DEPARTMENT OF SCIENCE AND TECHNOLOGY

NO. 246 **22 MARCH 2017**

PUBLICATION OF A REPORT ON PUBLIC ORAL HEARINGS ON REGULATIONS TO PROTECT THE KAROO CENTRAL ASTRONOMY ADVANTAGE AREAS IN TERMS OF THE ASTRONOMY GEOGRAPHIC ADVANTAGE ACT, 2007.

This notice relates to the Karoo Central Astronomy Advantage Areas (KCAAA) declared for the purpose of radio astronomy and related scientific endeavours in terms of section 9(1) and (2) of the Astronomy Geographic Advantage Act, 2007 (Act No. 21 of 2007) (hereinafter referred to as "the Act").

As provided for in the Act, the declared astronomy advantage areas are to be protected, preserved and properly maintained in respect of radio frequency interference or interference in any other manner.

I have published notices with draft regulations for the protection of the KCAAA on 23 November 2015 in Government Gazette No.39442 and again on 20 April 2016 in Government Gazette No. 39939 to extend the period for written submissions, to hold additional workshops on the regulations in the Karoo region and to amend Annexure A to the draft Schedules A and D to the regulations. Annexure A contained the geographical layout of the SKA radio telescope which has been amended.

After receiving written representations, I decided that public oral hearings were necessary and I designated JCW van Rooyen SC in terms of section 42(3) of the Act to preside over the public hearings in Pretoria and in Carnarvon, respectively, on 13 and 20 October 2016.

Professor van Rooyen submitted his report to me on 24 January 2017. An addendum containing a summary of the report by JCW van Rooyen SC, is attached to this notice. The full version of the report, as accepted by myself, is available from the Astronomy Management Authority within the Department of Science and Technology, Pretoria.

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The regulations are currently being finalised, with due consideration of the submissions made by interested and affected parties during the above consultative process. Thereafter the regulations will be promulgated, following which a notice will be published indicating the date of commencement of the regulations.

G.N.M. Pandor

MRS GNM PANDOR, MP
MINISTER OF SCIENCE AND TECHNOLOGY

Summary

Summary of full report to the Minister of Science and Technology on the public participation in and legality of the 2016 draft regulations to protect the Karoo central astronomy advantage areas in terms of the Astronomy Geographic Advantage Act 2007.

Prof JCW van Rooyen

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Background

The necessity for the protection of the Square Kilometre Array ("SKA") against certain levels of radio frequency interference or any activity which may detrimentally impact on radio astronomy and related scientific endeavours, has led to the declaration of areas in the Northern Cape Province, by the Minister of Science and Technology, where special protective measures are necessary. The International Telecommunication Union has emphasised the importance of a project such as the SKA. It, inter alia, states that the exceptionally high sensitivity of radio astronomy stations often make it practicable to give special consideration to the avoidance of interference. And that is the intention of the Draft Regulations 2016, which were published in the *Government Gazette* by the Minister of Science and Technology on 20 April 2016 in terms of the Astronomy Geographic Advantage Act 2007. The said Notice also provided for written presentations by way of a public participation process which, in the discretion of the Minister, could include an opportunity for interested or affected persons to present oral presentations or objections to the Minister or to a person designated by the Minister. Substantial further publicity was also given to the Draft Regulations and eight workshops were held by the Department. Two public hearings, chaired by the undersigned, were also held in Pretoria and Carnarvon in October 2016.

