

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

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

10 Appellant The Ostrom Company, Inc. (Ostrom) is challenging three orders issued to it by
11 the Olympic Region Clean Air Agency (ORCAA). A hearing was held on June 9 and 10, 2005,
12 in Lacey, WA. Mark M. Myers, with Williams, Kastner & Gibbs, represented Ostrom. Fred D.
13 Gentry, with Bean & Gentry, represented ORCAA.

14 The Board was comprised of Chair William H. Lynch and Members Bill Clarke and
15 David W. Danner. Administrative Appeals Judge, Kay M. Brown, presided for the Board.

16 Prior to the hearing, Ostrom moved for summary judgment on all issues. The Board
17 initially granted summary judgment to Ostrom, but then reconsidered its decision in response to
18 a petition filed by ORCAA, and allowed the matter to proceed to hearing.

19 At the hearing, the Board received the sworn testimony of witnesses, admitted exhibits,
20 and heard arguments on behalf of the parties. On the first day of the hearing, the Board also
21 conducted a site visit. Having fully considered the record, the Board enters the following:

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
PCHB NO. 04-105, 04-140

1 Findings of Fact

2 I.

3 Ostrom Company operates a mushroom farm at 8323 Steilacoom Road SE in Lacey,
4 Washington. The Street family purchased the farm in 1967. At the time of the purchase, the
5 farm was “in the country,” surrounded by timberland and other undeveloped land. Since then,
6 the area around the farm has changed dramatically. The Ostrom property is now surrounded by
7 residential development, a middle school, and a large county park. Ostrom has continuously
8 operated a mushroom farm in this location since 1967. *Testimony of Christopher Street, William*
9 *Street, Sr. & William Street.*

10 II.

11 In the mid-70’s, Mr. Street Sr., who was the president of Ostrom’s at the time, became
12 increasingly concerned about the encroaching residential development. In 1976, 60 acres of land
13 neighboring the farm were put up for sale. Mr. Street Sr. offered to buy just a part of the land,
14 but the seller refused to divide the property. Mr. Street therefore agreed that Ostrom would
15 purchase the entire 60 acres. Ostrom purchased the property, and resold 40 of the 60 acres the
16 next year because the company could not afford to keep the entire 60 acres. The 40 acres that
17 Ostrom sold were never used for agricultural purposes. The acreage was sold with the restriction
18 that if it were again resold, the buyer would notify its own purchasers of the mushroom farm’s
19 proximity. In fact, the 40 acres was developed into a residential neighborhood. Ostrom kept the
20 20 acres closest to the farm. *Testimony of William Street, Sr. & Christopher Street.*

1 III.

2 Ostrom grows mushrooms on its farm. The mushrooms are grown inside large buildings,
3 and it is not the actual growing of the mushrooms that causes odor. Instead, odor emitted from
4 the farm is caused by the creation of the compost in which the mushrooms are grown. *Testimony*
5 *of Christopher Street.*

6 IV.

7 Mushrooms are grown in specially prepared compost. They cannot be grown without this
8 special compost, and different mushrooms require different kinds of compost. Ostrom makes its
9 compost at the Lacey site out of straw, chicken manure, and other organic materials.

10 Composting involves the biological breakdown of this mixture of material. The breakdown is
11 caused by the internal heat generated by the material, which triggers a nitrogen conversion
12 reaction. Composting increases the nutritive content of the mixture. Repeated wetting and
13 turning of the material facilitates the composting process. Once the compost is ready for use, it
14 is pasteurized, and then combined with mushroom spawn, from which the mushrooms grow.

15 The time it takes to complete the composting process varies considerably, depending upon the
16 raw materials used. *Testimony of Christopher Street, William Street, and William Street, Sr.,*
17 *Exs. R-9 and R-10.*

18 V.

19 Creation of the compost occurs in a two-phase process. Phase I involves wetting straw,
20 allowing it to cure, adding poultry waste, piling it up, periodically turning the pile, and allowing
21 the material to break down. Prior to 1999, Ostrom did all Phase I composting outside. Phase II

1 of the process involves moving the compost to large enclosed structures called “composting
2 tunnels.” Composting tunnels are equipped with forced air to aerate the compost. Exhaust air
3 from the Phase II tunnels is conducted through exhaust stacks. *Testimony of Goodin Christopher*
4 *Street, and William Street; Exs. R-9 and R-10.*

5 VI.

6 Ostrom has struggled with odor issues ever since people began moving closer to the farm.
7 For the last 25 years, ORCAA has been receiving odor complaints related to Ostrom’s activities.
8 Ostrom is one of the top 10 sources of odor complaints in ORCAA’s geographic service area.
9 Despite this long history, Ostrom has maintained a cooperative relationship with ORCAA.
10 *Testimony of Kelly and Stedman; Ex. R-15.*

