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DATED Sept 9, 2005 at Lacey, WA.  
Haron N. Pieglar



BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR  
AGENCY,

Respondent.

PCHB NO. 04-105

PCHB NO. 04-140

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

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

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

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

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

FINDINGS OF FACT, CONCLUSIONS  
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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.*

XI.

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

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

XII.

The ICF became operational in 2000. It was not initially a successful business venture. The compost produced in the ICF was inferior, and the composting process took longer than anticipated. In part, this was due to changing characteristics in the wheat straw used for composting. As a result, Ostrom's mushroom production declined. Ostrom was very concerned about losing its established customer base due to an inability to produce enough mushrooms. To address this concern, Ostrom began producing more compost than it was using at its Lacey farm. It sold this excess, unused compost to other mushroom growers in exchange for the opportunity 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,<sup>1</sup> 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 <sup>1</sup> 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 practices<sup>2</sup> 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.

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

<sup>2</sup> 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.”

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(11)



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

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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.3<sup>rd</sup> 1277  
5 (2004).<sup>3</sup> 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 compost<sup>4</sup> 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 <sup>3</sup> 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 <sup>4</sup> “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.<sup>5</sup>

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  
10 shall not apply.

11 After hearing the facts as presented at the hearing, the Board is not persuaded by  
12 ORCAA's argument. The testimony established that the 40-acre portion of the 60-acre piece  
13 purchased and resold the next year was never used for agricultural activities. Therefore the  
14 purchased parcel never became part of a contiguous piece of "agricultural land" and its sale  
15 cannot be considered for purposes of RCW 70.94.640(4). To the extent Ostrom is engaged in  
16 agricultural activities, it is entitled to the protections provided by RCW 70.94.640.  
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 <sup>5</sup> 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).

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(14)

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 (4<sup>th</sup> 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

1 XIV.

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

5 XV.

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

14 XVI.

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

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.3<sup>rd</sup> 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.<sup>6</sup> 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 <sup>6</sup> 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.<sup>7</sup> 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 <sup>7</sup> 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.<sup>8</sup>

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  
conditional exemption in RCW 70.94.640.

20 <sup>8</sup> An alternative to the Board's effort to reconcile the contradicting exemptions in the Clean Air Act and ORCAA's  
21 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

FINDINGS OF FACT, CONCLUSIONS

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(19)



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.

19  
20  
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.

FINDINGS OF FACT, CONCLUSIONS

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(20)

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.<sup>9</sup>

16  
17  
18  
19  
20 <sup>9</sup> 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)."

FINDINGS OF FACT, CONCLUSIONS

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(21)

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.  
21

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 9<sup>th</sup> day of September, 2005.

10 **POLLUTION CONTROL HEARINGS BOARD**

11  
12 See Concurring and Dissenting Opinion  
13 BILL CLARK, Chair

14 William H. Lynch  
15 WILLIAM H. LYNCH, Member

16 David W. Danner  
17 DAVID W. DANNER, Member

18  
19 Kay M. Brown  
20 Kay M. Brown  
21 Administrative Appeals Judge, Presiding



*Shaping  
our community  
together*

KENNETH R. AHLF  
City Attorney

JOSEPH M. SVOBODA  
ASST. CITY ATTORNEY, PROSECUTOR

1230 RUDDELL ROAD S.E., SUITE 201, LACEY, WA 98503-5747  
(360) 491-1802 FAX (360) 491-1805

CITY COUNCIL

VIRGIL CLARKSON

*Mayor*

NANCY PETERSON

*Deputy Mayor*

ANN BURGMAN

JOHN DARBY

MARY DEAN

THOMAS L. NELSON

GRAEME SACKRISON

CITY MANAGER

GREG J. CUOIO

RECEIVED

JUN 15 2005

ORCAA

June 14, 2005

Mark Goodin  
ORCA  
2940 Limited Lane NW  
Olympia, WA 98502

**Re: Ostrom's Purchase and Sale Agreement**

Dear Mr. Goodin:

At the request of Jim Sheler, the City of Lacey's Director of Parks and Recreation, I am forwarding to you a copy of the Agreement for the Purchase and Sale of Real Estate and in Amendment to the Agreement between the City of Lacey and Thurston County as Purchasers and the Ostrom Company as Seller. You will notice that pages 4 and 5 of this Agreement deals with the approval of an odor control plan and compliance with that plan.

Sincerely,

KENNETH R. AHLF  
Lacey City Attorney

KRA/ke  
Enclosures



TDD Relay  
1-800-833-6388

City Council  
(360) 491-3214

City Manager  
(360) 491-3214

City Attorney  
(360) 491-1802

Community Development  
(360) 491-5642

Finance  
(360) 491-3212

Park & Recreation  
(360) 491-0857

Police  
(360) 459-4333

Public Work  
(360) 491-5600

Fax #  
(360) 438-2669





**AMENDMENT TO**  
**AGREEMENT FOR THE PURCHASE AND SALE OF REAL ESTATE**

THIS AMENDATORY AGREEMENT is made and entered into this 15 day of March, 1999, by and between THE OSTROM COMPANY, a Washington corporation, hereinafter called "Seller" and THURSTON COUNTY, a subdivision of the State of Washington, and the CITY OF LACEY, Washington, a municipal corporation, hereinafter called "Purchaser."

WITNESSETH:

---

1. That certain Agreement for the Purchase and Sale of Real Estate by and between the parties dated July 23, 1998 is hereby amended in the following particulars:

A. That certain contingency calling for an agreement satisfactory to both the Seller and the Purchaser for extending sanitary sewerage services to the property and all provisions related thereto contained in Section 1.A. of said Agreement is hereby waived and deleted.

B. The purchase price set forth in Section 2 of said Agreement is amended to be the total sum of Two Million Five Hundred Eighty Two Thousand Seven Hundred Thirty Six Dollars and 00/100 (\$2,582,736.00.)

C. The time for closing set forth in Section 7 of said Agreement is extended to a date not later than March 15, 1999.

2. It is understood and agreed between the parties that the contingency of furnishing a report or plan for odor control satisfactory to the purchaser as required by Section 1 of said

Agreement has been satisfied and further that the short plat or other appropriate approval for division of the property as required in Section 7 of said Agreement has been completed.

DATED this day and date first above written.

THE OSTROM COMPANY

Wm Street  
President

CITY OF LACEY

Greg J. Cuoio  
Greg J. Cuoio, City Manager

THURSTON COUNTY

Judy Wilson  
Commissioner

Marie Chequard  
Commissioner

[Signature]  
Commissioner

Approved as to form:

Approved as to form:

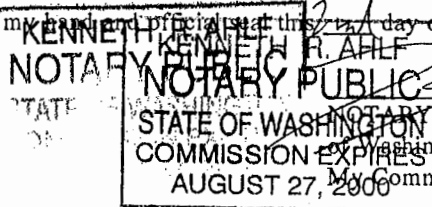
[Signature]  
Kenneth R. Ahlf  
Lacey City Attorney

[Signature]  
Deputy Prosecuting Attorney  
Thurston County

STATE OF WASHINGTON )  
 ) ss.  
County of Thurston )

On this day personally appeared before me William Street, Sr., to me known to be the President of The Ostrom Company that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument.

GIVEN under my hand and official seal this 27 day of March, 1999.



PUBLIC in and for the State  
Washington, residing at  
My Commission Expires: 6-27-2000

# COPY

## AGREEMENT FOR THE PURCHASE AND SALE OF REAL ESTATE

THIS AGREEMENT is made and entered into this 23<sup>rd</sup> day of July, 1998, by and between THE OSTROM COMPANY, a Washington corporation, hereinafter called "Seller" and THURSTON COUNTY, a subdivision of the State of Washington, and the CITY OF LACEY, Washington, a municipal corporation, hereinafter called "Purchaser."

### WITNESSETH:

1. Sale and Purchase. Subject to the contingencies set forth in this section, the Seller agrees to sell and the Purchaser agrees to purchase in accordance with the terms and conditions set forth herein, that certain real property located in Thurston County, Washington, legally described as follows:

Parcel "B" of Boundary Line Adjustment No. 0931 recorded under Thurston County Auditor's File No. 9006260006 and situated in section 14, Township 18 North, Range 1 West, W.M. except that portion of said parcel lying northerly of the following described line:

~~Beginning at the southwest corner of Parcel "A" in said Boundary Line Adjustment: Thence North 02°00'45" East along the Westerly line of said Parcel "A" for a distance of 115.00 feet: thence North 88°13'13" West, parallel to the South line of said Parcel "A", for a distance of 728.68, more or less, to a point on the Easterly Right-of-Way line for Marvin Road (State Route 510) being the end of said line and westerly of a line located 60 feet west of the westerly boundary of Parcel "A" of said boundary line adjustment, which line runs parallel with said westerly boundary and extends from the line first described herein and extends north to Steilacoom Road SE. Seller reserves an easement to allow the Seller, its successors and assigns, access for ingress, egress and utilities to the portion of Sellers property which consists of that portion of Parcel "B" of Boundary Line Adjustment No. 0931 which is excepted from the description herein first contained. Said reserved easement shall be over a strip of land 60 feet in width and abutting the easterly boundary of that portion of Parcel "B" of Boundary Line Adjustment No. 0931 excepted from this description.~~

This agreement to sell and purchase is contingent upon fulfillment of the following conditions:

A. The execution of an agreement satisfactory to both the Seller and the Purchaser providing for the financing, together with other property owners, of an appropriate extension of sanitary sewerage services, the benefits of which will include the subject property. Such agreement shall be in the nature of a latecomers agreement and shall provide that the first \$75,000 of latecomer fees which would otherwise be reimbursed to the Seller under such agreement, shall, instead, be reimbursed to The City of Lacey.

B. The furnishing of a report or plan, satisfactory to the Purchaser, specifying the steps needed for odor control as further specified in this agreement.

The contingencies set forth in this paragraph are to be satisfied prior to August 1, 1998. However, notwithstanding anything in this agreement to the contrary, such satisfaction date shall be extended at the written request of either party to a date no later than September 1, 1998.

