



Association for Water and Rural Development

Company Reg. No. 98/03011/08
Private Bag X48
Acornhoek 1360
South Africa

Non profit org. Reg. No. 006 - 821

Tel: 015 - 793 - 7500
Fax: 015 - 793 - 7509
Cell: 0724984421
e-mail: ramin@award.org.za

Draft:

Delegation and Assignment in the National Water Act

Prepared by Ramin Pejan and Jonathan Cogger

Understanding the Legal Distinctions between Delegation and
Assignment in the National Water Act

September 2011

Prepared for the
Inkomati Catchment Management Agency

1. Introduction and Objective of Research

The preamble of the National Water Act¹ recognises the need 'for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to regional or catchment level so as to enable everyone to participate'. The creation of a new institutional framework that focuses on the catchment level for water resource management (WRM), namely through the creation of Catchment Management Agencies (CMAs), is central to determining the effectiveness of policy implementation of the NWA and the policy documents preceding it.²

While the NWA has received international recognition for its comprehensive and innovative legislative design, pitfalls in institutional capacity and implementation of the NWA has sorely hampered the realisation of WRM at the catchment level.³ In fact, the enactment of environmental legislation 'may lull the public into a false sense of security that the problems are being addressed, whereas there can be no realistic expectation of success without the adequate implementation of such legislation.'⁴ One major implementation delay that is emblematic of the kind of failure which is having a significant impact on the effective implementation of the NWA has been the creation of fully functioning. Despite that the NWA has been operational for thirteen years, the establishment of CMAs remains elusive with only 2 out of 19 established. Of those, none are fully functioning, and only one has created a catchment management strategy, which remains to be gazetted by the Minister.

Contributing significantly to this delay is the NWA's lack of guidance as to the appropriateness and use of delegation or assignment to Catchment Management Agencies. Generally, whereas delegation is more of a temporary transfer of responsibilities where the authority delegating retains a large measure of responsibility and control over the outcome of the process, assignment is seen as more of a permanent devolution of complete authority and responsibility for the exercise of a certain power or function.

¹National Water Act 96 of 1998 (hereafter referred to as 'the NWA').

²DWAF. 1997. White Paper on a National Water Policy for South Africa, Department of Water Affairs and Forestry, Pretoria, South Africa, p. 30 (National Water Policy).

³Schreiner, B., Pegram, G. & von der Heyden, C. *Reality check on WRM: Are we doing the right things in the best possible way?* (2009) Development Planning Division. Working Paper Series No.11, DBSA: Midrand; Pollard S. R. and du Toit D. Towards the sustainability of freshwater systems in South Africa: An exploration of factors that enable and constrain meeting the ecological Reserve within the context of Integrated Water Resources Management in the catchments of the lowveld, (2010). Report to WRC, K8/1711. Sept. 2010.

⁴Fuggle & Rabie (eds) *Environmental Management in South Africa* (1992) at 120.

The intended purpose of this paper is to investigate the defining elements and distinctions between the legal terms ‘delegation’ and ‘assignment’ as referred to in the NWA, particularly as it related to the functioning of CMAs, and the implications this has on WRM at the catchment level. While the NWA expressly refers to both terms it fails to define either of them, leaving practitioners and administrators in the dark as to their application.

The authors have through several discussions with the Department of Water Affairs (DWA) and the Incomati Catchment Management Agency (ICMA), observed multiple, often conflicting viewpoints around the assignment and delegation of functions to the CMA and the role that the CMA should play in water management. This includes unfamiliarity with the distinction between these terms, disagreement about when and how functions should be assigned or delegated to CMA, disagreement as to the role of a fully functioning CMA, and a lack of knowledge as to the extent of powers that the NWA envisions assigning to the CMA. This lack of clarity is unfortunate and contributes significantly to the delays in establishing and developing fully functioning CMAs as required by the NWA and the water policy underlying the NWA.

