

UNPOISON SUBMISSION ON DRAFT REGULATIONS

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3 August 2022

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UNPOISON SUBMISSION ON DRAFT REGULATIONS (PUBLISHED AS GN 2239 in GG 46665 ON JULY 2022) TO REPEAL AND REPLACE REGULATIONS TO DOMESTICATE REQUIREMENTS OF THE ROTTERDAM CONVENTION ON THE PRIOR INFORMED CONSENT PROCEDURE FOR CERTAIN HAZARDOUS CHEMICALS AND PESTICIDES IN INTERNATIONAL TRADE.

Submitted by [UNPOISON](#)

This comment on the draft regulations is submitted by Unpoison, a civil society collective made up of multi-sector organisations, educational institutions, NPO's, researchers, advocacy groups, communities, environmental practitioners, scientists, doctors, and concerned citizens, committed to a sustainable, healthy, clean, safe, just and thriving agricultural sector; a healthy food system, and a food secure future for all South Africans.

EXECUTIVE SUMMARY

The draft regulations, if promulgated, are unconstitutional.

The stated purpose of the draft regulations is to outline a procedure for countries to obtain and exchange information about certain pesticides and industrial chemicals, to promote shared responsibility and environmentally sound use.¹

“Environmentally sound” use in South Africa is at the very least, constitutionally compliant use, i.e. use that is governed by reasonable measures to ensure that the chemical does not pose a threat to public health and the environment, as envisaged in Section 24 of the Constitution. However the regulations do not achieve this purpose. They allow chemicals that are identified under the Rotterdam Convention that are hazardous to public health and the environment to be imported/exported and transited in South Africa, and they do so providing no mechanism to ensure that public health and the environment is considered and protected when an application is made to the Department of Forestry, Fisheries and the Environment (DFFE) for such importation/export or transit. They fail to carry out the National Environmental Management Act (NEMA)² mandate that requires the DFFE to protect the environment and public health when exercising administrative decision-making functions.³ In fact they result in the fettering of the discretion of the DFFE rendering it effectively subordinate to the Department of Agriculture Land Reform and Rural Development (DALRRD) Registrar of Fertilizers Farm Feeds, Agricultural Remedies and Stock Remedies (the Registrar) under Act 36 of 1947 (Act 36 of 1947), thus abrogating and evading its mandate to protect the public health and environment. DALRRD has fallen woefully short of regulating pesticides and agricultural chemicals in a way that would protect health and the environment, having done little to bring Act 36 of 1947 in line with the 1996 Constitution imperative to protect public health and the environment. The draft regulations preserve the *status quo* of lack of guidance in our current legislation for the exercise of administrative discretion when regulating hazardous pesticides both by the DALRRD and the DFFE.

To address these shortcomings the regulations should provide criteria for the exercise of discretion to refuse or severely limit permits to import/export and transit chemicals listed on Annexure 3 of the Rotterdam Convention, on public health and or environmental

¹ Draft regulation 2(3)

² Act 107 of 1998

³ Id section 2(3) and 2(4)

grounds when considering applications for these purposes. (These are contained in Annexure 1 of the draft regulations). The regulations should make provision for access to information and public participation in any application for importation/export and transit of chemicals identified in the Annexure 1. They should guide co-operative governance between the DFFE, DALRRD and the Department of Health to ensure that current legislation and pesticide registrations are brought in line with the objectives of the Rotterdam Convention. To protect public health and the environment they should ban or in exceptional circumstances, severely limit the importation/export or transit of chemicals listed in Annexure 3 of the Convention

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A. Introduction

1. The aim of the Rotterdam Convention on the Prior Informed Consent Procedure (PIC) for certain hazardous chemicals and pesticides in international trade is to promote shared responsibility and co-operative efforts among the Parties in the international

trade of dangerous chemicals in order to protect human health and the environment from potential harm, and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties. These objectives are particularly important for developing countries that may lack capacity in chemicals management.⁴

2. Trade in pesticides may be required as many pesticides are not produced locally. In allowing the importation and transit of pesticides, government enables these chemicals to enter and be used in South Africa. Chemicals listed on Annexure 3 of the Rotterdam Convention are hazardous substances and their transit and use, pose a threat to health and environment, and hence a threat to a fundamental right, the Constitutional right to environment. The DNA when considering applications for import must be guided by clear and justiciable criteria which protect public health and the environment, but the draft regulations contain no such criteria. The draft regulations do not enable the constitutional exercise of powers of the DNA, and if promulgated will be unconstitutional.

