

Ecobat Resources California, Inc. (Permit No. 05-GLN-08)
Response to Clean Air Coalition Notice of Appeal

Clean Air Coalition (“CAC”) has appealed DTSC’s July 22, 2022 temporary authorization (“TA”) allowing Ecobat to operate dewatering equipment at its recycling facility in the City of Industry (the “Dewatering Project”). The Dewatering Project is an environmental improvement project that utilizes two pieces of equipment to capture and treat lead-bearing liquids early in the recycling process.¹ This process reduces the risk of releasing hazardous materials into the groundwater, addresses DTSC’s concerns regarding Ecobat’s batch house leak detection system, and reduces Ecobat’s emissions of sulfur dioxide.

In its appeal, CAC does not even attempt to dispute that the Dewatering Project is protective of human health and the environment. Nor could they—those benefits are clear. Instead, CAC attacks the form of the TA, rather than the substance. At issue in CAC’s appeal is whether DTSC’s approval of the TA included an adequate explanation supporting its finding that “the changes [authorized in the TA] will facilitate the protection of human health and the environment before action is likely to be taken on a [full permit] modification request.”²

The Board should deny CAC’s appeal. Both Ecobat (in its request for a TA) and DTSC (in its approval letter) explained in detail that the TA is necessary pending resolution of Ecobat’s request for a full permit modification, which is currently under review by DTSC. Even if DTSC were to grant that request tomorrow, the modification would not take effect until the Board resolves any appeals—a process which will take a minimum of six months under the Board’s recently adopted rules. A temporary authorization therefore is the only way to realize the environmental benefits of the Dewatering Project while Ecobat’s permit modification proceeds through this lengthy regulatory process.

Background

In April 2021, DTSC’s Permitting Division issued Ecobat a temporary authorization to operate the dewatering equipment (“2021 TA”). CAC appealed that TA on May 27, 2021.³ In January 2022, the DTSC Permit Appeals Officer vacated the 2021 TA on narrow grounds.

In February 2022, DTSC approved Ecobat’s Class 2 permit modification request for the Dewatering Project, which CAC appealed in March 2022. This prompted the Board to advise that the modification was therefore of “no effect” and would be stayed indefinitely pending

¹ See Ecobat Letter to Board re: Dewatering Project (November 17, 2022); *see also* AR 44.

² See AR 44; *see also* 22 CCR 66270.42(e)(3)(c).

³ While not relevant to this appeal, CAC alleges that Ecobat “unlawfully installed and operated” the dewatering equipment following issuance of the 2021 TA. This is not true. Ecobat installed the equipment with approval from DTSC, and operated the equipment as allowed by the 2021 TA until it was notified that the 2021 TA had been stayed due to the CAC Appeal. At all times, Ecobat complied with applicable regulations and direction from DTSC permitting staff.

completion of the Board's rulemaking process and resolution of CAC's appeal. In June 2022, Ecobat voluntarily withdrew its permit modification request to resubmit a request that would directly address the various points raised in CAC's prior appeals to satisfy any potential concerns.

On June 9, 2022, Ecobat filed a request for temporary authorization to begin operating the Dewatering Project that "explicitly address[ed] the issues upon which the Appeals Officer granted the previous appeal."⁴ In a letter dated July 22, 2022, DTSC issued a TA (the "2022 TA"). CAC appealed that TA in August 2022, and the Board stayed the TA while the Board developed and finalized its permit appeals regulations, which are now in place to govern this appeal. The approval, and by extension the environmental benefits of the Dewatering Project, have now been stayed for almost *one full year*.

Argument

CAC bears the substantial burden of showing that DTSC's approval was based upon a "clearly erroneous conclusion of law." CAC has failed to meet its burden.

CAC first argues that the DTSC Permit Appeals Officer ("PAO") decided the "*exact*" question at issue here in his January 2022 order, and that the Board should grant CAC's appeal on the same grounds because "the circumstances have [not] changed."⁵ These plain mischaracterizations of the record are regrettable. As CAC well knows, the record on this appeal is materially different. And it requires a different outcome.

