



biowatch
SOUTH AFRICA

biodiversity | food sovereignty | agroecology | social justice

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Attention:

- Dr Noluthando Netnou-Nkoana – By email to NoluthandoN@Dalrrd.gov.za
- Mr Herman Mootane (Acting Registrar-PIA) – By email to HermanMo@dalrrd.gov.za
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Directorate Genetic Resources

Department of Agriculture, Land Reform and Rural Development

Additional comments from Biowatch SA following consultations held in Pretoria and Cape Town in October 2023 and November 2023 on the Draft Regulations (published 10 June 2022) made in terms of the Plant Improvement Act, 2018 and the Plant Breeders' Rights Act, 2018

Please find our additional comments to the Draft Regulations made in terms of the Plant Improvement and Plant Breeders' Rights Acts of 2018. We note that these must specifically respond to the aspects of farmers' privilege discussed at the in-person Consultation meetings. Thank you for the opportunity to provide these additional comments.

We noted that the Consultations were poorly attended by farmers and civil society organisations, possibly due to the time of year (planting season for farmers) as well as most organisations not having the funds to travel to Pretoria and Cape Town. Despite being under-represented in this process, we hope that the Department gives due weight to the inputs of farmer and civil society organisations which represent the interests of the many thousands of smallholders whose livelihoods and food security rest on the outcome of these consultations.

We hope that sufficient exemptions will be provided through these Regulations so that space is provided that will allow for the development of meaningful support and policy for farmer seed systems and the conservation of plant genetic resources for food and agriculture, to ensure Farmers' Rights and related rights for communities living in rural areas.

Yours sincerely

Rose Williams
Director

Trust No. IT 4212/99

Additional comments

1. General

The Regulations to the Plant Improvement Act and Plant Breeders' Rights Act should, through the exemptions granted to small farmers, create adequate space to:

- Realise Farmers' Rights as defined in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGFA) as well as the United Nations Human Rights Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), which South Africa has championed.

The UNDROP says in Article 19:

*Peasants and other people working in rural areas have the right to seeds, in accordance with article 28 of the present Declaration, including: (a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture; (b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture; (c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture; (d) **The right to save, use, exchange and sell their farm-saved seed or propagating material.***

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGFA), Article 9:

Recognizes the enormous contribution that local and indigenous communities and farmers of all regions of the world have made, and will continue to make, for the conservation and development of plant genetic resources as the basis of food and agriculture production throughout the world. Article 9 of the Treaty establishes that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments and is subject to its national legislation.

However article 9.3 emphasises that '**Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.**'

- Realise the Right to Food in the South African Constitution and international human rights law.
- Address the historical inequalities in our food and farming systems.
- Assist the majority of small producers to develop mixed farming systems providing adequate livelihoods for sufficient nutritious and culturally appropriate food as well as affording other household essentials such as water, housing, energy and education.

2. Categories of exempted farmers

Noting that different policies of the Department should be congruent, Biowatch supports the Regulations using the categorisation of producers that are in the Producer Support Policy (although it is yet to be formally published). We accept that the criteria for delineation of categories of farmers has been exhaustively discussed in the development of the Producer Support Policy and that annual

turnover was agreed as the most practical criterion to use. We note the good reasons given by the Department to not use:

- land size due to differences in productivity with variable local conditions such as climate, soils etc across the country
- VAT registration as small farmers are encouraged to register for VAT to access government support despite having turn over below the requirement for VAT registration.

In essence the Regulations should differentiate between 2 groups of farmers: those who are small and focused on livelihoods and those that are large and are commercial. In this regard we support the intention of the Regulations in both the Plant Breeders' Rights and Plant Improvement Acts to exempt "small farmers" who are primarily farming as a livelihood strategy – including all three of the lowest categories of farmers in the Producer Support Policy namely: 'Vulnerable Household Producer', 'Subsistence Household Producer' and 'Smallholder Producer'. These farmers are primarily focused on household food security and where they can sell any surplus production it is to supplement basic household needs. As much as they may be involved in markets, they are not commercial.

The dividing line between these 2 groups (small farmers who are exempted vs commercial farmers) should be the upper delineation of the 'Smallholder Producer' category as defined in the Producer Support Policy - which is currently an annual turnover of one million Rands. Furthermore, these Regulations should refer to the Producer Support Policy so that this categorisation of farmers is updated dynamically with changes in the Producer Support Policy in response to inflation.

We are aware that the seed industry is concerned that commercial farmers may try and circumvent the regulations by saying they have had a bad year on a particular land holding, but this should rather be addressed through the Producer Support Policy in relation to counting farming entities with multiple land holdings as one commercial entity.