B. The purpose of the regulations is the environmentally sound, i.e. constitutional use of highly hazardous chemicals

3. The regulations apply to importers and exporters of the banned or severely restricted chemicals listed on Annexure 1 to the draft regulations, which list is equivalent to Annex 3 of the Rotterdam Convention.

The stated purpose of the regulations includes to

"to promote shared responsibility and cooperative efforts in the international movement of the chemicals listed in Annexure 1 to the regulations in order to **protect human health, animal health and or the environment from potential harm, and contribute to environmentally sound use of the chemicals listed** in Annexure 1 to these regulations, by facilitating information exchange about their characteristics by providing for a national decision making process on their import and export and by disseminating these decisions to other countries."⁵

⁴ https://ec.europa.eu/environment/chemicals/trade_dangerous/rotterdam-convention/objectives_en.htm

⁵ Draft regulation 2(3)(c)

4. The draft regulations forbid the importation, export or transit in South Africa of chemicals listed on Annexure 1, without consent having been obtained in terms of these regulations.⁶

C. ***Environmentally sound use is constitutional use***

5. “Environmentally sound use” of a hazardous chemical must be interpreted at the very least to mean constitutional use, which is use that does not violate the constitutional requirement that everyone is entitled to an environment which is not detrimental to health and well being, and to have that environment protected through reasonable measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development.⁷

What Chemicals Are Covered Under the Rotterdam Convention?

6. The Rotterdam Convention applies to industrial chemicals and pesticides that meet the criteria for listing under the Convention, generally because they have been **banned or severely restricted** in party countries or are severely hazardous pesticide formulations. Chemicals are subject to the PIC procedure if they are included in Annex III of the Rotterdam Convention. These are listed in Annexure 1 of the draft regulations. The Rotterdam Convention establishes a prior informed consent (“PIC”) procedure to ensure that restricted hazardous chemicals are not exported to countries that do not wish to receive them.⁸

7. The PIC procedure does not ban or restrict any chemicals, nor does it mean that any individual country must automatically prohibit their import.⁹ However in South Africa, a consent mechanism to determine whether this country will allow the import of a highly hazardous chemical must be implemented constitutionally, i.e. must ensure

⁶ Draft regulation 3

⁷ Section 24 of the SA Constitution states:

Everyone has the right - (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that - (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁸

<https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/rotterdam-convention-on-the-prior-informed-consent-procedure-for-certain-hazardous-chemicals-and-pesticides-in-international-trade/>

⁹ id

that the constitutional right to environment is not violated in the permitting process. It must ensure that the chemical does not pose a risk to public health and environment, and if it does, there are reasonable measures in place to prevent such risk.

8. Arguably the chemicals listed in Annexure 1 (being on Annex III of the Rotterdam Convention) are of such a hazardous nature that reasonable measures do not exist to prevent them from harming public health and the environment if used generally, and for this reason they are either banned or severely restricted in Party countries.

D Absence of reasonable measures governing harm posed by pesticides and agricultural chemicals generally in South Africa

9. South Africa has the additional problem of a lack of a constitutionally compliant system of regulation of pesticides and agricultural chemicals. The regulation of registration of these chemicals falls under the Department of Agriculture Land Reform and Rural Development (DALRRD) which has as its main focus and mandate, the promotion of agriculture rather than the protection of the environment. Its main statute regulating the use of pesticides, the FERTILIZERS, FARM FEEDS AND AGRICULTURAL REMEDIES ACT¹⁰ (Act 36 of 1947) is devoid of provisions that would protect the environment and public health. It makes passing reference to the public interest. It does not provide criteria for decision makers, including the Registrar that would enable them to develop reasonable measures to protect the environment and public health. Act 36 of 1947, despite several amendments, is deficient and is thus constitutionally inadequate for the protection of public health and the environment. These problems were recognised by the reform process for this statute which commenced in 2010 with the promulgation of the Pesticide Management Policy.¹¹ However this process has ground to a halt, as subsequent draft regulations under this Act have largely ignored its recommendations. Notably, the Pesticide Management Policy recorded that there is an

¹⁰ Act 36 of 1947 – draft regulations published under GNR 541 OF 18 JUNE 2021- UNDER FERTILIZERS, FARM FEEDS AND AGRICULTURAL REMEDIES ACT (36 OF 1947).