The PAO's holding was narrow. He held that the California Code of Regulations "requires DTSC to find that 'temporary authorization is necessary to achieve [environmental or safety improvements] before action is likely to be taken on a modification request,'" that DTSC failed to "explicitly identify this requirement in its decision letter," and that a supporting "explanation. . . [was] lacking in both the temporary authorization request and DTSC's decision."⁶ Nowhere in the Final Order does the PAO broadly conclude that the Dewatering Project is ineligible for temporary authorization as a matter of law. To the contrary, the PAO merely held that DTSC failed to include the type of "explicit[]" discussion of necessity required by the Regulations.⁷

The 2022 TA, now before this Board, expressly cures the deficiency the PAO found in the 2021 TA. When Ecobat submitted its new TA request in 2022, Ecobat included a lengthy explanation of why this temporary authorization is necessary pending an effective permit modification.⁸ And in approving this temporary authorization request, DTSC explicitly acknowledged the PAO's order and included a multi-paragraph discussion of necessity, ultimately concluding: "To

⁴ 2022 TA Request at 2 (June 9, 2022); *see also id.* at Attachment 6.

⁵ Appeal at 2.

⁶ AR 28 at 8.

⁷ *Id.*

⁸ *See* June 9, 2022 TA Request at 6-9.

address this specific issue [referring to the deficiency the PAO identified in his order], DTSC concludes that . . . [t]he addition of [the dewatering equipment] will allow [Ecobat] to better and more safely manage its wastes without the delay associated with a permit modification request, public comment period, and final decision, which could take between 6 months and a year from start to finish.”⁹

CAC next argues that a temporary authorization is unnecessary because DTSC approved Ecobat’s *initial* Class 2 permit modification for the Dewatering Projection. But CAC’s focus on that permit modification request is a red herring. That permit modification is not at issue here.¹⁰ As the Board will recall, CAC appealed that permit modification, and the Board advised that the permit modification “never took effect” and would be stayed indefinitely pending the Board’s adoption of rules for the appeals process.¹¹ Ecobat opted to respond constructively, withdrawing its challenged permit modification request and filing a new request that expressly addresses the concerns CAC raised in its appeal of the initial permit modification. This type of responsiveness to public comments should be encouraged—CAC’s attempt to use it against Ecobat on this appeal is disappointing.

CAC’s accusation that Ecobat was attempting to circumvent public engagement is objectively false. Ecobat’s withdrawal allowed for *more* public engagement—not less—because it subjected the Dewatering Project to an *additional* public comment period and an *additional* public meeting, both of which have now taken place. In total, the Dewatering Project has now been subject to two formal 60-day public comment periods; two public meetings; four rounds of public notice soliciting input on the project; and three permit appeals filed by CAC. Ecobat even has invited CAC to meet in-person to discuss their concerns—an invitation to which CAC never responded.

Conclusion

The Board should deny CAC’s appeal.¹² Ecobat has been seeking approval of this environmental improvement project for nearly 2.5 years. CAC’s continued opposition to this environmental improvement project is not advocacy on behalf of the community—it is obstruction, at the community’s expense. It is time for the Board to put an end to this appeal, lift the resulting stay, and allow Californians to realize the environmental benefits from the Dewatering Project.

⁹ AR 44 at 2-3.

¹⁰ While not legally relevant here, the analysis and outcome of this appeal would be the same even if Ecobat had continued pursuing its initial permit modification request. The initial permit modification would have remained stayed while the Board proceeded with its rulemaking process, and then the permit modification would have been further stayed for a minimum of six months pending appeal pursuant to the Board’s rules governing appeals of Class 2 permit modifications. Thus, even in that hypothetical scenario, a temporary authorization would have been necessary to allow for operation pending resolution of that appeal, and CAC’s appeal of this TA would likewise be denied on that basis.

¹¹ See June 16, 2022 Letter from Board to Ecobat “re: Receipt of CAC Appeal....”.

¹² To the extent that the Board finds any deficiencies in DTSC’s approval, Ecobat requests that the Board retain jurisdiction and order DTSC to address any such deficiencies per 22 CCR 66271.72(d)(2).

Statement of Compliance with Word Limitation

This response (including footnotes) complies with the word limit of 1,440 derived from Standing Order 23-01(5)(c) (as calculated by CAC in their Notice of Appeal) because it contains 1,438 words.

Respectfully Submitted,

s/ Matt Williamson

Matt Williamson

1 **PROOF OF SERVICE**

2 I, Laiza Garcete, declare:

3 I am resident of the State of California, and I am over the age of eighteen years and not a
4 party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 695 Town
5 Center Drive, 14th Floor, Costa Mesa, California 92626.

6 On July 28, 2023, I served the following document(s) :

7 **RESPONSE TO CLEAN AIR COALITION NOTICE OF APPEAL**

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

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25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct.

27 Executed on July 28, 2023 at Costa Mesa, California.

28 

Laiza Garcete