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BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

CENTER FOR ENVIRONMENTAL LAW  
& POLICY,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and  
CITIES OF RICHLAND, KENNEWICK,  
PASCO, and WEST RICHLAND;

Respondents.

PCHB NO. 02-216

ORDER GRANTING AND  
DENYING SUMMARY JUDGMENT

On March 17, 2003, the Center for Environmental Law & Policy ("CELP") filed a Motion for Summary Judgment with the Pollution Control Hearings Board ("Board"). The motion asked the Board to rule in CELP's favor on issue number six from the joint issues list prepared by the parties. Ecology and the cities of Richland, Kennewick, Pasco, and West Richland ("Quad Cities") filed a Joint Motion for Summary Judgment on the same day. Their motion asks the Board to grant summary judgment in their favor on issues 3, 4, 10, and whether the Board should defer to the Benton County Superior Court decision in *City of Richland v. Ecology*, No. 00-2-01772-1.

Attorneys, Shirley Nixon and Karen D. Allston, represent CELP. Attorney, Thomas M. Pors, represents the Quad Cities. Barbara A. Markham and Sarah Bendersky, Assistant Attorneys General, represent Ecology.

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1           The Board, comprised of Robert V. Jensen, presiding; Kaleen Cottingham and William  
2 H. Lynch, heard oral argument and considered the pleadings of the parties. These pleadings  
3 were:

- 4           1. Appellant CELP's Motion for Summary Judgment, including Memorandum in Support of  
5           Motion for Summary Judgment, and Declaration of Shirley Nixon in Support of Motion  
6           for Summary Judgment with Attachments A-P;
- 7           2. Respondents' Joint Motion for Partial Summary Judgment, including: Memorandum in  
8           Support of Respondents' Joint Motion for Summary Judgment, Declaration of Robert F.  
9           Barwin, Declaration of Robert Wubbena in Support of Respondents' Joint Motion for  
10          Summary Judgment with Exhibits QC-7 and QC-8; Declaration of Robert Alberts in  
11          Support of Respondents' Motion for Summary Judgment with Exhibit QC-1; and  
12          Declaration of Thomas M. Pors with Exhibits QC-2 through QC-6;
- 13          3. Proposed Order for Partial Summary Judgment submitted by Respondents;
- 14          4. Appellant's Response to Respondents' Joint Motion for Partial Summary Judgment,  
15          including: Declaration of Shirley Nixon in Support of Appellant's Response to  
16          Respondents' Joint Motion for Partial Summary Judgment with Attachments Q-Y; and  
17          Declarations of: Bill Barmettler, Janine Blaeloch, Carol Coker, Tena Doan, Barry  
18          Goldstein, Victor Magistrale, Jill Sheldon, Rachel Paschal Osborn, Toby Thaler, and  
19          Timothy Walsh;
- 20          5. Response Memorandum to Appellant CELP's Motion for Summary Judgment, including:  
21          Second Declaration of Robert Alberts, Declaration of Stan Arlt with Exhibits QC-9  
            through QC-13, Second Declaration of Thomas M. Pors with Exhibits QC-14 through  
            QC-21, Second Declaration of Robert F. Barwin, and Declaration of Keith E. Phillips  
            with Attachment;
6. Appellant CELP's Reply to Respondents' Response to CELP's Motion for Summary  
            Judgment, including Attachments comprised of federal cases cited;
7. Proposed Order for Summary Judgment submitted by Appellant; and
8. Joint Reply Memorandum in Support of Respondents' Joint Motion for Partial Summary  
            Judgment, including: Supplemental Declaration of Stan Arlt, Supplemental Declaration  
            of Robert Wubbena, Supplemental Declaration of Robert Alberts in Support of  
            Respondents' Joint Motion for Summary Judgment, Supplemental Declaration of Thomas

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1 M. Pors in Support of Respondents' Joint Motion for Summary Judgment with Exhibits  
2 P1 through P51, Second Declaration of Keith E. Phillips with Attachment, and Third  
3 Declaration of Robert F. Barwin with Attachments.

