

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 786-6043

April 25, 2006

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

Re: ORCAA v. PCHB-Ostrom

Dear Mark:

Enclosed please find one of the two duplicate originals of the Memorandum of Understanding which has now been signed by both of our clients. I also enclose a Stipulation and Order of Dismissal With Prejudice. I ask that you please sign where indicated on pages 1 and 2 and return it to me together with a draft made payable to ORCAA in the amount of \$2,100. Upon receipt of the draft and the signed Stipulation and Order, I will have the Stipulation and Order signed by the court and provide you with a conformed copy.

I am pleased that we were able to resolve this matter. Please call me if you have any questions or concerns.

Very truly yours,

FRED D. GENTRY
Attorney for Olympic Region Clean Air Agency

FDG/crm
Enclosures
cc: Richard Stedman, ORCAA
S:\PC 1\wp51\ORCAA\OSTROM\ostrom - myers ltr10.wpd

RECEIVED
APR 26 2006
ORCAA

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

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492
RECEIVED
APR 18 2006
ORCAA
AREA CODE 360
TELEPHONE 943-8040
FAX 786-6943

April 17, 2006

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

Re: ORCAA v. PCHB - Ostrom

Dear Rich:

Enclosed please find duplicate originals of the MOU between Ostrom and ORCAA. The president of Ostrom has signed each. Will you please do the same and return both duplicate originals to me, keeping a copy for yourself.

As soon as I receive these back from you I will send one of the duplicate originals to Ostrom's attorney together with a Stipulation for Dismissal and we will go ahead and have a Stipulated Order of Dismissal entered by the court in this matter.

Call me if you have any questions. (I did compare the signed duplicate originals with the final version of the MOU prepared by Mark and forwarded to me and they are identical.)

Sincerely,



CECILIA M. CLYNCH

CMC/crm
Enclosures

S:\PC 1\wp51\ORCAA\IOSTROM\stedman ltr3.wpd

COPY

original
w/ B & G

MEMORANDUM OF UNDERSTANDING
BETWEEN THE OSTROM COMPANY AND THE OLYMPIC REGION CLEAN AIR
AGENCY

RECITALS AND STATEMENT OF PURPOSE

The Ostrom Company (Ostrom) and the Olympic Region Clean Air Agency (ORCAA) have long enjoyed a cooperative working relationship. For certain reasons, they nonetheless find themselves in the position of being opposing litigants in Cases No. 04-105 and 04-140 before the Washington State Pollution Control Hearings Board (PCHB). The PCHB on September 9, 2005, issued an Order in which it made certain findings of fact and conclusions of law, some of which either Ostrom or ORCAA or both have considered appealing from and asking an appellate court to reverse.

Both ORCAA and Ostrom acknowledge that the outcome of appeals or cross-appeals by them from the PCHB Order cannot be predicted with certainty, such that both face a risk of an adverse ruling or set of rulings on appeal. Ostrom and ORCAA agree that the legitimate needs of each can better be accommodated through a spirit of compromise and through negotiated agreement, and therefore have entered into this Memorandum of Understanding. To resolve these disputed issues between Ostrom and ORCAA, the parties agree as follows:

AGREEMENT

1. Ostrom shall retain the right to manage its mushroom substrate production commensurate with changes in raw materials and weather, (i.e., make operational changes) without reporting to ORCAA.
2. Ostrom agrees to produce only enough compost to be used for onsite mushroom growing operations at its Lacey facility with the following exception: Under limited and infrequent circumstances, Ostrom shall retain the right to exchange mushroom substrate

7. This agreement shall remain in effect unless amended by written agreement of both parties.

8. This agreement sets forth all understandings of the parties with respect to its subject matter, and supersedes any prior understandings or agreements on those subjects.

9. To the extent that ORCAA and/or Ostrom have perfected any appeal(s) from the above-referenced PCHB Order, such appeal(s) shall be withdrawn, and the parties authorize their respective counsel to execute on their behalf such documents as may be necessary to secure dismissal thereof without award of costs or fees.

10. Should any future dispute arise between the parties regarding the subject matter of this Agreement, the agreements and understandings set forth above shall supersede, to the extent legally permissible, the rulings of the PCHB in the above-referenced Order, and shall, to the extent legally permissible, be given precedence thereover as the law of the case as between the parties.

11. The parties have entered into this agreement after consultation with their legal counsel. The signatories hereto warrant that they are authorized by the parties they represent to enter into this agreement.

12. Duplicate originals of this agreement are being executed at _____,
Washington on _____, 2006.

THE OSTROM COMPANY

THE OLYMPIC REGION CLEAN AIR AGENCY

By Paul Egly

By [Signature]

Its PRESIDENT

Its EXECUTIVE DIRECTOR

DATE 4/10/06

DATE 4/18/06

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

BEAN & GENTRY
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW
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February 22, 2006

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

RECEIVED
FEB 24 2006
ORCAA

Re: ORCAA v. PCHB - Ostrom

Dear Rich:

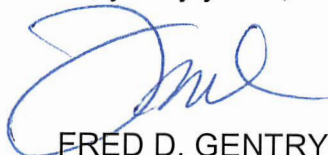
I write to inform you that Judge Tabor has scheduled the appeal on the Ostrom cases for Friday, June 2, 2006. I haven't heard anything from Ostrom's attorney regarding a meeting but will drop them a note now.

One thing we need to decide about, however, is whether or not to order the cost of transcription of the record by the court reporter. Ostrom's insists that they do not need a copy of the transcript since they are not alleging any errors in the Finding of Fact.

We are not claiming much in the way of error in Finding of Fact either, although some of Mark Goodin's testimony and the complainant's testimony might be helpful in writing the brief. The cost of the entire transcript would be \$1,800 and I want to discuss this with you before we decide to order all or part of it.

As always, give me a call.

Very truly yours,



FRED D. GENTRY

FDG/crm
Enclosure

S:\PC 1\wp51\ORCAA\OSTROM\stedman ltr2.wpd

*Photo.
Spoken w/ Fred G. 3/3/06
we will not order
transcription.
RAG
3/3/06*

File - Schedule

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

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TELEPHONE 943-8040
FAX 786-6943

February 22, 2006

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

Re: ORCAA v. PCHB-Ostrom

Dear Mark:

The Ostrom appeals are scheduled for hearing June 2, 2006. I think that when we last talked you were going to talk to your clients about a get together to see if we can resolve issues. Please let me know.

Very truly yours,

FRED D. GENTRY
Attorney for Olympic Region Clean Air Agency

FDG/crm

cc: Richard Stedman, ORCAA

S:\PC 1\wp51\ORCAA\OSTROM\ostrom - myers ltr9.wpd

COPY

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

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January 6, 2006

RECEIVED

JAN 09 2006

ORCAA

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

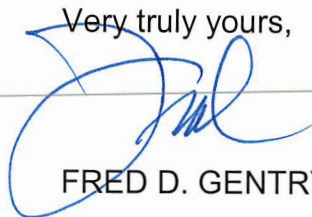
MARK GOODIN
OLYMPIC REGION CLEAN
AIR AGENCY
2940-B LIMITED LANE NW
OLYMPIA, WA 98502

Re: ORCAA v. Ostrom

Dear Rich and Mark:

Here is the latest correspondence from the lawyers for Ostrom. After you have had a chance to review this, let's get together and talk it over.

Very truly yours,



FRED D. GENTRY

FDG/crm
Enclosure

S:\PC 1\wp51\ORCAA\IOSTROM\stedman - gooding ltr1.wpd

Confidential Settlement Communication – Subject to ER 408

January 4, 2006

66845.102

Fred D. Gentry, Esq.
Bean & Gentry
230 North Columbia Street
P.O. Box 2317
Olympia, WA 98507

Re: Ostrom v. Olympic Region Clean Air Agency

Dear Fred:

I am sorry it has taken a while to respond regarding the proposed Memorandum of Understanding (MOU) between our respective clients. The Holidays prove to be most inconvenient.

We have considered your November 22 letter and revisions to the MOU. Ostrom Farms is willing to compromise to some degree but the extent contained in your version of the MOU goes too far. Regarding offsite shipments of mushroom substrate, Ostroms is willing to limit such activities to exchanges of compost with its Everson farm. See revised paragraph 1, attached. On rare occasion, Ostroms needs to determine production and quality issues by exchanging substrate with its other farm and growing mushrooms in that substrate. As noted in the PCHB hearing, this amounts to about 400 cubic yards of mushroom substrate per exchange and does not involve any increase in substrate production at either facility – it is an exchange.

Regarding penalties, Ostroms remains convinced that the PCHB's imposition of any penalties is legally baseless. Yet, Ostroms is willing to compromise and have any penalty amount be tied to farm improvements that directly relate to odor mitigation, such as covering the second wastewater tank and other measures. See revised paragraph 6. Ostroms would rather see the money go toward improvements and not the state general fund.

