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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

**RESPONDENT OLYMPIC REGION
CLEAN AIR AGENCY'S FIRST
INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS PROPOUNDED
TO APPELLANT THE OSTROM
COMPANY, INC.**

16 **TO: The Ostrom Company Inc., Appellant;**

17 **AND TO: Mark M. Myers, Attorney for Appellant:**

18 Pursuant to the Prehearing Order and Superior Court Civil Rules 26, 33, and 34,
19 respondent Olympic Region Clean Air Agency, propounds the following interrogatories and
20 requests for production of documents to appellant The Ostrom Company Inc. The
21 interrogatories set forth below are to be answered fully and separately in writing, under
22 oath, in accordance with the Civil Rules. As is required under the rules, please serve your
23 answers to these interrogatories and produce responsive documents to Fred D. Gentry,
24 P.O. Box 2317, Olympia, WA, 98507, within thirty (30) of the date of service upon you.
25 If The Ostrom Company Inc., elects to produce the originals for copying in lieu of providing
26 copies, then Olympic Region Clean Air Agency requests that such inspection and copying
27 be done at Bean & Gentry within 30 days of this service.
28

**RESPONDENT OLYMPIC REGION CLEAN AIR
AGENCY'S FIRST INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS TO APPELLANT THE OSTROM
COMPANY, INC. - 1**

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

1 **I. INSTRUCTIONS AND DEFINITIONS**

2 A. In answering these interrogatories and requests for production, please furnish
3 all information available to you, including information in the possession of your
4 investigators, agents, representatives, attorneys, investigators of your attorneys, and any
5 other person or persons acting on your behalf, and information or knowledge that is
6 available to you, your representatives, and attorneys by reasonable inquiry.

7 B. If you cannot answer any of the following interrogatories or requests for
8 production in full, after exercising due diligence to secure the information to do so, so state
9 and answer to the extent possible, specify your inability to answer the remainder, and state
10 what information or knowledge you have concerning the unanswered portion.

11 C. If you object to any interrogatory or request for production, state with specificity
12 the reasons for each such objection. If you claim any privilege with respect to any request
13 for production or any part thereof, identify the type of privilege which is claimed, state the
14 basis for the claim of privilege, identify the communication, document or other item as to
15 which the privilege is claimed and state the general subject matter thereof. If you claim a
16 privilege with regard to any request for production or any part thereof, you should
17 nevertheless respond to the request for production to the extent that it calls for documents
18 or parts of documents as to which you do not claim a privilege.

19 D. If a document called for by a request is known to have existed, but cannot
20 be located now, identify the document and state:

21 (i.) Whether the missing document has been in your
22 possession, custody, or control;

23 (ii.) When and where the missing document was known to
24 be in your possession, custody, or control; and

25 (iii.) In whose possession, custody, or control such
26 document may be found or, as applicable, whether the
27 document has been destroyed or has otherwise ceased to
28 exist.

E. These interrogatories and requests for production are continuing and
therefore require supplemental answers to the extent called for by Civil Rule 26(e).

1 F. In answering these interrogatories and requests for production, the following
2 definitions apply:

3 (i.) "You" or "your" includes plaintiff and all assigns, agents,
4 guardians and other persons acting in a representative
5 capacity to plaintiff, including, without limitation, plaintiff's
6 attorneys and accountants.

7 (ii.) "Person" means an individual, corporation, partnership,
8 group, association, business or governmental agency, or any
9 other entity.

10 (iii.) Whenever any person must be "identified" or a request
11 calls for the "identity" of a person, the person shall be identified
12 by name, last known address and last known telephone
13 number.

14 (iv.) "Relating to" or "relates to" means, without limitation,
15 embodying, mentioning, or concerning, directly or indirectly,
16 the subject matter identified in the specific request.

17 (v.) "Document" shall be construed in its broadest sense
18 and includes any original, reproduction, or copy of any kind of
19 written or documentary materials, or drafts thereof, including,
20 but not limited to, correspondence, memoranda, interoffice
21 communications, telegrams, minutes of meetings, notes of
22 telephone conversations, notes of any oral communications,
23 other notes, diaries, calendars, contract documents,
24 publications, calculations, estimates, vouchers, invoices,
25 billings, checks, reports, studies, computer files, electronic data
26 storage materials, digitally recorded information, movies
27 photographs, negatives, slides, dictation belts, and voice
28 tapes.

(vi) Any other words used herein shall be defined according
to standard American usage, as shown in a dictionary of the
English language.

MAILING CERTIFICATE

I CERTIFY THAT I MAILED TWO (2) COPIES OF THESE
INTERROGATORIES AND REQUEST FOR PRODUCTION TO THE
ATTORNEY FOR THE APPELLANT, AT HIS/HER OFFICE ADDRESS,
POSTAGE PREPAID, ON THE ____ DAY OF _____, 2004.

BEAN & GENTRY
Attorneys for Respondent

FRED D. GENTRY

II. INTERROGATORIES AND REQUESTS FOR PRODUCTION

INTERROGATORY NO. 1: State the name, current address and telephone number of each person who provided any information or otherwise assisted in preparing your answers to each of these discovery requests.

ANSWER:

INTERROGATORY NO. 2: For the 10 years preceding the opening of the indoor composting facility (ICF) in Lacey, please provide the following information:

ANSWER:

YEAR	AMOUNT OF COMPOST PRODUCED AT OSTROM'S LACEY PLANT	AMOUNT OF MUSHROOMS PRODUCED AT OSTROM'S LACEY PLANT	AMOUNT OF COMPOST PRODUCED AT OSTROM'S EVERSON PLANT	AMOUNT OF MUSHROOMS PRODUCED AT OSTROM'S EVERSON PLANT

INTERROGATORY NO. 3: For the years since opening of the ICF in Lacey, please provide the following information:

ANSWER:

YEAR	AMOUNT OF COMPOST PRODUCED AT OSTROM'S LACEY PLANT	AMOUNT OF MUSHROOMS PRODUCED AT OSTROM'S LACEY PLANT	AMOUNT OF COMPOST PRODUCED AT OSTROM'S EVERSON PLANT	AMOUNT OF MUSHROOMS PRODUCED AT OSTROM'S EVERSON PLANT

INTERROGATORY NO. 4: At any time since Ostrom Company began operations in Lacey has Ostrom's Lacey plant supplied Ostrom's Everson plant with compost prepared at the Lacey plant? If the answer is yes, please provide the following information:

ANSWER:

DATE(S)	AMOUNT OF COMPOST SUPPLIED BY LACEY PLANT TO EVERSON PLANT

REQUEST FOR PRODUCTION NO. 1: Please produce a copy of each and every document which relates to your answer to Interrogatory No. 4.

INTERROGATORY NO. 5: At any time since Ostrom Company began operations in Lacey, has Ostrom's Lacey plant supplied, sold, traded, transferred, shipped, bartered, and/or given away compost prepared at the Lacey plant to any other person or entity? If the answer is yes, please provide the following information:

ANSWER:

DATE(S) OF SALE, SUPPLY, ETC.	IDENTITY OF ENTITY OR PERSON TO WHOM SUPPLIED (including address/phone/contact person)	AMOUNT OF COMPOST SOLD/SUPPLIED, ETC.	PRICE

INTERROGATORY NO. 7: With respect to Ostrom Company's purchase of the real property for its Lacey plant, please provide the following information:

ANSWER:

DATE(S) OF PURCHASE	NUMBER OF ACRES PURCHASED AND STREET ADDRESS(ES)	IDENTITY OF SELLER	PARCEL NUMBER(S)

REQUEST FOR PRODUCTION NO. 4: Please produce a copy of each and every document that relates to your answer to Interrogatory No. 7.

INTERROGATORY NO. 8: Has Ostrom Company, at any time, sold any piece or portion of real property located in Lacey and/or Thurston County? If the answer is yes, please provide the following information:

ANSWER:

DATE(S) OF SALE	NUMBER OF ACRES AND STREET ADDRESS (ES)	IDENTITY OF PURCHASER	PURCHASE PRICE	PURPOSE/ USE(S) OF PROPERTY PRIOR TO SALE BY OSTROM	PURPOSE/ USE(S) OF PROPERTY SUBSEQ- UENT TO SALE BY OSTROM	PARCEL NUMBERS

REQUEST FOR PRODUCTION NO. 5: Please produce a copy of each and every document that relates to your answer to Interrogatory No. 8.

INTERROGATORY NO. 9: With respect to any real property identified in response to the preceding Interrogatory, was this property or any portion of this property contiguous to Ostrom's Lacey plant and/or the land on which it sits? If the answer is yes, please identify to which sale(s) you are referring.

ANSWER:

INTERROGATORY NO. 10: With respect to any and all contiguous land sales referred to in your answer to Interrogatory No. 9, has any piece or portion of that land been used for residential purposes since its sale by Ostrom? If the answer is yes, please identify to which sale(s) you are referring.

ANSWER:

INTERROGATORY NO. 11: Please describe in detail any and all buildings, or structures erected by Ostrom Company and/or any and all additions, changes, and/or retrofitting to any existing buildings or structures that Ostrom Company has made at its Lacey plant since the beginning of Ostrom's operations in Lacey. With respect to each building/structure/addition/change/retrofit identified and described, please indicate:

- (a) Whether or not an application for notice of construction was filed with ORCAA(OAPCA);
- (b) Whether or not any permit or application was filed with any other governmental or regulatory agency and the identity of such governmental or regulatory agency;
- (c) Permitting agency, permit number and year issued, if any;
- (d) Date(s) of construction.

ANSWER:

REQUEST FOR PRODUCTION NO. 6: Please produce a copy of each and every document that relates to your answer to Interrogatory No. 11.

INTERROGATORY NO. 12: With respect to each of the items at the Lacey plant which are identified below, please provide the requested information:

	DATE(S) OF INSTALLATION AND/OR CONSTRUCTION	WHETHER PERMIT(S) OBTAINED FROM GOV'T/REG AGENCY	IDENTITY OF PERMITTING AGENCY/DATE PERMIT ISSUED/PERMIT NUMBER
HEAP TURNER			
PRECONDITIONING BUNKERS (NORTH & SOUTH BUNKERS)			
240,000 GAL. LEACHATE TANK AND ASSOCIATED AERATION SYSTEM			

REQUEST FOR PRODUCTION NO. : Please produce a copy of each and every document that relates to your answer to Interrogatory No. 12.

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**STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE**

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THE OSTROM COMPANY INC.,

Appellant,

vs.

OLYMPIC REGION CLEAN AIR AGENCY

Respondent.

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

**DECLARATION OF JOHN T.
KELLY**

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

COPY


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 23RD day of March, 2005, at Olympia, Washington.

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JOHN T. KELLY, Engineer 1

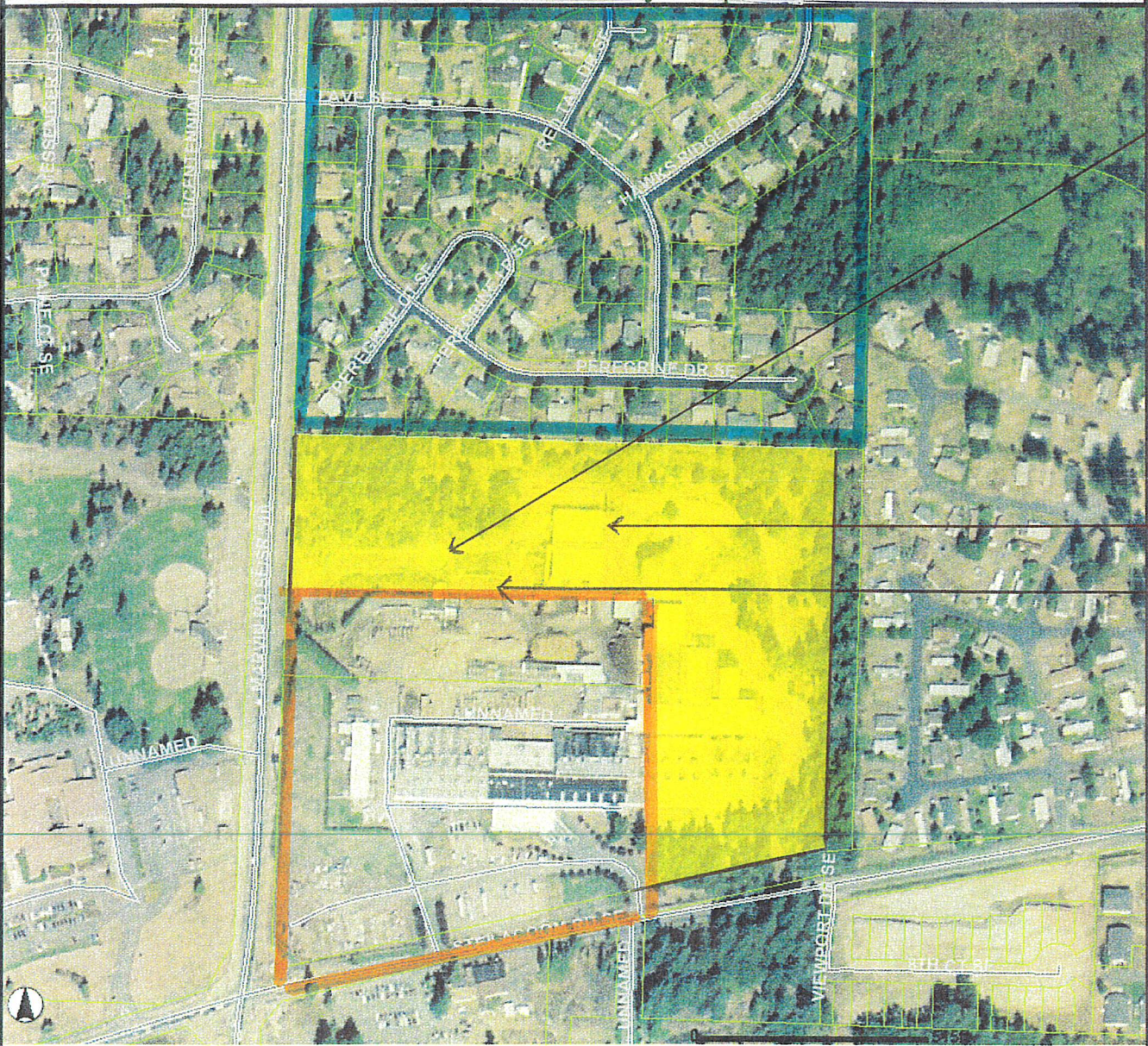
8 Olympic Region Clean Air Agency

9

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11

Thurston County Map #2



OPEN-AIR
260,000 GA
WASTEWATER
HOLDING
TANK

PHASE 1
COMPOSTING
AERATED
BUNKER

Disclaimer: Thurston County makes every effort to ensure that this map is a true and accurate representation of the work of County government. However, the County and all related personnel make no warranty, expressed or implied, regarding the accuracy, completeness or convenience of any information disclosed on this map. Nor does the County accept liability for any damage or injury caused by the use of this map.

To the fullest extent permissible pursuant to applicable law, Thurston County disclaims all warranties, express or implied, including, but not limited to, implied warranties of merchant ability, data fitness for a particular purpose, and non-infringements of proprietary rights.

Under no circumstances, including, but not limited to, negligence, shall Thurston County be liable for any direct, indirect, incidental, special or consequential damages that result from the use of, or the inability to use, Thurston County materials

Thurston
GeoData
Center

© 2003 - Thurston County GeoData Center
Bldg #4, Rm 205, 921 Lakeridge Dr SW
Olympia, WA 98502-6052

LEGEND

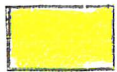
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|--|-----------------|--|--------------|
| | Major Roads | | Flood Zones |
| | Roads | | Water Bodies |
| | Streams | | Zoning |
| | Contours | | Cities |
| | Wetlands | | Parcels |
| | Wetland Buffers | | |



Original Mushroom Farm Location - Parcel #s 11814140200 and 11814140300



Acreage sold to Tanglewilde Properties Inc. by Ostrows in 1977



Ostrows "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
ATTORNEYS AT LAW
COLUMBIA SQUARE
320 NORTH COLUMBIA STREET
POST OFFICE BOX 2317
OLYMPIA, WASHINGTON 98507

AREA CODE 360
TELEPHONE 943-8040
FAX 786-6943

February 10, 2005

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

RECEIVED

FEB 14 2005

ORCAA

Re: Ostrom v. ORCAA

Dear Rich:

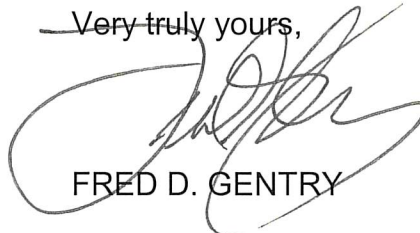
I think you have received all of the pleadings thus far except for Appellant's Reply Memorandum in Support of its Dispositive Motion. Nevertheless, I enclose for your review and John Kelly's review the following:

1. Appellant's Dispositive Motion;
2. Olympic Region Clean Air Agency's Memorandum in Opposition to Ostrom's Dispositive Motion; and
3. Appellant's Reply Memorandum in Support of its Dispositive Motion. I am particularly interested in having John review pages 6-8 of the reply.