4 In addition, the presiding officer received the following procedural pleadings from the  
5 parties:

- 6 1. Appellant's Motion to Strike Excerpts of Declarations of Robert F. Barwin and Robert  
7 Alberts and Exhibit QC-1;
- 8 2. Appellant's Second Motion to Strike Excerpts of Declarations of Keith E. Phillips and  
9 Stan Arlt and Exhibits QC-20, QC-21 and Portions of Exhibit QC-1;
- 10 3. Response in Opposition to Motion to Strike;
- 11 4. Response in Opposition to Second Motion to Strike, including portions of a federal case  
12 and the Rules of Evidence; and
- 13 5. Appellant's Reply to Respondents' Response in Opposition to Motion to Strike.

14 Kay Brown, acting as presiding officer, orally ruled on the procedural record, during the oral  
15 argument on the motions for summary judgment on April 22, 2003. Robert V. Jensen, presiding  
16 officer, adopts those rulings as his own. In summary, the rulings are:

- 17 1. The last sentence of paragraph three of Robert F. Barwin's first declaration is stricken.
- 18 2. The remainder of the motion to strike his declaration is denied.
- 19 3. The motion to strike portions of Robert Albert's declaration and Exhibit QC-1 is denied.
- 20 4. The motion to strike portions of Keith E. Phillips' declaration is denied, with the  
21 exception of the last sentence. It is modified to read: "This delay affected the Quad  
Cities' application."
5. The motion to strike portions of Stan Arlt's declaration is denied.
6. The motion to strike Exhibits QC-20 and QC-21 is denied.

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## DISCUSSION

The Board denies the motion challenging CELP's standing, except as it relates to CELP's ability to challenge the processing order of the Quad Cities' water right application. The Board concludes it has jurisdiction over the issues raised by CELP. The Board declines the invitation to defer to the ruling of the superior court in: *Richland v. Ecology*, Benton County Superior Court No. 00-2-01772-1 (Mar. 20, 2001). The Board rules all procedural issues raised by CELP are trumped by SB 5333 (Laws of 2001, ch. 239 §1, p. 1194), enacted as RCW 90.03.290(2)(b); except for the question raised by CELP on the effect of the June 30, 2002 time-limitation for the extension of the permit, which is contained in that statute. The application of this deadline and all other issues from the joint issue list of the party will remain for hearing.

## FACTUAL BACKGROUND

### I

Ecology received from the City of Richland an application for a surface water right on September 23, 1991. The application requested 178 cubic feet per second ("cfs") of water annually "primarily for industrial and commercial uses with some municipal." Richland proposed to install an intake into the Columbia River with four 1,750 horsepower pumps, capable of pumping 20,000 gallons per minute ("gpm"). This pump would hook up to a 15,000-foot, 60-inch diameter pipe to the first customer in the Horn Rapids Industrial Park. The application proposed April 1992 as the date of commencement of construction, and June 1993 as the date the project would be completed. Ecology designated the application No. S4-30976. It has a priority date, under the water code of September 23, 1991.

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II

On December 20, 1991, the first of several species of Columbia/Snake River salmon were listed under the Endangered Species Act.

III

Richland published notice of the application twice in the Tri-City Herald for "continuous municipal supply, industrial and commercial." Richland wrote Ecology a letter on February 27, 1992, stating in part as follows:

However, do [sic] to a delay in required use and the unknown water requirements the City has decided to abandon this water right application at this time. It appears that the development of the Horns Rapids Industrial Park will take longer than anticipated and we do not want to burden the Department of Ecology with reviewing the water right application until the development requirements and time schedule are better defined. We appreciate your cooperation to date.

The letter closed by asking Ecology to contact Richland if it had any questions.

IV

Phil Kerr, an Ecology employee, visited Richland. After their meeting, Richland wrote Ecology a letter dated March 11, 1992, stating during the visit of Mr. Kerr, it had been determined to change the construction date to 1995 to accommodate the development delay. However, the application would continue to be processed with that construction date.

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## VII

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Richland, on March 23, 1992, issued a determination of nonsignificance ("DNS") relating to this water right application for the Horn Rapids Industrial Park. This document explained the industrial park development would require an annual water supply of 180 cfs.

Ecology responded to the Endangered Species Act listings by promulgating WAC 173-563-015, effective January 3, 1993. The regulation declared: "New information and changing conditions place into question whether sufficient information data is available for making sound decisions of water availability and the public interest for additional appropriations from the main stem of the Columbia River." WAC 173-563-015(1). This regulation declared a moratorium on further appropriations of water from the main stem of the Columbia River. WAC 173-563-015(2). The regulation further declared, "[a]ll water right applications which the department accepted for filing prior to December 20, 1991, for diversion or pumping of surface water from the main stem of the Columbia, or for withdrawal of ground water which is part of or tributary to the main stem of the Columbia, shall be processed in accordance with existing policies and procedures and are not subject to this withdrawal of waters." WAC 173-563-015(3). The rule declared it would expire June 30, 1994, unless amended earlier. WAC 173-563-015(6). Ecology extended it, effective February 3, 1995 until 1999.