¹¹ Pesticide Management Policy for South Africa - GN 1120 of 2010 published in GG 33 899 on 24 December 2010.

“...absence of effective management of pesticides to ensure that pesticides are used in ways that lead to the minimisation of significant adverse effects on human health and the environment is of concern.”¹²

10. The Policy identified pesticides which pose an unmanageable risk, including
 - a. Endocrine disrupting properties (EDP)
 - b. Persistent organic pollutants (POP)
 - c. Carcinogenic & immunotoxic potential (class 1a)
 - d. Highly hazardous (class 1b)
 - e. Pesticides with frequent and severe poisoning incidents (arsenic, 2a)¹³

11. One of the serious consequences of this state of poor regulation is the widespread contamination of non-target areas by pesticide drift, of often highly hazardous chemicals sprayed on crops. A 2019 study of the Krom, Breede and Hex River catchments¹⁴ using passive water samplers detected 248 chemicals, including 187 pesticide compounds in river water samples, in a number of typical fruit farming areas in the Western Cape. This depicts the scale of the problem of pesticide drift very clearly.¹⁵ Many of the chemicals detected are banned in other countries.

12. Scholars in South Africa have researched and documented the tragic consequences of the current poor pesticide management. For example the long-term effects of DDT exposure on semen, fertility, and sexual function of malaria vector-control workers in Limpopo Province, South Africa was established as long ago as 2004.¹⁶ Children in

¹² id section 1.

¹³ id section 4(1)

¹⁴ Out of the 248 analyzed compounds (187 pesticide compounds and 61 TPs), 34 parent compounds (18% of the analyzed active ingredients) and 19 TPs (31% of the analyzed TP) were detected (Table S4 of the SI). The 34 pesticide compounds detected above LOD consisted of 13 fungicides, 12 herbicides and nine insecticides (Fig. 3). Out of the 96 pesticide compounds that have been reported on the spray records, 35 compounds were covered by the analytical method. These included six out of the eight dominating compounds in the spraying records (Tables S3 and S4 of the SI). Only the fungicide mancozeb and the herbicide glyphosate, which are hardly stable in the environment or require particular analytical methods, were not covered (paragraph 3.2.2).

¹⁵ Lou Curchod, Christelle Oltramare, Marion Junghans, Christian Stamm, Mohamed Aqiel Dalvie, Martin Rööslü and Samuel Fuhrmann. 2020. Temporal variation of pesticide mixtures in rivers of three agricultural watersheds during a major drought in the Western Cape, South Africa.

Available: <https://www.sciencedirect.com/science/article/pii/S2589914719300751>

¹⁶

https://scholar.google.co.za/citations?view_op=view_citation&hl=en&user=4dCK3YwAAAAJ&citation_for_view=4dCK3YwAAAAJ:u-x6o8ySG0sC

rural communities in the Western Cape have been observed to be impacted by pesticide drift from neighbouring farms which has contaminated their school grounds.¹⁷ The position is unlikely to have changed given that there has been little or no substantive change in the regulatory environment concerning pesticides since these studies were undertaken.

13. A wide array of health impacts from agricultural remedies due to acute and/or long term exposure can include – the risks of developing cancers, endocrine disruption, impacts on neurodevelopment of children, impacts on the immunological system, renal and respiratory effects, development of obesity, dermatological, neurological and cognitive effects. Most at risk of developing these serious medical conditions are the **most vulnerable in our society, women, children and farm workers**. These persons can least afford the medical costs apart from other impacts on their lives that result from continued chemical exposure. Pesticides and agricultural chemicals also pose a threat to biodiversity including importantly, bee populations. As stated in a recent article on pesticides and their implications for environmental and human exposure:¹⁸

“Indeed, pesticide contamination has been related to declines in bees (Stanley et al., 2015; Woodcock et al., 2017) and insectivorous birds (Hallmann et al., 2014). In particular, the new generation of pesticides is associated with a considerable increase in toxicity to aquatic invertebrates and pollinators (Schulz et al., 2021). At the global level, exposure by pesticides has been considered as **one of the main chemical threats on human health** (Landrigan et al., 2017) as several CUPs (e.g. chlorpyrifos, carbaryl, terbutylazine) are known to be carcinogenic, neurotoxic or are associated with adverse growth effects, disruption of the endocrine system and respiratory problems (FAO and WHO, 2016; Kim et al., 2017; Mamane et al., 2015; Mostafalou and Abdollahi, 2017; Zhang et al., 2018). Therefore, the potential risks of pesticides for the environment and human health exist and need to be assessed.

