

~~001.12. 2004 4:17PM~~

MARTIN'S FEED

No. 4529

P. 2

Mushroom compost picked up during the w/o:

7/4/2004

<u>Then:</u>	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
8-Jul	CW31045	Ted	63600
9-Jul	CW31046	Russ	64560
		Total:	128160

Don

Jul. 8. 2004 5:23PM MARTIN'S FEED

No. 4401 P. 2

Mushroom compost picked up during the w/o:

6/27/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
FFRAL:			
28-Jun	CW30800	Russ	66040
28-Jun	CW30801	Ed W.	55420
29-Jun	CW30802	Chuck	60040
29-Jun	CW30803	David	57840
30-Jun	CW30804	David	62040
1-Jul	CW30806	Duane	64440
2-Jul	CW30983	Russ	64940
Total:			430760

Then:			
29-Jun	CW30805	Dan	61940
1-Jul	CW30807	David	55460
Total:			117400

Mushroom compost picked up during the w/o:

6/20/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Then:			
22-Jun	CW30798	Russ	65040
23-Jun	CW30799	Sergey	50980
		Total:	116020

Jun. 30. 2004 11:22AM

MARTIN'S FEED

No. 4043

P. 2/4

Mushroom compost picked up during the w/o:

6/20/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Then:			
22-Jun	CW30798	Russ	65040
23-Jun	CW30799	Sergey	50980
		Total:	116020

Jun 22. 2004 1:20PM MARTIN'S FEED

No. 3650 P. 2

Mushroom compost picked up during the w/o:

6/13/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
17-Jun	CW30648	Dane	65800
18-Jun	CW30650	Wilbur	68560
Total:			197700

Bradner:

14-Jun	CW30641	Russ	64700
14-Jun	CW30642	Chuck	58820
14-Jun	CW30643	Bob Z.	63820
15-Jun	CW30644	Jim	65440
15-Jun	CW30645	Ed W.	57220
16-Jun	CW30647	Eric	64640
17-Jun	CW30649	Ed W.	57340
Total:			431980

Total:			

Total:			

Jun. 16. 2004 9:31AM MARTIN'S FEED

No. 3338 P. 2

Mushroom compost picked up during the w/o:

6/6/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Then:			
7-Jun	CW30490	Russ	65280
7-Jun	CW30491	David	54660
7-Jun	CW30492	Tim	64060
11-Jun	CW30497	Russ	64720
11-Jun	CW30498	Duane	62100

Total: 310820

Bradner:			
7-Jun	CW30493	Ted	65800
9-Jun	CW30494	Bob Z.	64640
9-Jun	CW30495	Duane	62760
9-Jun	CW30496	Chuck	59000

Total: 252200

Mushroom compost picked up during the w/o:

5/30/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Then:			
31-May	CW30271	Russ	65900
1-Jun	CW30382	Tim	65600
1-Jun	CW30383	Sergey	59020
Total:			190520

Bradner:			
2-Jun	CW30384	Duane	66520
3-Jun	CW30385	Duane	64640
3-Jun	CW30386	Russ	64440
3-Jun	CW30387	Bob Z.	64760
4-Jun	CW30388	Ted	66560
4-Jun	CW30389	David	58040
Total:			384960

Jun. 2, 2004 5:00PM MARTIN'S FEED

No. 2652 P. 2/8

Mushroom compost picked up during the w/o:

5/23/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Bradner:			
25-May	CW30266	Duane	55100
26-May	CW30267	Ted	66080
26-May	CW30268	Bob Z.	64720
Total:			185900
Then:			
23-May	CW30265	Russ	63780
Total:			63780
AK:			
29-May	CW30269	Dan	60780
29-May	CW30270	Tim	65540
Total:			126320
Total:			

May 17. 2004 11:30AM

MARTIN'S FEED

No. 1899

P. 2

Mushroom compost picked up during the w/o:

5/9/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Bradner:			
10-May	CW29890	Russ	64480
12-May	CW29891	Tim	66260
13-May	CW29893	David	60760
13-May	CW29894	Ted	67180
Total:			258680
Christina:			
12-May	CW29892	Ed W.	60040
Total:			60040

May 10. 2004 3:57PM

MARTIN'S FEED

No. 1541 P. 2/10

Mushroom compost picked up during the w/o:

5/2/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Bradner:			
3-May	CW29882	Eric	64580
3-May	CW29883	Bob Z.	64800
4-May	CW29884	Sergey	60960
4-May	CW29885	Wilbur	66560

Total: 256900

Then:			
5-May	CW29886	Ted	65140
5-May	CW29887	Eric	62300

Total: 127440

Christina:			
5-May	CW29888	David	62080
5-May	CW29889	Ed W.	55060

Total: 117140

Mushroom compost picked up during the w/o:

4/25/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Bradner:			
26-Apr	CW29716	David	61140
26-Apr	CW29717	Ted	65940
26-Feb	CW29718	Russ	65380
27-Apr	CW29720	Eric	63860
28-Apr	CW29721	Duane	63020
27-Apr	CW29723	Bob Z.	64780
28-Apr	CW29722	Ted	64520
Total:			448640

Christina:			
27-Apr	CW29719	David	54900
28-Apr	CW29724	David	59480
Total:			114380

Then:			
4-29	CW29725		63,860
4-30	CW29726		63,820
Total:			127680

Apr. 29, 2004 2:38PM MARTIN'S FEED

No. 0881 P. 2/15

Mushroom compost picked up during the w/o:

4/18/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Then:			
19-Apr	CW29576	Russ	64720
19-Apr	CW29577	David	58820
19-Apr	CW29578	Sergey	55700
21-Apr	CW29584	Duane	64460
22-Apr	CW29585	Bob Z.	64600
23-Apr	CW29587	Ted	64740
23-Apr	CW29588	David	59180
Total:			432220

Bradner:			
20-Apr	CW29579	Ted	64200
20-Apr	CW29580	Eric	62840
22-Apr	CW29586	Ted	64980
Total:			192020

Christina:			
20-Apr	CW29581	David	59000
21-Apr	CW29583	Chuck	58400
Total:			117400

Canadian:			
21-Apr	CW29582	David	58120
Total:			58120

Apr. 19. 2004 12:55PM MARTIN'S FEED

No. 0338 P. 2

Mushroom compost picked up during the w/o:

4/11/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Bradner:			
12-Apr	CW29443	Eric	63100
12-Apr	CW29444	Russ	65460
12-Apr	CW29445	David	55080
15-Apr	CW29452	David	55260
16-Apr	CW29453	Ted	64820
16-Apr	CW29454	Duane	65880
16-Apr	CW29455	Russ	65120
Total:			434720

Canadian:			
13-Apr	CW29448	Duane	64180
Total:			64180

Then:			
13-Apr	CW29449	Bob Z.	64520
15-Apr	CW29450	Ted	66540
15-Apr	CW29451	Ted	66540
Total:			197400

63,340
*special 66,540

Christina:			
13-Apr	CW29446	David	62840
13-Apr	CW29447	Ed W.	50260
Total:			113100

Apr. 13. 2004 10:32AM MARTIN'S FEED

No. 0012 P. 2

Mushroom compost picked up during the w/o:

4/4/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Then:			
5-Apr	CW29295	Ed W.	53140
8-Apr	CW29303	David	72900
9-Apr	CW29304	Russ	63500
		Total:	189540
Bradner:			
6-Apr	CW29296	Duane	64660
8-Apr	CW29297	David	56940
7-Apr	CW29300	Dane	62760
		Total:	184360
White Pearl:			
7-Apr	CW29298	David	60380
7-Apr	CW29299	Tim	63780
8-Apr	CW29302	Tim	64320
		Total:	188480
Canadian:			
7-Apr	CW29301	Russ	64060
		Total:	64060

Mushroom compost picked up during the w/o:

3/28/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Bradner:			
29-Mar	CW29137	Eric	61940
29-Mar	CW29138	Ed W.	49180
30-Mar	CW29140	Duane	65300
Total:			176420
Then:			
30-Mar	CW29141	Sergey	58820
2-Apr	CW29145	David	56080
2-Apr	CW29146	Chuck	59380
Total:			174280
White Pearl:			
30-Mar	CW29139	David	64860
30-Mar	CW29142	Jim	63220
Total:			128080
Canadian:			
31-Mar	CW29143	Bob Z.	65240
31-Mar	CW29144	Eric	62820
Total:			128060

Brille

Mushroom compost picked up during the w/o:

3/21/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
AK:			
22-Mar	CW29004	Eric	62700
		Total:	62700

Bradner:			
22-Mar	CW29005	Sergey	58340
22-Mar	CW29003	David	77100
22-Mar	CW29006	Russ	65760
27-Mar	CW29016	Tim	64600
		Total:	265800

Thanh Trang			
23-Mar	CW29007	Bob Z.	62620
23-Mar	CW29008	Sergey	57000
		Total:	119620

