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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.

G.W.M.S.

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

DEPARTEMENT VAN WETENSKAP EN TEGNOLOGIE

NO. 246 **22 MAART 2017**

PUBLIKASIE VAN N VERSLAG OOR OPENBARE MONDELINGE VERHORE INSAKE REGULASIES VIR DIE BESKERMING VAN DIE KAROO SENTRALE ASTRONOMIEVOORDEELGBIEDE KRAGTENS DIE WET OP GEOGRAFIESE ASTRONOMIEVOORDEEL, 2007.

Hierdie kennisgewing is van toepassing op die Karoo Sentrale Astronomievoordeel-gebiede (KSAVG), vir die doeleindes van radio-astronomie en verwante wetenskaplike ondernemings verklaar, kragtens artikels 9(1) en (2) van die "Astronomy Geographic Advantage Act, 2007 (Act Nr. 21 of 2007)" (na verwys as "die Wet" hierna).

Soos daar in die Wet voorsien is, moet die verklaarde astronomievoordeelgebiede teen radiofrekwensiesteuring, of steuring op enige ander manier, beskerm, bewaar en behoorlik in stand gehou word.

Ek het kennisgewings met konsep regulasies vir die beskerming van die KSAVG op 23 November 2015 in Staatskoerant No. 39442 gepubliseer, en weer op 20 April 2016 in Staatskoerant No. 39939 om die tydperk vir geskrewe voorleggings te verleng, om meer werkwinkels oor die regulasies in die Karoo-streek te hou en om Bylae A tot die konsep Skedules A en D van die regulasies, te wysig. Die Bylae A behels die geografiese uitleg van die SKA radioteleskoop wat gewysig is.

Nadat geskrewe vertoë ontvang is, het ek besluit dat openbare mondelinge verhore nodig is en het ek JCW van Rooyen SC aangewys kragtens artikel 42(3) van die Wet om voor te sit in openbare verhore in Pretoria en in Carnarvon, onderskeidelik op 13 en 20 Oktober 2016.

Professor van Rooyen het sy verslag op 24 Januarie 2017 aan my voorgelê. 'n Opsomming van Prof JCW van Rooyen SC se verslag is as 'n bylae tot hierdie kennisgewing aangeheg. Die volle weergawe van die verslag, soos deur my aanvaar, is beskikbaar by die Astronomiebestuursgesag binne die Departement van Wetenskap en Tegnologie, Pretoria.

Navrae kan gedoen word by:

Mnr. Mere Kgampe
Dept. van Wetenskap en Tegnologie
Gebou 53, WNNR Kampus
Meiring Naude-weg
Brummeria
Pretoria
0184

of

Dept. van Wetenskap en Tegnologie
Privaatsak X894
Pretoria
0001

of E-pos adres mere.kgampe@dst.gov.za; of telefoonnommer 012 843 6644.

Die regulasies word tans gefinaliseer, met die oorweging wat dit toekom, van die voorleggings deur geïnteresseerde en belanghebbende partye gemaak tydens die bogenoemde raadplegende proses. Daarna sal die regulasies uitgevaardig word en sal opgevolg word deur die publikasie van 'n kennisgewing waarin die regulasies in werking gestel word.

G.N.M. Pandor

MEV GNM PANDOR, LP
MINISTER VAN WETENSKAP EN TEGNOLOGIE

DRAFT REGULATIONS ON THE PROTECTION OF THE KAROO CENTRAL ASTRONOMY ADVANTAGE AREAS 2016

PROF JCW VAN ROOYEN SC

SUMMARY OF REPORT: IN
AFRIKAANS

24 JANUARIE 2017

G.N.M.P.

DRAFT REGULATIONS ON THE PROTECTION OF THE KAROO CENTRAL ASTRONOMY ADVANTAGE AREAS 2016

PROF JCW VAN ROOYEN SC

SUMMARY OF REPORT: IN **AFRIKAANS**

24 JANUARIE 2017

Astronomy Geographic Advantage Act 2007

OPSOMMING VAN VOLLE VERSLAG TEN AANSIEN VAN KONSEP REGULASIES VIR DIE BESKERMING VAN DIE KAROO SENTRALE ASTRONOMIE VOORDEELGEBIEDE 2016

Prof JCW VAN ROOYEN SC

AAN

DIE MINISTER VAN WETENSKAP EN TEGNOLOGIE

DIE EDELE MEV GRACE NALEDI MANDISA PANDOR LP

24 JANUARIE 2017

G.N.M.P.

VOORAF

Die noodsaak vir die beskerming van die sogenaamde Square Kilometre Array ("SKA") teen sekere vlakke van radiofrekewensie versteuring of enige aktiwiteit wat nadelig mag inwerk op radio astronomie en verwante wetenskaplike ondernemings, het gelei tot die verklaring van drie gebiede in die Noord Kaap Provinsie, deur die Minister van Wetenskap en Tegnologie,waar spesiale beskermings-maatreëls noodsaaklik is. Die International Communication Union het reeds die noodsaak vir die beskerming van hierdie tipe gebiede beklemtoon.Dit het, ondere andere, die uitsonderlike sensitiewe aard van die betrokke meganismes beklemtoon. Dit is, inderdaad, die bedoeling van die Konsepregulasies wat in 2016 deur die Minister vir kennisname en kommentaar gepubliseer is. `n Geleentheid vir openbare verhore, wat op 13 en 20 Oktober 2016 in Pretoria en Carnarvon gehou is, is ook geskep.Wesentlike publisiteit aan die Konsepregulasies is ook deur die Departement gegee by agt werkswinkels in die Karoo.