Ecology, on April 26, 1993, issued a preliminary permit to Richland. The permit was not for the diversion of water, but rather for planning purposes. Its term was initially for one year.

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1 However, Ecology later extended it to the maximum period allowed, which was for three years,  
2 until April 23, 1996.

3 VIII

4 Ecology notified Richland on March 8, 1996, if it did not respond to the requirements of  
5 the preliminary permit, the permit would be cancelled. The letter noted Richland had notified  
6 Ecology the City had retained SCM Consultants to assist in completion of the permit  
7 requirements. Ecology then informed the consultant it could apply for extension of the permit  
8 for five years, with the approval of the Governor. Ecology advised Richland, failure to either  
9 fulfill the Preliminary Permit requirements, or obtain the further extension would result in  
10 automatic cancellation of the permit and the application, consistent with RCW 90.03.290.

11 IX

12 Ecology ultimately wrote a letter to Richland on October 30, 1996, concluding Richland  
13 had failed to fulfill the Preliminary Permit requirements; therefore the permit was cancelled and  
14 the application was rejected. Ecology stamped the application "rejected" the same day. The  
15 letter did not contain a statement stating Richland had a right to appeal this action to the Board.  
16 Richland never appealed this action.

17 X

18 Richland, on January 17, 1997, sent a letter to Ecology asking the agency to reconsider  
19 the cancellation, pending a meeting to discuss the reasons behind the delay. The letter warned, if  
20 necessary, "we will initiate steps to appeal the action taken." On February 19, representatives of

1 the Quad Cities met with Ecology to discuss potential solutions to their water supply problems,  
2 including reinstatement of the Richland application.

3 XI

4 Ecology agreed to reinstate the application and to add the names of the cities of Pasco,  
5 Kennewick, and West Richland as co-applicants. Ecology represented it would consent to an  
6 assignment of the application, provided the Quad Cities agreed to develop a regional water  
7 supply plan, and process the application as a regional water supply, rather than as individual,  
8 competing applications.

9 XII

10 The Legislature, in 1997, passed ESHB 1110, which nullified the moratorium on further  
11 withdrawal from the Columbia. The Governor signed the law on May 20, 1997. It went into  
12 effect on August 18, 1997.

13 XIII

14 The Quad Cities accepted Ecology's proposal. On July 8, 1997, Ecology reinstated  
15 application S4-30976, adding the cities of Pasco, Kennewick, and West Richland, and modifying  
16 the place of use to be consistent with the Quad Cities' regional service area. This reinstatement  
17 was conditioned upon the Quad Cities' completion of a jointly developed Regional Water Supply  
18 Plan ("Regional Plan"). No public notice was given of this reinstatement.

19 XIV

20 On March 30, 1998, Ecology promulgated a new rule to replace the moratorium  
21 regulation. It became effective on April 30<sup>th</sup> of that year. This new rule declared any instream

1 flows established by the chapter for out-of-stream uses do not apply to any decision approving or  
2 denying a water right application by Ecology on the main stem of the Columbia River, after July  
3 27, 1997. The regulation provided any water application considered for approval or denial after  
4 that date would be "evaluated for possible impacts on fish and existing water rights." Ecology  
5 was required to consult with "appropriate local, state and federal agencies and Indian tribes," in  
6 making these evaluations. WAC 173-563-020(4).

7 XV

8 Ecology and the Quad Cities signed a Memorandum of Agreement ("MOA") on July 16,  
9 1999, agreeing to close the Columbia River consultation process and begin the evaluation  
10 process by September 1, 1999. Ecology at this time began processing 12 permit applications.  
11 The Quad Cities, as part of this MOA, agreed to withdraw the DNS it had issued on the  
12 application. Instead they agreed to do a supplemental environmental impact statement ("SEIS").  
13 The purpose of this study was to address instream flow and endangered species habitat for the  
14 Columbia River, and to address comments received during the Columbia River consultation  
15 process.