If after reviewing these you, John or anyone else at ORCAA have any thoughts or comments, please give me a call.

So far there has been no hearing date set on Ostrom's motion.

Very truly yours,



FRED D. GENTRY

FDG/crm
Enclosures

WASHINGTON STATE
POLLUTION CONTROL HEARINGS BOARD

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR AGENCY,

Respondent.

PCHB NO. 04-105

APPELLANT'S DISPOSITIVE
MOTION (With Subjoined Certificate
of Service)

I. SUMMARY.

In this appeal, The Ostrom Company, Inc., challenges the validity of, and asks the Pollution Control Hearings Board to vacate, three sets of orders issued by the Olympic Region Clean Air Agency ("ORCAA").

The first set of ORCAA orders consists of a Notice of Violation No. 2172 dated July 7, 2004, and a Notice of Civil Penalty Assessment based thereon. The Notice of Civil Penalty Assessment fined Ostrom \$10,000 under authority of ORCAA Regulation 1, § 9.11(c), for emitting from its mushroom farm located at 8323 Steilacoom Road SE in Lacey, odors that "unreasonably interfere[] with another person's use, and enjoyment of their property."

APPELLANT'S DISPOSITIVE MOTION - 1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1596859.1

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1 The second set of ORCAA orders consists of a Notice of Violation (No. 2198), dated
2 June 28, 2004, and a Regulatory Order based thereon. The effect of the Regulatory Order, if
3 enforced, would be to require Ostrom to comply with ORCAA's Notice of Construction rules
4 and secure the agency's approval of modifications the company has made, or proposes to
5 make, to composting facilities at the mushroom farm.

6 The third is a Notice of Civil Penalty dated October 4, 2002, in which ORCAA alleged
7 Ostrom violated ORCAA Regulation 1, Section 7.01(a) and 7.07 regarding the Notice of
8 Construction requirements and fined Ostrom \$1,600.00.

9 Ostrom maintains that ORCAA lacks the authority to issue the orders and penalties,
10 because they seek to regulate, as nuisances, odors of agricultural activity. The "Right to Farm"
11 Act, RCW 7.48.300-.310, precludes the regulation of agricultural activity odors as a nuisance,
12 and the statute from which ORCAA derives its regulatory authority, RCW Chapter 70.94,
13 similarly limits its authority to regulate such odors by requiring in any notice of violation "a
14 statement as to why the activity is inconsistent with good agricultural practices, or a statement
15 that the odors have substantial adverse effect on public health," RCW 70.94.640(2), neither of
16 which ORCAA included the notices of violation and civil penalty it issued to Ostrom. In
17 addition, the odors are generated through activity that constitutes "primary agricultural
18 activity" within the meaning of ORCAA's own Regulation 1, § 701(d)(51), such that the
19 agency's Notice of Construction rules are inapplicable and may not be enforced against
20 Ostrom.

21 22 II. PERTINENT FACTS.

23 Ostrom operates a mushroom farm at the corner of Marvin and Steilacoom Roads in
24 Lacey known as Mushroom Corner. The farm has been used by Ostroms for growing
25

1 mushrooms since 1967 and by predecessors for that purpose since 1928.¹ ORCAA has fined
2 Ostrom \$10,000 for emitting from the Lacey farm odors that “unreasonably interfere[] with
3 another person’s use, and enjoyment of their property.” Appendices 1 and 2. ORCAA also
4 has ordered Ostrom to comply with the agency’s Notice of Construction regulation.
5 Appendices 3 and 4. ORCAA has fined Ostrom \$1,600 for allegedly failing to comply with
6 ORCAA’s Notice of Construction requirements. Appendix 5. Ostrom has timely appealed.

7 ORCAA has made no finding that odors emitted by the Lacey farm have had, or are
8 having, or probably will have, “a substantial and adverse effect upon the public health and
9 safety” within the meaning of RCW 7.48.305, the Right to Farm Act. Nor did the Notice of
10 Violation or the Notice of Civil Penalty include any a statement as to why the activity is
11 inconsistent with good agricultural practices, or a statement that the odors have substantial
12 adverse effect on public health, as required by RCW 70.94.640(2).

13 14 III. APPLICABLE RULES AND STATUTES.

15 ORCAA Regulation 1, § 1.07, defines “Nuisance” as “an emission that unreasonably
16 interferes with the use and enjoyment of property.”

17 ORCAA Regulation 1, § 9.11(c) provides that “No person shall cause or allow the
18 emission or generation of any odor from any source, which unreasonably interferes with
19 another person’s use, and enjoyment of their property.”

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¹ To create a buffer between the farm and neighboring land that was being offered for sale for residential development, Ostrom in 1976 or 1977 bought a 60-acre parcel adjacent to the original farm, kept the 20 acres closest to it, and in 1977 sold the remainder, which has since been developed for homes. *Declaration of William Street, Sr.*

1 ORCAA Regulation 1, § 701(d)(51) provides that "Primary agricultural production
2 activities including soil preparation, planting, fertilizing, weed and pest control, and
3 harvesting" are categorically exempt from the agency's Notice of Construction rules.

4 RCW 7.48.120 provides that a nuisance "consists in unlawfully doing an act, or
5 omitting to perform a duty, which . . . annoys, injures or endangers the comfort, repose, health
6 or safety of others, . . . or in any way renders other persons insecure in life, or in the use of
7 property."

8 RCW 7.48.130 provides that a public nuisance is one that "affects equally the rights of
9 an entire community or neighborhood, although the extent of the damage may be unequal."

10 RCW 7.48.140 provides in pertinent part that:

11 It is a public nuisance:

12 (1) To cause or suffer the carcass of any animal or any offal, filth, or
13 noisome substance to be collected, deposited, or to remain in any place to the
14 prejudice of others; [or]

15 *

16 *

17 *

18 (7) To erect, continue, or use any building, or other place, for the
19 exercise of any trade, employment, or manufacture, which, by occasioning
20 obnoxious exhalations, offensive smells, or otherwise is offensive or dangerous
21 to the health of individuals or of the public . . .

22 RCW 7.48.310 of the Right To Farm Act provides in pertinent part that:

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

1 and watercourses; and conversion from one agricultural activity to another.
2 (Italics supplied.)

3 (2) "Farm" means the land, buildings, freshwater ponds, freshwater
4 culturing and growing facilities, and machinery used in the commercial
5 production of farm products.

6 (3) "Farmland" means land or freshwater ponds devoted primarily to the
7 production, for commercial purposes, of livestock, freshwater aquacultural, or
8 other agricultural commodities.

9 (4) "Farm product" means those plants and animals useful to humans
10 and includes, but is not limited to, forages and sod crops, dairy and dairy
11 products, poultry and poultry products, livestock, including breeding, grazing,
12 and recreational equine use, fruits, vegetables, flowers, seeds, grasses, trees,
13 freshwater fish and fish products, apiaries, equine and other similar products, or
14 any other product which incorporates the use of food, feed, fiber, or fur.

15 RCW 7.48.305 of the Right to Farm Act provides in pertinent part that:

16 Notwithstanding any other provision of this chapter, **agricultural activities**
17 **conducted on farmland** and forest practices, **if consistent with good**
18 **agricultural and forest practices and established prior to surrounding**
19 **nonagricultural and nonforestry activities, are presumed to be reasonable**
20 **and shall not be found to constitute a nuisance unless the activity has a**
21 **substantial adverse effect on the public health and safety.** (Emphases added.)

22 If those agricultural activities and forest practices are undertaken in
23 conformity with all applicable laws and rules, the activities are presumed to be
24 good agricultural and forest practices not adversely affecting the public health
25 and safety for purposes of this section and RCW 7.48.300. An agricultural
activity that is in conformity with such laws and rules shall not be restricted as
to the hours of the day or day or days of the week during which it may be
conducted.

ORCAA is an air pollution control authority operating pursuant to **RCW 70.94.053** and
other provisions of the Washington Clean Air Act, RCW Chapter 70.94.

In 1981, the legislature made the following finding:

The legislature finds that agricultural land is essential to providing citizens with
food and fiber and to insuring aesthetic values through the preservation of open
spaces in our state. The legislature further finds that government regulations
can cause agricultural land to be converted to nonagricultural uses. The

1 legislature intends that agricultural activity consistent with good practices be
2 protected from government over-regulation.

3 Laws of 1981, ch. 297, § 29.

4 **RCW 70.94.640** provides as follows:

5 (1) **Odors caused by agricultural activity consistent with good**
6 **agricultural practices on agricultural land are exempt from the**
7 **requirements of this chapter unless they have a substantial adverse effect**
8 **on public health.** In determining whether agricultural activity is consistent
9 with good agricultural practices, the department of ecology or board of any [air
10 pollution control] authority² shall consult with a recognized third-party expert in
11 the activity prior to issuing any notice of violation. (Emphasis added.)

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

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

22 (4) If a person engaged in agricultural activity on a contiguous piece of
23 agricultural land sells or has sold a portion of that land for residential purposes,
24 the exemption of this section shall not apply.

25 (5) As used in this section:

(a) "Agricultural activity" means the growing, raising, or production of
horticultural or viticultural crops, berries, poultry, livestock, grain, mint, hay,
and dairy products.

² See RCW 70.94.030(5), providing that "'Authority' means any air pollution control agency whose jurisdictional boundaries are coextensive with the boundaries of one or more counties."

1 (b) "Good agricultural practices" means economically feasible practices
2 which are customary among or appropriate to farms and ranches of a similar
nature in the local area.

3 (c) "Agricultural land" means at least five acres of land devoted
4 primarily to the commercial production of livestock or agricultural
commodities.

5 WAC 371-08-450 authorizes a party to an appeal to this Board to seek relief by
6 dispositive motion.

7
8 IV. PERTINENT CASE AUTHORITY.

9 Vicwood Meridian Partnership v. Skagit Sand & Gravel, __ Wn. App. __, 98 P.3d
10 1277 (October 19, 2004), holds that the creation of compost, by Ostrom, at the same mushroom
11 farm as at issue hereI, which compost is used to grow mushrooms as food, is an "agricultural
12 activity" within the meaning of RCW 7.48.310(1), and is conducted on "farm land" within the
13 meaning of RCW 7.48.030(2), such that, as a matter of law, odors from creating as a byproduct
14 of the making of the compost may not be treated as nuisances.

15
16 V. ARGUMENT WHY THIS MOTION SHOULD BE GRANTED.

17 A. The "Right to Farm" Act Precludes Treating Odors Emitted by Ostrom's Agricultural
18 Activity as Nuisances.

19 ORCAA has issued its Notice of Violation and Notice of Civil Penalty Assessment on
20 the ground that odors emitted by Ostrom constitute what the agency's orders define as a
21 "nuisance." That is, the orders are based on a finding that odors from the Lacey mushroom
22 farm have "unreasonably interfere[d] with another person's use, and enjoyment of their
23 property," which is also the agency's definition of "nuisance." ORCAA Reg. 1 §§ 9.11(c) and
24 1.07.
25

APPELLANT'S DISPOSITIVE MOTION - 7

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1 ORCAA generally has the authority to fine persons whose activities emit nuisance
2 odors. However, ORCAA's authority does not extend to odors emitted as a result of activities
3 that constitute "agricultural activities," because the legislature has expressly exempted such
4 odors from treatment as nuisances unless the odors have a "substantial adverse effect on the
5 public health and safety." RCW 7.48.305.

6 The Court of Appeals has held in Vicwood Meridian that the activity by Ostrom at its
7 Lacey mushroom farm -- specifically including its compost-making activity -- constitutes
8 "agricultural activity" protected by the Right To Farm Act. The mushroom farm was
9 established before suburban residential growth spread into areas around and closer to the
10 mushroom farm. Because Ostrom's agricultural activity was established first, Ostrom has what
11 amounts to a license from the legislature to emit nuisance odors unless it thereby creates a
12 "substantial adverse effect on the public health or safety." RCW 7.48.305. ORCAA has not
13 made a finding that any odors from the Lacey mushroom farm have substantially and adversely
14 affected the public health and safety.

15 ~~Under the several provisions of RCW Chapter 7.48 quoted above, "obnoxious~~
16 ~~exhalations," and smells that are offensive or even dangerous to the health of individuals or to~~
17 ~~the public, or that annoy, injure or endanger the comfort, repose, health or safety of others, or~~
18 ~~that render other persons insecure in life, or in the use of property, even on a community-wide~~
19 ~~basis, are mere nuisances. Unless such odors have an effect on the public health and safety that~~
20 ~~is both substantial and adverse, however, they are presumed, under RCW 7.48.305, "to be~~
21 ~~reasonable and . . . not . . . a nuisance" if they are generated by agricultural activity that was~~
22 ~~established first. Thus, mere unreasonable interference with enjoyment and use of property --~~
23 ~~the basis for the Notice of Civil Penalty Assessment issued by ORCAA to Ostrom -- is not a~~
24 ~~sufficient legal basis for fining Ostrom for generating nuisance odors.~~

1 B. The Notices of Violation and of Civil Penalty Assessment are Statutorily Defective.

2 The Washington Clean Air Act, under which ORCAA operates and from which it
3 derives its authority to regulate odors, complements the protections of the Right to Farm Act
4 for "agricultural activity," by providing, in RCW 70.94.640(2), that "[a]ny notice of violation
5 issued under this chapter pertaining to odors caused by agricultural activity shall include a
6 statement as to why the activity is inconsistent with good agricultural practices, or a statement
7 that the odors have substantial adverse effect on public health." Neither the Notice of
8 Violation nor the Notice of Civil Penalty Assessment includes a statement of either kind.³
9 Mushroom growing meets the definition of "agricultural activity" in RCW 70.94.640(5)(a)
10 ("the growing, raising, or production of horticultural or viticultural crops. . ."). The civil
11 penalty is based on a statutorily defective notice and is therefore void.

12 C. A \$10,000 Penalty Is Excessive.

13 Ostrom itself has received few odor complaints over the past three years. Apparently
14 ORCAA, during the 12-month period prior to issuance of the Orders, received approximately
15 30 complaints about odors believed by the complainant(s) to emanate from its mushroom farm.
16 ORCAA did not inform Ostrom of the complaints at the time(s). Thus, Ostrom was not given
17 the opportunity to investigate to determine whether it was in fact the source of these odor
18 complaints (as opposed to other well-known odor sources in the area), and thus to gather
19 evidence to defend itself against the Notice of Violation and the civil penalty assessment based
20 thereon. Under the circumstances, any penalty is unfair and unwarranted, and a \$10,000 fine is
21 manifestly excessive.
22
23

24 ³ Nor has Ostrom been given any reason to believe that ORCAA complied with the provision in RCW
25 70.94.640(1) requiring consultation with "a recognized third-party expert in the activity prior to issuing any notice
of violation."

1 D. Ostrom is Exempt From ORCAA's Notice of Construction Rules, and Thus From Any
2 Order Issued Pursuant to Them.

3 Administrative agencies are bound by their own rules. Skamania County v. Woodall,
4 104 Wn. App. 525, 539, 16 P.3d 701 (2001).

5 ORCAA Regulation 1, § 701(d)(51) categorically exempts from the agency's Notice of
6 Construction (NOC) requirements: "Primary agricultural production activities including soil
7 preparation, planting, fertilizing, weed and pest control, and harvesting;" Growing mushrooms
8 involves each of the enumerated activities: soil preparation (making compost substrate),
9 planting, weed and pest control, and harvesting. Thus, the preparation of mushroom-growing
10 substrate – a kind of soil – is a "primary agricultural production activity." ORCAA's June 29,
11 2004 Regulatory Order attempts to apply to Ostrom's NOC requirements that the agency's own
12 regulations exempt it from. Thus, the Order is void.

13 VI. RELIEF REQUESTED.

14 Ostrom asks the Board to hold:

15 ~~(1) that odors emitted from Ostrom's Olympia facility constitute "agricultural activity"~~
16 that is exempt from regulation as a nuisance by virtue of RCW 7.48.305;

17 (2) that the ORCAA Notice of Civil Penalty is predicated on a finding that odors
18 emitted from Ostrom's Olympia facility have constituted a nuisance;

19 (3) that ORCAA lacks the authority to regulate or impose penalties upon Ostrom's
20 based on a finding that odors emitted from Ostrom's Lacey facility constitute a nuisance;

21 (4) that the Notice of Civil Penalty is invalid, void, and unenforceable because of
22 noncompliance by ORCAA with RCW 70.94.640(2) or, alternatively, that the amount thereof
23 is excessive;

24
25 APPELLANT'S DISPOSITIVE MOTION - 10

1596859.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

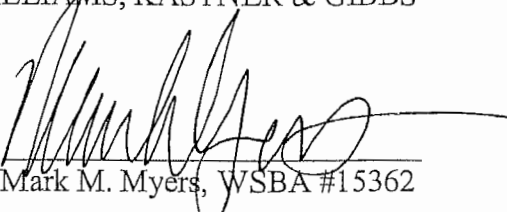
1 (5) that the Notice of Construction is invalid, void and unenforceable, because it is
2 based on the same finding, *i.e.*, that odors emitted from Ostrom's Lacey facility constitute a
3 nuisance, and because ORCAA Regulation 1, § 701(d)(51), exempts from the agency's Notice
4 of Construction rules any "primary agricultural activity."