Lastly, Ostroms completely disagrees with ORCAA's claim that the toxic air pollutant (TAPS) regulations apply to its facility to the extent that they override the statutory farm activity exemptions. The PCHB rightly concluded that Ostrom's operations were farming activities. The Thurston County Superior Court and Washington Court of Appeals have likewise so ruled.

cc: [redacted]

cc: [redacted]

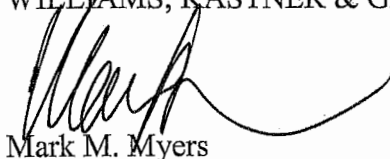
Fred D. Gentry
January 4, 2006
Page 2

Attached is a revised version of the MOU with redline changes from Ostrom's original version. For your convenience, I have enclosed a colored version. If you would like an electronic copy, send me an email with your request.

If this agreement is acceptable, please let me know. If you think we have a basis for an agreement that requires some additional discussions, I suggest we set up a meeting with clients and counsel to hammer this out.

Very truly yours,

WILLIAMS, KASTNER & GIBBS PLLC

A handwritten signature in black ink, appearing to read 'Mark M. Myers', with a long, sweeping horizontal line extending to the right.

Mark M. Myers

Enclosure

William Street (w/encl.)
Christopher Street (w/encl.)
Dan Ferm (w/encl.)

MEMORANDUM OF UNDERSTANDING
BETWEEN THE OSTROM COMPANY AND THE OLYMPIC REGION CLEAN AIR
AGENCY

RECITALS AND STATEMENT OF PURPOSE

The Ostrom Company (Ostrom) and the Olympic Region Clean Air Agency (ORCAA) have long enjoyed a cooperative working relationship. For certain reasons, they nonetheless find themselves in the position of being opposing litigants in Cases No. 04-105 and 04-140 before the Washington State Pollution Control Hearings Board (PCHB). The PCHB on September 9, 2005, issued an Order in which it made certain findings of fact and conclusions of law, some of which either Ostrom or ORCAA or both have considered appealing from and asking an appellate court to reverse.

Both ORCAA and Ostrom acknowledge that the outcome of appeals or cross-appeals by them from the PCHB Order cannot be predicted with certainty, such that both face a risk of an adverse ruling or set of rulings on appeal. Ostrom and ORCAA agree that the legitimate needs of each can better be accommodated through a spirit of compromise and through negotiated agreement, and therefore have entered into this Memorandum of Understanding. To resolve these disputed issues between Ostrom and ORCAA, the parties agree as follows:

AGREEMENT

1. Ostrom shall retain the right to manage its mushroom ~~substrate~~compost production commensurate with changes in raw materials and weather, (i.e., make operational changes) without reporting to ORCAA. Ostrom shall retain the right to exchange mushroom substrate ~~transfer~~ ~~compost~~-produced at Lacey with the same quantity of mushroom substrate produced at its Everson, Washington, farm ~~to any Ostrom-owned subsidiary~~. Ostrom shall provide advance notice to ORCAA of any pending mushroom substrate exchange~~compost~~

~~transfer~~. Ostrom shall retain the right to increase the quantity of mushroom substrate ~~empest~~ produced after Ostrom, in consultation with ORCAA, assures that there will likely be no increase in odor complaints and the mushroom substrate conforms with good agricultural practices as defined in RCW 70.94.640. In the event there is an increase in odor complaints based upon increased ~~msuhroom substrate~~ ~~empest~~ production, Ostrom shall work closely with ORCAA to determine an appropriate remediation of that increase in odor. Ostrom shall maintain records of the amount of mushroom substrate produced and used at the Lacey facility and any exchanged with the Everson farm. Such records shall be provided to ORCAA when requested.—

2. Ostrom shall notify ORCAA at least 30 days in advance of any capital improvements or facility upgrades requiring the issuance of permits from other government agencies. Ostrom shall provide ORCAA with copies of any such permit application and supporting documents at the same time Ostrom submits such application. Ostrom shall not object to ORCAA commenting on permit applications, provided, however, that unless ORCAA identifies any proposed aspect of a capital improvement or facility upgrade as inconsistent with good agricultural practices, ORCAA shall not thereafter contend that the capital improvement or facility upgrade was not consistent with good agricultural practices at the time of implementation. Ostroms shall not object to ORCAA otherwise commenting on notifications or requesting information to verify good agricultural practices.

3. ORCAA shall notify Ostrom by fax, email or telephone of any odor complaint in which Ostrom is identified as a possible source of the odor. ORCAA shall provide such notice as soon as reasonably possible, but no later than one business day after receiving the complaint. Ostrom shall attempt to determine the source of the odor release, initiate corrective action if possible and report that action to ORCAA.

4. Ostrom shall notify ORCAA as soon as reasonably possible, but no later than one business day after occurrence, of any incident or event that Ostrom believes will emit unusual odors – either in character or intensity. With that notification, Ostrom shall provide an indication of what steps will be taken to minimize the exposure, and prevent reoccurrence.

5. Ostrom shall present to ORCAA a formal odor management plan (OMP) describing Ostrom's mushroom substrate ~~compost~~ facility, air and water handling systems, and operations as they relate to the generation of odor.

6. ORCAA shall waive the \$1,600 penalty related to claimed Notice of Construction violations and the \$500 penalty related to odor emissions upon Ostrom's verification that such dollar sums have been spent on odor reducing capital improvements.

7. This agreement shall remain in effect for the life of the facility or unless amended by written agreement of both parties years.

8. This agreement sets forth all understandings of the parties with respect to its subject matter, and supersedes any prior understandings or agreements on those subjects.

9. To the extent that ORCAA and/or Ostrom have perfected any appeal(s) from the above-referenced PCHB Order, such appeal(s) shall be withdrawn, and the parties authorize their respective counsel to execute on their behalf such documents as may be necessary to secure dismissal thereof without award of costs or fees.

10. Should any future dispute arise between the parties regarding the subject matter of this Agreement, the agreements and understandings set forth above shall supersede, to the extent legally permissible, the rulings of the PCHB in the above-referenced Order, and shall, to the extent legally permissible, be given precedence thereover as the law of the case as between the parties.

11. The parties have entered into this agreement after consultation with their legal counsel. The signatories hereto warrant that they are authorized by the parties they represent to enter into this agreement. The person signing for ORCAA warrants that ORCAA has received any approval of the Washington State Attorney General necessary for ORCAA to execute this agreement.

12. Duplicate originals of this agreement are being executed at _____, Washington on _____, 2005.

THE OSTROM COMPANY

THE OLYMPIC REGION CLEAN AIR AGENCY

By _____

By _____

Its _____

Its _____



November 21, 2006 (revised)

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

1-800-422-5623 or
(360) 586-1044
Fax: (360) 491-6308
www.ORCAA.org

Executive Director
Richard A. Stedman

*Clean Air is
Everyone's
Business*

*Serving Clallam, Grays
Harbor, Jefferson, Mason,
Pacific and Thurston
counties.*

Mark Myers

Subject: Response to draft MOU

COPY

Dear Mr. Myers:

Thank you for your proposed agreement between Olympic Region Clean Air Agency (ORCAA) and the Ostrom Company (Ostrom) to settle remaining differences surrounding the Order issued on September 9, 2005, by the Washington State Pollution Control Hearings Board (PCHB) for Cases No. 04-105 and 04-140. ORCAA concurs that a negotiated agreement would serve legitimate needs of both ORCAA and the Ostrom Company, and is appropriate to resolve remaining differences. In addition, ORCAA believes that an agreement would be the best means to define practical working relationships and protocols necessary to administer air regulations consistent with the PCHB ruling. ORCAA does have several issues regarding the draft proposed Memorandum of Understanding (MOU) that was forwarded October 20, 2005. However, ORCAA is optimistic that these issues can be mutually resolved through a meeting. The following discussion details ORCAA's specific issues with the draft MOU. A revised draft of the proposed MOU aligned to ORCAA's understanding of the PCHB Order is attached.

Offsite Shipment of Compost

The PCHB ruling regarding applicability of the exemption offered under RCW 70.94.640 opposes ORCAA's principal argument that all composting, irrespective of where the compost is used, is subject to regulation under RCW 70.94. As a result of the ruling, ORCAA's ability to regulate mushroom facilities is significantly curtailed.

F:\...\MeyersResponse

Nevertheless, for sake of achieving a mutually acceptable working agreement between ORCAA and the Ostrom Company as soon as practicable, ORCAA accepts the PCHB's conclusion regarding the exemption. Since this conclusion differentiates between compost used at the farm and compost shipped for use outside of the facility, the MOU must provide the means to differentiate between these two activities. Also, the MOU must define the mechanisms for applying the PCHB's specific legal conclusions with respect to each activity.