In the consultations the seed industry were arguing against the inclusion of Smallholder farmers in the group of producers who are exempt from abiding by these laws. We support that these farmers and ventures are included to support livelihoods and also because many individual smallholders have been encouraged to group together as cooperatives in order to access government support, and should not now be penalised for these livelihood strategies.

In the draft Plant Breeders' Rights Regulations Clause 3 (a) it also confines the farmers specified in sub regulation 2 (a), (b) and (c) to exchanging only within their own category. This is unnecessarily restrictive and counteractive to the intent of the exemptions. Biowatch propose that at a minimum, small farmers as a group in all 3 categories (vulnerable, subsistence and smallholder) should be allowed to exchange and sell across categories of small farmers. Furthermore, since small farmers are selling propagating material as a livelihood it shouldn't matter who they sell to. Commercial farmers are unlikely to buy seed from small farmers and it isn't possible for small farmers to interrogate a buyer on their annual turnover.

All farmers who are categorised as small farmers (with a turn-over of under one million Rands) should be able to produce, save, condition, exchange and sell all crops and their propagating material.

3. Use for own holding, exchange and sale of crops with PBR

Biowatch reiterates the points made in previous submissions with regard to the fluidity of farmer seed systems; in which the traditional practice of exchanging propagating material is necessary and intrinsic to the resilience of farming systems and has resulted in the diversity of the plant genetic resources that are our common heritage.

With this in mind, we note that although small farmers may focus on their own Open Pollinated Varieties, smallholder production can also inadvertently include varieties of crops that have PBRs over them because:

- It is not possible to physically differentiate seed of farmer varieties from commercial varieties with PBRs for all crops (for example, for many legumes).
- Open Pollinated Varieties that have PBRs over them may enter farmer systems through cross pollination and seed exchange.
- The Extension service has distributed seed in unmarked packaging with no indication of the varieties or whether these have PBRs.

For the above reasons we are therefore concerned that:

- The Table of crops and quantities outlined in Clause 6 is unnecessarily complicated for small farmers to implement as well as being difficult to regulate given regulatory capacity and resource constraints. Should smallholders even be aware that they are using a protected variety, they have little capacity to weigh and record propagating material of each crop or variety over a year.
- By fixing a list of crops and quantities in the Regulations, these are difficult to update in response to subsequent registrations of PBRs over important food security crops that are not currently on this list (crops such as pigeon pea, a range of Lima beans (*Phaseolus lunatus*), Mucuna beans (*Mucuna pruriens*), and Lab-Lab beans (*Lablab purpureus*) come to mind).

According to Clause 10. (2) of the Plant Breeders' Rights Act the Regulations should prescribe 3 things in relation to farmers who are exempt from the application of Plant Breeders' Rights:

- (i) the category or categories of farmers who may use the protected variety*
- (ii) the category or categories of plants that may be used*
- (iii) the uses to which the protected variety may be put*

Limitations on quantities for these crops is not a requirement in this law.

We therefore propose that Clauses are amended as follows (additions in *italic* and deletions shown by strikethrough e.g. ~~abe~~):

Plant Breeders' Rights Regulations

Clause 5 (2) (1)

- (1) For the purposes of Section 10(2)(a)(i) *of the Act* the farmers are categorised into the following categories of farmers *in accordance with the Comprehensive Producer Support Policy*, reflecting the different types of Producers in the Republic:
 - a) *Vulnerable Household Producer that produces primarily for household and has limited resources and skills to operate a market-oriented production system. This category includes vulnerable women and youth, child headed households, persons with*

disabilities, and households that are registered as indigents or would qualify to be registered as indigents.

- b) Subsistence Household Producer that produces primarily for household consumption. These producers are not or would not be classified as indigents by their municipality and they do not meet the criteria to be registered as indigents with their municipalities. They may market limited surplus production with an annual turnover of less than R50 000.*
- c) Smallholder Producer defined as a venture undertaken by an individual or business entity for the purpose of household consumption and deriving a source of income from agriculture activities along the value chain. These are usually the new entrants with an annual turnover ranging from R50 001 – R1 million per annum.*
- d) Medium Scale Commercial Producer defined as a venture undertaken by an individual or entity for the purpose of deriving a source of income from agriculture activities along the value chain. These are established enterprises with an annual turnover ranging from R1 000 001 – R10 million.*
- e) Large Scale Commercial Producer and Mega/Corporate Producer defined as a venture undertaken by an individual or entity for the purpose of production and sale of agriculture products to make a profit. These are established enterprises producing for market to make a profit with an annual turnover over R10 000 001 per annum.*

New Clause 5 (2) (2) Criteria for the categorisation of farmers should align with the Comprehensive Producer Support Policy as these are updated from time to time for inflation.

