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A Human Rights Assessment of Lincoln County's Proposed Herbicide Sprays on Seal Rock and Cross Streets

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and

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Matter of Concern:

Human health impacts of Lincoln County's proposed herbicide applications on road shoulders of Seal Rock and Cross Streets

Date:

June 18, 2009

Copies:

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Purpose of This Report

The purpose of this Report is to provide the Lincoln County Public Works Department and Concerned Citizens for Clean Air a list of human rights norms of concern regarding Lincoln County's proposed herbicide sprays on Seal Rock and Cross Streets in Seal Rock, Oregon, to outline potential liabilities of the County's proposed spray and to describe measures the County could take to minimize those liabilities.

Facts

1. The Vegetation Management Program in the Road Maintenance Department of the Lincoln County Public Works Department is the agency charged with responsibility for control of vegetation on the shoulders of Lincoln County roadways. The Program uses a variety of methods for vegetation control, including mechanical methods, brush mowing, manual removal and chemical herbicide control.

Chemical herbicides have not been used on Seal Rock and Cross Streets in the past several years, but the Public Works Department is proposing application of Telar DF and Garlon 3A herbicides in the summer of 2009 for management of horsetail, alder and blackberries to control the risk of their damaging pavement edges.

The proposed spray area includes sections of road shoulder on both sides of approximately 1.25 miles of roadway in Seal Rock, Oregon, comprising the portions of Seal Rock and Cross Streets paved by the county in 2006, plus approximately 0.25 mile of Seal Rock Street paved prior to 2006.

2. Herbicides to be used include Dupont Telar DF and Dow Agrosiences Garlon 3A.

Telar DF

75% of the Telar DF formulation consists of the active ingredient, Chlorsulfuron. 25% of the ingredients are undisclosed.

Instructions for use on the Telar DF label include the statements:

"Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application."

...

“Do not use on lawns, walks, driveways, tennis courts, or similar areas.”

...

“AVOID APPLICATIONS DURING GUSTY OR WINDLESS CONDITIONS [emphasis in original]. Note: Local terrain can influence wind patterns. Every applicator should be familiar with local wind patterns and how they effect [sic] spray drift.”

Garlon 3A

44.4% of the Garlon 3A formulation consists of the active ingredient, the amine form of triclopyr. 55.6% of the ingredients are undisclosed.¹ Instructions for use on the Garlon 3A label include the statements:

“Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application.”

...

“...do not allow entry into areas until sprays have dried, unless applicator and other handler PPE [personal protective equipment] is worn.”

Required Personal Protective Equipment includes

- coveralls
- shoes plus socks
- protective eyewear
- chemical-resistant gloves (≥ 14 mils) such as butyl rubber, natural rubber, neoprene rubber or nitrile rubber

...

“Make applications only when there is little or no hazard from spray drift. Small quantities of spray, which may not be visible, may seriously injure susceptible plants...”

...

“Sensitive areas: The pesticide should only be applied when the potential for drift to adjacent sensitive areas (e.g., residential areas...) is minimal.”

...

“It is impossible to eliminate all risks associated with use of this product.”

3. Community concerns

Concerned Citizens for Clean Air is a non-profit citizens' group located on the central Oregon coast, chartered with the state of Oregon since 2005.

As a result of meetings with CCCA the Oregon Department of Transportation designated a 25 mile stretch of coastal Highway 101 as a no-spray pilot project to study the effects and costs of significantly reduced chemical herbicide use. Seal Rock Street and Cross Street both immediately abut this section of Highway 101 designated as a no-spray area.

This Seal Rock neighborhood has a history of non-herbicide vegetation management practice.

- In 2004 Central Lincoln People's Utility District began using mechanical and hand weeding at the substation on Cross Street at the request of residents who had experienced adverse health effects from herbicide applications at the substation.
- Postal patrons requested in 2005 that the owner of the Seal Rock post office building refrain from using herbicides for weed control on post office property due to concerns about human health effects and access by disabled patrons who were unable to tolerate the chemical herbicides.
- Spraying of telephone equipment boxes near the intersection of Seal Rock and Cross Streets was discontinued in 2007 when neighborhood residents expressed concerns to Pioneer Telephone managers after observing drift from a contractor's spray truck in an area where people frequently walk.

Neighborhood residents, particularly those with pre-existing health conditions such as asthma (2), pesticide intolerance (7), cancer (1), stroke (1) and cardiovascular conditions (4), expressed concern about the risk of adverse health effects, both acute and long term. Of 108 residents approached in spring 2009, 106 signed a petition requesting that no chemical herbicides be applied on neighborhood roadways.