To clarify some of these issues, this paper seeks to explore references to the terms in other areas of the law as a way to fully conceptualise the appropriateness of when to ‘delegate’ and when to ‘assign’. Primary reference will be made to section 99, 126, and 156 of the Constitution,⁵ which provides the foundation for the assignment of powers and functions between spheres of government. Thereafter, an attempt will be made to understand the meaning of delegation and assignment in the Municipal Systems Act,⁶ which has promulgated draft guidelines for the application of delegation and assignment to municipalities.⁷

Although this paper draws from other laws to understand the distinction between assignment and delegation in the NWA, due regard will be paid to the meaning that these terms have within the context that they have been developed. Nevertheless, considering the lack of guidelines around delegation and assignment in the NWA and the establishment of CMAs

⁵ Act 108 of 1996 (hereinafter referred to as the Constitution).

⁶ Act 32 of 2000.

⁷ The Assignment and Delegation Guidelines GN 636 GG 27518 of 22 April 2005 (Hereafter referred to as ‘*Assignment and Delegation Guidelines*’).

which fall outside the spheres of government⁸, it is a beneficial exercise to explore their development in other areas so as to facilitate an understanding of this issue specific to the NWA.

While the ultimate purpose of this paper is geared towards understanding the implications for delegation and assignment specific to the NWA, one can appreciate that other complex issues flow from such a discussion. These include: (1) issues related to the timing of delegation or assignment; (2) issues around dispute resolution and whether CMA's are subject to the tenets of co-operative; (3) issues around financial allocations; and (4) the need to amend the language of the NWA to make the distinction between these terms more clear. Each will be explored; however, we emphasise that the discussion is intended to create dialogue, and not represent final conclusions.

Finally, it should be noted that the most developed of the CMAs that have been established is the ICMA, with a fully functioning governing board, initial functions assigned, and the completion of a non-gazetted CMS. Being the most advanced, the ICMA represents an ideal example of the kind of complexities that an established CMA would face in the delegation and assignment process. As such, this paper concludes by referring to the delegation and assignment issues that the ICMA is facing as a case study.

2. Delving into the legal nature of CMAs: are they subject to cooperative government?

According to the *White paper on a National Water Policy for South Africa* a key function of DWA, formerly the Department of Water Affairs and Forestry (DWAF), will be 'to promote the establishment, and support the functioning of Catchment Management Agencies as and where conditions permit.'⁹ The functioning and ultimate success of CMAs is governed by the principles underlying *Integrated Catchment Management (ICM)* which provides for the

⁸The nature of CMAs will be explained more in depth later on in this paper. An attempt will be made to explain the how the peculiar design of CMAs, which fall outside the normal structures of government, has complicated the application of public law principles of delegation and assignment in the context of the NWA.

⁹ The White Paper on a National Water Policy for South Africa *op cit* note 2 at 30.

devolution and decentralisation of water management.¹⁰ Accordingly, the National Water Resource Strategy (NWRS), a NWA mandated document, divides South Africa into 19 Water Management Areas (WMAs) each of which will be managed by a single CMA, representing the interests of different water users at the catchment level.¹¹ A CMA manages water resources within the bounds of a WMA, which is based on the catchment area or a single river system, in accordance a catchment management strategy (CMS), which must be aligned with the NWRS. In effect, the task of the CMA is to ensure that water resources within its specific WMA is protected, used, developed, conserved, managed and controlled.¹²

From a legal perspective, a CMA is statutory institutional body established by section 77 of the NWA. It is a legal entity with a separate identity from DWA, and it is managed and controlled by governing board appointed by the Minister. The participatory function of a CMA means that the governing board should represent a balance between the interests of existing and potential water users, local and provincial government and environmental interest groups.¹³ The basis of the governing board is co-operation and consensus seeking on water-related matters that affect the various stakeholders and interested persons.¹⁴ Each CMA should be developmental in nature, working progressively towards the implementation of their specific catchment management strategy in the WMA they are responsible for.¹⁵

The public trust doctrine holds that the Minister is public trustee for all aspects of WRM on the behalf of South African government. Thus, the ultimate responsibility for all water-related matters resides with the Minister and to whom all water management institutions are subject. However, due to practical impossibility and a consensus that water management at the catchment level is more appropriate than at the political or administrative level, the Minister cannot be expected to perform all the powers and functions of WRM. For this reason, provision is made for, among other things, the establishment of CMAs, as mentioned above, and the progressive delegation and assignment of powers, duties and functions for the effective management of water related issues to the catchment level.