14. Part of the required reform process around pesticides and agricultural chemicals must also necessarily concern what chemicals are permitted to be imported/exported

¹⁷ Environmental monitoring of pesticide residues from farms at a neighbouring primary and pre-school in the Western Cape in South Africa

https://scholar.google.co.za/citations?view_op=view_citation&hl=en&user=4dCK3YwAAAAJ&citation_for_view=4dCK3YwAAAAJ:_FxGoFyzp5QC

¹⁸ <https://www.sciencedirect.com/science/article/pii/S0048969721055327#bb0470> Current use pesticides in soil and air from two agricultural sites in South Africa: Implications for environmental fate and human exposure
Céline Degrendele^{a1} Jana Klánová^a Roman Prokeš^a Petra Přibyllová^a Petr Šenk^a Marek Šudoma^a Martin Rössli^{bc} Mohamed Aqiel Dalvie^d Samuel Fuhrmann^{bce}

and transited through South Africa. This is the legislative duty of the Department of Forestry Fisheries and Environment to ensure that when it drafts regulations, and permits any activity that is harmful to the environment and public health, it must ensure that such activity is governed by reasonable measures that prevent pollution and threats to public health and the environment. Such measures must also promote conservation. The draft regulations fail to achieve this mandatory purpose.

E. *Importation/export and transit of Annex 1 chemicals is constitutionally problematic*

15. We submit that permission to import/export or transit Annexure 1 chemicals (listed in Annex III of the Rotterdam Convention) cannot be constitutional except in the most restricted of circumstances, by virtue of their hazardous and toxic nature. The draft regulations do not address this.

F. *The draft regulations lack any mechanism to protect public health*

16. The draft regulations allow for consent to the importation/export and transit of certain chemicals, listed under the Rotterdam, if the chemical is authorised for use in South Africa.

Regulation 4(7) states that

“the decision to grant consent or deny consent will be based on

- (a) **Availability of the licence certificate from the competent authority for use** of the chemical in the country if applicable; and
- (b) Acknowledgment of chemical consignment by the importer.

17. The wording of regulation 4(7) is constitutionally problematic. In terms of the law of interpretation of statutes only the two factors mentioned in the regulation will determine whether consent to import or transit is given. Neither of them has any reference to protection of the public health or environment through reasonable measures. By giving a list of only these two requirements other requirements are excluded by reason of the application of the legal maxim *expressio unius est exclusio alterius* in the South African law of interpretation of statutes which means when one

or more things of a class are expressly mentioned others of the same class are excluded.¹⁹

18. The draft regulations therefore enable chemicals on the Annexure 1 list to be imported (and therefore used) without imposing reasonable measures to ensure that the use thereof will be constitutional. They also fail to provide any criteria for the evaluation of the risk posed by such chemicals to the public's right to a safe and healthy environment. Without these additional regulatory protections, the draft regulations will be unconstitutional.

19. An example of one such chemical is carbofuran²⁰ which is listed in Annexure 1, but is still registered for use under the Act 36 of 1947 and used widely on potatoes, corn and soybeans. It is a systemic insecticide, which means that the plant absorbs it through the roots, and from there the plant distributes it throughout its organs where insecticidal concentrations are attained. Carbofuran also has contact activity against pests. It is one of the most toxic pesticides still in use.²¹ The World Health Organisation classifies it as a highly hazardous (Class 1 b) pesticide. Carbofuran exhibits toxicity mediated by the same mechanism as that of the notorious V-series nerve agents and presents a risk to human health. It is classified as an extremely hazardous substance in the United States as defined in Section 302 of the United States Emergency Planning and Community Right-to-Know Act (42 U.S.C. 11002), and is subject to strict reporting requirements by facilities which produce, store, or use it in significant quantities.²² It has been reported as a cause of a significant number of wildlife poisonings and its high toxicity may put humans at risk.²³

¹⁹ "Expressio unius est exclusio alterius." *Merriam-Webster.com Legal Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius>. Accessed 25 Jul. 2022.

