

By filing this Notice of Appeal with the Environmental Hearing Board, I hereby certify that the information submitted is true and correct to the best of my information and belief. Additionally, I certify that a copy of this Notice of Appeal was served upon each of the individuals indicated in the Certificate of Service on the date below.

Dated: September 14, 2021

/s/ Alexander G. Bomstein

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CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Notice of Appeal was filed with the Pennsylvania Environmental Hearing Board and was served on the following on the date listed below:

Electronic Service via the Board

Department of Environmental Protection
Office of Chief Counsel
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Overnight Mail

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Burgettstown, PA 15021-2120

Date: September 14, 2021

s/ Alex Bomstein
Alexander G. Bomstein, Esq.