

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

THE OSTROM COMPANY, INC.,

Appellant,

v.

OLYMPIC REGION CLEAN AIR
AGENCY,

Respondent.

PCHB NO. 04-105

PCHB NO. 04-140

ORDER GRANTING SUMMARY
JUDGMENT

This matter comes before the Pollution Control Hearings Board (Board) on a Motion to Dismiss filed by Appellant The Ostrom Company, Inc. (Ostrom). Ostrom is challenging three orders issued to it by the Olympic Region Clean Air Agency (ORCAA), and is asking the Board to reverse these orders on summary judgment.

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. Mark M. Myers, with Williams, Kastner & Gibbs, represented Ostrom. Fred D. Gentry, with Bean & Gentry, represented ORCAA.

In rendering its decision, the Board considered the following submittals:

1. Ostrom's Notice of Appeal for PCHB Nos. 105 and 140;
2. Ostrom's Dispositive Motion with attached Appendices 1 through 5;
3. Declaration of William Street Sr. in Support of Ostrom's Motion;

ORDER GRANTING
SUMMARY JUDGMENT
PCHB NO. 04-105, 04-140

4. ORCAA's Memorandum in Opposition to Ostrom's Dispositive Motion;
5. Affidavit of Fred D. Gentry with attached exhibits 1 through 12; and,
6. Ostrom's Reply Memorandum in Support of its Dispositive Motion.

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

FACTUAL BACKGROUND

Ostrom Company operates a mushroom farm in Thurston County. Ostrom has grown mushrooms in this location since 1967. In 1976 or 1977, land neighboring the farm was being developed for residential purposes. Ostrom purchased a 60-acre parcel adjacent to their farm, kept the 20 acres closest to the farm as a buffer, and sold the remainder, which has since been developed for homes. Declaration of William Street, Sr.

Ostrom grows mushrooms. As part of the mushroom growing process, it produces compost in which the mushrooms are grown. Ostrom also sells the compost to others. The amount of compost it sells has been increasing. Affidavit of Gentry, Exhibits 8 and 10.

Between April 2003 and April 2004, ORCAA received 28 odor complaints concerning Ostrom. In response to these complaints, and based upon their own investigation, ORCAA issued three orders to Ostrom. The orders address odor violations that arise out of Ostrom's composting activities, and assess a total of \$10,000 in civil penalties for these alleged violations. ORCAA also assessed an additional \$1,600 for moving forward with construction of certain composting facilities without compliance with ORCAA's Notice of Construction rules. Ostrom appealed all of the orders to this Board. Affidavit of Gentry, Exhibits 1 through 7.

1 Ostrom has moved for summary judgment on all of the issues in these consolidated cases,
2 and asks the Board to vacate all of the orders under appeal. The Board concludes that this
3 summary judgment motion can be addressed by answering the following two questions: 1) Is
4 Ostrom protected by the provisions of the Washington Clean Air Act, in particular RCW
5 70.94.640 pertaining to odors from agricultural activities, and 2) Is Ostrom exempt from
6 ORCAA's Notice of Construction Rules under the exemption for "primary agricultural
7 production activities?" The Board concludes, as a matter of law and based on undisputed facts,
8 that the answer to both questions is yes. The Board accordingly grants summary judgment to
9 Ostrom and reverses ORCAA's orders.

10 ANALYSIS

11 A. Summary Judgment Standard

12 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
13 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
14 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
15 moving for summary judgment must show there are no genuine issues of material fact and the
16 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
17 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment
18 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
19 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider
20 the material facts and all reasonable inferences therefrom in the light most favorable to the
21 nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If

1 the moving party is a respondent and meets this initial showing, then the inquiry shifts to the
2 party with the burden of proof at trial. If, at this point, the non-moving party fails to make a
3 showing sufficient to establish the existence of an element essential to that party's case, and on
4 which that party will bear the burden of proof at trial, then the trial court should grant the motion.
5 *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

6 Ostrom presented its motion as a motion to dismiss. However, it is the type of motion
7 envisioned by CR 12, and made applicable here by WAC 371-08-300. If, on a motion for
8 judgment on the pleadings, "matters outside the pleading are presented to and not excluded by
9 the court, the motion shall be treated as one for summary judgment and disposed of as provided
10 in rule 56." CR 12 (c). Accordingly, the analysis will proceed in a manner similar to a motion
11 for summary judgment.