16 XVI

17 Richland, on June 2, 2000, signed an Ecology document assigning its application to the  
18 Quad Cities. The form does not contain any signature of an Ecology official consenting to this  
19 assignment. On March 25, 2003, Mr. Pors, the attorney for the Quad Cities, paid the requisite  
20 \$5.00 for the assignment.

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XVII

On June 7, 2000, Pasco issued the final SEIS and the final Regional Plan.

XVIII

Ecology, on June 26, 2000, announced it had erroneously reinstated the Richland application, and the Quad Cities' application was no longer valid. The Quad Cities filed a lawsuit in Benton County Superior Court. The court ordered Ecology to resume processing the application, concluding Ecology was equitably estopped from doing otherwise. *Richland v. Ecology*, Final Judgment at 10 (Mar. 20, 2001).

XIX

In April 2001, the Legislature enacted SB 5333. It was signed by the Governor on May 11, and became effective August of that year. It was intended to grant Ecology the authority to overcome any defects in its transferring the cancelled Richland permit to the Quad Cities. It allowed reinstatement of the cancelled permit until June 30, 2002. This legislation, now codified as RCW 90.03.290(2)(b), also authorizes Ecology to modify such a canceled application and permit to accomplish the objectives of (b)(i) and (ii).

XX

Ecology had prepared a draft Report of Examination ("ROE") for the Quad Cities' application by September 2001. Ecology delayed processing the Quad Cities' application because the agency was involved in litigation with other applicants, some of whom had priority dates earlier than the Quad Cities' application. Ecology did not issue the Quad Cities' application earlier because these other applicants requested Ecology not condition their permits

1 to the Biological Opinion ("BiOp") target flows prepared by the National Marine Fisheries  
 2 ("NMFS") to protect species in the Columbia River, listed under the Endangered Species Act.  
 3 Ecology subsequently was enjoined from issuing those water rights on those applicants with the  
 4 BiOp flows unless it went through rule-making. *Kennewick Public Hospital District/ Columbia*  
 5 *Snake River Irrigators Association v. Ecology*, Benton County Superior Court Nos. 97-2-01041-  
 6 9 and 00-2-02057-7 (Jun. 24, 2000).

7 XXI

8 The Quad Cities did not join in this action. However, Ecology is required to issue  
 9 decisions allocating water from the same source, generally in the order the applications are  
 10 received. WAC 173-152-030(3). The Quad Cities agreed to allow Ecology to issue its water  
 11 right decision with the BiOp flows as a condition. Ecology, however, refused to issue a decision  
 12 on the Quad Cities' application, until the Quad Cities presented Ecology with signed waivers  
 13 from the six applicants with an earlier application date than the Quad Cities.

14 XXII

15 The requested waivers could not be obtained from all the senior applicants. Therefore,  
 16 the Quad Cities sought and obtained an additional order from the Benton County Superior Court,  
 17 ordering Ecology to issue a decision on the application. *Richland v. Ecology*, Order Granting  
 18 Amendment to Petition and Order Requiring Performance (November 15, 2002).

19 XXII

20 Ecology issued the ROE to the Quad Cities on November 19, 2002. CELP timely filed  
 21 this appeal on December 18, 2002.

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**ANALYSIS**

**XXIII**

Summary judgment may be granted only where there are no genuine issues of material fact, and the law supports the motion. WAC 371-08-300(2); Civil Rules for Superior Court ("CR") 56(c).

**STANDING**

**XXIV**

Ecology and the Quad Cities do not contest the standing of CELP to challenge Ecology's determinations on the merits in the ROE. They do, however, posit CELP has no standing to challenge the procedural issues. This theory argues there is a clear distinction between the procedural and substantive provisions of the water code. They contend the environmental protections CELP argues for inhere in these substantive provisions, are neither expressed, nor implied in the procedural provisions. They fail to cite any persuasive legal authority for this extraordinary proposition.

**XXV**

The water code provides in pertinent part: "It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and retention of waters and streams and lakes in sufficient quantity and quality to protect instream and natural values and rights." RCW 90.03.005. There is no indication this policy statement applies solely to the substantive provisions of the water code.

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**XXVI**

The water code was significantly amended in 1971 with the passage of the Water Resources Act of 1971. The Water Resources Act contains an important provision, which mandates the "quality of the natural environment shall be protected, and where possible enhanced." RCW 90.54.020(3).