5 Ostrom asks the Board to vacate all of the notices and orders at issue, and to grant
6 Ostrom such other relief as is warranted under the circumstances and applicable law.

7 DATED this 3rd day of January, 2005.

8
9 Respectfully submitted,

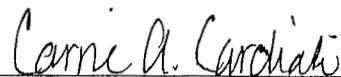
10 WILLIAMS, KASTNER & GIBBS

11
12 By 
13 Mark M. Myers, WSBA #15362

14 Attorneys for The Ostrom Company, Inc.
15

16
17 Certificate of Service

18 I certify under penalty of perjury under the law of Washington that, on January 3, 2005,
19 I sent a copy of the foregoing document, Appellant's Dispositive Motion (and Appendices 1-
20 5), as well as a copy of the accompanying Declaration of William Street, Sr., by facsimile and
21 prepaid first class United States Mail to counsel of record for the Olympic Region Clean Air
22 Agency, Fred D. Gentry, Bean & Gentry, P.O. Box 2317, Olympia, Washington, 98507.

23
24 

25 Carrie A. Cardiali

APPELLANT'S DISPOSITIVE MOTION - 11

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

APPENDIX 1



Olympic Region Clean Air Agency
2940-B Limited Lane NW
Olympia, Washington 98502
(360) 586-1044

NOTICE OF VIOLATION

No. 2172

Name: Ostrom's Mushrooms Phone: 360-491-1410
Mailing Address: 8223 STEILACOOM RD- SE.
City: OLYMPIA State: WA Zip Code: 98503
Date of Violation: 4/18/03 THROUGH 4/18/04 Time: VARIOUS
Location of Violation: ☐ "✓" if same as above

In Violation of:

☒ Section 9.11 (c) of ORCAA's Regulation 1
☐ Other _____

FINDINGS: CAUSED OR ALLOWED AN ODOR TO
UNREASONABLY INTERFERE WITH A PERSON'S
USE AND ENJOYMENT OF THEIR PROPERTY.

ORDER: _____

Issued by: John T. Kelly

Date: 4/29/04

Violation of Regulation 1 of the Olympic Region Clean Air Agency carries a civil penalty of up to \$10,000. You will be sent notification by letter setting forth the civil penalty to be assessed for the above violation(s) after 30 days have passed. You have the right to meet with an ORCAA representative to discuss the matter at any time in the 30 day period following your receipt of this notice.



April 30, 2004

Ostroms Mushroom Farm
8223 Steilacoom Rd SE
Olympia, WA 98503

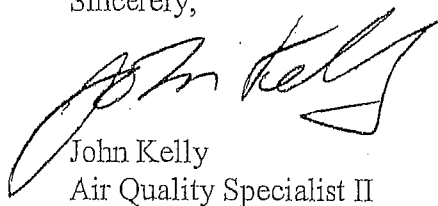
Dear Sir:

The enclosed citation, #2172, is issued as a result of action taken by Olympic Region Clean Air Agency (ORCAA) in response to a violation on the date, time and location as stated on the citation.

Violation of Regulation 1 of the Olympic Region Clean Air Agency (ORCAA) carries a civil penalty of up to \$10,000. You will be sent notification by letter setting forth the civil penalty to be assessed for the above violation after 30 days have passed. You have the right to meet with an ORCAA representative to discuss this matter in the 30 days following your receipt of this notice.

If you have any questions please contact me at 360-586-1044 extension 109.

Sincerely,



John Kelly
Air Quality Specialist II

Enclosure

OLYMPIC REGION CLEAN AIR AGENCY

APPENDIX 2

Olympic Region Clean Air Agency

2940 B Limited Lane NW
Olympia, WA 98502
360.586.1044

**NOTICE OF
CIVIL PENALTY ASSESSMENT**

To: Ostrom's Mushroom Farm
8323 Steilacoom Rd SE
Olympia, WA 98513

On or about, May 3, 2004, you received (via certified mail) a Notice of Violation signed by Air Quality Specialist John Kelly regarding a site near Olympia, Washington, County of Thurston regarding an alleged violation that occurred from April 18, 2003 through April 18, 2004. At that time, you or your representatives were charged with a violation for the following reason(s):

Section 9.11(c) of Regulation 1

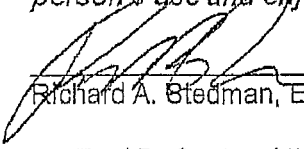
As a penalty for your violation, you are hereby assessed a fine in the amount of Ten thousand Dollars (\$10,000.00) in accordance with Section 3.27 of Regulation 1.

YOU HAVE THE FOLLOWING RIGHTS REGARDING THIS CIVIL PENALTY ASSESSMENT

- 1) Within thirty (30) days after the notice imposing a civil penalty is received, you may apply in writing to Olympic Region Clean Air Agency (ORCAA) for the remission or mitigation of the penalty. You will receive a Notice of Disposition on your request for remission or mitigation in writing. **OR**
- 2) You may appeal for relief from this order by making a request for a hearing and an appeal to the State of Washington Pollution Control Hearings Board, PO-Box-40903, Olympia-WA-98504-0903, in accordance with chapter 43.21(B) RCW, and rules chapter 371-08 WAC. This request for appeal and for a hearing must be made in writing and served within thirty (30) days after receipt of this notice (or if you request for a remission or mitigation of the penalty as per paragraph 1) above within thirty (30) days of receipt of the Notice of Disposition of your application for remission or mitigation of the penalty) upon both the Pollution Control Hearings Board (address above) and the Olympic Region Clean Air Agency (ORCAA), at 2940 B Limited Lane NW, Olympia, Washington 98502.
- 3) The penalty assessed is due and payable upon the later of:
 - A. Thirty (30) days after receipt of this notice imposing the penalty;
 - B. Thirty (30) days after receipt of the Notice of Disposition or application for remission or mitigation of the penalty, if such an application is made; or
 - C. Thirty (30) days after receipt of the Notice of Decision of the Pollution Control Hearings Board if the penalty is appealed.

If the penalty amount is not paid when it becomes due and payable, ORCAA shall bring court action, in Thurston County, to recover said penalty and interest.

CONDITION: *Fifth Violation. Causing or allowing an odor to unreasonably interfere with a person's use and enjoyment of their property.*


Richard A. Stedman, Executive Director

Dated July 7, 2004

cc: Fred D. Gentry, Attorney

Certified Mail No. _____

NOV #2172

WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD
ENVIRONMENTAL HEARINGS OFFICE
4224 - 6th Avenue SE, Rowe Str, Bldg. 2
PO Box 40903
Lacey, Washington 98504-0903
(360)459-6327 Fax: (360)438-7699
Web Address: <http://www.eho.wa.gov>
E-Mail: EHO@EHO.WA.GOV

"Your Right to Be Heard"

Board Members

Robert V. Jensen, Chair
William H. Lynch
Kaleen Cottingham

Administrative Appeals

Judges

Phyllis K. Macleod
Eric Z. Lucas
Kay Brown

This is your informal guide to your rights and responsibilities in an appeal. It is not exclusive and does not have force and effect of state law or regulation. ALTERNATE FORMAT AVAILABLE UPON REQUEST. More detailed information, in a chapter of the Washington Administrative Code entitled, "Rules of Practice and Procedure of the Pollution Control Hearings Board, WAC 371-08," is available at your county law library or upon request.

Hearings Coordinator

Judy Greear

Administrative Assistant

Robyn Bryant

Secretary

Tracey Johnson

YOUR RIGHT TO BE HEARD

The Pollution Control Hearings Board (PCHB) hears appeals from orders and decisions made by:

1. Local and regional air pollution control agencies or authorities.
2. The State Department of Ecology, and
3. Other agencies as provided by law.

The Board's sole function is to give you, and all other litigants in the matter, a full and complete public hearing, as promptly as possible, followed by a fair and impartial written decision based on the facts and law.

The Board is not affiliated with Department of Ecology or any other agency. To insure the Board's impartiality, the state Legislature created this independent, quasi-judicial state agency entirely separate from any other state, regional or local unit of government.

The Board consists of three full-time members, who are appointed by the governor and confirmed by the State Senate for staggered six-year terms. One of the three must be an attorney. All are salaried employees of the State, who also serve on the Shorelines Hearings Board.

DO YOU NEED AN ATTORNEY?

You may be represented by an attorney, but one is not required by law. However, you might want to consider whether a lawyer would be helpful, before you decide to represent yourself.

WHEN & WHERE TO FILE AN APPEAL

The Board must RECEIVE your appeal within 30 days of the date that the copy of the order or decision was communicated to the appealing party.

You must also serve, within 30 days, a copy of your appeal with the Department or Air Pollution Authority or other agency whose order or decision you are appealing.

If it a permit you are appealing, such as a water right, you should also serve a copy of your appeal on the holder of the permit unless you are the permittees.

Failure to observe the thirty (30) day deadline for filing with the Board and serving the Department or Air Pollution Control Authority or other agency will result in dismissal of the appeal.

CONTENT OF THE APPEAL

You need to supply the Board, in writing, with:

Your name and address (mailing and legal, if different) and, if applicable, the name and address of your representative.

A daytime phone number.

A copy of the order or decision you are appealing, and if the order or decision followed an application, a copy of the application.

A brief statement why you are appealing.

The relief you seek (what you want the Board to do).

A statement, signed by you or your representative, attesting that the content of the appeal is true.

IF YOU ARE NOT AN APPELLANT

Perhaps you have been granted a permit by the Department of Ecology, air authority or another agency, but another party has appealed. You have a right to defend the permit and are automatically a respondent in the appeal before the Board. All subsequent sections in this publication apply to you as well as to the appellant.

HEARING DATES

When an appeal is filed, the Board will assign and notify you of a date, time, and location for hearing the case.

THE PRE-HEARING CONFERENCE

Soon after the appeal is filed, a date and place for the pre-hearing conference are selected. It is usually held within 6 weeks. The conference has two main purposes: to help reach a settlement, and to prepare the case for hearing if settlement is not reached. The parties should come to the conference prepared to present a preliminary list of legal issues; proposed witnesses and exhibits.

CAN THIS DISPUTE BE SETTLED?

Litigation is time and energy consuming for the parties. Each party needs to think about possible compromise. For settlement to be reached, each side needs to offer something. Litigants are encouraged to begin settlement talks, without waiting for Board participation.

The Board has a mediation program to assist parties in reaching settlement. If the parties settle, a written document containing the settlement terms will ultimately be signed by all, and filed with the Board, which may decide to dismiss the appeal if the settlement conforms to the law.

BEFORE THE HEARING

Before the hearing you will want to prepare. You have the right to review the agency's file of their decision. Contact them to arrange a time and place to see the file.

You and the other litigants have the right to find out in advance what witnesses and other evidence will be used at the hearing. This may be provided to you without formal procedures, such as by looking at public records. If done formally, this is known as **discovery** and is best accomplished with the assistance of a lawyer. Examples of formal discovery are: Deposition-questioning witnesses before the hearing, under oath with a court reporter present. Interrogatory-presenting written questions to the other side. There are formal rules that apply to discovery.

HEARING

At the hearing, it is important to be on time. An appellant's failure to appear may result in dismissal of the appeal.

The second thing to do is relax. You will have your full opportunity to tell your side of the case, but there is a court procedure to be followed, so that all sides can be heard in an orderly manner.

The Presiding Officer for the Board manages the proceedings. A court reporter will record what is said. The appellant usually has the obligation to present his or her case first. Then, the respondents will present their case.

Each side has the right to make an opening statement, briefly outlining what its evidence will be. Witnesses who are sworn to tell the truth, testify from their personal knowledge in response to questions. After direct testimony, the witness answers questions asked by the other side during "cross-examination". The Board members may also ask questions.

Persons essential to your case need to be present at the hearing to testify as witnesses, as the "hearsay" rule prevents you from testifying for them.

Exhibits, such as letters, maps, etc. may be offered as evidence. Before the hearing, number your exhibits and prepare an exhibit list. At the hearing, you will need to have the original and copies for each member of the Board, and for the other parties.

After all the evidence has been presented, litigants can summarize their arguments in closing statements.

THE BOARD'S DECISION

The Board will deliberate on the testimony, exhibits, and final arguments, before issuing a written decision.

The written decision called "Findings of Fact, Conclusions of Law and Order" is prepared and mailed to all litigants generally within ninety (90) days.

YOU MAY APPEAL THE FINAL ORDER

The Board's decision may be appealed to Superior Court within thirty (30) days from the date of the ORDER, or you may file a petition with the Board for a reconsideration within ten (10) days of the date of the ORDER.

FREQUENTLY USED TERMS

BOARD: The Washington State Pollution Control Hearings Board.

DEPARTMENT: The Washington State Department of Ecology (DOE).

PERSON OR PERSONS: A citizen, a business firm, an association or a government agency.

APPEAL: A request for review of a decision filed with the Board.

APPELLANT: A person or persons bringing the appeal.

RESPONDENT: A person or entity on the other side of the dispute.

LITIGANTS: All parties to the action.

STIPULATION: An agreement by the parties.

MITIGATED: Reducing, diminishing or lessening either the penalty or the impact of the proposed action.

AIR POLLUTION CONTROL AUTHORITY: a local or regional agency authorized under the Washington Clean Air Act, RCW 70.94, to issue orders and assess penalties for air pollution violations, and to issue notices of construction for new air emission sources.

The Environmental Hearings Office does not discriminate in employment or any of its services against persons with disabilities, and will make reasonable accommodations for any citizen who needs assistance to participate in our hearings or other activities.

Judy/Office/PCHBPAMP 10/07/02

APPENDIX 3



**Olympic Region Clean Air Agency
2940-B Limited Lane NW
Olympia, Washington 98502
(360) 586-1044**

NOTICE OF VIOLATION

No. 2198

Name: OSTROMS MUSHROOM FARM Phone: (360) 491-1410

Mailing Address: 8323 STEILACOOM RD.

City: OLYMPIA, WA State: WA Zip Code: 98513

Date of Violation: 5/21/04 Time: _____

Location of Violation: ☒ "✓" if same as above _____

In Violation of:

☒ Section 7.01(a) AND 7.07 of ORCAA's Regulation 1

☐ Other _____

7.01(g) = MODIFICATION TO A STATIONARY SOURCE
WITHOUT APPROPRIATE INSTALLATION OF

FINDINGS: AERATED BUNKERS AND WATER RECIRCULATION TANK AND AERATION.

7.07:- COMPOSTING OPERATIONS NOT IN ACCORDANCE
WITH INFORMATION IN THE APPLICATION OR APPROVAL
ORDER FOR NOC # 99WOC 023 AS DETAILED
ORDER: IN THE ATTACHED INSPECTION REPORT.

OSTROMS WILL IMPLEMENT FURTHER ODOR CONTROL MEASURES AND SUBMIT A NEW NOTICE OF CONSTRUCTION AS REQUIRED IN THE ATTACHED REGULATORY ORDER

Issued by: [Signature] Date: 6/28/04

Violation of Regulation 1 of the Olympic Region Clean Air Agency carries a civil penalty of up to \$10,000. You will be sent notification by letter setting forth the civil penalty to be assessed for the above violation(s) after 30 days have passed. You have the right to meet with an ORCAA representative to discuss the matter at any time in the 30 day period following your receipt of this notice.

APPENDIX 4



June 29, 2004

REGULATORY ORDER

TO:

Ostrom's Mushroom Farm
8323 Steilacoom Rd. SE
Lacey, WA 98503

The following Regulatory Order concerns air pollutant emissions from operations and equipment at the Ostrom's Mushroom Farm facility located at 8323 Steilacoom Rd. SE in Lacey, Washington. Notification is made in accordance with Regulation 1 of Olympic Region Clean Air Agency (ORCAA), as amended, and as described in Section 3.21 (a) and (b), Service of Notice, and Section 3.27 (a), (b), and (c), Penalty.

