

---

**EXHIBIT 2**



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

**NOTICE OF VIOLATION** No. 2172

Name: OCTROMS MUSHROOMS Phone: 360-491-1410  
Mailing Address: 8223 STELLACOOM RD- 5C  
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.

**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**

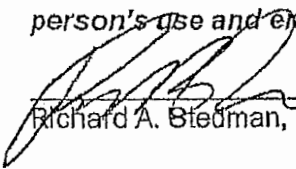
As a penalty for your violation, you are hereby assessed a fine in the amount of **Ten thousand Dollars (\$10,000.00)** in accordance with Section 3.27 of Regulation 1.

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

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

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

  
Richard A. Stedman, Executive Director

Dated July 7, 2004

cc: Fred D. Gentry, Attorney  
Certified Mail No. \_\_\_\_\_  
NOV #2172

---

**EXHIBIT 3**



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:  "v" 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: Jan 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.

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

**Olympic Region Clean Air Agency**

2940 B Limited Lane NW

Olympia, WA 98502

360.586.1044

**NOTICE OF  
CIVIL PENALTY ASSESSMENT**

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

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

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

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

**YOU HAVE THE FOLLOWING RIGHTS REGARDING THIS CIVIL PENALTY ASSESSMENT**

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

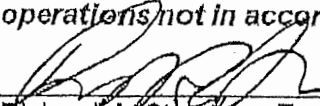
2) You may appeal for relief from ~~this order by making a request for a hearing and an appeal to the State of Washington Pollution Control Hearings Board, PO Box 40903, Olympia WA 98504-0903, in accordance with chapter 43.21(B) RCW, and rules chapter 371-08 WAC. This request for appeal and for a hearing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

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

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

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

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

  
Richard A. Steedman, Executive Director

Dated Oct 4, 20 04

cc: Fred D. Gentry, Attorney

Certified Mail No. \_\_\_\_\_

NOV #2198



June 29, 2004

## REGULATORY ORDER

**TO:**

Ostrom's Mushroom Farm  
8323 Stellacoom 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 Stellacoom 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 Stellacoom 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 I composting system relative to those that were approved under NOC# 99NOC023. The new NOC shall also include any proposed changes, modifications or additions to odor controls and/or methods resulting from the 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.



CERTIFICATE OF SERVICE

1  
2 I hereby certify under penalty of perjury under the laws of the State of Washington that  
3 on the 6<sup>th</sup> day of October, 2005, I caused a true and correct copy of the foregoing document,  
4 "Petition for Review," to be delivered via U.S. Certified Mail to the following counsel of  
5 record:

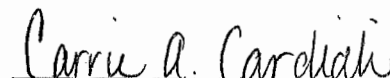
6  
7 Fred Gentry, WSBA #01448  
8 ATTORNEY AT LAW  
9 P.O. Box 2137  
10 Olympia, WA 98507

11 Hon. Rob McKenna, WSBA #18327  
12 WASHINGTON STATE ATTORNEY GENERAL  
13 1125 Washington St. SE  
14 P.O. Box 40100  
15 Olympia, WA 98504

16 And via legal messenger to:

17 Washington State Pollution Control Hearings Board  
18 Environmental Hearing Office  
19 4224 - 6<sup>th</sup> Ave. SE  
20 Rowe Six, Bldg. 2  
21 Lacey, WA 98504-0903

22 Dated this 6<sup>th</sup> day of October, 2005, at Seattle, Washington.

23  
24   
25 Carrie A. Cardiali

FILE #492

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

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

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

October 5, 2005

RECEIVED  
OCT 07 2005  
ORCAA

MARK M. MYERS  
WILLIAMS KASTNER & GIBBS, PLLC  
601 UNION STREET, STE. 4100  
SEATTLE, WA 98101-2380

**Re: *Ostrom v. ORCAA***  
***PCHB No. 04-105***

Dear Mr. Myers:

Enclosed is ORCAA's Petition for Review. We are filing this just in case we are not able to work things out under the Board's Order.

Very truly yours,

---

FRED D. GENTRY

FDG/crm  
Enclosures  
cc: Rich Stedman  
S:\PC 1\wp51\ORCAA\OSTROM\ostrom - myers ltr6.wpd

COPY

1  
2  
3  
4  
5  
6  
7

<input type="checkbox"/> <b>EXPEDITE</b> <b>Hearing is set:</b> Date: _____ Time: _____ Judge/Calendar: _____
---

8  
9

<b>SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY</b>
---

10  
11  
12  
13  
14  
15  
16

ORCAA,   Petitioner,  vs.  PCHB, an agency of the state of Washington; and, THE OSTROM COMPANY, INC.,  Respondents.
---

No.  
  