11 VII.

12 Ostrom has taken steps to reduce its odor emissions through innovations in technology.
13 In the early 90’s, Ostrom added aerated floors in the bunkers where the straw and manure
14 mixture is housed while it breaks down during Phase II of the composting process. The
15 introduction of oxygen through the aerated floors reduces the creation of, and subsequent
16 emissions of hydrogen sulfide during composting. Hydrogen sulfide emissions are among the
17 primary sources of odor emitted from the farm. *Testimony of Christopher Street, William Street,*
18 *and William Street, Sr.; Exs. R-9, R-10.*

19 VIII.

20 In 1999, Ostrom built an indoor composting facility (ICF). A portion of the ICF is built
21 on the 20 acres Ostrom retained from its purchase in 1976. The ICF consists of large indoor

1 tunnels where Phase I composting, like Phase II composting, can now be conducted indoors.
2 Emissions from Phase I can be controlled through filtering systems. Ostrom was not required to
3 build the ICF, but chose to do so in an attempt to address odor problems. *Testimony of*
4 *Christopher Street, William Street, William Street, Sr., Goodin and Kelly; Exs. R-9, R-10.*

5 IX.

6 Ostrom submitted a Notice of Construction (NOC) to ORCAA for review of the proposed
7 ICF. NOC 99NOC023 was reviewed by Mark Goodwin, Engineer, and approved with
8 conditions on May 24, 1999. The conditions reflected Ostrom's intended plan of operation.
9 *Testimony of Christopher Street, William Street, William Street, Sr., Goodin and Kelly; Ex. R-9.*

10 X.

11 Ostrom has also focused on improvements in its manner of handling wastewater. The
12 leachate wastewater, called brown water, is another source of odor from the farm. Ostrom no
13 longer allows this leachate wastewater to pool on site. Instead, it collects the water in a below-
14 grade collection system, and contains it in a system of two large wastewater holding tanks. NOC
15 99NOC023, issued by ORCAA, approved the addition of the first tank. This 130,000 gallon
16 wastewater holding tank is covered. The second tank, a 240,000 gallon overflow tank, is open to
17 the air. The addition of the second tank was not approved by ORCAA. The leachate water
18 contained in these tanks is reused in the composting process. None of the water used in the
19 processing is discharged to surface or ground water. *Testimony of Christopher Street, William*
20 *Street, William Street, Sr., Kelly and Goodin; Exs. R-9, R-10.*

1 XI.

2 Ostrom has taken many steps to manage its odor issues. Ostrom has developed an
3 internal response protocol for handling complaints from the public. When a complaint is
4 received Ostrom personnel solicit information from the complainant, attempt to determine what
5 has happened at the farm to generate the odor, and then call the complainant back with
6 information. Ostrom's policy is to treat every complainant with respect, and to assume that they
7 are correct. Ostrom has also requested that ORCAA notify it when ORCAA receives a
8 complaint so it can do similar follow up. Ostrom has made efforts to reach out to the community
9 by offering tours and educating people on the mushroom growing process. Ostrom has also
10 monitored its own odor by initiating drive-through programs in neighboring residential areas.

11 *Testimony of Christopher Street, William Street, and William Street, Sr.*

12 XII.

13 The ICF became operational in 2000. It was not initially a successful business venture.
14 The compost produced in the ICF was inferior, and the composting process took longer than
15 anticipated. In part, this was due to changing characteristics in the wheat straw used for
16 composting. As a result, Ostrom's mushroom production declined. Ostrom was very concerned
17 about losing its established customer base due to an inability to produce enough mushrooms. To
18 address this concern, Ostrom began producing more compost than it was using at its Lacey farm.
19 It sold this excess, unused compost to other mushroom growers in exchange for the opportunity
20 to purchase their mushrooms for resell to Ostrom's own customers. Ostrom also used some of

1 the excess compost at its other farm in Everson, WA. *Testimony of Christopher Street, William*
2 *Street, and Goodin; Exs. R-9 and R-12.*

3 XIII.

4 During the first few years of using the ICF, Ostrom also adjusted the way it made
5 compost. When it first built the ICF, Ostrom intended to do all composting production, except
6 straw pre-conditioning, inside. Ostrom's intent was reflected in a condition on ORCAA's Order
7 of Approval of the Notice of Construction for the ICF. It soon became evident, however, that the
8 inside composting process was not producing effective compost. Over time, Ostrom adjusted the
9 process to approximately nine days of composting outside, coupled with 12 to 13 days of
10 composting inside. Ostrom did not inform ORCAA of this change in processing, or request of
11 modification of the conditions on the Order of Approval. *Testimony of Christopher Street,*
12 *William Street, Kelly and Goodin; Ex. R-9 and R-10.*