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1. Introduction

1. I have been designated by the Minister of Science and Technology, the Honourable Mrs Grace Naledi Mandisa Pandor MP, in terms of section 42(3) of the Astronomy Geographic Advantage Act 2007, to hold public hearings and to advise the Minister whether she would be justified in promulgating the 2016 Draft Regulations on the Protection of the Karoo *Central* Astronomy Advantage Areas, with or without amendments, as the final regulations.
2. Additionally, it is the intention of the Report to inform the Minister as to what the reaction, in essence, is of the affected or interested parties to the said draft regulations and to evaluate the legal relevance of such reaction in this advice. It should be mentioned that in so far as the presentations from the involved community members are concerned, more or less 80% have serious problems with the declarations and the negative economic and environmental impact, which they claim, the SKA has on the surrounding communities and environment. A substantial number also claim that the declarations of the core and central areas were null and void, essentially since adequate consultation had not taken place and, according to them, fundamental legal errors in procedure had been made. I should add that Telkom, Vodacom, several organs of state and state departments put forward valuable proposals as to amendments to the draft regulations. I have been informed that Agri South Africa and the National Research Foundation and the SKA(SA) are soon to sign a Memorandum of Understanding which, to my mind, addresses many problems raised by the presenters.
3. As a matter of legal principle the regulations must, naturally, be limited to what is reasonably necessary to protect the scientific integrity of the SKA as a priority. In this process other fundamental rights, inter alia, the right to information (connectivity) and the right to be active in a trade must also be protected in so far as it is reasonably possible.
4. Before conducting the two public participation hearings on the 13th and 20th October 2016, I received sixty eight written presentations from interested or affected persons through the office of the Management Authority in the Department of Science and Technology, Pretoria. These were added to by six persons who applied at the hearings to address me.
5. I have studied all the notices which had to be published by the Minister in regard to these regulations and I am satisfied that the required notices were issued in accordance with the Act and, where required by the Act, sent to the registered interested or affected parties and also given publicity to in provincially distributed newspapers as required by the Act.
6. Based on the valid declarations of the core and central areas, the next step was to publish draft regulations for public participation. Such draft regulations were published and satisfactory public participation did take place not only by way of presentations filed, but also by way of an opportunity to present at public hearings in Pretoria and Carnarvon on the 13th and 20th October 2016.
7. The Draft Regulations consist of Schedules A, B, C and D with an Annexure to Schedules A and D. Although the Draft Regulations each has its own heading and each said to be made operational on a date in future, I propose that the Regulations be promulgated

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as a unit and that there would only be one later date, announced by the Minister, for its implementation as a whole. The regulations are, in fact, inter-related and should be made operational on the same date. The Schedules, as indicators of the subject addressed, would remain intact, but there will only be two sanction regulations and one regulation referring to the Minister's making the Regulations operational. In fact, only Schedules A and D require a sanction regulation. Certain amendments have been proposed by me. A few of the amendments proposed amount to substantial proposals but, in the main, the purpose was to provide greater clarity and make the procedures less involved.

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2. Prosecution in the courts

1. Contraventions of identified duties in the 2016 Draft Regulations may lead to a maximum fine of R1 Million Rand plus possible imprisonment for a maximum of five years. It is noted that the fine and imprisonment are repeated from the AGA Act which, however, only lays down the *maxima* as to a fine and imprisonment. I undertook at the public hearing in Pretoria on 13 October 2016 to advise that the final Regulations would include particulars as to the maximum levels at which the fines could be imposed. I, in any case, also considered the matter of possible imprisonment.
2. Our Constitutional Court has clarified and thus amended vague language in legislation. I have accordingly decided, in my advice to the Minister, to particularise the fine clause in the draft regulations in the interests of reasonable certainty and also in accordance with the seriousness of the categories of contraventions. It is of crucial importance that greater clarity be provided as to the fines which could be imposed. The draft maximum fine of R1 million Rand, without differentiating according to levels of seriousness in the Regulations, is likely to give rise to substantial uncertainty – not only for persons subject to the regulations, but also for judicial officers.
3. As to possible *imprisonment* I am of the opinion that imprisonment is not justified in regard to the category of offences created in the Draft Regulations. Imprisonment would be unnecessarily invasive of a community which, in contrast to a situation which existed in the past where no such limitations applied, would in future have to be subject to possible imprisonment. Imprisonment, in any case, does not fit the level of the contraventions in the Draft Regulations. I have, accordingly, in accordance with section 36(1)(e) of the Constitution of the Republic of South Africa 1996, which provides for the possibility to seek less restrictive means to achieve a purpose, decided to advise that imprisonment should not be a possibility for the contravention of these regulations.