2. Purchase Price. The total purchase price is Two Million Eight Hundred Eighty Two Thousand Seven Hundred Thirty Six Dollars (\$2,882,736). This purchase price provides the consideration for the purchase of land set forth in paragraph 1 and the right of first offer to purchase additional lands referenced in paragraph 10. Subject to the contingent escrow provisions, the purchase price shall be paid upon closing.
3. Transfer of Title. Fee title shall be conveyed by the Seller to the Purchaser by Statutory Warranty Deed free of encumbrances or defects except those rights reserved in federal patents or state deeds, building, zoning or use restrictions general to the area, existing easements not inconsistent with Purchaser's intended use, and the matter set forth in that certain commitment for title insurance issued by Transnation Title Insurance Company under order no. 9804918 effective as of 4/20/98 at 8:30 a.m. as special exceptions 2, 3, 4, 6, 7, 9 and 10. Provided, however, that any real property taxes referenced in exceptions 2, 3 and 4 which apply to the property being sold shall be prorated as of closing pursuant to Section 5 hereof. Any increased assessments or taxes which are applied to said property for periods of time prior to closing by virtue of a change in use as described in exception 6, shall be the obligation of the Seller.
4. Title Insurance. Seller shall furnish to Purchaser, a standard form purchaser's policy of title insurance in the amount of the purchase price and shall make available to purchaser prior to closing, preliminary commitment therefore. The title policy to be issued shall contain no exceptions other than those set forth in paragraph 3.

5. Taxes. Taxes for the current year shall be prorated as of the date of closing.
6. Possession. Purchaser shall be entitled to possession upon closing.
7. Time for Closing. The sale shall be closed in the escrow department of the title insurance company providing the preliminary commitment for title insurance called for herein, within 60 days after the satisfaction or waiving of the contingencies set for in paragraph 1 hereof. Provided, however, that except as set forth in the next sentence, closing shall not take place prior to August 1, 1998 nor later than September 30, 1998 except through mutual agreement of all parties. Notwithstanding the foregoing, Seller shall have the right to extend the closing date for five (5) additional one-month periods by delivering to Purchaser (prior to the then-effective closing date) at the addresses set forth herein a written notice expressing Seller's intent to extend the closing date for an additional month. It is understood between the parties that closing cannot take place until the further division of parcel B of Boundary Line Adjustment No. 0931 called for herein, is approved, by Thurston County. The time period for such approval may extend the closing date otherwise called for herein. Seller shall make application for a short plat or other appropriate approval immediately after this agreement is executed by all parties.

The Purchaser and Seller shall deposit with the closing agent all instruments, documents and monies necessary to complete the sale in accordance with this agreement. Seller shall pay the premium for a standard form owner's policy of title insurance in the face amount of the purchase price, real estate excise taxes if any are required, and one-half of the Title Company's escrow fee. Purchaser shall pay the cost of recording the conveyance of the property and one-half of the Title Company's escrow fee. Purchaser and Seller shall each pay their own attorneys' accountants', and other professionals' fees.

In the event Seller wishes to structure the sale of the property as part of a like-kind exchange under Section 1031 of the Internal Revenue Code, Purchaser agrees to cooperate with Seller in effecting such exchange, subject to the provisions of this Section 7 and the contingent escrow provisions for odor removal set forth herein. Purchaser shall not be liable for any obligations or costs incurred with respect to the like-kind exchange nor shall Purchaser be materially or economically impacted due to such like-kind exchange, nor shall Purchaser be required to take title to any other property in connection with any such exchange, nor shall such cooperation delay or interfere with the closing hereunder. Further, Seller shall indemnify Purchaser against damages or expense, including fees and costs in defending against same, incurred by Purchaser arising under or from the like-kind exchange.

8. Conditions of Property and Indemnity Agreements. Seller agrees to hold the

individual Purchasers harmless from any and all claims made by someone other than the Purchasers under the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Super Fund Amendments and Reauthorization Act of 1986 or under Washington State Model Toxics Control Act, or under both said Acts (collectively "Environmental Laws") or any other claim whatsoever based upon a finding or claim that soils or any other portion of said real property contain contaminants which contaminants were upon said real property or within the soils located on said real property prior to the closing of the purchase and sale called for herein. Each of the individual Purchasers agrees to hold the Seller harmless from any such claims made upon the basis of the placement of contaminants upon such real property subsequent to the closing of the purchase and sale called for herein. These hold harmless agreements shall include complete indemnification, including the providing of legal defense by the indemnitor(s) to the indemnitee(s). As used herein, "contaminants" shall mean any substance or matter defined as a toxic or hazardous substance or material or pollutant or contaminant under any Environmental Law to the extent they are present in amounts or levels which require remediation or removal pursuant to applicable clean up standards under the Environmental Laws.

Purchasers are aware of the issuance of an Independent Remedial Action report for the subject property by Stemen Environmental, Inc. dated November 3, 1997 (the "Stemen Report") and agree, in developing such property, to follow the recommendations contained in the Stemen Report. Notwithstanding anything herein to the contrary, Seller shall have no duty to indemnify the Purchasers to the extent any claim pertains to contaminants located within the Farm Waste Disposal Area identified in the Stemen Report that has been disturbed by any activities of Purchasers or their agents within the Farm Waste Disposal Area.

9. Odor Mitigation. Seller owns and operates a commercial mushroom farm (the "Mushroom Farm") at 8323 Steilacoom Road SE, Lacey, Washington, in the immediate vicinity of the property. It is known and acknowledged by Seller and Purchaser that composting, which is an integral part of the growing of mushrooms at the Mushroom Farm, causes odors that could affect the development of the property.

It is further known and acknowledged by Seller and Purchaser that Mushroom Farm operations involve large truck activity entering and leaving the Mushroom Farm property, and that Seller intends to continue and expand the operations of the Mushroom Farm in the future. However, nothing in this acknowledgement shall negate or detract from the Seller's obligation to mitigate composting odors as set forth in this section.

In order to mitigate such odors, Seller has elected and agrees to construct an indoor composting facility at the Mushroom Farm. This facility will be constructed to

current U.S. Industry Standards for sound odor management practices.

On or before July 20, 1998, Seller shall provide to Purchaser a descriptive summary of and preliminary plans for the development of the indoor composting facility together with a consultant's report specifying the steps needed to control odor. Purchaser shall have ten (10) days following Purchaser's receipt of said items to determine, in its discretion whether the actions called for in said items are acceptable to Purchaser. Purchaser shall not unreasonably withhold such acceptance.

If Purchaser determines that the plans and specifications are not acceptable, Purchaser may cancel this Agreement.

At the time of closing, Seller shall present to Purchaser evidence of financial commitments in an amount adequate to construct said indoor composing facility. In the event such evidence is not forthcoming it is agreed by both parties that from the net proceeds due Seller, there shall be held in escrow an amount equal to 120% of the estimated costs of constructing said indoor composing facility. Such escrow fund shall require the consent of both the Seller and the Purchaser for release. Portions of said escrow fund shall be disbursed to pay the direct costs of performing the odor control activity necessary to fulfill the Seller's obligation. All interest earned upon the escrowed funds shall belong to the Seller. When such work has been satisfactorily completed the balance of the escrowed funds shall be released to the Seller.

---

~~Seller agrees that the Seller shall complete said facility on or before December 31, 1999. It is known and acknowledged by Purchaser and Seller that Seller shall be entitled to make changes to said plans and specifications before, during and after construction that may be required for the issuance of building permits or to comply with governmental regulations or that are intended to improve quality, or to increase capacity, or to increase efficiency or to lower cost without adversely affecting quality, capacity or efficiency. Purchaser acknowledges and agrees that Seller shall not be required to seek Purchaser's consent to such changes.~~

Purchaser acknowledges that even though the composting operations will be done with an indoor composting facility, the Mushroom Farm may occasionally give rise to a certain amount of odor no matter how good its management practices. Nothing in this provision is intended to be a covenant or guarantee that the Mushroom Farm and its operation will be totally odor free at all times.

10. First Offer to Purchase Additional Land. As part of the consideration for the transaction contemplated by this Agreement, Seller and Purchaser shall, concurrently with the closing of the transaction contemplated by this Agreement, execute and deliver to the other a Right of First Offer Agreement in the form attached hereto as

Exhibit "1" and made a part hereof as though fully set forth at length, which right of first offer agreement shall survive closing for a period of ten (10) years.

11. Legal Expenses. If either party to this Agreement brings suit or otherwise becomes involved in any legal proceedings seeking to enforce the terms of the Agreement, or to recover damages for their reach, the prevailing party shall be entitled to recover its costs and expenses (including fees of attorneys, expert witnesses, accountants, court reporters and others) incurred in connection therewith including all such costs and expenses incurred in: (i) trial and appellate court proceedings, (ii) connection with any and all counterclaims asserted by one party to this Agreement against another whether or not such counterclaims arise out of or are otherwise related to this Agreement, (iii) in bankruptcy or other insolvency proceedings, and (iv) in post-judgment collection proceedings.
12. Authority. Purchasers and Seller each warrant and represent that they have the authority to enter into this agreement.
13. Non-Merger. The terms and provisions of this agreement shall not merge in but shall continue in force and survive the closing of this purchase and sale transaction and shall further survive beyond the date upon which the full purchase price is paid and the deed delivered.
14. Commissions. Seller and Purchaser each represent to the other that they have not ~~dealt with any real estate broker in connection with the negotiations leading to this Agreement.~~ Seller and Purchaser each agree to indemnify and hold each other harmless from and against the claims of any and all brokers or other intermediaries claiming to have had any dealings, negotiations or consultations with the indemnifying party in connection with this Agreement or the sale of the Property.
15. Notices. All notices, demands, consents, approvals and other communications which are required or desired to be given by either party to the other hereunder shall be in writing and shall be hand delivered or sent by United States registered or certified mail, postage prepaid, return receipt requested, addressed to the appropriate party at its address set forth below, or at such other address as such party shall have last designated by notice to the other. Notices, demands, consents, approvals, and other communications shall be deemed given when delivered or three days after mailing; provided, however, that if any such notice or other communication shall also be sent by telecopy or fax machine, such notice shall be deemed given at the time and on the date of machine transmittal if the sending party receives a written send verification on its machines and forwards a copy thereof with its mailed or courier delivered notice or communication.



