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A Human Rights Assessment of the Proposed Seneca Biomass Power Generation Plant in Eugene, Oregon

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Matter of Concern: Health impacts of Seneca power plant emissions and disproportionate impacts on adjacent neighborhoods

Date: August 28, 2009

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Purpose of This Report

The purpose of this Report is to provide Lane Regional Air Protection Agency, Seneca Sustainable Energy, LLC and Oregon Toxics Alliance with a list of formal human rights norms of concern associated with the permitting of Seneca's proposed power generation plant, to outline LRAPA's and Seneca's potential liabilities and to describe pathways that can be taken to reduce those liabilities.

Facts

Lane Regional Air Protection Agency is the agency charged with regulating impacts on air quality within the Lane County regional airshed. LRAPA has prepared a draft permit for Seneca Sustainable Energy, LLC to operate a proposed 18.8 MW cogeneration power plant to be located just south of Enid Road, east of Highway 99 and co-located with the existing Seneca sawmill.

The cogeneration plant would employ a wood-fired boiler to produce steam for an 18.8 MW steam turbine. Fuel for the boiler would principally be sawdust from the Seneca sawmill and trucked in woody biomass (trees and slash from forestry operations).

According to LRAPA's draft Air Contaminant Discharge Permit Review Report (dated 6-29-09), air emissions from the proposed plant would include 187 tons per year of NOx, 39 tons per year of SO2, 202 tons per year of CO, 39 tons per year of VOCs, 6 tons per year of Acetaldehyde, 17 tons per year of various Hazardous Air Pollutants, including 1.7 tons of formaldehyde, and 14 tons per year of PM/PM10/PM2.5.

According to data in the *Eugene-Springfield Consolidated Plan 2005*, West Eugene neighborhoods within a five mile radius of the proposed power plant have a disproportionately high percentage of minority populations, a disproportionately high poverty rate, and a disproportionately high percentage of disabled residents, compared to minority, poverty and disability rates in Eugene's overall population.

Oregon Toxics Alliance is a 501(c)(3) non-governmental organization, chartered in the state of Oregon, whose mission is to understand and expose root causes of pollution and to assist communities in efforts to protect human and environmental health. OTA is concerned about potential degradation of regional air quality and about maldistribution of adverse health impacts on residents of adjacent neighborhoods.

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Issues

OTA is concerned about

1. adverse acute human health effects resulting from neighborhood residents' exposures to elevated levels of toxic air emissions;
2. potential adverse long-term health effects (carcinogenic, neurotoxic, respiratory, and cardio- and cerebro-vascular) that may result from acute and/or prolonged exposure to toxic air emissions;
3. inequitable distribution of adverse health impacts, and inadequate compliance with EPA's Environmental Justice standards;
4. adverse health and economic impacts resulting from contributions to global climate change; and
5. inadequate compliance with human rights standards.

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Human Rights Norms of Concern

Environmental concerns often directly impact human rights, and part of the purpose of this Report is to help Lane Regional Air Protection Agency and Oregon Toxics Alliance appreciate the human rights dimensions of permitting Seneca's proposed wood-fired boiler and steam turbine power plant. As Daniel Taillant, Director of the Argentine-based Center for Human Rights and the Environment says, "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."[1]

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.[2] 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."[3] Additionally, human rights norms are considered to represent a moral minimum for behavior of governments and non-state actors, a moral floor beneath which policy and state-regulated behaviors must not go.[4]

Listed below are 23 specific human rights norms that may have direct relevance to LRAPA's proposed permitting of the power generation plant. (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 different human rights declarations, conventions, charters and other international instruments, including:

- *Universal Declaration of Human Rights* (*UDHR*) [5]
- *International Covenant on Civil and Political Rights* (*CCPR*) [6]
- *International Covenant on Economic, Social and Cultural Rights* (*CESCR*) [7]
- *Convention on the Rights of the Child* (1990) (*CRC*) [8]
- *Convention on the Elimination of All Forms of Discrimination against Women* (*CEDAW*) [9]
- *Rio Declaration on Environment and Development*
- The World Health Organization *Declaration of Alma Ata*[10]
- *The Nuremberg Code*[11]