   In serious cases common law crimes would address crimes such as theft, robbery, intentional damage to property and arson. In such cases, justice would take its normal course and, depending on the circumstances, could even lead to imprisonment. But these common law crimes are far removed from the present regulation of transmissions which could affect astronomy. A maximum fine of R1 million is also far too high, given the nature of the offences. Maximum fines of R200 000 or R100 000 in cases of intentional contraventions and R20 000 or R5 000 in cases of negligent contraventions, will be included in the newly formulated draft regulations for the consideration of the Minister.
4. It will also be recommended that an administrative tribunal, on an *urgent* basis, be instituted by way of an amendment to the AGA Act, to adjudicate contraventions and that, only in cases where intentional contraventions have *clearly* been committed, the Management Authority should approach the Director of Public Prosecutions. The said Tribunal will act on complaints from the Management Authority, will issue orders to rectify or desist in future from a similar contravention *or* dismiss a complaint. It will also be in a position to fine a person where aggravating circumstances are present. The maxima suggested above for contraventions would also apply for that Tribunal. Of course, imprison-

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ment will not be an alternative, since such a tribunal will, in any case, not be permitted to impose imprisonment - that authority may only be exercised by a court of law.

5. In my opinion the powers granted to the Minister in the Act do not include the authority to set up such a tribunal by way of *Regulations*.
6. There is no reason why a Tribunal set up in terms of an *amended* AGA Act should not be granted the authority to finalize a matter by making a finding on the merits *and*, if a contravention is found, to order the respondent to desist from such conduct in future or, in aggravating circumstances, to impose a fine. Such an order or fine would, if not abided by, be enforceable in a court. The benefit of such a system is that it would ensure the speedy addressing of alleged contraventions, would keep almost all matters out of the criminal courts and would not lead to a criminal record being created by, what may be termed, administrative contraventions. A draft proposal for an amendment to the Act is attached as **Annexure A** to the Full Report.

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3. The requirement of concurrence

1. The Act, in specified instances, requires the Minister before making Regulations to, inter alia, obtain the concurrence of the Independent Communications Authority of South Africa the Minister of Defence, the Civil Aviation Authority, the Minister of Transport and the Minister of Finance, depending on the interests involved.
2. An important issue is the concurrence of the Civil Aviation Authority, since over-flight and radio contact is likely to create a risk for the SKA. The concurrence of the Civil Aviation Authority in terms of section 21 of the Act has not, I am informed, been achieved at the date of this Report to the Minister. The Civil Aviation Authority did make a presentation to me on the 13th October in Pretoria. It stated its opposition to the draft Regulations in so far as they might limit overflight and amount to limitations to radio communication systems. I was informed that a meeting was held on 25 November 2016 between representatives of the Department and the Civil Aviation Authority and mutual understanding was gained. "Concurrence" does not mean that each party's demands need be satisfied. The mere fact that concurrence must, according to Parliament, be achieved, clearly implies that a special arrangement may be made with reasonable protection of each party's interests.
3. Even where concurrence has been attained, recognition must, in law, be afforded to the jurisdiction of an organ of state. To take an example, the Civil Aviation Authority has jurisdiction in regard to the enforcement of the rules and regulations in terms of the Civil Aviation Act 2009. In so far as concurrence is reached with the Civil Aviation Authority, as provided for in section 21 of the AGA Act, that Authority, it is advised, should include such rules in *its* regulations. Then it is for that Authority to enforce such rules, possibly based on a complaint by the Management Authority. In that manner, the Civil Aviation Authority will apply *its* rules to respondents before it in a manner that accords with its procedures in other cases. In the process, it would have reached concurrence with the Minister of Science and Technology as to how best to protect the SKA against interference by aircraft. This matter of jurisdiction by the Civil Aviation Authority, following upon concurrence, is written into the amended draft regulations as proposed by me.

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4. The draft regulations

1. The Karoo *Central* Astronomy Advantage Areas were declared by Minister Derek Hanekom MP in 2014 for radio astronomy purposes with respect to the radio frequency spectrum from 100 MHz to 25.5 GHz.
2. Logically, the next step was to draft regulations applicable to the declared central areas so as to ensure that the SKA would not, from this area, be affected in its astronomy function. These draft regulations were the subject of the 2016 public participation process, referred to above.The draft regulations focus on preserving the designated radio frequency spectrum for radio astronomy purposes and preventing radio frequency interference and electromagnetic interference that has a detrimental impact on radio astronomy observations.
3. The fact that the final regulations, as advised by me, differ from the draft regulations is a natural result of the present process, where the views of interested and affected parties are considered. Quite a number of the critical opinions expressed were not based on legal grounds. Where technical amendments were proposed, most of them were based on legally and technically sound grounds and have led to proposed amendments to the draft Regulations. I have already dealt with the matter of sanctions within the context of these Regulations.
4. There is also the aspect of costs which will result from having to obtain a permit as advised by an expert. This is a cost which directly results from the need of the protection of the SKA and should be compensated by the State in accordance with procedures and principles as set out in Schedule C of the Draft Regulations. I have included this Constitutional principle in the Draft Regulations, for consideration by the Minister.
5. I will not be advising the Minister to first publish the draft regulations for further comment. To once again publish the amended draft regulations would, in my considered view, amount to "a never ending story" of public participation against which the Supreme Court of Appeal has cautioned. The proposed amendments to the draft regulations 2016 contribute to clarity and are also in the interest of lesser administrative intervention. They also remove the possibility of heavy fines. Imprisonment is removed as a whole. Provision is also made for concurrence by the Civil Aviation Authority and the exercise of jurisdiction by it in regard to flights over the core and central areas – which have to be regulated.

