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Secretary for  
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## Department of Toxic Substances Control

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**Gavin Newsom**  
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July 28, 2023

Sheena Brooks  
Board Clerk  
Board of Environmental Safety  
Department of Toxic Substances Control  
California Environmental Protection Agency  
P.O. Box 806  
Sacramento, CA 95812-0806  
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RE: DTSC PERMITTING DIVISION'S BRIEF RESPONSE STATEMENT  
DOCKET NO. FY22/23-02  
ECOBAT RESOURCES CALIFORNIA INC. (EPA ID NO. CAD066233966)  
CITY OF INDUSTRY, CA  
PERMIT NUMBER 05-GLN-08

Madam Clerk:

The Department of Toxic Substances Control, Permitting Division, hereby electronically submits the enclosed brief statement in response to Earthjustice's Appeal (Docket No. FY22/23-02) as well as proof of service. As requested by the Board in its July 5, 2023, letter to Sam Coe, the brief statement is a similar length to the three-page Appeal submitted by Earthjustice.

Sincerely,

William Heung  
Supervising Hazardous Substances Engineer / Unit Chief  
Permitting Division  
Hazardous Waste Management Program  
DTSC

Enclosure

**INTRODUCTION:** The Department of Toxic Substances Control (DTSC) Permitting Division submits the following brief statement responding to Earthjustice's notice of appeal filed to challenge DTSC's July 22, 2022, decision to issue a Temporary Authorization to Ecobat Resources California, Inc. (formerly known as Quemetco, Inc.).

**FACTS AND PROCEDURAL HISTORY:** Ecobat Resources California, Inc. (Ecobat) operates a facility to reclaim lead from spent lead acid batteries and other lead-bearing materials. On February 11, 2021, Ecobat submitted a temporary authorization request to install two hazardous waste management units - Compression Auger and Centrifuge (Units) - for removal of liquids from the hazardous waste prior to it being placed on the floor of the Containment Building<sup>1</sup>, benefiting both human health and the environment. (AR 4 at 1.) On April 19, 2021, DTSC approved a 180-day Temporary Authorization (TA 1) after determining that the Units would improve protection of human health and the environment. (AR 24.)

TA 1 was vacated on January 26, 2022, by DTSC's Permit Appeals Officer, who issued an Order (TA 1 Order) stating that DTSC failed to explicitly identify why TA 1 was necessary to achieve an objective before action is likely to be taken on a modification request. (AR 28 at 8-9.) All other grounds challenging TA 1 were rejected in the TA 1 Order. (*Id.* at 11.)

On February 23, 2022, DTSC approved a Class 2 Permit Modification for the permanent operation of the two Units. (AR 44 at 1.) That approval decision was appealed (Class 2 Permit Modification appeal) and DTSC's Board of Environmental Safety (Board) accepted the appeal. (*Ibid.*) Ecobat withdrew the Class 2 Request on June 24, 2022, and notified the Board of the withdrawal on June 29, 2022. (*Ibid.*) At the Board's July 12, 2022, public meeting, the Board Chair stated that the appeal had become moot. (*Ibid.*) On June 8, 2022, Ecobat submitted the second Temporary Authorization Request for the installation and operation of the same Units with a revised explanation of why it was necessary. The revised explanation specifically addressed the TA 1 Order. (AR 30 at 7-8.) On July 22, 2022, DTSC approved a 180-day Temporary Authorization (TA 2). (AR 44.)

In TA 2, DTSC found that the requested activities complied with DTSC's regulations, and that TA 2 would facilitate the protection of human health and the environment before action is likely to be taken on a modification request. (AR 44 at 2.) DTSC explicitly included an explanation of why the Units should be authorized before action was likely to be taken on a modification request. (AR 44 at 2-3.)

On June 30, 2023, Appellant filed a notice of appeal<sup>2</sup> with the Board challenging TA 2. TA 2 is the sole subject of this appeal.

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<sup>1</sup> The Containment Building is another Unit at the facility.

<sup>2</sup> DTSC objects to the Appellant's citation to its October 14, 2021, Opening Brief because it is not in the administrative record as required by the Board's Standing Order 23-02, paragraph (2).

**STANDARD OF REVIEW:** Under 22 CCR 66271.72(c)(1), Clean Air Coalition of North Whittier and Avocado Heights (Appellant) bears the burden of establishing that the permit decision is based upon “a finding of fact or conclusion of law which is clearly erroneous.” According to the U.S. Supreme Court, “[a] finding is ‘clearly erroneous’ when...the reviewing court is left with the definite and firm conviction that a mistake has been committed.” (*U.S. v. U.S. Gypsum Co.*, (1948) 333 U.S. 364, 395.)

**ISSUE PRESENTED:** At issue here is whether DTSC complied with 22 CCR 66270.42(e)(3)(C) in granting TA 2. That regulation explains that DTSC may grant a temporary authorization if necessary to achieve one of five objectives “before action is likely to be taken on a modification request.” One of the listed objectives is “to facilitate other changes to protect human health and the environment.” (*Id.*, at subd. (e)(3)(C)(5).)