Then:			
23-Mar	CW29009	Ed W.	55080
25-Mar	CW29013	Sergey	58040
26-Mar	CW29015	Duane	64880
		Total:	178000

White Pearl:			
24-Mar	CW29010	Chuck	57980
25-Mar	CW29014	Russ	62680
		Total:	120660

Canadian:			
24-Mar	CW29011	Ted	65160
24-Mar	CW29012	David	57160
		Total:	122320

Mar. 30. 2004 12:09PM MARTIN'S FEED

No. 9246 P. 2

Mushroom compost picked up during the w/o: 3/21/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
AK:			
22-Mar	CW29004	Eric	62700
			Total: 62700
Bradner:			
22-Mar	CW29005	Sergey	58340
22-Mar	CW29003	David	77100
22-Mar	CW29006	Russ	65760
27-Mar	CW29016	Tim	64600
			Total: 265800
Thanh Trang			
23-Mar	CW29007	Bob Z.	62620
23-Mar	CW29008	Sergey	57000
			Total: 119620
Then:			
23-Mar	CW29009	Ed W.	55080
25-Mar	CW29013	Sergey	58040
26-Mar	CW29015	Duane	64880
			Total: 178000
White Pearl:			
24-Mar	CW29010	Chuck	57980
25-Mar	CW29014	Russ	62680
			Total: 120660
Canadian:			
24-Mar	CW29011	Ted	65160
24-Mar	CW29012	David	57160
			Total: 122320

Mar. 24. 2004 1:23PM MARTIN'S FEED

No. 8997 P. 2/17

Mushroom compost picked up during the w/o:

3/14/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
VT:			
16-Mar	CW28879	Tim	63720
Total:			63720
AK:			
19-Mar	CW28889	Dan	61500
Total:			61500
Bradner:			
15-Mar	CW28875	Russ	64860
15-Mar	CW28876	Duane	63720
16-Mar	CW28877	Eric	64260
Total:			192840
Canadian:			
16-Mar	CW28878	Chuck	60840
17-Mar	CW28880	Wilbur	65320
Total:			126160
Thanh Trang:			
18-Mar	CW28882	Eric	62820
18-Mar	CW28884	David	64160
Total:			126980
Then:			
17-Mar	CW28881	Sergey	63700
18-Mar	CW28883	Bob Z.	64340
18-Mar	CW28885	Chuck	57260
18-Mar	CW28886	Russ	63200
Total:			248500
White Pearl:			
19-Mar	CW28887	Eric	62100
19-Mar	CW28888	Ed W.	59140
Total:			121240

Mar. 17. 2004 12:31PM MARLIN'S FEED

No. 8625 P. 2

Mushroom compost picked up during the w/o:

3/7/2004

Order # Driver Weight**Thang Trang:**

8-Mar	CW28706	Russ	65060
8-Mar	CW28707	Dan	56700
Total:			121760

Canadian:

10-Mar	CW28709	David	51640
10-Mar	CW28711	split Chuck	24240
Total:			75880

Then:

9-Mar	CW28708	Sergey	56980
10-Mar	CW28710	Eric	63440
10-Mar	CW28711	split Chuck	18900
12-Mar	CW28715	David	59060
12-Mar	CW28716	Jim	65480
12-Mar	CW28717	David	47440
Total:			311300

VT:

11-Mar	CW28712	Tim	63200
Total:			63200

White Pearl:

11-Mar	CW28713	Sergey	50560
12-Mar	CW28714	Russ	63700
Total:			114260

VT. -

White Pearl -

Mar. 8. 2004 2:36PM MARTIN'S FEED

No. 8179 P. 2

Mushroom compost picked up during the w/o:

2/29/2004

Order # Driver Weight**Truong:**

1-Mar	CW28560	Ed W.	46880
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Total:			46880
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Thanh Trang:

1-Mar	CW28559	Les	43940
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2-Mar	CW28561	Sergey	56800
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3-Mar	CW28566	split Eric	36090
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Total:			136830
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Canadian:

2-Mar	CW28563	Eric	63180
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5-Mar	CW28567	Bob Z.	61540
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Total:			124720
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Then:

2-Mar	CW28562	David	55520
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2-Mar	CW28564	Wilbur	65240
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2-Mar	CW28565	Tim	62800
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3-Mar	CW28566	split Eric	26090
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Total:			209650
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Bradner:

5-Mar	CW28568	David	51860
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5-Mar	CW28569	Russ	64240
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5-Mar	CW28570	Duane	65280
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5-Mar	CW28571	Dane	64480
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Total:			245860
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Mushroom compost picked up during the w/o:

2/22/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Truong:			
23-Feb	CW28416	Sergey	49040
24-Feb	CW28418	Duane	63720
24-Feb	CW28419	David	62000
24-Feb	CW28420	Russ	62280
25-Feb	CW28421	Wilbur	64720
25-Feb	CW28422	Sergey	46000
26-Feb	CW28426	Tim	63620
27-Feb	CW28427	Russ	62560
27-Feb	CW28412	Tim	64260
Total:			538200

Then:			
23-Feb	CW28414	Bob Z.	64120
23-Feb	CW28415	Russ	63200
25-Feb	CW28423	Dane	60720
25-Feb	CW28424	Eric	61180
25-Feb	CW28425	Les	58160
Total:			307380

Thanh Trang:			
24-Feb	CW28417	Les	58240
27-Feb	CW28434	Eric	61940
Total:			120180

Canadian:			
27-Feb	CW28532	Wilbur	66200
Total:			66200

Mushroom compost picked up during the w/o:

2/15/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Troung:			
16-Feb	CW28287	Dane	64380
16-Feb	CW28288	Bob Z.	64120
17-Feb	CW28289	Tim	62760
17-Feb	CW28290	Eric	63100
17-Feb	CW28291	Dane	61700
18-Feb	CW28292	Wilbur	64780
18-Feb	CW28293	Russ	64220
18-Feb	CW28294	Les	58080
19-Feb	CW28295	Bob Z.	62840
20-Feb	CW28391	David J.	61260
Total:			627240

Then:			
16-Feb	CW28286	Jim	61560
19-Feb	CW28296	Tim	63660
19-Feb	CW28297	Eric	61970
Total:			187190

Thanh Trang:			
20-Feb	CW28390	Eric	62280
Canadian:			
21-Feb	CW28398	David	53360
Total:			53360

Mushroom compost picked up during the w/o:

2/8/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Troung:			
10-Feb	CW28150	Ed W.	61940
10-Feb	CW28151	David J.	48520
11-Feb	CW28153	Jim	69240
12-Feb	CW28157	Tim	63320
13-Feb	CW28158	Dan	59700
14-Feb	CW28258	David J.	59580
Total:			362300

Then:			
11-Feb	CW28152	Bob Z.	65220
11-Feb	CW28155	Eric	61220
12-Feb	CW28154	Russ	63160
13-Feb	CW28259	Ed W. split	25620
Total:			276940

Thanh Trang:			
13-Feb	CW28257	Dane	61480
14-Feb	CW28159	Les	57640
Total:			119120

Canadian:			
13-Feb	CW28259	Ed W. split	30000
14-Feb	CW28305	Frank	56320
Total:			86320

Feb. 12. 2004 11:33AM MARTIN'S FEED

No. 7008 P. 2

Mushroom compost picked up during the w/o:

2/1/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Troung:			
3-Feb	CW28029	Russ	64140
3-Feb	CW28031	Sergey	56640
3-Feb	CW28032	Gale	64440
4-Feb	CW28033	Tim	64280
4-Feb	CW28034	Dane	63680
4-Feb	CW28036	Wilbur	66840
4-Feb	CW28037	Eric	64140
7-Feb	CW28103	David J.	30220
Total:			474380
Then:			
2-Feb	CW28030	Sergey	56020
4-Feb	CW28035	Sergey	57560
6-Feb	CW28038	David	59320
Total:			172900
Thang Trang:			
6-Feb	CW28100	Dane	59960
7-Feb	CW28101	Tim	63580
Total:			123540
Canadian:			
7-Feb	CW28102	Bob Z.	66620
7-Feb	CW28103	David J.	21640
Total:			88260

Mushroom compost picked up during the w/o:

1/25/2004

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Troung:			
✓ 27-Jan	CW27732	Tim	64720
✓ 27-Jan	CW27733	Jim	63560
✓ 28-Jan	CW27737	Les	57600
✓ 29-Jan	CW27738	Eric	62420
✓ 28-Jan	CW27739	Sergey	57200
✓ 29-Jan	CW27740	Don	66520
✓ 29-Jan	CW27741	Tim	63240
✓ 30-Jan	CW27742	Eric	62500
✓ 30-Jan	CW27743	Gale	62320

Total: 560080

Then:			
✓ 29-Jan	CW27636	Russ	64080
✓ 30-Jan	CW27990	Sergey	49780
✓ 31-Jan	CW28028	Dane	62460