²⁰ <https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/carbofuran>

²¹ Wikipedia -<https://en.wikipedia.org/wiki/Carbofuran>

²² Reference is "WHO recommended classification of pesticides by hazard and guidelines to classification, 2019 edition. Geneva: World Health Organization; 2020. at <https://apps.who.int/iris/bitstream/handle/10665/332193/9789240005662-eng.pdf?ua=1>

²³ See Botha Christo J., Coetser Heleen, Labuschagne Leonie, Basson Andre. Confirmed organophosphorus and carbamate pesticide poisonings in South African wildlife (2009-2014). *J. S. Afr. Vet. Assoc.* [Internet]. 2015 [cited 2022 July 30]; 86(1): 01-04. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1019-91282015000100015&lng=en. <http://dx.doi.org/10.4102/jsava.v86i1.1329>

20. In South Africa it is authorised for use and the label for carbofuran 10 GR only refers to it as harmful.²⁴

G. Failure to provide guidance to decision makers in order to ensure constitutionally compliant administrative action.

21. The Constitutional Court judgement in the **Dawood**²⁵ case, stated that legislation granting the power to infringe a constitutional right must be drafted in such a way that the exercise of administrative discretion that infringes such rights is guided by **clear and justiciable criteria**. Justiciable refers to an issue being capable of determination by a court of law. A statute granting powers which are vague results in courts having to determine whether the exercise of powers in each case was reasonable and justifiable which is inappropriate, as statutes are required to promote the Bill of Rights and ensure that administrative officials exercise their discretion appropriately and also promote the bill of rights.

22. In the case of the draft regulations implementing the Rotterdam Convention on prior informed consent, the power to allow a hazardous chemical to be imported/exported or transited could result in a risk to public health and the environment and infringes on the fundamental constitutional right to environment.²⁶ The pesticides and chemicals on Annexure 1, being banned or severely restricted in other countries, require scrutiny before they are allowed to be imported into South Africa, even if they are currently authorised for use under Act 36 of 1947 or other statutes. These chemicals have been found to pose a threat to public health and the environment in other jurisdictions triggering a need for constitutionally compliant protective measures in South Africa. For example, Carbofuran is banned in 87 countries worldwide.²⁷

²⁴ Reg. No.: L 8547 Act /Wet No. 36 of/van 1947

https://za.uplonline.com/download_links/HplyLHTpVOfvGKnTal3aLnhR1CcLZFTJp5Tb8sC.pdf

²⁵ **Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000),**

²⁶ Constitution section 24

²⁷ . <https://pan-international.org/pan-international-consolidated-list-of-banned-pesticides/>

23. However no criteria are provided for by the draft regulations for the exercise of discretion by the DNA when considering applications for prior consent to import, export or transit highly hazardous chemicals, which are activities that may result in the infringement of a fundamental right, and the draft regulations if promulgated will therefore be unconstitutional. For example the draft regulations should indicate that listing on the Annex III of the Rotterdam Convention should trigger refusal of consent, except in the most exceptional of circumstances, which need to be clearly motivated and justified. However no indication is given that this is not only acceptable, but desirable.

24. In the DAWOOD case, which concerned immigration permits, officials were given a general discretion to grant or refuse permits without access to clearly justiciable criteria which would guide the exercise of that discretion. The court found that any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit the right to dignity, a fundamental right under our Constitution. The court explained the requirement for clearly justiciable rules to guide the exercise of discretion where a fundamental right could be infringed by administrative action:

“[53] Discretion plays a crucial role in any legal system.^[23] It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here.

[54] We must not lose sight of the fact that rights enshrined in the Bill of Rights **must be protected and may not be unjustifiably infringed**. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative

requirement that delegated legislation be properly enacted by a competent authority.^[74]

[55] Such guidance is demonstrably absent in this case. It is important that discretion be conferred upon immigration officials to make decisions concerning temporary permits. Discretion of this kind, though subject to review, is an important part of the statutory framework under consideration. However, no attempt has been made by the legislature to give guidance to decision-makers in relation to their power to refuse to extend or grant temporary permits in a manner that would protect the constitutional rights of spouses and family members.