Arrangements will have to be made with organs of state to ensure compliance based on concurrence – a concurrence which would need to protect the SKA. My impression from the presentations is that there is a willingness to co-operate – co-operation which is, in any case, provided for in section 41 of the Constitution of the RSA.

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5. A memorandum of understanding between the SKA, the NRF and Agri South Africa

1. The farming community was well represented by Agri Northern Cape which, especially, expressed serious concerns as to mobile and internet connectivity. Individuals, at times in group presentations, are similarly concerned. After the hearings I was informed by the SKA that a Memorandum of Understanding with Agri South Africa has been agreed to and would be signed in January 2017. I have read the draft MOU. It states broad principles of co-operation between the SKA and Agri South Africa. It is clear that projects, which would further the interests of the farming community and its employees and towns, would, in principle, be addressed in unison. The purchase of farms will also form part of the agenda – which is a particularly positive sign. This is especially so since a number of presentations accuse the SKA of what may be called a dictatorial rule over the future of farming, which then leads to ex-employees without work, a serious decline in the mutton market, the closing down of abattoirs and, ultimately, semi-ghost towns. In the light of the MOU it will not be necessary to decide to what extent the SKA as such, or the draft regulations, have led or is likely to lead to the deterioration of the welfare of the Northern Cape society. I am, in any case, not convinced that the SKA project should bear the sole or substantial blame for the mobile and internet problems in the areas surrounding the SKA project. It is well known that land services had, in any case, deteriorated for reasons which I am not called upon to investigate. The draft MOU is attached as Annexure B to the *full* report.
2. It would be presumptuous for me to take the matter further than this. I simply do not have all the facts and further inquiry into this area, in any case, does not fall within my mandate. What is, however, important is the constitutional duty on the State to ensure mobile and internet facilities at a reasonable cost as part of the infrastructure. Of special relevance is also the planned MOU between the SKA, the NRF and Agri South Africa. It demonstrates a willingness to co-operate in the building of welfare for a society, which does not only consist of owners of large tracts of land but also of their employees, the towns and local businesses that serve them, people without work, the elderly and children. Justice Ngcobo (the later Chief Justice) states the following important guideline with which a MOU should be approached:

> What is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side. The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the [parties] ... This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another.

An important aspect of the MOU is that it is foreseen that, if it is at all possible, farms should rather not be purchased as a whole and that alternative arrangements by way of servitudes may address the need of the SKA. This arrangement will also contribute to keeping the source of markets alive. On the other hand, it is not unlikely that the SKA would wish to cre-

ate a zone within which there would not be a possibility of interference. Obviously this will be discussed with Agri South Africa in the light of the MOU – *which discussion will indeed have to be based on mutual respect as pointed out by Justice Ngcobo, as quoted above.*

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6. Public participation

1. Chapter 6 of the AGA Act provides for public participation, inter alia, in the making of regulations by the Minister. The principle of public participation in the legislative processes finds its origin in the Constitution of the Republic of South Africa 1996, where public involvement in the legislative process is prescribed for both Houses of Parliament and the Provincial Legislatures.

   First, section 42 of the AGA Act establishes the broad principle of public participation. Before I advised the then Minister in 2013 that the Minister was justified in declaring the *central* areas, I made sure that participation of the relevant public had been an integral part of the process.

   Second, the AGA Act provides that the Management Authority must compile and keep a list of interested or affected persons. Once so registered, the particular person has a duty to update his or her contact details so that notices may reach her or him.

   Third, notice was given to interested or affected persons of the 2016 draft regulations and the opportunity to file presentations, not only in the *Government Gazette* but also in newspapers which circulate in the Northern Cape Province.