13 XIV.

14 The orders at issue in this appeal arose because of complaints received by ORCAA
15 between April 2003 and April 2004. During this period, ORCAA received 20 odor complaints
16 concerning Ostrom. The complaints came from at least seven people, although the majority of
17 the complaints came from three individuals. The three primary complainants testified at the
18 hearing that the odors kept them indoors at times, and interfered with their use of their property.
19 Of the complaints ORCAA received, it was able to classify seven of them as verified. *Testimony*
20 *of Kelly, Lundsten, Giroux, and Aspgren, Ex. R-17.*

1 XV.

2 On April 29, 2004, ORCAA issued Notice of Violation (NOV) 2172 to Ostrom. The
3 notice was issued for causing odors that unreasonably interfered with a person's use of his or her
4 property during the period between April 18, 2003 and April 18, 2004. Upon receipt of the
5 NOV, Ostrom invited ORCAA personnel to tour its facility. *Testimony of Kelly, Ex. R-3.*

6 XVI.

7 The tour took place on May 21, 2004. While on the tour, ORCAA personnel observed
8 violations of 99NOC023. On June 28, 2004, ORCAA issued NOV 2198 for these alleged
9 violations. The alleged violations stemmed from the installation of aerated bunkers and a
10 240,000 gallon water recirculation tank at the farm that was not approved in 99NOC 023. The
11 composting operation in progress on the day of the tour also deviated from the process approved
12 in 99NOC023. These changes consisted of pre-conditioning the straw for as much as eight days
13 outside, adding dry poultry waste before the pre-conditioning is complete and the straw is ready
14 to be moved inside, and using the Phase I processor and conveyor system to route material away
15 from the Phase I tunnels and to dump the material on the ground from a height of 30 feet. These
16 changes in the process were inconsistent with 99NOC023, and were made without notice or
17 approval from ORCAA. The day after issuance of NOV 2198, ORCAA also issued a regulatory
18 order, requiring Ostrom to implement further odor control measures and submit a new notice of
19 construction in compliance with ORCAA's notice of construction rules. *Testimony of Kelly and*
20 *Goodin; Exs. R-3, R-7, R-10, and R-11.*

1 XVII.

2 On July 7, 2004, ORCAA issued a civil penalty to Ostrom for the odor violations alleged
3 in NOV 2172. The amount of the penalty, \$10,000, was arrived at through the use of ORCAA's
4 civil penalty matrix. On October 4, 2004, ORCAA issued a second penalty for the violations
5 alleged in NOV 2198. This penalty, in the amount of \$1,600, was also calculated through use of
6 the matrix. *Testimony of Kelly and Stedman; Exs. R-2, R-6.*

7
8 XVIII.

9 This appeal is of the two NOV's and the regulatory order, and the two civil penalties
10 based on the NOV's.

11 XIX.

12 Any conclusion of law deemed to be a finding of fact is adopted as such.

13 Based on these findings, the board makes the following:

14 Conclusions of Law

15 I.

16 The Board has jurisdiction over the subject matter and the parties. RCW 43.21B.110.
17 The Board reviews the issues raised *de novo*. WAC 371-08-485. The Respondent ORCAA has
18 the burden of proof in this proceeding. WAC 371-08-485(3).

19 II.

20 ORCAA alleges that Ostrom has committed odor violations (NOV 2172), that it has
21 violated its construction order (NOV 2198), and that it must submit an odor control plan and

1 comply with ORCAA’s notice of construction requirements in the future (Regulatory Order).
2 ORCAA has assessed \$11,600 in penalties for the alleged violations (\$10,000 for the odor
3 violations and \$1,600 for the Notice of Construction violations).

4 III.

5 Ostrom’s primary defenses to these allegations is that (1) Ostrom is protected by the
6 provisions of the Washington Clean Air Act, in particular RCW 70.94.640 pertaining to odors
7 from agricultural activities and the Right to Farm Act, RCW Ch. 7.48, and (2) Ostrom is exempt
8 from ORCAA’s Notice of Construction Rules under the exemption for “primary agricultural
9 production activities.” If these legal defenses fail,¹ Ostrom also contends that the amount of the
10 penalties assessed is unreasonable.

11 A. Clean Air Act and Agricultural Exemption

12 IV.

13 The Washington Clean Air Act, Chapter 70.94 RCW, sets up a regulatory scheme to
14 protect air quality in Washington State. As part of that system, the Legislature wanted to ensure

15
16 ¹ These legal defenses were the subject of a summary judgment motion made by Ostrom prior to the hearing. The
17 Board initially granted summary judgment to Ostrom on the odor violation on the grounds that Ostrom’s activities
18 were agricultural as defined in the Clean Air Act, and therefore ORCAA’s regulatory actions were subject to the
19 enhanced requirements set out in the Clean Air Act. Since ORCAA had not complied with these heightened
20 requirements, the Board reversed the penalty. With regard to the notice of construction violation, here again, the
21 Board concluded ORCAA’s regulations exempted Ostrom from compliance because Ostrom’s activities met the
definition of agricultural contained in these regulations. Therefore, the Board reversed ORCAA’s regulatory order
requiring future compliance with the notice of construction rules, and reversed the penalty assessed by ORCAA
based on past failure to comply with these same rules. Upon reconsideration, which was requested by ORCAA, the
Board reversed its summary judgment order. In light of additional evidence submitted into the record, the Board
decided it should hear testimony before deciding whether the composting activity at issue was agricultural, and also
to understand more fully the purchase of property Ostrom had made, and its impact on the Clean Air Act
protections. *See Order Granting Summary Judgment, PCHB No. 04-105 and 04-140 (March 18, 2005), and Order*