To Purchasers:                   Thurston County  
2000 Lakeridge Drive SW  
Olympia, WA 98502  
Attention: Chief Administrative Officer  
Facsimile: (360) 754-4101

City of Lacey  
P.O. Box 3400  
Lacey, WA 98509  
Attention: City Manager  
Facsimile: (360) 412-3186

With a copy to:                   Chief Civil Deputy  
Thurston County  
2000 Lakeridge Drive SW  
Olympia, WA 98502  
Facsimile: (360) 754-3349

Lacey City Attorney  
1230 Ruddell Rd SE Ste 201  
Lacey, WA 98503  
Facsimile: (360) 491-1805

---

To Seller:                         The Ostrom Company  
8323 Steilacoom Road SE  
Olympia, WA 98513  
Facsimile: (360) 438-2594

With a copy to:                   Foster Pepper & Shefelman  
1111 Third Avenue #3400  
Seattle, WA 98101  
Attention: Bruce Coffey  
Facsimile: (206) 447-9700

16. Assignment. Purchaser's rights under this Agreement are not assignable and Purchaser covenants not to assign its rights hereunder without the prior written consent of Seller.
17. Appraisal Costs. The parties have jointly ordered an appraisal from Anderson Appraisal Inc., which appraisal has been delivered. The Seller shall pay one-half of

the fee incurred for said appraisal for up to a maximum obligation by the Seller of \$1,750.00. All other costs of such appraisal shall be paid by the Purchaser.

DATED this day and date first above written.

THE OSTROM COMPANY

William Street  
President

CITY OF LACEY

Bernadene Main  
Greg J. Cuoio, City Manager

BERNADENE MAIN, ACTING CITY MANAGER

THURSTON COUNTY

Richard D. Nichols  
Commissioner

Shane Chiquel  
Commissioner

Judy Nelson  
Commissioner

Approved as to form:

Approved as to form:

Kenneth R. Ahlf  
Lacey City Attorney

W. J. Smith  
Deputy Prosecuting Attorney  
Thurston County

STATE OF WASHINGTON )

) ss.

County of Thurston )

On this day personally appeared before me William Street, Sr., to me known to be the President of The Ostrom Company that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument.

GIVEN under my hand and official seal this 16 day of

July, 1998.

Kristine E. Erickson-Moran

NOTARY PUBLIC in and for the State  
of Washington, residing at Shelton  
My Commission Expires: 3/20/02

Pick → John ✓, Mark ✓, Robert ✓ → File

FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

**BEAN & GENTRY**  
A LIMITED LIABILITY PARTNERSHIP  
ATTORNEYS AT LAW  
320 COLUMBIA STREET NW  
POST OFFICE BOX 2317  
OLYMPIA, WASHINGTON 98507

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

May 19, 2005

KAY BROWN, PRESIDING  
ADMINISTRATIVE APPEALS JUDGE  
ENVIRONMENTAL HEARINGS OFFICE  
4224 6<sup>TH</sup> AVE SE BLDG #2 ROWE SIX  
P.O. BOX 40903  
LACEY WA 98504-0903

RECEIVED

MAY 24 2005

ORCAA

**Re: The Ostrom Company Inc. v. ORCAA**  
**PCHB No. 04-105 & 04-140**

Dear Judge Brown:

Enclosed for filing please find Olympic Region Clean Air Agency's Final Witness and Exhibit List as well as the Trial Brief.

Very truly yours,

FRED D. GENTRY  
Attorney for Olympic Region Clean  
Air Agency

FDG/crm  
Enclosures  
cc: Richard Stedman, ORCAA (w/encl)  
Mark M. Myers (w/encl)

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**STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE**

THE OSTROM COMPANY INC.,

Appellant,

vs.

OLYMPIC REGION CLEAN AIR AGENCY

Respondent.

PCHB NO. 04-140 &  
PCHB NO. 04-105

**OLYMPIC REGION CLEAN AIR  
AGENCY'S FINAL WITNESS AND  
EXHIBIT LIST**

**I. WITNESSES**

1. Richard Stedman, Executive Director, Olympic Region Clean Air Agency, 2940-B Limited Lane NW, Olympia, WA 98502.

2. John Kelly, Air Quality Specialist II, Olympic Region Clean Air Agency, 2940-B Limited Lane NW, Olympia, WA 98502.

3. Robert Moody, Supervising Air Quality Specialist, Olympic Region Clean Air Agency, 2940-B Limited Lane NW, Olympia, WA 98502.

4. Mark V. Goodin, Professional Engineer, Olympic Region Clean Air Agency, 2940-B Limited Lane NW, Olympia, WA 98502.

5. Dean Nguyen, Olympic Region Clean Air Agency, 2940-B Limited Lane NW, Olympia, WA 98502.

6. Hal Aspgren, 8616 Sebastian Drive NE, Christa Heights, Olympia, Washington 98516.

7. Penny Batts, 3000 Hannah Court NE, Christa Heights, Olympia, Washington 98516.

8. Tom Giroux, 8635 Christa Drive NE, Christa Heights, Olympia, Washington 98516.

9. Gail Lundsten, 1325 Union Mills Road, Lacey, Washington 98503.

10. William V.G. Street, Ostrom Company.

11. Christopher Street, Ostrom Company.

**II. EXHIBITS**

R-1. Regulation 1 of the Olympic Region Clean Air Agency (by official notice).

R-2. Notice of Civil Penalty Assessment re: NOV 2172, dated July 7, 2004.

R-3. Notice of Violation No. 2172.

R-4. Outdoor Civil Penalty Worksheet and Recommendation regarding NOV 2172.

R-5. Photos (17) taken 5/21/04.

R-6. Notice of Civil Penalty Assessment re: NOV 2198, dated October 4, 2004.

R-7. Notice of Violation No. 2198.

R-8. General Civil Penalty Worksheet and Recommendation regarding NOV 2198.

R-9. NOC# 99NOC023.

R-10. ORCAA Inspection Report dated 6/22/04, re: date of inspection 5/21/04.

R-11. Regulatory Order dated 6/29/04.

R-12. Respondent Olympic Region Clean Air Agency's First Interrogatories and Requests for Production of Documents Propounded to Appellant the Ostrom Company, Inc., and Responses Thereto.

R-13. Declaration of William Street, Sr., dated December 13, 2004.

R-14. Aerial Photographs from the Thurston County Geodata website on which can be seen Ostrom's Lacey facilities.

R-15. Complaints and Records regarding Ostrom received by ORCAA between January 2003 and October 2004.

R-16. Article entitled Mushroom Magic by Lani Jordan dated October 8, 2004.

DATED and SIGNED this 23 day of May, 2005.

BEAN & GENTRY

Attorneys for Respondent

FRED D. GENTRY, WSBA #1448

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**STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE**

THE OSTROM COMPANY INC.,

Appellant,

vs.

OLYMPIC REGION CLEAN AIR AGENCY

Respondent.

**PCHB NO. 04-105 &  
PCHB NO. 04-140**

**OLYMPIC REGION CLEAN AIR  
AGENCY'S TRIAL BRIEF**

**I. FACTUAL BACKGROUND**

Since 1967, the Ostrom Company, Inc., has owned property in Thurston County on which it has produced mushrooms. In 1977 Ostrom purchased an additional 60 contiguous acres from Robert Gibb. Ostrom kept 20 of the 60 acres and constructed an indoor composting facility (ICF), aerated composting bunkers, and a waste water tank on the 20 acres which it retained. The other 40 acres were sold to Tanglewilde Properties, Inc., in 1977 and developed as residential.

The last Notice of Construction which Ostrom filed with ORCAA was in 1999. NOC #99N0C023 (Exhibit R-9) reflects ORCAA's approval order conditions for the construction of which it was apprised.

**A. The Process.**

As explained by Ostrom Chief Financial Officer Clay Frederick in an October 8, 2004, article entitled "Mushroom Magic" and authored by Lani Jordan:

Good mushrooms begin with good compost, . . . . It takes 21 days of near - constant attention to produce the perfect

1 compost blend of dried poultry waste and wheat straw brought  
2 in from Central and Eastern Washington. The components are  
3 mixed with water, then regularly moved and 'turned' on a  
massive conveyor belt system to insure even, thorough  
composting.

4 Recently, Ostrom Farms expanded its business by not only  
5 preparing the 1,200 yards of compost it needs each week, but  
6 selling another 800 yards weekly to other growers as far away  
7 as Canada.

8 Following the compost process, mushroom production moves  
9 indoors. While most people associate mushroom growing with  
10 caves, Ostrom Farms produces its crop inside thick - walled  
11 buildings with precise temperature control. Large wooden  
12 trays are filled with perfected compost and sprinkled with  
13 mushroom 'spawn,' the equivalent of seeds, along with a  
14 nutritional supplement. After about a week, a layer of soil - a  
15 mixture of peat, sugar beet lime, linsate, and water - is applied  
16 to each tray.

17 Inside a growing room, trays are stacked several high like  
18 mushroom bunk beds. There the trays form a mold layer and  
19 are treated with cool, oxygenated air to shock the spores into  
20 forming tiny mushrooms known as pinnings. Then it is on to  
21 the 5,400-sq.-foot picking room where mushrooms can grow to  
22 market size in a matter of hours.

23 In all it's a nine week journey from compost preparation to the  
24 third and final picking for each compost filled tray. Each tray  
25 produces six to seven pounds of mushrooms per square foot,  
26 depending on compost and other conditions. . . .

27 (Emphasis added.) After the mushrooms have been picked, the trays are steam  
28 disinfected and the spent compost is dumped out onto a concrete pad to be picked up by  
O'Neill Brothers for transport to their facility where it is sold for mulching and gardening.

Discovery in this case confirms that Ostrom is producing a lot more compost than  
needed for mushrooms grown at its Lacey facility. Ostrom's responses to ORCAA's  
Interrogatories (Exhibit R-12) indicate that Ostrom's fresh compost production was very  
stable at its Lacey and Everson facilities for several years prior to 1999. For the years  
1993 through 1999, the Ostrom's Lacey facility produced 78,000 cubic yards of compost.  
For the years 1997 through 1999, the Everson facility produced 20,800 cubic yards of  
compost.



1 1993 through 1999, the Ostrom's Lacey facility produced 78,000 cubic yards of compost.  
2 For the years 1997 through 1999, the Everson facility produced 20,800 cubic yards of  
3 compost.

4 Subsequent to the opening of the ICF in Lacey, compost production there  
5 significantly increased from 78,000 cubic yards in 2000 to 114,000 cubic yards in 2003.  
6 Significantly, the annual volume of mushrooms grown in Lacey remained about the same  
7 and even decreased in 2004.

8 Meanwhile, the increased volume of fresh compost produced at the Lacey facility  
9 was shipped to Ostrom's Everson plant and at least three Canadian mushroom growers.  
10 In response to Interrogatory No. 4 and Request for Production No. 1, regarding shipment  
11 of compost produced at the Lacey plant and shipped to the Everson plant, Ostrom listed  
12 two separate periods, in December 2003, and May 2004, during which 800 cubic yards of  
13 fresh compost were shipped from Lacey to Everson.