WHEREAS, the ORCAA has received a total of twenty-eight (28) complaints of unreasonable odors from the Ostrom's Mushroom Farm facility located at 8323 Steilacoom Rd. SE between April 24, 2003 and April 24, 2004; and,

WHEREAS, the origin of the odors were traced back to the Ostrom's Mushroom Farm by a combination of field verification by ORCAA of the presence of odors attributable to Ostrom's Mushroom Farm in the vicinity of alleged impacts and meteorological data coincident with the time the impacts were reported to ORCAA; and,

WHEREAS, ORCAA has issued Notice of Violation (NOV) # 2172 on April 29, 2004 to Ostrom's Mushroom Farm for unreasonable odors; and,

WHEREAS, modifications to operations and equipment associated with the Phase I composting system and wastewater treatment system have taken place without ORCAA's prior approval through a Notice of Construction (NOC) application; and,

WHEREAS, modifications to Phase I operations and equipment have resulted in an increase in emissions of both odorous compounds and particulate matter; and,

WHEREAS, ORCAA has issued NOV # 2198 on June 28, 2004 to Ostrom's Mushroom Farm for failure to secure ORCAA's approval of an NOC prior to making modifications,

NOW, THEREFORE, I, Richard A. Stedman, hereby impose the following regulatory order upon you.

IT IS HEREBY ORDERED THAT:

- 1) Ostrom's Mushroom Farm shall develop an odor control plan containing odor control measures sufficient to minimize odor impacts caused by emissions from the facility, and

OLYMPIC REGION CLEAN AIR AGENCY

- 2) The proposed odor control plan shall address odorous emissions from all potential odor sources at the facility, and shall be based on an analysis of procedures, practices and equipment used by the mushroom farm that contribute to odors impacting the surrounding communities; and,
 - 3) The analysis and resulting odor control plan shall be prepared by a qualified professional experienced in the field of air pollution control, including odor control and management, and
 - 4) At a minimum this analysis and plan shall include:
 - a) An analysis of the contribution of all activities at the facility to odor generation. This will include, but not be limited to wastewater collection and control, pre-conditioning of raw materials, Phase I composting, Phase 2 composting, and the handling and disposal of spent mushroom compost.
 - b) Recommendations for improved odor control in all areas identified as contributing to odors emanating from the farm. These recommendations shall include specific methods of operations, and full consideration of the installation of further air pollution control equipment or systems for control of odors; and,
 - 5) The odor control plan shall be submitted to ORCAA for approval within 30 days from the date of this Order; and,
 - 6) Within 30 days of ORCAA's approval of the odor control plan Ostrom's Mushroom Farm shall submit a Notice of Construction (NOC) application addressing physical and operational changes of the Phase I composting system relative to those that were approved under NOC# 99NOC023. The new NOC shall also include any proposed changes, modifications or additions to odor controls and/or methods resulting from the approved odor control plan; and,
 - 7) ORCAA's approval of the NOC shall be secured prior to changing operational methods or the modification or installation of any air pollution control equipment, and
 - 8) The approved odor control measures and control equipment shall be fully implemented and installed no later than 180 days from the issuance of this order.
-

FAILURE TO COMPLY with the above order is a violation of Regulation 1 of Olympic Region Clean Air Agency and the Washington Clean Air Act, and is subject to a penalty of up to \$10,000.00 per violation.

DATED this 30 day of June 2004.

Olympic Region Clean Air Agency

By: 

Richard A. Stedman, Executive Director

Olympic Region Clean Air Agency
2940 B Limited Lane NW
Olympia, WA 98502
(360) 586-1044 Ext. 100

CC: Fred Gentry, Attorney
Certified Mail No.

APPENDIX 5

Olympic Region Clean Air Agency

2940 B Limited Lane NW
Olympia, WA 98502
360.586.1044

**NOTICE OF
CIVIL PENALTY ASSESSMENT**

To: Ostrom's Mushroom Farm
8323 Steilacoom Rd SE
Lacey, WA 98503

On or about, July 1, 2004, you received (via certified mail) a Notice of Violation signed by Air Quality Specialist John Kelly regarding a site near Lacey, Washington, County of Thurston regarding an alleged violation that occurred on May 21, 2004. At that time, you or your representatives were charged with a violation for the following reason(s):

Section 7.01(a) and 7.07 of ORCAA's Regulation 1

As a penalty for your violation, you are hereby assessed a fine in the amount of **One Thousand six hundred Dollars (\$1,600.00)** in accordance with Section 3.27 of Regulation 1.

YOU HAVE THE FOLLOWING RIGHTS REGARDING THIS CIVIL PENALTY ASSESSMENT

1) Within thirty (30) days after the notice imposing a civil penalty is received, you may apply in writing to Olympic Region Clean Air Agency (ORCAA) for the remission or mitigation of the penalty. You will receive a Notice of Disposition on your request for remission or mitigation in writing. **OR**

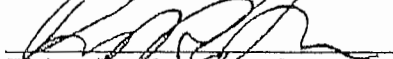
2) You may appeal for relief from this order by making a request for a hearing and an appeal to the State of Washington Pollution Control Hearings Board, PO Box 40903, Olympia WA 98504-0903, in accordance with chapter 43.21(B) RCW, and rules chapter 371-08 WAC. This request for appeal and for a hearing must be made in writing and served within thirty (30) days after receipt of this notice (or if you request for a remission or mitigation of the penalty as per paragraph 1) above within thirty (30) days of receipt of the Notice of Disposition of your application for remission or mitigation of the penalty) upon both the Pollution Control Hearings Board (address above) and the Olympic Region Clean Air Agency (ORCAA), at 2940 B Limited Lane NW, Olympia, Washington 98502.

3) The penalty assessed is due and payable upon the later of:

- A. Thirty (30) days after receipt of this notice imposing the penalty;
- B. Thirty (30) days after receipt of the Notice of Disposition or application for remission or mitigation of the penalty, if such an application is made; or
- C. Thirty (30) days after receipt of the Notice of Decision of the Pollution Control Hearings Board if the penalty is appealed.

If the penalty amount is not paid when it becomes due and payable, ORCAA shall bring court action, in Thurston County, to recover said penalty and interest.

CONDITION: *First Violation. Completing a modification to a stationary source without prior approval—installation of aerated bunkers and water recirculation tank and aeration. Also, composting operations not in accordance with information in the application or approval order for NOC#99NOC023.*


Richard A. Steedman, Executive Director

Dated Oct 4, 20 04

cc: Fred D. Gentry, Attorney
Certified Mail No. _____
NOV #2198

WASHINGTON STATE
POLLUTION CONTROL HEARINGS BOARD

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR AGENCY,

Respondent.

PCHB NO. 04-105

DECLARATION OF WILLIAM
STREET, SR.

WILLIAM STREET, SR., declares as follows under penalty of perjury under the law of

Washington:

1. I have personal knowledge of the facts stated herein and am competent to be a witness.

2. I ~~have~~^{was} was the president of The Ostrom Company, Inc., from 1965 to 1999. I am currently on Ostrom's Board of Directors.

3. Ostrom operates a mushroom farm on property in Thurston County and has done so on the same property since 1967. The farm was previously owned by Green Giant Foods. It has been used as a mushroom farm since the 1920s.

DECLARATION OF WILLIAM STREET, SR. - 1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1640160.1

COPY

4. In 1976 or 1977, I learned that the 60-acre property to the north of the mushroom farm property, along Marvin Road, was being offered for sale. Ostrom considered it likely that whoever bought the property would develop it for residential use.

5. Ostrom decided to buy the property first, keep a 20 acre buffer between the farm and any non-agricultural development, and then sell the remaining 40 acres. Ostrom did so, and sold the 40-acre property in 1977. That 40 acres was later developed for residences. No part of the 40-acre property abutted the original Ostrom mushroom farm property. It did, of course, border the 20-acre piece of the 60-acre property that Ostrom briefly owned.

Signed at Jarey, Washington, on December 13, 2004.

William Street, Sr.

DECLARATION OF WILLIAM STREET, SR. - 2

1640160.1

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ENVIRONMENTAL
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STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

THE OSTROM COMPANY INC.,

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vs.

OLYMPIC REGION CLEAN AIR AGENCY

Respondent.

PCHB NO. 04-105

OLYMPIC REGION CLEAN AIR
AGENCY'S MEMORANDUM IN
OPPOSITION TO OSTROM'S
DISPOSITIVE MOTION

I. INTRODUCTION

Ostrom's Dispositive Motion must be denied in its entirety. As discussed more fully below, the Right to Farm Act is not applicable, the narrow exemption found in RCW 70.94.640 is not applicable, a notice of construction was required under ORCAA's Regulation 1 as well as Chapter 173-460 WAC, and whether or not the penalties imposed by ORCAA are excessive presents a factual issue not capable of summary resolution.

II. FACTUAL BACKGROUND

The factual background of this case is set forth clearly and succinctly in the following documents some or all of which have already been filed and all of which are attached hereto as exhibits:

Ex. 1 Notice of Violation 2172

Ex. 2 Notice of Civil Penalty Assessment related to NOV 2172.

Ex. 3 General Civil Penalty Worksheet Re: NOV 2172.

COPY

1 Ex. 4 Notice of Violation 2198.

2 Ex. 5 Notice of Civil Penalty Assessment related to NOV 2198.

3 Ex. 6 General Civil Penalty Worksheet Re: NOV 2198.

4 Ex. 7 June 29, 2004, Regulatory Order issued by ORCAA to Ostrom.

5 Ex. 8 ORCAA's Inspection Report.

6 To briefly summarize, between April of 2003 and April of 2004, ORCAA received 28
7 odor complaints concerning Ostrom. The specific details of these complaints are found in
8 ORCAA's answers to interrogatories and documents provided in response to requests for
9 production, copies of which are attached hereto as Ex. 9. ORCAA issued NOV 2172 to
10 Ostrom on April 29, 2004, for odor impacts. ORCAA's answers and responsive documents
11 indicate that, contrary to Ostrom's unsupported contention, ORCAA did in fact advise
12 Ostrom of odor complaints it had received prior to issuance of NOV 2172.

13 On May 21, 2004, ORCAA agreed to an offer of a tour of the Ostrom's plant with the
14 proviso that one of the purposes of the tour would be to evaluate compliance at the facility,
15 in particular adherence to the approval order conditions for NOC #99NOC023. Ex. 8.

16 The details of what was observed on the tour are reflected in the inspection report,
17 the regulatory order, and NOV 2198. Ex. 5, 7 and 8.

18 During the course of discovery in this case, Ostrom answered interrogatories and
19 provided documents in response to requests for production, copies of which are attached
20 hereto as Exhibit 10. These answers and responsive documents establish that in the last
21 few years Ostrom substantially increased compost production at its Lacey plant and that
22 the amount of compost produced at its Lacey plant exceeds the amount of compost needed
23 for the mushroom growing operation in Lacey. These answers to interrogatories and
24 responsive documents also indicate that Ostrom does not use all of the compost produced
25 at its Lacey to grow mushrooms in Lacey but sells compost to others, including another
26 Ostrom's plant in Everson, Washington, as well as buyers in Canada.

Ostrom's answers to interrogatories and responsive documents, together with William Street, Sr.'s, Declaration, also establish that Ostrom's sold a contiguous 40 acre piece of land for residential purposes.

III. OSTROM'S DISPOSITIVE MOTION MUST BE DENIED IN ITS ENTIRETY

A. Right to Farm Act.

1. Right to Farm Act is Not Applicable.

The Right to Farm Act (RTFA), codified in RCW 7.48.300-.310, is not applicable. There are several reasons for this.

First, this is a regulatory action not a nuisance lawsuit precluded by the RTFA. It is the stated purpose of the RTFA "to provide that agricultural activities conducted on farmland and forest practices be protected from nuisance lawsuits." (Emphasis added) RCW 7.48.300.

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

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

Black's Law Dictionary (4th edition, 1951).

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

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

"Agricultural activity" means a condition or activity which occurs on a farm in connection with the commercial production of farm products and includes, but is not limited to, marketed produce

1 at roadside stands or farm markets; noise; odors; dust; fumes;
2 operation of machinery and irrigation pumps; movement,
3 including but not limited to, use of current county road ditches,
4 streams, rivers, canals, and drains, and use of water for
5 agricultural activities; ground and aerial application of seed,
6 fertilizers, conditioners, and plant protection products;
7 employment and use of labor; roadway movement of
equipment and livestock; protection from damage by wildlife;
8 prevention of trespass; construction and maintenance of
buildings, fences, roads, bridges, ponds, drains, waterways,
and similar features and maintenance of streambanks and
watercourses; and conversion from one agricultural activity to
another.

8 (Emphasis added.)

9 As evidenced by Ostrom's answers to interrogatories, Ostrom's does not use all of
10 the compost produced in Lacey to grow mushrooms in Lacey but sells compost to others,
11 including another Ostrom's plant in Everson, Washington, and buyers in Canada.

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

15 An established farm may not be able to institute a new or
16 radically expanded "activity" and maintain nuisance immunity,
because the language of the statute focuses on agricultural
17 activity that has been established prior to the urban
encroachment. Cf. Payne v. Skaar, 127 Idaho 341, 900 P.2d
18 1352, 1355 (1995) (Idaho Right to Farm Act does not protect
an established feedlot from nuisance suits if the nuisance
19 arises because of expansion of the agricultural activity).

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

23 It is anticipated that Ostrom will rely on Vicwood Meridian Partnership v. Skagit Sand
24 and Gravel, 123 Wn.App. 877, 98 P.3d 1277 (2004) to attempt to counter ORCAA's
25 arguments that Ostrom's compost production is not an agriculture activity and that it is a
26 new and expanded activity and for these reasons not exempted under the RTFA. The
27 Court of Appeal's opinion is not determinative or even persuasive in this case because of
28 significant factual distinctions between that case and this one. In Vicwood, Thurston

1 County had brought a true nuisance suit in the form of a claim for contribution. Moreover,
2 as pointed out by the Court of Appeals in its opinion:

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

9 It is also clear from the Court of Appeal's discussion of Donovan v. Frezo Brothers, Inc.,
10 678 F.2d 1166, 1171 (3d Cir. 1982) and the trial court's oral opinion in Vicwood Meridian
11 v. Skagit Sand and Gravel (Ex. 11) that the only evidence in that case was that Ostrom
12 produced compost at its Lacey facility only for its own use in growing mushrooms at that
13 site.

14 In contrast, Ostrom's answers to interrogatories in this case prove beyond a doubt
15 that (1) Ostrom's Lacey plant is producing more compost; (2) Ostrom's Lacey facility is
16 now selling compost to others; and (3) not all of the compost produced by Ostrom at its
17 Lacey facility is connected with the commercial production of its own mushrooms. In light

18 of this admitted evidence, Ostrom's substantially increased compost production is clearly
19 a new or radically expanded activity which is not exempted by the RTFA and is not an
20 "agricultural activity" within the meaning of the definition found in RCW 7.48.310(1). The
21 Vicwood case is clearly distinguishable and thus not controlling.

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

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

1 **B. The Exemption Found in RCW 70.94.640 is Not Applicable.**

2 The exemption for odors caused by agricultural activity which is found in RCW
3 70.94.640 is not applicable here. RCW 70.94.640(4) provides that the exemption shall not
4 apply "[i]f a person engaged in agricultural activity on a contiguous piece of agricultural land
5 sells or has sold a portion of that land for residential purposes."

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

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

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

13 The *American Heritage Dictionary of the English Language* defines the word as
14 follows:

- 15 1. Sharing an edge or boundary; touching.
16 2. Nearby; neighboring; adjacent.

17 ~~The 40 acres sold by Ostrom for residential purposes meets either or both of these~~
18 definitions. Even if the general exemption for agricultural activities found in RCW 70.94.640
19 were otherwise applicable, which ORCAA does not admit, Ostrom's sale of the 40 acres
20 renders the exemption inapplicable.

21 **C. The Issue of Whether or Not the Penalties Imposed by ORCAA are**
22 **Excessive Presents a Factual Issue Not Capable of Resolution on Summary**
23 **Judgment.**

24 This Board looks to several factors when determining whether a penalty is
25 reasonable.

26 The Board considers the reasonableness of a penalty on a de
27 novo basis, taking into account (1) the nature of the violation,
28 (2) the prior behavior of the violator, and (3) subsequent action
taken to rectify the problem. Deskin Farms v. Ecology, PCHB
98-073 (1998); Columbia Aluminum Corporation v. Ecology,
PCHB 95-028 (1995). The board considers the gravity criteria

1 employed by the air authority in its evaluation of the
2 reasonableness of a penalty.

3 Watts v. BCAA, 2000 WL 33100036 (Wash. Pol. Control Bd.)

4 This is clearly a factual matter not capable of resolution on summary judgment. The
5 only reason given by Ostrom in support of its argument on this issue is that ORCAA never
6 gave Ostrom notice of complaints. Ostrom proffers no evidence to support this bare
7 assertion. Moreover, as set forth in ORCAA's answers to interrogatories and the attached
8 ORCAA records regarding complaints and ORCAA's follow-up, Ostrom was contacted
9 about these complaints.