1 that regulations did not “cause agricultural land to be converted to nonagricultural uses.” 1981 c
2 297 §29. Therefore, it enacted RCW 70.94.640, which creates an exemption to the requirements
3 of the Clean Air Act for agricultural activities that cause odors so long as the activities are
4 consistent with good agricultural practices, and unless they have a substantial adverse effect on
5 public health.

6 V.

7 RCW 70.94.640 (1), (2) and (3) create additional procedural steps that must be taken by
8 an air authority prior to issuing a notice of violation pertaining to odors caused by agricultural
9 activity. Subsection (1) requires the agency to consult with a third party expert to determine
10 whether an agricultural activity is consistent with good agricultural practices² prior to issuing a
11 notice of violation. Subsections (2) and (3) impose additional proof requirements on the agency
12 when such a notice has been issued and is challenged. RCW 70.94.640(2) and (3) provide:

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

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

20 *Granting Motion to Supplement the Record and Petition for Reconsideration, Reversing Summary Judgment, and*
21 *setting Hearing Date, PCHB No. 04-105 and 04-140 (April 28, 2005).*

² The term “good agricultural practices” is defined in RCW 70.94.640(5)(b) as “economically feasible practices
which are customary among or appropriate to farms and ranches of a similar nature in the local area.”

1 VI.

2 ORCAA does not contend that Ostrom’s alleged odor violations will have a substantial
3 adverse effect on public health, or that it has established that Ostrom’s activities are inconsistent
4 with good agricultural practices. Rather, it argues that the partial exemption contained in this
5 section is not available to Ostrom for two reasons. First, it argues that the creation of compost is
6 not an agricultural activity. Second, it argues that even if the composting is an agricultural
7 activity, Ostrom lost the protection of this section by selling some of its land for residential
8 development.

9 VII.

10 “Agricultural activity” is defined for purposes of this section of the Clean Air Act as “the
11 growing, raising, or production of horticultural or viticultural crops, berries, poultry, livestock,
12 grain, mint, hay, and dairy products.” RCW 70.94.640(5)(a). In its summary judgment order,
13 the Board considered dictionary definitions of “mushroom,” “fungi,” “crop,” and “horticultural,”
14 to conclude that the growing of mushrooms is an agricultural activity. Nothing in the testimony
15 presented at the hearing changes the Board’s decision on this point.

16 VIII.

17 The Board also ruled, in its summary judgment, that the production of compost which is
18 used in the “growing, raising, or production” of mushrooms, meets the statutory definition of
19 “agricultural activity.” After touring the facility, and listening to the testimony, the Board
20 concludes that Ostrom’s production of compost is so integral to its growing of mushrooms, that it
21 remains within the definition of “agricultural activity” contained in RCW 70.94.640(5)(a). The

1 Washington Court of Appeals observed in a recent case involving a nuisance lawsuit against
2 Ostrom under the Right to Farm Act, “mushrooms cannot grow without the compost and,
3 therefore, the compost activities cannot be separated from the mushroom growing. . .” *Vicwood*
4 *Meridian Partnership v. Skagit Sand and Gravel*, 123 Wn. App. 877, 885-86, 98 P.3rd 1277
5 (2004).³ The Board concludes that where the compost is produced on the mushroom farm, and
6 where it is used for the growing of mushrooms *on that same farm*, the production of the compost
7 is an agricultural activity.

8 IX.

9 A more complex question, however, is whether selling the fresh compost⁴ for use by
10 other mushroom growers on other mushroom farms changes the nature of the activity such that
11 the production of compost is no longer agricultural in nature. The Board concludes that it does.
12 The production of compost, in and of itself, is not an agricultural activity. It is the close tie
13 between the creation of the compost and the use of the compost in growing mushrooms on the
14 same site that makes the creation of the compost agricultural. *Vicwood*, at 885-886. The
15 production of compost at the Lacey farm, for use at the Lacey farm, ensures that the Lacey site
16 will continue to be used for farming. Creating compost for use on site, therefore, fits within the
17 purposes of the Clean Air Act exemption. Selling the compost for use in growing mushrooms

18 _____
19 ³ In that case, the Court concluded that production of compost for mushroom growing was an agricultural activity
for purposes of application of Washington’s Right to Farm Act (RTFA), RCW 7.48.300-310.