**ORCAA'S PETITION FOR REVIEW  
OF AGENCY ACTION**  
  
**(PCHB NO. 04-105 &  
PCHB NO. 04-140)**

17

**1. Name and Mailing Address of Petitioner:**

18  
19

Olympic Region Clean Air Agency  
2940-b Limited Lane NW  
Olympia, WA 98502

20

**2. Name and Mailing Address of Petitioner's Attorney:**

21  
22  
23

Fred D. Gentry  
Bean & Gentry  
320 Columbia St. NW  
Olympia, WA 98501

24

**3. Name and Mailing Address of Agency Whose Action Is At Issue:**

25  
26  
27

The Pollution Control Hearings Board  
Environmental Hearings Office  
4224 Sixth Avenue SE, Bldg. 2 Rowe 6  
PO Box 40903  
Lacey, WA 98504-0903

**COPY**

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

1 **4. Identification of Agency Action at Issue:**

2 Findings of Fact, Conclusions of Law, and Order, issued by the Pollution Control  
3 Hearings Board in PCHB Nos. 04-105 and 04-140, The Ostrom Co. Inc. v. ORCAA.  
4 A true and correct copy of the Findings of Fact, Conclusions of Law, and Order, as  
5 well as a true and correct copy of the dissent is attached hereto.

6 **5. Identification of Persons Who Were Parties:**

- 7 • Olympic Region Clean Air Agency  
8 2940-b Limited Lane NW  
9 Olympia, WA 98502

10 Represented by:

11 Fred D. Gentry  
12 Bean & Gentry  
13 320 Columbia St. NW  
14 Olympia, WA 98501

- 15 • The Ostrom Company, Inc.  
16 8323 Steilacoom Rd. SE  
17 Lacey, WA

18 Represented by:

19 Mark M. Myers  
20 Williams Kastner & Gibbs  
21 601 Union Street, Suite 4100  
22 Seattle, WA 98111-3926

23 **6. Facts to Demonstrate that Petitioner is Entitled to Obtain Judicial Review:**

24 ORCAA is one of seven regional air pollution control agencies in Washington.  
25 ORCAA has regulatory and enforcement authority in six counties, including Thurston  
26 County where The Ostrom Co., Inc., is located. The agency is responsible for  
27 enforcing federal, state, and local air pollution standards and governing air pollutant  
28 emissions from new and existing sources.

ORCAA issued two notices of violation with civil penalties of \$1,600 and \$10,000  
and also issued a Regulatory Order to The Ostrom Co., Inc. Ostrom appealed to  
the PCHB. Following a hearing in June of 2005, the PCHB issued Findings of Fact,  
Conclusions of Law, and Order, affirming in part and modifying and reversing in part.

Petitioner brings this petition pursuant to Chapter 34.05 RCW. Petitioner, ORCAA,  
was a party to the proceeding before the PCHB and has standing to obtain judicial  
review. Petitioner has been adversely affected by the PCHB's Findings of Fact,  
Conclusions of Law, and Order issued in PCHB Nos. 04-105 and 04-140, as set  
forth below.

1 **7. Petitioner's Reasons for Believing That Relief Should be Granted:**

2 *The PCHB has erroneously interpreted or applied the law and/or acted arbitrarily*  
3 *and capriciously with respect to those portions of the Findings of Fact, Conclusions*  
4 *of Law, and Order identified below:*