10 In sum, this is a factual issue and there are disputed facts. Summary judgment is
11 not appropriate.

12 **D. A Notice of Construction Was Required.**

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

17 Moreover, even if this exemption had been in effect at the time of construction, the
18 modifications to operations and equipment associated with the Phase I composting system
19 and wastewater treatment system were not "primary agricultural production activities." As
20 discussed more fully in Section III.A.1. of this Memorandum, Ostrom does not use all of the
21 compost that it produces to grow its own mushrooms but sells much of the compost to
22 others.

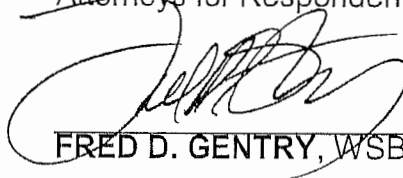
23 Finally, even if this exemption had been in effect and was applicable, it is clear that
24 a Notice of Construction was nevertheless required under Chapter 173-460 WAC, Controls
25 for New Sources of Toxic Air Pollutants. Ostrom's Lacey facility emits several Class B air
26 pollutants which are listed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

1
2 V. CONCLUSION

3 In conclusion, Ostrom's Dispositive Motion should be denied in its entirety.
4

5 DATED this 2ND day of February, 2005.

6 BEAN & GENTRY
7 Attorneys for Respondent ORCAA

8 
9 FRED D. GENTRY, WSBA #1448

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

THE OSTROM COMPANY INC.,

Appellant,

vs.

OLYMPIC REGION CLEAN AIR AGENCY

Respondent.

PCHB NO. 04-105

AFFIDAVIT OF FRED D. GENTRY

FRED D. GENTRY, being first duly sworn on oath, deposes and says:

I am the attorney of record for Olympic Region Clean Air Agency in the above-captioned case. Attached hereto are true and correct copies of the following:

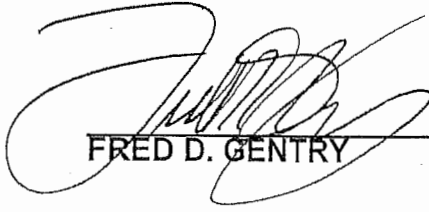
- Ex. 1 Notice of Violation 2172.
- Ex. 2 Notice of Civil Penalty Assessment related to NOV 2172.
- Ex. 3 General Civil Penalty Worksheet Re: NOV 2172.
- Ex. 4 Notice of Violation 2198.
- Ex. 5 Notice of Civil Penalty Assessment related to NOV 2198.
- Ex. 6 General Civil Penalty Worksheet Re: NOV 2198.
- Ex. 7 June 29, 2004, Regulatory Order issued by ORCAA to Ostrom.
- Ex. 8 ORCAA's Inspection Report.
- Ex. 9 Ostrom's First Interrogatories and Requests for Production to ORCAA and ORCAA's Answers Thereto.
- Ex. 10 ORCAA's First Interrogatories and Requests for Production to Ostrom and Ostrom's Answers Thereto.
- Ex. 11 Trial court's opinion in Vicwood Meridian v. Skagit Sand and Gravel.
- Ex. 12 Dunlap v. City of Nooksack, 2003 WL 21391320 (Wash.Shore.Hrg.Bd.)

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

3
4 DATED this 2ND day of February, 2005, at Olympia, Washington.

5
6
7 
8 FRED D. GENTRY
9
10
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16

WASHINGTON STATE
POLLUTION CONTROL HEARINGS BOARD

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR AGENCY,

Respondent.

PCHB NO. 04-105

APPELLANT'S REPLY
MEMORANDUM IN SUPPORT OF
ITS DISPOSITIVE MOTION (With
Subjoined Certificate
of Service)

ORCAA's response to Ostrom's dispositive motion was not timely filed and served. If the Board nonetheless considers ORCAA's arguments, it should reject them for the following reasons. Ostrom is addressing ORCAA's arguments in the order in which ORCAA presented them.

APPELLANT'S REPLY MEMORANDUM IN SUPPORT OF ITS
DISPOSITIVE MOTION - 1

1667257.1

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1 A. ORCAA's argument that the RTFA "is not applicable" is incorrect and misses the
2 point.

3 1. The RTFA may not be ignored.

4 Production of compost at Ostrom's Lacey mushroom farm constitutes "agricultural
5 activity" under the Washington Right-To-Farm Act (RTFA) because the Court of Appeals, in
6 Vicwood Meridian Partnership, recently held that it does. ORCAA cites no authority for the
7 proposition that it, or the Board, is free to ignore the RTFA. ORCAA cites no authority
8 allowing it to fine Ostrom for, or otherwise regulate, odors emanating from Ostrom's
9 mushroom farm without bothering to make either (1) the kind of finding required under the
10 RTFA (that the activity has a substantial adverse effect on the public health and safety," RCW
11 7.48.305) or (2) the parallel and complementary finding required before an air pollution control
12 authority may regulate odors from agricultural activity ("the activity is inconsistent with good
13 agricultural practices, or . . . the odors have substantial adverse effect on public health," RCW
14 70.94.640(2)).

15 The RTFA is a statute relating to nuisances, because it expressly provides that
16 "agricultural activities conducted on farmland . . . , if consistent with good agricultural . . .
17 practices and established prior to surrounding nonagricultural . . . activities, . . . *shall not be*
18 *found to constitute a nuisance* unless the activity has a substantial adverse effect on the public
19 health and safety." RCW 7.48.305. Pursuant to RCW 70.94.230, "nothing herein [*i.e.*, in
20 RCW chapter 70.94] shall be construed to supersede . . . any provision of the statutory or
21 common law pertaining to nuisance. . ." The statute under which ORCAA operates does not
22 permit the RTFA's limitation on odor-nuisance complaints to be ignored.

23 2. That Ostrom has sold some compost for use elsewhere is irrelevant.

24 Contrary to what ORCAA argues, the RTFA does not cease to apply simply because
25 some portion of what a farm produces is occasionally or even often sold for use on another

1 farm. In fact, that would be absurd. It would mean a dairy farm that sells or gives away cow
2 manure for use by gardeners, or that sells live calves to be raised on another farm, is no longer
3 engaged in "agricultural activity." Thus, neither authority nor logic support an argument that a
4 farmer by selling a farm product has ceased to engage in agricultural activity.

5 3. Buchanan v. Simplot Feeders is inapposite.

6 The dictum from Buchanan v. Simplot Feeders that ORCAA quotes (Memo in Opp. at
7 4), is not instructive for at least two reasons. First, that case presented the court with a
8 completely unrelated question: whether "damages" can be recovered even if the RTFA
9 provides a good defense to a nuisance claim. The court said no. Second, Buchanan arose out
10 of a situation where the defendant who was asserting RTFA immunity was the newcomer.
11 Ostrom's mushroom farm has been in Lacey since the late 1920s. Even then, the court did not
12 hold that the defendant had no right to assert the RTFA as a defense.

13 4. Odors from composting at Ostrom's Lacey farm are not new and ORCAA
14 neither argues nor shows that they have radically "expanded".

15 It would be inappropriate to treat the Buchanan court's gratuitous comments as
16 authority for refusing to apply the RTFA to "new or radically expanded" farming activity. The
17 RTFA itself does not contain or imply any limitation upon a farmer's right to enlarge a herd or
18 switch from growing one kind of crop to growing another kind or kinds, or upon the percentage
19 of his acreage that can be planted or grazed, nor does the RTFA purport to protect only
20 antiquated and often less-productive methods of farming. The point of the RTFA is to protect
21 owners of active farms from the pressure to capitulate to the development pressures that odor-
22 nuisance complaints by newcomer residential neighbors can bring to bear. To read into the
23 RTFA any constraint on efforts by farmers to make their farmland more productive would be
24 inconsistent with the conservationist purpose of the act.
25

1 But, even if the RTFA did protect farms only to the extent they did not change to “new”
2 or “radically expanded” agricultural activity, the Buchanan court’s comments were made in a
3 case involving an agribusiness corporation that expanded a “small” cattle-feeding operation
4 into a 580-acre feed lot for 40,000 animals, see 134 Wn.2d at 676, and, even then, the court
5 presumed it could still invoke the RTFA as a defense to the plaintiff’s nuisance claim.
6 Ostrom’s production of mushrooms and compost to grow them on plainly is not a “new”
7 activity at the Lacey farm, and ORCAA has not alleged or undertaken to show that Ostrom’s
8 emissions of composting odors has “radically expanded” due to increased *indoor* production of
9 compost.¹ Thus, *even if* “radical” expansion of a farming activity might cause a farmer to lose
10 protection under the RTFA, no such expansion has occurred here.

11 B. Ostrom is not asking the PCHB to determine whether a “violation” of the RTFA has
12 occurred.

13 ORCAA’s argument based on a Shoreline Hearings Board (SHB) decision (Memo. in
14 Opp. at 5) is unclear, perhaps because the decision it cites is unclear. Whatever the SHB’s
15 comment means, though, the PCHB surely has “jurisdiction” to respect and follow state law,
16 even if the source of that law lies outside the RCW chapter creating ORCAA or the PCHB.

17 The point of Ostrom’s argument, though, is that *ORCAA* lacks authority to bring what
18 amounts to a nuisance suit for damages and abatement based on a finding that odors from
19 Ostrom’s mushroom farm constitute a nuisance to Ostrom’s neighbors – which is exactly what
20 ORCAA seeks to do in the regulatory orders and notices at issue in this appeal. Ostrom so
21 argues because the legislature has explicitly immunized agricultural activity from odor-
22 nuisance claims. The legislature has done so not only through its enactment of the RTFA, but

23
24 ¹ Ostrom increased production of compost at the Lacey farm from an average of 78,000 cubic yards per year
25 during the late 1990s and 2000 to 109,000 cu. yds in 2003 and 109,00 cu. yds in 2004. The increased production
followed construction of an indoor composting facility and equipment to reduce odor emissions. See Answer to
ORCAA Interrogatory No. 3 in Exhibit 10 to ORCAA’s Memo. in Opposition.

1 separately through the parallel exemption in RCW 70.94.640(1) and the statement of legislative
2 purpose in the enabling legislation under which ORCAA derives its regulatory authority: *i.e.*,
3 “[t]he legislature intends that agricultural activity consistent with good practices be
4 protected from government over-regulation.”²

5 ORCAA may not take regulatory action based on a finding of odor-nuisance unless it
6 finds, and includes in its order a statement saying, that “[1] the activity is inconsistent with
7 good agricultural practices, or [2] . . . the odors have substantial adverse effect on public
8 health.” ORCAA’s notice to Ostrom’s contains neither statement, and thus it is legally invalid
9 and unenforceable. RCW 70.94.640(2).

10 C. Ostrom is entitled to the exemption for agricultural activity under RCW 70.94.640(1)
11 because it has not made the kind of sale of contiguous farmland contemplated by RCW
12 70.94.640(4).

13 ORCAA argues (Memo. in Opp. at 6) that the exemption for agricultural activity
14 granted by RCW 70.94.640(1) is inapplicable because Ostrom once sold “contiguous” land,
15 such that the exception-to-exemption provision of 70.96.640(4) applies. Implicit in ORCAA’s
16 argument is a concession that the exemption of subsection 640(1) would apply if the sale of
17 land described in Mr. Street’s declaration is not the kind of land sale contemplated by RCW
18 70.94.640(4). It is not that kind of land sale.

19 The “contiguous land sale” exception obviously was meant to disqualify from the
20 exemption a farmer who brings growth closer to himself (or herself) by selling off parts of his
21 (or her) farm and profiting from the kind of suburban growth from which RCW 70.94.640(1)
22 (and the RTFA) were intended to protect farms. Thus, farmers who attract suburban residential
23 growth to their farms’ boundaries by selling off parts of their farms lose the right to be
24

25 ² Laws of 1981, ch. 297, § 29 (quoted in full at Ostrom’s Motion, pp. 5-6).

1 protected from governmental nuisance-odor regulation based on complaints by persons who
2 move into the former farmland. That makes sense. But it is not what happened here.

3 Ostrom has only sold land that had not been part of its farm and that it bought for the
4 sole purpose of creating a buffer *against* residential development on land “contiguous” to its
5 farm. The exception in RCW 70.94.640(4) was not designed to disqualify farmers who do that.
6 A statute must be construed in a way that avoids, rather than reaches, an absurd result.
7 Hangartner v. City of Seattle, 151 Wn.2d 439, 448 (2004). Under ORCAA’s argument,
8 Ostrom would have kept its exemption from ORCAA regulation if it had done nothing and
9 allowed the adjoining 60 acres – including the 20-acre buffer portion that Ostrom kept – to be
10 developed for residential use by others, or Ostrom it had contrived a way to buy only the 20
11 acres it kept. But, under ORCAA’s argument, Ostrom should forfeit the exemption because it
12 acted to keep residential development at bay by buying land that had never been a part of its
13 farm and then promptly selling off the part that was not necessary to keep in order to create the
14 buffer. ORCAA’s proposed interpretation of the sale-of-contiguous-land exception is perverse
15 and cannot be what the legislature intended by enacting RCW 70.94.640(4).

16 D. Excessiveness of the Civil Penalty.

17 ORCAA contends that “the attached ORCAA records regarding complaints and
18 ORCAA’s followup” show that Ostrom “was contacted about these complaints.” Memo. in
19 Opp. at 7 (emphasis by ORCAA). ORCAA’s reference must be to documents included in
20 Exhibit 9 to its Memorandum. The \$10,000 civil penalty was assessed for odor violations
21 occurring from 4/18/03 to 4/18/04.³ The attachments under Part B reflect 24 informal odor
22

23 ³ Documents under Part A to Exhibit 9 relate to informal complaints made before the penalty period; documents
24 under Part C relate to complaints made after that period. See Answer to Interrogatory No. 1. Although ORCAA’s
25 interrogatory answer describes Tab B as “gathered complaints and records made between April 23, 2004 and April
20, 2004,” Ostrom believes the first date is a typographical error and should be “April 23, 2003.”

1 complaints taken and, in some instances, checked out, by ORCAA staff during that time. Part
2 B also includes a single formal odor complaint, filed April 20, 2004, by the person, Tom
3 Giroux, who had made 14 of the 24 informal odor complaints.

4 Of the 24 informal odor complaints recorded by ORCAA during the penalty period,
5 ORCAA reported having made "contact" with Ostrom concerning only three. The first of
6 those three informal complaints was made on August 7, 2003. The ORCAA employee who
7 checked out the complaint wrote that "[n]o odors were noted during a drive through the
8 complainants' neighborhood." The second of the three informal odor complaints about which
9 ORCAA had "contact" with Ostrom was made seven months later, on (Saturday) March 20,
10 2004, and ORCAA informed Ostrom about it two days later without making any determination
11 itself as to whether the complainant had in fact smelled an odor created by Ostrom. The third
12 of the three informal odor complaints was made on March 24, 2004, by Mr. Giroux, who told
13 ORCAA he was "pretty sure" the odor was from Ostrom but that it was no longer "as strong."
14 ORCAA called Ostrom to advise of the informal complaint, but did not do anything to confirm
15 whether it was from Ostrom or not. The formal complaint was made about odors the
16 complainant attributed to Ostrom on April 17 and 18, 2004, neither of which ORCAA's
17 documentation indicates it ever "contacted" Ostrom about. Thus, it is quite an exaggeration for
18 ORCAA to assert that documents under Part B of Exhibit 9 show that ORCAA "was contacted
19 about these complaints."

20 ORCAA argues that the issue of whether a penalty is excessive is an issue that cannot
21 be resolved summarily. That may ordinarily be true. But this is no ordinary case. It would be
22 capricious to impose a fine of \$10,000 based on having "contacted" Ostrom after the fact three
23 times in a year to tell it that someone had reported an odor problem that ORCAA itself had not
24
25

1 been able to verify, and also to base that fine on 21 other informal complaints about which it
2 had not contacted Ostrom.

3 E. When ORCAA Regulation 7.01(d)(51) was adopted makes no difference, and ORCAA
4 cannot regulate agricultural odors by relabeling them as “pollutants”.

5 ORCAA seems to argue at page 7 of its Memorandum in Opposition that its own
6 regulation *categorically exempting* “primary agricultural production activities including soil
7 preparation, planting, fertilizing, weed and pest control, and harvesting” from its own Notice of
8 Construction rules is somehow subject to a kind of reverse-grandfathering principle under
9 which “primary agricultural activity” is exempt from regulation by ORCAA only if it began
10 after October 6, 2003. If that is ORCAA’s argument, it is creative but absurd.

11 ORCAA surely does not expect the Board to believe that the purpose of a “categorical
12 exemption” from NOC rules for “primary agricultural activity” was meant to apply only to
13 activity that began after October 6, 2003. A regulation meant to exempt only “new”
14 agricultural activity in an increasingly suburban area would be a meaningless one that no
15 rational agency would waste its time adopting. If activity is “categorically exempt” from a
16 regulation, it is categorically exempt.