Total: 176320

Jan. 23. 2004 1:14PM

MARTIN'S FEED

No. 6168

P. 2/19

Mushroom compost picked up during the w/o:

1/11/2003

	<u>Order #</u>	<u>Driver</u>	<u>Weight</u>
Troung:			
12-Jan	CW27610	Bob Z.	64260
12-Jan	CW27611	Eric	61580
12-Jan	CW27612	Tim	63060
13-Jan	CW27613	Don	63320
13-Jan	CW27614	Wilbur	65360
14-Jan	CW27615	Tim	63320
14-Jan	CW27624	Gale	63180
14-Jan	CW27617	Ed W.	52760
14-Jan	CW27618	Duane L.	55000
Total:			551840
Then:			
15-Jan	CW27622	Bob Z.	64420
15-Jan	CW27616	Dane	63380
15-Jan	CW27625	Eric	60680
16-Jan	CW27629	Tim	65800
Total:			254280
Canadian:			
15-Jan	CW27628	Wilbur	62760
16-Jan	CW27623	Don	64200
Total:			126960
Thanh Trang:			
15-Jan	CW27626	Les	55720
16-Jan	CW27627	Ed W.	58060
Total:			113780

Mushroom compost picked up during the w/o:

1/4/2003

Order # Driver Weight**Truong:**

4-Jan	CW27441	Tim	62160	
6-Jan	CW27528	Eric	62840	Mon
5-Jan	CW27529	Eric	62680	
5-Jan	CW27530	Bob Z.	65120	
6-Jan	CW27531	Dane	64840	
6-Jan	CW27532	Tim	58820	
7-Jan	CW27533	Les	57140	Tues
7-Jan	CW27534	Eric	62840	
8-Jan	CW27535	Les	58340	
8-Jan	CW27547	Duane	45200	
9-Jan	CW27548	Gale	63960	Fri
9-Jan	CW27549	Ted	61380	
9-Jan	CW27544 (split)	Sergey	23360	
Total:			748680	

Then:

6-Jan	CW27536	Wilbur	65060	Tues
8-Jan	CW27537	Bob Z.	63800	
8-Jan	CW27538	Tim	62380	Thurs
	CW27539			
Total:			191240	

Thanh Trang:

10-Jan	CW27540	David	53640	Wed.
10-Jan	CW27541	Tim	62320	
Total:			115960	

Lee:

9-Jan	CW27542	Dane	67000	Wed.
10-Jan	CW27543	Bob Z.	65200	
9-Jan	CW27544 (split)	Sergey	27400	
Total:			159600	

Canadian:

10-Jan	CW27545	Jim	65640	Wed.
10-Jan	CW27546	Bob J.	59000	
Total:			124640	

122
122

EXHIBIT 11

FILED

MAY 22 2002

SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

VICWOOD MERIDIAN PARTNERSHIP,

Plaintiff(s),

v.

SKAGIT SAND & GRAVEL,

Defendant(s).

NO. 00-2-00665-6

COURT'S OPINION

(CLERK'S ACTION REQUIRED)

Third party defendant The Ostrom Company seeks summary judgment of dismissal from the third party contribution claims alleged by defendant Thurston County. Since argument on this motion, this court has concluded that Thurston County is entitled to summary judgment of dismissal of the plaintiffs' claim for trespass arising out of odors. This ruling effectively extinguishes the third party claim of Thurston County against Ostrom on this theory, leaving only the claims for nuisance and negligence. Those claims are addressed here.

Ostrom is entitled to dismissal of the nuisance claim because it is exempt from liability under RCW 7.48.300, the Washington Right to Farm Act. To be exempt from liability under the Act, a person or entity seeking protection must satisfy the three elements identified in RCW 7.48.305. As a matter of law, this record establishes that Ostrom has satisfied the three elements. Thurston County has not challenged Ostrom's assertion in this regard and has not offered any evidence to create a material issue of fact concerning those

1 elements. Rather, Thurston County contends that the Right to Farm Act does not apply to
2 Ostrom.

3 In relevant part, RCW 7.48.300 provides:

4 It is the purpose of [the Right to Farm Act] to provide that agricultural activities
5 conducted on farmland . . . be protected from nuisance lawsuits.

6 The issue presented in this part of the motion is whether Ostrom's operation for
7 making compost constitutes an agricultural activity conducted on farmland where the
8 activity is conducted by Ostrom for its own use in growing mushrooms and at the site where
9 the mushrooms are grown. I conclude that it does. This conclusion results from the
10 following analysis:

11 1. Commercially grown mushrooms, produced by Ostrom in the manner described
12 in this record, are farm products encompassed by the definition in RCW 7.48.310(4):

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

19 "Plants" and "animals" are both broadly defined in popular dictionaries. The definition of
20 farm product in §.310(4) makes clear the breadth of those definitions intended by the
21 Legislature in the Right to Farm Act. The non-exclusive list of examples encompassed by
22 the phrase "plants and animals useful to humans" includes cheese and honey, to identify just
23 two of the farm products included in the list that would not ordinarily be included in a list of
24 plants and animals.

25 2. Ostrom grows its mushrooms on a "farm," as that word is defined in RCW
26 7.48.310(2). The mushroom farm is "farmland," as that word is defined in RCW
27 7.48.310(3).
28

1 RCW 7.48.310(2). "Farm" means the land, buildings, . . . , and growing facilities, and
2 machinery used in the commercial production of farm products.

3 RCW 7.48.310(3). "Farmland" means land . . . devoted primarily to the production,
4 for commercial purposes, of . . . agricultural commodities.¹

5 3. The creation of compost by Ostrom at its mushroom farm for the purpose of using
6 it to commercially grow mushrooms is an agricultural activity as that term is defined by
7 RCW 7.48.310(1):

8 "Agricultural activity" means a condition or activity which occurs on a farm in
9 connection with the commercial production of farm products . . ."

10 It follows that Ostrom's compost operation is protected by the Right to Farm Act.
11 This conclusion derives solely from interpretation of the words of the Act in the analytic
12 sequence set forth above. It does not depend upon an interpretation of the Act that requires
13 the conclusion that compost is a farm product, as urged by defendant Thurston County. It is
14 sufficient that mushrooms are a farm product and that compost is produced as an "activity
15 which occurs on a farm in connection with the commercial production of farm products
[mushrooms] . . ." RCW 7.48.310(1).

16 The conclusion that Ostrom's compost operation is protected by the Right to Farm
17 Act also does not derive from the binding precedent or persuasive weight of other appellate
18 decisions from the courts of appeal in Washington or other jurisdictions. The federal court
19 decisions relied on by defendant Thurston County very strongly suggest that those decisions
20 are limited to facts peculiar to those decisions – that 90% of the compost generated by the
21 Frezzo Brothers was sold to others as a product, and not used in the Frezzo Brothers'
22 production of mushrooms. The decisions from other jurisdictions cited at footnote 158 of
23 Thurston County's Response make clear that the words and phrases relating to agriculture

24
25
26 ¹ It is not clear why the Legislature chose the term "agricultural commodities" rather than "farm products" in the definition
27 of farmland. Agricultural commodity is not defined in the Right to Farm Act, and nothing in the context of the subsection
28 or the Act suggests that the Legislature intended to distinguish farmland from farm by use of the phrase "agricultural
commodity" rather than "farm product."

1 in those decisions were interpreted much more narrowly than are similar words and phrases
2 defined in the Washington Right to Farm Act.

3 The Washington Supreme Court cases, *Lamp v. Ostrom Mushroom Co.*, 57 Wn.2d
4 629 (1961), and *Cowiche Growers, Inc., v. Bates*, 10 Wn.2d 585 (1941), are neither binding
5 nor persuasive. Both involve issues and statutes substantially different than are present
6 here. The *Cowiche Growers* case especially highlights the caution that should be used in
7 addressing the parameters of legislative intention where agriculture is concerned. In 1998,
8 in *Valley Fruit v. Dept. of Revenue*, 92 Wn. App. 413 (1998),² Division III of the Court of
9 Appeals considered whether apple processing was manufacturing or agriculture under the
10 sales tax deferral plan enacted in 1985 for predominantly rural counties. The act provided
11 sales tax deferral for construction of manufacturing facilities in qualifying counties. Over
12 objection by the Department of Revenue, the Court of Appeals determined that apple
13 packing and storage facilities were manufacturing facilities, a result that is clearly consistent
14 with *Cowiche Growers* (it was not cited) and with the legislative intent expressed in Chap
15 82.60 RCW. However, at the Legislature's first opportunity after the *Valley Fruit* decision,
16 it amended the definition of manufacturing to clearly exclude fruit packing and storage.
17 And it made the amendment retroactive. *Valley Fruit* is not precedent here, but it is a clear
18 indication that this court should not rely on distinctions between agriculture and
19 manufacturing drawn by the Supreme Court in 1941 and 1961 when interpreting the Right
20 to Farm Act, enacted in 1979.