The PCHB was very specific with their ruling on the agricultural exemption under RCW 70.94.640. For compost used at the farm where it is produced, the exemption under RCW 70.94.640 may apply provided the composting activities are consistent with good agricultural practices. For activities producing compost that is shipped for use outside the farm, there is no such exemption. This is clearly stated on page 22 of the PCHB ruling: "However, when Ostrom creates compost for resale to other mushroom farmers, or for use by Ostrom to grow mushrooms at other locations, the activity loses its status as agricultural." ORCAA understands this legal conclusion to mean that any activity producing compost for shipment offsite is subject to normal regulation under RCW 70.94 including odor prohibitions and new source review requirements. This viewpoint is consistent with condition 2.a of the PCHB Order that states, "ORCAA may also require a Notice of Construction if Ostrom intends to continue producing compost for use on off site mushroom farms."

Therefore, several provisions in the draft proposed MOU must be excised from the agreement since they conflict with the PCHB legal conclusions as they relate to compost shipped off-site. Also, monitoring, recordkeeping and reporting provisions need to be included in the agreement as a means for both ORCAA and Ostroms to verify how much compost is used at the Lacey facility. If Ostroms intends to ship finished compost offsite, then prior approval by ORCAA through a NOC application is required for all equipment and operations not previously approved under 99NOC023. This approval would need to happen prior to shipping compost offsite to avoid a violation.

Penalties

The PCHB ruling upheld both NOVs (# 2172 and #2198) as valid. However, the penalty amount for NOV #2172 was significantly reduced by the Board. The total amount of approved penalties for the two violations combined is \$2,100, which is eighteen percent of the total combined amount originally

assessed by ORCAA. ORCAA is not willing to reduce the penalty amount further.

Air Toxic Emissions

Based on testing results from other composting facilities, ORCAA believes ammonia and several other volatile organic compounds that are also toxic air pollutants (TAPs) comprise a significant portion of the emissions from any composting operation. ORCAA contends that emissions of these pollutants renders the exemption under RCW 70.94.640 obsolete, except for air emissions that are regulated only because they are odors. Though odors are exempted under RCW 70.94.640, TAPs are not. New sources of TAP emissions and any modification of an existing source that result in an increase in TAP emissions are subject to new source review under Chapter 173-460 of the Washington Administrative Code (Chapter 173-460 WAC). There are no exemptions.

ORCAA contends that ammonia and other TAPs are emitted from Ostrom's composting operations in significant quantities. The U.S. EPA and other air agencies have developed emission factors that relate the amount of ammonia and other TAPs emitted during composting to the rate of compost feedstock used. Ostrom testified during the hearing that ORCAA's use of these factors was not appropriate for calculating Ostrom's emissions because of the uniqueness of the compost feed materials used. ORCAA believes that the factors are representative, at least for purposes of approximating emissions from Ostroms.

The standard way of resolving disputes over air pollutant emissions rates is to conduct air pollutant emissions testing in accordance with accepted and established test methods and procedures. Emissions testing would verify the presence of TAPs and would help in assessing whether emissions are contributing to health impacts in the community. ORCAA is agreeable to deferring any conclusions regarding air toxic emissions until air emissions testing of Ostrom is completed and results are final. However, as an alternative, ORCAA is willing to forgo requiring emissions testing provided that the agreed MOU include two essential conditions:

1. Ostroms devises and implements a comprehensive odor control plan approved by ORCAA.
2. Ostrom ceases offsite shipment of compost made at the Lacey facility.

COPY

Revised Draft MOU

Attached is a revised version of the draft MOU proposed by Ostrom. It incorporates ORCAA's needs as discussed above. Anticipating the need for further negotiation, ORCAA would like to set a meeting date to finalize this MOU. As an alternative to the MOU, ORCAA would require emissions testing in order to confirm emissions rates of ammonia and other air toxics. This would be followed by appropriate regulatory actions based on test results. We look forward to your response.

REVISED
MEMORANDUM OF UNDERSTANDING
BETWEEN THE OSTROM COMPANY AND THE OLYMPIC REGION CLEAN
AIR
AGENCY

RECITALS AND STATEMENT OF PURPOSE

The Ostrom Company (Ostrom) and the Olympic Region Clean Air Agency (ORCAA) have long enjoyed a cooperative working relationship. For certain reasons, they nonetheless find themselves in the position of being opposing litigants in Cases No. 04-104 and 04-140 before the Washington State Pollution Control Hearings Board (PCHB). The PCHB on September 9, 2005, issued an Order in which it made certain findings of fact and conclusions of law, some of which either Ostrom or ORCAA or both have considered appealing from and asking an appellate court to reverse.

Both ORCAA and Ostrom acknowledge that the outcome of appeals or cross-appeals by them from the PCHB Order cannot be predicted with certainty, such that both face a risk of an adverse ruling or set of rulings on appeal. Ostrom and ORCAA agree that the legitimate needs of each can better be accommodated through the spirit of compromise and through negotiated agreement, and therefore have entered into this Memorandum of Understanding. To resolve these disputed issues between Ostrom and ORCAA, the parties agree as follows:

AGREEMENT

1. Ostrom shall retain the right to manage its mushroom compost production commensurate with changes in raw materials and weather, (i.e., make operational

changes) without reporting to ORCAA, provided the changes conform with good agricultural practices as defined in RCW 70.94.640.

2. Ostrom shall retain the right to transfer compost produced at Lacey to any Ostrom owned subsidiary, provided that:

- a. Testing is conducted on the existing composting facility to confirm ammonia and other air pollutant emissions rates;
- b. Ostrom secures ORCAA's approval through a Notice of Construction (NOC) for the north and south composting bunkers and the new waste water tank; and,
- c. Good agricultural practices for composting operations are employed.

3. Ostrom shall monitor and record the amount of compost produced and used at the Lacey facility in terms of tons of compost per month, standardized to an agreed upon percent moisture. In addition, data and calculations supporting monthly compost production and consumption records shall be retained. Monthly records shall be provided to ORCAA when requested. Failure to keep compost production records would constitute a violation of Regulation 1.

4. Approval by ORCAA through a NOC application shall be required prior to construction or establishment of any new source of air pollution or any modification of an existing source that does not employ good agricultural practices. The terms "new source" and "modification" shall be construed consistent with the definitions in ORCAA's Regulation 1. Criteria for defining and verifying "good agricultural practices" shall conform to RCW 70.94.640.

- COPY
5. Ostrom shall notify ORCAA at least 30 days in advance of any capital improvements, facility upgrades or changes in composting operations that have the potential to increase air pollutant emissions and/or odors. Notification shall include all information normally required in a Notice of Construction (NOC) application including an appropriate NOC fee, and any other information specifically requested by ORCAA for purposes of verifying conformance with good agricultural practices.
 6. Ostrom shall not object to ORCAA commenting on notifications nor requesting additional information in order to verify good agricultural practices.
 7. Unless ORCAA identifies any proposed aspect of a capital improvement or facility upgrade as inconsistent with good agricultural practices, ORCAA shall not thereafter contend that the capital improvement or facility upgrade was not consistent with good agricultural practices at the time of implementation.
 8. ORCAA shall notify Ostrom by fax, email or telephone of any odor complaint in which Ostrom is identified as a possible source of odor. ORCAA shall provide such notice as soon as reasonably possible, but not later than one business day after receiving the complaint. Ostrom shall attempt to determine the source of the odor release, initiate corrective action if possible and report that action to ORCAA.
 9. Ostrom shall notify ORCAA as soon as reasonably possible, but no later than one business day after occurrence, of any incident or event that Ostrom believes will emit unusual odors—either in character or intensity. With that notification,

Ostrom shall provide an indication of what steps will be taken to minimize the exposure, and prevent recurrence.

COPY

10. Ostrom shall present to ORCAA a formal odor management plan (OMP) describing Ostrom's compost facility, air and water handling systems, and operations as they relate to the generation of odor.

11. This agreement shall remain in effect for the life of the facility or until amended.

12. Except for NOC approvals previously issued by ORCAA, this agreement set forth all understandings of the parties with respect to its subject matter, and supersedes any prior understanding or agreements on those subjects.

13. To the extent that ORCAA and/or Ostrom have perfected any appeal(s) from the above-referenced PCHB Order, such appeal(s) shall be withdrawn, and the parties authorize their respective counsel to execute on their behalf such documents as may be necessary to secure dismissal thereof without award of costs or fees.

14. The parties have entered into this agreement after consultation with their legal counsel. The signatories hereto warrant that they are authorized by the parties they represent to enter into this agreement.

15. Duplicate originals of this agreement are being executed at _____, Washington on _____, 2005.

THE OSTROM COMPANY THE OLYMPIC REGION CLEAN AIR
AGENCY

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

BEAN & GENTRY
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW
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OLYMPIA, WASHINGTON 98507

492
En

AREA CODE 360
TELEPHONE 943-8040
FAX 786-6943

RECEIVED
JAN 09 2006
ORCAA

January 6, 2006

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

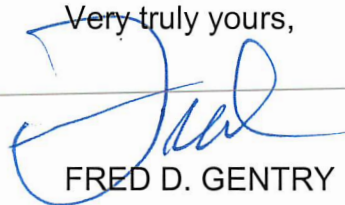
MARK GOODIN
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AIR AGENCY
2940-B LIMITED LANE NW
OLYMPIA, WA 98502

Re: ORCAA v. Ostrom

Dear Rich and Mark:

Here is the latest correspondence from the lawyers for Ostrom. After you have had a chance to review this, let's get together and talk it over.

