

**NOTICE OF APPEAL – TEMPORARY AUTHORIZATION**

Special Appeal Form BES 2302 (3/23/23)

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**Directions:** Any person wishing to dispute the Department of Toxic Substances Control's decision to grant or deny a temporary authorization may appeal the Department's written decision by completing this form and seeking review of the decision by the Board of Environmental Safety in accordance with 22 CCR 66271.72.

**Notice is given that the party below hereby appeals the decision by the Department to grant or deny a temporary authorization, as authorized by Health and Safety Code section 25125.2.**

Appellant Name: Clean Air Coalition of North Whittier and Avocado Heights

Email: ameszaros@earthjustice.org

Address: 707 Wilshire Blvd., Suite 4300, Los Angeles, CA 90017

Represented by Legal Counsel (if any): Angela Johnson Meszaros and Byron Chan, Earthjustice

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DTSC Case Number of Permit Decision Being Appealed (if known): Unknown

Date of Mailed Notice of Permit Decision Being Appealed: July 22, 2022

Facility Name and Address: Quemetco/Ecobat, 720 S. 7<sup>th</sup> Avenue, City of Industry, CA 91746

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**IMPORTANT NOTE – PLEASE READ CAREFULLY**

This notice must be filed with the Board of Environmental Safety at 1001 I Street, 25<sup>th</sup> Floor, P.O. Box 806, Sacramento, CA, 95814-0806 or via email to [appeals@bes.dtsc.ca.gov](mailto:appeals@bes.dtsc.ca.gov) or using the website portal at [bes.dtsc.ca.gov](http://bes.dtsc.ca.gov) **no later than 30 days** after the date of the mailed notice of the decision by DTSC to grant the class 2 modification and/or temporary authorization being appealed.

**ONLY use this form if you are appealing the decision to grant or deny a temporary authorization. To appeal any other permit decision, please use Standard Appeal Form BES 2301.**

**EXPLANATION (REQUIRED):** In the space provided below, please explain why the Board should grant this appeal (you may attach up to two (2) additional pages).

Please see attached (Standing Order 23-01(5)(c) limits briefs to 12,000 words or 25 pages, for a ratio of 480 words per page. With a three-page limit, the maximum word count is 1,440. The word count for the attached appeal is 1,438 and meets this requirement.)

Clean Air Coalition of North Whittier and Avocado Heights (CAC) appeals the Department of Toxic Substances Control Permitting Division's (Permitting) June 22, 2022, approval of Quemetco's (now Ecobat) Temporary Authorization Request to add miscellaneous waste handling equipment to its facility (2022 TAR).<sup>1</sup> Permitting's approval of the 2022 TAR is based upon a clearly erroneous conclusion of law and, as a result, the Board of Environmental Safety (BES) must grant this appeal and enter an order vacating and setting aside the Department of Toxic Substances Control's (DTSC) permitting decision.

**CAC FILES THIS APPEAL UNDER PROTEST because:** (1) 22 CCR 66271.72 contains provisions that were unlawfully adopted, depriving CAC of its right to appeal Permitting's failure to comply with the California Environmental Quality Act; and (2) the BES failed to provide a timely and complete administrative record (AR) for this action and instead required CAC to file this appeal without the AR and set a July 28, 2023, deadline for a Motion to Augment the Record.<sup>2</sup>

**PROCEDURAL BACKGROUND:** At issue here is *one* set of waste handling equipment, *three* permitting decisions, and *three* appeals.

Permitting approved Quemetco's "temporary authorization" request in April 2021 (2021 TAR) (AR 17) to allow operation of the *same* waste handling equipment (waste equipment) that is the subject of this appeal. CAC appealed Permitting's decision.<sup>3</sup> In January 2022, after briefing from CAC<sup>4</sup>, Quemetco, Permitting, and others, DTSC's Permit Appeals Officer issued a Final Order on Appeal (Final Order) (AR 28) finding that "[a] temporary authorization should not replace a timely permit modification request." (AR 28 at 8.) The Permit Appeals Officer vacated Permitting's improper approval of the 2021 TAR. (AR 28 at 11.)

