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December 13, 2016

**Public Comment on Worker Protection Standards - Division 2, General Industry, at OAR 437-002-0170;
and, in Division 7, Forest Activities, at OAR 437-007-0010**

The four non-profit organizations submitting this public comment serve and advocate for farm and forestry workers. Our coalition is: Beyond Toxics, PCUN Farm Worker Union, Northwest Workers' Justice Project and the Northwest Forest Worker Center.

We have standing on the issue of Worker Protection Standards having given testimony during 2015 and 2016 to the Oregon Environmental Justice Task Force (9/25/2015 Medford; 12/4/2015 Wilsonville; 2/5/2016 Salem; 6/3/2016 Hood River; 9/23/2016 Pendleton). We have also provided testimony to the Senate Interim Committee on Workforce on 5/24/2016.

We write you today with deep concerns regarding the implementation of the Environmental Protection Agency's Worker Protection Standards in Oregon.

The Environmental Protection Agency adopted changes to the Worker Protection Standard in 2015. Oregon OSHA is carrying out rulemaking to update Oregon OSHA rules that contain the Worker Protection Standard. Oregon OSHA has issued proposed rules for public comment. The comment period opened on October 20th and public comment is being accepted through December 14th. The adoption of the final rules, according to the OSHA website, "tentatively will be in December 2016." We strongly believe that this time frame is too short to allow for meaningful public input, review of the public comments, consideration of the recommendations and incorporation of changes to the proposed WPS rule.

Our coalition has been working towards Farm and Forestry workers' rights. While we are glad to see some improvements to Oregon's laws regarding worker protection, we have serious doubts as to the efficacy, legality, thoroughness, and transparency of this process.

Out of our four organizations who have been working on providing testimony and information to state agencies and state legislators, not a single one was invited to participate in the rulemaking committee. This is unacceptable. In addition the time frame given to address all the WPS standards issues, how workers may be impacted and how the rules will be implemented, is simply inadequate.

We have outlined below components of the proposed Oregon Worker Protection Standards for Farm and Forestry Workers that are unacceptable to our organizations and a list of areas that need to be improved in order to have true worker protection in Oregon.

- **170.315 & OAR 437-004-6401(23) Prohibited actions.**

At meetings of the Environmental Justice Task Force and the Senate Interim Committee on Workforce, our coalition and the workers they represent testified that workers may be subjected to maltreatment, coercion and workplace discrimination if workers report symptoms associated with pesticide exposure, request to be taken to a medical facility or report poorly working or non-working PPE. We support the provisions in 170.315 and OAR 437-004-6401 that protect workers from prohibited behaviors from employers. The prohibited behaviors of intimidation, threats, coercion and discrimination and worker harassment still occur with regularity in agricultural and forestry work sites.

We strongly recommend that within 170.315, a mechanism be put in place to ensure that the burden of proof of discrimination, intimidation, threat or coercion is not solely placed upon the worker. The farm and forestry worker experiences a power imbalance in regards to the employer. There is the threat that a complaint about pesticide exposure will result in termination of employment. There should be civil penalties sufficiently high to discourage discrimination, intimidation, threat or coercion against workers. There must be a burden of proof placed upon the employer that employment termination has nothing to do with punitive measures against an employee who files a complaint about rule violations or pesticide exposure and illness.

Recommendation: Our suggestion is for OR-OSHA to convene an Anti-Discrimination Policy Work Group to research and propose methods to reduce and eliminate discrimination, intimidation, threat or coercion. Fifty percent of work group members must represent farm and forestry workers and/or their advocates.

- **170.405 Application Exclusion Zone.**

Under Oregon Law 170.305 Definitions, an Application Exclusion Zone (AEZ) means *the area surrounding the application equipment that must be free of all persons other than appropriately trained and equipped handlers during pesticide applications.* The area must be *free of all people* who are not trained and licensed to apply pesticides or performing other agricultural duties. The federal rule applies as well to family members occupying nearby farm worker housing. **By definition, the AEZ extends 100 ft. horizontally in all directions from the aerial, blast, fumigant, mist, fog or smoke and when small droplet sizes are used.** A distance of 25 ft. is required for droplets sizes larger than 294 microns. **The purpose of the AEZ is to prevent pesticide exposure for workers and non-workers on agricultural sites.**

The purpose of Oregon Rule 170.405 is to meet the newly adopted federal Agricultural Worker Protection Standard. The federal standard is the minimal requirement, a moral floor that a state government should not go below. The federal law was not adopted so that OR-OSHA could promote the suggested “Compliance Alternative,” the euphemism used in the proposed Oregon rulemaking that actually means a “work-around.” **The proposed Compliance Alternative is an unwarranted attempt to circumvent the minimal federal requirement to protect workers.**

The federal law is clear – no person, other than the pesticide applicator, shall remain in the AEZ during an application. The law also applies to workers’ families who may live in on-site worker housing.