Plant Breeders' Rights Regulations: Clause 3 (a)

A Plant Breeders' Right shall not be infringed by:

- a) A farmer or venture in the group of producers included in sub regulation 2 (a), (b) and (c) who produce ~~the prescribed maximum quantities of protected varieties of the kinds of plants listed in regulation 6 and save on their own holding, or exchange and sell within their own category,~~ for propagating purposes, propagating material of such protected varieties.

4. Lists of crops and quantities for exempted small farmers

Crops and quantities in the Plant Breeders' Rights Regulations

In the event that the Regulations continue to limit small farmers to prescribed categories of plants and maximum quantities of seed per variety per year in the Table in Clause 6 of the Plant Breeders' Rights Regulations then:

- The quantities of seed should be accurately determined through thorough research in smallholder systems (see below).

- The list of categories of plants must allow for diverse production systems and cultures in the country, which should include all important crops to smallholders and should also include plants which have multiple uses including for food, medicine, soil improvement and pest management. We are concerned that the listed ornamental plants in Table 2 which are specifically excluded from exemption in the PBR Regulation (4) include all species of some plants that are important for food security in many communities for example Amaranth, Hibiscus (several edible Hibiscus are relied on and now planted by San indigenous communities), and Okra (*Abelmoschus esculentus*) as well as many herbs.

Therefore, if the PBR Regulations continue to prescribe categories of plants for which small farmers are exempt then we propose the following additional crops be added to the Table in Clause 6 in case of innocent infringement of current or future protected varieties (**shown in bold**):

<i>Allium</i> L. add (alle / all species)	Onion, and garlic, leek, chives
<i>Beta vulgaris</i> (alle/all varieties)	Beetroot, Swiss Chard
<i>Brassica oleracea</i> L. add (alle / all varieties)	Cabbage and broccoli, cauliflower, kale, Brussels sprouts, collard greens
<i>Brassica rapa</i>	Turnip, bok choy
<i>Cucumis</i> L. add (alle / all species)	Sweet melon, cucumber, horned cucumber
<i>Capsicum</i> L. (alle / all species)	Peppers, chillis
<i>Daucus carota</i>	Carrot
<i>Foeniculum vulgare</i>	Fennel
<i>Lactuca sativa</i>	Lettuce
<i>Ocimum basilicum</i>	Basil / sweet basil
<i>Pastinaca sativa</i>	Parsnip
<i>Petroselinum crispum</i>	Parsley
<i>Pisum sativum</i>	Garden Pea
<i>Raphanus sativus</i>	Radish
<i>Solanum melongena</i>	Egg fruit /aubergine

From the list of Ornamental plants add:

<i>Abelmoschus esculentus</i> spp.	Lady's Fingers / Okra
<i>Aloe</i> spp.	
<i>Amaranth</i> spp.	
<i>Hibiscus</i>	Rosella etc
<i>Artemesia afra</i>	
<i>Coriandrum</i> spp.	Coriander
<i>Moringa adans</i> spp.	Moringa
<i>Pelargonium</i>	
<i>Lavendula</i> spp.	Lavendar
<i>Tropaeolum majus</i>	Nasturtium
<i>Tulbaghia</i> L.	Wild garlic
<i>Verbena</i>	

Fruit Crops

In section C of the Table under Clause 6 for Fruit Crops amend the heading to be clear: Maximum number of trees **or vines** produced per protected variety.

We strongly disagree that the number of fruit crops (trees or vines) be further reduced in quantity from 100 plants per variety per year as these are very small quantities.

In particular we reject the attempt by companies in the Citrus industry to use these Regulations to enforce exclusive rights to propagate and sell citrus fruits by excluding these from the 100 tree exemption for small farmers; circumventing the due process that will be applied in consideration of the Citrus Improvement Certification Scheme.

Crops and quantities of a non-commercial scale in the Plant Improvement Act Regulations: Regulation 5, Table 3

The exemptions for “small” farmers (including vulnerable, subsistence and smallholder producers) from the requirements of the Plant Improvement Act are crucial to their ability to maintain their seed systems and thereby conserve and develop agricultural biodiversity and secure their Rights as rural dwellers.