20 ⁴ “Fresh” compost is compost that has not yet been used for the growing of mushrooms. “Spent” compost is
compost in which mushrooms have already been grown. “Spent” compost is routinely sold for use in gardening.
21 The board concludes that “spent” compost is a by-product of mushroom farming, and that selling it does not mean
that Ostrom is not engaged in agricultural activity. As Ostrom points out, the fact that a dairy farm sells manure

1 off site, however, severs the connection between the creation of the compost at the Lacey farm
2 and the farming activity. Compost created for purposes of sale could be created anywhere. It is
3 not tied to the Ostrom farm in Lacey, and therefore, it is not an agricultural activity.⁵

4 X.

5 ORCAA argues that even if some or all of Ostrom’s activities are agricultural, Ostrom
6 lost the protection afforded to an “agricultural activity” under the Clean Air Act because it sold a
7 portion of its land for residential purposes. RCW 70.94.640(4) provides:

8 If a person engaged in agricultural activity on a contiguous piece of agricultural land sells
9 or has sold a portion of that land for residential purposes, the exemption of this section
shall not apply.

10 After hearing the facts as presented at the hearing, the Board is not persuaded by
11 ORCAA’s argument. The testimony established that the 40-acre portion of the 60-acre piece
12 purchased and resold the next year was never used for agricultural activities. Therefore the
13 purchased parcel never became part of a contiguous piece of “agricultural land” and its sale
14 cannot be considered for purposes of RCW 70.94.640(4). To the extent Ostrom is engaged in
15 agricultural activities, it is entitled to the protections provided by RCW 70.94.640.
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17
18

19 does not mean that the sale of manure is its primary activity such that it is no longer engaged in the agricultural
activity of dairy farming.

20 ⁵ Requiring composting and mushroom growing to occur on the same site in order to be considered “agricultural
activity” is consistent with other related regulatory schemes: For example, Ecology’s solid waste handling rules
21 have a conditional exemption from solid waste permitting for “[p]roduction of substrate used solely *on-site* to grow
mushrooms” and for “[a]gricultural composting when all the agricultural wastes are generated *on-site* and all
finished compost is used *on-site*.” WAC 173-350-220(1)(b)(i) and (v) (emphasis added).

1 B. Right to Farm Act

2 XI.

3 The Board did not reach the issue of the applicability of RFTA in its summary judgment
4 order. The parties, however, have requested a ruling from the Board on this issue. Therefore,
5 the Board will address the applicability of the RTFA to this appeal.

6 XII.

7 RFTA, codified at RCW 7.48.300-.310, was created by the Legislature as an exception to
8 the state law on nuisances. Its stated purpose is “to provide that agricultural activities conducted
9 on farmland and forest practices be protected from nuisance lawsuits.” RCW 7.48.300. ORCAA
10 argues, and the Board agrees, that the term “lawsuit” does not apply to the type of regulatory
11 action at issue here.

12 XIII.

13 Back’s Law Dictionary (4th ed. rev., 1968) defines “lawsuit” as:

14 A vernacular term for a suit, action or cause instituted or depending between two private
15 persons in the courts of law.

16 Based on the ordinary definition of “lawsuit”, an action by governmental entity such as
17 ORCAA, acting in its regulatory capacity, is not a lawsuit. Therefore, RFTA is not available to
18 Ostrom as a defense to ORCAA’s regulatory penalties and orders.

19 C. Notice of Construction Rules

20 XIV.

1 Ostrom also raises a legal challenge to ORCAA’s Notice of Violation (NOV) 2198, a
2 Regulatory Order based thereon, and a civil penalty assessment in the amount of \$1,600, all of
3 which were based on Ostrom’s alleged violations of ORCAA’s Notice of Construction rules.

4 XV.

5 NOV 2198 was issued for Ostrom’s installation of the aerated bunkers and water
6 recirculation tank without first filing and receiving approval of a Notice of Construction. The
7 second prong of NOV 2198 was issued for changes in Ostrom’s composting operations that no
8 longer conformed to the conditions of Ostrom’s prior approved Notice of Construction for the
9 ICF. The \$1,600 civil penalty was issued for the violations noted in NOV 2198. The June 29,
10 2004 Regulatory Order requires Ostrom to submit an odor control plan for approval, and a notice
11 of construction application addressing physical and operational changes in the composting
12 process since the prior approval of the NOC, along with any proposed changes.

13 XVI.

14 Ostrom contends that it is not required to comply with ORCAA’s Notice of Construction
15 rules because the rules contain an exemption for agricultural activity. ORCAA’s Regulation 1,
16 Article 7, § 7.01(a) requires a notice of construction application and prior approval by the agency
17 before constructing, installing, establishing, or modifying stationary sources. However, prior
18 approval is not required for “primary agricultural production activities including soil preparation,
19 planting, fertilizing, weed and pest control, and harvesting.” ORCAA Regulation 1 §
20 7.01(d)(51). Ostrom argues that based on §7.01(d)(51) (“Regulation 51”), no notice of
21

1 construction was required, no regulatory order can be issued, and no violation occurred for which
2 a penalty can be assessed.