INLEIDING

1. Ondergetekende is deur die Minister van Wetenskap en Tegnologie aangestel, kragtens 42(3) van die Wet op Astronomie Geografiese Voordeel 2007, om verhore in Pretoria en Carnarvon in Oktober 2016 te hou ten einde persone, wat voorleggings gemaak het insake die Konsepregulasies, aan te hoor. Ongeveer `n derde van die persone het my by die geleenthede toegespreek. By die saamstel van die verslag, waarvan hierdie stuk die opsomming is, is die meer as sewentig voorleggings oorweeg.Ondergetekende se taak is ook om die Minister te adviseer of die Minister afdoende gronde – beide juridies en feitelik – het om die Regulasies af te kondig en later in werking te stel.
2. Dit is ook die doel van die verslag om die Minister te adviseer of die besware wat teen die Konsepregulasies aanhangig gemaak is juridies geldig is. Dit moet gestel word dat ongeveer 80% van die geskrewe

verslae krities is teenoor die geldigheid van die verklaring van die gebiede in 2010 en 2014. Die beweerde negatiewe ekonomiese en omgewings-benadeling, sonder ondersoek deur die SKA, is aangevoer as gronde vir bewys daarvan dat die verklarings ook uit hierdie hoek ongeldig is. Vodacom, Telkom en verskeie staatsorgane het waardevolle bydraes tot die tegniese her-formulering van die Regulasies gelewer. Die feit dat Agri-Suid-Afrika en die SKA en die Nasionale Navorsingsraad (NNR) in Januarie 2017`n konsep Memorandum van Verstandouding ("MV") bereik het oor `n wye reeks relevante aangeleenthede is besonder bemoedigend. Dit spreek juis die beweerde nadele aan en aangeleenthede van gesamentlike belang – soos werkloosheid, die aankoop van plase en die effek op die bemarking van Karoo skaapvleis - sal in die toekoms in `n gees van samewerking aangepak word.Besondere dank word uitgespreek vir hierdie ontwikkeling ná die verhore.

3. In beginsel moet die Regulasies beperk word tot dit wat redelikerwys nodig is om die SKA as `n prioriteit te beskerm. In hierdie proses moet ander fundamentele regte, soos die reg om aktief te wees in die handel en die reg om per selfoon en internet verbind te wees, ook deeglik in ag geneem word – maar, noodwendig, met die reg tot wetenskaplike integriteit van die SKA as `n prioriteit. Die fundamentele reg op redelike vergoeding is natuurlik ook relevant. Dus, waar ooreenstemming oor die koop van `n plaas nie bereik kan word nie, sal benadeeldes geregtig wees op redelike vergoeding kragtens die Grondwet – iets wat, volgens my inligting, nog nie gebeur het nie. Vergoeding vir kostes tot aanpassing van apparatuur word ook ingesluit by die Regulasies, soos aanbeveel deur ondergetekende.
4. Ondergetekende het al die vertoë bestudeer asook die konsepregulasies. Al die kennisgewings wat vanaf voor 2010 uitgereik is deur die Minister om die kerngebied en die sentrale gebiede te verklaar is bestudeer en ek is daarvan oortuig dat, vir sover openbare deelname nodig was, daar aan hierdie vereiste voldoen is deur relevante kennisgewings aan persone op die Direkteur se register te

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stuur. Die nodige kennisgewings is ook in die *Staatskoerant* gepubliseer en pubisiteit is, soos voorgeskryf, in koerante wat in die gebiede versprei word aan die beoogde verklarings en besluite gegee. Agt werskwinkels is ook in in Januarie en April 2016 in Karoo-dorpe gehou en die bywoning was, volgens my inligting, bevredigend - veral in April toe 688 persone dit op vier dorpe bygewoon het. Die verhore wat ek gehou het in Pretoria en Carnarvon was, soos later in die opsomming en volle verslag aangedui, die enigste wetlik vereiste verhore en was goed bygewoon.

5. Die konsepregulasies bestaan uit Skedules A,B,C en D en daar is Aanhangsels tot Skedules A en D. Alhoewel die aanvanklike plan was om elke skedule as `n aparte stel regulasies te publiseer, is ek van mening dat die Skedules `n eenheid vorm en saam as Regulasies gepromulgeer moet word en later saam in werking gestel moet word. Slegs Skedules A en D regverdig strafbepalings – wat later behandel sal word. Die voorstel is dat daar minstens ses maande verloop vanaf publikasie van die Regulasies tot dit in werking gestel word by wyse van kennisgewing in die Staatskoerant. Dit is in belang van kennisname van en voorbereiding vir die nuwe bestel.

