

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

8th December 2022

Re:PHASE OUT OF ACTIVE INGREDIENTS AND FORMULATIONS THAT MEET THE CRITERIA OF CARCINOGENICITY, MUTAGENICITY, AND REPRODUCTIVE TOXICITY CATEGORIES 1A OR 1B OF THE GHS SYSTEM OF CLASSIFICATION AND LABELING OF CHEMICALS

UnPoison is 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 sustainable food sector future for all South Africans.

Unpoison has a focused interest in agrichemical policy, legislation, and regulations and is committed to assisting the Registrar via feedback and comment to ensure South Africa is aligned to or surpasses global best practice in this regard. In this regard Unpoison has made submissions to the Registrar in 2021 on the Draft Regulations under Act 36 of 1947 and to Parliament regarding the draft Climate Change Bill.

We refer to the publication, on 14 April 2022, of the Registrar's intention to prohibit the use of active ingredients, and their formulations that meet the criteria of CMR categories 1A of 1B as of 1 June 2024. This announcement is administrative action, and also indicates the Registrar's intention to engage in further administrative action to determine a final list and regime for the phase out, and as such is governed by provisions relating to fair administrative action under the Promotion of Administrative Justice Act¹ (PAJA) and other statutes, in regard to requirements for transparency and public participation.

Administrative action regulating the use of highly hazardous pesticides and agricultural chemicals will impact on the rights and legitimate expectations of persons, in a manner that could be material and adverse, especially if the steps taken do not go far enough to protect public health. Hence the Registrar has a duty to consult the public prior to the intended administrative action and to enable meaningful participation through providing sufficient information to the public.² Moreover, sections 3 and 4 of the PAJA read with Regulation 18(3)(a) of GNR.1022 of 31 July 2002: Regulations on fair administrative procedures (as

¹ Act 3 of 2000

² PAJA section 3(2)(ii)

amended), provide that a notice published concerning the proposed administrative action 'must contain sufficient information about the proposed administrative action to enable members of the public to submit meaningful comment'. What 'meaningful comment' entails was clarified by the court in *Heatherdale Farms v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486F-G. The court recognised that the common law principles relating to procedural fairness require (among other things) that a person 'must be put in possession of such information as will render his right to make representations a real, and not an illusory one'.

This letter serves to request the Registrar to undertake to ensure that the phase out process is transparent and procedurally fair and that the constitutional rights of interested and affected parties will be protected in the process. In particular the Registrar is required to take steps to ensure that interested and affected parties can meaningfully engage in the phase out process.

Deficiencies in the process to date

The process announced to date fails to comply with the requirement of providing sufficient information to enable the public to meaningfully comment on what is contained therein. It also fails to ensure that the process to follow will result in reasonable measures to protect environmental and public health as required by section 24 of the Constitution.

The announcement does not present an intention to phase out all of those chemicals registered under Act 36 which pose an unacceptable risk to the public and the environment. No precise list of substances, nor the active ingredients and formulations that meet CMR criteria are given, or any information on the assessments referred to. The notice does not explain the intended process to be undertaken between now and June 2024 to identify, and thereafter phase out such chemicals. There is no indication of whether interested and affected parties will at any time be afforded an opportunity to engage meaningfully in the process of phase out, including being provided with sufficient information in order to meaningfully engage in the comment process.

The group of chemicals referred to in the Registrar's letter includes several highly hazardous chemicals, but is by no means a comprehensive list of highly hazardous agricultural chemicals and pesticides, or even a list of those chemicals currently banned for use in agriculture in the USA and European Union, major trading partners of South Africa.

Currently internationally, the list of Highly hazardous chemicals used in agriculture is generally accepted by the FAO and WHO as including the following eight criteria that were developed at the FAO/WHO Joint Meeting on Pesticide Management in 2008, which are listed in the table below. (See *International Code of Conduct on Pesticide Management Guidelines on Highly Hazardous Pesticides*³ section 2.2. See also *The potential key role of SAICM National Focal Points in Reducing Harm from Highly Hazardous Pesticides (HHPs): Factsheet 2022*⁴).

³https://apps.who.int/iris/bitstream/handle/10665/205561/9789241510417_eng.pdf?sequence=1&isAllowed=y

⁴ <https://www.fao.org/documents/card/en/c/cc1806en/> box 1 on page 7.

2.2 Criteria The FAO/WHO Joint Meeting on Pesticide Management [2008] recommended that highly hazardous pesticides should be defined as having one or more of the following characteristics:

- Criterion 1: Pesticide formulations that meet the criteria of classes Ia or Ib of the WHO Recommended Classification of Pesticides by Hazard; or
- Criterion 2: Pesticide active ingredients and their formulations that meet the criteria of carcinogenicity Categories 1A and 1B of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS);
- or · Criterion 3: Pesticide active ingredients and their formulations that meet the criteria of mutagenicity Categories 1A and 1B of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS);
- or · Criterion 4: Pesticide active ingredients and their formulations that meet the criteria of reproductive toxicity Categories 1A and 1B of the Globally Harmonized System of Classification and Labelling of Chemicals (GHS);
- or · Criterion 5: Pesticide active ingredients listed by the Stockholm Convention in its Annexes A and B, and those meeting all the criteria in paragraph 1 of Annex D of the Convention;
- or · Criterion 6: Pesticide active ingredients and formulations listed by the Rotterdam Convention in its Annex III;
- or · Criterion 7: Pesticides listed under the Montreal Protocol;
- or · Criterion 8: Pesticide active ingredients and formulations that have shown a high incidence of severe or irreversible adverse effects on human health or the environment.