21 The second remaining part of Ostrom's motion seeks dismissal of Thurston County's
22 contribution claim based on Ostrom's negligence. Ostrom's motion is presented in the form
23 of a *Celotex* motion, which requires Thurston County to come forward with evidence that,
24 viewed using the summary judgment standard, creates material issues of fact sufficient to
25
26

27 _____
28 ² Review denied at 137 Wn.2d 1017 (1999).

1 support a claim for negligence. I conclude that Thurston County has failed to make such a
2 showing.

3 To counter Ostrom's motion, Thurston County offers only speculative assertions that
4 are insufficient as a matter of law to support its claim.

5 There can be little doubt (especially using the summary judgment standard) that
6 Ostrom's operation creates malodorous gas that escapes into the air. Such a showing might
7 support a claim for nuisance if Ostrom was not exempt from a claim on that theory.

8 However, more than mere odor escaping into air and migrating to plaintiffs' properties is
9 necessary to establish a claim based on negligence. Thurston County must show more than
10 just the presence of malodorous gasses, because production and release of such gas is a
11 foreseeable result of even non-negligent production of compost.

12 Through submission of the Streets' depositions and the Luebbe declaration, Thurston
13 County has presented several possibilities that Ostrom has operated either its composting or
14 mushroom raising operations in a negligent manner. It has suggested that improvements to
15 the process by Ostrom may be insufficient. None of these contentions rises to the level of
16 evidence necessary to support its claims, even when viewed in the light most favorable to
17 Thurston County. They are mere speculation.

18 Ostrom is entitled to summary judgment of dismissal. Counsel should prepare and
19 present an appropriate order.

20
21 Dated: May 22 2002

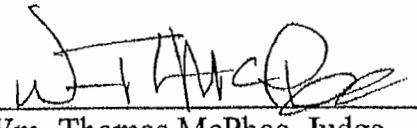
22
23 
24 Wm. Thomas McPhee, Judge

EXHIBIT 12

Westlaw.

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Shorelines Hearings Board
 State of Washington

*1 KIP AND MARILYN DUNLAP, PETITIONERS

v.

CITY OF NOOKSACK AND STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENTS
 SHB No. 02-026
 May 22, 2003

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 22, 2002, Kip and Marilyn Dunlap ("Dunlaps") filed a request for review with the Shorelines Hearings Board ("Board"), contesting the partial denial and conditions imposed on a Shoreline Substantial Development Permit and Variance by the City of Nooksack ("the City") and the Department of Ecology ("Ecology").

A hearing was held in the above matter on April 11, 2003. The Board was comprised of Kaleen Cottingham, presiding, Robert Jensen, Phyllis Shrauger, William H. Lynch, Darcie Nielsen, and Judy Wilson. Gene Barker and Associates of Olympia, Washington provided court-reporting services.

~~The Dunlaps represented themselves. Thomas H. Fryer, Attorney at Law, represented the City of Nooksack. Thomas J. Young, with the Attorney General's Office, represented Ecology.~~

On the morning of the hearing, the entire Board conducted a site visit with all parties present. The Board also received sworn testimony of witnesses, exhibits and argument on behalf of the parties.

In addition, the Board considered a Motion to Dismiss and a Motion to Dismiss Legal Issues brought by the City. On April 3, 2003, the Board entered an Order denying the Motion to Dismiss and Granting the Motion to Dismiss Issues 2 and 4. As a result of this Order, the only remaining issues in this case are as follows:

1. Did the City of Nooksack properly consider the Shoreline Substantial Development permit and associated variance, including the public hearing process?
3. Is the conditioning and partial denial of the Shoreline Substantial Development permit and associated variance consistent with the local Shoreline Master Plan, the Shoreline Management Act, and any implementing regulations?

Having fully considered the entire record, the Board enters the following:

FINDINGS OF FACT

I.

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The **Dunlaps** own the property involved in this appeal. They live in the farmhouse on the property at 302 W. Lincoln Street, Nooksack, Washington. They raise cattle on the property. The structures on the property include the house, garage, shop, and two barns. Immediately adjacent to the larger barn is a livestock containment pen. The structures are surrounded on most sides by pasture and portions of the Nooksack Slough.

II.

The **Dunlaps** own four individual, contiguous parcels of land. The largest parcel is approximately 30 acres in size. Two of the parcels contain the **Dunlap** residence and an adjacent farm field, both of which are within the city limits and zoned residential. The third, and largest parcel, is located west of the residence and is zoned Agricultural. This parcel contains the large barn and agricultural fields. The eastern part of this parcel is within the city limits; the western part is located in unincorporated Whatcom County. The fourth parcel is comprised of two platted lots lying south of the residence and is taken up in large part by a portion of the Nooksack Slough. This parcel is zoned residential and is within the city limits.

III.

*2 The area to the north, east, and south of the **Dunlaps'** property is heavily developed as residential. Numerous streets and undeveloped rights-of-ways access the existing homes and potentially access future development on property owned by the **Dunlaps**.

IV.

In addition to the property being divided by parcel lines and jurisdictional lines, it is also divided by the Nooksack Slough into three distinct areas. The Nooksack Slough is a Category II wetland, with a 50-foot buffer designated by the City. The Nooksack Slough in the vicinity of the **Dunlaps'** barn is in the 100-year floodplain within zone AE, which is identified as an area of special flood hazard. The Nooksack Slough is connected to the Sumas River to the east. During flooding, water backs up from the Nooksack River.

V.

In order to access the entirety of the property, crossing points over the slough have been developed over time. There currently is one culvert crossing the slough located near the southwest corner of the **Dunlaps'** barn. This crossing is the primary route of access for moving equipment and animals to the fields located on the south side of the slough. The location and condition of this access is substandard, especially during the winter. There is another crossing far to the

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west, accessing the far west part of the Dunlaps' property. This crossing is not at issue in this case.

VI.

With the exception of the small platted parcel south of the slough, the Dunlaps' property is accessed by the driveway on the Lincoln Street right-of-way. Access to the south pasture currently occurs via the driveway on the Lincoln Street right-of-way and then via the substandard culvert crossing on the southwest corner of the barn. Access to this south pasture will be improved by the installation of the new culvert crossing #1. Access to the small residential platted property south of the slough is not an issue in this appeal. The Board was presented evidence about the options available to the Dunlaps should they decide to subdivide their property in the future. The Board does not have jurisdiction to address whether reasonable access exists for a yet undefined future subdivision or development.

VII.

On October 5, 2001, the City issued a stop work order to the Dunlaps for performing work within the Nooksack Slough. This work included the installation of a 12-inch culvert in the slough for a new crossing. In November 2001, Ecology conducted a site visit of the Dunlaps' property and raised concerns about water quality violations. The Dunlaps began working with the Natural Resource Conservation Service (NRCS) to develop a farm plan to address these problems. The Dunlaps' farm plan is designed to move animals away from the slough while still providing access for equipment and animals to the fields on the south side of the slough.

VIII.

On March 18, 2002, the Dunlaps applied for a Shoreline Substantial Development Permit to implement their farm plan. The Application indicates the current use of the property is "agriculture" and the proposed use of the property is "agriculture." The site plan attached to this application shows the proposed project as: 1) placing a berm on the south side of the barn to control manure and 2) relocating the existing culvert just off the southwest corner of the barn to a new location due east, just off the southeast corner of the new berm.

IX.

*3 On April 2, 2002, the City issued a Notice of Incompleteness regarding the application for the Substantial Development Permit. The notice required the Dunlaps to provide: 1) Application fees, 2) Site Plan, with detail showing the culvert/access design for the proposed relocated access, 3) Shoreline Variance Application, and 4) Mitigation Plan. The notice also required a Floodplain Development permit and a Nooksack Fill and Grade Permit before work could begin.

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Further, the notice referenced discussions concerning a number of alternative proposals being considered for crossing the slough. The City asked the **Dunlaps** to coordinate any changes to the proposed project with the Conservation District and to provide the City with an updated site plan.

X.

On April 15, 2002, the City Council approved a petition to vacate a portion of West Third Street between West Madison Street and the West Lincoln Street right-of-way. A portion of this vacated right-of-way is adjacent to the **Dunlaps'** property. The **Dunlaps** had planned to access their property from this street. This street vacation by the City caused the **Dunlaps** to re-evaluate how to access their property. This decision by the City is not within the jurisdiction of the Board.

XI.

