UNPOISON

EARTH • AIR • WATER

Department of Agriculture Land Reform and Rural Development
Att: Mr MJ MUDZUNGA
Registrar: Act 36 of 1947

Email: MalutaM@dalrrd.gov.za

03th March 2025

RE: **Regulatory Breaches in DALRRD's Derogation Process - Immediate Suspension Required**

Introduction

The April 2024 Guideline For The Application For A Derogation For An Agricultural Remedy Identified As A Substance Of Concern issued by the DALRRD on applications for pesticide derogations is deeply flawed, with internal contradictions and unclarity that could lead to systematic failures in procedural fairness. The weaknesses of the guideline potentially contravene the South African legal framework for both human and environmental health protection and fair, just administrative action.
This memorandum is a critique of the guidelines and the resulting process which we have now experienced first hand with our comments. Based on this analysis as well as the deficient derogation applications and risk assessments, we request that this process is immediately halted until it has been revised.

1. Background and Legal Foundation

Section 1 of the guideline aims to outline the process for granting derogations under Section 8(6) of the Agricultural Remedies Regulations. However, it inaccurately summarizes this legislative authority. While the guideline correctly states that derogations are permitted only in "exceptional circumstances," it omits a crucial qualifier in the law: such circumstances must arise "where there are no other agricultural remedies available."

This omission weakens the precision of the legislation, potentially expanding the scope of derogations beyond their intended use as last-resort measures. The failure to reflect the full legal requirement raises concerns about compliance with the doctrine of legal certainty.

2. Deficiencies in Risk Assessment Procedures (Section 2.1)

Section 2.1 of guideline lacks clarity on the scientific and procedural standards for risk assessments:

- It does not specify the methodology, data requirements, or evaluation criteria for assessing "associated risks" or determining whether risks are "sufficiently mitigated."

- It provides no distinction between risk assessments for new pesticide applications (regulated under Section 3(h) of the Agricultural Remedies Regulations) and risk assessments for derogation applications, which involve chemicals already recognized as particularly hazardous.
- The requirement for applicants to submit a risk assessment before the public comment period is inconsistently stated. Applicants may submit either a "completed risk assessment report" or "proof that the study has been initiated," yet public notice can only commence once a "hard copy" of the report is provided to the Registrar. The guideline does not specify whether this copy must be complete, introducing uncertainty that could lead to inconsistent enforcement and procedural fairness failures.

3. Public Notice and Comment Process (Section 2.2)

3.1. Lack of Specificity in Public Notice Requirements (Section 2.2.2)

The guideline provides only a general list of information required for public notices, without detailed specifications. Critical information is missing from the public participation process.
Key gaps include:

- No requirement to disclose criteria 1. (a), (b), and (c) of the guideline which justify with evidence why the derogation is being sought are are the fundamental criteria upon derogations are granted
- No requirement to disclose all chemical components of a pesticide, limiting public understanding of potential risks.
- Lack of clarity on the hazard classification system to be used.
- No mandated details on scope of use (e.g., crop types, geographical locations, application methods, exposure periods).
- Vague requirements for summarizing the risk assessment report, risking inconsistent disclosures that could hinder public engagement.

These ambiguities create risks of procedural unfairness, as stakeholders may not receive sufficient information to meaningfully engage in the consultation process.

3.2. Delegation of Authority to Applicants (Section 2.2.3)

The guideline appears to shift decision-making authority over late submissions from the Registrar (as required by the Regulations on Fair Administrative Procedures) to the applicant. Under administrative law, the Registrar has discretion to accept or reject late comments if doing so serves the public interest. However, Section 2.2.3 states that late comments may only be considered with "written authorization from the applicant." This conflicts with established principles of administrative fairness and may be legally unenforceable.

4. Application Submission Requirements (Section 2.3)

4.1. Inconsistent Requirements for Risk Assessment Submission

The guideline contradicts itself regarding when the full risk assessment report must be submitted:

- Section 2.1 suggests that a hard copy must be submitted before public notice begins.

- Section 2.3 states that the report need only be submitted after the public comment period, unless it was already provided earlier.

This internal inconsistency could create legal uncertainty, potentially allowing applications to proceed without a risk assessment being publicly available during the notice and comment period.

4.2. Insufficient Requirements for Justification and Use Details

The guideline does not require applicants to provide key details in their cover letter, such as:

- The specific crops for which the derogation is sought.
- Total volume, frequency, and method of application.
- Justifications for why no alternative remedies are viable.

The absence of clear disclosure requirements could lead to inconsistent assessments by DALRRD, undermining transparency and accountability in derogation approvals.

5. Evaluation Criteria for Derogation Applications (Section 2.4)

The guideline lacks specific evaluation criteria for the Registrar to assess derogation applications. It vaguely states that the Registrar must be "satisfied that the risk assessment addresses the material concerns," but provides no framework for determining when risks are deemed "unmanageable."

While Section 8(1) of the Agricultural Remedies Regulations sets evaluation standards for general pesticide applications, derogations require separate, more stringent criteria due to their inherently higher risks. The absence of explicit evaluation parameters increases the risk of arbitrary decision-making.

6. Internal Contradictions in Appendix A

Appendix A, which provides an example of a public notice, contradicts the main text of the guideline:

- It omits the required "short summary" of the risk assessment report.
- It permits vague classifications beyond the three core "substances of concern" criteria.
- It provides minimal information on "restricted uses," failing to disclose key details such as geographic restrictions and application methods.

These inconsistencies weaken regulatory clarity and could undermine public trust in the derogation process.

7. Lessons from the EU's Pesticide Derogation Framework

Recent EU case law (Pesticide Action Network Europe v. Belgium, 2023) has led to major reforms in the European approach to pesticide derogations, which now prohibit derogations for substances already banned under standard pesticide approval rules. South Africa's framework, which recently introduced a derogation process for banned (or soon to be banned) pesticides, remains aligned with the EU's outdated system rather than its current, more stringent approach.

The EU's revised derogation framework includes:

- More stringent information disclosure requirements (e.g., safeners, synergists, application frequency and timing, residue monitoring).
- Justifications based on scientific evaluations using European Food Safety Authority (EFSA) protocols, ensuring a data-driven assessment of necessity and risks.
- A requirement to demonstrate the lack of viable alternatives through structured scientific analysis.

The South African framework could be strengthened by aligning with these best practices, particularly given the Pesticide Management Policy's commitment to "sound scientific criteria that are generally consistent worldwide."

Conclusion and Recommendations

The DALRRD guideline on pesticide derogations contains multiple legal and procedural deficiencies that could undermine its effectiveness. To address these concerns, the following reforms are recommended:

- **Clarify legal requirements**: Ensure that all legislative provisions are fully and accurately reflected in the guideline.
- **Standardize risk assessment criteria**: Specify scientific and procedural requirements for evaluating risks and mitigation measures.
- **Improve transparency in public notices**: Mandate full disclosure of evidence justifying why the derogation is necessary, all chemical components, hazard classifications, and intended uses.
- **Ensure procedural fairness**: Retain administrative discretion over late submissions, rather than delegating this power to applicants.
- **Eliminate internal contradictions**: Align all sections of the guideline to avoid confusion over submission deadlines and evaluation criteria.
- **Adopt best practices from the EU**: Enhance scientific rigor and disclosure requirements in line with international standards.

A more robust and legally sound derogation framework is essential to balancing agricultural needs with public and environmental safety. UnPoison is requesting a response within 7 days and a suspension to the derogation process, pending a review.

Anna Shevel
NETWORK COORDINATOR
UnPoison.Org