Neighbors have expressed concern about proximity of residential structures to the road shoulders; estimates are that at least five homes on Cross Street, between Seal Rock and Osprey Streets, are situated less than 30 feet from the pavement edge.

Residents regularly walk along the shoulders of Seal Rock and Cross Streets, often with pets. School bus routes follow Seal Rock and Cross Streets.

CCCA is asking that Lincoln County avoid use of chemical herbicides on Seal Rock and Cross Streets.

Issues

CCCA is concerned about

1. adverse acute human health effects resulting from neighborhood residents' exposures to roadshoulder herbicides, drift, residues and subsequent vaporization,
2. potential long-term health effects that may result from acute or prolonged exposures to herbicides, drift, residues and subsequent vaporization,
3. non-compliance with herbicide label requirements, and
4. inadequate compliance with human rights standards.

Human Rights Norms of Concern

Environmental concerns often directly impact human rights, and part of the purpose of this Report is to help the Lincoln County Public Works Department and CCCA appreciate the human rights dimensions of the proposed roadside sprays. As Daniel Taillant, Director of the Argentina-based Center for Human Rights and the Environment explains, “Everything and anything that influences the environment directly influences our human condition, and a violation of the environment is a violation of our human rights.”²

Human rights standards are said to apply to individuals, not just to communities or majorities. This means that if even one or two persons’ rights are violated, then human rights violations have occurred.³ Some of the following rights are grounded in legal authority – ADA rights, rights in the Nuremberg Code, protections against chemical trespass, etc. But all of these rights, including those without grounding in domestic law, are recognized as grounded in moral authority.

Human rights standards are normally recognized as trumping other policy considerations; i.e. “right-holders are authorized to make special claims that ordinarily ‘trump’ utility, social policy, and other moral or political grounds for action.”⁴ Additionally, human rights norms are considered to represent a moral minimum for behavior of governments, a moral floor beneath which state behaviors must not go.⁵

Listed below are six specific human rights norms of concern with direct relevance to Lincoln County’s proposed roadside sprays on Seal Rock and Cross Streets, and 17 more rights that may have relevance. (This list does not include rights that may be protected by the US or Oregon constitutions or by state statutes.) These norms can be found articulated in several human rights declarations, conventions, charters and other international and domestic instruments, including:

- *Universal Declaration of Human Rights (UDHR)*⁶
- *International Covenant on Civil and Political Rights (CCPR)*⁷
- *International Covenant on Economic, Social and Cultural Rights (CESCR)*⁸
- *Convention on the Rights of the Child (1990) (CRC)*⁹
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*¹⁰
- *Rio Declaration on Environment and Development*
- *The World Health Organization Declaration of Alma Ata*¹¹
- *The Nuremberg Code*¹²

The first three documents above, *UDHR*, *CCPR* and *CESCR*, are usually

considered primary and are often referred to as the international bill of human rights, so in the list below they are given a certain pride of place when identifying documents in which specific rights are articulated.¹³

1. Right to life, liberty and security of person.

Articulated in

UDHR Article 3

“Everyone has the right to life, liberty and security of person.”

CCPR Article 9

“Everyone has the right to liberty and security of person.”

UDHR Article 13

“(1) Everyone has the right to freedom of movement and residence within the borders of each State.”

What this right entails

This is the right to be safe and secure in one’s person.

The right to liberty entails the freedom to move about within the boundaries of one’s state.

Reasons for concern

- Reports of adverse physical health effects related to road shoulder herbicide exposures.
- Proximity of residential structures to spray areas
- Herbicide label requirements that these products not be applied “in a way that will contact workers or other persons, either directly or through drift.”
- Herbicide label requirements that “only protected handlers may be in the area during application.”
- Adverse health effects attributable to exposures to herbicides, drift and residues include respiratory, cardiovascular, dermal and neurologic effects, as well as miscarriages and birth anomalies, particularly for pregnancies conceived or carried during periods of exposure.
- If any citizens consider their freedom of movement to be restricted due to their need to avoid roadside herbicide applications, particularly if those restrictions result in documentable economic loss, that would be a concern.

2. Right to privacy and home

Articulated in

UDHR Article 12

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence....”

CCPR Article 17

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”

What this right entails

This entails the right to be secure in one's home, to be able to enjoy the use of one's property and to not have one's property devalued as a result of state actions.

"The European Human Rights Court noted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."¹⁴

This means that adverse health effects are not the only kind of adverse effects that violate the right to one's property and home.