While the appeal of the 2021 TAR was pending, it appears that Quemetco unlawfully installed and operated *the exact* waste equipment at issue here and submitted a Class 2 Permit Modification request (Class 2 Request) to continue its operation<sup>5</sup>. Permitting approved Quemetco's Class 2 Request in February 2022.<sup>6</sup> CAC appealed Permitting's approval.<sup>7</sup> In June 2022, Quemetco announced its withdrawal of the Class 2 Request, leaving it without a permit for the waste equipment.<sup>8</sup>

In June 2022, Quemetco again requested a "temporary authorization" for the now apparently installed but unpermitted waste equipment at issue here.<sup>9</sup> Permitting approved the request in July 2022 (2022 TAR Approval). (AR 44.) CAC appealed.<sup>10</sup>

**ARGUMENT:** Temporary authorization allows a permittee to postpone the Class 2 or

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<sup>1</sup> See Cal. Code Regs. tit. 22 §§ 66271.71, 66271.72.

<sup>2</sup> Standard practice is to complete the administrative record prior to briefing.

<sup>3</sup> CAC, Appeal of Approval of Temporary Authorization Request for Quemetco (May 27, 2021).

<sup>4</sup> Petitioner's Opening Brief in Support of Appeal of Quemetco Inc's Temporary Permit Authorization, PAT-FY21/22-001 (Oct. 14, 2021) (2021 CAC Opening Brief).

<sup>5</sup> Quemetco, Additional Information for Pending Class 2 Permit Modification Request (Sept. 8, 2021).

<sup>6</sup> DTSC, Notice of Class 2 Permit Modification Approval (Feb. 23, 2022).

<sup>7</sup> CAC, Appeal of Feb. 23, 2022, Auger Centrifuge Permit Mod. Request for Quemetco (Mar. 28, 2022).

<sup>8</sup> Letter from M. Williamson, Manatt, to J. Rizzo, BES (June 29, 2022).

<sup>9</sup> Quemetco, Temporary Authorization Request (June 9, 2022) (2022 TAR).

<sup>10</sup> CAC, Appeal of July 22, 2022, Approval of Temporary Authorization Request for Quemetco (Aug. 4, 2022).

Class 3 permit modification process in limited circumstances “to conduct activities necessary to respond promptly to changing conditions.”<sup>11</sup> In January 2022, DTSC’s Permit Appeals Officer decided the *exact* question at issue here, finding that use of the temporary authorization process to permit installation and operation of the *exact* waste equipment at issue here was improper as a matter of law.

The Final Order examined the attempt by Permitting and Quemetco to erase a key requirement of the regulation for temporary authorizations: the obligation to provide a defensible explanation for why DTSC should make the extraordinary decision to bypass a transparent public process on a permitting determination. The Permit Appeals Officer observed:

Considering that the Facility has been placing hazardous waste containing free liquids on the floor of the containment building since at least 2001, Quemetco has not explained why a temporary authorization is necessary for the addition of the two new miscellaneous units. *A temporary authorization should not replace a timely permit modification request.* (AR 28 at 8.)

Nonetheless, Permitting provided the same finding to approve the 2022 TAR that the Permit Appeals Officer rejected in the Final Order. Now, as then, Permitting’s approval is “clearly erroneous” because it fails to provide a rational explanation to support a “finding” of necessity to circumvent the Class 2 permit modification process. As the Appeals Officer found when voiding the 2021 TAR:

It is clearly erroneous for DTSC to grant Quemetco’s temporary authorization request, as DTSC did so without the required explanation of why the temporary authorization was necessary and furthermore it is clearly erroneous for DTSC to find that installation of the proposed units was necessary before action is likely to be taken on a modification request, without any basis. (AR 28 at 8.)

Neither the law nor the circumstances have changed between the issuance of the Final Order and today. As a result, Permitting is not free simply to ignore the Final Order. Here, just as with Permitting’s previous arbitrary and capricious decision, there is no defensible explanation for permitting this equipment “before action is likely to be taken on a modification request.” (AR 44 at 2–3.) Rather, Permitting simply asserts that the approval is “necessary” because it “allow[s] DTSC to continue its mission.” Continuing DTSC’s mission is not a defensible explanation for a temporary authorization.

If Permitting or Quemetco disagreed with the Permit Appeals Officer’s decision that “it is clearly erroneous for DTSC to find that installation of the proposed units was necessary before action is likely to be taken on a modification request,” the appropriate next step was to challenge that decision in court. It is, however, completely inappropriate for Permitting and Quemetco simply to ignore the Final Order and attempt to undertake *the exact* action vacated by the Permit Appeals Officer.