Very truly yours,



FRED D. GENTRY

FDG/crm
Enclosure

S:\PC 1\wp51\ORCAA\OSTROM\stedman - gooding ltr1.wpd

492

Confidential Settlement Communication – Subject to ER 408

January 4, 2006

66845.102

Fred D. Gentry, Esq.
Bean & Gentry
230 North Columbia Street
P.O. Box 2317
Olympia, WA 98507

Re: Ostrom v. Olympic Region Clean Air Agency

Dear Fred:

I am sorry it has taken a while to respond regarding the proposed Memorandum of Understanding (MOU) between our respective clients. The Holidays prove to be most inconvenient.

We have considered your November 22 letter and revisions to the MOU. Ostrom Farms is willing to compromise to some degree but the extent contained in your version of the MOU goes too far. Regarding offsite shipments of mushroom substrate, Ostroms is willing to limit such activities to exchanges of compost with its Everson farm. See revised paragraph 1, attached. On rare occasion, Ostroms needs to determine production and quality issues by exchanging substrate with its other farm and growing mushrooms in that substrate. As noted in the PCHB hearing, this amounts to about 400 cubic yards of mushroom substrate per exchange and does not involve any increase in substrate production at either facility – it is an exchange.

Regarding penalties, Ostroms remains convinced that the PCHB's imposition of any penalties is legally baseless. Yet, Ostroms is willing to compromise and have any penalty amount be tied to farm improvements that directly relate to odor mitigation, such as covering the second wastewater tank and other measures. See revised paragraph 6. Ostroms would rather see the money go toward improvements and not the state general fund.

Lastly, Ostroms completely disagrees with ORCAA's claim that the toxic air pollutant (TAPS) regulations apply to its facility to the extent that they override the statutory farm activity exemptions. The PCHB rightly concluded that Ostrom's operations were farming activities. The Thurston County Superior Court and Washington Court of Appeals have likewise so ruled.

Very truly yours,
Mark M. Myers
Attorney at Law
(206) 628-6633
mmyers@wkg.com

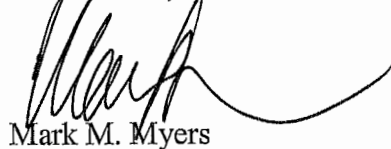
Fred D. Gentry
January 4, 2006
Page 2

Attached is a revised version of the MOU with redline changes from Ostrom's original version. For your convenience, I have enclosed a colored version. If you would like an electronic copy, send me an email with your request.

If this agreement is acceptable, please let me know. If you think we have a basis for an agreement that requires some additional discussions, I suggest we set up a meeting with clients and counsel to hammer this out.

Very truly yours,

WILLIAMS, KASTNER & GIBBS PLLC

A handwritten signature in black ink, appearing to read 'Mark M. Myers', with a long, sweeping horizontal line extending to the right.

Mark M. Myers

Enclosure

William Street (w/encl.)
Christopher Street (w/encl.)
Dan Ferm (w/encl.)

MEMORANDUM OF UNDERSTANDING
BETWEEN THE OSTROM COMPANY AND THE OLYMPIC REGION CLEAN AIR
AGENCY

RECITALS AND STATEMENT OF PURPOSE

The Ostrom Company (Ostrom) and the Olympic Region Clean Air Agency (ORCAA) have long enjoyed a cooperative working relationship. For certain reasons, they nonetheless find themselves in the position of being opposing litigants in Cases No. 04-105 and 04-140 before the Washington State Pollution Control Hearings Board (PCHB). The PCHB on September 9, 2005, issued an Order in which it made certain findings of fact and conclusions of law, some of which either Ostrom or ORCAA or both have considered appealing from and asking an appellate court to reverse.

Both ORCAA and Ostrom acknowledge that the outcome of appeals or cross-appeals by them from the PCHB Order cannot be predicted with certainty, such that both face a risk of an adverse ruling or set of rulings on appeal. Ostrom and ORCAA agree that the legitimate needs of each can better be accommodated through a spirit of compromise and through negotiated agreement, and therefore have entered into this Memorandum of Understanding. To resolve these disputed issues between Ostrom and ORCAA, the parties agree as follows:

AGREEMENT

1. Ostrom shall retain the right to manage its mushroom ~~substrate~~compost production commensurate with changes in raw materials and weather, (i.e., make operational changes) without reporting to ORCAA. Ostrom shall retain the right to exchange mushroom substrate ~~transfer~~ ~~compost~~ produced at Lacey with the same quantity of mushroom substrate produced at its Everson, Washington, farm ~~to any Ostrom-owned subsidiary~~. Ostrom shall provide advance notice to ORCAA of any pending mushroom substrate exchange~~compost~~

~~transfer~~. Ostrom shall retain the right to increase the quantity of mushroom substrate~~compost~~ produced after Ostrom, in consultation with ORCAA, assures that there will likely be no increase in odor complaints and the mushroom substrate conforms with good agricultural practices as defined in RCW 70.94.640. In the event there is an increase in odor complaints based upon increased ~~msuhroom substrate~~~~compost~~ production, Ostrom shall work closely with ORCAA to determine an appropriate remediation of that increase in odor. Ostrom shall maintain records of the amount of mushroom substrate produced and used at the Lacey facility and any exchanged with the Everson farm. Such records shall be provided to ORCAA when requested.—

2. Ostrom shall notify ORCAA at least 30 days in advance of any capital improvements or facility upgrades requiring the issuance of permits from other government agencies. Ostrom shall provide ORCAA with copies of any such permit application and supporting documents at the same time Ostrom submits such application. Ostrom shall not object to ORCAA commenting on permit applications, provided, however, that unless ORCAA identifies any proposed aspect of a capital improvement or facility upgrade as inconsistent with good agricultural practices, ORCAA shall not thereafter contend that the capital improvement or facility upgrade was not consistent with good agricultural practices at the time of implementation. Ostroms shall not object to ORCAA otherwise commenting on notifications or requesting information to verify good agricultural practices.

3. ORCAA shall notify Ostrom by fax, email or telephone of any odor complaint in which Ostrom is identified as a possible source of the odor. ORCAA shall provide such notice as soon as reasonably possible, but no later than one business day after receiving the complaint. Ostrom shall attempt to determine the source of the odor release, initiate corrective action if possible and report that action to ORCAA.

4. Ostrom shall notify ORCAA as soon as reasonably possible, but no later than one business day after occurrence, of any incident or event that Ostrom believes will emit unusual odors – either in character or intensity. With that notification, Ostrom shall provide an indication of what steps will be taken to minimize the exposure, and prevent reoccurrence.

5. Ostrom shall present to ORCAA a formal odor management plan (OMP) describing Ostrom's mushroom substrate compost-facility, air and water handling systems, and operations as they relate to the generation of odor.

6. ORCAA shall waive the \$1,600 penalty related to claimed Notice of Construction violations and the \$500 penalty related to odor emissions upon Ostrom's verification that such dollar sums have been spent on odor reducing capital improvements.

7. This agreement shall remain in effect for the life of the facility or unless amended by written agreement of both parties—years.

8. This agreement sets forth all understandings of the parties with respect to its subject matter, and supersedes any prior understandings or agreements on those subjects.

9. To the extent that ORCAA and/or Ostrom have perfected any appeal(s) from the above-referenced PCHB Order, such appeal(s) shall be withdrawn, and the parties authorize their respective counsel to execute on their behalf such documents as may be necessary to secure dismissal thereof without award of costs or fees.

10. Should any future dispute arise between the parties regarding the subject matter of this Agreement, the agreements and understandings set forth above shall supersede, to the extent legally permissible, the rulings of the PCHB in the above-referenced Order, and shall, to the extent legally permissible, be given precedence thereover as the law of the case as between the parties.

11. The parties have entered into this agreement after consultation with their legal counsel. The signatories hereto warrant that they are authorized by the parties they represent to enter into this agreement. The person signing for ORCAA warrants that ORCAA has received any approval of the Washington State Attorney General necessary for ORCAA to execute this agreement.

12. Duplicate originals of this agreement are being executed at _____, Washington on _____, 2005.

THE OSTROM COMPANY

THE OLYMPIC REGION CLEAN AIR AGENCY

By _____

By _____

Its _____

Its _____

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

November 22, 2005

REC'D

NOV 23 2005

ORCAA

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

Re: Response to draft MOU

Dear Mr. Myers:

Thank you for your proposed agreement between Olympic Region Clean Air Agency (ORCAA) and the Ostrom Company (Ostrom) to settle remaining differences surrounding the Order issued on September 9, 2005, by the Washington State Pollution Control Hearings Board (PCHB) for Cases No. 04-105 and 04-140. ORCAA concurs that a negotiated agreement would serve legitimate needs of both ORCAA and the Ostrom Company, and is appropriate to resolve remaining differences. In addition, ORCAA believes that an agreement would be the best means to define practical working relationships and protocols necessary to administer air regulations consistent with the PCHB ruling. ORCAA does have several issues regarding the draft proposed Memorandum of Understanding (MOU) that was forwarded October 20, 2005. However, ORCAA is optimistic that these issues can be mutually resolved through a meeting. The following discussion details ORCAA's specific issues with the draft MOU. A revised draft of the proposed MOU aligned to ORCAA's understanding of the PCHB Order is attached.