We do not support and we will not accept the proposed Compliance Alternative dubbed “shelter in place.” “Shelter in place” is nothing other than allowing a pesticide spray to occur even when there are workers, wives, and/or children within 100 ft. of an application by aerial, blast, fumigant, mist, fog or smoke and when small droplet sizes are used. That is direct conflict with the spirit and letter of the federal law. “Shelter in place” may also constitute a violation of label instructions for re-entry intervals (REI).

“Shelter in place” doesn’t protect against pesticide drift or vaporization. Pesticide vapors can penetrate living spaces, particularly typical farm worker housing. Pesticide vapors can enter holes and cracks in walls, window and doors that are not properly sealed or closed, or points of ingress or egress should any person need to leave the building for any reason during pesticide spraying (imagine a child who must use the bathroom). Pesticide residues can settle onto outdoor living spaces such as chairs and tables, cook areas, washing areas, play areas and personal hygiene facilities. People can be exposed and adversely affected by touching or inhaling pesticide residues.

Furthermore, the concept of “shelter in place” is unfair because it places the burden of “sheltering” on the person(s) who are potential harmed by the pesticide application. The proposed Compliance Alternative states that those who must take shelter also are responsible for receiving and carrying out instructions about “how to close up and secure” living spaces inside the AEZ during pesticide applications. In addition, under the proposed rules, the workers and their families must *“maintain all feasible measures to minimize exposure to the outside air until the application equipment moves beyond the AEZ range.”*

Such language serves to free the employer of responsibility for protecting workers, and makes it more difficult for the Agency to perform their duty of proper monitoring and enforcement. Instead this rule language places undue, unfair burdens on workers and their family members to take action in the face of pesticide exposure, to monitor the location and movement of aerial or blast pesticide equipment to determine if the equipment is operating at a distance of 100 ft. (or 90 ft., 101 ft., etc.), to track weather conditions and to be responsible for the safety conditions of the buildings where innocent people are seeking “shelter.” Simply put, that burden is unreasonable and outrageous.

Oregon has 330 registered labor camps and as many as 200 illegal unregistered agricultural labor housing sites. There could be as many as ten thousand individuals unfairly and negatively impacted by the Compliance Alternative. Does OR-OSHA have the staffing and resources to oversee protections at all 330-530 sites? We object to Compliance Alternatives for the following reasons:

- **Potential for Pesticide Exposure for Workers and Family Members, including children.**
 - OR OSHA’s Compliance Alternative does nothing to protect workers and their families from exposure to pesticide drift, vaporization or re-volatilization.
 - The Compliance Alternative may violate pesticide label instructions for pesticide re-entry periods
 - If the REI is 12 hours, are people expected to shelter inside farm worker housing for 12 hours during a hot summer day? Are they expected to forego using outdoor bathrooms, or cooking, playing and other activities that take place outside of farm worker housing?

- OSHA lacks guidelines and protocols to require and enforce the suggested standards outlined in 170.405(b) 1-4. OR-OSHA must determine that workers have what they need to be protected in Oregon’s agricultural labor housing sites.
 - How will OR OSHA ensure all of the 330-530 housings sites in Oregon will be up to par to protect workers?
 - Will the employer or contractor be responsible for ensuring that all housing and indoor spaces meant for daily living activities (bathroom, cooking and recreation) are properly ventilated and equipped with air conditioning. Will there be a requirement for air circulation systems that do not circulate air from outside areas that have recently been sprayed?
 - The conditions for “sheltering in place” under 170.405(b)3 are inhumane. Under certain conditions that may or may not be monitored, the rule would have people live in housing and living spaces that are not equipped with air conditioning. Instead, many of these living facilities use passive air ventilation, thus forcing people to endure unacceptable conditions when temperatures rise, but no door or window can be opened while people “shelter in place.”
 - The proposed rule places the following ill-defined and unenforceable burden upon the farm worker and their families: *“maintain all feasible measures to minimize exposure to the outside air until the application equipment moves beyond the AEZ range.”*
 - Who determines what is a “feasible measure” and what “minimize exposure” entails? Is OR-OSHA prepared to determine whether those who are forced to “shelter in place” took the “feasible measures” or whether truly minimal exposure limits were achieved? What are the criteria to measure this requirement?