On June 17, 2002, the **Dunlaps** submitted an Application for Floodplain Development, with the project being to: "build dike, and heavy usage containment pen for livestock operation & culvert crossing." The **Dunlaps** also submitted a Fill and Grading Permit Application and a Shoreline Management Program Variance Application. The variance is for a "[b]arn improvement project to control runoff from livestock operation." As with earlier applications, the current use of the property is listed as agriculture. Attached to the Variance Application is a site map showing a different culvert configuration from the earlier submitted Substantial Development Permit. In this version, the proposal for crossing the slough changed from one culvert to two culverts, both of which are substantially to the east of the current, substandard culvert. One of the culverts appears to line up with the east wall of the shop. The other culvert appears to line up with the east wall of the **Dunlaps'** House. The details of the proposed berm and livestock pen remain unchanged.

XII.

On July 18, 2002, the City again sent the **Dunlaps** a Notice of Incompleteness. Missing from the application materials were: 1) Application fees, 2) Site Plan, 3) Cross sections, and 4) Engineered Culvert Crossing. Given the additional culvert, the City asked the **Dunlaps** to provide evidence of property lines to determine whether the two culverts are on the **Dunlaps'** property.

XIII.

Sometime after this notice, the **Dunlaps** requested their applications back. Although this is not the standard practice, the City gave them the original documents.

XIV.

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On July 29, 2002, the City sent the **Dunlaps** a letter regarding prohibited work in wetlands. The letter clarified that a legal survey by a licensed surveyor would be required to establish legal property lines.

XV.

*4 At some point during this period, the **Dunlaps** installed a wire fence on the platted parcel south of the slough. This fence is far removed from the areas where livestock are kept and on the far side of the slough from the **Dunlaps'** residence. The stated purpose of this fence is to mark the property line. This fence consists of metal posts and two non-barbed wires. The fence is erected within the wetland buffer.

XVI.

On September 5, 2002, the City sent a second letter notifying the **Dunlaps** that construction of a fence within the 50-foot shoreline buffer was in violation of City Code provisions. The letter further required the **Dunlaps** to remove the newly installed fence or apply for the proper permits within fifteen days.

XVII.

On September 11, 2002, the **Dunlaps** resubmitted their applications for the Variance, Floodplain Development Permit, Fill and Grading Permit, and Shoreline Substantial Development Permit. The changes made by the **Dunlaps** were directly written on the earlier submitted documents.

XVIII.

The plan envisioned by the **Dunlaps** for crossing the slough evolved over time. Initially the plan was to relocate the existing culvert to a new location slightly southeast of the barn. Then the plan was to pipe and cover the entire slough to the south of the barn. Then the plan was to install two culverts to cross the slough south of the barn and south of the house. Then the plan was to install one culvert crossing (culvert #1) on the southeast corner of the barn, and to install one culvert (culvert #2) on the north side of the property. This is the configuration that finally appeared in the applications submitted to the City on September 11, 2002. While not clear from any documents, the **Dunlaps** argue it was not their intent to remove the old culvert crossing. However, as will be described later, this is a condition imposed as part of the permitting process.

XIX.

In addition to the resubmitted applications, supplemental information prepared by the NRCS was submitted to the City. The changes include expanding the description of the requested Variance and Floodplain Development Application to include a proposal to "[b]uild property line fences, and buffer fences and plant trees." The

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environmental checklist attached to the modified Shoreline Substantial Development Permit identifies the project as:

[b]uild a burm [sic] along the barnyard to protect waterway from runoff. Build Livestock containment pen and make side entrance into barn. Make filter strip along shoreline. Culvert crossings in the slough. Build fences and plant trees along shoreline. Make access driveway."

Further, the checklist identifies the purpose of the project as "to control runoff from livestock operation."

XX.

The proposed culvert crossing #1 on the southeast corner of the barn has been designed by an engineer using an oversized culvert as required by the Nooksack code. This crossing will include installation of a 30-inch diameter culvert approximately forty feet in length. The proposed culvert #2 on the northeast corner of the western parcel is to access the property from Hayes Street and is within the northern portion of the Third Street right-of-way.

XXI.

*5 Nowhere in any of the applications is there a request to utilize the culvert crossing(s) for use other than agricultural use. The **Dunlaps** seem to believe the culvert crossings could be used to access a future home to be built in the unincorporated area on the far west part of the property. However, little evidence was presented to the Board on this future home, and no evidence was presented demonstrating such access was ever part of the application submitted to the City.

Evidence was submitted indicating these crossing were designed for agricultural use, not residential use. Based on this evidence, the Board finds that any access to a future home is not covered by this permit or variance request.

XXII.

On September 17, 2002, the City issued a Notice of Completeness with respect to the application for a Shoreline Variance and Flood Plain Development Permit. The Notice of Application and Public Hearing was issued on September 18th, which describes the proposed project as "to make barn improvements to control animal waste and install two culvert crossings in the Nooksack Slough."

XXIII.

On September 19th, the City issued a Shoreline Statement of Exemption indicating several of the proposed activities qualify under the Agricultural Exemption listed in the Nooksack Code at Section 2.3.2(e). Specifically listed as exempt were:

1. Placement of ecology blocks on south end of existing concrete slab located on the south side of the barn and backfilling along the south side of the ecology blocks to establish structural berm;
2. Placement of fill to establish protective berm near the west side of the

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barn;

3. Placement of gravel base and hog fuel in area to the north of the barn to establish improved, paddock area for livestock;

4. Placement of fill on west side of barn to create an access route between the barn and the new paddock area;

5. Planting of vegetated filter strips along the north side of the slough and between the barn and the new, access road.

XXIV.

An approved Fill and Grade Permit accompanied the statement of Agricultural Exemption. Together they authorized the **Dunlaps** to proceed with the work identified in the Exemption. This Exemption specifically did not authorize any work waterward of the high water mark in the Nooksack slough.

XXV.

On October 1, 2002, the City issued a SEPA Mitigated Determination of Non-Significance (MDNS) for the Shoreline Variance and Floodplain Development Applications. The proposed project is listed as "to make barn improvements to control animal waste and install two culvert crossings in the Nooksack Slough." The MDNS also includes reference to the "installation of property line fencing and planting of trees along the Slough." The MDNS contains several conditions, including the following:

1. Proposed barn improvements and culvert crossing shall be installed according to plans and specifications prepared by Natural Resources Conservation Service.

*6 3. The number of culverts placed with the slough, and the length of any such culvert, shall be limited to the minimum necessary to allow access to the subject property for the proposed use.

7. A mitigation plan approved by state and local agencies shall be implemented to mitigate impacts associated with the project. This plan should include removal of the existing culvert crossings located on the southwest corner of the barn, revegetation of disturbed areas, and restoration or enhancement of native vegetation along the slough.

XXVI.

On October 21, 2002, the City issued its Report of Decision on the **Dunlaps'** Shoreline Variance and Floodplain Development Applications. The City decision was organized for each culvert and for the property line fencing. Culvert #1, to be located on the southeast corner of the barn, was found to be consistent with the variance criteria and was approved with conditions requiring the removal of the existing, substandard culvert crossing and some on-site mitigation. It was determined that this crossing would provide reasonable access to the property where no practical alternatives exist. Culvert #2, to be located on the northeast corner of the **Dunlaps'** most western parcel, was determined to be an additional access point to the **Dunlaps'** property. The City found, with the construction of culvert #1 and the current driveway from West Lincoln Street, this second culvert crossing was not necessary to provide access to the **Dunlaps'** property. The City

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thus concluded culvert #2 was inconsistent with the Shoreline Variance Permit Criteria and denied the variance for this culvert crossing. The City concluded the short property line fence located south of the Slough was inconsistent with the Variance Permit Criteria and denied the variance for this segment of the fence. However, the City did indicate the marking of the property lines with trees or other native vegetation could be approved under certain conditions. Those conditions include a requirement to have an official survey prepared by a licensed, professional land surveyor and to have a Buffer Enhancement Plan approved by the City, showing the location and type of native trees, shrubs, or other vegetation to be planted on the property line. The purpose of this approval was identified as necessary to assure the plantings not constitute a nuisance or pose an environmental threat.

XXVII.

On December 1, 2002, the Department of Ecology conditionally approved the variance for construction of the road crossing the slough adjacent to the **Dunlaps'** barn (culvert #1). Ecology conditioned the approval on the submittal of a fencing plan, with the requirement for the installation of a gate that opens toward Lincoln Street and connects with a movable and/or fixed fence adjacent to and several feet away from the east side of the barn. The gate and fence are intended to keep livestock out of the area near the slough. Ecology also required the submittal of a fencing plan for review and approval by the City and Ecology to establish slough buffer limits and structural setbacks. The **Dunlaps** were also required to grant Ecology access for compliance inspections and related monitoring. Ecology concurred in the denial of the variance for the other culvert crossing (culvert #2) and the short section of fence south of the slough.

XXVIII.

*7 The **Dunlaps** appealed this decision to the Board on November 22, 2002, and filed an amended Petition on December 18, 2002. Specifically, the **Dunlaps** challenged the denial of the variance for culvert crossing #2 and the short fence. The **Dunlaps** also challenged the conditions imposed on the permits and variances granted.