VERVOLGING IN DIE HOWE

1. Volgens die konsep-regulasies mag vervolging in die howe lei tot `n boete van `n maksimum van R1 miljoen en/of gevangenisstraf van `n maksimum van vyf jaar.Ek het by die verhore onderneem om aandag aan hierdie aspek te gee.
2. Die Grondwethof het hom reeds verskeie keer uitgespreek teen vae bepalings in wette en dit aangepas na groter duidelikheid. Gevolglik het ek besluit om te adviseer dat spesifieke oortredings en boetes duidelik in die Regulasies uiteengesit moet word. Die maksimum vir opsetlike oortredeings sal R200 000 wees en vir nalatige oortredings R20 000 of R5000, na gelang van die geval. Geen gevangenisstraf mag opgelê word nie. Dit is onregverdig om `n gemeenskap wat nie aan hierdie

beperkings onderworpe was nie, nou met moontlike gevangenisstraf te bedreig. Buitendien pas gevangenisstraf nie hierdie tipe regulatoriese oortredings nie. In ernstige gevalle soos diefstal, brandstigting en roof kan persone aldus aangekla word, maar hierde misdrywe is ver verwyder van die regulatoriese bestel wat ingestel word in die Regulasies.

3. Dit word ook aanbeveel dat `n administratiewe tribunaal dringend ingestel word deur wetswysiging. Die tribunaal sal dan, op `n klagte van die Bestuursgesag, alle klagtes aanhoor wat nie klaarblyklik opsetlik gepleeg is nie. Die Tribunaal sal, by skuldigbevinding, `n bevel uitreik dat `n saak reg gestel word en/of dat die respondent nie weer die oortreding moet begaan nie. Persone mag, in ernstige gevalle, `n boete opgelê word. Natuurlik, kan `n klagte ook verwerp word. Die boetes, wat hierbo voorgestel is, sal ook hier toepaslik wees. Noodwendig sal gevangenisstraf nie ter sprake kom nie en `n skuldigbevinding sal ook nie tot `n kriminele rekord lei nie. Die magte wat in die Wet aan die Minister verleen word, sluit nie die bevoegdheid in om die Tribunaal by wyse van regulasies in te stel nie. Daarom, die wetswysiging. Die voordeel van so `n sisteem – wat byvoorbeeld by die Onafhanklike Kommunikasie-Owerheid van SA ("OKOSA") toegepas word - is dat dit byna alle gevalle uit die strafhowe sal hou. Die besonderhede van die voorstel tot wetswysiging is in Aanhangsel A van die volle verslag.

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DIE VEREISTE VAN INSTEMMING

1. Die Wet vereis, in spesifieke gevalle, dat die Minister instemming ("concurrence") moet verkry voordat Regulasies afgekondig mag word. Onder andere, van die OKOSA (vir sover dit uitsaaidienste betref), die Minister van Verdediging, die Lugvaartowerheid, die Minister van Vervoer en die Minister van Finansies.
2. `n Belangrike saak is die instemming van die Lugvaartowerheid, aangesien vlugte en radio-kontak oor die gebiede waarskynlik `n risiko vir die SKA sal skep. By die indiening van hierdie verslag is die instemming van die Lugvaartowerheid nog nie verkry nie. Die Owerheid het `n voorlegging aan my in Pretoria gemaak en aangedui dat dit `n ingewikkelde saak is en dat hulle nie geneë is om instemming te gee nie. `n Latere vergadering, na wat ek verneem, is wel gehou waar begrip getoon is vir die relevante beskerming van die SKA.
3. Dit word voorgestel, en dit is reeds vervat in die voorgestelde regulasies, dat die Lugvaartowerheid jurisdiksie behou oor alle vlugte en dat, na verdere onderhandelinge, maatreëls ingestel word deur die Owerheid wat die SKA redelikerwys beskerm. Die Owerheid oefen dan ook jurisdiksie hieroor uit en klagtes mag, byvoorbeeld deur die Bestuursgesag, by die Owerheid aanhangig gemaak word. Dit is dan ook, oor die algemeen, nodig dat erkenning verleen word aan staatsorgane se jurisdiksie. Buitendien mag `n staatsorgaan nie strafregtelik aangekla word nie – sien *S v De Bruin* 1976(3) SA 56 (T) - en behoort reëlings dus op `n basis van instemming getref te word. "Instemming" beteken natuurlik nie dat aan elke party se eise voldoen kan word nie, maar dat daar `n middeweg gesoek behoort te word. Art. 41 van die Grondwet vereis dan ook samewerking tussen staatsdepartemente.

DIE KONSEPREGULASIES

1. Die Karoo *Sentrale* Astronomie Gebiede is deur Minister Hanekom LP

as destydse Minister van Wetenskap en Tegnologie in 2014 verklaar met die oogmerk om beskerming te verleen aan die frekwensie spektrum van 100 MHz tot 25.5GHz.