14 In response to Interrogatory No. 5 and Request for Production No. 2, Ostrom  
15 indicated that it had shipped a total of 104,644 cubic yards of fresh compost from  
16 November 2000 through August of 2003 to three Canadian firms. In addition, documents

17 produced in response to Request for Production No. 2 include 27 separate pages detailing  
18 shipments of compost from Ostrom's Lacey facility between January 4, 2004, and July 9,  
19 2004, which were picked up by Martin's Feed. According to these documents, during the  
20 first six months of 2004, 22,542 cubic yards of fresh compost were picked up by Martin's  
21 Feed.

22 All told, Ostrom admits that it produced over 127,000 cubic yards of fresh compost  
23 at its Lacey facility which it did not use for mushroom production at that facility. (This fresh  
24 compost which Ostrom shipped offsite to other mushroom growers is to be differentiated  
25 from the "spent" compost left after the mushrooms are picked which was picked up by  
26 O'Neill Brothers and sold for gardening purposes.)



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1 *Black's Law Dictionary* defines "lawsuit" as follows:

2 A vernacular term for a suit, action, or cause instituted or  
3 depending between two private persons in the courts of law.  
4 A suit at law or in equity; an action or proceeding in a civil  
5 court; a process in law instituted by one party to compel  
6 another to do him justice.

6 *Black's Law Dictionary* (4<sup>th</sup> edition, 1951).

7 Perusal of Chapter 7.48 RCW and caselaw decided thereunder confirms that a  
8 regulatory action such as this is not synonymous with a nuisance lawsuit and therefore the  
9 RTFA exception to nuisance lawsuits is inapplicable. Significantly, Ostrom has not pointed  
10 to any caselaw in which the RTFA was held to bar a regulatory action such as this.

11 Second, even assuming, for the purposes of argument, that a regulatory action is  
12 akin to a nuisance lawsuit, the RTFA exception is not applicable here because Ostrom's  
13 compost production, which is the subject of this regulatory action, is not an "agricultural  
14 activity" within the meaning of the definition found in RCW 7.48.310(1):

15 "Agricultural activity" means a condition or activity which occurs  
16 on a farm in connection with the commercial production of farm  
17 products and includes, but is not limited to, marketed produce  
18 at roadside stands or farm markets; noise; odors; dust; fumes;  
19 operation of machinery and irrigation pumps; movement,  
20 including but not limited to, use of current county road ditches,  
21 streams, rivers, canals, and drains, and use of water for  
22 agricultural activities; ground and aerial application of seed,  
23 fertilizers, conditioners, and plant protection products;  
24 employment and use of labor; roadway movement of  
25 equipment an livestock; protection from damage by wildlife;  
26 prevention of trespass; construction and maintenance of  
27 buildings, fences, roads, bridges, ponds, drains, waterways,  
28 and similar features and maintenance of streambanks and  
watercourses; and conversion from one agricultural activity to  
another.

24 (Emphasis added.)

25 As evidenced by Ostrom's answers to interrogatories, Ostrom's does not use all of  
26 the compost produced in Lacey to grow mushrooms in Lacey but sells a huge amount of  
27 fresh compost to others, including another Ostrom's plant in Everson, Washington, and  
28 buyers in Canada.

1 Third, Ostrom's substantially increased compost production is a new activity and  
2 thus not protected. In Buchanan v. Simplot Feeders Limited, 134 Wn.2d 673, 680, 952  
3 P.2d 610 (1998) the court said that:

4 An established farm may not be able to institute a new or  
5 radically expanded "activity" and maintain nuisance immunity,  
6 because the language of the statute focuses on agricultural  
7 activity that has been established prior to the urban  
8 encroachment. Cf. Payne v. Skaar, 127 Idaho 341, 900 P.2d  
1352, 1355 (1995) (Idaho Right to Farm Act does not protect  
an established feedlot from nuisance suits if the nuisance  
arises because of expansion of the agricultural activity).

9 In this case, it is clear from Ostrom's answers to interrogatories that Ostrom radically  
10 expanded its compost production after the construction of surrounding residential areas and  
11 thus Ostrom's increased compost production is not exempt under the RTFA.

12 It is anticipated that Ostrom will rely on Vicwood Meridian Partnership v. Skagit Sand  
13 and Gravel, 123 Wn.App. 877, 98 P.3d 1277 (2004) to attempt to counter ORCAA's  
14 arguments that Ostrom's compost production is not an agriculture activity and that it is a  
15 new and expanded activity and for these reasons not exempted under the RTFA. The  
16 Court of Appeal's opinion is not determinative or even persuasive in this case because of

17 significant factual distinctions between that case and this one. In Vicwood, Thurston  
18 County had brought a true nuisance suit in the form of a claim for contribution. Moreover,  
19 as pointed out by the Court of Appeals in its opinion:

- 20
- 21 • "Thurston County failed to preserve the issue of whether Ostrom's indoor  
22 composting facility is a new or expanded activity because it did not present  
it to the trial court." Vicwood, at 886.
  - 23 • "Thurston County also failed to provide evidence that Ostrom produces more  
24 compost since moving into its indoor facility." Vicwood, at 886.

25 It is also clear from the Court of Appeal's discussion of Donovan v. Frezo Brothers, Inc.,  
26 678 F.2d 1166, 1171 (3d Cir. 1982) and the trial court's oral opinion in Vicwood Meridian  
27 v. Skagit Sand and Gravel that the only evidence in Vicwood was that Ostrom produced  
28 compost at its Lacey facility only for its own use in growing mushrooms at that site.

1 In contrast, Ostrom's answers to interrogatories in this case prove beyond a doubt  
2 that (1) Ostrom's Lacey plant is producing more compost; (2) Ostrom's Lacey facility is  
3 now selling a considerable amount of fresh compost to others; and (3) not all of the  
4 compost produced by Ostrom at its Lacey facility is connected with the commercial  
5 production of its own mushrooms. In light of this evidence, Ostrom's substantially  
6 increased compost production is clearly a new or radically expanded activity which is not  
7 exempted by the RTFA and is not an "agricultural activity" within the meaning of the  
8 definition found in RCW 7.48.310(1). The Vicwood case is clearly distinguishable and thus  
9 not controlling.

10 **2. This Board Does Not Have the Jurisdiction to Determine Whether**  
11 **the Right to Farm Act Precludes This Regulatory Enforcement Action.**

12 In Dunlap v. City of Nooksack, 2003 WL 21391320  
13 (Wash.Shore.Hrg.Bd.), the Washington Shoreline Hearings Board responded to an  
14 argument that the RTFA limited the ability of the city to restrict certain agricultural activities  
15 by saying that "The Board does not have jurisdiction to determine whether a violation of  
16 these provisions of the code has occurred." (Ex. 12.) The jurisdiction of the Pollution  
17 Control Hearings Board is similarly restricted. RCW 43.21B.005 and RCW 43.21B.110.

18 **3. The Exemption Found in RCW 70.94.640 is Not Applicable.**

19 The exemption for odors caused by agricultural activity which is found in RCW  
20 70.94.640 is not applicable here. RCW 70.94.640(4) provides that the exemption shall not  
21 apply "[i]f a person engaged in agricultural activity on a contiguous piece of agricultural land  
22 sells or has sold a portion of that land for residential purposes."

23 William Street, Sr., admits in his Declaration and in answers to interrogatories (Ex.  
24 10) that Ostrom sold a contiguous piece of property for residential purposes.

25 The Washington Clean Air Act does not define "contiguous." *Black's Law Dictionary*  
26 defines "contiguous" as follows:

27 In close proximity; near, though not in contact; neighboring;  
28 adjoining; near in succession; in actual close contact; touching;  
bounded or traversed by.

1 The *American Heritage Dictionary of the English Language* defines the word as  
2 follows:  
3

- 4 1. Sharing an edge or boundary; touching.
- 5 2. Nearby; neighboring; adjacent.

6 The 40 acres sold by Ostrom to Tanglewilde Properties for residential purposes  
7 meets either or both of these definitions. Even if the general exemption for agricultural  
8 activities found in RCW 70.94.640 were otherwise applicable, which ORCAA does not  
9 admit, Ostrom's sale of the 40 acres renders the exemption inapplicable.

10 **B. Notice of Violation No. 2198.**

11 This board may take judicial notice of the fact that the exemption found in Regulation  
12 1, Section 7.01(d)(51) was not adopted until October 6, 2003. From Ostrom's answers to  
13 interrogatories it is clear that the construction which is the subject of NOV 2198 occurred  
14 prior to the adoption of Regulation 1, 7.01(d)(51).

15 Moreover, even if this exemption had been in effect at the time of construction, the  
16 modifications to operations and equipment associated with the Phase I composting system  
17 and wastewater treatment system were not "primary agricultural production activities." As  
18 discussed more fully earlier in this Brief, Ostrom does not use all of the compost that it  
19 produces to grow its own mushrooms but sells much of the fresh compost to others.

20 Finally, even if this exemption had been in effect and was applicable, it is clear that  
21 a Notice of Construction was nevertheless required under Chapter 173-460 WAC, Controls  
22 for New Sources of Toxic Air Pollutants. Ostrom's Lacey facility emits several Class B air  
23 pollutants which are listed in WAC 173-460-160. As the testimony of Mark Goodin will  
24 establish, increased composting production increased the emissions triggering the need  
25 for a NOC under Chapter 173-40.

26 **III. CONCLUSION**

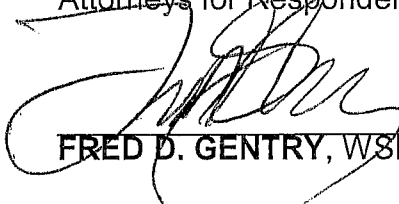
27 Ostrom violated ORCAA's Regulation 1 §'s 7.01(a), 7.07, and § 9.11(c). As  
28 discussed more fully above, the Right to Farm Act is not applicable, the narrow exemption  
found in RCW 70.94.640 is not applicable, and a Notice of Construction was required under

1 ORCAA's Regulation 1 as well as Chapter 173-460 WAC. The penalties imposed by  
2 ORCAA for these violations were clearly fair and reasonable and arrived at in compliance  
3 with the Civil Penalty Assessment Worksheet.