3 The Board has already concluded that Ostrom’s composting and mushroom growing
4 operation constitutes “agricultural activity” under RCW 70.94.640. The Washington Court of
5 Appeals previously concluded that under RFTA, Ostrom’s operation was an agricultural activity.
6 *Vicwood Meridian Partnership*, 123 Wn. App. 877, 885-86, 98 P.3rd 1277 (2004). Thus,
7 concluding that Ostrom qualified for the Notice of Construction exemption in ORCAA’s
8 regulations for “primary agricultural production activities including soil preparation, planting,
9 fertilizing, weed and pest control, and harvesting” would seem to be a simple and logical next
10 step. However, a careful look at the basis for ORCAA’s Regulation 51 shows that this
11 conclusion is not so simple.

12 XVII.

13 ORCAA’s Regulation I, Article 7, Section 7.01, generally requires an entity to file and
14 receive approval of a notice of construction application prior to construction, installation,
15 establishment, or modification of any stationary source of air pollution. This regulation stems
16 from RCW 70.94.152, which provides that either Ecology or the Board of an Air Authority may
17 require notice prior to the establishment of new sources of air pollutants.⁶ RCW 70.94.152 (1)
18 and (5). “New Source” is defined by statute to include modification. See RCW 70.94.030(14)
19 and (16). RCW 70.94.152(11), however, provides an exemption from the notice requirement for
20

21 ⁶ RCW 70.94.153 also requires the filing of a NOC if a person proposes to replace or substantially alter the emission control technology installed on an existing stationary source emission unit.

1 “new sources, which have a de minimis impact on air quality,” which are defined as “new
2 sources of trivial levels of emissions that do not pose a threat to human health or the
3 environment.” The statute directs Ecology to adopt rules identifying *de minimis* new sources.
4 Ecology adopted WAC 173-400-110(4) to identify categories of *de minimis* new sources. WAC
5 173-400-100(4)(h) contains the exemption for primary agricultural production that is repeated in
6 ORCAA Regulation 51.

7 XVIII.

8 In isolation, ORCAA’s Regulation 51 does not provide an exemption for Ostrom for
9 “primary agricultural production activities, including soil preparation, planting, fertilizing, weed
10 and pest control and harvesting,” because the exemption was intended only for *de minimis*
11 sources, which Ostrom is not.⁷ However, Regulation 51 and RCW 70.94.152(11) must be
12 viewed in light of RCW 70.94.640, which exempts odors from agricultural activities consistent
13 with good agricultural practices from “the requirements of this chapter,” unless they cause
14 substantial adverse effect on public health. The chapter, RCW 70.94, is the entire Clean Air Act,
15 and includes the Notice of Construction process that applies to new sources that emit “air
16 containments.” See RCW 70.94.152(1), RCW 70.94.030(14) and (16). Air contaminants
17 include “dust, fumes, mist, smoke, or other particulate matter, vapor, gas, *odorous substance*, or
18 any combination thereof.” RCW 70.94.030(1)(emphasis added).

19 _____
20 ⁷ The parties also disagreed on the legal effect of ORCAA’s adoption of Regulation 51 after the period of time for
21 which Ostrom was issued the civil penalties. Under the Board’s analysis, however, whether ORCAA adopted
Regulation 51 before or after the activities in question occurred is immaterial, because Ostrom’s exemption from the

1 XIX.

2 While Ostrom's odors are not *de minimis*, which under RCW 70.94.152 and ORCAA's
3 Regulation 51 is the basis for exemption from the Notice of Construction process, Ostrom is
4 eligible for RCW 70.94.640's exemption for odors caused by agricultural activities consistent
5 with good agricultural practices, and therefore the Clean Air Act, including the Notice of
6 Construction requirements. Because the exemption provided for odors caused by agricultural
7 activities is conditional, however, it is necessary to reconcile the exemption's broad language
8 excluding compliance with the requirements of the chapter and the need for an air authority or
9 Ecology to determine if the exemption is applicable.

10 The Notice of Construction requirement in RCW 70.94.152 applies to Ostrom if it
11 cannot meet the conditional exemption for agricultural odors in RCW 70.94.640. That is, if
12 odors from the Ostrom facility are due to Ostrom's failure to use good agricultural practices, or if
13 the odors have a substantial adverse impact on public health, then Ostrom is not eligible for the
14 conditional agricultural odor exemption.⁸

15 XX.

16 In interpreting contradictory statutory provisions, the goal of the interpreting tribunal is to
17 reconcile them, and to give effect to each of them, if this can be achieved without distortion of
18

19 NOC requirement is not due to the *de minimus* odor exemption in Regulation 51. Instead, it is based on Ostrom's
20 conditional exemption in RCW 70.94.640.