¹⁰Julia Brown and Phil Woodhouse 'Pioneering Redistributive Regulatory Reform: A Study of implementation of a Catchment Management Agency for the Inkomati Water Management Area, South Africa' in Martin Minogue et al (ed) *Regulatory governance in developing countries* (2006) 227.

¹¹At the time of writing, DWA was revisiting this number and seeking to decrease it to under 10.

¹²Section 1(1) 'water management area' of the NWA.

¹³Section 81(1) of the NWA.

¹⁴Section 79(4)(b) of the NWA.

¹⁵DWAF.1997 *op cit* note 2at 30.

While the Minister is presently responsible for a WMA where no CMA has yet to be established,¹⁶ the NWA foresees the role of DWA, which acts on behalf of the Minister, will eventually shift towards concentrating on regulatory oversight, national policy and strategic issues, institutional support, co-ordination, and auditing.¹⁷ Therefore, what is anticipated is a shift, over time, in the framework of implementation and realisation of WRM from DWA to CMAs, but under the over-arching regulatory function of DWA.

It is precisely the peculiar design of CMAs, that hedge between performing vital public functions with regards to water management in the NWA and its corporate legal identity that makes the application of public law principles of delegation and assignment, a challenging issue. However, what needs to be stressed in any attempt to understand the nature of CMAs is its alignment with DWA and not a disengagement from DWA as an independent corporate identity. Thus, as we elaborate below, in the structure of government, as provided for in the Constitution, it is our view that CMAs are organs of state which are extensions of DWA, thus making them a body within national government.

Whether one can assert that a CMA is subject to the requirements of co-operative governance or falls outside these requirements thus turns on how one defines the legal nature of a CMA (i.e. is it an organ of state that falls within the national executive). The significance of applying cooperative government principles to the CMA within the context of understanding assignment and delegation relates to how disputes between the CMA and DWA will be resolved, including disputes around how, what, and when powers and functions are or are not delegated or assigned.

A close analysis of the term ‘responsible authority’ (of which definitional clarity is vital to the effective implementation of the NWA) helps to resolve this issue. With reference to section 1(1) of the NWA, the meaning of responsible authority hinges on whether a power or function in the NWA has been assigned. Accordingly, where such power or function is retained by the Minister, she or he is the responsible authority; whereas, if such power or function is so assigned to a CMA, then that CMA is deemed to be the responsible authority.¹⁸

¹⁶See section 72(2) of the NWA.

¹⁷Part 5 water management institution at p2.

¹⁸ Section 1(1) of NWA therefore defines the responsible authority as: (a) if that power or duty has been assigned by the Ministers to a catchment management agency, that catchment management agency; or (b) if that power or duty has not been assigned, the Minister.

The difficulty lies in the fact that while the Minister, acting with the authority of the national executive, falls into the spheres of government as set out in the Constitution, a CMA acting, primarily through its governing board, in the same capacity and undertaking the same exact functions as the Minister is merely an organ of state, but falling outside the spheres of government.¹⁹

While this distinction between Minister and CMA may seem slight, it is one that has tremendous implications in practice. For example, this distinction has prompted at least one legal scholar to conclude that CMAs are not subject to the principles of co-operative government and intergovernmental relations as set out in section 41(1) of the Constitution.²⁰ Thus, according to this view, a CMA would not be subject to many Constitutional protections and mechanisms that are meant to facilitate integrated environmental management and that seek to prevent fragmentation in governance because it does not fall within a sphere of government.²¹ This would apply both to how a CMA conducts its affairs with other governmental spheres and how governmental spheres conduct their affairs with the CMA. We, however, do not agree with such a conclusion, and firmly believe that a CMA falls within the ambit of co-operative government.