2. Die logiese verdere stap was om konsepregulasies vir die verklaarde gebiede af te kondig ter beskerming van die SKA in sy astronomie funksie. Hierdie konsepregulasies was die onderwerp van die 2016 openbare raadpleging.
3. Die feit dat die finale regulasies, soos deur my adviseer, mag verskil van die 2016 konsepregulasies, is `n redelike gevolg van die proses van raadpleging en juridiese oorweging van die konsepregulasies. Die reeks besware wat teen die aanvanklike afkondigings en die geldigheid van hierdie proses aangeteken is, was, met eerbied, nie op regsgronde baseer nie.Waar tegniese wysigings voorgestel is, is die oorgrote meerderheid aanvaar.
4. Daar word ook voorgestel, en dis reeds in die konsep vervat, dat redelike koste wat met die aanpassing van bestaande apparaat gepaardgaan, vergoed sal word. `n Prosedure word uiteengesit in Skedule C van die Regulasies.
5. Ondergetekende sal nie die Minister adviseer om eers weer die gewysigde konsep-regulasies te publiseer nie. Om dit te doen sal ontaard in `n proses wat die Hoogste hof van Appèl `n nimmereindigende proses noem en waarteen die Hof maan. Die voorgestelde wysigings aan die konsep-regulasies 2016 dra by tot helderheid en is ook in die belang van minder ingrypende regulering. Swaar boetes word aansienlik verminder en gevangenisstraf word geheel en al verwyder as `n moontlikheid.

MEMORANDUM VAN VERSTANDHOUDING ("Memorandum of Understanding")

1. Die boerdery-gemeenskap was goed verteenwoordig by die verhoor op Carnarvon deur Agri Noordkaap. Laasgenoemde het, onder andere, klem geplaas op die gebrekkige selfoon en internet toeganklikheid

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asook beperkings op die vleismark as gevolg van die aankoop van plase deur die SKA.Individue, soms in groepvertoë, het soortgelyke probleme geopper. Na die verhoor op Carnarvon is ek ingelig dat daar `n Memorandum van Verstandhouding ("MV") (Memorandum of Understanding) gesluit is tussen Agri Suid-Afrika en die SKA en die Nasionale Navorsingsraad ("NNR") en dat dit teen die einde van Januarie 2017 onderteken sou word. Dit is nou wel onderteken aan die einde van Februarie. Ek het die Memorandum gelees. Dit stel stel breë beginsels van samewerking tussen Agri Suid-Afrika en die SKA en die NNR daar. Dit is duidelik dat projekte wat die belange van die boerdery-gemeenskap, sy werknemers en dorpe raak, in beginsel, met die oogmerk van samewerking benader sal word. Die aankoop van plase sal ook deel van die agenda wees – wat `n besondere positiewe teken is. Dit is so omdat `n aantal voorleggings die SKA beskuldig van wat mens diktatoriale beheer oor die toekoms van boerdery sou kon noem - wat dan weer lei tot oud-plaaswerkers sonder werk, `n ernstige afname in die skaapvleis-mark, die sluit van abattoirs en, uiteindelik, semi-spookdorpe. In die lig van die MV is dit onnodig om te besluit in welke mate die SKA of die die Verklarings en die Konsepregulasies gelei het tot, of bygedra het tot die afname in die welsyn van die Noor-Kaapse gemeenskap. Ek is, in elk geval, nie daarvan oortuig dat die SKA projek die volle blaam of selfs wesentlike blaam moet dra vir die selfoon en internet probleme in die gebiede aangrensend aan die SKA nie. Dit is goed bekend dat landdienste, in elk geval, afgeneem het om redes wat nie binne my ondersoek-opdrag val nie. Die konsep MV is aangeheg by die Volle Verslag wat ek aan die Minister gelewer het – welke verslag beskikbaar is op aanvraag by die Direkteur van die Bestuursowerheid by die Departement van Wetenskap en Tegnologie in Pretoria.

2. Dit val buite my opdrag om die die onderwerp verder te neem as dit. Ek het eenvoudig nie al die feite nie en, verdere ondersoek in dié verband val nie binne my opdrag nie. Wat wel belangrik is, is die

grondwetlike plig op die Staat om te verseker dat dat selfoon en internet fasiliteite teen `n redelike koste deel is van die infra-struktuur van die Noord Kaap. Van besondere belang is die MV tussen die SKA en die NNR en Agri Suid-Afrika. Dit toon `n bereidwilligheid om saam te werk in die bou van die welsyn van `n gemeenskap, wat nie net bestaan uit eienaars van groot plase nie, maar ook hulle werknemers, die dorpe en plaaslike ondernemenings wat hulle dien, mense sonder werk, senior burgers en kinders. Regter Ngcobo (die latere Hoofregter) stel die volgende belangrike riglyn, waarmee `n MV benader moet word:

> *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.*

`n Belangrike aspek van die MV is dat, indien dit hoegenaamd moontlik is, plase eerder nie as geheel gekoop moet word nie en dat alternatiewe reëlings by wyse van servitute die behoeftes van die SKA sou kon aanspreek. Aan die anderkant is dit nie onwaarskynlik dat die SKA `n sone sou wou skep waarbinne daar nie `n moontlikheid van inmenging sal wees nie. Noodwendig sal dit bespreek word met Agri Suid-Afrika in die lig van die MV – welke bespreking inderdaad met wedersydse respek sal moet plaasvind, binne die raamwerk van wat die latere Hoofregter Ngcobo (hierbo aangehaal) uitgewys het.