   Four, in January and May 2016 workshops were held by the Department of Science and Technology in Northern Province towns. Presentations were made by representatives from the Department and the SKA. An overview of the process plus certain projections as to the benefits, which the SKA projects could or would have for the communities in the area, was given. A list of complaints and questions raised at the workshops was handed to me at the hearing in Carnarvon by the Management Authority. I am satisfied that the procedure followed demonstrated the good faith of the said institutions.

   Five, the Minister *may,* in appropriate circumstances, allow interested or affected parties to present oral presentations to the Minister or to a person designated by the Minister. This was done in 2013 before the central areas were declared and again in 2016, when the draft regulations were published for comment. As mentioned, I chaired both inquiries.

   Thus, in spite of a recurring complaint amongst the persons who filed presentations in 2016 that the required publicity had not been given to the declaration of the core area and central areas, I have no doubt that the public participation process had been publicised in accordance with the AGA Act. The same conclusion applies to the 2016 public participation process in regard to the draft regulations.

2. The opinions of interested or affected parties in regard to the present draft regulations was formally gained through the said written presentations.

3. According to the 2003 Promotion of Administrative Justice Act Regulations I have a duty to compile a written report to the Minister without unreasonable delay after the 20th October 2016, the last hearing day. After I file my report with the Minister, the Minister has sixty days to inform interested and affected parties, who filed and or made presentations, of her decision in terms of the Act and provide reasons for the decision, should any interested or affected party request this. *To my mind the Minister is not obliged to also promulgate the Regulations on that day. That is a matter within her discretion.*

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I will also not add the full set of draft regulations, as proposed for amendment by me, to this Report. That may create the impression that the future regulations will, indeed, conform to my proposals. That is, of course, not necessarily true. The final decision as to the content of the Regulations lies with the Minister. I will, however, as part of my task, provide a copy of the proposed amended regulations to the Minister, who will then have the final say as to which proposed amendments she is prepared to accept.

My advice is, however, that the Draft Regulations, as amended, comply with the requirement of rationality as defined by Deputy Chief Justice Moseneke in *Law Society of South Africa & Others v Minister of Transport* 2011(1) SA 400(CC).

4. According to a few presentations filed with me, some of the workshops were not that successful, since questions were not, allegedly, satisfactorily answered. Given the strong points of view expressed in the written presentations, the disappointment expressed by some persons who were at the workshops, is not surprising. I have studied the reports of the workshops and am satisfied that they had been informative and that a satisfactory list of objections was made.

   The two hearings which I chaired in Pretoria and Carnarvon were the relevant opportunities for the said parties. This was *their* opportunity – which was a *full* opportunity to raise the said and other concerns.

   It should be mentioned that it was not my task to answer questions at the hearings. I was appointed to *hear* the presenters, study all the presentations as well as the draft regulations and then advise whether the Minister would be justified in promulgating and, ultimately, making the Regulations operational at a later date.

5. A legally prescribed facet of this inquiry, as set out above, is the consideration by the Minister, in the making of regulations, of the opinions expressed in the presentations by interested or affected parties. The Constitutional Court and Supreme Court of Appeal have provided guidelines in regard to how and to what extent public involvement should take place in the making of legislation. The ambit of the consultative process depends on the legislation being dealt with. Ultimately, the consultative steps taken must be *reasonable*, given the nature of the legislation. The inputs from the public are relevant but not decisive.

6. The Minister of Science and Technology has the authority to make regulations – an authority which the Minister must exercise in accordance with the Astronomy Geographic Advantage Act 21 of 2007, taking the views of the affected or interested parties into consideration in so far as it is constitutionally permissible and not in conflict with the intention of the AGA Act. The Supreme Court of Appeal has, however, made it clear that the public participation process may not be permitted to result in a "never ending story". At a certain stage the Minister, as the legally designated legislator, may conclude the matter and promulgate (publish) the final regulations. It can be accepted that the regulations will not be made operational immediately – as clearly foreshadowed in the Draft as published in April 2016. This distinction between promulgate and making operational is, in any case, still in the draft regulations as amended by me for consideration by the Minister.