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<sup>11</sup> Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37,912-01, 37,919 (Sept. 28, 1988) (revising 40 CFR. § 270.42). *See, also*, 2021 CAC Opening Brief, *supra* note 4, at 6-7, for discussion of the requirements for a Temporary Authorization which cannot be included here due to the word limit imposed by the BES regulation.

Further, to proceed under provisions for a “temporary authorization,” Permitting and Quemetco must establish a need to act prior to completing the full Class 2 permit modification process.<sup>12</sup> That did not happen here. To the contrary, when Permitting approved the 2022 TAR it *had already taken action on a Class 2 permit modification request for this exact waste equipment*. As a result, the *only* reason Quemetco was seeking this temporary authorization was because Quemetco opted to “withdraw” its Class 2 Permit Modification Request on which Permitting had already taken action. Although Permitting’s decision was stayed during appeal, the fact that *a permitting decision had been made* is undeniable. As a result, there is no way that Permitting and Quemetco can support an argument that this temporary authorization was necessary to allow for a timely response to changes in circumstances, corrective action, environmental benefit, or any other reason.

Rather, it is clear that Permitting and Quemetco were trying to circumvent public engagement and sidestep the appeals process. Indeed, neither Permitting nor Quemetco attempt to hide that avoidance was the *only* reason this temporary authorization was requested and approved. For example, Permitting stated in its approval letter that the temporary authorization allows Quemetco to operate the equipment at issue here “*without the delay* associated with a permit modification request, public comment period, and final decision.” (AR 44 at 3.) And Quemetco’s application states that “long delays in the processing of [CAC’s] appeals” have prevented Quemetco, “in large part,” from operating the unpermitted equipment it installed.<sup>13</sup>

**CONCLUSION:** A Temporary Authorization serves a particular function within the structure of permit modifications—to allow a “rapid response” so that “activities necessary to respond promptly to changing conditions” can be undertaken. Just as the Appeals Officer observed in January 2022, this temporary authorization was not issued because of a need for a “rapid response;” rather this temporary authorization was issued in response to the desire to circumvent the clearly established permit modification and appeals process.

CAC calls upon the BES to support, rather than undermine, transparent permitting decisions by directing Permitting to deny Quemetco’s June 2022 request for a temporary authorization to operate the waste equipment at issue here.

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<sup>12</sup> See 2021 CAC Opening Brief, *supra* note 4, at 3–9, for discussion of the requirements for a Temporary Authorization.

<sup>13</sup> 2022 TAR, *supra* note 9, at 8.

1 **PROOF OF SERVICE**

2 I, Lupe Ruelas, declare:

3 I am a resident of the State of California, and I am over the age of 18 years and not a party to  
4 the within entitled action. My business address is 707 Wilshire Boulevard, Suite 4300, Los Angeles,  
5 CA 90017.

6 On June 30, 2023, I served the following document(s):

7 **NOTICE OF APPEAL – TEMPORARY AUTHORIZATION**

8 **(X) VIA E-MAIL.** I caused the document(s) to be sent to the person(s) at the e-mail  
9 address(es) listed below.

10 Parisa Khosraviani, DTSC  
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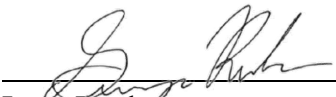
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Carl.Raycroft@ecobat.com

20 Matt Williamson, Manatt  
21 MWilliamson@manatt.com

David McGrath, Manatt  
DLMcGrath@manatt.com

22  
23 I declare under penalty of perjury under the laws of the State of California that the foregoing  
24 is true and correct.

25 Executed on June 30, 2023, in Los Angeles, California.

26  
27   
28 Lupe Ruelas

1 **CORRECTED PROOF OF SERVICE**

2 I, Lupe Ruelas, declare:

3 I am a resident of the State of California, and I am over the age of 18 years and not a party to  
4 the within entitled action. My business address is 707 Wilshire Boulevard, Suite 4300, Los Angeles,  
5 CA 90017.

6 On June 30, 2023, I served the following document(s):

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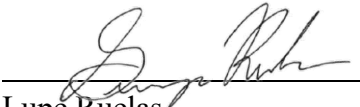
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22  
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24 is true and correct.

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26  
27   
28 Lupe Ruelas