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## **A Human Rights Assessment of ODA's Proposed Aerial Gypsy Moth Spray in Eugene, Oregon**

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**Matter of Concern:** Oregon Department of Agriculture's proposed aerial application of Foray 48B over urban neighborhoods in Eugene, Oregon

**Date:** March 2, 2009

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## Purpose of This Report

The purpose of this Report is to provide the Oregon Department of Agriculture and the Oregon Toxics Alliance a list of international human rights norms of concern associated with ODA's proposed aerial pesticide application in Eugene, Oregon, to outline ODA's potential liabilities and to describe pathways the Department could take to minimize those liabilities.

## Facts

### 1. ODA's Findings and Goals

The Oregon Department of Agriculture has reported detecting seven gypsy moths (*Lymantria dispar*) in southeast Eugene in 2008. According to ODA

Delimitation trapping in 2008 caught six gypsy moths in four traps.... Another moth (the seventh) was caught approximately 1.5 miles north of this site in a detection trap and is outside of the proposed eradication area. Two moths were also caught in a detection trap about 3.5 miles southwest of the other positive catches. This site is also outside of the proposed eradication area. (*Environmental Assessment: Gypsy Moth Eradication Program, Southeast Eugene, Lane County, January 27, 2009*)

ODA believes these numbers to be representative of a small population. ODA's *Environmental Assessment* states that if a population of gypsy moths were to become established in Oregon it would have "serious economic impacts for some residents and industries in the state."

### 2. Plan

ODA has chosen an eradication strategy rather than a "control," "slow the spread" or "suppression" strategy for this moth population. ODA thus, "in cooperation with USDA, Animal and Plant Health Inspection Service (APHIS), proposes to eradicate a gypsy moth infestation in Lane County, Oregon."

This plan involves three aerial applications of the biological insecticide Foray 48B, a flowable concentrate consisting of 12.65% of the active ingredient and 87.35% "other" ingredients.

The initial application will occur in late April or early May with two subsequent applications 7-14 days apart.

### 3. Spray area

The eradication zone where the three aerial applications will occur consists of 626 acres in the Old Dillard Road area of southeast Eugene. “The exact location is within T18S R3W S16, 17, 20, and 21. The East Fork Amazon Creek runs from the south to north along the western portion of the eradication area.” (*Invitation to Bid*, 2009-08, ORPIN 603-1213-09, February 17, 2009)

According to ODA the area within the spray zone includes “over 1500 residences,” some of which are apartment complexes (“a significant portion of residential property within the spray boundary” (ODA’s *Invitation to Bid*); Eugene Christian School, which includes pre-kindergarten, kindergarten, and grades one through eight; one assisted living facility, Emerald Valley Assisted Living Residence; one church, Calvary Fellowship Church; four city parks which “are popular with locals and are used by the public for walking, playing or family leisure activities (*Invitation to Bid*);” and forty acres in the Amazon Creek headwaters area. Several school bus routes travel through the proposed spray area. Additionally,

Four other schools including Fox Hollow Elementary School, Spencer Butte Middle School, Edgewood Community Elementary School, and Ellis Parker Elementary School, are nearby and to the west or north of the eradication area (*Environmental Assessment*).

Additional homes or businesses in the larger drift zones are not enumerated.

#### 4. The insecticide

Foray 48B is the biological insecticide that will be applied aerially. The Foray 48B label lists the active ingredient, 12.65% of the formulation, as *Bacillus thuringiensis* subspecies *kurstaki*, strain ABTS-351, fermentation solids, spores and insecticidal toxins.

The remaining ingredients, 87.35% of the formulation, are not disclosed.

ODA estimates that approximately 939 gallons will be deployed over the spray area at an elevation of 50-75 feet above vegetation levels (*Invitation to Bid*).

ODA acknowledges that drift may occur in an (undefined) area outside the spray zone, but states that quantities in that drift zone will be “much less than in the eradication area.” The *Environmental Assessment* explains that spray drift “is likely to be affected by conditions such as temperature, humidity, wind direction, wind speed, and terrain.”