- 4 (a) Conclusion of Law VIII insofar as it concludes that the creation of fresh  
5 compost is an agricultural activity.
- 6 (b) Conclusion of Law X insofar as it concludes that the purchased parcel never  
7 became part of a contiguous piece of "agricultural land" and its sale cannot  
8 be considered for purposes of RCW 70.94.640(4).
- 9 (c) Conclusion of Law XVIII through XXIV insofar as they include conclusions  
10 that Ostrom's creation of compost for growing mushrooms at its Lacey farm  
11 is an agricultural activity exempt under RCW 70.94.64 and that Ostrom is  
12 therefore exempt from the NOC filing requirements unless agricultural odors  
13 are due to failure to use good agricultural practices or have a substantial  
14 adverse impact on the public health.
- 15 (d) Conclusion of Law XXV insofar as it includes a conclusion that the making of  
16 compost for use at the Lacey facility is an agricultural activity for purposes of  
17 RCW 70.94.640.
- 18 (e) Conclusion of Law XXVIII is an erroneous interpretation/application of law  
19 and/or arbitrary and capricious in reducing the penalty for odor violations is  
20 reduced to \$500.
- 21 (f) With respect to Conclusion of Law XXIX, ORCAA does not appeal from the  
22 affirmation of the penalty amount but asserts that the implication that Ostrom  
23 may be eligible for a conditional exemption with respect to composting  
24 activities is an erroneous interpretation/application of law and/or arbitrary and  
25 capricious.
- 26 (g) Part 1 of the Order, insofar as the civil penalty is reduced to \$500, is an  
27 erroneous interpretation/application of law and/or arbitrary and capricious.  
28 The modifications to ORCAA's Regulatory Order, found on page 25 line 18  
through page 26 line 8 of the PCHB Findings of Facts, Conclusions of Law,  
and Order constitute erroneous interpretations/applications application of law  
and/or arbitrary and capricious insofar as the PCHB concludes that ORCAA  
may require a Notice of Construction for Ostrom's operations "only if it  
consults with a third party expert in the activity of mushroom growing, and  
confirms that Ostrom's activities are not consistent with good agricultural  
activities, or that the odor causes substantial adverse affects on public  
health." (Emphasis added.)

24 *Those portions of the Findings of Fact, Conclusion of Law, and Order*  
25 *identified below are not supported by the evidence:*

- 26 (h) The final sentence of Finding of Fact VI and the first sentence of Finding of  
27 Fact VII find some support in the evidence but the substantial evidence is  
28 that Ostrom did not inform ORCAA of changes in processing or request

1 modifications of conditions of the Order of Approval or submit required  
2 Notices of Construction with respect to substantial construction and changes  
3 such as addition of a second tank and aerated bunkers and reversal of the  
4 process used with particular equipment, all of which contribute to odors.  
5 Findings to this effect, included in Finding of Fact X, XIII, and XVI, belie the  
6 final sentence of Finding of Fact VI and the first sentence of Finding of Fact  
7 VII that Ostrom has been cooperative and taken steps to reduce odors.

- 8 (i) Conclusion of Law XXVIII insofar as the reasons given by the PCHB for  
9 finding the penalty excessive are not supported by substantial evidence and  
10 are belied by Findings of Fact X, XIII, and XVI.

11 **8. Request For Relief:**

12 Petitioner prays that the court reverse the PCHB and affirm ORCAA's Notices of  
13 Violation, Regulatory Order, and the civil penalties in their entirety. In so doing, the  
14 court should specifically hold that the creation of compost is not an agricultural  
15 activity for purposes of RCW 70.94.640.

16 DATED this 5 day of October, 2005.

17 BEAN & GENTRY  
18 Attorneys for Respondent ORCAA

19   
20 \_\_\_\_\_  
21 **FRED D. GENTRY, WSBA #1448**

Rich → Kirt ✓, Mark ✓, Gordon —  
John — → Fild

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

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

AREA CODE 360  
TELEPHONE 943-8040  
FAX 786-6943

September 28, 2005

RECEIVED  
SEP 29 2005  
ORCAA

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

**Re: Ostrom's**

Dear Rich:

I just talked to Mark Myers, attorney for Ostrom's, and he would like to schedule a meeting with us to work out the details of implementing ORCAA's relationship with Ostrom's, given the recent PCHB ruling. I have asked him to put together a "wish list" of how Ostrom's would like to work with us in implementing the decision and when I receive it I will pass it on to you for review.

Frankly, I am inclined to think that a joint meeting will be helpful in our future dealings with Ostrom's.

I will keep you advised, but if you have any questions in the meantime, please give me a call.

Very truly yours,



FRED D. GENTRY

FDG/crm

S:\PC 1\wp51\ORCAA\stedman ltr61.wpd

ation Control Hearings Board  
orelines Hearings Board  
orest Practices Appeals Board  
Hydraulic Appeals Board  
Environmental and Land Use Hearings Board



Gordon ✓ Mark ✓ Robert ✓  
John ✓ RIM ✓  
Telephone: (360) 459-6521  
FAX: (360) 438-7699  
Email: eho@eho.wa.gov  
Website: www.eho.wa.gov  
→ File

STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

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

RECEIVED  
SEP 28 2005  
ORCAA

September 27, 2005

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

Fred Gentry  
Attorney at Law  
PO Box 2317  
Olympia WA 98507

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

Dear Parties:

Enclosed is the dissenting opinion in this matter. Please contact the Board if you have any questions.