17 Insofar as ORCAA argues that it is trying to enforce its NOC requirements with respect
18 to things that are not “primary agricultural activities,” it also is wrong. ORCAA’s own
19 regulation defines “primary agricultural activities” broadly, as “*including* soil preparation,
20 planting, fertilizing, weed and pest control, and harvesting,” And composting for the
21 production of mushroom-growing substrate is a kind of “soil preparation.” Furthermore,
22 ORCAA cannot, by adopting a regulation, confer upon itself the authority to do what RCW
23 94.70.640(1) says it cannot do, *i.e.* regulate odors from agricultural activity. Having conceded
24 (as it must) that RCW 70.94.640(1) exempts Ostrom from regulation absent a finding either
25 that what Ostrom is doing, or that “toxic pollutants” that are produced by composting at its

1 Lacey farm, are “inconsistent with good agricultural practices” or are having a “substantial
2 adverse effect on public health,” or unless the sale-of-contiguous-land exception to the
3 exemption applies (which is not the case, as explained above), ORCAA may not invoke its
4 own regulation to deprive Ostrom of a statutory exemption.

5 Finally, ORCAA seems to argue (Memo. in Opp. at 7, lines 22-27) that the statutory
6 exemption, or ORCAA’s own categorical exemption, do not apply because Ostrom has
7 “increased” production of a farming-related growing medium or byproduct, and thus is a “new
8 source” of “toxic air pollutants.” Again, ORCAA makes an absurd argument. First, there is no
9 legal or logical authority for ignoring the statutory exemption for agricultural odors by
10 relabeling things as “pollutants.”

11 Second, Ostrom is not a “new source” of compost odors. Ostrom for decades has been
12 producing at the Lacey farm both mushrooms and the compost to grow them on. Whatever
13 may be the byproducts of composting, they are not “new” ones. The biochemical process of
14 composting has not changed. Despite the protections from nuisance claims and governmental
15 regulation conferred upon it by the RTFA and RCW 70.94.640(1), Ostrom several years ago
16 did voluntarily make a major investment in equipment to reduce the odors its operation
17 generates. But Ostrom should not be treated as *more* vulnerable to regulation because of that.

18 If ORCAA is now arguing that the Board may infer that increased production of
19 compost makes Ostrom a “new” source of pollutants even though increased production
20 followed installation of odor-reducing equipment, the Board should decline to do so because
21 ORCAA has never purported to have made such a finding and has never notified Ostrom of
22 any such contention. When a farmer who is free to generate farm odors as long as they do not
23 have a “substantial adverse effect on public health,” it would be perverse to label the farmer a
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1 polluter simply because he has voluntarily invested in equipment to make legal odors from his
2 farm less annoying.

3 F. Conclusion.

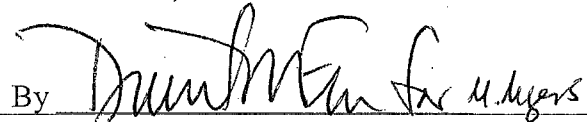
4 ORCAA must come to grips with limitations on its authority to regulate agricultural
5 odors that it has not even attempted to show have a substantial adverse effect on public health.
6 It is not part of ORCAA's mission to think up ways to get around exemptions from nuisance-
7 odor regulation that the legislature has granted not only under the Right to Farm Act, but also
8 under the statute creating ORCAA itself.

9 The Board should vacate the several orders from which Ostrom has appealed.

10 DATED this 7th day of February, 2005.

11
12 Respectfully submitted,

13 WILLIAMS, KASTNER & GIBBS

14 By 

15 Mark M. Myers, WSBA #15362

16 Daniel W. Ferm, WSBA #11466

17 Attorneys for The Ostrom Company, Inc.

Certificate of Service

I certify under penalty of perjury under the law of Washington that, on February 7, 2005, I sent a copy of the foregoing document, Appellant's Reply Memorandum In Support of Its Dispositive Motion, by facsimile and prepaid first class United States Mail to counsel of record for the Olympic Region Clean Air Agency, Fred D. Gentry, Bean & Gentry, P.O. Box 2317, Olympia, Washington, 98507.

Carrie A. Cardiali
Carrie A. Cardiali

CERTIFICATE OF SERVICE

1667257.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

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4 **STATE OF WASHINGTON**
5 **ENVIRONMENTAL HEARINGS OFFICE**
6

7 THE OSTROM COMPANY INC.,

8 Appellant,

9 vs.

10 OLYMPIC REGION CLEAN AIR AGENCY

11 Respondent.
12

RECEIVED

FEB 02 2005

ORCAA

PCHB NO. 04-105

AFFIDAVIT OF FRED D. GENTRY

13 FRED D. GENTRY, being first duly sworn on oath, deposes and says:

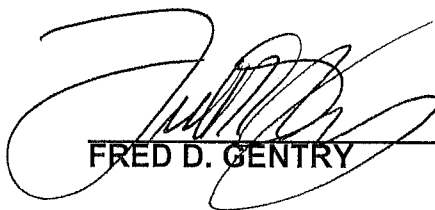
14 I am the attorney of record for Olympic Region Clean Air Agency in the above-
15 captioned case. Attached hereto are true and correct copies of the following:

- 16 Ex. 1 Notice of Violation 2172.
17 Ex. 2 Notice of Civil Penalty Assessment related to NOV 2172.
18 Ex. 3 General Civil Penalty Worksheet Re: NOV 2172.
19 Ex. 4 Notice of Violation 2198.
20 Ex. 5 Notice of Civil Penalty Assessment related to NOV 2198.
21 Ex. 6 General Civil Penalty Worksheet Re: NOV 2198.
22 Ex. 7 June 29, 2004, Regulatory Order issued by ORCAA to Ostrom.
23 Ex. 8 ORCAA's Inspection Report.
24 Ex. 9 Ostrom's First Interrogatories and Requests for Production to ORCAA
and ORCAA's Answers Thereto.
25 Ex. 10 ORCAA's First Interrogatories and Requests for Production to Ostrom
and Ostrom's Answers Thereto.
26 Ex. 11 Trial court's opinion in Vicwood Meridian v. Skagit Sand and Gravel.
27 Ex. 12 Dunlap v. City of Nooksack, 2003 WL 21391320 (Wash.Shore.Hrg.Bd.)
28

COPY

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

3
4 DATED this 2ND day of February, 2005, at Olympia, Washington.

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7 
8 FRED D. GENTRY

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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
16

PCHB NO. 04-105

**OLYMPIC REGION CLEAN AIR
AGENCY'S MEMORANDUM IN
OPPOSITION TO OSTROM'S
DISPOSITIVE MOTION**

17 **I. INTRODUCTION**

18 Ostrom's Dispositive Motion must be denied in its entirety. As discussed more fully
19 below, the Right to Farm Act is not applicable, the narrow exemption found in RCW 70.94.
20 640 is not applicable, a notice of construction was required under ORCAA's Regulation 1
21 as well as Chapter 173-460 WAC, and whether or not the penalties imposed by ORCAA
22 are excessive presents a factual issue not capable of summary resolution.

23 **II. FACTUAL BACKGROUND**

24 The factual background of this case is set forth clearly and succinctly in the following
25 documents some or all of which have already been filed and all of which are attached
26 hereto as exhibits:

27 Ex. 1 Notice of Violation 2172

28 Ex. 2 Notice of Civil Penalty Assessment related to NOV 2172.

Ex. 3 General Civil Penalty Worksheet Re: NOV 2172.

1 Ex. 4 Notice of Violation 2198.

2 Ex. 5 Notice of Civil Penalty Assessment related to NOV 2198.

3 Ex. 6 General Civil Penalty Worksheet Re: NOV 2198.

4 Ex. 7 June 29, 2004, Regulatory Order issued by ORCAA to Ostrom.

5 Ex. 8 ORCAA's Inspection Report.

6 To briefly summarize, between April of 2003 and April of 2004, ORCAA received 28
7 odor complaints concerning Ostrom. The specific details of these complaints are found in
8 ORCAA's answers to interrogatories and documents provided in response to requests for
9 production, copies of which are attached hereto as Ex. 9. ORCAA issued NOV 2172 to
10 Ostrom on April 29, 2004, for odor impacts. ORCAA's answers and responsive documents
11 indicate that, contrary to Ostrom's unsupported contention, ORCAA did in fact advise
12 Ostrom of odor complaints it had received prior to issuance of NOV 2172.

13 On May 21, 2004, ORCAA agreed to an offer of a tour of the Ostrom's plant with the
14 proviso that one of the purposes of the tour would be to evaluate compliance at the facility,
15 in particular adherence to the approval order conditions for NOC #99NOC023. Ex. 8.

16 The details of what was observed on the tour are reflected in the inspection report,
17 the regulatory order, and NOV 2198. Ex. 5, 7 and 8.

18 During the course of discovery in this case, Ostrom answered interrogatories and
19 provided documents in response to requests for production, copies of which are attached
20 hereto as Exhibit 10. These answers and responsive documents establish that in the last
21 few years Ostrom substantially increased compost production at its Lacey plant and that
22 the amount of compost produced at its Lacey plant exceeds the amount of compost needed
23 for the mushroom growing operation in Lacey. These answers to interrogatories and
24 responsive documents also indicate that Ostrom does not use all of the compost produced
25 at its Lacey to grow mushrooms in Lacey but sells compost to others, including another
26 Ostrom's plant in Everson, Washington, as well as buyers in Canada.

Ostrom's answers to interrogatories and responsive documents, together with William Street, Sr.'s, Declaration, also establish that Ostrom's sold a contiguous 40 acre piece of land for residential purposes.

III. OSTROM'S DISPOSITIVE MOTION MUST BE DENIED IN ITS ENTIRETY

A. Right to Farm Act.

1. Right to Farm Act is Not Applicable.

The Right to Farm Act (RTFA), codified in RCW 7.48.300-.310, is not applicable. There are several reasons for this.

First, this is a regulatory action not a nuisance lawsuit precluded by the RTFA. It is the stated purpose of the RTFA "to provide that agricultural activities conducted on farmland and forest practices be protected from nuisance lawsuits." (Emphasis added) RCW 7.48.300.

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

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

Black's Law Dictionary (4th edition, 1951).

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

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

"Agricultural activity" means a condition or activity which occurs on a farm in connection with the commercial production of farm products and includes, but is not limited to, marketed produce

1 at roadside stands or farm markets; noise; odors; dust; fumes;
2 operation of machinery and irrigation pumps; movement,
3 including but not limited to, use of current county road ditches,
4 streams, rivers, canals, and drains, and use of water for
5 agricultural activities; ground and aerial application of seed,
6 fertilizers, conditioners, and plant protection products;
7 employment and use of labor; roadway movement of
8 equipment and livestock; protection from damage by wildlife;
9 prevention of trespass; construction and maintenance of
10 buildings, fences, roads, bridges, ponds, drains, waterways,
11 and similar features and maintenance of streambanks and
12 watercourses; and conversion from one agricultural activity to
13 another.

14 (Emphasis added.)

15 As evidenced by Ostrom's answers to interrogatories, Ostrom's does not use all of
16 the compost produced in Lacey to grow mushrooms in Lacey but sells compost to others,
17 including another Ostrom's plant in Everson, Washington, and buyers in Canada.

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

21 An established farm may not be able to institute a new or
22 radically expanded "activity" and maintain nuisance immunity,
23 because the language of the statute focuses on agricultural
24 activity that has been established prior to the urban
25 encroachment. Cf. Payne v. Skaar, 127 Idaho 341, 900 P.2d
26 1352, 1355 (1995) (Idaho Right to Farm Act does not protect
27 an established feedlot from nuisance suits if the nuisance
28 arises because of expansion of the agricultural activity).

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

32 It is anticipated that Ostrom will rely on Vicwood Meridian Partnership v. Skagit Sand
33 and Gravel, 123 Wn.App. 877, 98 P.3d 1277 (2004) to attempt to counter ORCAA's
34 arguments that Ostrom's compost production is not an agriculture activity and that it is a
35 new and expanded activity and for these reasons not exempted under the RTFA. The
36 Court of Appeal's opinion is not determinative or even persuasive in this case because of
37 significant factual distinctions between that case and this one. In Vicwood, Thurston

1 County had brought a true nuisance suit in the form of a claim for contribution. Moreover,
2 as pointed out by the Court of Appeals in its opinion:

- 3
- 4 • "Thurston County failed to preserve the issue of whether Ostrom's indoor
5 composting facility is a new or expanded activity because it did not present
6 it to the trial court." Vicwood, at 886.
- 7 • "Thurston County also failed to provide evidence that Ostrom produces more
8 compost since moving into its indoor facility." Vicwood, at 886.

9 It is also clear from the Court of Appeal's discussion of Donovan v. Frezo Brothers, Inc.,
10 678 F.2d 1166, 1171 (3d Cir. 1982) and the trial court's oral opinion in Vicwood Meridian
11 v. Skagit Sand and Gravel (Ex. 11) that the only evidence in that case was that Ostrom
12 produced compost at its Lacey facility only for its own use in growing mushrooms at that
13 site.

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

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

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

1 **B. The Exemption Found in RCW 70.94.640 is Not Applicable.**

2 The exemption for odors caused by agricultural activity which is found in RCW
3 70.94.640 is not applicable here. RCW 70.94.640(4) provides that the exemption shall not
4 apply "[i]f a person engaged in agricultural activity on a contiguous piece of agricultural land
5 sells or has sold a portion of that land for residential purposes."

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

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

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

13 The *American Heritage Dictionary of the English Language* defines the word as
14 follows:

- 15 1. Sharing an edge or boundary; touching.
16 2. Nearby; neighboring; adjacent.

17 The 40 acres sold by Ostrom for residential purposes meets either or both of these
18 definitions. Even if the general exemption for agricultural activities found in RCW 70.94.640
19 were otherwise applicable, which ORCAA does not admit, Ostrom's sale of the 40 acres
20 renders the exemption inapplicable.

21 **C. The Issue of Whether or Not the Penalties Imposed by ORCAA are**
22 **Excessive Presents a Factual Issue Not Capable of Resolution on Summary**
23 **Judgment.**

24 This Board looks to several factors when determining whether a penalty is
25 reasonable.

26 The Board considers the reasonableness of a penalty on a de
27 novo basis, taking into account (1) the nature of the violation,
28 (2) the prior behavior of the violator, and (3) subsequent action
 taken to rectify the problem. *Deskin Farms v. Ecology*, PCHB
 98-073 (1998); *Columbia Aluminum Corporation v. Ecology*,
 PCHB 95-028 (1995). The board considers the gravity criteria

1 employed by the air authority in its evaluation of the
2 reasonableness of a penalty.

3 Watts v. BCAA, 2000 WL 33100036 (Wash. Pol. Control Bd.)

4 This is clearly a factual matter not capable of resolution on summary judgment. The
5 only reason given by Ostrom in support of its argument on this issue is that ORCAA never
6 gave Ostrom notice of complaints. Ostrom proffers no evidence to support this bare
7 assertion. Moreover, as set forth in ORCAA's answers to interrogatories and the attached
8 ORCAA records regarding complaints and ORCAA's follow-up, Ostrom was contacted
9 about these complaints.

10 In sum, this is a factual issue and there are disputed facts. Summary judgment is
11 not appropriate.

12 **D. A Notice of Construction Was Required.**

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

17 Moreover, even if this exemption had been in effect at the time of construction, the
18 modifications to operations and equipment associated with the Phase I composting system
19 and wastewater treatment system were not "primary agricultural production activities." As
20 discussed more fully in Section III.A.1. of this Memorandum, Ostrom does not use all of the
21 compost that it produces to grow its own mushrooms but sells much of the compost to
22 others.

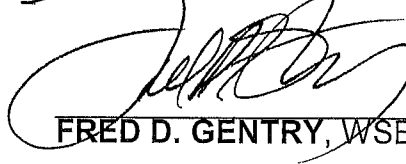
23 Finally, even if this exemption had been in effect and was applicable, it is clear that
24 a Notice of Construction was nevertheless required under Chapter 173-460 WAC, Controls
25 for New Sources of Toxic Air Pollutants. Ostrom's Lacey facility emits several Class B air
26 pollutants which are listed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

1
2 **V. CONCLUSION**

3 In conclusion, Ostrom's Dispositive Motion should be denied in its entirety.
4

5 DATED this 2nd day of February, 2005.

6 BEAN & GENTRY
7 Attorneys for Respondent ORCAA

8 
9

10 **FRED D. GENTRY, WSBA #1448**
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4 **STATE OF WASHINGTON**
5 **ENVIRONMENTAL HEARINGS OFFICE**

6 THE OSTROM COMPANY INC.,

7 Appellant,

8 vs.

9 OLYMPIC REGION CLEAN AIR AGENCY

10 Respondent.
11

PCHB NO. 04-105

**DECLARATION OF MARK
GOODIN**

12 The undersigned declares:

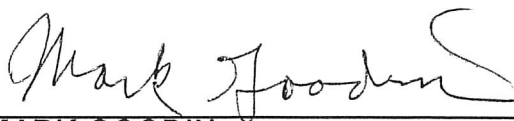
13 I am Mark Goodin, a professional engineer employed by ORCAA for 12 years.