7. The intention of the hearings as chaired by me was to *hear* the relevant interested or affected parties and consolidate the relevant opinions in this advice to the Minister. This was the prescribed opportunity to be heard. The numbers at the two public hearings, chaired by me, were substantial. A wide variety of opinions were aired and I have no doubt that, with the more than seventy written presentations, a clear picture of the perceived and real problems was conveyed.

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7. The legal merit of the opinions expressed by interested or affected parties

1. It would be impossible to repeat each point of criticism raised. However, the following paragraphs should provide a broad picture of the main points raised by interested or affected parties. In several instances, strongly held critical opinions were expressed. However, consistently, a high level of good manners was displayed.
2. That an environment and social impact investigation study should, by law, have been undertaken before the core and central areas were declared by the Minister of Science and Technology.

   There was also reference to ecocide, a crime which has been proposed to be included in the Rome Statute of the International Criminal Court – and, that if the Minister continued with this process, the Minister would be guilty of ecocide when the Rome Statute is amended.
3. **Response**

   With respect, there is no legal basis for the points raised against the declarations in 2010 and 2014. The AGA Act does not require a Strategic Environmental Assessment (SEA) or a Social Impact Study (SIA) to have been undertaken before the declaration of the core area in 2010. The same principle applies to the declaration of central areas in 2014 and the promulgation of regulations, in terms of the Act – such regulations, in future, being applicable to the central areas as declared. Section 4 of the AGA Act clearly grants priority to the AGA Act. In a few instances the Act does refer to environmental legislation, which must be taken into consideration, but those instances have no bearing on the declarations or the promulgation of regulations.

   Competing constitutional rights must, initially, be weighed against each other at the same level. That one of them could be found to be of more significance in a certain situation is clear from the Constitutional Court judgments. I have no doubt that the constitutional right to scientific research outweighs environmental rights in the case of the SKA project. It is, in any case, not my task to assess whether unreasonable inroads have been made into the environment. There is no evidence that the SKA did not approach the project without paying attention to the protection of the environment in so far as it was possible, given the construction plans.

   Now that a MOU has been negotiated with Agri South Africa, crucial issues will, I am convinced, be addressed within the context and spirit of that understanding – the core of which is based on consultation. I, once again, refer to the words of the later Chief Justice Ngcobo:

   > What is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side. The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the [parties] ... This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another.

For purposes of this report, the question is, however, whether a Strategic Environmental Assessment (SEA) or a Social Impact Study (SIA) was a *legal* requirement for the declarations and the Regulations. **It was not.**

4. The Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA"), which became operational on 1 July 2015, does not have retroactive effect and does not govern the legality of the declarations of the core and central areas and the Regulations. That it, however, has a most real effect in so far as future spatial planning throughout South Africa is concerned, is a fact.

5. As to the charge of **Ecocide** by a few presenters, once the crime is included in the *Rome Statute*. Even if the *Rome Statute*, as possibly amended, were to have been applicable to the declarations, the declarations of the core and central areas amount to a far cry from the crime of ecocide, which was proposed by the International Law Commission to read as follows:

> An individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to] ...

The presenters at Carnarvon, however, did not refer to the ILC proposal (the ILC being the *official* international body in this regard) but referred to the much wider proposal of Prof Polly Higgins, which reads as follows:

> Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished.

I need not spend more time on this unwarranted allegation of ecocide. It has no merit and the declarations by the Minister of Science and Technology in 2010 and 2014 are far removed from ecocide – under both definitions - and amounted to a *bona fide* and lawful exercise of an authority provided for by a democratically elected Parliament in sections 5, 7 and 9 of the AGA Act.

6. That, generally, the process was "steamrolled." That an independent Board of Inquiry should have been appointed to decide whether the Northern Karoo Province should be the relevant area and, in any case, whether the SKA bid should have been made at all. South Africa cannot afford the SKA.

   That a referendum should have been held before the AGA Act was accepted by Parliament.

   I have closely studied the process followed by Parliament and the Department of Science and Technology in regard to the AGA Act from its inception. My conclusion is that all the legally required steps were taken and that public participation was an integral part of the procedure.

7. As to the claim that a ***referendum*** should have been held before the declaration of the core area, the response is that referenda are governed by the Constitution of the Republic of South Africa 1996. Section 84(2) (g) of the Constitution provides that the President is responsible for calling a national referendum when an Act of Parliament permits him or her to do so. Section 127(2)(f) of the Constitution provides that the Premier of a Province is responsible for calling a referendum in the Province when an Act of Parliament permits

her or him to do so. The AGA Act does not include this power for the President or the Premier of a Province, and thus a referendum was not a legal possibility to even consider.