OPENBARE DEELNAME

Die proses van openbare deelname vind sy oorsprong in die Grondwet waar die twee Kamers van die Parlement verplig word tot openbare deelname by die maak van wetgewing.

Eerstens maak artikel 42 van die AGA Wet voorsiening vir die breë beginsel van openbare deelname. Voordat ek die Minister in 2013 adviseer het om die sentrale gebiede te verklaar, is seker gemaak dat die betrokke publiek `n integrale deel van die proses was.

Tweedens, bepaal die Wet dat die Bestuursowerheid `n lys moet opstel en in stand hou van belanghebbendes. Iemand, wat as sodanig geregistreer is, het dan die plig om adres-veranderings aan die Bestuurgesag te stuur om te verseker dat toekomstige kennisgewings hom of haar bereik.

Derdens, kennisgewing van die 2016 Konsepregulasies is gegee aan belanghebbendes, nie net in die *Staatskoerant* nie maar ook in koerante wat in die gebied versprei word.

Vierdens, is agt werkwinkels in Januarie en April deur die Departement gehou in Noord Kaap dorpe. Voorleggings is gemaak deur verteenwoordigers van die Departement en die SKA. `n Oorsig van die wetgewende proses is gegee asook sekere voordele wat die SKA projek het of kan hê vir die gemeenskappe in die gebiede. `n Lys van klagtes en vrae wat aanhangig gemaak is by die werkwinkels is aan my oorhandig by die verhoor wat ek gehou het op Carnarvon op die 20ste Oktober 2016. Ek is tevrede dat die proses wat gevolg is die goeie trou van die gemelde instellings weerspieël.

Vyfdens, mag die Minister, in toepaslike omstandighede, belanghebbendes toelaat om mondelinge voorleggings te maak aan die Minister of `n persoon wat deur die Minister aangewys is. Dit is in 2013 gedoen met die verklaring van die drie sentrale gebiede en, weereens, in 2016, nadat die konsepregulasies gepubiseer is. Soos vermeld, het ondergetekende by beide geleenthede voorgesit.

Dus, ten spyte van besware geopper deur persone wat vertoë ingedien het dat die vereiste publisiteit nie ten aansien van die verklaring van die kerngebied in 2010 en sentrale gebiede in 2014 gegee is nie, het ek geen twyfel dat die openbare deelname proses in beide gevalle in ooreenstemming met die Wet uitgevoer is.

2. Dieselde gevolgtrekking geld ten aansien van die 2016-proses waar Konsepregulasies in 2016 afgekondig is en vertoë van die

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belanghebbendes uitgenooi is. Soos vermeld, is dit opgevolg deur twee openbare verhore.

3. Volgens die 2003 Regulasies afgekondig kragtens die Bevordering van Administratiewe Geregtighed Wet van 2000, het ek die plig om sonder onredelike vertraging na die laaste verhoor op 20 Oktober 2016 `n volledige verslag aan die Minister te lewer. Na die lewering het die Minister sestig dae om die belanghebbendes, wat vertoë gelewer het, in te lig van haar besluit kragtens die Wet en, indien daartoe versoek, redes te gee vir haar besluit.

   Ek beveel in elk geval aan dat, in ooreenstemmimg met die vermelde Regulasies, die Minister haar besluit plus hierdie opsomming van my verslag publiseer binne die vermelde termyn. Na my mening is die Minister nie verplig om ook op daardie datum die Regulasies af te kondig nie. Dit is `n saak wat binne haar diskresie val.Ek sal ook nie die volle stel regulasies, soos voorgestel vir wysiging, aanheg by hierdie verslag nie. Dit sal die indruk skep dat die toekomstige Regulasies, inderdaad, sal ooreenstem met my voorstelle. Dit is, natuurlik, nie `n geregverdigde afleiding nie. Ek sal egter, as deel van my opdrag die Minister voorsien van die voorstelle tot wysiging. Die Minister sal dan besluit watter wysigings sy aanvaar.

   My advies is egter dat die konsepregulasies, soos voorgestel deur my, ooreenstem met die vereiste van rasionaliteit soos voorgeskryf deur Adjunk Hoofregter Moseneke in *Law Society of South Africa v Minister of Transport* 2011 SA 400(CC).Die volle verslag, wat beskikbaar is op aanvraag, bevat die aanhaling.

4. Volgens `n paar voorleggings, van die ongeveer 70 wat voor my geplaas is, was sommige van die werkswinkels nie so suksesvol nie, aangesien vrae nie, na bewering, bevredigend beantwoord is nie. In die lig van die sterk standpunte teen die verklarings van die gebiede soos uitgespreek in die vertoë voor my, is dit nie `n verbasende standpunt nie. Ek het die verslae van die werskwinkels bestudeer en is tevrede dat inligting bevredigend oorgedra is en dat vrae wat nie beantwoord kon word nie, geplaas is in `n lys wat aan my beskikbaar gestel is op Carnarvon.Dit

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moet egter in ag geneem word dat die verhore waarby ek voorgesit het in Pretoria en Carnarvon die juridies relevante geleenthede was om vrae te stel. *Dit* was, in ooreenstemming met regulasies in dié verband, die geleentheid om vrae te stel en standpunte te stel. Dit was ook nie my taak om vrae te beantwoord nie. My taak is om die vrae, standpunte gelewer plus die verslae feitelik en juridies te beoordeel en die Minister te adviseer of die Minister geregverdig sou wees om die Regulasies te publiseer en op `n latere datum in werking te stel.