12 B. Clean Air Act and Agricultural Exemption

13 The Washington Clean Air Act, Chapter 70.94 RCW, sets up a regulatory scheme to
14 ensure that air quality in Washington State is protected. As part of that system, however, the
15 legislature wanted to ensure that regulations did not "cause agricultural land to be converted to
16 nonagricultural uses." 1981 c 297 §29. Therefore, the legislature promulgated RCW 70.94.640,
17 which creates an exemption to the requirements of the Clean Air Act for odors caused by
18 agricultural activities so long as they are consistent with good agricultural practices, and unless
19 they have a substantial adverse effect on public health.

20 RCW 70.94.640 (1), (2) and (3) create additional procedural steps that must be taken by
21 an air authority prior to issuing a notice of violation pertaining to odors caused by agricultural

1 activity. Subsection (1) requires the agency to consult with a third party expert to determine
2 whether an agricultural activity is consistent with good agricultural practices¹ prior to issuing a
3 notice of violation. Subsection (2) and (3) impose additional proof requirements on the agency
4 when such a notice has been issued and is challenged. RCW 70.94.640(2) and (3) provide:

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

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

13 ORCAA does not contend that Ostrom's alleged odor violations will have a substantial
14 adverse effect on public health, or that ORCAA has established that Ostrom's activities are
15 inconsistent with good agricultural practices. Rather, it argues that the partial exemption

16 contained in this section is not available to Ostrom for two reasons. First, it contends that the
17 creation of compost is not an agricultural activity. Second, it contends that even if the
18 composting is an agricultural activity, Ostrom lost the protection of this section by selling some
19 of its land for residential development. The Board rejects both of these arguments.

20 "Agricultural activity" is defined for purposes of this section of the Clean Air Act as "the
21 growing, raising, or production of horticultural or viticultural crops, berries, poultry, livestock,
grain, mint, hay, and dairy products." RCW 70.94.640(5)(a). A "mushroom" is "a . . .fungi."

¹ 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 similarnature in the local area."

1 Webster's Third International Dictionary, at 1490 (1966). A "fungi" is "a division or other
2 major group of lower plants." Id. at 922. A "crop" is a "plant or animal or plant or animal
3 product that can be grown and harvested extensively for profit or subsistence." Id. at 540.
4 "Horticultural" means "produced under cultivation." Id. at 1093. Putting all of these definitions
5 together, the Board concludes that mushrooms are a horticultural crop, and therefore that the
6 growing of mushrooms is an agricultural activity. Similarly, the related production of compost,
7 which is used in the "growing, raising, or production" of mushrooms, meets the statutory
8 definition of "agricultural activity."

9 ORCAA argues that because some of the compost is sold, production of the compost is
10 no longer related to the growing or production of a crop, and hence is no longer an agricultural
11 activity. To conclude that because surplus compost is sold, it changes the essential nature of
12 Ostrom's activities from agricultural to something else, does not seem consistent with the
13 purpose of the exemption for agricultural activities in the Clean Air Act.² The Washington Court
14 of Appeals observed in a recent case involving a nuisance lawsuit against Ostrom under the
15 Right to Farm Act, "mushrooms cannot grow without the compost and, therefore, the compost
16 activities cannot be separated from the mushroom growing." *Vicwood Meridian Partnership v.*
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20 ² The fact that Ostrom sells a by-product of mushroom growing (compost) may be distinguishable from the situation
21 where compost is produced solely for sale. The record before the Board, however, does not support the conclusion
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1 *Skagit Sand and Gravel*, 123 Wn. App. 877, 885-86, 98 P.3rd 1277 (2004).³ The purpose of the
2 exemption in the Clean Air Act for agricultural activities is to prevent agricultural land from
3 being converted to non-agricultural land because of government regulation. If Ostrom cannot
4 produce compost, it cannot grow mushrooms. If Ostrom cannot grow mushrooms, its continued
5 use of the land for agricultural purposes is put in jeopardy. The Board concludes that Ostrom's
6 production of compost is an "agricultural activity" and therefore subject to the protections
7 contained in RCW 70.94.640 for these activities.