Offsite Shipment of Compost

The PCHB ruling regarding applicability of the exemption offered under RCW 70.94.640 opposes ORCAA's principal argument that all composting, irrespective of where the compost is used, is subject to regulation under RCW 70.94. As a result of the ruling, ORCAA's ability to regulate mushroom facilities is significantly curtailed. Nevertheless, for sake of achieving a mutually acceptable working agreement between ORCAA and the Ostrom Company as soon as practicable, ORCAA accepts the PCHB's conclusion regarding the exemption. Since this conclusion differentiates between compost used at the farm and compost shipped for use outside of the facility, the MOU must provide the means to differentiate between these two activities. Also, the MOU must define the mechanisms for applying the PCHB's specific legal conclusions with respect to each activity.

The PCHB was very specific with their ruling on the agricultural exemption under RCW 70.94.640. For compost used at the farm where it is produced, the exemption under RCW

COPY

70.94.640 may apply provided the composting activities are consistent with good agricultural practices. For activities producing compost that is shipped for use outside the farm, there is no such exemption. This is clearly stated on page 22 of the PCHB ruling: "However, when Ostrom creates compost for resale to other mushroom farmers, or for use by Ostrom to grow mushrooms at other locations, the activity loses its status as agricultural." ORCAA understands this legal conclusion to mean that any activity producing compost for shipment offsite is subject to normal regulation under RCW 70.94 including odor prohibitions and new source review requirements. This viewpoint is consistent with condition 2.a of the PCHB Order that states, "ORCAA may also require a Notice of Construction if Ostrom intends to continue producing compost for use on off site mushroom farms."

Therefore, several provisions in the draft proposed MOU must be excised from the agreement since they conflict with the PCHB legal conclusions as they relate to compost shipped off-site. Also, monitoring, recordkeeping and reporting provisions need to be included in the agreement as a means for both ORCAA and Ostroms to verify how much compost is used at the Lacey facility. If Ostroms intends to ship finished compost offsite, then prior approval by ORCAA through a NOC application is required for all equipment and operations not previously approved under 99NOC023. This approval would need to happen prior to shipping compost offsite to avoid a violation.

Penalties

The PCHB ruling upheld both NOVs (#2172 and #2198) as valid. However, the penalty amount for NOV #2172 was significantly reduced by the Board. The total amount of approved penalties for the two violations combined is \$2,100, which is eighteen percent of the total combined amount originally assessed by ORCAA. ORCAA is not willing to reduce the penalty amount further.

Air Toxic Emissions

Based on testing results from other composting facilities, ORCAA believes ammonia and several other volatile organic compounds that are also toxic air pollutants (TAPs) comprise a significant portion of the emissions from any composting operation. ORCAA contends that emissions of these pollutants renders the exemption under RCW 70.94.640 inapplicable, except for air emissions that are regulated only because they are odors. Though odors are exempted under RCW 70.94.640, TAPs are not. New sources of TAP emissions and any modification of an existing source that result in an increase in TAP emissions are subject to new source review under Chapter 173-460 of the Washington Administrative Code (Chapter 173-460 WAC). There are no exemptions.

ORCAA contends that ammonia and other TAPs are emitted from Ostrom's composting operations in significant quantities. The U.S. EPA and other air agencies have developed emission factors that relate the amount of ammonia and other TAPs emitted during composting to the rate of compost feedstock used. Ostrom testified during the hearing that ORCAA's use

of these factors was not appropriate for calculating Ostrom's emissions because of the uniqueness of the compost feed materials used. ORCAA believes that the factors are representative, at least for purposes of approximating emissions from Ostroms.

The standard way of resolving disputes over air pollutant emissions rates is to conduct air pollutant emissions testing in accordance with accepted and established test methods and procedures. Emissions testing would verify the presence of TAPs and would help in assessing whether emissions are contributing to health impacts in the community. ORCAA is agreeable to deferring any conclusions regarding air toxic emissions until air emissions testing of Ostrom is completed and results are final.

Revised Draft MOU

Attached is a revised version of the draft MOU proposed by Ostrom. It incorporates ORCAA's needs as discussed above. Anticipating the need for further negotiation, ORCAA would like to set a meeting date to finalize this MOU. As an alternative to the MOU, ORCAA would require emissions testing in order to confirm emissions rates of ammonia and other air toxics. This would be followed by appropriate regulatory actions based on test results. We look forward to your response.

Very truly yours,

FRED D. GENTRY
Attorney for Olympic Region Clean Air Agency

FDG/crm

cc: Richard Stedman, ORCAA

S:\PC 1\wp51\ORCAA\OSTROM\ostrom - myers ltr8.wpd

MEMORANDUM OF UNDERSTANDING
BETWEEN THE OSTROM COMPANY AND THE OLYMPIC REGION
CLEAN AIR AGENCY

RECITALS AND STATEMENT OF PURPOSE

The Ostrom Company (Ostrom) and the Olympic Region Clean Air Agency (ORCAA) have long enjoyed a cooperative working relationship. For certain reasons, they nonetheless find themselves in the position of being opposing litigants in Cases No. 04-104 and 04-140 before the Washington State Pollution Control Hearings Board (PCHB). The PCHB on September 9, 2005, issued an Order in which it made certain findings of fact and conclusions of law, some of which either Ostrom or ORCAA or both have considered appealing from and asking an appellate court to reverse.

Both ORCAA and Ostrom acknowledge that the outcome of appeals or cross-appeals by them from the PCHB Order cannot be predicted with certainty, such that both face a risk of an adverse ruling or set of rulings on appeal. Ostrom and ORCAA agree that the legitimate needs of each can better be accommodated through the spirit of compromise and through negotiated agreement, and therefore have entered into this Memorandum of Understanding. To resolve these disputed issues between Ostrom and ORCAA, the parties agree as follows:

AGREEMENT

1. Ostrom shall retain the right to manage its mushroom compost production commensurate with changes in raw materials and weather, (i.e., make operational changes) without reporting to ORCAA, provided the changes conform with good agricultural practices as defined in RCW 70.94.640 and do not result in increased air pollution omissions and/or odor described in paragraph 5 below.

COPY

2. Ostrom shall retain the right to transfer compost produced at Lacey to any Ostrom owned subsidiary, provided that:

- a. Testing is conducted on the existing composting facility to confirm ammonia and other air pollutant emissions rates;
- b. Ostrom secures ORCAA's approval through a Notice of Construction (NOC) for the north and south composting bunkers and the new waste water tank; and,
- c. Good agricultural practices for composting operations are employed.

3. Ostrom shall monitor and record the amount of compost produced and used at the Lacey facility and the amount of compost produced and shipped offsite in terms of tons of compost per month, standardized to an agreed upon percent moisture. In addition, data and calculations supporting monthly compost production and consumption records shall be retained. Monthly records shall be provided to ORCAA when requested. Failure to keep compost production records would constitute a violation of Regulation 1.

~~4. Approval by ORCAA through a NOC application shall be required prior to construction or establishment of any new source of air pollution or any modification of an existing source that does not employ good agricultural practices. The terms "new source" and "modification" shall be construed consistent with the definitions in ORCAA's Regulation 1. Criteria for defining and verifying "good agricultural practices" shall conform to RCW 70.94.640.~~

5. Ostrom shall notify ORCAA at least 30 days in advance of any capital improvements, facility upgrades or changes in composting operations that have the potential to increase air pollutant emissions and/or odors. Notification shall include all information normally required in a Notice of Construction (NOC) application including an

appropriate NOC fee, and any other information specifically requested by ORCAA for purposes of verifying conformance with good agricultural practices.

6. Ostrom shall not object to ORCAA commenting on notifications nor requesting additional information in order to verify good agricultural practices.

7. Unless ORCAA identifies any proposed aspect of a capital improvement or facility upgrade as inconsistent with good agricultural practices, ORCAA shall not thereafter contend that the capital improvement or facility upgrade was not consistent with good agricultural practices at the time of implementation.

8. ORCAA shall notify Ostrom by fax, email or telephone of any odor complaint in which Ostrom is identified as a possible source of odor. ORCAA shall provide such notice as soon as reasonably possible, but not later than one business day after receiving the complaint. Ostrom shall attempt to determine the source of the odor release, initiate corrective action if possible and report that action to ORCAA.

9. ~~Ostrom shall notify ORCAA as soon as reasonably possible, but no later than one business day after occurrence, of any incident or event that Ostrom believes will emit unusual odors—either in character or intensity. With that notification, Ostrom shall provide an indication of what steps will be taken to minimize the exposure, and prevent recurrence.~~

10. Ostrom shall present to ORCAA a formal odor management plan (OMP) describing Ostrom's compost facility, air and water handling systems, and operations as they relate to the generation of odor.