4 Respectfully Submitted,

5 This 23 day of May, 2005.

6  
7 BEAN & GENTRY  
Attorneys for Respondent ORCAA

8  
9   
10 FRED D. GENTRY, WSBA #1448

John → Sent ✓, John → file

**BEAN & GENTRY**

FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

A LIMITED LIABILITY PARTNERSHIP  
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TELEPHONE 943-8040  
FAX 786-6943

May 2, 2005

RECEIVED  
MAY 04 2005  
ORCAA

HAL ASPGREN  
8616 SEBASTIAN DRIVE NE  
CHRISTA HEIGHTS  
LACEY, WA 98516

**Re: Ostrom v. Olympic Region Clean Air Agency**

Dear Mr. Aspgren:

I am happy to report that the Pollution Control Hearings Board reversed their order dismissing our case against Ostrom and the case will move forward on June 9 and 10, 2005, at the office of the Pollution Control Hearings Board, 4224 6<sup>TH</sup> Avenue SE, Bldg. #2 Rowe Six, Lacey, WA.

I would like you to be available to testify on the morning of Thursday, June 9. Would you please call to confirm that you will be available then. If you need a subpoena to show your employer or for any other reason, please let me know and I am happy to provide that to you.

Please give me a call.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
cc: Rich Stedman, ORCAA  
S:\PC 1\wp51\ORCAA\OSTROM\ostrom-aspgren ltr2.wpd

COPY

FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

**BEAN & GENTRY**  
A LIMITED LIABILITY PARTNERSHIP  
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320 COLUMBIA STREET NW  
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OLYMPIA, WASHINGTON 98507

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

May 2, 2005

GAIL LUNDSTEN  
1325 UNION MILLS ROAD  
LACEY, WA 98503

**Re: *Ostrom v. Olympic Region Clean Air Agency***  
***Date of Hearing April 4, 2005***

Dear Ms. Lundsten:

I am happy to report that the Pollution Control Hearings Board reversed their order dismissing our case against Ostrom and the case will move forward on June 9 and 10, 2005, at the office of the Pollution Control Hearings Board, 4224 6<sup>TH</sup> Avenue SE, Bldg. #2 Rowe Six, Lacey, WA.

I would like you to be available to testify on the morning of Thursday, June 9. Would you please call to confirm that you will be available then. If you need a subpoena to show your employer or for any other reason, please let me know and I am happy to provide that to you.

Please give me a call.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
cc: Rich Stedman, ORCAA  
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FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

**BEAN & GENTRY**  
A LIMITED LIABILITY PARTNERSHIP  
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OLYMPIA, WASHINGTON 98507

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

May 2, 2005

TOM GIROUX  
8635 CHRISTA DRIVE NE  
LACEY, WA 98516

**Re: *Ostrom v. Olympic Region Clean Air Agency***

Dear Mr. Giroux:

I am happy to report that the Pollution Control Hearings Board reversed their order dismissing our case against Ostrom and the case will move forward on June 9 and 10, 2005, at the office of the Pollution Control Hearings Board, 4224 6<sup>TH</sup> Avenue SE, Bldg. #2 Rowe Six, Lacey, WA.

I would like you to be available to testify on the morning of Thursday, June 9. Would you please call to confirm that you will be available then. If you need a subpoena to show your employer or for any other reason, please let me know and I am happy to provide that to you.

---

Please give me a call.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
cc: Rich Stedman, ORCAA

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COPY

FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

**BEAN & GENTRY**  
A LIMITED LIABILITY PARTNERSHIP  
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OLYMPIA, WASHINGTON 98507

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

May 2, 2005

PENNY BATTS  
3000 HANNAH COURT NE  
LACEY, WA 98516

**Re: *Ostrom v. Olympic Region Clean Air Agency***

Dear Ms. Batts:

I am happy to report that the Pollution Control Hearings Board reversed their order dismissing our case against Ostrom and the case will move forward on June 9 and 10, 2005, at the office of the Pollution Control Hearings Board, 4224 6<sup>TH</sup> Avenue SE, Bldg. #2 Rowe Six, Lacey, WA.

I would like you to be available to testify on the morning of Thursday, June 9. Would you please call to confirm that you will be available then. If you need a subpoena to show your employer or for any other reason, please let me know and I am happy to provide that to you.

Please give me a call.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
cc: Rich Stedman, ORCAA  
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File

STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

4224 - 6th Ave. SE, Bldg. 2, Rowe Six  
PO Box 40903, Lacey, WA 98504-0903

April 28, 2005

RECEIVED  
APR 29 2005  
ORCAA

Mark M. Myers  
WILLIASM KASTNER & GIBBS  
601 Union Street Suite 4100  
PO Box 21926  
Seattle WA 98111-3926

Fred Gentry  
Attorney at Law  
PO Box 2317  
Olympia WA 98507

RE: PCHB NO. 04-105 & 04-140  
**THE OSTRUM COMPANY, INC. v. ORCAA**

Dear Parties:

Enclosed is an Order Granting Motion to Supplement the Record and Petition for Reconsideration, Reversing Summary Judgment, and Setting Hearing Date.

Sincerely yours,

  
Kay Brown  
Administrative Appeals Judge, Presiding

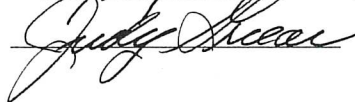
KB/jg/P 04-105 ltr  
cc: ORCAA  
enc.

**CERTIFICATION**

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED 4/28/05 at Lacey, WA.





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

ORDER GRANTING MOTION TO  
SUPPLEMENT THE RECORD AND  
PETITION FOR RECONSIDERATION,  
REVERSING SUMMARY  
JUDGMENT, AND SETTING  
HEARING DATE

10 This matter came before the Pollution Control Hearings Board (Board) on two appeals  
11 filed by Appellant The Ostrom Company, Inc. (Ostrom). Ostrom challenged three orders issued  
12 to it by the Olympic Region Clean Air Agency (ORCAA). Ostrom filed a motion to dismiss  
13 which the Board determined was a summary judgment motion. The Board granted summary  
14 judgment to Ostrom, by order dated March 18, 2005.

15 ORCAA filed a timely petition for reconsideration of the order, along with a motion to  
16 supplement the record and a declaration. Ostrom filed a response in opposition to the petition  
17 and the motion to supplement the record. ORCAA filed a reply.

18 The Board that decided the summary judgment motion was comprised of William H.  
19 Lynch, Chair, and Members Bill Clarke and David W. Danner. Kay M. Brown, Administrative  
20

21  
ORDER GRANTING PETITION  
FOR RECONSIDERATION  
PCHB NO. 04-105, 04-140

1 Appeals Judge, presided for the Board. The same Board has reviewed the pleadings and ruled on  
2 the record on the Petition for Reconsideration. These pleadings are:

- 3 1. Respondent's Petition for Reconsideration, Memorandum in Support of Petition,  
4 Motion to Supplement the Record, and Declaration of John T. Kelly;
- 5 2. Appellant's Response to ORCAA's Motion to Supplement the Record and  
6 Petition for Reconsideration; and,
- 7 3. ORCAA's Reply Memorandum.

8 Having fully considered the record in this case and being fully advised, the Board enters  
9 the following ruling.

10 ANALYSIS

11 ORCAA makes two primary arguments in support of its Petition for Reconsideration.

12 First, it contends the Board erred by concluding that Ostrom's composting activities were  
entitled to the protection afforded agricultural activities under RCW 70.94.640, and that they

13 were not subject to the notice of construction requirements of ORCAA's Regulation 1 Section  
14 7.01(d)(51). The primary thrust of this argument is that by selling some of the mushroom  
15 compost it makes, Ostrom's composting activity loses its agricultural status, and becomes  
16 manufacturing for resale. This argument is not new, and was made to the Board in the original  
17 summary judgment briefing. However, based upon the briefing material filed by ORCAA with  
18 its Petition for Reconsideration, and after further review and consideration of the material filed

1 by Ostrom in Response to the Petition for Reconsideration, the Board concludes that taking  
2 testimony and receiving further briefing on this question would be appropriate.<sup>1</sup>

3 Specifically, the Board concludes there is insufficient factual material in the record  
4 before it to fully understand the relationship between the growing of mushrooms, and the  
5 creation of compost. In particular, the Board notes the reference to a distinction between “fresh”  
6 compost and “spent” compost in ORCAA’s brief, a reference not highlighted during the initial  
7 round of briefing on summary judgment and not contained in the factual material submitted with  
8 the record. *See* ORCAA’s Memorandum in Support of Petition, p. 3, line 8-9. At the hearing,  
9 the Board would like testimony presented that describes the role of compost in the mushroom  
10 growing process, and how the compost sold by Ostrom, fits into this process. The Board would  
11 also like to receive analysis in the pre-hearing briefing from both parties, addressing if, or when,  
12 the composting activity loses its agricultural status and becomes manufacturing for resale.

13 Further, the Board would like the briefing to address how the potential change in status of the  
14 composting activity affects the status of odor emissions from the farm, which are still at least  
15 partially due to emissions from composting used by Ostrom in growing mushrooms at its Lacey  
16 farm.

17 ORCAA’s second argument in its petition for reconsideration pertains to the Board’s  
18 ruling on the effect of Ostrom’s prior sale of land. ORCAA argues that Ostrom lost its  
19 agricultural exemption by selling a parcel of land contiguous to its farm. Ostrom’s initial

---

21 <sup>1</sup> The Board concludes that oral argument would not be helpful in making a decision on this petition for  
reconsideration, and therefore ORCAA’s request for oral argument on its petition is denied.

1 response to this argument,<sup>2</sup> which the Board accepted, was that the parcel sold was not a  
2 “contiguous piece of agricultural land” because the land was part of a 60-acre parcel purchased,  
3 and almost immediately resold, by Ostrom. A portion of the 60 acres was not resold, and was  
4 instead retained, according to Ostrom, for a “buffer.”

5 Now, however, ORCAA offers additional evidence to suggest that this land is not solely  
6 used as a “buffer,” but includes Ostrom’s indoor composting facility, a large water tank, and  
7 bunkers. See Declaration of John T. Kelly.<sup>3</sup> ORCAA goes on to argue that this use of the  
8 “buffer” cuts against Ostrom’s argument that the land was not part of a contiguous piece of  
9 agricultural land.

10 The Board recognizes that both parties were aware throughout the briefing process on the  
11 Motion to Dismiss that the “buffer” was being used for part of Ostrom’s operations. Therefore  
12 it is not newly discovered evidence. Unfortunately, it was not presented to the Board until the

13 filing of the Petition for Reconsideration. The Board concludes that both parties failed to meet  
14 their obligations to bring this material to the Board’s attention during the motion process.<sup>4</sup> In the  
15 interests of fully informed decision making, the Board grants ORCAA’s motion to supplement  
16 the record, and considers the additional factual information. In light of that information, the

---

18 <sup>2</sup> ORCAA’s defensive argument was anticipated by Ostrom, and included both in a footnote in its opening brief on  
19 its motion and in a declaration filed with that motion. See Appellant’s Dispositive Motion, p. 3, footnote 1, and  
Declaration of William Street Sr.

