

UNPOISON

EARTH • AIR • WATER

Department of Employment and Labour
Att: Minister of Employment and Labour
Email: DraftComments.OHH@labour.gov.za

Date: 3rd July 2024

RE: REQUEST AND MOTIVATION FOR DRAFT REGULATIONS TO BE WITHDRAWN

This submission is made by Unpoison in response to the request to comment on **DRAFT REGULATIONS FOR HAZARDOUS CHEMICAL AGENTS** published on 5th April 2024 under the OCCUPATIONAL HEALTH AND SAFETY ACT, 1993 (ACT NO. 85 OF 1993)

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 sustainable, clean, safe, fair, non-toxic, South Africa by assisting to ensure effective regulating, monitoring & disposal of agrichemicals, chemicals, and other pollutants, while eradicating human and environmental exposures to hazardous chemicals.

It is of grave concern to UnPoison that there has been no memorandum to explain why these regulations are being replaced, and in many respects weakened and watered down, so soon after the promulgation of initial regulations in 2021.

The summary below lists some of the main substantive concerns. (It is not a full list of the concerns raised in the separate comments submitted):

- (i) The draft regulations introduce vague and unenforceable obligations – for example the use of the term “reasonably practicable” in many instances, such as for the labelling of HCA’s by the manufacturer or importer¹ and for packaging of HCA’s²
- (ii) Risk assessments need only be undertaken when a HCA is present in the workplace, whereas the 2021 regulations required assessments if there was a **likelihood** that the HCA might be present in the workplace.
- (iii) Certain categories of hazardous chemical agents identified in the GHS and 2021 regulations have been removed.³
- (iv) Certain annexures contained in the 2021 regulations relating to levels of exposure are incomplete although data is available:

¹ Draft regulations 5 Labelling of Hazardous Chemical Agents.

² Draft regulation 6 Packaging of Hazardous Chemical Agents

³ “Aspiration hazard” the table stipulates only one subcategory ie Category 1, whereas the GHS system indicates Category 1 and Category 2.

Annexure 2, Table 1 - prohibited hazardous chemical agents - why are they mentioned as prohibited. Reference should be made to the multilateral environmental agreements, for example, PCB and PCB are listed under Annexure A of the Stockholm Convention.

The STEL/C does not align to international exposure indices as FAO/WHO and GHS refers to the STEL/C indicated here as acute reference dose (ARfD). These indicators for almost all HCA can be found on PubChem, ECHA and Pesticide Properties Database (PPDB) for pesticides.

- (v) The 2021 regulations had clear and concise obligations and have been replaced in many cases with convoluted and uncertain regulations. Certain provisions are drafted in overly complex, unwieldy provisions that are difficult to understand and should be drafted in plain language, understandable to employers and employees – who in most cases might not be mother tongue English speakers or familiar with legal language.⁴
- (vi) Regulations 10, 11, 13 and 14 interrelate in a manner which is complex and unclear, creating regulatory uncertainty to the detriment of protecting worker health and safety from situations of serious risk through exposure to hazardous substances. The Constitution⁵ requires reasonable measures to protect health and well-being and legislation should at all times be clear, concise and drafted in plain language accessible to employers and employees - without the need for lawyers to attempt to explain their meaning.
- (vii) It is unclear when air monitoring should take place, and it could be every 24 months, exposing workers to danger from airborne hazardous chemical agents.⁶
- (viii) The draft regulations have set an unacceptably high threshold for medical screening. The result is that medical screening will become unacceptably cumbersome, expensive and unlikely to be implemented to the detriment of employee health and safety. Three requirements now have to be met before screening will take place. This is unacceptable since medical screening is aimed at protecting individuals “at sufficient risk of a specific disorder because of exposures in the workplace”.⁷
- (ix) The regulations put an unreasonably high burden on the occupational health practitioner before they can recommend a program of medical surveillance, and will result in increased costs, delays and interference with the professional discretion of the occupational health practitioner.⁸
- (x) Under the 2021 regulations for risk assessments, health and safety representatives or committees were required to be given a reasonable time to comment on arrangements for HCA assessment. This provision has been removed.⁹

SUBSTANTIVE CONCERNS AND THE CONSTITUTION

⁴ See for example regulation 7(2)

⁵ Constitution section 24:

Everyone has the right to (a) an environment that is not harmful to their health and 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.

⁶ Draft regulation 10(1)(e)

⁷ Draft regulations - definitions

⁸ Draft regulation 14(2)

⁹ Draft regulation 17

The substantive concerns above regarding the regulations are significant. In many respects the draft regulations, if promulgated, would be unconstitutional for this reason as well. According to section 24 of the Constitution everyone has the right to (a) an environment that is not harmful to their health and 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.

Existing regulations geared to ensuring such protection are being amended to introduce vague, permissive and unenforceable regulations, thus removing reasonable measures for the protection of health against substances that are inherently dangerous to health, namely hazardous chemical agents. The result is that the draft regulations are unconstitutional in that they undermine existing reasonable measures for the protection of health and expose workers to potential hazards.