14 Over the years, I have become very familiar with the Ostrom plant and its
15 composting facility and attended the tour and inspection on May 21, 2004.
16

17 Composting operations at Ostrom's is classified under an SIC code of 2875.
18 Expansion and changes in operations, equipment and structures at Ostrom's since May 24,
19 1999, constitute and are a new toxic air pollutant source included under WAC 173-460-
20 030(1)(b)(i)(D). Ostrom's emits several Class B air pollutants listed in WAC 173-460-160,
21 including: ammonia and, potentially, acetic acid, acetone, ethyl alcohol, hexane, hydrogen
22 sulfide, isopropyl alcohol, methyl-ethyl-ketone, phenol, propionic acid, toluene, and
23 trimethyl amine. Pursuant to WAC 173-460-040 Ostrom should have filed a NOC.

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

26 DATED this 2nd day of February, 2005, at Olympia, Washington.

27 
28

MARK GOODIN

COPY

EXHIBIT 1



Olympic Region Clean Air Agency
2940-B Limited Lane NW
Olympia, Washington 98502
(360) 586-1044

NOTICE OF VIOLATION

No. 2172

Name: OSTROMS MUSHROOMS Phone: 360-491-1410

Mailing Address: 8223 STELLACOOM RD - SE.

City: OLYMPIA State: WA Zip Code: 98503

Date of Violation: 4/18/03 THROUGH 4/18/04 Time: VARIOUS

Location of Violation: ☐ "✓" if same as above

In Violation of:

☒ Section 9.11 (c) of ORCAA's Regulation 1

☐ Other

FINDINGS: CAUSED OR ALLOWED AN ODOR TO
UNREASONABLY INTERFERE WITH A PERSON'S
USE AND ENJOYMENT OF THEIR PROPERTY.

ORDER:

Issued by:

John T. Kelly

Date:

4/29/04

Violation of Regulation 1 of the Olympic Region Clean Air Agency carries a civil penalty of up to \$10,000. You will be sent notification by letter setting forth the civil penalty to be assessed for the above violation(s) after 30 days have passed. You have the right to meet with an ORCAA representative to discuss the matter at any time in the 30 day period following your receipt of this notice.

EXHIBIT 2

Olympic Region Clean Air Agency

2940 B Limited Lane NW
Olympia, WA 98502
360.586.1044

**NOTICE OF
CIVIL PENALTY ASSESSMENT**

To: Ostrom's Mushroom Farm
8323 Steilacoom Rd SE
Olympia, WA 98513

On or about, May 3, 2004, you received (via certified mail) a Notice of Violation signed by Air Quality Specialist John Kelly regarding a site near Olympia, Washington, County of Thurston regarding an alleged violation that occurred from April 18, 2003 through April 18, 2004. At that time, you or your representatives were charged with a violation for the following reason(s):

Section 9.11(c) of Regulation 1

As a penalty for your violation, you are hereby assessed a fine in the amount of **Ten thousand Dollars (\$10,000.00)** in accordance with Section 3.27 of Regulation 1.

YOU HAVE THE FOLLOWING RIGHTS REGARDING THIS CIVIL PENALTY ASSESSMENT

1) Within thirty (30) days after the notice imposing a civil penalty is received, you may apply in writing to Olympic Region Clean Air Agency (ORCAA) for the remission or mitigation of the penalty. You will receive a Notice of Disposition on your request for remission or mitigation in writing. **OR**

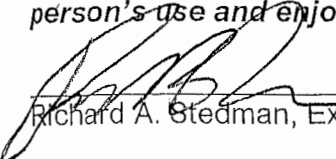
2) You may appeal for relief from this order by making a request for a hearing and an appeal to the State of Washington Pollution Control Hearings Board, PO Box 40903, Olympia WA 98504-0903, in accordance with chapter 43.21(B) RCW, and rules chapter 371-08 WAC. This request for appeal and for a hearing must be made in writing and served within thirty (30) days after receipt of this notice (or if you request for a remission or mitigation of the penalty as per paragraph 1) above within thirty (30) days of receipt of the Notice of Disposition of your application for remission or mitigation of the penalty) upon both the Pollution Control Hearings Board (address above) and the Olympic Region Clean Air Agency (ORCAA), at 2940 B Limited Lane NW, Olympia, Washington 98502.

3) The penalty assessed is due and payable upon the later of:

- A. Thirty (30) days after receipt of this notice imposing the penalty;
- B. Thirty (30) days after receipt of the Notice of Disposition or application for remission or mitigation of the penalty, if such an application is made; or
- C. Thirty (30) days after receipt of the Notice of Decision of the Pollution Control Hearings Board if the penalty is appealed.

If the penalty amount is not paid when it becomes due and payable, ORCAA shall bring court action, in Thurston County, to recover said penalty and interest.

CONDITION: *Fifth Violation. Causing or allowing an odor to unreasonably interfere with a person's use and enjoyment of their property.*


Richard A. Stedman, Executive Director

Dated July 7, 2004

cc: Fred D. Gentry, Attorney

Certified Mail No. _____

NOV #2172

EXHIBIT 3

GENERAL CIVIL PENALTY WORKSHEET AND RECOMMENDATION

SOURCE: OSTROM'S MUSHROOM FARM ¹⁹⁹⁴

NOV #: 2172

Previous NOVs #, 535-91 397-91 350-82 032-82 029-82 026-80 (more than 5)

The following procedures shall be used in making a recommendation for assessment of civil penalties for violations of Federal, State and local regulations. Civil penalties should include a "gravity" component of an amount which is appropriate considering the severity of the violation. The gravity component of a civil penalty shall be determined according to Step 1 below. In addition, civil penalties for violations involving demonstrable economic benefit to the violator should include a "benefit" component. The amount of benefit component should be equivalent to the economic benefit realized by the violator due to the noncompliance and may be determined according to Step 2 below. The total civil penalty assessed for a violation should be the sum of the "gravity" and "benefit" components.

STEP 1, GRAVITY COMPONENT: Answer all questions in Table 1 below using guidance found on the b. Add the numerical "Ratings" for all answers and proceed to Tables 2 and 3 which indicate the recommended amount for the gravity component.

Table 1 - Gravity Criteria

Rating:	0	1	2	3
1. Did the violation result in an emission of an air pollutant?				X
2. Was the violation due to emissions in excess of an applicable emission limitation or standard?			X	
3. Violation of applicable permitting, new source review or registration requirements?	X			
4. Violation of applicable monitoring, record keeping or reporting requirements?	X			
5. Was the violation a result of improper operation or inadequate maintenance?				X
6. Was the violator unresponsive in correcting the violation?			X	
7. Were there any complaints associated with this violation?				X

Total Gravity Criteria Rating: 13

Table 2 - Gravity Component Amount(see Table 3)

Total Rating	1-3	4-6	7-8	9+
Penalty	Level 1	Level 2	Level 3	Level 4

Table 3

	Level 1	Level 2	Level 3	Level 4
1st Violation	\$ 100	\$ 400	\$ 700	\$ 1,000
2nd Violation	\$ 1,000	\$ 1,200	\$ 1,400	\$ 2,000
3rd Violation	\$ 3,000	\$ 4,000	\$ 4,500	\$ 5,000
4th Violation	\$ 6,000	\$ 7,000	\$ 7,500	\$ 8,000
5th Violation	\$10,000			\$10,000

STEP 2, BENEFIT COMPONENT: Did the violator economically benefit from the violation? YES , NO X. If the answer is "YES", an economic benefit portion shall be included in the penalty. The estimated dollar amount of economic benefit is: \$. Attach any calculations, reports, or any other pertinent information.

STEP 3, TOTAL CIVIL PENALTY: The total amount of the recommended civil penalty should be the sum of the dollar amounts from Step 1 and Step 2.

TOTAL RECOMMENDED CIVIL PENALTY: \$10,000

Issuing Staff

Date

Reviewed By

Date

EXHIBIT 4



Olympic Region Clean A
2940-B Limited Lane NW
Olympia, Washington 98502
(360) 586-1044

NOTICE OF VIOLATION

No. 2198

Name: OSTROMS MUSHROOM FARM Phone: (360) 491-1410
Mailing Address: 8323 STEILACOOM RD.
City: OLYMPIA, WA State: Zip Code: 98513
Date of Violation: 5/21/04 Time:
Location of Violation: ☒ "✓" if same as above

In Violation of:

- ☒ Section 7.01(a) AND 7.07 of ORCAA's Regulation 1
☐ Other

7.01(a) = MODIFICATION TO A STATIONARY SOURCE
WITHOUT APPROVAL - INSTALLATION OF
FINDINGS: AERATED BUNKERS AND WATER RECIRCULATION
TANK AND AERATION.

7.07 = COMPOSTING OPERATIONS NOT IN ACCORDANCE
WITH INFORMATION IN THE APPLICATION OR APPROVAL
ORDER FOR NOC # 99WOC 023 AS DETAILED
ORDER: IN THE ATTACHED INSPECTION REPORT.

OSTROMS WILL IMPLEMENT FURTHER ODOR CONTROL
MEASURES AND SUBMIT A NEW NOTICE OF CONSTRUCTION
AS REQUIRED IN THE ATTACHED REGULATORY ORDER.

Issued by: Jim T. Kelly

Date: 6/28/04

Violation of Regulation 1 of the Olympic Region Clean Air Agency carries a civil penalty of up to \$10,000. You will be sent notification by letter setting forth the civil penalty to be assessed for the above violation(s) after 30 days have passed. You have the right to meet with an ORCAA representative to discuss the matter at any time in the 30 day period following your receipt of this notice.

EXHIBIT 5

Having Jurisdiction in Clallam, Grays Harbor, Mason, Pacific, Jefferson and Thurston
Counties of Washington State

Olympic Region Clean Air Agency

2940 B Limited Lane NW
Olympia, WA 98502
360.586.1044

**NOTICE OF
CIVIL PENALTY ASSESSMENT**

To: Ostrom's Mushroom Farm
8323 Steilacoom Rd SE
Lacey, WA 98503

On or about, July 1, 2004, you received (via certified mail) a Notice of Violation signed by Air Quality Specialist John Kelly regarding a site near Lacey, Washington, County of Thurston regarding an alleged violation that occurred on May 21, 2004. At that time, you or your representatives were charged with a violation for the following reason(s):

Section 7.01(a) and 7.07 of ORCAA's Regulation 1

As a penalty for your violation, you are hereby assessed a fine in the amount of **One Thousand six hundred Dollars (\$1,600.00)** in accordance with Section 3.27 of Regulation 1.

YOU HAVE THE FOLLOWING RIGHTS REGARDING THIS CIVIL PENALTY ASSESSMENT

- 1) Within thirty (30) days after the notice imposing a civil penalty is received, you may apply in writing to Olympic Region Clean Air Agency (ORCAA) for the remission or mitigation of the penalty. You will receive a Notice of Disposition on your request for remission or mitigation in writing. **OR**
- 2) You may appeal for relief from this order by making a request for a hearing and an appeal to the State of Washington Pollution Control Hearings Board, PO Box 40903, Olympia WA 98504-0903, in accordance with chapter 43.21(B) RCW, and rules chapter 371-08 WAC. This request for appeal and for a hearing must be made in writing and served within thirty (30) days after receipt of this notice (or if you request for a remission or mitigation of the penalty as per paragraph 1) above within thirty (30) days of receipt of the Notice of Disposition of your application for remission or mitigation of the penalty) upon both the Pollution Control Hearings Board (address above) and the Olympic Region Clean Air Agency (ORCAA), at 2940 B Limited Lane NW, Olympia, Washington 98502.
- 3) The penalty assessed is due and payable upon the later of:
 - A. Thirty (30) days after receipt of this notice imposing the penalty;
 - B. Thirty (30) days after receipt of the Notice of Disposition or application for remission or mitigation of the penalty, if such an application is made; or
 - C. Thirty (30) days after receipt of the Notice of Decision of the Pollution Control Hearings Board if the penalty is appealed.

If the penalty amount is not paid when it becomes due and payable, ORCAA shall bring court action, in Thurston County, to recover said penalty and interest.

CONDITION: *First Violation. Completing a modification to a stationary source without prior approval—installation of aerated bunkers and water recirculation tank and aeration. Also, composting operations not in accordance with information in the application or approval order for NOC#99NOC023.*


Richard A. Steinhilber, Executive Director

Dated Oct 4, 20 04

cc: Fred D. Gentry, Attorney
Certified Mail No. _____
NOV #2198

EXHIBIT 6

GENERAL CIVIL PENALTY WORKSHEET AND RECOMMENDATION

SOURCE: OSTROM'S MUSHROOM FARM
 NOV #: 2198 Previous NOVs #: NONE (more than 5)

The following procedures shall be used in making a recommendation for assessment of civil penalties for violator Federal, State and local regulations. Civil penalties should include a "gravity" component of an amount which is appropriate considering the severity of the violation. The gravity component of a civil penalty shall be determined according to Step 1 below. In addition, civil penalties for violations involving demonstrable economic benefit to the violator should include a "benefit" component. The amount of benefit component should be equivalent to the economic benefit realized by the violator due to the noncompliance and may be determined according to Step 2 below. The total civil penalty assessed for a violation should be the sum of the "gravity" and "benefit" components.

STEP 1, GRAVITY COMPONENT: Answer all questions in Table 1 below using guidance found on the back of this page. Add the numerical "Ratings" for all answers and proceed to Tables 2 and 3 which indicate the recommended amount for the gravity component.

Table 1 - Gravity Criteria

Rating:	0	1	2	3
1. Did the violation result in an emission of an air pollutant?				X
2. Was the violation due to emissions in excess of an applicable emission limitation or standard?			X	
3. Violation of applicable permitting, new source review or registration requirements?			X	
4. Violation of applicable monitoring, record keeping or reporting requirements?	X			
5. Was the violation a result of improper operation or inadequate maintenance?				X
6. Was the violator unresponsive in correcting the violation?				X
7. Were there any complaints associated with this violation?				X

Total Gravity Criteria Rating: 16

Table 2 - Gravity Component Amount(see Table 3)

Total Rating	1-3	4-6	7-8	9+
Penalty	Level 1	Level 2	Level 3	Level 4

Table 3

	Level 1	Level 2	Level 3	Level 4
1st Violation	\$ 100	\$ 400	\$ 700	\$ 1,000
2nd Violation	\$ 1,000	\$ 1,200	\$ 1,400	\$ 2,000
3rd Violation	\$ 3,000	\$ 4,000	\$ 4,500	\$ 5,000
4th Violation	\$ 6,000	\$ 7,000	\$ 7,500	\$ 8,000
5th Violation	\$10,000			

- 1. Did the violation result in an emission of an air pollutant?**
 Answer "0" if the violation was not the result of an emission. Answer "1" if there was an emission which was not verified. Answer "2" if the emission was verified. Answer "3" if the emission was verified and/or there was a formal complaint or informal complaints from more than one complainant.
- 2. Was the violation due to emissions in excess of an applicable emission limitation or standard?**
 Answer "0" if the violation was not a result of, or did not result in an air contaminant emission. Answer "1" when records or data indicate a violation for a period of time less than a day. Answer "2" when records or data indicate probable intermittent excess emissions over a number of days. Answer "3" when records or data indicate ongoing, continuous excess emissions over a number of days.

3. Violation of applicable permitting, new source review or registration requirements?

Answer "0" if the violation was not the result of failure to comply with registration, new source performance standards (NSPS), national emission standards for hazardous air pollutants (NESHAP), new source review (NSR), or permitting requirements. Answer "1" if the violation was a result of failure to comply with registration requirements. Answer "2" if the violation was a result of failure to comply with minor NSR requirements. Answer "3" if the violation was a result of failure to comply with major NSR (PSD), Title V applicable requirements, NSPSs or NESHAPs, failure to submit a Title V air operating permits application (and/or operating a major source without a Title V operating permit.)

4. Violation of applicable monitoring, record keeping or reporting (MRR) requirements?

Answer "0" if the violation was not a result of failure to comply with monitoring, record keeping or reporting (MRR) requirements. Answer "1" if the violation was a result of failure to comply with applicable MRR requirements of Regulation 1 or WAC 173-400. Answer "2" if the violation was a result of failure to comply with a MRR requirement of a NOC Approval Order condition. Answer "3" if the violation was a result of failure to comply with a MRR requirement of an Air Operating Permit, federal NESHAP or federal NSPS.

5. Was the violation a result of improper operation or inadequate maintenance (O&M)?

Answer "0" if the violator was following proper operation and maintenance (O&M). Answer "1" if the violator was following an O & M plan/ procedures that were not adequate. Answer "2" if the violator did not have an O & M plan or procedures in place. Answer "3" if the violation was clearly a result of improper O & M.