Legislative framework

The Department of Agriculture Registrar under Act 36 of 1947 has a duty to in terms of Section 24 of the Constitution to take reasonable measures to protect the public health and the environment, and to engage interested and affected parties in a transparent process in order to develop such measures, regarding the registration of agricultural remedies, and the phase out of highly hazardous chemicals under that Act. (Constitutional Right to Environment and Right to Just Administrative Action).

The Pesticide Management Policy

The Registrar under Act 36 has created a legitimate expectation that there will be a transparent process to phase out highly hazardous pesticides and agricultural chemicals. As far back as 2010 this was undertaken in terms of the Pesticide Management Policy⁵ but this has not been implemented. The failure to do so is an omission that constitutes unlawful administrative action, as PAJA includes under the definition of administrative action, any decision taken, or any failure to take a decision by and organ of state and which adversely affects the rights of any person and which has a direct, external legal effect.⁶ This adverse impact is described in the Policy as follows:

“The 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. Scientific and medical journals increasingly report the risks posed to human health

⁵ Notice 1120 of 2010 GG 33899 24 December 2010y . Promulgated by the then Department of Agriculture, Forestry and Fisheries.

DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES FERTILIZERS, FARM FEEDS, AGRICULTURAL REMEDIES AND STOCK REMEDIES ACT, 1947 (ACT NO. 36 OF 1947)

⁶ PAJA section 1

by pesticides, including links between pesticides and diseases such as cancer and hormone disruption.”⁷

This Pesticide Management policy recognises that Section 24 of the Constitution of the Republic of South Africa specifically imposes a duty on the State to promulgate legislation that ensures that the environment is not harmful to the health or well being of its inhabitants; as well as the need to have the environment protected for future generations, and that everyone has the right to fair, lawful, reasonable and procedurally fair administrative action.

In the context of its governance of pesticides and agricultural remedies the Department undertakes to do a proper appraisal of the health and environmental risks posed by pesticides and lists several chemicals and methodology for assessment:

“The Policy takes into cognisance the fact that special attention should be given to pesticides that pose unmanageable risk, with an understanding that such pesticides should be considered for phaseout, severe restriction and bans. Those that will be considered include those with Endocrine Disrupting Properties (EDP), Persistent Organic Pollutants (POPs), carcinogenic and immunotoxic potential, formulations classified by WHO as Extremely Hazardous (class 1a) and Highly Hazardous (class 1b), as well as pesticides associated with frequent and severe poisoning incidents.”⁸

The Department also undertakes to take a proactive approach to substitution of highly hazardous chemicals:

“The pesticide reduction strategies will include the incorporation of an appropriate application of the “Substitution principles” as an important tool to promote the replacement of pesticides with less toxic products and non-chemical alternatives. The substitution principle requires or encourages phasing out the use of harmful substances when less harmful substances or methods can be identified to achieve the same or similar level. Also, the DAFF shall incorporate the requirements of review of existing registered pesticides in the new legislation. The review shall be done if there is new evidence that indicates that they (pesticides) might carry a significant risk of harm to human health, safety or the environment or that the product is no longer efficacious.”⁹

The Department also undertakes to regulate in a transparent fashion:

“To ensure transparency and access to information, the DAFF shall incorporate all aspects of the regulatory system and also avail the opportunity for public involvement in the development of new aspects of the regulatory decision in the new legislation. Information must be presented in such a way that it enables a person to understand the risks and develop a sense of proportion in order to make a judgment on the acceptability of those risks. This will enable them to make informed choices and avoid products containing harmful pesticides, and put pressure on industry to develop safer substitutes.”¹⁰

⁷ Pesticide Management Policy section 1

⁸ Id section 4(i)

⁹ id

¹⁰ Page 11 section 4(vii)

The National Environmental Management Act¹¹ (NEMA) principles also establish a duty to afford the public a right to participate in decision making in regard to actions of state that significantly affects the environment:

Principles 2(4)(f) states:

“The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.”

Importantly, NEMA recognises the need for the rights of vulnerable and disadvantaged persons to be promoted. In the case of agricultural chemicals and pesticides this would apply particularly to farm workers, and including women and children on farms.

In light of the above, the Registrar is called upon to ensure that the process of phase out of highly hazardous agricultural chemicals and pesticides will constitute fair administrative action by making the following undertakings

1. To provide interested and affected parties with all information concerning the assessment of chemicals for phase out to date, including:
 - a. the list of active ingredients and formulations that meets CMR criteria;
 - b. and any representations by industry representatives regarding the phase of specific chemicals; and
 - c. the plan for phasing out Class 1A & 1B substances
2. To Indicate the intended procedure for obtaining input from experts and steps that will be taken to ensure that such experts are independent;
3. To indicate what further assessments are intended to be undertaken including socio-economic and/or environmental assessments;
4. To indicate the methodology for determining how the phase out is to be managed;
5. To indicate what steps will be taken to avail the opportunity for public involvement in the development of new aspects pertaining to the phase out of registered chemicals

Should you fail to respond positively to the above demand it is submitted that the announcement and further action taken as envisaged in it, will be procedurally unfair and unconstitutional. We trust that you will take all steps as mandated in the Pesticide Management Policy to ensure that the process is fair and transparent and results in reasonable measures as envisaged in section 24 of the Constitution.

Kindly provide us with the undertaking that you will comply with these requests within 7 days of receipt of this letter.

UNPOISON

Angela ANDREWS

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Cape Town

8 th December 2022

¹¹ Act 107 of 1998