With regards to the quantities contemplated as a non-commercial scale for the exchange and sale of Open Pollinated Varieties without Plant Breeders’ Rights provided in Table 3, these must be sufficient to maintain smallholder production systems in a variety of contexts across the country. These must also provide scope for growth so that smallholders are not confined to subsistence production simply because they can’t make the leap to meet technocratic requirements designed in Europe for the multinational seed industry.

Biowatch rejects the ‘consensus’ positions put forward at the consultations in Pretoria regarding quantities of seed considered non-commercial, which resulted from the unbalanced power relations in the room, and which disregarded the realities of millions of small producers who could not be there.

Biowatch rejects the assertions made that smallholder producers are responsible for spreading diseases and therefore must be limited from producing and sharing propagation material. For example, the outbreak of Fall Army Worm was most prevalent in industrial monocultures and arose from increasing global trade and particular weather conditions. The Regulations to the Plant Breeders’ Rights and Plant Improvement Acts are not the place to address issues of pest management, which are context specific and better addressed by other legislation providing measures to prevent the spread of disease such as the Agricultural Pests Act 36 of 1983.

As motivated previously, it would be preferable to allow free production, exchange and sale of all crops that can be propagated by farmers prescribed as exempt under this regulation – that is “small” producers (vulnerable, subsistence and smallholder) without any maximum quantity of seed being prescribed.

However, if the Regulations continue to prescribe types of plants and quantities that small farmers may produce, exchange and sell without following the Provisions of the Act then Biowatch makes the following proposals:

1. Column 3 describing the maximum seed per packet is removed. Such packaging and quantities are not congruent with smallholder systems, creating unnecessary work and costs for producers that need support; requirements they are unlikely to meet. Smallholders typically exchange seed in handfuls, bottles, buckets and sacks depending on the crop and planting system.

2. It remains unclear if the crops on Table 3 which have no quantities indicated are yet to be determined or no amount is allowed despite these crops being on closed varietal lists. If the latter is the case, we argue that quantities should be determined for the following crops due to their role in smallholder production systems: forage sorghum (fodder for livestock), and tobacco (traditional cultural use).

3. Accurate quantities for each crop are determined through research into smallholder production systems across the country. This research and the resulting prescribed quantities (both here and in the PBR regulations) should provide sufficient propagating material at any place in South Africa taking the following into account:
 - The differing production contexts (such as climate, soil, topography, etc) across the country
 - Smallholder production systems such as Agroecological production where there is greater plant density and intercropping, and where farmers may plant more than one seed in a space to compensate for weather and germination rates.
 - In some areas there is more than one cropping season in a year – for example in northern KZN sugar beans can be sown in February and August, ground nuts are produced twice a year in Ingwavuma and quick to harvest vegetables are planted continuously from autumn to spring.
 - Household use includes having propagating material for multiple plantings in a season in case of crop failure due to variable weather – a must in increasing climate change – as well as enough for the next season in case the crop fails in this one.
 - Some crops are used for multiple purposes (food, feed, soil fertility and fuel) and are therefore needed in greater quantities.
 - The quantity of the crop that is consumed by a family and the frequency it is consumed. Staple foods need to be produced in larger quantities.
 - The average size of households in different areas. For example, we have found in KZN that on average households have 7 people, but this may double during holidays or other times where household members return (such as happened during the COVID lockdown).
 - The differing cultures influencing which are staple crops in a particular region or province. All of South Africa’s food cultures should be accommodated.
 - Farmers need enough for household use and exchange, especially where community seed networks are relied on to supply seed where one’s own crop may have failed.
 - Extra seed and propagating materials may be needed for household or community rituals.
 - Land size differs across the country dependent on conditions, tenure arrangements and availability. It is erroneous to say smallholders only produce on half a hectare and therefore only enough seed is needed for this. The Producer Support Policy was unable to fix land size as a criterion for differentiating farmers and shouldn’t be used here to undermine smallholder livelihoods – rather err on larger sizes (e.g. 10-12 ha) considering aggregated land for cooperative ventures and access to communal fields. Also, we need to recognise smallholder farmers’ potential for growth if they are supported with fencing, access to water etc to bring fallow far fields into production.

- Different tenure arrangements – many smallholders have been encouraged to form cooperative ventures by aggregating their land.

5. Conclusion

We propose that given the obligation to ensure the Right to Food, Farmers' Rights and to address inequality in South Africa "small" producers should be able to grow, save, exchange and sell any crop regardless of whether it has PBRs or not without restriction and the threat of criminalisation. This will also provide the legislative space to develop supportive policy to strengthen farmer-led seed systems that is straight forward and easy for farmers to engage with.