**XXVII**

That Act also contains numerous policy sections, which apply to the entire water code, not just its substantive provisions, including any provisions, which relate to the regulation and management of the state's public waters. RCW 90.54.010(2) declares:

It is the purpose of this chapter to set forth fundamentals of water resource policy for the state to insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington and, in relation thereto, to provide direction to the department of ecology, other state agencies and officials, and local government in carrying out water and related resources programs. It is the intent of the legislature to work closely with the executive branch, Indian tribes, local government, and interested parties to ensure that water resources of the state are wisely managed.

This section gives clear notice to all citizens of the state and levels of state and local government; both the substantive and procedural provisions are intended to protect the waters of the state of Washington for the greatest benefit to the people of the state.

**XXVIII**

RCW 90.54.020(10) illustrates the Legislature's concern for full public involvement in all stages of water planning and allocation. It declares: "Expressions of the public interest will be sought at all states of water planning and allocation discussions." There is no indication

1 Ecology would seek expressions of public interest only on the substantive aspects of its  
2 allocation decisions.

3 XXIX

4 RCW 90.54.040(1) directs Ecology to develop rules, which, "as a matter of high priority  
5 to the best interests of the people, to develop and implement in accordance with the policies of  
6 this chapter a comprehensive state water resources program which will provide a process for  
7 making decisions on future water resource allocation and use." (Emphasis added.) RCW  
8 90.54.040(3) directs Ecology, in "relation to management and regulatory programs relating to  
9 water resources . . . to modify existing regulations and adopt new regulations, when needed and  
10 possible, to insure that existing regulatory programs are in accord with the water resource policy  
11 of this chapter and the program established in subsection (1) of this statute."

12 XXX

13 The water dispute before us affects local and state government and the citizens of the  
14 state. It most certainly affects the interests of CELP and its members, which include protecting  
15 the beneficial uses of the Columbia River for fish, wildlife, and recreation. If CELP were to  
16 prevail in its contention Ecology invalidly processed the ROE to determine the Quad Cities are  
17 entitled to a water permit for 178 cfs from the Columbia River, Ecology's decision would be  
18 invalid. As a consequence, some of that water could potentially be made available to reduce the  
19 potential for extinction of certain salmon species from the Columbia River and Snake Rivers.  
20 Once Ecology allocates that water for municipal uses, other potential use of that water is gone.

21 Ecology's processes in allocating water are the means the agency utilizes to provide the

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1 maximum net benefits for the people of this state from the public waters. If the means are not  
2 correctly and fairly applied, the ends will surely be frustrated.

3 XXXI

4 While CELP has an interest in the validity of the Quad Cities' application, we conclude it  
5 has no standing to assert the Quad Cities' application was processed out of order. CELP does  
6 not have a prior water permit application in competition to the Quad Cities' application. CELP  
7 is not asserting any established instream rights, which are prior to the Quad Cities' application.  
8 The applicants ahead of the Quad Cities would have such standing, but they did not appeal  
9 Ecology's decision. An applicant's right to a place in line for a water permit is personal to that  
10 applicant and may not be asserted by another party. Court decisions regarding an applicant's  
11 place in line have only discussed this right with regards to the applicant who is waiting in line to  
12 have his or her permit acted upon by Ecology. *Schuh v. Ecology*, 100 Wn.2d 180, 187, 667 P.2d  
13 64 (1983); *Jensen v. Ecology*, 102 Wn.2d 109, 114, 685 P.2d 1068 (1984); *Hillis v. Ecology*, 131  
14 Wn.2d 373, 392, 932 P.2d 139 (1997). In addition, RCW 90.03.265, enacted by the Legislature  
15 in 2000 to provide for expedited review of pending water right applications, only contemplates  
16 the applicant as having a right to his or her place in line. CELP has not shown an injury in fact  
17 or that it was within the zone of protected interests with regards to the processing of the Quad  
18 Cities' water right application before more senior applications.

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**BOARD'S JURISDICTION**

**XXXII**

The Board has jurisdiction over CELP's appeal. The decision by Benton County Superior Court, does not reach beyond Benton County. The decision of that superior court does not bind CELP, who was not a party, nor in privity with any party in that litigation. The Board has statewide jurisdiction. The Supreme Court has announced its preference for the Board review of Ecology decisions, as opposed to those of the 39 superior courts.