20 <sup>3</sup> Ostrom does not offer factual material to refute Kelly’s declaration.

21 <sup>4</sup> In the interests of full disclosure, Ostrom should have clarified, when it argued that the acreage it retained was for a  
buffer, that it was actually using the buffer for some of its operations. On the other hand, ORCAA, as the party  
responding to a motion for summary judgment and the party with the ultimate burden of proof, should have brought  
forth available factual information to rebut the argument Ostrom had included in its motion.

1 Board will proceed with a hearing to take testimony from both sides regarding the history of the  
2 purchase and use of this property.

3 Based on the above analysis, the Board enters the following:


4 ORDER

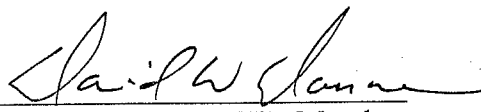
5 The Board's Order Granting Summary Judgment to Ostrom, issued on March 18, 2005, is  
6 reversed, and summary judgment is denied. This matter is scheduled for a full factual hearing on  
7 6/9&10/05, in Lacey, WA. The hearing will begin at 9:00 a.m., with the presentation of  
8 opening statements by the parties. The hearing will then be adjourned, and a site visit by the  
9 Board will be conducted. Following the site visit, the hearing will reconvene at the Board's  
10 office in Lacey for the taking of testimony.

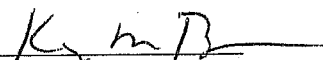
11 Done this 28<sup>th</sup> day of April 2005.

12 POLLUTION CONTROL HEARINGS BOARD

13  
14   
WILLIAM H. LYNCH, Chair

15  
16   
BILL CLARKE, Member

17  
18   
DAVID W. DANNER, Member

19  
20   
Kay M. Brown

21 Administrative Appeals Judge, Presiding

ORDER GRANTING PETITION  
FOR RECONSIDERATION  
PCHB NO. 04-105, 04-140



CAS → Robert —, Mark —

→ File

FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

**BEAN & GENTRY**  
A LIMITED LIABILITY PARTNERSHIP  
ATTORNEYS AT LAW  
320 COLUMBIA STREET NW  
POST OFFICE BOX 2317  
OLYMPIA, WASHINGTON 98507

AREA CODE 360  
TELEPHONE 843-8040  
FAX 786-6943

April 12, 2005

RECEIVED

APR 13 2005

ORCAA

KAY BROWN, PRESIDING  
ADMINISTRATIVE APPEALS JUDGE  
ENVIRONMENTAL HEARINGS OFFICE  
4224 6<sup>TH</sup> AVE SE BLDG #2 ROWE SIX  
P.O. BOX 40903  
LACEY WA 98504-0903

**Re: The Ostrom Company Inc. v. ORCAA**  
**PCHB No. 04-105 & 04-140**

Dear Judge Brown:

Enclosed for filing please find the original and four copies of ORCAA's Reply Memorandum.  
On behalf of my client, ORCAA, I request that oral argument be scheduled.

Very truly yours,

FRED D. GENTRY  
Attorney for Olympic Region Clean  
Air Agency

FDG/crm  
Enclosures  
cc: Richard Stedman, ORCAA (w/encl)  
Mark M. Myers (w/encl)

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**STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE**

THE OSTROM COMPANY INC.,

Appellant,

vs.

OLYMPIC REGION CLEAN AIR AGENCY

Respondent.

PCHB NO. 04-105 &  
PCHB NO. 04-140

**ORCAA'S REPLY MEMORANDUM  
(ORAL ARGUMENT REQUESTED)**

**I. INTRODUCTION**

Olympic Region Clean Air Agency's (ORCAA's) Petition for Reconsideration should be granted. The Board should also (1) grant the Motion to Supplement the Record; (2) reverse its March 18 order and deny summary judgment; and (3) schedule a full evidentiary hearing.

**II. ARGUMENT**

"The summary judgment device is designed to do away with useless trials on formal issues which cannot be factually supported, or, if factually supported, could not in law lead to a result favorable to the opposing party. It may not be used to displace a trial on the facts where there is a genuine issue of fact." (Citations omitted.) Orland, L. and Tegland, K., 4 Washington Practice p. 536.

The benefit of all favorable inferences that can be drawn from the evidence is given to the non-moving party. Meadows v. Grant's Auto Brokers, Inc., 71 Wn.2d 874, 881-82, 431 P.2d 216 (1967). Even where evidentiary facts are not in dispute, where different

1 inferences may be drawn therefrom, a summary judgment will not be proper. Preston v.  
2 Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960).

3 It is error for the trial court to grant summary judgment based on an issue first raised  
4 in the moving party's reply brief. Truck Insurance v. Century Indemnity, 76 Wn.App. 527,  
5 535-36 (1995), rev. den. 127 Wn.2d 1002 (1995).

6 **A. Ostrom's Waiver Argument is Not on Point.**

7 Ostrom argues that waiver precludes ORCAA's Petition for Reconsideration and  
8 Motion to Supplement the Record. This waiver argument misses the mark entirely.

9 ORCAA could not, as Ostrom argues, have responded to the "buffer" argument in  
10 ORCAA's responsive memorandum because Ostrom did not raise the issue until its Reply.  
11 ORCAA does not suggest that the information contained in Mr. Kelly's Declaration was  
12 newly discovered because it was not. This was information known to ORCAA which  
13 certainly would have been proffered earlier if Ostrom had raised the "buffer" issue in its  
14 opening memorandum. Ostrom deliberately chose not to, however, and cannot be heard  
15 to complain that ORCAA should be penalized for Ostrom's failure to raise all of the issues  
16 in its opening papers. <sup>1</sup>

17 **B. Summary Judgment Erroneously Predicated on Issue First Raised in**  
18 **Ostrom's Reply Brief Necessitates Supplementing the Record and Reversal of**  
19 **Summary Judgment.**

20 Although Ostrom admittedly "anticipated" that ORCAA might respond to its claim of  
21 exemption with an argument that Ostrom is not entitled to the "agricultural activity"  
22 exemption (Appellant's Response at p. 2), Ostrom chose not to make its "buffer" argument  
23 until its Reply. In its Reply, Ostrom for the first time argued that it had "only sold land that  
24 had not been part of its farm and that it bought for the sole purpose of creating a buffer  
25 *against* residential development on land 'contiguous' to its farm." Significantly, Ostrom  
26

---

27 <sup>1</sup> Ostrom also argues that ORCAA could have requested oral argument. While this is true, it  
28 should be noted that this is the first time in 30 plus years of practice before this Board that the Board ever  
decided a summary judgment without first hearing oral argument. ORCAA's attorney was awaiting notice  
as to potential dates for oral argument when the order was received in the mail.

1 made no mention in the Reply brief to the use to which the 20-acre piece it kept had been  
2 put. Rather, by referring to it only as a "buffer" Ostrom suggested to the reader that this  
3 piece was unused and served no purpose other than as a true buffer.

4 *The American Heritage Dictionary of the English Language* defines "buffer" as "1.  
5 something that lessens or absorbs the shock of an impact. 2. one that protects by  
6 intercepting or moderating adverse pressures or influences." The Declaration of John T.  
7 Kelly soundly refutes the argument, first raised in Ostrom's Reply, that the 20-acre parcel  
8 was kept as a "buffer." What Ostrom calls its buffer zone, in fact, houses Ostrom's indoor  
9 composting facility (ICF), its 260 gallon waste water holding tank, and the aerated  
10 composting bunkers!

11 It is incumbent upon a moving party to raise in its opening papers all of the issues  
12 upon which it believes it is entitled to summary judgment. Here, Ostrom admittedly  
13 anticipated making its "buffer" argument but strategically waited until the Reply brief to raise  
14 it. It was clearly error to grant summary judgment based on an issue first raised in  
15 Ostrom's Reply Brief. Truck Insurance v. Century Indemnity, at 535-36.

16 The Motion to Supplement the Record with the Declaration of John T. Kelly should  
17 be granted. This declaration vividly illustrates the reason behind the rule that summary  
18 judgment may not be granted based upon an issue first raised in a moving party's Reply  
19 brief. Furthermore, the Order of Summary Judgment should be reversed, an order should  
20 be entered denying summary judgment, and the case should proceed to hearing.

21 **C. Substantial Factual Evidence Regarding Extensive Compost Production**  
22 **Wholly Unrelated to Mushroom Production at Ostrom's Lacey Facility Demands That**  
23 **the Petition for Reconsideration be Granted and the Order of Summary Judgment**  
24 **Reversed.**

25 Contrary to Ostrom's characterization of the Board's order, neither the courts of this  
26 state, nor this Board in this or any other case, have ever concluded that "[t]he production  
27 of compost is agricultural activity, period." (Appellant's Response at p. 7.) Indeed, this  
28 Board carefully acknowledged that "the fact that Ostrom sells a by-product of mushroom

1 growing (compost) may be distinguishable from the situation where compost is produced  
2 solely for sale." (Order Granting Summary Judgment at p. 6, footnote 2.) This Board went  
3 on to say, "the record before the Board, however, does not support the conclusion that  
4 compost production is unrelated to mushroom growing."

5 The latter statement was clearly erroneous and contradicted by substantial evidence  
6 proffered by ORCAA. The evidence in the record before the Board, in fact, showed that  
7 Ostrom significantly increased its compost production at its Lacey facility from 78,000 cubic  
8 yards in 2000 to 114,000 cubic yards in 2003. Despite this huge increase (36,000 cubic  
9 yards per year), the volume of mushrooms produced at its Lacey facility, remained about  
10 the same and even decreased in 2004. Meanwhile, Ostrom sold and shipped offsite  
11 127,000 cubic yards of compost which it did not use for its own mushroom production at  
12 its Lacey facility.

13 These facts were before the Board when it ruled on Ostrom's Motion for Summary  
14 Judgment. Contrary to Ostrom's characterization of the Board's ruling, this Board did not  
15 rule that the production of compost is always agricultural activity. Rather, it is clear from  
16 the Board's discussion of the issue that the Board did not initially appreciate all of the  
17 evidence which had been proffered and which showed the extent of Ostrom's compost  
18 production which was produced solely for sale.