Sincerely yours,

Bill Clarke, Chair

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

**CERTIFICATION**

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

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED Sept 27, 2005, at Lacey, WA.



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

4 THE OSTROM COMPANY, INC.,

5 Appellant,

6 v.

7 OLYMPIC REGION CLEAN AIR  
8 AGENCY,

9 Respondent.

PCHB NO. 04-105

PCHB NO. 04-140

DISSENT

10 [1]

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

12 (A) The Findings of Fact.

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

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

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

18 [2]

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

DISSENT

PCHB NO. 04-105, 04-140

(1)

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

7 [2]

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

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

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

20  
21 ORCAA did not consult with an expert prior to issuing the NOV's in this case.

1 [3]

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

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

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

13 RCW 70.94.640(2) & (3)

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

19 [4]

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

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

8 [5]

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

---

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

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

DISSENT

PCHB NO. 04-105, 04-140

(4)

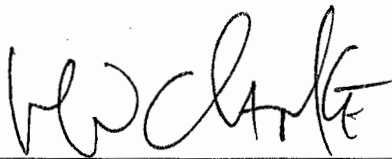
1 whether Ostrom is exempt. In other words, the majority opinion requires Ostrom to utilize the  
2 Notice of Construction process to allow ORCAA to determine whether Ostrom is exempt from  
3 the Notice of Construction requirement.

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

8 Finally, I agree with the majority that it is difficult to apply the agricultural exemption in  
9 RCW 70.94.640 to mushroom growing, which includes the production of compost for mushroom  
10 growing. In the case of mushroom growing, the Legislature needs to clarify how the  
11 enforcement of odor issues relates to ongoing regulation of mushroom growing facilities,  
12 including the use of the Notice of Construction process. Until then, Ostrom is exempt from the

13 Washington Clean Air Act, including the Notice of Construction requirement, unless ORCAA  
14 follows the enforcement procedures in RCW 70.94.640 and meets its burden of proof that  
15 Ostrom is either not using good agricultural practices or is causing a substantial adverse impact  
16 on public health.

17 For these reasons, I respectfully dissent.

18   
19 BILL CLARKE, Chair



STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

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

September 27, 2005

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

Fred Gentry  
Attorney at Law  
PO Box 2317  
Olympia WA 98507

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

Dear Parties:

Enclosed is the dissenting opinion in this matter. Please contact the Board if you have any questions.

Sincerely yours,

Bill Clarke, Chair

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

**CERTIFICATION**

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

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

DATED Sept 27, 2005, at Lacey, WA.

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

4 THE OSTROM COMPANY, INC.,

5 Appellant,

6 v.

7 OLYMPIC REGION CLEAN AIR  
8 AGENCY,

9 Respondent.

PCHB NO. 04-105

PCHB NO. 04-140

DISSENT

10 [1]

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

12 (A) The Findings of Fact.

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

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

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

18 [2]

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

DISSENT  
PCHB NO. 04-105, 04-140

(1)

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

7 [2]

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

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

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

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



1 [3]

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

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

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

13 RCW 70.94.640(2) & (3)

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

19 [4]

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

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

8 [5]

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

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

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

1 whether Ostrom is exempt. In other words, the majority opinion requires Ostrom to utilize the  
2 Notice of Construction process to allow ORCAA to determine whether Ostrom is exempt from  
3 the Notice of Construction requirement.

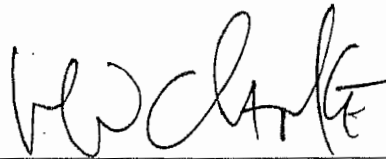
4 This is clearly circular. ORCAA has the authority to require submission of information,  
5 conduct site visits and inspections, hire experts, and can use the expertise of its professional staff  
6 to determine whether Ostrom is using good agricultural practices and is therefore exempt from  
7 Chapter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

8 Finally, I agree with the majority that it is difficult to apply the agricultural exemption in  
9 RCW 70.94.640 to mushroom growing, which includes the production of compost for mushroom  
10 growing. In the case of mushroom growing, the Legislature needs to clarify how the  
11 enforcement of odor issues relates to ongoing regulation of mushroom growing facilities,  
12 including the use of the Notice of Construction process. Until then, Ostrom is exempt from the

---

13 Washington Clean Air Act, including the Notice of Construction requirement, unless ORCAA  
14 follows the enforcement procedures in RCW 70.94.640 and meets its burden of proof that  
15 Ostrom is either not using good agricultural practices or is causing a substantial adverse impact  
16 on public health.

17 For these reasons, I respectfully dissent.



---

BILL CLARKE, Chair