[56] Nor can it be said that there is any legislative purpose to be achieved by not supplying such guidance at all. The Minister, in his written argument, did not seek to suggest the contrary. It would be neither unduly complex nor difficult to identify the considerations relevant to a justifiable refusal of a temporary permit. There is no reason therefore for the legislative omission that can be weighed in the limitations analysis. In this case, the effect of the absence of such guidance, coupled with the breadth of the discretion conferred upon immigration officials and the DG by sections 26(3) and (6), significantly undermines the purpose of section 25(9)(b).

26. The National Environmental Management Act²⁸ (NEMA) principles²⁹ provide general guidance³⁰ to decision makers in order to ensure sustainable development, but are insufficiently detailed and specific to ensure that decisions regarding granting of prior informed consent to import/export or transit hazardous chemicals are consistently and appropriately made, in furtherance of the object of NEMA and the State's constitutional duty to protect the environment and public health.
27. Precise and justiciable criteria are required where the exercise of a public function could threaten a constitutional right and the NEMA principles do not provide the level of detail required in order to constitute specific reasonable measures to protect public

²⁸ Act 107 of 1998

²⁹ Id Section 2 -(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment;....

³⁰ The principles2(1) (c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

health and the environment.³¹ In *President of the RSA v Hugo* 1997 6 BCLR 708 (CC); 1997 4 SA 1 (CC) the court said the following at par 102:

“The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to conform his or her conduct to the law..”

28. It is therefore our submission that the draft regulations fail the test of being a reasonable measure, as required in terms of section 24 of the Constitution and as interpreted by the Constitutional Court, for the protection of public health and the environment when the DNA considers applications for prior consent to the import/export and transit of pesticides and agricultural remedies and will be unconstitutional, if promulgated in their current form.

Lack of access to information in the regulations

29. Access to information and public participation in matters that could significantly affect the environment are cornerstone principles of our system of environmental management under NEMA.³² There is no provision for access to information and public participation in the free prior consent process envisaged by the draft regulations. It is unacceptable for the public to have to rely on general principles of access to information and weak provisions for access to information in the Promotion of Access to Information Act, and the principle of public participation set out in NEMA, to establish these rights. These rights should be spelt out explicitly in the regulations, to prevent uncertainty and conflict over this issue, given the far reaching consequences for public health and the environment of the regulations.

D. Fettering of the discretion of the DFFE- to act on instruction

³¹The constitution states:

Section 24 :Everyone has the right - (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that - (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure. ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

³² NEMA Principle 2(4)(f) and (k).

30. In administrative law, the fettering of the discretion of one government department by another is undesirable and unlawful. In the case of the draft regulations the requirements for exercise of discretion in granting a licence to export/import or transit listed chemicals are set out in such a way that the discretion of the DNA is subject to the will of the Registrar, the official of DALRRD. If the Registrar has granted authorisation for the use of the chemical, this will be the determining factor as to whether a licence to import/export or transit a chemical listed under Annex III of the Rotterdam convention is granted.
31. However the protection of public health and environment is a core mandate of the DFFE under the Constitution and the NEMA and cannot be subordinated to the will of another government department.
32. Moreover Act 36 of 1947 does not make provision for the protection of public health and environment and has been identified in government policy as being severely lacking and requiring reform.
33. The draft regulations create uncertainty, in a context where an environmental right could be violated by the authorisation of importation of a hazardous chemical. The uncertainty arises as to whether
- (1) the DNA will apply any criteria apart from what is explicitly stated in regulation Regulation 4(7);³³
 - (2) what other requirements will be considered; and
 - (3) whether, and if so how, the NEMA principles will be read into requirements by officials when considering granting consent under the regulations.
34. The consequence of the above uncertainty is that there is likely to be merely a tick box approach based on the two criteria provided for in Regulation 4(7). In effect the exercise of discretion will be subordinate to the DALRRD Registrar's licensing process

³³ "the decision to grant consent or deny consent will be based on

- (a) **Availability of the licence certificate from the competent authority for use** of the chemical in the country if applicable; and
- (b) Acknowledgment of chemical consignment by the importer.

which does not have NEMA principles embedded in it nor criteria for protection of health.

