

1
2 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
3 STATE OF WASHINGTON

4 THE OSTROM COMPANY, INC.,

5 Appellant,

6 v.

7 OLYMPIC REGION CLEAN AIR
8 AGENCY,

9 Respondent.

PCHB NO. 04-105

PCHB NO. 04-140

DISSENT

10 [1]

11 I concur with my colleagues in the following portions of their majority decision:

12 (A) The Findings of Fact.

13 (B) The Conclusions of Law that in making compost on site for purposes of growing
14 mushrooms in the compost on that site, that Ostrom is conducting an agricultural
activity under the Washington Clean Air Act.

15 (C) The Conclusions of Law that the penalty issued against The Ostrom Company
(Ostrom) for odor violations should be reduced from \$10,000 to \$500.00.

16 (D) The Conclusions of Law that the sale of land by Ostrom did not result in Ostrom
17 losing the specific protections afforded to agricultural activities in the Washington
Clean Air Act.

18 [2]

19 I disagree with their conclusions, however, that ORCAA properly issued the civil penalty
20 for violation of the prior Notice of Construction and that Ostrom is subject to the Notice of
21 Construction requirement and therefore respectfully dissent. I would vacate the civil penalty

DISSENT
PCHB NO. 04-105, 04-140

(1)

1 issued for the Notice of Construction violations. The Washington Clean Air Act provides
2 Ostrom with an exemption from the Act which includes the Notice of Construction requirement,
3 and allows ORCAA to prove that the exemption does not apply and that therefore Ostrom is
4 subject to the Notice of Construction provisions. ORCAA has not done so, and thus ORCAA
5 cannot issue Ostrom a civil penalty for violating the Notice of Construction provisions of the Act
6 from which Ostrom is exempt.

7 [2]

8 The Washington Clean Air Act, Chapter 70.94 RCW, includes provisions specific to
9 odors produced by agricultural activities. Under RCW 70.94.640(1):

10 Odors caused by agricultural activity consistent with good agricultural practices on
11 agricultural land are exempt from the requirements of this chapter unless they have a
12 substantial adverse effect on public health. In determining whether agricultural activity is
13 consistent with good agricultural practices, the department of ecology or board of any
14 authority shall consult with a recognized third-party expert in the activity prior to issuing
15 any notice of violation.

16 Thus, a conditional exemption from the Washington Clean Air Act is afforded not for all
17 agricultural odors, but only for those agricultural odors consistent with good agricultural
18 practices. This exemption is further conditioned in that even if good agricultural practices are
19 used, the exemption does not apply if the odors have a substantial adverse effect on public
20 health. In order to determine whether this conditional exemption applies, the local air authority
21 must consult with an expert to determine whether good agricultural practices are being used prior
to issuing any notice of violation.

ORCAA did not consult with an expert prior to issuing the NOV's in this case.

1 [3]

2 In addition to conditionally exempting certain agricultural odors from the Washington
3 Clean Air Act, the Act also provides specific procedures that must be followed in enforcement
4 situations and appeals involving agricultural odors:

5 (2) Any notice of violation issued under this chapter pertaining to odors caused by
6 agricultural activity shall include a statement as to why the activity is inconsistent with
7 good agricultural practices, or a statement that the odors have substantial adverse effect
8 on public health.

9 (3) In any appeal to the pollution control hearings board or any judicial appeal, the
10 agency issuing a final order pertaining to odors caused by agricultural activity shall prove
11 the activity is inconsistent with good agricultural practices or that the odors have a
12 substantial adverse impact on public health.

13 RCW 70.94.640(2) & (3)

14 ORCAA did not include in the NOV's the statements that Ostrom's activity is inconsistent
15 with good agricultural practices or that the odors have a substantial adverse effect on public
16 health, as required by RCW 70.94.640(2). At hearing, ORCAA did not prove that Ostrom's
17 activity is inconsistent with good agricultural practices or that the resulting odors have
18 substantial adverse effect on public health.

19 [4]

20 In both the regulatory process and on appeal, ORCAA has the burden of showing that the
21 conditional exemption for agricultural activities has not been met, due either to Ostrom's failure
to use good agricultural practices or due to odors with substantial adverse effect on public health.
Because ORCAA did not meet that burden, the odors caused by Ostrom's agricultural activity
are "exempt from the requirements of this chapter." (emphasis added). The chapter being

1 referenced is Chapter 70.94 RCW, the Washington Clean Air Act. RCW 70.94.152 gives
2 ORCAA the authority to require submission of a Notice of Construction for air pollution sources.
3 But because Ostrom is exempt from Chapter 70.94 RCW, it is exempt from the Notice of
4 Construction requirement in RCW 70.94.152. Since Ostrom is exempt from the Notice of
5 Construction requirement because it is exempt from the entire chapter, the penalty issued by
6 ORCAA based on violation of a Notice of Construction (for process changes) and failure to
7 obtain a Notice of Construction (for installation of aerated bunkers and a recirculation tank) is
8 invalid.

9 **[5]**

10 The majority decision affirms the \$1,600 penalty issued by ORCAA for Ostrom's
11 deviation from the composting process in a prior Notice of Construction, and for Ostrom's
12 failing to obtain a Notice of Construction for the bunkers and recirculating tank. The majority's
13 basis is that:

14 because Ostrom did not supply ORCAA with timely information to evaluate whether it
15 qualified for the conditional exemption in RCW 70.94.640, Ostrom cannot now claim
16 that ORCAA failed to meet its burden of proving that its operations were not exempt
17 from the NOC requirement in RCW 70.94.152.

18 ORCAA did not claim that Ostrom's failure to provide timely information had any
19 impact on the NOV's issued in this case. At the same time, the majority concludes that Ostrom is
20 engaged in agricultural activities and is therefore conditionally exempt from the Notice of
21 Construction requirements, but yet can be fined for violating the Notice of Construction
22 requirements from which it is exempt and must still furnish the type of information generally

1 submitted in a notice of construction application to enable ORCAA to make a decision on
2 whether Ostrom is exempt. In other words, the majority opinion requires Ostrom to utilize the
3 Notice of Construction process to allow ORCAA to determine whether Ostrom is exempt from
4 the Notice of Construction requirement.

5 This is clearly circular. ORCAA has the authority to require submission of information,
6 conduct site visits and inspections, hire experts, and can use the expertise of its professional staff
7 to determine whether Ostrom is using good agricultural practices and is therefore exempt from
8 Chapter 70.94 RCW, the Washington Clean Air Act.

9 Finally, I agree with the majority that it is difficult to apply the agricultural exemption in
10 RCW 70.94.640 to mushroom growing, which includes the production of compost for mushroom
11 growing. In the case of mushroom growing, the Legislature needs to clarify how the
12 enforcement of odor issues relates to ongoing regulation of mushroom growing facilities,
13 including the use of the Notice of Construction process. Until then, Ostrom is exempt from the
14 Washington Clean Air Act, including the Notice of Construction requirement, unless ORCAA
15 follows the enforcement procedures in RCW 70.94.640 and meets its burden of proof that
16 Ostrom is either not using good agricultural practices or is causing a substantial adverse impact
17 on public health.

18 For these reasons, I respectfully dissent.

19
20 BILL CLARKE, Chair
21