XXIX.

Any Conclusion of Law that is deemed a Finding of Fact is hereby adopted as such. From the above Findings of Fact, the board makes these:

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over the subject matter and the parties. RCW 90.58.180. The Board considers this matter on a de novo standard and scope of

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review. WAC 461-08-500. This matter involves the appeal of conditions imposed on a shoreline variance and the denial of other shoreline variances. The petitioner has the burden of proving the imposition of conditions and the denial of the variances was in error. This also means the petitioner has the burden to establish that the criteria for a variance have been met. RCW 90.58.140(7). The appellants must meet this burden by a preponderance of the evidence.

II.

The primary responsibility for implementing the policies enunciated in the Shoreline Management Act rests with local governments, who adopt Shoreline Master Program consistent with the state program. RCW 90.58.060 et seq. The City has adopted a Shoreline Master Program, which is contained in Chapter 16.04 of the Nooksack Municipal Code (NMC.)

III.

All of the **Dunlaps'** proposed projects lie within the jurisdiction set forth in Ch. 16.04 § 2.1 NMC, and thus the shoreline master program is applicable. The City designated the Nooksack Slough in this vicinity as a Category II wetland, for which the standard buffer is fifty-feet. Ch. 16.04 § 4.4(2)(b)(i) NMC. No development is allowed in a Category II wetland or buffer. Ch. 16.04 § 4.4(2)(b)(ii) NMC. "Development" means:

a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or mineral; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use, of any state of water level, of the surface of the water overlying land subject to Chapter 90.58 R.C.W.
Ch. 16.04 NMC § 7.3

IV.

The Nooksack Municipal Code, Chapter 16.04, § 4.5(3)(iii) sets forth an allowance for the reduction in the buffer width as an alternative. A reduction of the standard buffer width to less than 60% of the standard width requires a Shoreline Variance. All three of the **Dunlaps'** proposals (the two culverts and the short section of fence) qualify as "development" and all three reduce the buffer to less than 60%. The culverts involve filling and placing structures in the slough. The culverts reduce the buffer to zero in those places it crosses the slough. The fence is a structure and an obstruction. The fence sits just a few feet from the wetland and thus reduces the buffer by more than 60% (from 50 feet to less than 30 feet). Therefore all three require a shoreline variance.

V.

*8 Variances are exceptions to the rule. The SMA is to be liberally construed on behalf of its purposes. RCW 90.58.900; Buechel v. Ecology, 125 Wn.2d 196, 203, 884

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P.2d 910 (1994). Concomitantly, exceptions to the rule are to be strictly construed. See Mead School District v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding the liberal construction command of the Open Public Meetings Act implies an intent the exceptions be narrowly construed). Any variance from an approved master program "shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect." Buechel, at 125 Wn.2d 205; RCW 90.58.100(5).

VI.

A variance is strictly limited to granting relief from specific bulk, dimensional, or performance standards set forth in the applicable master program where there are extraordinary circumstances relating to the physical character or configuration of property, which would cause a the strict implementation of the master program to impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020. WAC 173-27- 170. In addition the City has adopted Variance Permit Criteria in Ch. 16.03 § 3.4 NMC. The regulations set forth in both the state regulations and the Nooksack code are essentially the same. The City's Variance Criteria are as follows:

1. Variance permits shall be granted only in a circumstance where denial of the permit will result in a thwarting of the policy enumerated in RCW 90.58.020, and where extraordinary circumstances are shown and where the public interest suffers no substantial detrimental effect.

2. Variance permits for development...may be authorized provided the applicant can demonstrate all of the following:

- a. That the strict application of the bulk, dimensional or performance standards set forth in this program creates a hardship and precludes or significantly interferes with a reasonable use of the property not otherwise specifically prohibited by this program;
- b. That the hardship described above is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of this program, and not from deed restriction, the actions of the applicant or other similar circumstance;
- c. That the design of the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment;
- d. That the requested variance does not constitute a grant of special privilege not enjoyed by other properties in the area, and is the minimum necessary to afford relief; and
- e. That the Public interest will suffer no substantial detrimental effect.

Ch. 16.04 § 3.4 NMC

In addition, for development located waterward of the ordinary high water mark, or within wetlands, such as both of the culverts here, a variance may be authorized provided the applicant can demonstrate all of the following:

- *9 a. That the strict application of the bulk, dimensional or performance standards set forth in this program precludes a reasonable use of the property not other wise prohibited by this program;
- b. That the proposal is consistent with the criteria established in section 3.4.2.b through e of this program; and
- c. That the public rights of navigation and use of the shorelines will not be

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adversely affected.
 Ch. 16.04 § 3.4 (3) NMC

VII.

Culvert #1

The City granted the variance for culvert #1, but imposed several conditions. The **Dunlaps** challenge these conditions. In particular, the **Dunlaps** challenge the condition requiring the removal of the existing substandard culvert crossing as mitigation for the installation of the new culvert. It also appears, although not in writing, the **Dunlaps** challenge the condition imposed by Ecology requiring the submittal of a fence plan, including the installation of a gate and fence to keep livestock out of the area near the slough when moving from the south pasture to the barn.

VIII.

The Board finds the concept of the removal of the old, substandard culvert has been part of the proposal since the original submittal. The removal of the old, substandard culvert was one of the mitigating aspects required in the MDNS. The Board finds the requirement to remove the old, substandard culvert is a reasonable mitigation measure for the impacts caused by the installation of the new culvert.

IX.

The condition requiring a gate and fence also appear to be a reasonable means to keep livestock from the sensitive slough, especially during the wet season. The **Dunlaps** argue the removal of the old culvert and the installation of the gate and moveable fence across their driveway would be a violation of RCW 90.58.065, which states:

The guidelines adopted by the department and master programs developed or amended by local governments according to RCW 90.58.080 shall not require modification of or limit agricultural activities occurring on agricultural lands. RCW 90.58.065(1).

However, the legislative enactment in 2002 adding this section of the law specifically limits the effectiveness of the act "until the earlier of either January 1, 2004, or the date the department of ecology amends or updates chapter 173-16 or 173-26 WAC." Session laws of Washington, 2002 c 298 § 2. The Board invalidated Ecology's update to chapter 173-16 and 173-26 (see SHB 00-037), and it is not yet January 2004, therefore RCW 90.58.065 is not effective and does not modify the way in which the Nooksack Shoreline Master Program and the associated municipal code regulate agricultural activities.

X.

The **Dunlaps** further argue RCW 7.48.300 et seq. limits the ability of the City to

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restrict these agricultural activities. RCW 7.48.300 through.310 relate to nuisances. RCW 7.48.305 states that certain agricultural practices shall not be found to constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety. The provisions go further to prohibit the restriction of certain agricultural activities as to the hours of the day or days of the week during which it may be conducted. The Board does not have jurisdiction to determine whether a violation of these provisions of the code has occurred.

XI.

*10 The Board finds the **Dunlaps** have not met their burden of showing the removal of the old, substandard culvert or the submittal of a fencing plan, with the requirement for the installation of the gate and fence are not reasonable conditions imposed on this permit. Therefore, the Board affirms the conditions imposed by the City and Ecology on the installation of culvert #1.

XII.

Culvert #2

The **Dunlaps** challenge the denial of the variance for the installation of culvert #2 in the northeast corner of the western parcel. The Board finds this access point off Hayes Street is not necessary to access the **Dunlaps'** property for agricultural uses. It appears this access point was contemplated only after the City vacated the right-of-way for a portion of West Third Street between West Madison Street and the West Lincoln Street right-of-way. It also appears such access is viewed by the **Dunlaps** as necessary should they construct a second residence and/or decide to sell the current residence and, as a result, desire to stop accessing the property via the driveway on the Lincoln Street right-of-way. Providing access for some yet unbuilt structure or some undefined future development is not related to the stated purpose of the variance application and is not "the minimum necessary to afford relief." Other options exist to access the property in the future for use other than agriculture, most of which would not require new crossings of the slough. Therefore, the variance criteria have not been met.

XIII.

The **Dunlaps** further argue the City should have authorized the culvert #2 under the "reasonable use" provisions found both in Ch. 16.04 § 3.4(a) NMC and Ch. 16.08.080 (B). The Board disagrees. First the Board does not have authority to determine whether the City should have evaluated this proposal under Ch. 16.08.080(B) NMC. This portion of the Nooksack code is identified as "Growth Management." The Board only has jurisdiction for Shoreline Substantial Development Permits, Variances, and Conditional Use Permits, all of which are governed by Ch. 16.04 NMC. Further, the reasonable use of this property is as stated on the **Dunlaps'** applications: agriculture. Reasonable use and reasonable access are currently adequately provided through the driveway on the Lincoln Street

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right-of-way. As a result, the Board affirms the denial of the variance by the City and Ecology for the installation of culvert #2.