#### 5. Community concerns

ODA held a public information meeting in Eugene on the evening of February 19, 2009. Community members in attendance expressed concerns about reported

human health impacts (in data available from New Zealand's experience but not mentioned in ODA's *Environmental Assessment*), about ODA's chosen strategy of eradication rather than control, about lack of information concerning the undisclosed ingredients in the insecticide formulation, about lack of peer-reviewed studies assessing human health impacts of inhalation and dermal exposures to the insecticide's complete formulation, about residents with chronic health conditions such as asthma, chemical sensitivity, etc, and about trapping, ground applications, mechanical controls and other measures for controlling the gypsy moth population.

## Issues

Oregon Toxics Alliance is concerned about documented reports of serious adverse acute health effects resulting from exposure to aerial applications of Foray 48B, spray drift and residues, and potential long-term health effects that may result from acute or prolonged exposures, as well as a number of other impacts on the lives and property of citizens who live in, work in, attend school in, visit or travel through the proposed spray area.

## Human Rights Norms of Concern

Environmental concerns often directly impact human rights, and part of the purpose of this Report is to help ODA and OTA appreciate the human rights dimensions of the proposed aerial spray program. 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."<sup>1</sup>

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.<sup>2</sup> 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."<sup>3</sup> 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.<sup>4</sup>

Listed below are 23 specific human rights norms that may have direct relevance to ODA's proposed aerial spray program. (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)*<sup>5</sup>
- *International Covenant on Civil and Political Rights (CCPR)*<sup>6</sup>
- *International Covenant on Economic, Social and Cultural Rights (CESCR)*<sup>7</sup>
- *Convention on the Rights of the Child (1990) (CRC)*<sup>8</sup>
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*<sup>9</sup>
- *Rio Declaration on Environment and Development*
- The World Health Organization *Declaration of Alma Ata*<sup>10</sup>
- *The Nuremberg Code*<sup>11</sup>

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.<sup>12</sup>

#### 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**

- Documented reports of adverse physical health effects associated with aerial spray exposures.
- Potential adverse health effects attributable to exposures to aerially applied Foray 48B, 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 aerial sprays, drift and residues, particularly if those restrictions result in documentable economic loss, that would be a concern.
- If any citizens consider that threat of injury from spray exposures will require them to move out of the area, particularly if that would 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 is 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.”<sup>13</sup>

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**

- Discomfort experienced at home, or a compromised ability to enjoy one's home and property due to exposure to aerial sprays, drift or residues, even without adverse health effects.
- Potential adverse physical health effects related to aerial sprays, drift or residues suffered while in the home.

## 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 sprays or the spray program then this right has been violated.

#### **Reasons for concern**

- Adverse physical or economic impacts on families attributable to aerial sprays, drift or residues.
- If the health or well being of families, including economic well being, have been adversely affected as a result of the sprays, that would be a concern.

### 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**

- Any adverse physical or economic impacts on property or property values attributable to aerial sprays, drift or residues.
- If individuals, families or businesses were forced to leave or sell their property due to the spray program, that would be a concern.
- If individuals’ or families’ ability to enjoy the use of their property were compromised due to the spray program, that would be a concern.

### 5. Right to work

#### **Articulated in**

*CESCR* Article 6

“The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

#### **What this right entails**

This right refers to the right to work and, by extension, the right to be able to transport oneself to work without being made sick along the way.

#### **Reasons for concern**

- Citizens who become unable to work because of disabilities resulting from exposure to aerial sprays, drift or residues.
- Citizens who are unable to work because their place of work is located inside the spray zone.
- Citizens who may be unable to transport themselves to work due to their need to avoid exposure to aerial sprays, drift or residues.
- Workplaces that have been contaminated by the sprays enough that some workers are unable to work or keep their jobs would be a concern.



## 6. Right to safe and healthy working conditions

### **Articulated in**

#### *CESCR Article 7*

“States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure...[s]afe and healthy working conditions”

### **What this right entails**

This entails the right to a safe and healthy work environment.

### **Reasons for concern**

- Adverse physical effects experienced in the workplace that are attributable to aerial sprays, drift or residues.
- Workplaces becoming less safe for some as a result of contamination by aerial sprays, drift or residues.

## 7. 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 development.

### **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 environmental toxics.
- Research indicates that fetuses and pregnant mothers are at increased risk for adverse effects from exposure to pesticides.
- If mothers, and mothers’ ability to be good caregivers for their children, are adversely affected by aerial sprays, that would be a concern.