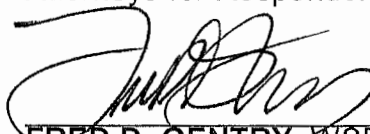
19 Clearly, ORCAA's Petition for Reconsideration should be granted, the Order  
20 reversed, summary judgment should be denied, and this matter should proceed to a full  
21 hearing.

### 22 **III. CONCLUSION**

23 ORCAA's Petition for Review should be granted. Additionally, this Board should  
24 grant the Motion to Supplement the Record with the Declaration of John T. Kelly, reverse  
25 the March 18 Order Granting Summary Judgment, deny summary judgment, and schedule  
26 this case for hearing.

1 Respectfully Submitted this 12 day of April, 2005.

2 BEAN & GENTRY  
3 Attorneys for Respondent ORCAA

4 

5 FRED D. GENTRY, WSBA #1448  
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7  
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16

## Richard Stedman

---

**From:** Richard Stedman  
**Sent:** Tuesday, April 05, 2005 4:40 PM  
**To:** 'Neumeyer, Kari'  
**Subject:** RE: records request



ORCAA-Ostrom  
hearing.pdf

Kari,

The file you requested is attached. I also included the briefing schedule established for our petition.

Sincerely,

Richard A. Stedman  
Executive Director  
Olympic Region Clean Air Agency  
(360) 586-1044, Ext. 100  
2940-B Limited Lane  
Olympia, WA 98502  
<<http://www.orcaa.org/>>

-----Original Message-----

From: Neumeyer, Kari [mailto:kneumeye@olympia.gannett.com]  
Sent: Tuesday, April 05, 2005 3:01 PM  
To: Richard Stedman  
Subject: records request

Records request

Richard,

Pursuant to RCW 42.17.320, I am requesting a copy of the Motion for Reconsideration filed by ORCAA to the Pollution Control Hearings Board regarding the \$10,000 fine against Ostrom Mushroom Farm.

Thanks,

Kari

~~~~~

Kari Neumeyer  
Lacey Today / The Olympian  
111 Bethel Street NE  
Olympia, WA 98507  
kneumeye@olympia.gannett.com  
360-357-0204

## Richard Stedman

---

**From:** Neumeyer, Kari [kneumeye@olympia.gannett.com]  
**Sent:** Tuesday, April 05, 2005 3:01 PM  
**To:** Richard Stedman  
**Subject:** records request

Records request

Richard,

Pursuant to RCW 42.17.320, I am requesting a copy of the Motion for Reconsideration filed by ORCAA to the Pollution Control Hearings Board regarding the \$10,000 fine against Ostrom Mushroom Farm.

Thanks,

Kari

~~~~~

Kari Neumeyer  
Lacey Today / The Olympian  
111 Bethel Street NE  
Olympia, WA 98507  
kneumeye@olympia.gannett.com  
360-357-0204





*Run - Robert ✓, John ✓, Mark ✓*  
Telephone: (360) 459-6327  
FAX: (360) 438-7699  
Email: eho@eho.wa.gov  
Website: www.eho.wa.gov  
*→ Flu*

STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

4224 - 6th Ave. SE, Bldg. 2, Rowe Six  
PO Box 40903, Lacey, WA 98504-0903

March 29, 2005

BY FAX AND REGULAR MAIL

Mark M. Myers  
WILLIASM KASTNER & GIBBS  
601 Union Street Suite 4100  
PO Box 21926  
Seattle WA 98111-3926

Fred Gentry  
Attorney at Law  
PO Box 2317  
Olympia WA 98507

RE: PCHB NO. 04-105 & 04-140  
**THE OSTRUM COMPANY, INC. v. ORCAA**

Dear Parties:

A timely petition for reconsideration was filed by ORCAA on March 25, 2005. The following briefing schedule is established for addressing the petition:

Response	April 6, 2005
Reply	April 13, 2005

The Board will act on the petition no later than April 29, 2005. If you have any questions, please feel free to call.

Sincerely yours,

Kay Brown  
Administrative Appeals Judge, Presiding

KB/jg/P 04-105 ltr  
cc: ORCAA

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED March 29, 2005 at Lacey, WA.

**RECEIVED**  
**MAR 30 2005**  
**ORCAA**



FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

**BEAN & GENTRY**  
A LIMITED LIABILITY PARTNERSHIP  
ATTORNEYS AT LAW  
320 COLUMBIA STREET NW  
POST OFFICE BOX 2317  
OLYMPIA, WASHINGTON 98507

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

March 25, 2005

KAY BROWN, PRESIDING  
ADMINISTRATIVE APPEALS JUDGE  
ENVIRONMENTAL HEARINGS OFFICE  
4224 6<sup>TH</sup> AVE SE BLDG #2 ROWE SIX  
P.O. BOX 40903  
LACEY WA 98504-0903

**Re: The Ostrom Company Inc. v. ORCAA**  
**PCHB No. 04-105 & 04-140**

Dear Judge Brown:

ORCAA is hereby petitioning for reconsideration. Enclosed please find the following:

1. Respondent's Petition for Reconsideration;
2. Memorandum in Support of Petition for Reconsideration;
3. Respondent's Motion to Supplement the Record; and
4. Declaration of John T. Kelly.

I am enclosing the original and three copies. Please let me know if additional copies are needed.

Very truly yours,

*Fred D. Gentry/crm*

FRED D. GENTRY  
Attorney for Olympic Region Clean  
Air Agency

FDG/crm  
Enclosures

cc: Richard Stedman, ORCAA (w/encl)  
Mark M. Myers (w/encl)

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**RECEIVED**

**MAR 29 2005**

**ORCAA**

**COPY**

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8 **STATE OF WASHINGTON**  
9 **ENVIRONMENTAL HEARINGS OFFICE**

10 THE OSTROM COMPANY INC.,

11 Appellant,

12 vs.

13 OLYMPIC REGION CLEAN AIR AGENCY

14 Respondent.  
15

PCHB NO. 04-105 &  
PCHB NO. 04-140

**RESPONDENT'S PETITION FOR  
RECONSIDERATION**

16  
17 COMES NOW Olympic Region Clean Air Agency by and through its attorney, Fred  
18 D. Gentry, Bean & Gentry, and petitions the Pollution Control Hearings Board for  
19 reconsideration of the Order Granting Summary Judgment issued on March 18, 2005. This  
20 petition is brought pursuant to WAC 371-08-550 and is based on the pleadings and  
21 materials heretofore filed with the Board, as well as the attached Memorandum in Support  
22 of Respondent's Petition for Reconsideration. Assuming ORCAA's Motion to Supplement  
23 the Record is allowed, this Petition for Reconsideration is also based on the Declaration of  
24 John T. Kelly.

25 Respectfully submitted this 24th day of March, 2005.

26 BEAN & GENTRY  
Attorneys for Respondent ORCAA

27  
28   
FRED D. GENTRY, WSBA #1448

BEAN & GENTRY  
Attorneys at Law  
320 North Columbia Street  
Post Office Box 2317  
Olympia, Washington 98507  
Telephone (360) 943-8040  
Fax (360) 786-6943

COPY

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6 **STATE OF WASHINGTON**  
7 **ENVIRONMENTAL HEARINGS OFFICE**

8 THE OSTROM COMPANY INC.,

9 Appellant,

10 vs.

11 OLYMPIC REGION CLEAN AIR AGENCY

12 Respondent.  
13

PCHB NO. 04-105 &  
PCHB NO. 04-140

**RESPONDENT'S MOTION TO  
SUPPLEMENT THE RECORD**

14 COMES NOW Olympic Region Clean Air Agency, by and through its attorney, Fred  
15 D. Gentry, Bean & Gentry, and moves the Pollution Control Hearings Board to permit  
16 supplementation of the record to include the Declaration of John T. Kelly. Respondent  
17 makes this request in conjunction with its Petition for Reconsideration of the Order Granting  
18 Summary Judgment issued on March 18, 2005. As explained more fully in Respondent's  
19 Memorandum in Support of its Petition for Reconsideration, the Declaration of John T. Kelly  
20 responds to an issue first raised by appellant in its Reply Brief. Respondent's  
21 Memorandum in Support of its Petition for Reconsideration further explains the grounds for  
22 this Motion to Supplement the Record. See Also CR 56(f); CR 59(a); Marzolt v. Stone, 136  
23 Wn.2d 122, 135-136, 960 P.2d 424 (1998)

24 DATED this 24<sup>th</sup> day of March, 2005.

25 BEAN & GENTRY  
26 Attorneys for Respondent ORCAA

27  
28   
FRED D. GENTRY, WSBA #1448

COPY



  
**John Kelly**

---

**From:** carla murphy [carla@beanandgentry.com]  
**Sent:** Wednesday, March 23, 2005 11:45 AM  
**To:** John Kelly  
**Subject:** Declaration of John T. Kelly

**COPY**

John:

Thanks for your help. Attached is the revised copy of your declaration.

Very truly,

Carla R. Murphy  
Legal Secretary  
LAW OFFICE of  
BEAN & GENTRY  
320 N. COLUMBIA STREET  
OLYMPIA, WA 98507  
(360) 943-8040 (Phone)  
(360) 786-6943 (Fax)

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03/23/2005

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**STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE**

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THE OSTROM COMPANY INC.,

Appellant,

**PCHB NO. 04-105 &  
PCHB NO. 04-140**

vs.

**DECLARATION OF JOHN T.  
KELLY**

OLYMPIC REGION CLEAN AIR AGENCY

Respondent.

I am an Engineer 1 employed by Olympic Region Clean Air Agency since January 1, 1994.

Over the years I have become very familiar with the Ostrom's plant and its composting facility and attended the tour and inspection on May 21, 2004.

Attached hereto is an aerial photograph from the Thurston County Geo Data website on which can be seen Ostrom's Lacey facilities. On that aerial photograph I have indicated the location of Ostrom's original mushroom farm location, the acreage sold to Tanglewilde Properties, Inc., by Ostrom's in 1977 for residential purposes, and the parcel Ostrom's refers to as its "buffer zone." I have also indicated on the aerial

photograph the location of Ostrom's indoor composting facility (ICF), its 260,000 gallon wastewater holding tank, and the aerated composting bunkers, all of which are located on the parcel Ostrom's calls its "buffer zone."

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
THE STATE OF WASHINGTON THAT I BELIEVE THE FOREGOING IS TRUE AND  
CORRECT.