8 ORCAA also argues that Ostrom lost the protection afforded to an "agricultural activity"
9 because it sold a portion of its land for residential purposes. Ostrom and ORCAA's rendition of
10 the facts related to the land sale do not appear to differ. In 1976 or 1977, land neighboring the
11 farm was being developed for residential purposes. Ostrom purchased a 60-acre parcel adjacent
12 ~~to its farm, kept the 20 acres closest to the farm as a buffer, and sold the remainder in 1977.~~

13 Ostrom argues that it only sold land that had not initially been part of its farm, and that it bought
14 the land for the purpose of creating a buffer against residential development. ORCAA does not
15 dispute these facts. However, ORCAA argues that, whatever the motivation, Ostrom did sell a
16 contiguous piece of land, and therefore is no longer entitled to the "agricultural activity"
17 exemption.

18 As a technical matter, the Board is not persuaded by ORCAA's argument. It does not
19 appear likely, based on the timing of the resale of the 40 acres, that the 60-acre parcel, as
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21 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), Ch. 7.48.300-310 RCW.

1 purchased, was ever used for Ostrom's agricultural activities. Nor does ORCAA offer any
2 evidence to this effect. Thus, the purchased parcel never became part of a contiguous piece of
3 "agricultural land," and therefore the sale of it could not be considered for purposes of RCW
4 70.94.640(4).

5 At a more fundamental level, the Board is persuaded by Ostrom's explanation of the
6 reasons why the purchase and sale took place. The fact that the 60 acres was purchased in 1976
7 or 1977, and that all but the 20 acres closest to the existing Ostrom farm was resold almost
8 immediately, lends credence to Ostrom's explanation of the purchase and resale. Ostrom was
9 attempting to buffer itself against the impacts of encroaching urbanization. Its efforts to do so
10 should not result in the loss of the exemption created by the legislature for the identical purpose.

11 Ostrom is entitled to the protections afforded agricultural activities under RCW
12 70.94.640. RCW 70.94.640(1) and (2) each provide specific requirements that must be followed
13 when issuing regulatory orders based on odors from agricultural lands. These are (1) consulting
14 with a third party expert to determine whether an agricultural activity is consistent with good
15 agricultural practices, and (2) including a statement as to why the activity is inconsistent with
16 good agricultural practices, or a statement that the odors have substantial adverse effect on public
17 health. ORCAA did not comply with either of these requirements in this case. Further, because
18 ORCAA does not allege, as a factual matter, that the odors from the composting activity will
19 have a substantial adverse effect on public health, or that Ostrom's activities are inconsistent
20 with good agricultural practices, Ostrom is entitled to summary judgment on the notice of
21 violation and penalties associated with alleged odor violations.

1 In light of this ruling, it is not necessary to address the parties' arguments related to the
2 applicability of RFTA as an alternate defense to the same notice and penalty assessment.

3 C. Notice of Construction Rules

4 Notice of Violation (NOV) 2198, a Regulatory Order based thereon, and a civil penalty
5 assessment in the amount of \$1,600, were issued to Ostrom related to compliance with
6 ORCAA's Notice of Construction rules. Affidavit of Gentry, Exs. 4 – 7. ORCAA's Regulation
7 1 § 7.01(a) requires a notice of construction application and prior approval by the agency before
8 constructing, installing, establishing, or modifying stationary sources. However, prior approval
9 is not required for "primary agricultural production activities including soil preparation, planting,
10 fertilizing, weed and pest control, and harvesting." ORCAA Regulation 1 § 7.01(d)(51). Ostrom
11 argues that based on §7.01(d)(51), no notice of construction was required, no regulatory order
12 can be issued, and no violation occurred for which a penalty can be assessed.

13 ORCAA offers three arguments in response to Ostrom's defense. ORCAA's first
14 argument is that the production of compost is not an agricultural activity. This argument has
15 already been addressed and rejected by the Board in its discussion of the exemption provided for
16 agricultural activities in RCW 70.94.640.⁴

17 Second, ORCAA argues that Regulation 1 § 7.01 (d)(51), the exemption for primary
18 agricultural activities, had not been adopted by ORCAA at the time of the construction.
19 According to ORCAA, this exemption did not go into effect until October 6, 2003. The Board is
20

21 ⁴ Regulation 1 § 7.01(d)(51) expressly includes soil preparation as a primary agricultural activity. Compost is utilized
in the preparation of soil for mushroom growing.