## 8. Duty to protect the child (i.e., persons under age 18):

### **Articulated in**

#### *CRC* Article 19

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, [or] maltreatment....”

#### *CESCR* Article ten (section three)

“Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.”<sup>14</sup>

### **What this right entails**

This refers to the child’s right to special protections, and to the state’s positive duty to provide special protections, from infliction of harm, including harm that could result from unavoidable exposures to environmental toxics.

### **Reasons for concern**

- See above.

## 9. Right of the child to the highest standard of health

### **Articulated in**

#### *CRC* Article 24

“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health.”

### **What this right entails**

This is the right of children to live in safe and healthy conditions, including safe and healthy environmental conditions, and not to have to undergo exposure to conditions that adversely affect health.

### **Reasons for concern**

- If a government agency undertakes any activity that puts children at increased risk of adverse health effects, that is a concern.
- Adverse health effects attributable to exposures to sprays, drift or residues can include respiratory, cardiovascular, dermal and neurologic effects, as well as miscarriages and birth anomalies, particularly for pregnancies conceived or carried during periods of exposure.

## 10. Right of everyone to the highest standard of health

### **Articulated in**

#### *CESCR* Article 12

“States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

### **What this right entails**

This is the right to live in conditions conducive to the highest standard of health.

### **Reasons for concern**

- If a government undertakes an activity or program that puts its citizens at increased risk of adverse health effects, that is a concern.
- Adverse health effects attributable to exposures to sprays, drift or residues can include respiratory, cardiovascular, dermal and neurologic effects, as well as miscarriages and birth anomalies, particularly for pregnancies conceived or carried during periods of exposure.
- Adverse psychological health effects believed to be related to spray exposures are also of concern.

## 11. State's duty to provide for the health of citizens

### **Articulated in**

The *Declaration of Alma-Ata*, Article V

"Governments have a responsibility for the health of their people which can be fulfilled only by the provision of health and social measures."

### **What this right entails**

This more clearly reframes the right to health as a positive duty of a government to provide for the health of its citizens.

### **Reasons for concern**

- See above

## 12. State's duty to provide for the health of citizens demands coordinated efforts of all sectors

### **Articulated in**

*Declaration of Alma-Ata* Article VII

[Provision of health measures includes,] "in addition to the health sector, all related sectors and aspects of national and community development, in particular agriculture, animal husbandry, food, industry, education, housing, public works, communications and other sectors; and demands the coordinated efforts of all those sectors."

### **What this entails**

This article elucidates the meaning of "provision of health and social measures," saying that the state's duty to provide the highest standard of health for its citizens extends beyond just the health sectors of governments; it involves all other sectors as well, including the responsibility to see that the industrial, manufacturing and agricultural sectors are regulated in ways that are protective of citizens' health.

### **Reasons for concern**

- This article says that in addition to departments of health, all government

departments, including departments of agriculture, forestry, transportation and other agencies that deal with chemicals and other health risks also have a positive duty to protect the health of citizens.

### 13. Right to a healthy environment

#### **Articulated in**

##### *Aarhus Convention* Preamble

“every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”

#### **What this right entails**

This is the right to live in an environment that is conducive to health.

#### **Reasons for concern**

- If aerial sprays, drift or residues compromise the environment or cause conditions not conducive to health, even if those exposures affect the health of some people more than others, that would a concern.

### 14. Duty to encourage school attendance

#### **Articulated in**

##### *CRC* Article 28, 1(e)

“[States Parties shall] Take measures to encourage regular attendance at schools.”

#### **What this right entails**

If states are enjoined to take measures “to encourage regular attendance at schools,” it follows that they are also required, *a fortiori*, to refrain from taking measures that make it difficult or impossible for students to attend school.

#### **Reasons for concern**

- Will aerial sprays prevent any students from attending school or being transported to school due to their need to avoid spray exposures?
- Will students be exposed to aerial sprays, drift or residues while waiting for or riding on school buses?
- Will schools located near aerial spray zones be affected enough that some students are unable to attend or remain in school?

### 15. Right to education

#### **Articulated in**

##### *CESCR* Article 13 (section 1)

“States Parties to the present Covenant recognize the right of everyone to education.”

#### **Reasons for concern**

- See #14 above.