XIV.

Short Fence South of Slough

The Dunlaps challenge the denial of the variance for the short fence and challenge the conditions requiring a survey should the Dunlaps chose to mark their boundary with native vegetation. The Dunlaps argue this fence is an agricultural fence and thus a variance is not required. The Board finds this fence is not a fence necessary to restrain livestock, nor does it appear able to restrain domestic animals or children. The fence is open at both ends as it approaches the edge of the slough and thus any animal could merely walk around the fence. With just two wires, it appears unable to keep children or dogs from passing through. Further, this short segment of fence is far removed from the area used by livestock and is removed from the Dunlaps' residence. This fence appears related to a dispute between neighbors. The fence appears necessary only to mark the property and to keep the neighbor's use from encroaching. The Board has previously found fencing to be a use consisting of the construction of a structure, and therefore within the definition of "development" under the SMA. *Madden v. Grenley*, SHB No. 80-30 (June 30, 1981). The board finds this fence is a development under the Nooksack code, Ch. 16.04 § 7.3 NMC. The fence is located within the 50-foot buffer of a Category II wetland and thus a variance is required. Other alternatives to mark the property boundary exist that are less intrusive on the shoreline environment. As such, the fence is not the minimum necessary to afford relief and thus does not meet the variance criteria. Therefore, the Board affirms the denial of the variance by the City and Ecology on the installation of the short fence on the south side of the slough.

XV.

*11 The Dunlaps argue no provision in the Nooksack code allows the City to impose a condition to have a licensed survey conducted prior to planting native vegetation to mark their property lines on the small parcel south of the slough. However, the Nooksack Shoreline provisions at Ch. 16.04 § 2.3 (2) NMC provide a list of actions not considered substantial development. One of the items on the list is the "marking of property lines or corners on state-owned lands, when such marking does not significantly interfere with normal public use of the surface of the water." Ch. 16.04 § 2.3(2)(j) NMC. This exemption parrots the exemption for this activity found in the Shoreline Management Act. RCW 90.58.030(3)(e)(ix). Local government has no authority to expand these statutory exemptions. Both use and development are regulated under the Shoreline Management Act. *Clam Shacks v. Skagit County*, 109 Wn.2d 91, 743 P.2d 265 (1987). The statutory list of exemptions from the definition of substantial development under the Shoreline Management Act makes no reference to marking property lines on private property. One of the intrinsic aids to construction of laws is where the law designates list of things whereupon it operates, inference arises the legislative body intended to omit other things not listed. *Matter of Eaton*, 110 Wn.2d 892, 757 P.2d 961 (1988). In

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addition, these exemptions are to be construed narrowly. Ch. 16.04 § 2.3(3) NMC. Therefore, marking of property lines on private property is not automatically excluded from the definition of substantial development. Nor have we been cited to any exemptions, within the Shoreline Management Act, for this activity. We conclude the exemption provided for the marking of property lines or corners on state-owned lands does not apply here. The marking of the property line as proposed here qualifies as a structure and therefore is a development under the act. Therefore, because its placement violates the setback requirements from the slough, it must be approved through a shoreline variance. In granting permission, the City is authorized to impose conditions "deemed necessary to assure that the development will be generally consistent with the permit criteria." Ch. 16.04 § 3.5(1) NMC. Here the requirement to obtain a survey prior to planting vegetation to mark the property boundaries seems more aimed at preserving peace in the neighborhood and not to protect the shoreline environment. Therefore, the Board finds the condition for a survey is outside the conditions authorized by Ch. 16.04 § 3.5 (1) NMC. However, the failure to ascertain the true extent of one's property boundaries prior to undertaking construction or the planting or removal of vegetation may have other legal consequences outside the jurisdiction of this Board. The **Dunlaps** are urged to use caution when marking their property boundaries.

XVI.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

ORDER

*12 The Board affirms the conditions imposed by the City and Ecology on the installation of culvert #1. The Board affirms the denial of the variance by the City and Ecology for the installation of culvert #2. The Board affirms the denial of the variance by the City and Ecology for the installation of the short fence on the south side of the slough. The Board removes the condition requiring a survey prior to the planting of native vegetation to mark the property boundary within the shoreline buffer.

SO ORDERED this 16th day of May 2003.

Kaleen Cottingham

Presiding

William H. Lynch

Member

Robert V. Jensen

Member

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Judy Wilson

Member

Phyllis Shrauger

Member

Darcie Nielsen

Member

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END OF DOCUMENT

Appeals Court Reaffirms Right to Farm

In *Vicwood Meridian Partnership v. Skagit Sand and Gravel*, a state appeals court recently ruled that a mushroom farm in Thurston County was not liable for nuisance and negligence claims of neighbors who had moved in and then complained of the smell associated with a compost operation.

Although there were numerous plaintiffs and defendants, this opinion concerned a third party plaintiff, Thurston County, versus the Ostrom Company, a well-known mushroom farm located outside of Lacey. Ostrom has been operating at the same location since the 1920s and took over the operation of an area farm in 1967, when all of the surrounding lands were rural. Ostrom operates a composting facility, a necessary ingredient to its mushroom-growing operation. Over the years, Ostrom has worked with its neighbors, the county, and the Olympic Air Pollution Control Authority to control odors from its operation. It even agreed to construct an indoor composting facility so that odors would be reduced. Apparently, this was not enough for Thurston County, who filed suit on a theory of nuisance and negligence on behalf of neighbors who had moved into the area and were now offended by the smell of the composting operation.

This example is precisely what Washington's Right to Farm Act (RCW 7.48.305) is intended to prevent. The law provides that "agricultural activities conducted on farmland and forest practices, if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and nonforestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety."

Thurston County attempted to argue that a mushroom compost operation was not an agricultural activity, that the enclosed compost facility was a new and radically expanded operation and did not qualify under the law, and that Ostrom farm was not using good agricultural practices and was therefore negligent.

The court ruled that the county's arguments were all without merit.



ISLAND COUNTY PLANNING & COMMUNITY DEVELOPMENT

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TRANSMITTAL & REPORT MEMORANDUM

DATE: May 3, 2004

TO: Island County Planning Commission

REGARDING: CPA 192/03- Composting & Grinding

FROM: Mitzi Hall, Long Range Planner

The following amendment is submitted by Island County Planning and Community Development and proposes to amend the Island County Comprehensive Plan and Chapter 17.03. of the Zoning Ordinance to include specific goals, policies and standards for the use and development of composting and grinding operations. This analysis serves as the application and staff report and is submitted in accordance with Section 16.26 ICC.

FINDINGS OF FACT

PURPOSE

Planning and Community Development has been approached a number of times throughout the past two years with the request to permit recycling of yard debris which includes composting facilities and operations that would allow for grinding of stumps. The current land use regulations do not address either type of operation. However, the Comprehensive Plan was amended in 1999 to allow for grinding to take place in conjunction with surface mines, but not composting until the proper development regulations are in place to implement the policy. In 2003 the Department placed the issue of developing composting and grinding standards on the Planning Commission Annual Review Docket. The Planning Commission agreed to assemble a sub-committee to consider the issue further. The following summary and attached proposed set of regulations is the culmination of that effort.

ANALYSIS

A committee comprised of the Island County Public Works, Planning and Community Development, the Health Department, Washington State University Extension, a Planning Commissioner, and private citizens was formed to decide what regulations should be developed to allow such uses. The committee discussed the concerns of the different entities, the potential benefits and concerns in forming development regulations for composting facilities.

Research completed on other jurisdiction's experiences with composting facilities revealed that most localities have chosen rural zones for placement of such facilities. The local Health

Department is usually the lead agency on the permit following the guidelines established by the Department of Ecology in the Washington Administrative Code. Other localities have taken a joint approach between the health department and planning department to the permit process using the same guides.

According to surrounding counties and cities the largest concern and complaint received regarding compost facilities is odor. Often this is also the hardest problem to control. Therefore, stringent conditions of approval of the facilities must be set. However, well-managed facilities tend not to have problems with this aspect of the operation.

Typically other jurisdictions have limited the zones in which these businesses are allowed to the rural or agriculture zones. This has been to keep the facilities away from dense residential developments and thwart potential problems. Since Island County has the benefit of being rural in character with most dense development in the Rural Residential zones and with the Urban Growth Areas it would be appropriate to allow composting facilities within most all zones except Rural Residential (RR).

In February 2003, the WAC was revised to include a section for composting facilities. Island County Health Department and the Board of Island County Commissioners adopted these standards in March 2004. The standards include exemptions for solid waste handling permits for ten categories of composting businesses due to the size and nature of the businesses. In an attempt to maintain a level of consistency with the newly adopted standards the exemptions were used as guides for grouping the composting facilities into either permitted or conditional uses with regard to land use standards.