11. This agreement shall remain in effect for the life of the facility or until amended.

12. Except for NOC approvals previously issued by ORCAA, this agreement set forth all understandings of the parties with respect to its subject matter, and supersedes any prior understanding or agreements on those subjects.

13. To the extent that ORCAA and/or Ostrom have perfected any appeal(s) from the above-referenced PCHB Order, such appeal(s) shall be withdrawn, and the parties authorize their respective counsel to execute on their behalf such documents as may be necessary to secure dismissal thereof without award of costs or fees.

14. The parties have entered into this agreement after consultation with their legal counsel. The signatories hereto warrant that they are authorized by the parties they represent to enter into this agreement.

15. Duplicate originals of this agreement are being executed at

Washington, on _____, 2005.

THE OSTROM COMPANY

By: _____
Its President

THE OLYMPIC REGION CLEAN AIR AGENCY

By: _____
Richard Stedman, Its Executive Director



File 492

Telephone: (360) 459-6327
FAX: (360) 438-7699
Email: eho@eho.wa.gov
Website: www.eho.wa.gov

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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

October 26, 2005

RECEIVED

OCT 27 2005

ORCAA

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: Thurston County Cause No. 05-2-02011-1
PCHB NO. 04-105 & 04-140
THE OSTROM COMPANY, INC. v. ORCAA

Dear Parties:

On October 7, 2005, Appellants filed a Petition for Review in the above-referenced matter. Accordingly, the entire written record has been transmitted this date to Thurston County Superior Court.

I would request that the parties file the decision of the Thurston County Superior Court with the Board when the matter is concluded.

If I can be of further assistance, please let me know.

Sincerely yours,

Sharon H. Ziegler, Clerk
Pollution Control Hearings Board

Enclosure
cc: ORCAA



STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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

October 26, 2005

Thurston County Superior Court Clerk
Thurston County Courthouse
2000 Lakeridge Dr SW
Olympia WA 98502

RE: Thurston County Cause No. 05-2-02011-1
PCHB NO. 04-105 & 04-140
THE OSTROM COMPANY, INC. v. ORCAA

Dear Clerk:

On October 7, 2005, Appellants filed a Petition for Review in the above-referenced matter. Enclosed is the entire file compiled by the Pollution Control Hearings Board in the appeal. The entire file consists of 1,280 pages.

Please date stamp and return a copy of the enclosed Certificate. I have enclosed a self-addressed, stamped envelope.

Thank you for your cooperation.

Sincerely,

Sharon H. Ziegler, Clerk
Pollution Control Hearings Board

Enclosure

cc: Mark M. Myers
Fred Gentry
ORCAA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR
AGENCY,

Respondent.

CAUSE NO. 05-2-02011-1

PCHB NO. 04-105

PCHB NO. 04-140

INDEX OF RECORD

Listed below are the contents of the record in the above-entitled matter. This index does not include routine correspondence, although all correspondence is included with the record.

Note: Because PCHB No. 04-105 and PCHB No. 04-140 are consolidated, PCHB 04-105 was used as the "lead file" and contains all correspondence and pleadings which apply to both cases. The only documents in file PCHB No. 04-140 that are not included in the lead file are as follows:

Index No. 24. Ostrom's Proposed Legal Issues, Preliminary Witness and Exhibit Lists, filed November 22, 2004. (pp. 735-737)

Index No. 25. Notice of Appearance, filed November 23, 2004. (p. 738)

Index No. 26. Notice of appeal, with Exhibits A through C, filed October 25, 2005. (pp. 739-756)

VOLUME 3

1. The Ostrom Company's Petition for Review, with Exhibits 1 and 2, filed October 7, 2005. (pp. 14-54)
2. ORCAA's Petition for Review of Agency Action, filed October 7, 2005. (pp. 55-58)
3. Findings of Fact, Conclusions of Law, and Order; Dissent, issued September 9, 2005. (pp. 59-89)
4. The Ostrom Company's PreHearing Brief, with Certificate of Service, filed May 31, 2005. (pp. 90-101)

1 Index of Record
2 Page 2

- 3 5. Olympic Region Clean Air Agency's Final Witness and Exhibit List; filed May
4 23, 2005. (pp. 102-103)
- 5 6. Olympic Region Clean Air Agency's Trial Brief, filed May 23, 2005.
6 (pp. 104-112)
- 7 7. Order Granting Motion to Supplement the Record and Petition for
8 Reconsideration, Reversing Summary Judgment, and Setting Hearing Date, issued
9 April 28, 2005. (pp. 113-117)
- 10 8. ORCAA's Reply Memorandum (Oral Argument Requested), filed April 12, 2005.
11 (pp. 118-122)
- 12 9. Appellant's Response to ORCAA's Motion to Supplement the Record and
13 Petition for Reconsideration, with Subjoined Certificate of Service, filed April 6,
14 2005. (pp. 123-130)
- 15 10. Respondent's Motion to Supplement the Record; Respondent's Petition for
16 Reconsideration; Memorandum in Support of Petition for Reconsideration; and
17 Declaration of John T. Kelly, filed March 25, 2005. (pp. 131-140)
- 18 11. Order Granting Summary Judgment, issued March 18, 2005. (pp. 141-151)
- 19 12. Olympic Region Clean Air Agency's Final Witness and Exhibit List, filed
20 February 24, 2005. (pp. 152-154)
- 13 13. Ostrom's Witness and Exhibit List, with Certificate of Service, (received by Fax
14 February 24, 2005), filed February 24, 2005. (pp. 155-158)
- 15 14. Appellant's Reply Memorandum in Support of its Dispositive Motion, with
16 Subjoined Certificate of Service, (received by Fax February 7, 2005), filed
17 February 8, 2005. (pp. 159-169)

18 VOLUME 2

- 19 15. Olympic Region Clean Air Agency's Memorandum in Opposition to Ostrom's
20 Dispositive Motion; Declaration of Mark Goodin; Affidavit of Fred D. Gentry,
with Exhibits 1 through 12, filed February 2, 2005. (pp. 170-456)

VOLUME 1

16. Appellant's Dispositive Motion, with Subjoined Certificate of Service, with Appendix 1 through 5; Declaration of William Street, Sr., (received by Fax January 3, 2005), filed January 4, 2005. (pp. 464-491)
17. Ostrom's Proposed Legal Issues, Preliminary Witness and Exhibit Lists, (received by Fax November 23, 2004), filed November 24, 2004. (pp. 492-494)
18. Second Pre-Hearing Order; Order of Consolidation, issued November 23, 2004. (pp. 495-502)
19. Ostrom's Proposed Legal Issues, Preliminary Witness and Exhibit Lists, with attachments 1 through 13, (received by fax September 14, 2004), filed September 16, 2004. (pp. 503-650)
20. Pre-Hearing Order, issued September 16, 2004. (pp. 651-656)
21. Olympic Region Clean Air Agency's Proposed Legal Issues, Witness List, and Exhibit List, filed September 14, 2004. (pp. 656-658)
22. Notice of Appearance, filed August 20, 2004. (p. 659)
23. Notice of Appeal, with Exhibit A through C, filed August 4, 2004. (pp. 660-673)

EXHIBITS

(File Folder) The Ostrom Company, Inc. Original Exhibits 1 through 13. All admitted. (pp. 757-903)

(Binder) ORCAA's Original Exhibits R-1 through R-17. All admitted, except R-16. (pp. 904-1280)

END OF INDEX

Rich → Common ✓, Mark ✓, Robert ✓ → File

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

BEAN & GENTRY

ATTORNEYS AT LAW
COLUMBIA SQUARE
320 COLUMBIA STREET NW
POST OFFICE BOX 2317
OLYMPIA, WASHINGTON 98507

AREA CODE 360
TELEPHONE 943-8040
FAX 786-6943

FACSIMILE COVER SHEET

DATE: October 20, 2005	TIME:
FAX NUMBER: 491-6308	PAGES FAXED: 6 (including cover)
TO: RICHARD STEDMAN	FROM: FRED D. GENTRY
RE: OSTROMS	

DOCUMENTS	
1.	MEMORANDUM OF UNDERSTANDING
2.	
3.	
4.	
5.	

MESSAGE
Dear Rich: Please review and give me a call to discuss.
Thanks, Fred

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT/ATTORNEY-CLIENT COMMUNICATIONS

This facsimile message is attorney privileged and confidential and is intended solely for the use of the recipient named above. If you are not the intended recipient, or the person responsible for delivering it to the intended recipient, you are hereby advised that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this FAX in error, please immediately notify the sender by phone and return the original FAX message to the sender by US Postal Service.