5. `n Juridies voorgeskrewe faset van hierdie ondersoek, soos hierbo uiteengesit, is die oorweging deur die Minister, by die maak van die Regulasies, van die standpunte wat in die vertoë gestel is. Die Gronwethof en die Hoogste Hof van Appèl het sekere riglyne in hierdie verband neergelê. Die kern van die riglyne is dat die aard van die openbare konsultasie afhang van die tipe wetgewing wat betrokke is. Op die ou end moet die raadpleging redelik wees, in die lig van die aard van die wetgewing. Die insette van die publiek is relevant, maar nie noodwendig deurslaggewend nie. In die volle verslag – en ook hieronder in korter vorm – word die hoof besware wat geopper is oorweeg.

6. Die Minister word gemagtig om in ooreenstemming met die AGA Wet regulasies te maak, na oorweging van die standpunte van die belanghebbende persone vir sover dit grondwetlik geregverdig is en nie strydig is met die strekking van die AGA Wet nie. Die Hoogste Hof van Appèl het egter beslis dat die openbare konsultasie nie moet neerkom op wat die Hof "a never ending story" noem nie. Op `n sekere stadium is die Minister, as die gemagtigde wetgewer, geregtig om te besluit om die Regulasies te publiseer (promulgeer). Dit kan aanvaar word, en dit word ook so adviseer, dat die Minister nie die Regulasies by promulgasie in werking sal stel nie. Die onderskeid tussen promulgasie en inwerkingtreding bly deel van die Regulasies, soos in April 2016 in konsepvorm gepubliseer.

7. Op die ou end was die doel van die verhore in Oktober 2016 om die belanghebbendes aan te hoor en dan die relevante standpunte te

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konsolideer in die advies aan die Minister. Die getal persone wat by die verhore teenwoordig was, was uiters bevredigend en ek is van mening dat `n geheelbeeld van die standpunte saamgesnoer kan word.

DIE JURIDIESE MERIETE VAN DIE OPINIES UITGESPREEK DEUR BELANGHEBBENDES

1. Dit is onmoontlik om elke regsbeswaar te herhaal. Desnieteenstaande, sal die opvolgende paragrawe `n breë beeld gee van die hoof besware wat geopper is. In verskeie gevalle is sterk bewoorde besware geopper. Nietemin, is daar deurlopend `n hoë standaard van beskaafheid gehandhaaf.
2. Dat `n omgewing en sosiale impak ondersoek onderneem moes gewees het voordat die kern en sentrale gebiede verklaar is deur die Minister. Daar was ook aantygings dat die Minister van Wetenskap en Tegnologie, sodra dit deel vorm van die Statuut van Rome, wat deur die Internasionale Strafhof toegepas word, skuldig sal wees aan `n internasionale misdaad "ecocide" wat vertaal kan word as eko-uitwissing.
3. **ANTWOORD**

   Daar is, met eerbied, nie regsgronde vir die beweerde ongeldigheid van die 2010 en 2014 verklaring van die Kern en Sentrale gebiede nie. Die AGA Wet vereis nie dat `n Strategiese Omgewingsbepaling ("SEA") of `n Sosiale Impak Studie ("SIA") voor die verklarings van die gebiede of die afkondiging van Regulasies onderneem moes gewees het nie. Art 4 van die AGA Wet verleen voorkeur aan die toepasing van die Wet. Daar is verwysings in die Wet na omgewingswetgewing wat in ag geneem moet word, maar dié gevalle hou geensins verband met die verklarings of die Regulasies nie. Volgens die Grondwethof moet grondwetlike regte aan die begin van die opwegingsproses op `n gelyke vlak geplaas word. Die uitslag van die opweging lei dan daartoe dat een van die regte, in `n besondere situasie, meer gewig dra as die ander regte. Ek het geen twyfel dat die grondwetlike reg op wetenskaplike navorsing, in dié omstandighede, swaarder weeg as die ander kompeterende regte. Dit is

buitendien nie my taak om te bepaal of ernstige aantasting van die omgewing plaas gevind het nie. Daar is in elk geval geen getuienis dat die SKA nie die projek met die nodige eerbied vir die omgewing uitgevoer het of sal uitvoer nie – in elk geval, vir sover dit redelikerwys moontlik is.

Nou dat `n Memorandum van Verstandhouding gesluit is tussen Agri-Suid-Afrika aan die een kant en die SKA en die NNR aan die ander kant, is ek daarvan oortuig dat geskilpunte aangesreek sal word binne die raamwerk van wat die latere hoofregter Ngcobo (hierbo aangehaal) oor so `n Memorandum gesê het.