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

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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.[12]

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 exposure to airborne environmental toxics.
- Potential adverse health effects attributable to exposures to air toxics 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 residents consider their freedom of movement to be restricted due to their need to avoid exposures to air toxics, particularly if those restrictions result in documentable economic loss, that would be a concern.
- If any citizens consider that threat of injury from 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

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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 a state's failure to adequately regulate.

"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."[13]

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 toxic air emissions, even without adverse health effects.
- Potential adverse physical health effects related to toxic air emissions and suffered 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 elevated levels of toxic air emissions, and greenhouse gas contributions to global climate change, then this right has been violated.

Reasons for concern

- Adverse physical or economic effects on families attributable to toxic air emissions and greenhouse gas contributions to global climate change.
- If the health or well being of families, including economic well being, have been adversely affected as a result of toxic air emissions, 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

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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 disproportionately elevated levels of toxic air emissions.
- If individuals, families or businesses have been forced to leave or sell their property due to toxic air emissions, that would be a concern.
- If individuals' or families' ability to enjoy the use of their property has been compromised due to toxic air emissions, 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 or illnesses resulting from exposure to disproportionately elevated levels of toxic air emissions.
- Citizens who are unable to work because their place of work is located near an area of elevated levels of toxic air emissions.
- Workplaces that have become contaminated enough that some workers are unable to perform their 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 nearby workplaces, including within the Seneca worksite, that are attributable to elevated levels of toxic air emissions.
- Workplaces becoming less safe for some as a result of contamination by toxic air emissions.

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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 both state and non-state actors have a positive duty to protect children and mothers from anything, including exposure to 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 risk for adverse effects from exposure to disproportionately elevated levels of environmental toxics.
- If mothers, and mothers' ability to be good caregivers for their children, are adversely affected by disproportionately elevated levels of environmental toxics, 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."[14]

What this right entails

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

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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

- Activities that put children at increased risk of adverse health effects are a concern.
- Adverse health effects attributable to exposures to elevated levels of toxic air emissions 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 all persons 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

- Activities that put citizens at increased risk of adverse health effects are a concern.
- Adverse health effects attributable to exposures to elevated levels of toxic air emissions 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 elevated levels of environmental toxics 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."

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What this right entails

This more clearly reframes the right to health as a duty of a government to its citizens 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," clarifying that a 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 environmental regulation 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 Convention articulates both a right and a duty. The right is to live in an environment adequate to one's health and well-being. The duty is to protect the environment so this right is respected.

Reasons for concern

- Disproportionately elevated levels of airborne toxics which compromise the

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environment or cause conditions injurious to health, even if those conditions affect the health of some people more than others, are 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 proscribe measures that make it difficult or impossible for students to attend school.

Reasons for concern

- Exposure to elevated levels of environmental toxics that prevent any students from attending classes in nearby schools, or being transported to school due to their need to avoid exposures, are a concern.
- Students exposed to elevated levels of toxic air emissions while attending school nearby, or while waiting for school buses would be a concern.
- Elevated levels of environmental toxics occurring near enough to schools that some students are unable to attend or remain in school would be a concern.

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."[15] 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."[16]

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"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 LRAPA failed to adequately control toxic air emissions from the proposed power plant.[17]

Reasons for concern

- The potential for being required to pay monetary compensation should citizens be adversely impacted by elevated levels of toxic air emissions 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."[18]

What this right entails

"The basic moral law of every society asserts that a government [or private entity] which wrongly injures its own citizens must make them whole insofar as this is possible."[19]

Reasons for concern

- Personal or business economic losses resulting from exposure to elevated levels of toxic air emissions would be a concern.
- Any additional 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 those issues. It entails the right to full disclosure of information about toxic air emissions, about Health Risk Assessments, Environmental Impact Reports, planned health effects monitoring, etc.