- **The proposed notification requirements are overall inadequate. Lacking elements include:**
 - Notification about what is being sprayed, when and for how long
 - Mandatory advanced warning
 - Notifications provided in accessible languages
 - Specific requirements about where notifications are posted
 - Enforceable protocols regarding how farm workers and their families who are outside the AEZ at the time of the pesticide application will be notified that they cannot return to the area until the pesticide application is more than 100 ft. away? (For example, will a child returning from school be notified?)
- The proposed Alternative Compliance fails to protect farm workers and their families because it does not require OR-OSHA inspectors to make sure the “shelter in place” structure is fully enclosed and not ventilated with outdoor air.
- The proposed rule is unenforceable because it does not clarify who is responsible for minimizing outside air intrusions, shutting doors and windows during pesticide applications. The rule language implies that the farm worker, him or herself, must ensure the protective quality of the building where people will shelter. How does that look? Does the agency expect a ten-year old child to take charge if no adult is on site; a sick person resting indoors; a mother who is working in an adjacent field and is not allowed to leave the job site?

- The proposed Alternative Compliance is inhumane because it does not account for human exposure from pesticide volatilization and drift that occur during and/or after a spray operation.
 - There is no requirement to monitor workers' health and the health of family members forced to "shelter in place."
 - There is no requirement to monitor air quality for the presence of pesticides – some pesticide which may be Restricted Use Pesticides or labeled as highly toxic pesticides – within and around the living spaces where workers and their families would be forced to remain during and after a spray operation.
 - There is no requirement to monitor for pesticide residues that may remain within the AEZ long after the spray operation has been completed.
 - There is no requirement to take into account how weather will impact the movement or persistence of pesticides in the AEZ, e.g., the possibility of heat, inversions, fog, wind, rain or lack of rain. These are factors that govern the intensity and length of exposure.
- **The proposed Alternative Compliance is inherently discriminatory because it does not require and provide extra protections for vulnerable people.**
 - The proposed rule does not provide additional protections for children and pregnant women who, according to EPA literature and scientific consensus, are the most vulnerable to harm from pesticide exposure.
 - The proposed rule discriminates against people with disabilities who may experience more harm due to pre-existing medical conditions, physical conditions or cognitive disabilities that prevent a reasonable level of self-care or the ability to understand and follow instructions.
- As discussed, there is a long and documentable history of workers being subjected to maltreatment, coercion and workplace discrimination when workers report symptoms associated with pesticide exposure. Forcing workers and their families to remain within the AEZ during a pesticide operation creates the situation where workers are more likely to be exposed to harmful chemicals and more likely to report exposure, illness and chronic health problems for themselves or their family members. This is exactly the type of situation that opens to the door to discrimination, maltreatment, coercion and workplace discrimination.
 - The burden of reporting the success or failure of avoiding pesticide impacts by "sheltering in place" should not be placed upon the workers themselves. Workers already are subject to power-imbalance, language barriers, or a different legal status than other types of workers.
 - To prevent discrimination and coercion, to ensure protection and health on the worksite, OR-OSHA must require their staff to conduct onsite monitoring and observation *during* pesticide applications within AEZ areas. OR-OSHA must conduct unannounced, frequent and objective on-site monitoring, observation and enforcement for Oregon's 330 farm worker housing sites during pesticide applications in the same location where farm workers are required to "shelter."

The proposed rule does not give the agency the authority to issue meaningful civil fines and penalties for non-compliance for the employer. Let's discuss fines and penalties upfront.

- **Housing Conditions that make “Shelter in Place” impossible to achieve or enforce.**

It is OR-OSHA’s responsibility to enforce not only federal Worker Protection Standards but labor housing standards as well.