Where a Minister retains responsibility for a WMA in which a CMA has not been established or performs the functions in the NWA which have not been assigned to an established CMA, in the exercise of such authority, there is no doubt that the Minister is bound to conduct such activities in the spirit of co-operative government. In light of the National Water Policy's and the NWA's overall objective of establishing CMAs for every WMA and the progressive adjustment of the role of DWA - with less emphasis on direct involvement in development, financing and operation in WRM - it would be inconceivable to imagine that CMAs were not intended to be an extension of DWA's institutional framework. To hold otherwise would mean that CMAs, as corporate legal entities, would be responsible for implementing a large volume of the NWA as de facto government actors not subject to cooperative governance

¹⁹An organ of state is defined in section 239 of the Constitution as including national, provincial and local departments of state or administration, and 'any other functionary or institution' which is 'exercising a public power or performing a public function' in terms of the Constitution, a provincial constitution or any legislation.

²⁰ Thompson, H Water law: A Practical Approach to Resource Management and the Provision of Services (2006) Juta, Pretoria at 623.

²¹ See e.g. Kotzé, L. "Environmental governance" in in *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*. Patterson, A. and Kotzé, L. J. (eds.). (Juta 2009) (discussing fragmentation in environmental governance).

requirements, such as the obligation to avoid litigation with other spheres of government. This would create a particularly incongruous result where, as is the case now, DWA retains some functions as the responsible authority while CMAs, where established, have taken on other functions as responsible authority.

The provisions governing intergovernmental disputes as provided for in the Constitution and Intergovernmental Relations Framework Act (IGRFA)²² are too important to let formalistic legal reasoning blind the needs of purposive and common-sense interpretation. It is understandable that a private entity or a corporation performing public functions, for example municipal services, as a result of a procurement process should not be party to an intergovernmental dispute.²³ However, a statutory entity established to perform vital aspects of such legislation and that for all practical purposes undertakes the same role as a government department cannot be excluded from the tenets of co-operative government. Considering the fundamental role that CMAs play in the overall framework of WRM, we should avoid complexity and absurd results at all costs. This approach does not sacrifice flexibility at the altar of established governmental structures, but rather calls for consistency in application and clarity in implementation.

In sum, it is our suggestion that while CMAs are organs of state created for a specific statutory purpose, their placing within the design of government should be seen as extensions of DWA rather than separate statutory bodies removed from the role of government. Such an understanding of the nature of CMAs is consistent with the role that they play in managing fundamental aspects of IWRM. Such an interpretation of the CMAs' nature sheds clarity as to the role that CMAs play in the overall framework of government, and the peculiar relationship between public law principles of delegation and assignment in the context of statutory bodies.

²² Act 13 of 2005. The legislature has passed the Intergovernmental Framework Relation Act (IGFRA), Act 13 as a means to facilitate cooperative government and resolve inter-governmental disputes. The purpose of IGFRA is to “establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith”.

²³ Nico Steyler and Jaap de Visser ‘The Powers of Local Government’ in Nico Steyler and Jaap de Visser *Local Government Law of South Africa* (2007) at 16-32.

3. Powers and functions of a CMA

Prior to discussing the legal implications between assignment and delegation in the NWA, this section presents the powers and functions of a CMA under the NWA.

3.1. CMA's initial powers and functions

As stated above, the ultimate purpose of establishing the CMA is to progressively delegate and/or assign WRM to the regional or catchment level as a way to involve catchment specific communities and water users, within the framework of the NWRS.²⁴ Section 80 of the NWA provides that a CMA will have initial functions by virtue of its establishment. In other words, these functions will be exercised by a CMA without them being delegated or assigned by the Minister. **Table 1** lists the initial functions as provided for in section 80 of the NWA.