8. That the public participation process by the Department had not been successful since undertakings could not be given and minutes of previously held meetings could or would not be provided.

First, the demand for Minutes of meetings held, going back to before the declaration of the central areas, is based on a misconception of the Act. The Minister is authorised to make declarations and issue Regulations. In the process the Minister must provide for public participation. The Minister has no duty to give effect to what may have been discussed at any meetings with interested or affected parties or even what might have been said or "undertaken" by officials of the Department. The path to the Minister is limited by the Act: *presentations* by interested or affected parties and, if so decided by the Minister, *hearings* chaired by the Minister or a person designated by the Minister.

I am confident, in my advice to the Minister, that these hearings plus the presentations provided a full opportunity for interested or affected parties to air their views.

Second, ultimately, I believe that the eight workshops plus the hearings held during 2016 were generally of value for the Department and the SKA management. The plight of the communities involved is, in any case, also relevant in terms of the SPLUMA investigations, the relevant Act having become operational on 1 July 2015. The MOU with Agri South Africa is also of particular importance. The amendments to the Draft Regulations, as proposed by the undersigned, are, partly, the result of this process.

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8. Synopsis of advice to minister

1. In summary, my advice to the Honourable Minister is as follows:
   (a) All prescribed procedures for the declaration of the Core and Central Areas and publication of the Draft Regulations have been complied with.
   (b) Attacks against the validity of the declarations based on:
      - Absence of prior environmental or social studies;
      - Absence of authorisation for the declarations by the Minister of Environmental Affairs;
      - The omission to hold a Provincial or National Referendum before electing the Northern Province for the SKA;
      - The declarations amounting to the possible future international crime of ecocide; and
      - The absence of proper public participation **are unfounded in law.**
   (c) The proposed amendments to the 2016 draft Regulations, it is submitted, are well founded on the basis that the Regulations:
      - Are regarded as an integrated unit;
      - Lead to justifiable fines to a much lesser maximum than R1 million as permitted by the Act and which was part of the 2016 version of the Draft Regulations;
      - Exclude imprisonment as a punishment, since it is not justified by the nature of the contraventions, which are essentially of an administrative nature;
      - Exclude a finding against a person who was not at fault in the sense of negligence (*culpa*) or intention (*dolus*);
      - Do not, in the absence of a response by the Management Authority for a permit application, regard an omission of an answer as amounting to a rejection of the application for a permit, but in fact regard the permit as issued;
      - Are more readily understandable;
      - Recognise the jurisdiction of the Aviation Authority in so far as air-traffic is concerned;
      - Provide for a procedure which ensures reasonable compensation for expenditure involved in ensuring that instruments comply with the Regulations;
      - Excludes red tape, by, e.g. not requiring that an applicant provide all previous documentation;
      - Protects the privacy of a permit holder's business in so far as insight of the Register is regulated more closely.
   (d) Generally, the advice is that priority be given by the Department to reach concurrence with organs of state so that they comply with the regulations by consent or through their own disciplinary mechanisms.
   (e) Since it might lead to confusion if the proposed Amended Draft Regulations, which must still be approved by the Minister, are attached to this Report, I am not attaching the said proposed Draft. I will, of course, make it available to the Minister. This Report

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has, in any case, indicated the most important proposals for amendment. A *summary* of Schedules A, B,C and D of the Draft Regulations, as proposed for promulgation, will be made available to the Honourable Minister under separate cover with the proposed Regulations.

(f) I further propose that the Draft Amended Regulations not be published for further public participation. I have considered all proposals and have proposed amendments which generally ameliorate the effect of the Draft Regulations as published in April 2016. Applying the guideline of the Courts: public participation was undertaken and all reasonable steps were taken in this regard.

(g) Lastly my advice is that the AGA *Act* be amended so as to provide for an Administrative Tribunal which will hear and decide complaints from the Management Authority and also impose sanctions. A draft amendment is included as Annexure A of the full Report.

(h) A copy of the draft MOU between Agri South Africa and the NRF and the SK, which will shortly be signed, is also attached to the full Report.

J. C. W. van Rooyen

G.N.M. Pauda

Prof JCW van Rooyen SC
24 January 2017