1 not persuaded by this argument. The Board notes that the Notice of Violation and Notice of
2 Civil Penalty issued by ORCAA state the date of the violation as May 21, 2004. See Affidavit of
3 Gentry, Exhibits 4 and 5. This date is after October 6, 2003, the effective date of the exemption.
4 Further, the purpose of a civil penalty is to change conduct and achieve future compliance.
5 *Ballard Construction Co, Inc., v. Puget Sound Air Pollution Control Agency*, PCHB No. 87-37
6 (1988). Imposing a civil penalty for conduct, which, if it occurred today, would not be a
7 violation and hence would not need to be changed, is not consistent with this purpose.

8 Third, ORCAA apparently argues that because the amount of compost being produced
9 has increased, the odor from the composting constitutes a new source of air pollution which,
10 pursuant to WAC 173-460-030(1)(b)(i)(D), can be the basis to require a notice of construction.
11 One problem with this argument is that ORCAA's Regulation 1 Article 7, entitled "New Source
12 Review" applies to new sources of air pollution as well as modification of old sources. § 7.01(a)
13 states that the notice of construction requirements apply to "(1) Construction, installation, or
14 establishment of any stationary source." The exemption contained in § 7.01(d)(51) for "primary
15 agricultural production activities including soil preparation," is an express exemption from the
16 new source requirements. A second problem is that ORCAA did not cite Ch. 173-460, or
17 indicate that it was issuing its notice of violation based on this authority. Thus, Ostrom had no
18 notice that ORCAA was basing its assessment on violations of WAC 173-460-030(1)(b)(i)(D).

19 The Board concludes that Ostrom was not required to comply with ORCAA Regulation 1
20 § 7.01 because of the exemption contained in §7.01(c)(51) for agricultural activities, and
21

1 therefore grants Ostrom summary judgment on the issues related to NOV 2198, and the
2 associated regulatory order and \$1,600 penalty assessment.

3 Based on the foregoing analysis, summary judgment for Ostrom is appropriate. Now,
4 therefore the Board enters the following:

5 ORDER

6 Ostrom's Motion for Summary Judgment is GRANTED. Notices of Civil Penalty
7 Assessment related to NOV 2172 (dated July 7, 2004) and NOV 2198 (dated October 4, 2004),
8 and Regulatory Order dated June 29, 2004, issued by ORCAA to Ostrom, are reversed.

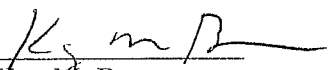
9 Done this 18th day of March, 2005.

10 POLLUTION CONTROL HEARINGS BOARD

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12 
WILLIAM H. LYNCH, Chair

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14 
BILL CLARKE, Member

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16 
DAVID W. DANNER, Member

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18 
19 Kay M. Brown
Administrative Appeals Judge, Presiding



File

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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

March 18, 2005

BY FAX AND REGULAR MAIL

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

Fred Gentry
Attorney at Law
PO Box 2317
Olympia WA 98507

RECEIVED

MAR 21 2005

ORCAA

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

Dear Parties:

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

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

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

Sincerely yours,

Kay Brown
Administrative Appeals Judge, Presiding

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

CERTIFICATION

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

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

DATED March 18, 2005, at Lacey, WA.



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15 agricultural practices, and (2) including a statement as to why the activity is inconsistent with
16 good agricultural practices, or a statement that the odors have substantial adverse effect on public
17 health. ORCAA did not comply with either of these requirements in this case. Further, because
18 ORCAA does not allege, as a factual matter, that the odors from the composting activity will
19 have a substantial adverse effect on public health, or that Ostrom's activities are inconsistent
20 with good agricultural practices, Ostrom is entitled to summary judgment on the notice of
21 violation and penalties associated with alleged odor violations.

1 In light of this ruling, it is not necessary to address the parties' arguments related to the
2 applicability of RFTA as an alternate defense to the same notice and penalty assessment.