Table 1

Section:	Contents of section:
s 80(a) – initial functions of CMA	To investigate and advise interested persons on the protection, use, development, conservation, management and control of the water resources in its water management area.
s 80(b) – initial functions of CMA	To develop a catchment management strategy.
s 80(c) – initial functions of CMA	To co-ordinate the related activities of water users and of the water management institutions within its water management area.
s 80(d) – initial functions of CMA	To promote the co-ordination of its implementation with the implementation of any applicable development plan established in terms of the Water Services Act 108 of 1997.
s 80(e) – initial functions of CMA	To promote community participation in the protection, use, development, conservation, management and control of the water resources in its water management area.

Furthermore, as a Water Management Institution, a CMA has the following powers, duties, functions and responsibilities in the NWA. **Table 2** provides the sections and content thereof.

Section:	Content of section ²⁵ :
s 57(1)(a)(i) and (b) read with s 57(2)	A CMA may make water use charges in its WMA.
s 58 read with s 1(5)	A CMA may recover water use charges that the Minister

²⁴Chapter 7 of the NWA.

²⁵See Thompson, *H op cit* note 20 at 625.

	made and directed the CMA to recover.
s 60(2)	On application of a person, a CMA may issue a certificate stating the amount of unpaid water use charges and any interest due.
s 64(1)	A CMA authorised by the Minister may expropriate property for a purpose contemplated in the NWA.
s 65(2) and s 128	A CMA responsible for the expropriation of a servitude has the same rights as those vesting in the holder of the servitude.
s 25(1)	A CMA may allow a person authorised to use water for irrigation to use some or all of the water for a different purpose or on another property for the same or similar purpose on a temporary basis.
s 25(3)	A CMA must include details in its annual report in respect of the permission to allow persons entitled to use water to use it for a different purpose or on other properties.
s 74(1) and (5)	A CMA must give effect to the directive given by the Minister in relation to the exercising of its powers or the performance of its duties, including any power or duty assigned or delegated.
s 124(1) and s 125	A CMA may appoint a person as an authorised person to enter a property to perform certain functions.
s 145(1)	A CMA must make information on WRM available.

Table 2

3.2. Powers and functions where the NWA expressly mentions the CMA

A related issue to the initial functions provided for in section 80 is the legal status of the sections in the NWA which specifically refer to CMAs. **Table 3** lists all the instances in the NWA where this takes place. Central to this issue is section 19 (prevention and remedying effects of pollution) and section 20 (control of emergency incidents) of the NWA.²⁶ The express reference to CMAs rather than ‘responsible authority’ in these sections causes confusion as to the precise nature of these powers and functions. A literal legalistic approach would regard these powers and functions as those that a CMA has as an initial function. However, to conclude that section 19 and 20 are initial functions would be out of place with overall scheme of progressively developing the capacity of CMAs to deal with functions that require both human and financial capacity. Taking into account the extent of the powers and nature of the functions intended to be performed in both section 19 and 20 of the NWA, one would expect that these sections would be subject to progressive assignment, akin to section 73(1)(a). It is submitted that such confusion should be cleared up through legislative changes to the NWA.

²⁶See specifically: section 19(3), (4), (5), (6) and (8); and section 20(3)(c), (4)(d), (6)(b), (7) and (9).