6. Was the violator unresponsive in correcting the violation?

Answer "0" if the violation was corrected as soon as the violator learned of it. Answer "1" if the violation was corrected in a less timely and cooperative fashion. Answer "2" if the violator attempted to correct the problem, but did not correct it. Answer "3" if the violator did not attempt to correct the problem.

7. Were there any complaints associated with this violation?

Answer "0" if there were no complaints. Answer "1" if there was a formal complaint. Answer "2" if there was a complaint, or emission, which was verified. Answer "3" if complaints were received from more than one complainant, which were verified.

STEP 2, BENEFIT COMPONENT: Did the violator economically benefit from the violation? YES ☒ NO ☐ If the answer is "YES", an economic benefit portion shall be included in the penalty. The estimated dollar amount of economic benefit is: \$ 1,600.00
Attach any calculations, reports, or any other pertinent information.

STEP 3, TOTAL CIVIL PENALTY: The total amount of the recommended civil penalty should be the sum of the dollar amounts from Step 1 and Step 2.

Penalty Assessment:

[Signature]
Issuing staff

10/1/04
date

\$ 1,600.00
Recommended penalty

Comments

[Signature]
Supervisor

10/1/04
date

\$ 1,600.00
Recommended penalty

Comments

[Signature]
Executive Director

10/1/04
date

\$ 1,600.00
Assessed penalty

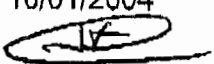
Comments

**Olympic Region Clean Air Agency
Penalty Assessment Recommendation
Economic Benefit Worksheet**

Name: Ostroms Mushroom Farm
NOV # 2198

Type of violation: Failure to file an NOC

Date worksheet completed: 10/01/2004

Completed by: JTK 

Economic benefit for this violation consists of the amount of avoided NOC fees.
Ostroms installed a 260,000 gallon open-air leachate tank and two aerated bunkers
without filing an NOC.

Applicable Fees

Filing fee	\$100.00
<u>Plan examination and inspection fee (odor source)</u>	<u>\$500.00</u>
Total avoided fees	\$600.00

EXHIBIT 7



June 29, 2004

REGULATORY ORDER

TO:

Ostrom's Mushroom Farm
8323 Steilacoom Rd. SE
Lacey, WA 98503

The following Regulatory Order concerns air pollutant emissions from operations and equipment at the Ostrom's Mushroom Farm facility located at 8323 Steilacoom Rd. SE in Lacey, Washington. Notification is made in accordance with Regulation 1 of Olympic Region Clean Air Agency (ORCAA), as amended, and as described in Section 3.21 (a) and (b), Service of Notice, and Section 3.27 (a), (b), and (c), Penalty.

WHEREAS, the ORCAA has received a total of twenty-eight (28) complaints of unreasonable odors from the Ostrom's Mushroom Farm facility located at 8323 Steilacoom Rd. SE between April 24, 2003 and April 24, 2004; and,

WHEREAS, the origin of the odors were traced back to the Ostrom's Mushroom Farm by a combination of field verification by ORCAA of the presence of odors attributable to Ostrom's Mushroom Farm in the vicinity of alleged impacts and meteorological data coincident with the time the impacts were reported to ORCAA; and,

WHEREAS, ORCAA has issued Notice of Violation (NOV) # 2172 on April 29, 2004 to Ostrom's Mushroom Farm for unreasonable odors; and,

WHEREAS, modifications to operations and equipment associated with the Phase I composting system and wastewater treatment system have taken place without ORCAA's prior approval through a Notice of Construction (NOC) application; and,

WHEREAS, modifications to Phase I operations and equipment have resulted in an increase in emissions of both odorous compounds and particulate matter; and,

WHEREAS, ORCAA has issued NOV # 2198 on June 28, 2004 to Ostrom's Mushroom Farm for failure to secure ORCAA's approval of an NOC prior to making modifications,

NOW, THEREFORE, I, Richard A. Stedman, hereby impose the following regulatory order upon you.

IT IS HEREBY ORDERED THAT:

- 1) Ostrom's Mushroom Farm shall develop an odor control plan containing odor control measures sufficient to minimize odor impacts caused by emissions from the facility, and

OLYMPIC REGION CLEAN AIR AGENCY

- 2) The proposed odor control plan shall address odorous emissions from all potential odor sources at the facility, and shall be based on an analysis of procedures, practices and equipment used by the mushroom farm that contribute to odors impacting the surrounding communities; and,
- 3) The analysis and resulting odor control plan shall be prepared by a qualified professional experienced in the field of air pollution control, including odor control and management, and
- 4) At a minimum this analysis and plan shall include:
 - a) An analysis of the contribution of all activities at the facility to odor generation. This will include, but not be limited to wastewater collection and control, pre-conditioning of raw materials, Phase I composting, Phase 2 composting, and the handling and disposal of spent mushroom compost.
 - b) Recommendations for improved odor control in all areas identified as contributing to odors emanating from the farm. These recommendations shall include specific methods of operations, and full consideration of the installation of further air pollution control equipment or systems for control of odors; and,
- 5) The odor control plan shall be submitted to ORCAA for approval within 30 days from the date of this Order; and,
- 6) Within 30 days of ORCAA's approval of the odor control plan Ostrom's Mushroom Farm shall submit a Notice of Construction (NOC) application addressing physical and operational changes of the Phase I composting system relative to those that were approved under NOC# 99NOC023. The new NOC shall also include any proposed changes, modifications or additions to odor controls and/or methods resulting from the approved odor control plan; and,
- 7) ORCAA's approval of the NOC shall be secured prior to changing operational methods or the modification or installation of any air pollution control equipment, and
- 8) The approved odor control measures and control equipment shall be fully implemented and installed no later than 180 days from the issuance of this order.

FAILURE TO COMPLY with the above order is a violation of Regulation 1 of Olympic Region Clean Air Agency and the Washington Clean Air Act, and is subject to a penalty of up to \$10,000.00 per violation.

DATED this 30 day of June 2004.

Olympic Region Clean Air Agency

By: 

Richard A. Stedman, Executive Director

Olympic Region Clean Air Agency
2940 B Limited Lane NW
Olympia, WA 98502
(360) 586-1044 Ext. 100

CC: Fred Gentry, Attorney
Certified Mail No.

EXHIBIT 8

EXHIBIT 9

WASHINGTON STATE
POLLUTION CONTROL HEARINGS BOARD

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR AGENCY,

Respondent.

PCHB NO. 04-105

OSTROM'S FIRST
INTERROGATORIES TO ORCAA

TO: Olympic Region Clean Air Agency, Respondent;

AND TO: Fred D. Gentry, Attorney for Respondent:

Pursuant to the Prehearing Order and Superior Court Civil Rules 26, 33, and 34, appellant The Ostrom Company propounds the following interrogatories and requests for production of documents to respondent Olympic Region Clean Air Agency (ORCAA). The interrogatories set forth below are to be answered fully and separately in writing, under oath, in accordance with the Civil Rules. As is required under the rules, please serve your answers to these interrogatories and produce responsive documents to Mark M. Myers, Williams Kastner & Gibbs, PLLC, 601 Union Street, Suite 4100, Seattle, WA, 98101, within thirty (30) of the date of service upon you. If ORCAA elects to produce the originals for copying in lieu of

MEMORANDUM OF AUTHORITIES IN SUPPORT OF
APPELLANT'S DISPOSITIVE MOTION - 1

1640166.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1 providing copies, then Ostrom requests that such inspection and copying be done at Williams
2 Kastner & Gibbs within 30 days of this service.

3 **I. INSTRUCTIONS AND DEFINITIONS**

4 A. In answering these interrogatories and requests for production, please furnish all
5 information available to you, including information in the possession of your investigators,
6 agents, representatives, attorneys, investigators of your attorneys, and any other person or
7 persons acting on your behalf, and information or knowledge that is available to you, your
8 representatives, and attorneys by reasonable inquiry.

9 B. If you cannot answer any of the following interrogatories or requests for
10 production in full, after exercising due diligence to secure the information to do so, so state and
11 answer to the extent possible, specify your inability to answer the remainder, and state what
12 information or knowledge you have concerning the unanswered portion.

13 C. If you object to any interrogatory or request for production, state with
14 specificity the reasons for each such objection. If you claim any privilege with respect to any
15 ~~request for production or any part thereof, identify the type of privilege which is claimed, state~~
16 the basis for the claim of privilege, identify the communication, document or other item as to
17 which the privilege is claimed and state the general subject matter thereof. If you claim a
18 privilege with regard to any request for production or any part thereof, you should nevertheless
19 respond to the request for production to the extent that it calls for documents or parts of
20 documents as to which you do not claim a privilege.

21 D. If a document called for by a request is known to have existed, but cannot be
22 located now, identify the document and state:

23 (i.) Whether the missing document has been in your possession, custody, or
24 control;

25
MEMORANDUM OF AUTHORITIES IN SUPPORT OF
APPELLANT'S DISPOSITIVE MOTION - 2

1640166.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1 (ii.) When and where the missing document was known to be in your
possession, custody, or control; and

2 (iii.) In whose possession, custody, or control such document may be found
3 or, as applicable, whether the document has been destroyed or has otherwise
4 ceased to exist.

5 E. These interrogatories and requests for production are continuing and therefore
6 require supplemental answers to the extent called for by Civil Rule 26(e).

7 F. In answering these interrogatories and requests for production, the following
8 definitions apply:

9 (i.) "You" or "your" includes plaintiff and all assigns, agents, guardians and
10 other persons acting in a representative capacity to plaintiff, including, without
limitation, plaintiff's attorneys and accountants.

11 (ii.) "Person" means an individual, corporation, partnership, group,
12 association, business or governmental agency, or any other entity.

13 (iii.) Whenever any person must be "identified" or a request calls for the
14 "identity" of a person, the person shall be identified by name, last known
address and last known telephone number.

15 (iv.) "Relating to" or "relates to" means, without limitation, embodying,
16 mentioning, or concerning, directly or indirectly, the subject matter identified in
the specific request.

17 (v.) "Document" shall be construed in its broadest sense and includes any
18 original, reproduction, or copy of any kind of written or documentary materials,
19 or drafts thereof, including, but not limited to, correspondence, memoranda,
20 interoffice communications, telegrams, minutes of meetings, notes of telephone
21 conversations, notes of any oral communications, other notes, diaries, calendars,
22 contract documents, publications, calculations, estimates, vouchers, invoices,
filings, checks, reports, studies, computer files, electronic data storage materials,
digitally recorded information, movies photographs, negatives, slides, dictation
belts, and voice tapes.

23 (vii) Any other words used herein shall be defined according to standard
24 American usage, as shown in a dictionary of the English language.
25

1 INTERROGATORIES

2 Interrogatory 1: With respect to each complaint about odors that ORCAA received in
3 2003 and based Notice of Violation No. 2172 on, please provide the following information:

4 (a) The name(s) and residence address(es) of the person(s) who made the complaint;

5 (b) Whether the complaint was made orally, in writing, or both;

6 (c) Whether the complainant(s) reported having experienced the odor(s) at their
7 residence or, if elsewhere, the location(s) where they reported having experienced the odor(s);

8 (d) The name of each person investigated the complaint on ORCAA's behalf and, if
9 that person is not currently employed by ORCAA, his or her last known residence address;

10 (e) The specific location(s), if any, at which the person(s) who investigated the
11 complaint on ORCAA's behalf confirmed the existence of each odor(s) such person(s)
12 concluded came from Ostrom's property and on which the Notice of Violation is based;

13 (f) What type of record, if any, was made at the time concerning such investigation,
14 and whether any or all of any such record still exists.

15 Answer:

16
17 **SEE ATTACHED**
18
19
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25

MEMORANDUM OF AUTHORITIES IN SUPPORT OF
APPELLANT'S DISPOSITIVE MOTION - 4

1640166.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1 Interrogatory 2: With respect to each complaint about odors that ORCAA received in
2 2004 and based Notice of Violation No. 2172 on, please provide the following information:

3 (a) The name(s) and residence address(es) of the person(s) who made the complaint;

4 (b) Whether the complaint was made orally, in writing, or both;

5 (c) Whether the complainant(s) reported having experienced the odor(s) at their
6 residence or, if elsewhere, the location(s) where they reported having experienced the odor(s);

7 (d) The name of each person investigated the complaint on ORCAA's behalf and, if
8 that person is not currently employed by ORCAA, his or her last known residence address;

9 (e) The specific location(s), if any, at which the person(s) who investigated the
10 complaint on ORCAA's behalf confirmed the existence of each odor(s) such person(s)
11 concluded came from Ostrom's property and on which the Notice of Violation is based; and

12 (f) What type of record, if any, was made at the time concerning such investigation,
13 and whether any or all of any such record still exists.

14 Answer:
15

16 **SEE ATTACHED**
17
18

19 Request for Production No. 1: Please produce all documents relating to or referencing
20 the odor complaints in Interrogatory Nos. 1 and 2, above.

21 Response:
22
23

24 **SEE ATTACHED**
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MEMORANDUM OF AUTHORITIES IN SUPPORT OF
APPELLANT'S DISPOSITIVE MOTION - 5

1640166.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1
2 Request for Production No. 2: Please produce all documents relating to your claims
3 against The Ostrom Company in Notice of Violation 2172, including but not limited to any
4 investigation reports, penalty calculations, internal memoranda, or any other documents.

5 Response:

6
7 **SEE ATTACHED**

8
9 DATED this 9th day of December, 2004.

10
11 Respectfully submitted,

12 WILLIAMS, KASTNER & GIBBS

13
14 By 
15 Mark M. Myers, WSBA #15362

16 Attorneys for The Ostrom Company, Inc.

17
18 **VERIFICATION AND CERTIFICATION**

19 The undersigned is the attorney for the named appellant herein; the foregoing answers
20 to interrogatories have been prepared and submitted in accordance with the Civil Rules for
21 Superior Court. I certify that a true and correct copy of the answers to these interrogatories
22 was mailed to Mark M. Myers, Williams Kastner & Gibbs PLLC, 601 Union Street, Suite
23 4100, Seattle, WA 98101, postage prepaid, on this ____ day of _____, 200__.

24 **SEE ATTACHED**

25 FRED D. GENTRY, WSBA # _____

 Attorney for Respondent

MEMORANDUM OF AUTHORITIES IN SUPPORT OF
APPELLANT'S DISPOSITIVE MOTION - 6

1640166.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1 WE CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
2 STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

3 DATED this _____ day of _____, 200_, at _____, Washington.
4

5
6 **SEE ATTACHED**

7 REPRESENTATIVE OF THE OLYMPIC
8 REGION CLEAN AIR AGENCY
9
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MEMORANDUM OF AUTHORITIES IN SUPPORT OF
APPELLANT'S DISPOSITIVE MOTION - 7

1640166.1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

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7
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
16

PCHB NO. 04-105

**RESPONDENT ORCAA'S
ANSWERS TO OSTROM'S FIRST
INTERROGATORIES**

17 **INTERROGATORY NO. 1:**

18 **ANSWER:**

19 All of the information sought in Interrogatories 1 and 2 is found in the attached records
20 supplied in response to Request for Production No. 1.

- 21 • Under Tab A are gathered complaints before April of 2003.
- 22 • Under Tab B are gathered complains and records made between April 23, 2004,
23 and April 20, 2004.
- 24 • Under Tab C are gathered complaints and records made after April 20, 2004.
- 25 • Under Tab D are copies of the NOV and civil penalty and worksheet.

26 The name of each person from ORCAA is abbreviated on these records in the form of
27 initials.

- 28 • RTM is Robert Moody.
- JTK is John Kelly.
- DTN is Dean Nguyen

All are currently employed by ORCAA.

1 **INTERROGATORY NO. 2:**

2 **ANSWER:**

3 See above answer to Interrogatory No. 1.

4 **REQUEST FOR PRODUCTION NO. 1:**

5 **ANSWER:**

6 See attached and answer to Interrogatory No. 1.

7 **REQUEST FOR PRODUCTION NO. 2:**

8 **ANSWER:**

9 See attached and answer to Interrogatory No. 1.

10
11 **VERIFICATION AND CERTIFICATION**

12 The undersigned is the attorney for the named appellant herein; the foregoing
13 answers to interrogatories have been prepared and submitted in accordance with the Civil
14 Rules for Superior Court. I certify that a true and correct copy of the answers to these
15 interrogatories was mailed to Maqrk M. Myers, Williams Kastner & Gibbs PLLC, 601 Union
16 Street, Suite 4100, Seattle, WA 98101, postage prepaid on this _____ day of January,
2005.

17
18 **FRED D. GENTRY, WSBA#1448**
19 **Attorney for Respondent**

20 **WE CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE**
21 **STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

22 **DATED this _____ day of January, 2005, at _____, Washington.**

23
24 **REPRESENTATIVE OF THE OLYMPIC**
25 **REGION CLEAN AIR AGENCY**