## 16. Right to effective remedy

### **Articulated in**

#### *CCPR* Article 2(3)a

“Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity....”

### **What this right entails**

“The legal obligation to offer restitution for injury is as old as the Code of Hammurabi, the first formal set of laws in history.”<sup>15</sup> It is recognized both internationally and domestically that “one of the major, primordial functions of the law is to return the victims of an unjust act to their previous condition.”<sup>16</sup>

“Effective remedy” means that by judicial action, monetary compensation or some other means any person whose rights have been unjustly violated will be restored as much as possible to their previous condition.

The right to effective remedy would be violated if, despite attempts to stop the spray program using normal governmental methods and channels, the spray program continues.<sup>17</sup>

### **Reasons for concern**

- The potential for being required to pay monetary compensation should citizens be adversely impacted by aerial sprays, drift or residues would be a concern.

## 17. Right to compensation

### **Articulated in**

In 1985 the U.N. General Assembly spelled out the nature of indemnification in the Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power. This declaration insists that “victims are entitled to prompt redress for the harm that they have suffered” and that offenders should “pay fair restitution to victims, their families and dependents.”<sup>18</sup>

### **What this right entails**

“The basic moral law of every society asserts that a government which wrongly injures its own citizens must make them whole insofar as this is possible.”<sup>19</sup>

### **Reasons for concern**

- Personal or business economic losses resulting from exposure to aerial sprays, drift or residues would be a concern.
- Any other losses that can be measured in economic terms would be a concern.

## 18. Right to know

### **Articulated in**

The *Rio Declaration on Environment and Development* establishes citizens' right to information about environmental toxics to which they may be exposed.

#### *Rio Declaration Principle 10*

"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available."

#### *Aarhus Convention Article 1*

"each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters..."

### **What this right entails**

This is the right of citizens to be provided full information about environmental issues so they can participate knowledgeably in decision-making about that issue. It entails the right to full disclosure of information about ingredients (both disclosed active and undisclosed "inert" ingredients), about details of spray plans, planned effectiveness studies, Health Risk Assessments, Environmental Impact Assessments, planned health effects monitoring, etc.

### **Reasons for concern**

- Despite manufacturers' claims that information about undisclosed ingredients is proprietary, precedents are emerging around the world in support of citizens' right to know the full list of ingredients in chemical formulations to which they are exposed.
- The fact of spray drift can be significant, particularly with aerial applications. The problem of drift, residues and subsequent vaporization exacerbates human rights concerns primarily because of the larger number of persons who are impacted by sprays, drift and residues and yet who may be uninformed, unwarned and perhaps unconsenting.

## 19. Right to participation in decision-making in environmental issues

### **Articulated in**

*Rio Declaration Principle 10*

*Aarhus Convention Article 1*

(see above)

### **Reasons for concern**

- Have citizens had sufficient opportunity for effective participation in decision-making about the aerial spray program?

## 20. Right to equal protection of the law

### **Articulated in**

### CCPR Article 26

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground...”

### What this right entails

This means that discrimination against persons and classes is prohibited.

The basic principles of environmental justice require that those communities that are disadvantaged in any way – socially, economically, as a result of discriminatory racial policies, etc, or who simply have less ready access to resources – be accorded the same degree of respect, fair treatment and opportunity for meaningful involvement in decision-making as communities that are more socially or economically advantaged and have greater access to resources. As explained on the Environmental Protection Agency website “Fair treatment means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of...negative environmental consequences.”<sup>20</sup>

### Reasons for concern

- Are all communities treated equally in the spray program, regardless of perceived social privilege or socioeconomic status?
- Does the socio-economic makeup of communities appear to be a factor in any decisions made by the spray program?
- Are disadvantaged communities affected any differently than more privileged communities?
- Are communities with different racial compositions affected differently?

## 21. Right to freedom from discrimination due to disability

### Articulated in

The U.S. Americans With Disabilities Act

### What this right entails

The US Department of Justice maintains a website with detailed information about ADA requirements.<sup>21</sup> 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.<sup>22</sup>

### 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 certain allergies, immunocompromised people, the elderly, the very young, pregnant women,<sup>23</sup> any place-bound persons (in hospitals or elder care facilities, for example) to name a few vulnerable sub-sets of residents,

may be reasonably expected to experience more serious adverse effects from aerial spray exposures than the general population.