Table 3

Section:	Content of section:
s 19(3)(a) – a CMA may direct a persons who fails to take measures.	To commence taking such measures before a given date.
s 19 (3)(b)	Diligently continue with those measures
s 19(3)(c)	Complete them before a given date.
s 19(4)	If such a person fails to comply with a directive given, a CMA may take the measures it considers necessary to remedy the situation.
s 19 (5)	A CMA may recover the costs incurred in taking the measure refereed to in subsection (4) jointly and severly from persons listed in paragraphs (a) to (d).
s 19(6)	A CMA, in recovering the costs refereed in subsection (5), may claim from any person who, in the opinion of the CMA, benefited from measures undertaken in terms of subsection (4).
s 19(8)	If more than person is liable for costs, a CMA may apportion liability. A CMA must give others an opportunity to be heard upon such a request.
s 20(3)(c)	A responsible person who gains knowledge of an emergency incident must, as soon as reasonably practical, report to a CMA concerned.
s 20(4)(d)	A CMA may make verbal or written directives for the prevention an remediation to the responsible person to undertake.
s 20(6)(b)	Should the responsible person fail to undertake such directives, either due to non-compliance or due to impossibility, a CMA may take such measures, it deems necessary – (i) contain and minimise the effects of the incident; (ii) undertake clean-up measures and; (iii) remedy the effects of the incident.
s 20 (7)	A CMA may recover all reasonable costs incurred with reference to subsection (6) from the responsible person jointly and severly.
s 20 (9)	If more than person is liable for costs, a CMA may apportion liability. A CMA must give others an opportunity to be heard upon such a request.

3.3.Additional powers and functions of CMAs

The NWA envisages that additional powers and functions may be transferred to CMAs through assignment and/or delegation. The Minister is tasked with the role of establishing CMAs and progressively delegating and/or assigning his or her powers to water management institutions. The Minister retains the ultimate responsibility for WRM, thereby obliging her to

‘fulfil the functions of a CMA in a WMA where no CMA is established, or where such an agency has been established but is not functional.’²⁷

Section 63 of the NWA provides that the Minister may delegate a power or a duty vested in her to a water management institution.²⁸ This section merely provides that a delegation be in writing and subject to conditions. Its silence as to whether agreement must be met raises interesting issues around the nature of delegation envisioned in the NWA and its relationship to assignment, which are discussed in section 4 below. **Table 4** herewith provides for summary of delegation in the NWA.

Table 4

<i>Section:</i>	<i>Content of section:</i>
s 63(1)(a)-(e)	Minister may delegate ...a power and duty vested in the Minister in terms of this Act to – (a) an official of DWAF by name; (b) a holder of an office in DWAF; (c) WRM institution; (d) an advisory committee established under section 99 or; (e) water board as defined in section 1 of Water Services Act.
s 63(2)	Minister may not delegate the power – (a) to make a regulation; (b) to authorise a water management institution to expropriate under section 64(1); (c) to appoint a member of a governing board of a CMA or; (d) to appoint a member of a Water Tribunal.

Section 73 of the NWA provides for the assignment to a CMA, for two sets of powers and functions, namely: a power or a duty of a responsible authority²⁹; and any power or duty listed in Schedule 3.³⁰ Such assignment can be subject to limitation in terms of area of application and conditions for exercise of assigned powers or functions.³¹ Subsection 73(3) obliges the Minister, before an assignment is made, to consider the capacity of the CMA to administer such powers and function and the desirability of such action.³² **Tables 5 and 6** provide for the assignment of a responsible authority and Schedule 3 respectively. As is evident, the NWA envisions that the vast majority of powers and functions be assigned to CMAs, rather than delegated.

²⁷Section 72(2) of the NWA.

²⁸Section 63(1)(c) of the NWA.

²⁹Section 73(1)(a) of the NWA.

³⁰Section 73(1)(b) of the NWA.

³¹Section 73(2) of the NWA.

³²Section 73(3) of the NWA.