- There needs to be an accounting of how many farm worker housing sites fall within an AEZ and monitoring that all housing is capable of protecting farm workers and their families by standards of human rights and human decency.
 - OSHA must set enforceable standards for housing for all 330-530 farm worker camps. Homes must have siding, insulation, doors and windows that, when closed, form an air tight seal against the intrusion of odiferous vapors, particulate matter, gases and fumes.
 - OSHA must ensure that all living area facilities, including bathrooms, showers, kitchens, laundry tubs, and drying lines are not located outside and are enclosed in structures that prevent all vapors from entering the building.
 - OR-OSHA must require an emergency evacuation plan and a drift mitigation plan. Not all conditions can be controlled. Weather, wind and temperature can change and shift. Evacuation may be necessary under these circumstances.

We feel OR-OSHA should commit to going above and beyond the federal standards and abandon what is currently being proposed. At the minimum, the proposed rules should uphold the standards set forth in federal Worker Protection Standard law. The federal law adopted by the US EPA clearly states:

No-entry application-exclusion zones up to 100 feet surrounding pesticide application equipment will protect workers and others from exposure to pesticide overspray.

The proposed rules for Oregon’s 4/W Agricultural Worker Protection Standards fail to meet federal standards. The proposed Alternative Compliance rules do not meet the requirements of the law. As proposed, the Alternative Compliance rules are inhumane, unenforceable and unacceptable.

Recommendation: For the many reasons described in this testimony, our Coalition recommends that Oregon adopt the federally mandated 100 ft. horizontal diameter for farm and forestry workers in the field. Due to the high likelihood of exposure, we further recommend a ¼ mile protective no-spray buffer for all housing and school buildings on agricultural sites. In addition, in consideration of the multiple flaws of the proposed rules, we strongly recommend that this process be restarted with a fair and equitable input from groups representing impacted classes of people.

- **The proposed rules fail to address water potability standards and personal hygiene standards.**

Testimony recently given to the Oregon Environmental Justice Task Force and the Oregon Senate described the inability of workers to access clean and drinkable water during work hours. The proposed rules must include strict and measurable standards for ensuring that farm and forestry workers have adequate amounts of potable water while working. The water must be provided by the employer.

Furthermore, testimony recently given to the Oregon Environmental Justice Task Force and the Oregon Senate Committee on Workforce described how workers are unable to access clean water

and soap at the work site when needing to use bathroom facilities and take rest breaks and lunch breaks. The proposed rules fail to describe enforceable standards and criteria to ensure that all workers are able to properly wash their hands and other exposed body parts when they need to.

Recommendations: All employers must provide access to toilet facilities that are private and clean. Facilities will be supplied with toilet paper, a washing station, soap and single use towels. The location of the toilet facilities must not be more than ¼ mile from where workers are located.

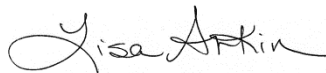
- **Unequal and Unbalanced Access to Decision Making**

We find fault with OR-OSHA for convening a rule-making process that allowed at least 32 representatives of farm, forest, seed, turf, cattlemen, orchards, vineyards and fruit packing, etc. to sit at the decision-making table, yet included only 2 farm worker advocacy groups (the Oregon Law Center and Legal Aide Services). **In other words, any representation from groups looking out for the welfare of the impacted workers amounted to 6% of the participants invited by OR-OSHA.**

The public must be better informed. The Agency did not provide sufficient notification for public input. Notifications should be issued in both English and Spanish and sent to media outlets and organizations that have the capacity to reach the affected population. The rule adoption timeline is rushed. We demand that the rule-making process start over with proper representation from affected parties, more time for public notification, invitations for public comment issued to farm worker unions and worker advocacy groups and sufficient advanced notification to other state agencies and commissions such as the Oregon Commission on Hispanic Affairs, the Oregon Environmental Justice Task Force, The Oregon Commission on Black Affairs, and the Oregon Sustainability Commission, etc.

We strongly oppose OR-OSHA's proposed 4/W Agricultural Worker Protection Standards. We request that this rule-making process be abandoned due to the likelihood that the proposed rules fail to meet federal standards and would not be legal. Oregon has an opportunity to truly protect farm and forestry workers by adopting rules that enhance and go above federal standards. Let us correct course, find our moral compass and uphold human rights and decency in the farm and forestry workplace.

Sincerely,



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