## **ARGUMENT**

### **1. DTSC’S Temporary Authorization Decision Was Reasonable and Not Clearly Erroneous**

**(a) DTSC’s Finding that the Temporary Authorization Was Necessary to Protect Human Health and the Environment is Supported by Evidence:** DTSC found that the Units proposed in TA 2 were “necessary to facilitate other changes to protect human health and the environment” because their operation would improve hazardous waste management by removing free liquids from the hazardous waste stored on the Containment Building floor. (AR 44 at 2.) Without this change, free liquids can mobilize hazardous waste and increase the risk of its migration into the groundwater beneath the facility if not properly contained. (*Ibid.*) Removal of these free liquids results in a “significant environmental improvement” and a “clear benefit to human health and the environment.” (*Ibid.*) This improvement in the Containment Building operations thus minimizes the risk of a hazardous waste release, which is in furtherance of DTSC’s mission to protect California’s people, communities, and environment from toxic substances. (*Ibid.*) Appellant’s statement does not dispute these significant environmental benefits, much less demonstrate that DTSC’s finding was clearly erroneous.

**(b) DTSC’s Finding that the Temporary Authorization Was Necessary Before the Modification Took Place Was Not Clearly Erroneous:** DTSC found the operation of the TA 2 Units would immediately minimize the risk that hazardous free liquids would be released to groundwater. (AR 44 at 2.) With a Class 2 permit modification expected to take 6-12 months, the immediate and temporary operation of the Units was necessary to protect human health and the environment. (AR 44 at 3.) It was entirely reasonable for DTSC to not delay removing that risk to the environment and public health, while simultaneously requiring Ecobat to follow the public process for a permanent authorization under a Class 2 permit modification. This is not “circumventing” the permit modification process as claimed by Appellant; rather, it exemplifies the

temporary authorization regulations working as designed.<sup>3</sup> DTSC's decision to realize an immediate environmental benefit during an expected 6 to 12-month timeframe was appropriate and not clearly erroneous.

The Appellant attempts to imply that a rapid response<sup>4</sup> to the free liquid danger was not justified because free liquids have been placed on the Containment Building floor since 2001. (AR 28 at 8.) DTSC disagrees with this flawed premise, as the existing environmental risk will remain until the free liquids are removed or minimized (AR 30 at 8.) Allowing the danger to remain for 6 to 12 more months, despite the availability of a new solution, would be inconsistent with DTSC's mission. (AR at 2-3.) Furthermore, the Appellant has not demonstrated that DTSC's finding was clearly erroneous.

**2. DTSC's Decision Complied with the DTSC Permit Appeals Officer's Order:** DTSC fully complied with the TA 1 Order. The TA 1 Order succinctly stated, "this *explanation* of why a temporary authorization is needed, *is what is lacking in* both the temporary authorization request and *DTSC's decision*." (AR 28 at 8 [emphasis added].) The Permit Appeals Officer emphasized needing DTSC to explain why authorization is necessary "**before action is likely to be taken on a modification request**: (emphasis added.)." (*Ibid.*) TA 2 summarized the TA 1 Order (AR 44 at 2) and explained the importance of the equipment (*id.* at 2-3) and the rapid response needed (*id.* at 2), making DTSC's decision informed by and fully compliant with the TA 1 Order.

**3. DTSC's Temporary Authorization Will Immediately Be Moot After the Stay Ends:** In addition to DTSC's actions being reasonable and not clearly erroneous, DTSC believes this appeal is moot because TA 2 will expire by its own terms upon the stay being lifted. (AR 44.) When DTSC issued TA 2, the authorization was intended to run immediately and constantly for 180 days until its January 18, 2023, expiration date. (*Id.* at 3.) DTSC believes that stays issued by the Board during the pendency of an appeal suspend enforcement of the challenged conditions without modifying the conditions, including expiration dates. (See 9 Witkin, Cal. Proc. 6th (2023) Appeal, § 240 ["A stay, obtained by any method, prevents any further proceedings to enforce the judgment or order."].) Likewise, the DTSC regulations in place when the Board issued the stay did not indicate that expiration dates in challenged conditions are tolled or otherwise modified. Therefore, TA 2 will be moot after the stay concludes.

**CONCLUSION:** For the foregoing reasons, the DTSC Permitting Division respectfully asks the Board to deny Appellant's appeal.

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<sup>3</sup> U.S EPA concluded Temporary Authorizations are useful to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process. (Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37912, 37919 (Sept. 28, 1988).)

<sup>4</sup> While the phrase "rapid response" is not in DTSC's regulations, the Permit Appeals Officer indicated the phrase represents a response 'before action is likely to be taken on a modification request' (AR 28 at 8), which includes changes "to improve the management of hazardous wastes." (Permit Modifications for Hazardous Waste Management Facilities, *supra*, at p. 37920.)