Reasons for concern

- Proximity of residential structures to spray areas
- Discomfort experienced at home, or compromised ability to enjoy one's home and property due to exposure to roadside herbicides or herbicide drift or residues, even without adverse health effects.
- Potential adverse physical health effects related to roadside herbicides and suffered in the home.
- Herbicide label requirements that these products not be applied "in a way that will contact workers or other persons, either directly or through drift."
- Herbicide label requirements that "only protected handlers may be in the area during application."

3. The family's right to protection

Articulated in

CCPR Article 23

"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

CESCR Article 10

"The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

What this right entails

This means that the health, strength, well-being and social integrity of families must be protected and supported; if these become compromised as a result of roadside herbicide applications, drift or residues then this right has been violated.

Reasons for concern

- Adverse physical or economic effects on families attributable to roadside herbicide applications, drift or residues.
- Proximity of residential structures to spray areas
- Herbicide label requirements that these products not be applied "in a way that will contact workers or other persons, either directly or through drift."
- Herbicide label requirements that "only protected handlers may be in the area during application."

4. Right to property

Articulated in

UDHR Article 17

“No one shall be arbitrarily deprived of his property.”

What this right entails

See number 2 above regarding the right to privacy and home.

Reasons for concern

- Adverse physical or economic impacts on property or property values attributable to roadside herbicide applications, drift or residues.
- Proximity of residential structures to spray areas
- Herbicide label requirements that these products not be applied “in a way that will contact workers or other persons, either directly or through drift.”
- Herbicide label requirements that “only protected handlers may be in the area during application.”

5. Motherhood and childhood’s right to special care

Articulated in

UDHR Article 25

“Motherhood and childhood are entitled to special care and assistance. All children...shall enjoy the same social protection.”

CESCR Article 12 (section 2a)

establishes the obligation of states party to this Covenant to take steps to make “provision for the reduction of the stillbirth-rate and...infant mortality and for the healthy development of the child.”

CRC Article 27

“1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.”

What this right entails

This is the right of children and their mothers to be provided special care, protection and assistance. This means that states have a positive duty to protect children and mothers from anything, including environmental toxics, that may compromise the child’s physical, mental, spiritual or social well-being.

Reasons for concern

- Research indicates that children are at much greater risk than adults because of their increased biological susceptibility to adverse health effects from exposure to herbicides.
- Research indicates that fetuses and pregnant mothers are at risk for adverse effects from exposure to herbicides.
- Proximity of residential structures to spray areas
- Herbicide label requirements that these products not be applied “in a way that will

- contact workers or other persons, either directly or through drift.”
- Herbicide label requirements that “only protected handlers may be in the area during application.”
- If mothers, and mothers’ ability to be good caregivers for their children, are adversely affected by roadside sprays, that would be a concern.

6. Right to freedom from discrimination due to disability

Articulated in

The Americans With Disabilities Act

What this right entails

The US Department of Justice maintains a website with detailed information about ADA requirements¹⁵, but in general this law requires that everyone who has, or is perceived to have, a disability not be discriminated against in any way.

A booklet providing an overview of ADA “requirements for ensuring equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation,” etc. is available on the ADA website.¹⁶

Reasons for concern

- Discrimination occurs when any sub-group is disproportionately impacted by a policy or practice and no sufficient accommodations are made for them. Individuals with asthma or other respiratory conditions, chemically sensitive persons, pesticide sensitive persons, people with various allergies, immunocompromised people, the elderly, the very young, pregnant women,¹⁷ any place-bound persons (in hospitals or elder care facilities near roadways, for example) to name a few vulnerable subsets of residents, may be reasonably expected to experience more serious adverse effects from herbicide exposures than the general population.
- Have reasonable accommodations been developed for persons in those groups to help them avoid being unfairly impacted by the sprays?

The following rights may also have direct relevance to the proposed spray.

7. Duty to protect the child (i.e., persons under age 18):
CRC Article 19

8. Right of the child to the highest standard of health
CRC Article 24

9. Right of everyone to the highest standard of health
CESCR Article 12

10. State’s duty to provide for the health of citizens
The Declaration of Alma-Ata, Article V

11. State’s duty to provide for the health of citizens demands coordinated efforts of all sectors
Declaration of Alma-Ata Article VII

12. Right to a healthy environment
Aarhus Convention Preamble
13. Duty to encourage school attendance
CRC Article 28, 1(e)
14. Right to education
CESCR Article 13 (section 1)
15. Right to work
CESCR Article 6
16. Right to safe and healthy working conditions
CESCR Article 7
17. Right to effective remedy
CCPR Article 2(3)a
18. Right to compensation
U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power.
19. Right to know
Aarhus Convention Article 1
20. Right to participation in decision-making in environmental issues
Rio Declaration Principle 10
Aarhus Convention Article 1
21. Right to equal protection of the law
CCPR Article 26
22. Right of experimental subjects to free and informed consent
Nuremberg Code Item 1
23. Right of experimental subjects to be protected from injury, disability or death
Nuremberg Code Item 7

Potential Liabilities

Listed below are some potential liabilities the Lincoln County Public Works Department may incur if it were to implement use of chemical herbicides on Seal Rock and Cross Streets.