Die kernvraag is egter of `n "SEA" of `n "SIA" `n regsvereiste was voor die verklarings en die Regulasies gemaak is. **Daar was geen so `n vereiste nie.**

4. Die Spatial Planning and Land Use Management Act 16 van 2013 ("SPLUMA"), wat op I Julie 2015 in werking getree het, het nie terugwerkende krag nie en beheer nie die geldigheid van die verklarings van die kern en sentrale of die voorgenome regulasies nie. Die Wet het egter besondere relevansie vir toekomstige beplanning dwarsoor Suid-Afrika – iets waaarop ek nie hier hoef in te gaan nie.
5. Wat die klag van eko-uitwissing betref(wat volgens `n aantal voorleggers toepaslik sal wees op die Minister sodra dit deur die lede van die Internasionale Strafhof aangeneem word - wat onseker is) is daar nie eens `n skrale kans dat die verklaring van die gebiede neergekom het op eko-uitwissing nie. Die voorstel van die International Law Commission, wat die liggaam is wat belas is met die taak om aandag te gee aan wysigings of toevoegings tot die Kode, is die definisie van ecocide soos volg: *An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to]...*

   Die voorleggings by Carnarvon, wat na eko-uitwissing verwys het, het egter die veel breër definisie van Prof Higgins aangehaal, wat soos volg lui: *Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given erritory, 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.*

Ek hoef nie verder aandag te gee aan hierdie ongeregverdigde klag van eko-uitwissing nie. Dit het geen juridiese meriete nie en die verklarings - asook die effek daarvan - deur die Ministers in 2010 en 2014 is ver verwyder van eko-uitwissing, kragtens beide definisies waarna hierbo verwys is. Die verklarings deur die Ministers het neergekom op die *bona fide* en wettige uitoefening van gesag waarvoor voorsiening gemaak is deur `n demokraties verkose Parlement in artikels 5, 7 en 9 van die 2007 AGA wet.

6. Dat die proses deurgedruk is; dat `n onafhanklike Raad van Ondersoek aangestel moes gewees het om te bepaal of die Noord Kaap Provinsie die gekose area moes wees vir die vestiging van die SKA projek en of Suid-Afrika, in elk geval, die bod moes gemaak het.
   Ondergetekende het die proses wat deur die Parlement en die Ministers gevolg is nagegaan vanaf die aanvang van die wetgewing tot die huidige stadium waarop Regulasies beoog word. Die wetgewing is noukeurig nagevolg en waar `n diskresie uitgeoefen moes word, is dit rasioneel benader – soos voorgeskryf deur die Grondwethof. Ook dat openbare deelname `n integrale deel van die proses was.
7. Dat `n referendum gehou moes gewees het voor die verklaring van die kerngebied gebied in die Karoo. Die antwoord is dat referenda beheers word deur die Grondwet. Art 84(2)(g) van die Grondwet bepaal dat die President verantwoordelik is vir die verklaar van `n nasionale referendum, slegs wanneer `n Wet daarvoor voorsiening maak. Artikel 127(2)(f) van die Grondwet bepaal verder dat `n Premier van `n Provinsie slegs gemagtig is om `n referendum te verklaar wanneer `n Wet van die Parlement die Premier magtig. Die AGA Wet sluit nie so `n bevoegdheid vir die President of `n Premier in nie.
8. Dat die openbare deelname proses gebrekkig was aangesien ondernemings nie gegee kon word nie en notules van vorige vergaderings nie beskikbaar gestel kon word nie of dat die Departement nie gewillig was om dit te doen nie.
   Eerstens, die eis om notules, wat sover teruggaan as die verklaring van die sentrale gebiede is, met eerbied, gebaseer op `n onjuiste benadering tot die AGA Wet. Die Minister word gemagtig om verklarings te maak en Regulasies uit te vaardig. In die proses moet die Minister voorsiening

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maak vir openbare deelname. Die Minister het egter geen plig om gevolg te gee aan wat bespreek is of selfs "onderneem" is deur amptenare nie. Die kontak met die Minister word beperk deur die AGA Wet: voorleggings deur belanghebbendes en, indien so besluit deur die Minister, verhore waar die Minister of `n persoon aangewys deur die Minister voorsit. *Dit* is die getuienis of standpunte wat deur die Minister oorweeg moet word. Ek is daarvan oortuig, in my advies aan die Minister, dat die verhore plus voorleggings `n volledige geleentheid gegun het aan belanghebbendes om hul standpunte te lug.

Tweedens, is ek daarvan oortuig dat die agt werkswinkels plus die verhore wat gedurende 2016 gehou is, oor die algemeen waardevol was vir die Departement en die SKA bestuur. Die nood van die gemeenskap is, in elk geval, relevant kragtens die SPLUMA ondersoeke – die betrokke wet het op 1 Julie 2015 van krag geword. Die MV tussen Agri Suid-Afrika en die SKA en NNR is ook van besondere betekenis. Die voorgestelde wysigings van die Konsepregulasies wat deur die ondergetekende voorgestel is, is gedeeltelik die gevolg van die proses van openbare deelname.