DATED this 23<sup>RD</sup> day of March, 2005, at Olympia, Washington.

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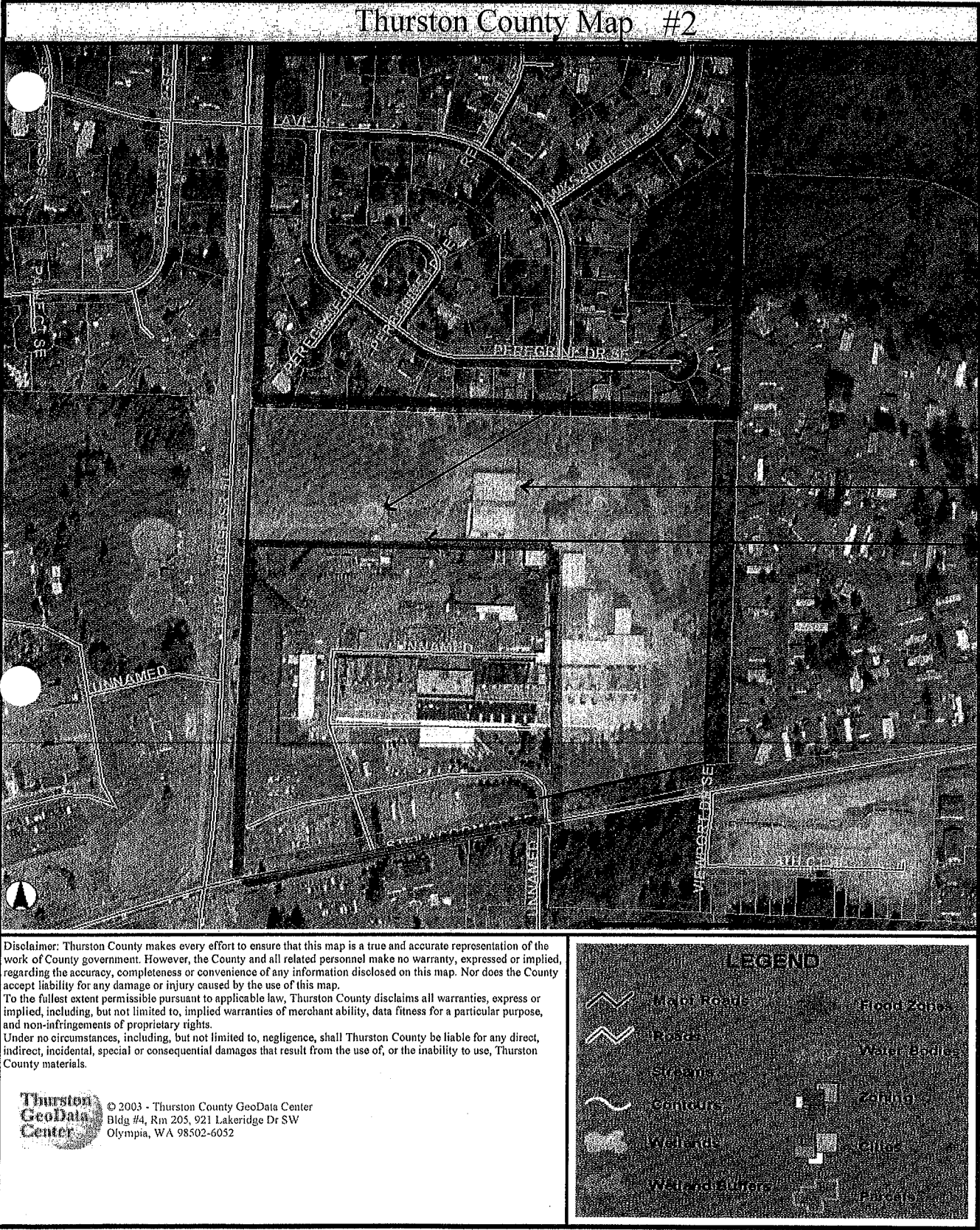
7

JOHN T. KELLY, Engineer 1  
Olympic Region Clean Air Agency

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11



Original Mushroom Farm Location - Parcel #s 11814140200 and 11814140300



Acreage sold to Tanglewilde Properties Inc. by Ostroms in 1977



Ostroms "Buffer Zone" - Parcel # 11814140100



FRED D. GENTRY  
STEPHEN J. BEAN, INC., P.S.  
MARY E. GENTRY  
CECILIA M. CLYNCH

**BEAN & GENTRY**  
A LIMITED LIABILITY PARTNERSHIP  
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320 NORTH COLUMBIA STREET  
POST OFFICE BOX 2317  
OLYMPIA, WASHINGTON 98507

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

March 21, 2005

RECEIVED  
MAR 22 2005  
ORCAA

RICHARD STEDMAN  
EXECUTIVE DIRECTOR  
OLYMPIC REGION CLEAN  
AIR AGENCY  
2940-B LIMITED LANE NW  
OLYMPIA, WA 98502

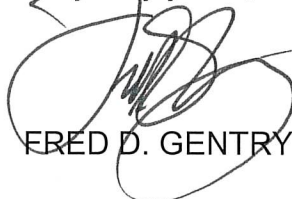
**Re: Ostrom v. ORCAA**

Dear Rich:

I am assuming that you have received a copy of the decision granting summary judgment but I enclose a copy in case it did not get to you.

Pursuant to our conversation, we will petition for reconsideration. I do not expect the motion to be granted (statistically the odds are about 1 in 100) and assuming that this is denied, we will then have 30 days from that point to appeal to the superior court if that is your decision.

Very truly yours,



FRED D. GENTRY

FDG/crm  
Enclosure

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FRED D. GENTRY  
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MARY E. GENTRY  
CECILIA M. CLYNCH

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FAX 786-6943

March 21, 2005

GAIL LUNDSTEN  
1325 UNION MILLS ROAD  
LACEY, WA 98503

**Re: *Ostrom v. Olympic Region Clean Air Agency***  
***Date of Hearing April 4, 2005***

Dear Ms. Lundsten:

I am writing regarding the above matter. I enclose for your information a copy of the order granting summary judgment in this matter.

The Pollution Control Hearings Board has decided that as a matter of law, Ostrom is protected from odor enforcement because of their agricultural activities.

ORCAA will be petitioning the Board for reconsideration. If that is denied, ORCAA has not yet made a decision as to whether or not to appeal the decision of the Pollution Control Hearings Board to the superior court.

In any event, the hearing scheduled April 4, has been cancelled. I will keep you informed of developments.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
Enclosure  
cc: Rich Stedman, ORCAA  
S:\PC 1\wp51\ORCAA\ostrom-lundsten ltr.wpd

COPY

FRED D. GENTRY  
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FAX 786-6943

March 21, 2005

HAL ASPGREN  
8616 SEBASTIAN DRIVE NE  
CHRISTA HEIGHTS  
LACEY, WA 98516

**Re: *Ostrom v. Olympic Region Clean Air Agency***

Dear Mr. Aspghren:

I am writing regarding the above matter. I enclose for your information a copy of the order granting summary judgment in this matter.

The Pollution Control Hearings Board has decided that as a matter of law, Ostrom is protected from odor enforcement because of their agricultural activities.

ORCAA will be petitioning the Board for reconsideration. If that is denied, ORCAA has not yet made a decision as to whether or not to appeal the decision of the Pollution Control Hearings Board to the superior court.

In any event, the hearing scheduled April 4, has been cancelled. I will keep you informed of developments.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
Enclosure  
cc: Rich Stedman, ORCAA  
S:\PC 1\wp51\ORCAA\ostrom-aspgren ltr.wpd

COPY

FRED D. GENTRY  
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FAX 786-6943

March 21, 2005

PENNY BATTS  
3000 HANNAH COURT NE  
LACEY, WA 98516

***Re: Ostrom v. Olympic Region Clean Air Agency***

Dear Ms. Batts:

I am writing regarding the above matter. I enclose for your information a copy of the order granting summary judgment in this matter.

The Pollution Control Hearings Board has decided that as a matter of law, Ostrom is protected from odor enforcement because of their agricultural activities.

ORCAA will be petitioning the Board for reconsideration. If that is denied, ORCAA has not yet made a decision as to whether or not to appeal the decision of the Pollution Control Hearings Board to the superior court.

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In any event, the hearing scheduled April 4, has been cancelled. I will keep you informed of developments.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
Enclosure  
cc: Rich Stedman, ORCAA  
S:\PC 1\wp51\ORCAA\ostrom-batts ltr.wpd

COPY

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FAX 786-6943

March 21, 2005

TOM GIROUX  
8635 CHRISTA DRIVE NE  
LACEY, WA 98516

**Re: *Ostrom v. Olympic Region Clean Air Agency***

Dear Mr. Giroux:

I am writing regarding the above matter. I enclose for your information a copy of the order granting summary judgment in this matter.

The Pollution Control Hearings Board has decided that as a matter of law, Ostrom is protected from odor enforcement because of their agricultural activities.

ORCAA will be petitioning the Board for reconsideration. If that is denied, ORCAA has not yet made a decision as to whether or not to appeal the decision of the Pollution Control Hearings Board to the superior court.

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In any event, the hearing scheduled April 4, has been cancelled. I will keep you informed of developments.

Very truly yours,

FRED D. GENTRY  
Attorney for the Olympic Region Clean Air Agency

FDG/crm  
Enclosure  
cc: Rich Stedman, ORCAA

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COPY



STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

4224 - 6th Ave. SE, Bldg. 2, Rowe Six  
PO Box 40903, Lacey, WA 98504-0903

March 18, 2005

BY FAX AND REGULAR MAIL

Mark M. Myers  
WILLIAMS KASTNER & GIBBS  
601 Union Street Suite 4100  
PO Box 21926  
Seattle WA 98111-3926

Fred Gentry  
Attorney at Law  
PO Box 2317  
Olympia WA 98507

RE: PCHB NO. 04-105 & 04-140  
**THE OSTRUM COMPANY, INC. v. ORCAA**

Dear Parties:

Please find enclosed an Order Granting Summary Judgment in this matter.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days,  
pursuant to WAC 371-08-555, 560, and RCW 34.05.542.

The following notice is given per RCW 34.05.461(3): Any party may file a petition for reconsideration within 10 days and serve it on the other parties. The term "file" means receipt.

Sincerely yours,

Kay Brown  
Administrative Appeals Judge, Presiding

KB/jg/P 04-105 ltr  
Enc.  
cc: ORCAA

**CERTIFICATION**

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 18, 2005, at Lacey, WA.