FARM WORKERS

Farm workers are constantly and indiscriminately subjected to hazardous chemical substances in the form of agricultural chemicals and pesticides which are used on a significant scale on farms and in factories. For this reason the governance of Hazardous Chemical Agents (HCA's) is a matter of life and death for large numbers of employees throughout the agricultural sector.

Evidence of widespread contamination of water bodies has been described in research undertaken by the University of Cape Town¹⁰ – demonstrating the scale of the lack of control and regulation of pesticides, and resultant pesticide drift on people and the environment. Farm workers are closest to pesticide use, being the mixers and sprayers of agricultural chemicals, and live in many cases within the spray zone on farms. Children are often exposed to pesticides and studies by UCT¹¹ show their reproductive health is being affected on a widespread basis in certain study areas. The lack of prosecutions for

¹⁰ A 2019 study of the presence of pesticides in river water samples in a number of typical fruit farming areas in the Western Cape depicts the scale of the problem of pesticide drift very clearly. The conclusion is inescapable that there is widespread non-compliance with the label requirement that pesticides and herbicides not be allowed to drift into non target areas and water bodies.

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The study included the Krom, Breede and Hex River catchments. Using passive water samplers 248 chemicals, including 187 pesticide compounds were detected. (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)). Analysis 53 of pesticides showed that the insecticide imidacloprid exceeded the environmental quality standards (EQS) up to 558 - fold. Additionally, thiacloprid, chlorpyrifos, acet-amiprid and terbuthylazine were detected at least once 12, 9, 5 and 3-fold above the EQS, respectively (see 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)

¹¹ Dalvie et al

non-compliance with the OHS Act in the domain of pesticides is another indication of the lack of proper protection of farm workers from pesticide poisoning. Diseases which flourish in immune-deficient and poor communities such as tuberculosis are widespread on South Africa's farms - where spraying is often unprotected by personal protective equipment and residents and persons working near to spraying are routinely exposed to drift from hazardous chemicals.

FACTORY WORKERS AND OTHERS IN INDUSTRIAL WORKER JOBS ARE SIMILARLY AFFECTED.

The regulations were published for comment in a government gazette. The regulation of hazardous chemical agents affects thousands of farm and factory workers, many of whom have modest levels of education and pay, and are not mother tongue English speakers. Most would therefore be unlikely to have access to the internet and to government gazettes and if they did would be very challenged in trying to respond to the technical nature of these regulations. Seasonal and migrant workers on farms who are a significant fraction of the agricultural labour sector would, in particular, be unlikely to participate in such a notice and comment process around technical regulations.

The process has not been informed by explanatory notes or memoranda which would detail why it is necessary to scrap the current perfectly adequate regulations and replace them with weaker provisions. In effect meaningful participation in a matter with far reaching impacts on the health and well-being of a major fraction of the working class is being prevented by the procedurally unfair manner in which the comment process is being undertaken. It has long been recognised that a fair decision-making procedure requires (among other things) that a person 'must be put in possession of such information as will render his [or her] right to make representations a real, and not an illusory one'.¹² Hoexter, an academic authority on administrative law, points out that there is 'a crucial link between the amount and type of information disclosed to an affected person and the quality of his or her opportunity to make representations'.¹³

The process of notice and comment for these regulations is thus procedurally unfair and if the regulations are promulgated they stand to be challenged as unlawful. We call on the Minister to withdraw the regulations forthwith. All rights are reserved.



Anna Shevel







NETWORK COORDINATOR

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This letter is supported by the organisations listed on the following pages.

¹² *Heatherdale Farms v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) (486F-G)

¹³ Hoexter, *Administrative Law in South Africa*, at p371, referring to by the Constitutional Court in *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 (CC) paras 69-74. Hoexter, *Administrative Law in South Africa*, at p371, referring to by the Constitutional Court in *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 (CC) paras 69-74.

 <p>Division of Environmental Health UCT</p>	<p>UCT Environmental Health</p>	<p>Professor Andrea Rother - Head of Division</p>
	<p>Poisons Information Centre, Department of Paediatrics and Child Health, UCT</p>	<p>Dr CR Stephen - Director</p>
	<p>Environmental Nano Sciences</p>	<p>Professor Leslie Petrik - UWC Chemistry Department</p>
	<p>GroundWork</p>	<p>Rico Euripidou - Campaign Coordinator</p>
	<p>SAOSO - South African Organic Sector Organisation</p>	<p>Alan Rosenberg - Chairperson</p>
	<p>Surplus People Project</p>	<p>Brian Adams - CEO</p>

	Khanyisa Education and Development Trust	Simpiwe Dada - Managing Director
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	LAUDATO SI MOVEMENT - South Africa	Bernie Crewe-Brown - Director
	NEAG	Glenn Ashton - Chairperson