- If reasonable accommodations have not been developed for persons in those groups to help them avoid being unfairly impacted by the sprays, that is a concern.

## 22. Right of experimental subjects to free and informed consent

### Articulated in

*Nuremberg Code* Item 1

“The voluntary consent of the human subject is absolutely essential.”

*Nuremberg Code* Item 9

“the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.”

### What this right entails

This is the right to be fully informed about an experiment before agreeing to participate, the freedom to choose whether to participate or not, and the freedom to withdraw from the experiment at any time.

The rights of experimental subjects to informed consent and to protection from possible harms, as those rights are expressed in *The Nuremberg Code*, are premised on the acknowledgment that the spray program is at least partially experimental in nature. This would be the case if to date no formal health impact studies of this specific pesticide formulation had yet been conducted, looking especially for dermal and inhalation exposure effects, particularly in children, pregnant mothers and fetuses. If there are no such studies, or if the results of such studies have not been published in the peer-reviewed scientific literature, then the aerial application of this pesticide formulation contains important unknowns and is at least partially experimental in nature.

### Reasons for concern

- If each citizen has not been provided full information about the chemical formulation to which they will be exposed, including all its ingredients (both active and “inert”), as well as information about the dates, times and methods of application, that would be a concern.
- If each individual citizen has not been provided opportunity to consent or not consent to exposure to aerial sprays, drift and residues, that would be a concern.
- If each citizen has not been provided opportunity to withdraw themselves and their families from the spray program if they do not wish to be exposed, that would be a concern.
- If each individual citizen, particularly those with certain disabilities, had not been notified about details of aerial sprays and provided alternative places to stay during and shortly after sprays to reduce exposures, that would be a concern.
- If place-bound persons, particularly those with certain disabilities, had not been notified about details of aerial sprays and provided alternative places to stay during and shortly after sprays to reduce exposures, that would be a concern.

## 23. Right of experimental subjects to be protected from injury, disability or death

### Articulated in



*Nuremberg Code* Item 7

“Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.”

**What this right entails**

This is the right to be protected from anticipated, remote or unanticipated harms that may possibly result from participation in the experiment.

**Reasons for concern**

- Have such protections been provided, particularly for those at increased risk of harm from spray exposure?

**Potential Liabilities**

Listed below are some potential liabilities the ODA aerial spray program may incur if it were to implement plans to aeri ally apply pesticides over urban neighborhoods.

1. The potential consequences of governments ignoring human rights norms are not insignificant. Loss of public confidence in government agencies 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 ODA did implement plans to aeri ally apply this pesticide over urban neighborhoods there would be risk of public recognition that, despite awareness of links between pesticide exposure and health impacts, and despite awareness of human rights concerns, ODA did not move to eliminate or significantly modify aerial spray plans.
3. Greater involvement of human rights organizations such as Human Rights Watch in pesticide activism.
4. One goal of human rights activism is what they refer to as “the mobilization of shame.” Tools human rights organizations use include, among others, videotaping of actions considered to be human rights violations, and of the persons believed responsible for those actions; public, community-led, trial-like Citizens’ Tribunals with independent judges who weigh, using human rights norms rather than civil law, the justness of a given situation; and public, community-led, Citizens’ Inquiries which involve oral and written testimony from affected community members before a panel of commissioners.
5. Potentially costly legal actions brought against ODA for aerial application of pesticides as a violation of human rights; possible legal action re the Americans with Disabilities Act; and possible multiple small claims court actions for economic redress.

6. Potential litigation through the Inter-American Court of Human Rights, a court of the Organization of American States.