Reasons for concern

- (see above)

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

- If citizens have not had sufficient opportunity for effective participation in decision-making about increases to environmental toxics in their neighborhoods which may impact them and their families, that would be a concern.

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 proscribed.

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. Fair treatment also means, as explained on the Environmental Protection Agency website, "that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations."[20]

Reasons for concern

- Have all impacted communities been treated equally regardless of perceived social privilege or socioeconomic status?
- Are communities facing socio-economic challenges impacted more than other communities in the region?
- Are disadvantaged communities impacted any differently than the larger population, or than more privileged communities in the region?

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- Are communities with different racial compositions impacted differently?

21. Right to freedom from discrimination due to disability

Articulated in

The Americans With Disabilities Act (US)

What this right entails

The US Department of Justice maintains a website with detailed information about ADA requirements.[21] 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.[22]

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, people with certain allergies, immunocompromised people, the elderly, the very young, pregnant women,[23] 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 elevated levels of environmental toxics than the general population.
- Have reasonable accommodations been developed for persons in those groups to help them avoid being unfairly impacted by increased air toxics exposures?

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 with no loss of benefits to which they would otherwise be entitled.

The rights of experimental subjects to informed consent and to protection from possible harms, as they are expressed in *The Nuremberg Code*, are premised on the acknowledgment that elevated levels of toxic air emissions and their impacts on exposed

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humans have not been adequately studied and are thus experimental in nature.

Reasons for concern

- Have citizens been provided opportunity to freely and effectively give or withhold consent to an increase in ambient levels of environmental toxics?
- Have citizens been provided ways to withdraw themselves or their families from the increased exposures if they do not wish to be exposed?
- Have citizens, particularly those with various disabilities, been notified about details of the proposed increased exposures and provided assistance finding alternative places to live to reduce exposures?

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 exposure to elevated levels of toxic air emissions?

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Potential Liabilities

Listed below are some potential liabilities Lane Regional Air Protection Agency may incur if Seneca were to open a plant that would result in increased levels of environmental toxics in such close proximity to urban neighborhoods.

1. The potential consequences of governments or corporations ignoring human rights norms are not insignificant. Loss of public respect for and confidence in corporate leadership and in government agencies and their processes is not a small thing, even from the perspective of the corporations and agencies, 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 LRAPA were to license the proposed power plant without adequate protections for residents in the area, and without requiring adequate pollution controls, there would be risk of public recognition that, despite awareness of known adverse health and economic impacts associated with toxic air emissions, and despite awareness of human rights concerns, LRAPA did not move to more strictly regulate those emissions and monitor for health impacts.

3. Greater involvement of human rights organizations such as Human Rights Watch in local and neighborhood air toxics 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; focused media campaigns, 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 LRAPA for violation of human rights norms as a result of failure to adequately regulate air toxics; possible legal action against LRAPA and/or Seneca 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.

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Pathways to Reduce Liabilities

1. The most important first step to reduce liabilities would be for LRAPA to initiate good faith discussions with Oregon Toxics Alliance and with neighborhood representatives concerned about the proposed plant's impact on their environment and neighborhood, and to postpone permitting decisions until satisfactory agreements can be reached in those discussions.

2. Request assessment and evaluation from the Governor's Environmental Justice Task Force, and factor their recommendations into permitting decisions.

3. Consult with staff in EPA's Region 10 Environmental Justice Program and factor their recommendations and compliance strategies into permitting decisions.

4. Provide evidence of safety for each of the criteria pollutants, VOCs and hazardous air pollutants that would be emitted from proposed plant. That is, provide examples of large scale, large sample, well designed population studies undertaken by third parties (i.e., not by industry or industry associations) published in the peer reviewed scientific literature that demonstrate no adverse health impacts from exposure to anticipated levels of these pollutants.