21 ⁸ An alternative to the Board's effort to reconcile the contradicting exemptions in the Clean Air Act and ORCAA's
regulations would be clarifying legislation in light of the unique nature of Ostrom's agricultural operations. It is
quite possible that in adopting RCW 70.94.640 as a conditional exemption for all agricultural practices, that the
Legislature was unaware of the unique processes used to grow mushrooms that results in odors. Specifically, this

1 the language used. *Willoughby v. Department of Labor and Industries of the State of Wash.* 147
2 Wash.2d 725, *731, 57 P.3d 611, 614 (2002). Under RCW 70.94.640, air agencies have the
3 burden of proving whether an agricultural odor source has failed to use good agricultural
4 practices or if an agricultural odor is having a substantial adverse impact on public health. For
5 the regulatory scheme to function properly, air agencies must have access to all information
6 necessary to make an appropriate determination of whether good agricultural practices are being
7 used. This is necessary both to make their enforcement authority meaningful and to enable air
8 agencies to work with agricultural odor sources to minimize odor impacts and make enforcement
9 unnecessary.

10 XXI.

11 ORCAA's general regulatory powers include the provision in ORCAA's Article 3,
12 Regulation 1. This regulation empowers ORCAA to conduct site visits and investigations,
13 require air pollution sources to submit information relating to activities causing air pollution, and
14 hire independent consultants with knowledge of specific air pollution sources. The Board
15 concludes that this regulation provides a basis for ORCAA's requirement that Ostrom prepare
16 the odor control plan requested in its regulatory order. Such a plan could also provide a basis
17 from which to determine whether good agricultural practices were being used in the event of
18 future regulatory actions.

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21 case reveals the gray area between *de minimis* emissions that are exempt from the NOC requirement under the Clean
Air Act and agricultural odors that cause substantial adverse health impacts.

1 XXII.

2 These powers alone, however, are not enough to allow ORCAA to anticipate what
3 changes Ostrom intends to make, and to determine whether these changes are consistent with the
4 requirements of RCW 70.94.640. It makes no sense for ORCAA to have to wait until after odor-
5 causing changes have been made and complaints have been received to learn that the changes
6 have occurred. Such an approach unnecessarily exposes the public to offensive odors and
7 potential health risks before remedial action can be taken. It also potentially results in expensive
8 after-the-fact modifications being made at the facility. The better approach is for Ostrom to
9 furnish information to ORCAA about its plans to make changes before the changes are made.
10 That way, ORCAA can intervene if it determines the proposed changes are not consistent with
11 good agricultural practices or will cause substantial harm effect on public health. It also gives
12 effect to the other language contained in RCW 70.94.640(1), which requires the air authority or
13 Ecology to consult with a recognized third party expert in the activity in determining whether
14 good agricultural practices have been met. The third party expert must have something to
15 evaluate before any determination on good agricultural practices can be made.⁹

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20 ⁹ The Board recognizes this mushroom growing facility is a hybrid type of operation distinct from typical farming
21 operations, and is therefore limited by its facts. Nothing in this opinion is meant to require farming operations that
were previously exempt from the NOC filing requirements to be subject to those requirements. Because a
mushroom growing operation is not typical agriculture, it may be necessary for ORCAA to look outside the local
area in determining whether good agricultural practices are being met. See RCW 70.94.640(5)(b)."

1 XXIII.

2 The Board concludes that Ostrom is engaged in agricultural activities and is therefore
3 conditionally exempt from the Notice of Construction requirements. However, to enable
4 ORCAA to determine if Ostrom meets the conditions for an exemption, Ostrom must still furnish
5 the type of information generally submitted in a notice of construction application prior to
6 undertaking the type of changes, additions, or modification that would normally require a notice
7 of construction. Once this information is submitted to ORCAA, the burden switches to ORCAA
8 to determine whether the construction proposed is consistent with good agricultural practices.

9 XXIV.

10 In summary, Ostrom's growing of mushrooms and creation of compost for the growing
11 of mushrooms at its farm in Lacey is an agricultural activity as defined by RCW 70.94.640.
12 However, when Ostrom creates compost for resale to other mushroom farmers, or for use by
13 Ostrom to grow mushrooms at other locations, the activity loses its status as agricultural.
14 Ostrom is not subject to the formal Notice of Construction requirements unless its agricultural
15 odors are due to failure to use good agricultural practices or have a substantial adverse impact on
16 public health. However, Ostrom must submit the type of information generally submitted in the
17 Notice of Construction application prior to undertaking construction in order to provide ORCAA
18 with notice that it intends to undertake the construction. This enables ORCAA to fulfill its
19 statutory responsibility to determine whether Ostrom is entitled to the conditional exemption
20 provided by RCW 70.94.640.