3 C. Notice of Construction Rules

4 Notice of Violation (NOV) 2198, a Regulatory Order based thereon, and a civil penalty
5 assessment in the amount of \$1,600, were issued to Ostrom related to compliance with
6 ORCAA's Notice of Construction rules. Affidavit of Gentry, Exs. 4 – 7. ORCAA's Regulation
7 1 § 7.01(a) requires a notice of construction application and prior approval by the agency before
8 constructing, installing, establishing, or modifying stationary sources. However, prior approval
9 is not required for "primary agricultural production activities including soil preparation, planting,
10 fertilizing, weed and pest control, and harvesting." ORCAA Regulation 1 § 7.01(d)(51). Ostrom
11 argues that based on §7.01(d)(51), no notice of construction was required, no regulatory order
12 can be issued, and no violation occurred for which a penalty can be assessed.

13 ORCAA offers three arguments in response to Ostrom's defense. ORCAA's first
14 argument is that the production of compost is not an agricultural activity. This argument has
15 already been addressed and rejected by the Board in its discussion of the exemption provided for
16 agricultural activities in RCW 70.94.640.⁴

17 Second, ORCAA argues that Regulation 1 § 7.01 (d)(51), the exemption for primary
18 agricultural activities, had not been adopted by ORCAA at the time of the construction.
19 According to ORCAA, this exemption did not go into effect until October 6, 2003. The Board is

20 _____
21 ⁴ Regulation 1 § 7.01(d)(51) expressly includes soil preparation as a primary agricultural activity. Compost is utilized
in the preparation of soil for mushroom growing.

1 not persuaded by this argument. The Board notes that the Notice of Violation and Notice of
2 Civil Penalty issued by ORCAA state the date of the violation as May 21, 2004. See Affidavit of
3 Gentry, Exhibits 4 and 5. This date is after October 6, 2003, the effective date of the exemption.
4 Further, the purpose of a civil penalty is to change conduct and achieve future compliance.
5 *Ballard Construction Co, Inc., v. Puget Sound Air Pollution Control Agency*, PCHB No. 87-37
6 (1988). Imposing a civil penalty for conduct, which, if it occurred today, would not be a
7 violation and hence would not need to be changed, is not consistent with this purpose.

8 Third, ORCAA apparently argues that because the amount of compost being produced
9 has increased, the odor from the composting constitutes a new source of air pollution which,
10 pursuant to WAC 173-460-030(1)(b)(i)(D), can be the basis to require a notice of construction.
11 One problem with this argument is that ORCAA's Regulation 1 Article 7, entitled "New Source
12 Review" applies to new sources of air pollution as well as modification of old sources. § 7.01(a)
13 states that the notice of construction requirements apply to "(1) Construction, installation, or
14 establishment of any stationary source." The exemption contained in § 7.01(d)(51) for "primary
15 agricultural production activities including soil preparation," is an express exemption from the
16 new source requirements. A second problem is that ORCAA did not cite Ch. 173-460, or
17 indicate that it was issuing its notice of violation based on this authority. Thus, Ostrom had no
18 notice that ORCAA was basing its assessment on violations of WAC 173-460-030(1)(b)(i)(D).

19 The Board concludes that Ostrom was not required to comply with ORCAA Regulation 1
20 § 7.01 because of the exemption contained in §7.01(c)(51) for agricultural activities, and
21

1 therefore grants Ostrom summary judgment on the issues related to NOV 2198, and the
2 associated regulatory order and \$1,600 penalty assessment.

3 Based on the foregoing analysis, summary judgment for Ostrom is appropriate. Now,
4 therefore the Board enters the following:

5 ORDER

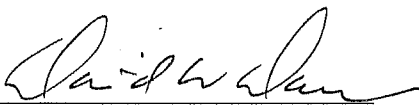
6 Ostrom's Motion for Summary Judgment is GRANTED. Notices of Civil Penalty
7 Assessment related to NOV 2172 (dated July 7, 2004) and NOV 2198 (dated October 4, 2004),
8 and Regulatory Order dated June 29, 2004, issued by ORCAA to Ostrom, are reversed.

9 Done this 18th day of March, 2005.

10 POLLUTION CONTROL HEARINGS BOARD

11 
12 WILLIAM H. LYNCH, Chair

13 
14 BILL CLARKE, Member

15 
16 DAVID W. DANNER, Member

17
18 
19 Kay M. Brown
20 Administrative Appeals Judge, Presiding
21