If any pages are not legible, or you do not receive all of the pages listed above, please call (360) 943-8040.

carla murphy

From: "Fred Gentry" <fred@beanandgentry.com>
To: "carla murphy" <carla@beanandgentry.com>
Sent: Thursday, October 20, 2005 3:26 PM
Attach: WKG-#1753188-v1-Revised_MOU_10_7_05.DOC
Subject: Fw: Ostrom v. ORCAA

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

From: Myers, Mark
To: fred@beanandgentry.com
Sent: Monday, October 10, 2005 1:51 PM
Subject: Ostrom v. ORCAA

Hi Fred:

I know you are traveling for another week, but I thought I would provide this draft to you in case your staff is monitoring emails and wants to send it on to ORCAA. Attached is our draft of a proposed Memorandum of Understanding between The Ostrom Company and ORCAA relating to the PCHB's decision, dissenting opinion and appeal to superior court. We have both filed our appeal notices to preserve our clients rights if we are not able to agree on the MOU. Unless ORCAA agrees to the MOU as written, we would like to have the opportunity to sit down with ORCAA and you to discuss our respective issues. We look forward to your response. Thanks.

--Mark

Mark Myers <mailto:mmyers@wkg.com>
Attorney at Law
Williams, Kastner & Gibbs PLLC
Seattle, WA
Phone: (206) 628-6633
Fax: (206) 628-6611
www.wkg.com

MEMORANDUM OF UNDERSTANDING
BETWEEN THE OSTROM COMPANY AND THE OLYMPIC REGION CLEAN AIR
AGENCY

RECITALS AND STATEMENT OF PURPOSE

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Both ORCAA and Ostrom acknowledge that the outcome of appeals or cross-appeals by them from the PCHB Order cannot be predicted with certainty, such that both face a risk of an adverse ruling or set of rulings on appeal. Ostrom and ORCAA agree that the legitimate needs of each can better be accommodated through a spirit of compromise and through negotiated agreement, and therefore have entered into this Memorandum of Understanding. To resolve these disputed issues between Ostrom and ORCAA, the parties agree as follows:

AGREEMENT

1. Ostrom shall retain the right to manage its mushroom compost production commensurate with changes in raw materials and weather, (i.e., make operational changes) without reporting to ORCAA. Ostrom shall retain the right to transfer compost produced at Lacey to any Ostrom owned subsidiary. Ostrom shall provide advance notice to ORCAA of any pending compost transfer. Ostrom shall retain the right to increase the quantity of compost produced after Ostrom, in consultation with ORCAA, assures that there will likely be no increase

in odor complaints. In the event there is an increase in odor complaints based upon increased compost production, Ostrom shall work closely with ORCAA to determine an appropriate remediation of that increase in odor.

2. Ostrom shall notify ORCAA of any capital improvements or facility upgrades requiring the issuance of permits from other government agencies. Ostrom shall provide ORCAA with copies of any such permit application and supporting documents at the same time Ostrom submits such application. Ostrom shall not object to ORCAA commenting on permit applications, provided, however, that unless ORCAA identifies any proposed aspect of a capital improvement or facility upgrade as inconsistent with good agricultural practices, ORCAA shall not thereafter contend that the capital improvement or facility upgrade was not consistent with good agricultural practices at the time of implementation.

3. ORCAA shall notify Ostrom by fax, email or telephone of any odor complaint in which Ostrom is identified as a possible source of the odor. ORCAA shall provide such notice as soon as reasonably possible, but no later than one business day after receiving the complaint. Ostrom shall attempt to determine the source of the odor release, initiate corrective action if possible and report that action to ORCAA.

4. Ostrom shall notify ORCAA as soon as reasonably possible, but no later than one business day after occurrence, of any incident or event that Ostrom believes will emit unusual odors – either in character or intensity. With that notification, Ostrom shall provide an indication of what steps will be taken to minimize the exposure, and prevent reoccurrence.

5. Ostrom shall present to ORCAA a formal odor management plan (OMP) describing Ostrom's compost facility, air and water handling systems, and operations as they relate to the generation of odor.

6. ORCAA shall waive the \$1,600 penalty related to claimed Notice of Construction violations and the \$500 penalty related to odor emissions.

7. This agreement shall remain in effect for ___ years.

8. This agreement sets forth all understandings of the parties with respect to its subject matter, and supersedes any prior understandings or agreements on those subjects.

9. To the extent that ORCAA and/or Ostrom have perfected any appeal(s) from the above-referenced PCHB Order, such appeal(s) shall be withdrawn, and the parties authorize their respective counsel to execute on their behalf such documents as may be necessary to secure dismissal thereof without award of costs or fees.

10. Should any future dispute arise between the parties regarding the subject matter of this Agreement, the agreements and understandings set forth above shall supersede, to the extent legally permissible, the rulings of the PCHB in the above-referenced Order, and shall, to the extent legally permissible, be given precedence thereover as the law of the case as between the parties.

11. The parties have entered into this agreement after consultation with their legal counsel. The signatories hereto warrant that they are authorized by the parties they represent to enter into this agreement. The person signing for ORCAA warrants that ORCAA has received any approval of the Washington State Attorney General necessary for ORCAA to execute this agreement.

12. Duplicate originals of this agreement are being executed at _____, Washington on _____, 2005.

THE OSTROM COMPANY

THE OLYMPIC REGION CLEAN AIR AGENCY

By _____

By _____

Its _____

Its _____

1.



STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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

October 17, 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: Thurston County Cause No. 05-2-02011-1
PCHB NO. 04-105 & 04-140
THE OSTROM COMPANY, INC. v. ORCAA

Dear Parties:

On October 7, 2005, Petitions for Review were filed by The Ostrom Company, Inc. and by Olympic Region Clean Air Agency (ORCAA) in Thurston County Superior Court (Cause No. 05-2-02011-1).

The record has been preserved without a transcript. Therefore, pursuant to RCW 34.05.566(3), the petitioners must pay the cost of transcription. Our rules of procedure at WAC 371-08-525 provide that petitioner shall order the transcript from the Board's reporter and assume the cost of same. The Board's reporter is:

Gene Barker & Associates
PO Box 1126
Olympia WA 98507
(360) 943-2693

RECEIVED
OCT 18 2005
ORCAA

The Board's reporter will furnish the transcript directly to the Board for certification to the reviewing court.

Thank you for your cooperation and assistance in this matter.

Sincerely,

Sincerely,

Sharon V. Piegler

Sharon H. Ziegler
Clerk

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 parties 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 Oct 17, 2005, at Lacey, WA
Sharon V. Ziegler



Rec'd
10/17/05

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

THE OSTROM COMPANY, INC.,
a Washington corporation,

Petitioner,

v.

POLLUTION CONTROL HEARINGS BOARD,

Agency/Respondent.

NO.

PETITION FOR REVIEW

The petitioner, The Ostrom Company, Inc. ("Ostrom"), alleges as follows pursuant to
RCW 34.05.546:

1. Petitioner's Name and Mailing Address:

The Ostrom Company, Inc.
8323 Steilacoom Rd. SE
Olympia, WA 98513

RECEIVED
OCT 13 2005
ORCAA

PETITION FOR REVIEW - 1

1752159.1

COPY

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

2. Name and Mailing Address of Petitioner's Attorneys:

Mark M. Myers, WSBA #15362
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS, PLLC
P.O. Box 21926
Seattle, WA 98111-3926

3. Name and Mailing Address of the Agency Whose Action is At Issue:

Pollution Control Hearings Board
P.O. Box 40903
Lacey, WA 98504-0903

4. Identification of the Agency Action At Issue:

The PCHB on September 9, 2005, issued a final order in its cases number 04-105 and 04-140. A copy of said order is attached hereto as Exhibit 1.

The order includes certain findings of fact and conclusions of law based on which the PCHB:

(a) upheld in part a civil penalty of \$10,000 that had been assessed by the Olympic Region Clean Air Authority (ORCAA) Notice of Violation No. 2172 (Exhibit 2), purportedly under authority of RCW 70.94.431 and ORCAA Regulation 1 Section 9.11(c), and

(b) upheld in its entirety a civil penalty of \$1,600 and regulatory order that had been assessed by ORCAA Notice of Violation No. 2198 (Exhibit 3), purportedly under authority of ORCAA Regulation 1, Sections 7.01(a) and 7.07. Ostrom had timely and properly appealed both ORCAA Notices of Violation to the PCHB.

5. Identification of Persons Who Were Parties in Any Adjudicative Proceedings That Led to the Agency Action:

Olympic Region Clean Air Agency

1 6. Facts to Demonstrate That the Petitioner Is Entitled to Obtain Judicial Review:

2 The order at issue was issued and entered on September 9, 2005. Pursuant to RCW
3 34.05.542, Ostrom has 30 days thereafter within which to file a petition for review of the
4 order. Fewer than 30 days have elapsed between the issuance of the order and the filing and
5 service of this petition.