## Pathways to Reducing Liabilities

1. The most important step to reduce liabilities would be for ODA to undertake good faith discussions with Oregon Toxics Alliance, city of Eugene representatives, members of the neighborhood association and other citizen groups concerned about aerial spraying over populated areas, and to postpone aerial spraying until satisfactory agreements can be reached in those discussions.
2. 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 effects from exposing urban populations to the specific pesticide formulation that will be used (not to just one of its ingredients). Absent such studies, provide examples of any studies published in the peer reviewed literature that demonstrate no adverse effects from exposing urban populations to the specific pesticide formulation that will be used. Absent that, provide examples of any studies that show there to be no adverse effects from exposing urban populations to the specific pesticide formulation that will be used.
3. Rely as much as possible on non-chemical means of moth control.
4. If some use of chemical pesticides were to occur:
  - a. Provide notification by multiple means – signage, email lists, websites, phone calls, etc. – especially to those individuals susceptible to or concerned about adverse health impacts.
  - b. Include in all public notification announcements a full disclosure of all precautions included on the product label. Precautions on the Foray 48B label include
    - i. “Hazards to Humans and Domestic Animals: Causes moderate eye irritation. Avoid contact with eyes or clothing. Wash thoroughly with soap and water after handling and before eating, drinking, chewing gum, using tobacco or using the toilet.”
    - ii. “Do not enter or allow worker entry into treated areas during the restricted-entry interval (REI) of **4** hours.” The numeral “4” is emphasized on the label and should be similarly emphasized in communications with community members.
    - iii. “PPE [Personal Protective Equipment] required for early entry to treated areas that is permitted under the Worker Protection Standard (that involves contact with anything that has been treated, such as plants, soil, or water) is:

1. Coverals
  2. Waterproof gloves
  3. Shoes plus socks.”
- c. Publicly disclose all ingredients, both active and “inert,” of all formulations that would be applied.
  - d. Develop strategies for providing alternative lodging, transportation and services to those who, for reasons of health or health concerns, require that they and their family members not be exposed to the sprays, drift or residues.
  - e. Develop strategies for insuring that placebound persons, such as those in daycare facilities, elder care facilities, hospitals, schools, etc, not be required to endure spray exposures if they wish not to.
  - f. Develop strategies for insuring that children, because of their greater biological vulnerability to environmental exposures, not be required to endure exposures to the sprays, drift or residues.
  - g. Arrange for health effects monitoring studies to be undertaken by the Department of Health or independent third parties. Active (rather than passive) surveillance methodologies should monitor for a range of adverse health effects, both acute and chronic, associated with spray exposures. Representatives from citizen groups should be involved in design of the studies.
  - h. Arrange oversight by an external observer, agreed to by both ODA and OTA, to monitor agreed upon implementation of eradication or control efforts.

## Conclusion

This Report provides the Oregon Department of Agriculture and the Oregon Toxics Alliance a list of international human rights norms that would be of concern should ODA undertake aerial application of any pesticide over urban neighborhoods. It also outlines ODA’s potential liabilities and describes pathways that could be taken to reduce those liabilities.

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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>

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<sup>1</sup> Picolotti, Romina and Jorge Daniel Taillant, *Linking Human Rights and the Environment*, University of Arizona Press, 2003, p 123 (emphasis in original).

<sup>2</sup> “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.

<sup>3</sup> Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2002, p8.

<sup>4</sup> “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.

<sup>5</sup> The *Universal Declaration of Human Rights* was unanimously adopted by the United Nations in 1948.

<sup>6</sup> 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.

<sup>7</sup> Signed by the US in 1977; not ratified.

<sup>8</sup> 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.

<sup>9</sup> Signed by the US in 1980; not ratified.

<sup>10</sup> 1978

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> See item 21 below on discrimination.

<sup>15</sup> Drinan, Robert F, *The Mobilization of Shame, A World View of Human Rights*. Yale University Press, 2001 p 186.

<sup>16</sup> Drinan RF. 2001. p 170.

<sup>17</sup> In reference to a specific case: “the human right to effective judicial remedy has been violated because despite the riverside communities’ plea to the judicial system, nothing has been done to stop the contamination.” in Picolotti, R and Taillant, JD, 2003, p 146.

<sup>18</sup> Quoted in Drinan RF. 2001. p 171.

<sup>19</sup> Drinan RF. 2001. p 187.

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<sup>20</sup> US EPA's definition of environmental justice. See <http://www.epa.gov/compliance/resources/faqs/ej/index.html> Quoted in Robert D Bullard, *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, Sierra Club Books, San Francisco, 2005, p. 4.

<sup>21</sup> <http://www.usdoj.gov/crt/ada/>

<sup>22</sup> <http://www.usdoj.gov/crt/ada/publicat.htm#Anchor-ADA-44867>

<sup>23</sup> In this regard, see provisions in the *Convention on the Elimination of All Forms of Discrimination against Women*.