BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

LARRIE N. ADAMS,	)	
Appellant,	)	PCHB NO. 93-67
v.	)	**ORDER GRANTING MOTION TO DISMISS**
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
Respondent.	)	

This matter came before the Pollution Control Hearings Board ("Board") on the Department of Ecology's ("Ecology") Motion to Dismiss. The Board was comprised of Robert V. Jensen, presiding, and Richard C. Kelley, member.

The appellant, Larrie Adams ("Adams"), was represented by Terry L. Karro, attorney, of Reeder & Karro. The respondent, Ecology, was represented by Mark C. Jobson, Assistant Attorney General.

The Board reviewed Ecology's: Motion to Dismiss, Memorandum in Support of Motion to Dismiss, and Response; Adams' Memorandum of Appellant in Opposition to Motion to Dismiss; Affidavit of Mary Meloy; and Affidavit of Dannie Thomason.

I

The issue is whether Ecology's rescission of its March 8, 1993 order, and substitution therefore of its October 8, 1993 letter deprives this Board of jurisdiction. That question depends upon whether the October 8 letter constitutes an appealable order, under the Administrative Procedure Act. We conclude that it does not.

II

RCW 34.05.010(10)(a) defines "order" as: "a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons".

III

Ecology's October 8 letter, which is issued in response to Okanogan County's ("County") request for evidence of an adequate water supply, under the Growth Management Act (RCW 19.27.097), states:

> *A request for allocation of water for any purpose, including domestic supply, from wells of this type would almost certainly result in a denial.*

IV

The Okanogan County Health District, on April 14, 1992, adopted guidelines which precludes it from issuing certificates of water adequacy in closed drainages and sub-basins, under the Growth Management Act, unless certain conditions are met. It is undisputed that the Beaver Creek sub-basin of the Methow Valley, from which Adams proposes to withdraw water, was closed by Ecology to all future water withdrawals on February 5, 1991 WAC 173-548. The condition which is applicable to this project provides:

> *Applicant is replacing or modifying an existing well developed under the exemption from permit under RCW 90 44 050, and this has been approved in writing by the DOE.*

V

Mary Meloy, the Director of Planning and Development for the County has the primary policy responsibility for developing procedures for granting building permits. She states in her affidavit that no new building permit will be issued, nor will a lapsed permit be reissued, without a current certificate of water adequacy. She further states that the County's determination of water adequacy is not discretionary, in basins closed by Ecology Rather, the

County apparently relies on the advice of Ecology as to the availability of water, in such circumstances.

VI

Adams originally obtained three determinations of adequacy, prior to the February 5, 1991 closure. On March 4,1992, Adams wrote Ecology requesting that Ecology write a letter to the County, requesting it to extend Adams' building permits. The permits were extended on November 2, 1992. In February, 1993,Adams contacted the County, asking that his building permits be extended beyond April 30. On March 8, 1993, Ecology wrote its order denying Adams' request for a determination of a legal source of water. That order was appealed to the Board. Apparently, the County extended the building permit for six months. On November 1, 1993, the County again extended the building permits. The County policy is to continue to extend the permits so long as progress is being made in construction. Adams has continued to make progress satisfactory to the County. There has been no evidence supplied that his permits have lapsed.

VII

Despite Ecology's October 8, 1993 letter, the County has extended Adams' building permits. Based on the information before it, it appears obvious that the County, has concluded that so long as his building permits do not lapse, Adams is not subject to the closure effected by Ecology. Given these circumstances, we believe that the October letter is not an order under RCW 34.05.010(10(a), and is not subject to appeal to this Board, under RCW 43.21B.110(1)(f).

VIII

Based on the foregoing analysis, the Board issues this:

ORDER

Ecology's Motion to Dismiss is granted.

DONE this 23rd day of December, 1993.

POLLUTION CONTROL HEARINGS BOARD

ROBERT V. JENSEN, Presiding Officer

RICHARD C. KELLEY, Member

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