SINOPSIS VAN ADVIES AAN DIE MINISTER

Oorsigtelik is my advies aan die Minister soos volg:

(a) Alle wetlik voorgeskrewe prosesse vir die verklaring van die Kern en Sentrale Gebiede en die Publikasie van die Konsepregulasies is nagekom.

(b) **Klagtes** teen die geldigheid van die verklarings gebaseer op:

- Afwesigheid van voorafgaande omgewing en sosiaal-maatskaplike ondersoeke;
- Afwesigheid van magtiging vir die verklarings deur die Minister van Omgewingsake;
- Die late om `n Provinsiale of Nasionale Referendum voor die besluit om die Noord Kaap Provinsie vir die SKA aan te wys;
- Die klag dat die verklarings neergekom het op die moontlike internasionale misdaad van eko-uitwissing, indien dit in die toekoms ingesluit word as `n internasionale misdryf; en
- Die afwesigheid van deeglike openbare deelname

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is juridies ongegrond

(c) Die voorgestelde wysigings van die 2016 Konsepregulasies is gebaseer op die volgende breë beginsels:

- Dat die Regulasies A,B, C en D beskou word as `n geïntegreerde eenheid;
- Dat maksimum boetes, wat aansienlik minder is as die R1 miljoen wat deur die Wet as maksimum voorgeskryf word en wat deel was van die 2016 konsepregulasies,voorgestel is vir die finale regulasies;
- Dat dit gevangenisstraf uitsluit, aangesien sodanige straf nie geregverdig word deur die aard van die oortredings nie, wat wesentlik neerkom op reëls van `n administratiewe aard;
- Dat dit bevindings teen `n beskuldigde uitsluit wat nie opsetlik of nalatiglik die regulasies oortree het nie;
- Dat die afwesigheid van `n tydige antwoord deur die Bestuursowerheid nie as `n afwysing beskou word nie, maar as `n goedkeuring;
- Dat dit meer geredelik verstaanbaar is (alhoewel tegniese advies steeds nodig mag wees);
- Dat erkennning verleen word aan die jurisdiksie van die Lugvaartowerheid vir sover dit lugvaart betref;
- Dat voorsiening gemaak word vir `n proses waarvolgens vergoeding geëis mag word vir koste aangegaan mbt die wysiging van apparatuur, wat voortspruit uit die nakoming van voorgeskrewe regulasies in dié verband;
- Dat rompslomp uitgesluit word, byvoorbeeld: deur nie te vereis dat `n applikant alle vorige dokumentasie insluit by `n aansoek, dat as `n deskundige een maal goedgekeur is besonderhede nie weer voorsien hoef te word nie en dat die insluit van voorgeskrewe vorms by die Regulasies uitgeskakel word en deur die Bestuursowerheid beskikbaar gestel word na gelang van omstandighede, wat mag verander; en
- Dat die privaatheid van `n permithouer se bedryf beskerm word deur insae van die Register van Permitte te reguleer.

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(d) Oor die algemeen word beklemtoon dat prioriteit verleen moet word aan die instemmining ("concurrence") deur bepaalde staatsorgane of Ministers sodat die Regulasies of vrywillig of deur hulle eie proses (soos by die Lugvaartowerheid – wat nou reeds in die Voorgestelde Regulasies ingeskryf is) afgedwing word. Dit spruit voort uit die regsbeginsel dat `n staatsorgaan nie aan `n strafproses onderwerp mag word nie.

(e) Aangesien dit tot verwarring aanleiding kan gee indien die hiermee voorgestelde regulasies, wat nog deur die Minister goedgekeur moet word, hierby ingesluit word, heg ek nie die voorgestelde regulasies by hierdie verslag of die volle verslag aan nie. Dit sal, natuurlik, tesame met my volle verslag, aan die Minister voorgelê word vir oorweging. Hierdie verslag vervat in elk geval die belangrikste beginsels vir wysiging van die 2016 konsep-regulasies.

(f) Dit word verder voorgestel dat die Konsep-Gewysigde Regulasies, soos tans voorgelê aan die Minister, nie vir verdere openbare deelname verwys word nie. Ek het al die voorleggings oorweeg en daarná voorstelle gemaak wat oor die algemeen die impak van die 2016 konsepregulasies versag. Ek is daarvan oortuig dat die voorgeskrewe vereiste van *redelike* openbare deelname, soos voorgeskryf deur die Grondwethof, nagekom is.

(g) Ten slotte is my advies dat die AGA Wet gewysig word ten einde voorsiening te maak vir `n adminisratiewe tribunaal wat klagtes deur die Bestuursowerheid sal aanhoor en daaroor beslis. Dit sal die sake wesentlik uit die strafhowe hou.`n Konsep-voorstel vir wetswysiging is aangeheg by die volle verslag aan die Minister.

(h)`n Kopie van die konsep Memorandum van Verstandhouding tussen Agri Suid-Afrika en die SKA en NNR is ook by die volle verslag aangeheg.

J. C. W. van Rooyen

Prof JCW van Rooyen SC

24 Januarie 2017

G. N. M. Pandor
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