[U]niform, independent review of not only the actions of the DOE but all the air pollution boards is patently preferable to fragmented and perhaps uneven results among the various superior courts in our 39 counties. Uniformity in administering the vast powers granted under our strong environmental and pollution control laws is an apparent and desirable goal of this act. That goal would be frustrated if the ultimate interpretation is vested in the several superior courts and their juries.

*State v. Woodward*, 34 Wn.2d 329, 333, 525 P.2d 247 (1974).

**XXXIII**

However, we are not inclined to review the decision rendered by the Benton County Superior Court in this case, because we conclude the Legislature intended to reinstate the Richland/Quad Cities' application, by the passage of SB 5333 in 2001. Even CELP admits it would be "hard to imagine any other intent." Memorandum in Support of Motion for Summary Judgment, at 21.

**XXXIV**

CELP argues, however, SB 5333, which has now been enacted as RCW 90.03.290(2)(b), does not even apply to the Quad Cities water application, because it was not "directly affected by

1 a moratorium on further diversions from the Columbia, during the years 1990 to 1998." Ecology  
2 points out the moratorium was replaced by another regulation, which directed Ecology to consult  
3 with various interest groups before issuing another water right, for any allocation decision on the  
4 main stem Columbia River made after July 27, 1997. The new regulation states "[a]ny permit  
5 which is then approved for the use of such waters will be, if deemed necessary, subject to  
6 instream flow protection or mitigation conditions determined on a case-by-case basis through the  
7 evaluation conducted with the agencies and the tribes." WAC 173-563-030(4). Ecology calls  
8 this a "de-facto" moratorium. The problem, however, is the dates in the statute do not  
9 correspond with the dates of a moratorium.

10 XXXV

11 First, Ecology's moratorium began December 31, 1991, not 1990, as suggested in the  
12 statute. Secondly, the moratorium ended on August 18, 1997, which is before the end of the  
13 year. Third, the so-called "de facto" moratorium, is not really a moratorium, but a condition to  
14 the allocation of future waters. Fourth, this regulation continues in effect until this day. It did  
15 not end in 1997, but rather began, in the form of a regulation in 1998.

16 XXXVI

17 However, the statute does not pretend to precisely define the beginning and end of the  
18 moratorium; rather it simply requires the moratorium to have directly affected the application  
19 during the years 1990 to 1998. This language of the statute appears to intend to cover the  
20 Richland application, even though it was filed before the moratorium officially began. Certainly  
21 Ecology did not act as if it were attempting to avoid the moratorium, in regard to the Richland

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1 permit. Indeed, Ecology cancelled both the permit and the application in 1996, in the middle of  
 2 the moratorium. We believe, on balance, the statutory intent here was to allow Ecology to  
 3 reinstate the Richland/Quad Cities' application.

4 XXXVII

5 The next question is whether Ecology complied with the statutory deadline for reinstating  
 6 the permit. The statute proclaims the reinstatement and extension shall be until June 30, 2002.  
 7 We believe there are legitimate issues as to whether Ecology's actions in not completing the  
 8 processing of the Quad Cities' application was excused by litigation, outside of the agency's  
 9 control. We reserve judgment on the affect of this time limitation until after the hearing on the  
 10 merits.

11 XXXVIII

12 The remaining issues from the joint list of the parties shall be determined at the hearing.  
 13 The Board, based on the foregoing analysis, issues the following:

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ORDER

1. CELP's motion for summary judgment on issue six is denied.
2. Ecology and the Quad Cities' motion for summary judgment on issue three is denied.
3. Ecology and the Quad Cities' motion for summary judgment on issue four is denied, except as to the order in which the Quad Cities' application was processed vis-à-vis prior applicants from the same source of water. That motion is granted.
4. The Board rules all procedural issues raised by CELP in its motion are trumped by RCW 90.03.290(2)(b), except the issue governed by the application of the June 30, 2002 time limitation found in that statute. This issue is: Was Ecology's failure to complete the ROE for the Quad Cities excused by litigation, and therefore outside the control of the agency?
5. All other issues from the joint issue list will remain for hearing.

DONE this 4<sup>th</sup> day of June 2003.

POLLUTION CONTROL HEARINGS BOARD

  
 \_\_\_\_\_  
 ROBERT V. JENSEN, presiding

  
 \_\_\_\_\_  
 KALEEN COTTINGHAM, Member

  
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 WILLIAM H. LYNCH, Member

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