1 D. Validity of NOV 2172

2 XXV.

3 NOV 2172 was issued for the emission of odors that unreasonably interfered with a
4 person's use and enjoyment of their property, occurring between April 18, 2003, and April 18,
5 2004. The Board concludes, based on the testimony from the complainants and the evidence of
6 ORCAA Air Inspector Kelly, that the violations did occur as alleged. However, the Board also
7 concludes that Ostrom was conducting both agricultural activities (making of compost for use on
8 the farm) and non-agricultural activities (making of compost for resell), and that both types of
9 activities contributed to the odor.

10 E. Validity of NOV 2198

11 XXVI.

12 ORCAA issued NOV 2198 for Ostrom's modifications to a stationary source without
13 approval and for activities not in conformance with a prior-approved NOC. The construction at
14 issue included the addition of aerated bunkers and an aerated water holding tank. The activities
15 alleged to deviate from the prior-approved NOC were Ostrom's change in its composting
16 operation so that some composting activity occurred outside. The Board concludes that because
17 Ostrom did not supply ORCAA with timely information to evaluate whether it qualified for the
18 conditional exemption in RCW 70.94.640, Ostrom cannot now claim that ORCAA failed to meet
19 its burden of proving that its operations were not exempt from the NOC requirement in RCW
20 70.94.152. Therefore, NOV 2198 is valid.

1 F. Reasonableness of the penalties

2 XXVII.

3 The Board reviews three criteria in determining the reasonableness of a fine: “(1) the
4 nature of the violation, (2) the prior history of violations, and (3) remedial actions taken by the
5 penalized party.” *U.S. Army v. Puget Sound Clean Air Agency*, PCHB No. 00-190 (August
6 2001).

7 XXVIII.

8 With regard to the penalty issued for odor violations, the Board finds that it is excessive
9 for several reasons. First, only a portion of the violation stemmed from non-agricultural
10 activities. ORCAA, as the entity with the burden of proof, failed to make an adequate showing
11 regarding what portion of the odors could be attributed to the non-agricultural activities. Second,
12 ORCAA also failed to make the required showing under RCW 70.94.640 that the odors were
13 based on Ostrom’s failure to use good agricultural practices or that the odors caused a significant
14 adverse effect on public health, to justify a penalty for odor violations for agricultural activities.
15 Third, the Board believes that Ostrom has made serious efforts to control its odor issues. Ostrom
16 has made a considerable investment in odor controlling technology such as the aerated bunkers
17 and ICF. Ostrom has also put extensive thought and effort into its community outreach and
18 response to odor complaints.

19 For these reasons, the Board concludes that a significant reduction in the odor violation
20 penalty to \$500 is appropriate.

1 XXIX.

2 With regard to the penalty issued for Ostrom's modifications to its composting process
3 without prior approval from ORCAA, the Board has determined that Ostrom was not exempt
4 from the NOC requirement because it did not provide in a timely manner the information
5 ORCAA requires to evaluate both Ostrom's agricultural practices and its eligibility for the
6 conditional exemption. Until this information is furnished, ORCAA cannot be said to have
7 failed to meet its burden of proving that the agricultural odors were due to Ostrom's failure to
8 use good agricultural practices or that the odors caused a substantial adverse impact on public
9 health. The penalty of \$1600 is affirmed.

10 XXX.

11 Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

12 From the foregoing, the Board issues this:

13 ORDER

- 14 1. NOV 2172 is affirmed, but the accompanying civil penalty is reduced to \$500.
15 2. NOV 2198, and the accompanying civil penalty in the amount of \$1600, are affirmed.

16 The Regulatory Order dated June 29, 2004, is affirmed with the following
17 modifications, to ensure consistency with the requirements of RCW 70.94.640.

- 18 a. ORCAA may require a Notice of Construction for Ostrom's operations only if
19 it consults with a third party expert in the activity of mushroom growing, and
20 confirms that Ostrom's activities are not consistent with good agricultural
21 activities, or that the odor causes substantial adverse effects on public health.

1 ORCAA may also require a Notice of Construction if Ostrom intends to
2 continue producing compost for use on off site mushroom farms.

- 3 b. Prior to making the type of changes that would normally trigger the
4 submission of a notice of construction, Ostrom must submit information to
5 ORCAA of the type normally submitted in a notice of construction
6 application, along with the appropriate fee. This information can be utilized
7 by ORCAA to determine whether Ostrom qualifies for the RCW 70.94.640
8 conditional exemption.

9 DATED the 9th day of September , 2005.

10 **POLLUTION CONTROL HEARINGS BOARD**

11 See Concurring and Dissenting Opinion

12 BILL CLARKE, Chair

13 WILLIAM H. LYNCH, Member

14 DAVID W. DANNER, Member

15
16 Kay M. Brown
Administrative Appeals Judge, Presiding