Groups of composting facilities exempt from obtaining a solid waste handling permit include the following facilities:

- i. Production of mushroom substrate
- ii. Vermicomposting, when used to process Type 1, Type 2, or Type 3 feedstocks generated on-site
- iii. Composting of Type 1 or Type 2 feedstocks with a volume limit of forty cubic yards of material on-site at any time. Material on-site includes feedstocks, partially composted feedstocks, and finished compost
- iv. Composting of food waste generated on-site and composted in containers designed to prohibit vector attraction and prevent nuisance odor generation. Total volume of the containers shall be limited to ten cubic yards or less
- v. Agricultural composting when all the agricultural wastes are generated on-site and all finished compost is used on-site

Although exempt from a solid waste handling permit, these facilities must meet performance standards listed in the Washington Administrative Code (WAC); protect surface water and groundwater, control odors, control the attractions of vectors, and allow inspections by Department of Ecology and the Health Department.

The following list is also exempt from obtaining a solid waste handling permit, but are larger in size than the previous five exemptions. These facilities must also meet performance standards in the WAC; protect surface water and groundwater, control odors, control the attractions of vectors, and allow inspections by Department of Ecology and the local Health Department. The facilities must notify the local Health Department and Department of Ecology upon beginning the

operation, submit results of composted material that has been analyzed, and submit annual reports to jurisdictional health departments.

- i. Agricultural composting when any agricultural wastes are generated off-site, and all finished compost is used on-site, and total volume of material is limited to one thousand cubic yards on-site at any time. Material on-site includes feedstocks, partially composted feedstocks, and finished compost
- ii. Agricultural composting at registered dairies when the composting is a component of a fully certified dairy nutrient management plan as required by chapter 90.64 RCW, Dairy Nutrient Management Act
- iii. Composting of Type 1 or Type 2 feedstocks when more than forty cubic yards and less than two hundred fifty cubic yards of material is on-site at any one time
- iv. Agricultural composting, when any of the finished compost is distributed off-site and when it meets the following requirements:
 - A. More than forty cubic yards, but less than one thousand cubic yards of agricultural waste is on-site at any time; and
 - B. Agricultural composting is managed according to a farm management plan written in conjunction with a conservation district, a qualified engineer, or other agricultural professional able to certify that the plan meets applicable conservation practice standards in the *Washington Field Office Technical Guide* produced by the Natural Resources Conservation Service.
- x. Vermicomposting when used to process Type 1 or Type 2 feedstocks generated off-site. Total volume of materials is limited to one thousand cubic yards on-site at any one time

In an effort to simplify the language and limit the number of exemptions from land use controls several changes are proposed to the exemptions. However the proposed changes in the land use standards do not affect whether a facility needs a solid waste handling permit to operate. For example, the production of mushroom substrate is exempt from obtaining a solid waste-handling permit. However, due to the nature of the business and other county's experiences in dealing with the businesses and the odor, particularly Whatcom County, it is recommended that those composting facilities be prohibited in the proposed code.

Several exemptions listed also had no limit in volume of material. The language for vermicomposting is proposed to include a set limit to prevent large operations. Also, several of the agriculture exemptions are combined to make the regulations more straightforward. Facilities proposed in a Rural Agriculture (RA), Rural (R), or Commercial Agriculture (CA) zone in conjunction with a farm use would be processed as a Permitted Use. The reasoning behind this is that most of the exemptions deal with agriculture composting which is considered secondary or accessory to the farm use.

Home composting was also included as an exemption and would therefore be permitted as long as all feedstock is generated onsite. Provisions for exemptions are also proposed for nursery and landscaping businesses due to the nature of the establishments. Golf courses are included due to the amount of yard waste production and landscaping need.

Regulations are proposed for facilities related to surface mine reclamation. The provisions would allow for surface mines to accept feedstock to aid in reclaiming mined areas. Excess compost would be exported or sold. However, on site sales of material would be prohibited to prevent a

retail business where it would not normally be permitted. The sale of compost would be allowed in zones where retail is permitted in the current code.

Composting operations that are more high risk due to the type of raw material being processed, usually Type 4 feedstocks must be done in conjunction with a solid waste handling facility and processed as a Type III permit. Any composting facility not specifically mentioned is prohibited under the code.

Siting and design standards were created to mitigate the appearance of the facilities and impact on neighboring parcels. These include setback standards, design standards, and minimum lot sizes.

Setbacks were created to increase the distance to dissipate noise and any odors. The minimum distance determined is 150 feet. The setback may be increased when necessary to screen and buffer adjacent uses, especially if there is no vegetation. If the facility is enclosed it may be located 50 feet from the property line. However, any building must meet the rural design guidelines of 17.03, already in place. Also a vegetated buffer with a berm to catch debris and dust is recommended as well as fencing for safety purposes.

It was felt the minimum lot size for composting operations would be 10 acres unless otherwise noted or exempt such as agriculture lands, surface mines, golf courses, nurseries, and landscaping businesses.

Material needed for evaluation of the facilities is referenced in the code, as are provisions for additional information if needed. There is also a provision to close any facility that is not able to comply with all land use standards and conditions of approval including the control of odor.

The Comprehensive Plan must also be updated to reflect the new development standards for composting. The proposed additions are as follows:

Goal: *To encourage the reuse of organic material in an appropriate manner.*

Policies:

- A. *When siting a facility the direction of prevailing winds, surrounding land uses and residential density shall be considered.*
- B. *Ensure the facility complies with the standards of WAC 173.350.220.*
- C. *Permitted facilities shall be compatible with the surrounding land uses*
- D. *Ensure the facility does not stockpile material on-site for longer than that allowed by WAC 173.220.*
- E. *Provide natural buffers to screen the facilities and prevent the spreading of debris.*
- F. *Ensure property controls are in place for dust, odor, vectors, and other contaminants.*
- G. *Ensure the facility operates under properly trained employees and managers in facility operations, maintenance, and safety and emergency procedures*

RECOMMENDATION

The code developed and recommended by staff and the Composting Committee is a well thought out starting point for meeting the current needs for composting in Island County. Additional provisions may be needed in the future. However, it is the staff's position that the recommended standards establish appropriately strict parameters for developing composting facilities but still provide opportunities for the creation of such operations. The standards would effectively eliminate the question of allowing composting facilities within the County and provide appropriate guidelines for their potential development.

The development regulations attached in Appendix A are recommended for adoption as land use standards under 17.03. ICC for composting and grinding in Island County. Additionally it is recommended that the goals and policies listed in the previous section be incorporated into to the Comprehensive Plan in order to meet the requirement of Item L, Resource Lands Policies, Mineral Lands Overlay of the Comprehensive Plan.

FRED D. GENTRY
STEPHEN J. BEAN, INC., P.S.
MARY E. GENTRY
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January 4, 2005



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

Re: Ostrom

Dear Rich:

Here is a copy of Ostrom's dispositive motion in which they are seeking an order from the Pollution Control Hearings Board granting their appeals and dismissing the citations. I would suggest that you, Robert and John Kelly review this and if you have any thought or comments I would appreciate hearing them. We will be responding to this.

Thank you.

Very truly yours,

FRED D. GENTRY

FDG/crm
Enclosure

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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

COPY

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.”

20
21
22
23 ¹ To create a buffer between the farm and neighboring land that was being offered for sale for residential
24 development, Ostrom in 1976 or 1977 bought a 60-acre parcel adjacent to the original farm, kept the 20 acres
25 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

APPELLANT'S DISPOSITIVE MOTION - 5

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

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

Laws of 1981, ch. 297, § 29.

RCW 70.94.640 provides as follows:

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

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

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

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

(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
3 nature in the local area.

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

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

9 IV. PERTINENT CASE AUTHORITY.

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

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

1596859.1

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

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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

APPENDIX 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 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

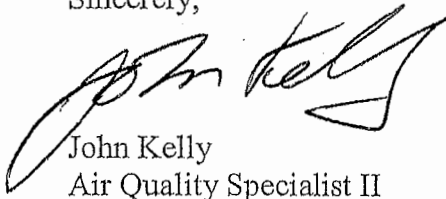
Dear Sir:

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

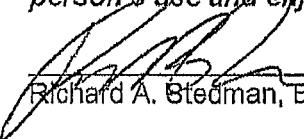
As a penalty for your violation, you are hereby assessed a fine in the amount of **Ten thousand Dollars (\$10,000.00)** in accordance with Section 3.27 of Regulation 1.

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 Stx, 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(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.

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 1 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 1 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 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

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

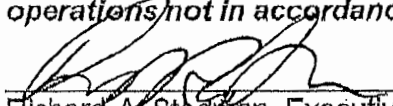
As a penalty for your violation, you are hereby assessed a fine in the amount of **One Thousand six hundred Dollars (\$1,600.00)** in accordance with Section 3.27 of Regulation 1.

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.*

 Dated Oct 4, 20 04
Richard A. Steedman, Executive Director

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

1640160.1

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

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

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