E. CO OPERATIVE GOVERNANCE

35. **This submission is opposed to the granting of permits for the export/import or transit of chemicals listed under Annex III of the Rotterdam Convention, or under consideration in terms of that convention.** However in the interests of promoting discussion and reform of our pesticide legislation, the following submissions are made concerning the constitutional duty on state departments to engage in co-operative governance.
36. Chemicals which are registered under Act 36 of 1947 may have such registration cancelled if the Registrar under Act 36 of 1947 is satisfied that it is contrary to the public interest that such remedy remain registered.³⁴
37. The Registrar may also limit the **manner of use/application** of a chemical registered under this Act in terms of section 6A,³⁵ in order to limit adverse impacts, such as pesticide drift into non-target areas. He/she does this by ordering pest control operators to discontinue use of certain equipment that in the opinion of the Registrar is "so unsuited for the administration of such remedy that the purpose for which the remedy is administered may be defeated." It is submitted that the wide scale occurrence of pesticide drift into non-target areas in South Africa indicates that the use, particularly of aerial spraying and mist blowers, currently defeats the purpose of the Act, which has as its objects compliance with the conditions of the registration³⁶ and the label requirements, and conduct that is not against the public interest.³⁷
38. The practical implementation of a decision to refuse or severely restrict use of a pesticide or agricultural chemical by the DFFE under the regulations for the

³⁴ Act 36 of 1947 as amended section 4(1) (e)

³⁵ 6A. If the registrar is of opinion that an equipment used by any registered pest control operator for the administration of any particular agricultural remedy is so unsuited for the administration of such remedy that the purpose for which the remedy is administered may be defeated, he may order the pest control operator to discontinue the use of such equipment when administering-the said remedy..".

³⁶ Id section 4A(a)

³⁷ Id section 4(1) (e)

implementation of the Rotterdam Convention requires the cooperation of the DALRRD, in terms of section 40 of the Constitution, which deals with the duty of state departments to engage in co-operative governance.

39. The draft regulations for the domestication of the requirements of the Rotterdam Convention on the free prior informed consent procedure should therefore state that:
- a. The DFFE shall notify the DALRRD of its intention to ban or severely limit the import of a chemical registered for use under Act 36 of 1947 and listed on Annex III of the Rotterdam Convention, or under consideration under the Rotterdam Convention.
 - b. The DFFE shall call on the DALRRD in terms of section 40 of the Constitution (Co-operative Governance) to invoke the provisions of section 23(a) and 4(1)(e) of Act 36 of 1947,
 - i. within a specified time not exceeding a year ;
 - ii. to terminate the registration of, or severely restrict the permissible use of the chemicals and/or the manner of application thereof. (“severely restrict” could include measures envisaged under Section 6A of Act 34 of 1947, by disallowing application of pesticides and agricultural chemicals by Pest Control Officers by any means other than for example hand application - effectively disallowing aerial spraying or large scale mist blower spraying, to prevent drift into adjacent areas.

CONCLUSION

40. The draft regulations must include provisions which are reasonable measures to prevent harm to health and environment by the importation, export or transit of ANNEXURE 1 pesticides and chemicals. Such reasonable measures must comply with the existing legal framework including the relevant fundamental constitutional rights (environment, just administrative action, access to information, right to life, right sufficient food and water) and be consistent with NEMA principles (principles of sustainable development; open and transparent decision making and access to information; the precautionary principle; the polluter pays principle; the principle of

cradle-to-grave responsibility; the public trust principle; and environmental justice and the prevention of unfair discrimination.).

41. The draft regulations must provide criteria guiding the decision making process, when the DNA considers granting consent to import, export or transit of such chemicals. The criteria should include

- (i) that any chemical listed on Annexure 1 or added after the promulgation of the regulations to Annex III of the Rotterdam Convention or under consideration for listing on Annex III of the Rotterdam Convention should not be granted consent for importation, export or transit save for in the most limited and exceptional circumstances bearing in mind the guidance provided by the NEMA principles;

In determining the extent of such limited circumstances the DNA must consider:

- (ii) the record of applications for use of the chemical in other jurisdictions;
- (iii) the health and environmental risks of the chemicals and how these are impacted by manner or application (eg aerial spraying, centrifugal spraying or hand spraying);
- (iv) submissions by the public;
- (v) intended use;
- (vi) safety record of the applicant for importation or transit and any previous violations of regulations in South Africa or other jurisdictions;
- (vii) appropriate limitations on the time period that may be granted for such importation, export or transit;
- (viii) other relevant considerations.

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