1. The potential consequences of government agencies ignoring human rights norms are not insignificant. Loss of public confidence in agencies, their Directors and their processes is not a small thing, even from the perspective of the agency, and even when viewed through the lens of basic practicality. When human rights standards are compromised the consequences can be monumental, costly and long lasting.
2. If the Vegetation Management Program made no move to minimize or eliminate herbicide exposures in a neighborhood where almost all residents have requested it, the Program would risk loss of public support, would risk negative publicity, and would risk public recognition that, despite label requirements, despite awareness of links between herbicide exposure and health impacts, and despite awareness of human rights concerns, management did not modify its herbicide practices.
3. Potential investigation and/or enforcement action by the Oregon Department of Agriculture for failure to adequately comply with pesticide label requirements.
4. Potentially costly legal action should anyone become ill or injured, or should anyone feel their rights have been violated.

Practical Measures for Reducing Liabilities

1. The most important first step to reduce liabilities would be for the Public Works Department to continue good faith discussions with Concerned Citizens for Clean Air and to postpone spraying until satisfactory agreements can be reached in those discussions. These discussions could include review of vegetation management policy and practices to insure that the policy includes consideration of potential acute and long term human health effects and respect for human rights norms.
2. Rely as much as possible on non-chemical means of vegetation control.
3. If some use of chemical herbicides were to occur:
 - a. Provide notification by multiple means – signage, email lists, websites, phone calls 24-48 hours in advance of spraying, etc. – especially to those individuals susceptible to or concerned about adverse health impacts.
 - b. Include in all public notification announcements a full disclosure of precautions included on the product labels. Precautions on the Telar DF and Garlon 3A labels include
 - i. “Do not apply this product in a way that will contact workers or other persons, either directly or through drift.”
 - ii. “Only protected handlers may be in the area during application.”
 - iii. “Do not use on lawns, walks, driveways, tennis courts, or similar areas.”
 - iv. “...do not allow entry into areas until sprays have dried, unless applicator and other handler PPE [personal protective equipment] is worn.”
 - v. Required personal protective equipment includes
 1. coveralls
 2. shoes plus socks
 3. protective eyewear
 4. chemical-resistant gloves (≥ 14 mils) such as butyl rubber, natural rubber, neoprene rubber or nitrile rubber
 - vi. “The pesticide should only be applied when the potential for drift to adjacent sensitive areas (e.g., residential areas...) is minimal.”
 - vii. “It is impossible to eliminate all risks associated with use of this product.”
 - c. Implement reasonable accommodations to insure that children, because of their greater biological vulnerability to pesticide exposures, not be required to endure exposures to the sprays, drift or residues.
 - d. Implement reasonable accommodations to insure that disabled, ill or placebound persons, such as those who are unable to leave their homes, not be required to endure spray exposures if they wish not to.

- e. Provide alternative routes of travel to accommodate those who choose to not expose themselves or their family members to herbicides, drift, residues and subsequent vaporization.

Some residents may require temporary alternative lodging and services to adequately insure that their family avoids exposure to sprays, drift or residues.

- f. Provide evidence of safety.

If the county wishes to claim that Telar DF and Garlon 3A are “safe” when used according to label, it should

- i. Provide examples of large scale, large sample, well designed population studies undertaken by third parties (i.e., not pesticide manufacturers or agriculture/forestry interests) published in the peer reviewed scientific literature that demonstrate no adverse health impacts from exposing residential populations to Telar DF and Garlon 3A.
 - ii. Absent such studies, provide examples of any studies published in the peer reviewed literature that demonstrate no adverse health impacts from exposing residential populations to Telar DF and Garlon 3A.
 - iii. Absent that, provide examples of any studies that show there to be no adverse health impacts from exposing residential populations to Telar DF and Garlon 3A.
- g. Establish a reporting process, perhaps with the County Department of Health or with representatives from the neighborhood, for neighborhood residents to report any adverse health effects that may occur.
- h. Arrange oversight by an external observer, agreed to by both Lincoln County Public Works Department and CCCA, to monitor the agreed upon vegetation control methods.
- i. Provide copies of this Report to the Vegetation Management Advisory Committee.