5. Require Seneca to file an emergency plan indicating how the public will be notified in the event of an emergency or malfunction, and how employees, nearby residences, businesses and transportation corridors will be evacuated or otherwise protected in the event of an emergency, malfunction or excess pollution release.

6. Require Seneca to install and employ the most effective industry technologies for controlling NOx and CO emissions.

7. Require Seneca to install continuous stack monitoring for as many pollutants as possible and to make data from that monitoring publicly available.

8. Require Seneca to cease operations during days of medium or poor air quality in the Eugene area.

9. Require Seneca to file a Toxics Emission Reduction plan every two years documenting how emission of criteria air pollutants and Priority Air Toxics will be reduced.

10. Require that Seneca partner with other local industries to undertake measures for monitoring ambient air for toxic air emissions and particulates.

11. Partner with Seneca to develop strategies for insuring that placebound persons, such as disabled persons living in homes near the power plant, those in daycare facilities, elder care facilities, hospitals, schools, etc, not be required to endure elevated levels of toxic air emissions.

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12. Partner with Seneca to develop strategies for insuring that children, because of their greater biological vulnerability to environmental exposures, not be required to endure elevated levels of toxic air emissions.

13. 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 exposure to elevated levels of toxic air emissions. Representatives from citizen groups should be involved in design of the studies.

Conclusion

This Report provides Lane Regional Air Protection Agency and Oregon Toxics Alliance a list of formal human rights norms of concern should LRAPA choose to issue a permit for the proposed Seneca power generation plant. The Report outlines LRAPA's and Seneca's potential liabilities and describes pathways that could be taken to reduce those liabilities.

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Bibliography

Drinan Robert F, *The Mobilization of Shame, A World View of Human Rights*. Yale University Press, 2001.

Human Rights Watch, Natural Resources Defense Council, *Defending the Earth: Abuses of Human Rights and the Environment*, 1992.

Kerns, Thomas A, *Environmentally Induced Illnesses: Ethics, Risk Assessment and Human Rights*, McFarland & Company, 2001.

Kravchenko, Svitlana, and John Bonine, *Human Rights and the Environment: Cases, Law, and Policy* (2008).

Mann, Jonathan, Gruskin, Sofia, et al, *Health and Human Rights: A Reader*, Routledge, 1999.

Picolotti, Romina and Jorge Daniel Taillant, *Linking Human Rights and the Environment*, University of Arizona Press, 2003.

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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Endnotes

[1] Picolotti, Romina and Jorge Daniel Taillant, *Linking Human Rights and the Environment*, University of Arizona Press, 2003, p 123 (emphasis in original).
[2] "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.
[3] Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2002, p8.
[4] "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.
[5] The *Universal Declaration of Human Rights* was unanimously adopted by the United Nations in 1948.
[6] Signed by the US in 1977, ratified in1992 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.
[7] Signed by the US in 1977; not ratified.
[8] 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.
[9] Signed by the US in 1980; not ratified.
[10] 1978
[11] 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 area where there are elevated levels of toxic air emissions are being studied for health effects resulting from exposures – then provisions of the *Nuremberg Code* would apply to individuals in that population.
[12] 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.
[13] 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.
[14] See item 21 below on discrimination.
[15] Drinan, Robert F, *The Mobilization of Shame, A World View of Human Rights*. Yale University Press, 2001 p 186.
[16] Drinan RF. 2001. p 170.
[17] 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.
[18] Drinan RF. 2001. p 171.

[19] Drinan RF. 2001. p 187.
[20] 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.
[21] http://www.usdoj.gov/crt/ada/
[22] http://www.usdoj.gov/crt/ada/publicat.htm#Anchor-ADA-44867
[23] In this regard, see provisions in the *Convention on the Elimination of All Forms of Discrimination against Women*.

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