6 7. The Petitioner's Reasons for Believing That Relief Should be Granted:

7 A. Relief should be granted from that part of the PCHB's order upholding, but
8 reducing to \$500, the \$10,000 civil penalty imposed by ORCAA under its Notice of Violation
9 No. 2172, because Ostrom is and was at all material times engaged in "agricultural activity"
10 within the meaning of RCW 70.94.640(5)(a). The PCHB erroneously interpreted and applied
11 the law in entering conclusions of law that hold that ORCAA's failure to comply with RCW
12 70.94.640(1) and (2) did not invalidate the Notice of Violation because odors for which
13 ~~Ostrom was fined thereunder were attributable in part to compost that Ostrom had made for~~
14 ~~sale to third parties and/or for use "off site."~~ Those conclusions of law that are legally
15 erroneous and should be overruled are: No. VIII (last sentence); No. IX; No. XXIV (second
16 sentence), and No. XXV; No. XXVIII (second sentence); and the first numbered portion of
17 the "Order" section on page 25.
18

19 B. Relief should be granted from that part of the PCHB's order upholding the
20 \$1,600 civil penalty imposed by ORCAA under its Notice of Violation No. 2198 because, as
21 explained in the dissent filed by PCHB Chair Bill Clarke explains, absent compliance by
22 ORCAA with RCW 70.94.640(1) and (2) -- which ORCAA did not even attempt -- Ostrom is
23 categorically exempted by RCW 70.94.640 from the Notice of Construction regulation under
24
25

1 which ORCAA imposed the said civil penalty. By holding, in effect, that Ostrom must
2 submit to regulation by ORCAA in order to qualify for exemption from regulation by
3 ORCAA, the PCHB erroneously interpreted and applied the law. Furthermore, the PCHB's
4 Conclusion No. XVIII and XIX are defective according to the board's own logic because the
5 board made no finding and reached no conclusion that the "changes" at issue (see Finding No.
6 XVI and Conclusion No. XV) constituted or made Ostrom a "new source" of air
7 contaminants. Those conclusions of law that are legally erroneous and should be overruled
8 are: No. XVI (last sentence); No. XVIII; and Nos. XIX through XXIII; No. XXIV (third,
9 fourth, and fifth sentences); No. XXVI (fourth and fifth sentences); No. XXIX; and those
10 portions of paragraphs 2(a) and 2(b) of the "Order" section on pages 25-26 that are based
11 thereon.
12

13 C. Petitioner agrees that the PCHB's Findings of Fact denominated as such are
14 supported by substantial evidence in the record.

15 8. Request for Relief:

16 Ostrom requests that the Court grant it the following relief:

- 17
18 (a) The Court should rule that the PCHB erroneously interpreted and applied the
19 law in reaching its conclusion that the sale of mushroom-growing compost to
20 third parties or for use "off site" (see Conclusion No. IX) constituted activity
21 that was not "agricultural activity" within the meaning of RCW 70.94.640(5)(a),
22 such that ORCAA is entitled to impose a civil penalty of \$500 despite
23 ORCAA's noncompliance with RCW 70.94.640(1) and (2); and
24
25

- 1 (b) The Court should overrule the PCHB's decision upholding in part the ORCAA
2 Notice of Violation No. 2172 and should hold that said notice of violation and
3 the civil penalty imposed pursuant to it are invalid, unenforceable, and void in
4 their entirety; and
- 5 (c) The Court should rule that the PCHB erroneously interpreted and applied the
6 law in reaching its conclusion that Ostrom, although engaged in "agricultural
7 activity," is nonetheless subject to ORCAA's Notice of Construction Regulation
8 1, Sections 7.01 and 7.11; and
- 9 (d) The Court should overrule the PCHB's decision upholding ORCAA Notice of
10 Violation No. 2198 and the associated regulatory order, and should hold that
11 said notice of violation, the regulatory order, and the civil penalty imposed
12 pursuant to the notice of violation are invalid, unenforceable, and void in their
13 entirety; and
14
- 15 (e) The Court should award Ostrom its costs and such other legal and equitable
16 relief as are permitted by law and equity.

17
18 DATED this 6th day of October, 2005.

19 WILLIAMS, KASTNER & GIBBS PLLC

20
21 By 

22 Mark M. Myers, WSBA #15362

23 Daniel W. Ferm, WSBA #11466

24 Attorney for Petitioner The Ostrom Company,
25 Inc.

EXHIBIT 1

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

Received

SEP 19 2005

WILLIAMS KASTNER & GIBBS
SEATTLE

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR
AGENCY,

Respondent.

PCHB NO. 04-105

PCHB NO. 04-140

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

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

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

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

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

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

(1)

1 Findings of Fact

2 I.

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

10 II.

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

1 III.

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

6 IV.

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

10 Composting involves the biological breakdown of this mixture of material. The breakdown is
11 caused by the internal heat generated by the material, which triggers a nitrogen conversion

12 reaction. Composting increases the nutritive content of the mixture. Repeated wetting and
13 turning of the material facilitates the composting process. Once the compost is ready for use, it
14 is pasteurized, and then combined with mushroom spawn, from which the mushrooms grow.

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

18 V.

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

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

5 VI.

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

11 VII.

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

19 VIII.

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

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

5 IX.

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

10 X.

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

1 XI.

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

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

12 XII.

13 The ICF became operational in 2000. It was not initially a successful business venture.
14 The compost produced in the ICF was inferior, and the composting process took longer than
15 anticipated. In part, this was due to changing characteristics in the wheat straw used for
16 composting. As a result, Ostrom's mushroom production declined. Ostrom was very concerned
17 about losing its established customer base due to an inability to produce enough mushrooms. To
18 address this concern, Ostrom began producing more compost than it was using at its Lacey farm.
19 It sold this excess, unused compost to other mushroom growers in exchange for the opportunity
20 to purchase their mushrooms for resell to Ostrom's own customers. Ostrom also used some of
21

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

3 XIII.

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

13 XIV.

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

1 XV.

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

6 XVI.

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

1 XVII.

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

7
8 XVIII.

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

11 XIX.

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

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

14 Conclusions of Law

15 I.

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

19 II.

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

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

4 III.

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

11 A. Clean Air Act and Agricultural Exemption

12 IV.

13 The Washington Clean Air Act, Chapter 70.94 RCW, sets up a regulatory scheme to
14 protect air quality in Washington State. As part of that system, the Legislature wanted to ensure
15

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

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

6 V.

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

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

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

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

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

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

PCHB NO. 04-105, 04-140

(11)

1 VI.

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

9 VII.

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

16 VIII.

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

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

8 IX.

9 A more complex question, however, is whether selling the fresh compost⁴ for use by
10 other mushroom growers on other mushroom farms changes the nature of the activity such that
11 the production of compost is no longer agricultural in nature. The Board concludes that it does.

12 ~~The production of compost, in and of itself, is not an agricultural activity. It is the close tie~~
13 ~~between the creation of the compost and the use of the compost in growing mushrooms on the~~
14 ~~same site that makes the creation of the compost agricultural. *Vicwood*, at 885-886. The~~
15 ~~production of compost at the Lacey farm, for use at the Lacey farm, ensures that the Lacey site~~
16 ~~will continue to be used for farming. Creating compost for use on site, therefore, fits within the~~
17 ~~purposes of the Clean Air Act exemption. Selling the compost for use in growing mushrooms~~

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

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

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

4 X.

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

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

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

17
18
19 does not mean that the sale of manure is its primary activity such that it is no longer engaged in the agricultural
activity of dairy farming.

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

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

PCHB NO. 04-105, 04-140

(14)

1 B. Right to Farm Act

2 XI.

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

6 XII.

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

12 XIII.

13 Back's Law Dictionary (4th ed. rev., 1968) defines "lawsuit" as:

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

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

19 C. Notice of Construction Rules

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21
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

PCHB NO. 04-105, 04-140

(15)

1 XIV.

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

5 XV.

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

14 XVI.

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

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

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

12 XVII.

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

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

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

7 XVIII.

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

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

1 XIX.

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

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

15 XX.

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

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

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

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

PCHB NO. 04-105, 04-140

(19)

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

10 XXI.

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

19
20
21 case reveals the gray area between *de minimis* emissions that are exempt from the NOC requirement under the Clean
Air Act and agricultural odors that cause substantial adverse health impacts.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

PCHB NO. 04-105, 04-140

(20)

XXII.

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

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

1 XXIII.

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

9 XXIV.

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

1 D. Validity of NOV 2172

2 XXV.

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

10 E. Validity of NOV 2198

11 XXVI.

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

1 F. Reasonableness of the penalties

2 XXVII.

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

7 XXVIII.

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

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

1 XXIX.

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

10 XXX.

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

12 From the foregoing, the Board issues this:

13 ORDER

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

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

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

1 ORCAA may also require a Notice of Construction if Ostrom intends to
2 continue producing compost for use on off site mushroom farms.
3 b. Prior to making the type of changes that would normally trigger the
4 submission of a notice of construction, Ostrom must submit information to
5 ORCAA of the type normally submitted in a notice of construction
6 application, along with the appropriate fee. This information can be utilized
7 by ORCAA to determine whether Ostrom qualifies for the RCW 70.94.640
8 conditional exemption.

9 DATED the 9th day of September, 2005.

10 **POLLUTION CONTROL HEARINGS BOARD**

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

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

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

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

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