Conclusion

This Report provides the Lincoln County Public Works Department and Concerned Citizens for Clean Air a list of international human rights norms that would be of concern should the Department undertake spraying of chemical herbicides on road shoulders of Seal Rock and Cross Streets. It also outlines the Department's potential liabilities and describes practical measures the Department could take to reduce those liabilities.

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<http://www.peoplesinquiry.co.nz>

The Center for Human Rights and the Environment is headquartered in Córdoba, Argentina. <http://www.cedha.org.ar>

Information about the Inter-American Commission on Human Rights, the Inter-American Court on Human Rights (seated in San José, Costa Rica) and human rights instruments pertinent to American states can be found at <http://www1.umn.edu/humanrts/inter-americansystem.htm>

¹ A 1996 Freedom of Information Act (FOIA) lawsuit, initiated by the Northwest Coalition for Alternatives to Pesticides against the US Environmental Protection Agency, required the EPA to disclose the “inert” ingredients in Garlon 3A. As a result of that court action EPA disclosed that those ingredients were: polyglycol (CAS# is confidential), triethylamine (CAS# 121-44-8), ethanol (CAS# 64-17-5) and ethylenediaminetetracetic acid (EDTA) (CAS# 60-00-4). For further information see <http://www.pesticide.org/LocatingInerts.pdf>

² Picolotti, Romina and Jorge Daniel Taillant, *Linking Human Rights and the Environment*, University of Arizona Press, 2003, p 123 (emphasis in original).

³ “With the exception of the right to self-determination, all the rights in the *Universal Declaration* and the Covenants are the rights of individuals. Enumerations of rights thus typically begin ‘Every human being...,’ ‘Every one has the right...,’ ‘No one shall be...,’ ‘Everyone is entitled....’” Jack Donnelly, Andrew Mellon Professor in the Graduate School of International Studies at the University of Denver, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2002, p23.

⁴ Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2002, p8.

⁵ “Human rights are minimal standards. They are concerned with avoiding the terrible rather than with achieving the best. Their focus is protecting minimally good lives for all people.” James Nickel, “Human Rights” in the *Stanford Encyclopedia of Philosophy*, 2006.

⁶ The *Universal Declaration of Human Rights* was unanimously adopted by the United Nations in 1948.

⁷ Signed by the US in 1977, ratified in 1992 and entered into force in 1992, though with reservations on articles 5-7, 10(2,3), 15(1), 19, 20, 27 and 47, and formal understandings on articles 2(1), 4(1), 7, 9(5), 14(3,6), 26. Ratification means that the provisions of this international instrument, aside from the reservations, do have the force of domestic law in the US.

⁸ Signed by the US in 1977; not ratified.

⁹ Signed by the US in 1995; not ratified. Though the US has not ratified this convention, “One hundred and ninety states have agreed to become parties to the Convention on the Rights of the Child, giving it the distinction of being the most widely ratified treaty in the history of the world.” Lauren, Paul Gordon, *The Evolution of International Human Rights*, University of Pennsylvania Press, Philadelphia, 2d ed, 2003, p 249.

¹⁰ Signed by the US in 1980; not ratified.

¹¹ 1978

¹² Rights enunciated in the 1947 *Nuremberg Code* are for the protection of individuals being studied in research protocols. If the case can be made that a population is being studied as research subjects – e.g., that persons living and working in the spray zone are being studied for health effects resulting from spray exposures – then provisions of the *Nuremberg Code* would apply to individuals in that population.

¹³ Many of the rights listed below have been articulated in several different human rights declarations, conventions or charters, but for simplicity’s sake this Report lists only one or two instruments for each right.

¹⁴ This passage continues: “It found that the determination of whether this violation had occurred in *Lopez-Ostra v. Spain* should be tested by striking a fair balance between the interest of the town’s economic well-being and the applicant’s effective enjoyment of her right to respect for her home and her private and family life. In doing this, the Court applied its “margin of appreciation” doctrine, allowing the State a “certain” discretion in determining the appropriate balance, but finding in this case that the margin of appreciation had been exceeded. It awarded Mrs Lopez-Ostra 4,000,000 pesetas [approximately US\$35,600], plus costs and attorneys’ fees.” Shelton, Dinah, “The Environmental Jurisprudence of International Human Rights Tribunals,” in Picolotti, R and Taillant, JD, 2003, p 15.

¹⁵ <http://www.usdoj.gov/crt/ada/>

¹⁶ <http://www.usdoj.gov/crt/ada/publicat.htm#Anchor-ADA-44867>

¹⁷ In this regard, see provisions in the *Convention on the Elimination of All Forms of Discrimination against Women*.