Table 5- responsible authority

Section:	Contents of section³³:
s 33(1) and (3) – verifying water use.	Declaring a water use an existing lawful water use on application.
s 33(2) and (3) – verifying water use.	Declaring a water use an existing lawful water use on own initiative.
s 35(1) – verifying water use.	Requiring from a person claiming an entitlement to water to apply for a verification of the lawfulness or extent of that use.
s 35(3)(a) – verifying water use.	Requiring from a person who has applied for the verification of the lawfulness or extent of a water use to provide further information.
s 35(3)(b) – verifying water use.	Conducting investigation into the veracity and the lawfulness of a water use that is to be verified.
s 35(3)(c) – verifying water use.	Inviting written comments from a person who has an interest in the verification of a water use.
s 35(3)(d) – verifying water use.	Affording a person who has applied for the verification of the lawfulness or extent of a water use to make presentations on the application.
s 35(6) – verifying water use.	Condoning a late application for verifying a use.
s 26(1)(c) – registering water use.	Registering an existing water use if so required.
s 29(1)(b)(vi) – registering water use.	Registering a water use permissible in terms of a general authorisation if so required in terms of general authorisation.
s 34(2) – registering water use.	Requiring the registration of an existing lawful water use.
s 41(2)(a) - evaluating applications for water use.	Requiring from a person applying for a license to provide additional information, an assessment of the likely effect of the resource quality and an independent review of the assessment by a person acceptable to the responsible authority.
s 41(3) - evaluating applications for water use.	Directing in writing that the assessment must comply with the requirements contained in the regulations dealing with environmental impact assessment.
s 41(4) - evaluating applications for water use.	Giving notice of the application and inviting objections against the application
s 39(1) – authorisation of water use.	Authorising persons to use water in terms of a general authorisation.
s 40 and s 41– authorisation of water use.	Issuing an individual license to use water.
s 43– authorisation of	Issuing a notice to start the compulsory licensing procedure.

³³See Thompson, H *op cit* note 9 20 at 626-629.

water use.	
s 44– authorisation of water use.	Condoning a late application for a license as part of a compulsory licensing procedure.
s 45(1) and (2) – authorisation of water use.	Preparing a proposed allocation schedule as part of the compulsory licensing procedure.
s 45(4) – authorisation of water use.	Publishing a proposed allocation schedule as part of the compulsory licensing procedure.
s 46 (1) – authorisation of water use.	Preparing and publishing a preliminary allocation schedule as part of the compulsory licensing procedure.
s 46(2) – authorisation of water use.	Amending a preliminary allocation schedule as directed in writing by the Water Tribunal.
s 47(1)(b) – authorisation of water use.	Publishing a notice in the Government Gazette stating that a preliminary allocation schedule has become final.
s 47(2) – authorisation of water use.	Issuing licenses according to a final allocation schedule.
s 42– authorisation of water use.	Notifying persons once a decision on individual and compulsory license application has been reached.
s 22(10) – authorisation of water use.	Entering into negotiations with the claimant and offering an allocation of water instead of compensation after the Water Tribunal has decided that compensation is payable.
s 22(4) – promoting single licence requirements with other organs of state.	Promoting arrangements with other organs of state to combine the different licence requirements into a single licence requirement in the interests of co-operative government.
s 22(1)(c) and 3– promoting single licence requirements with other organs of state.	Relieving a person from the requirement to obtain a licence for water use.
s 29 – setting conditions for water use.	Attaching conditions to a general authorisation or licence.
s 22(2)(e) – setting conditions for water use.	Directing a person in writing to return any seepage, run-off or water containing waste which emanates from a water use to a water resource other than the resource from which the water has been taken.
s 30(1) – requiring the provision of security.	Requiring from an applicant for a licence to give security in respect of an obligation or potential obligation arising from a licence to be issued if it is necessary for the protection of water resources or property.
s 30(3) – requiring the provision of security.	Determining the type, extent and duration of the security required.
s 30(5) – requiring the provision of security.	Requiring that, if the security is in the form of an insurance policy, the responsible authority may be jointly insured under or be a beneficiary of the insurance policy.
s 30(6) – requiring the provision of security.	Amend or discharge security given.

s 49(1) – reviewing and amending authorised water uses.	Reviewing a licence.
s 49(2), (3) and (5) – reviewing and amending authorised water uses.	Amending the conditions of a licence.
s 28 (3) and (4) – reviewing and amending authorised water uses.	Extending the period of a licence.
s 50(1) and (3) – reviewing and amending authorised water uses.	Amending or substituting a licence condition if the licensee or successor-in-title has consented to or requested the amendment or substitution, to reflect one or more successors-in-title as new licensees or to change the description of the property to which the licence applies.
s 50(2) and (3) – reviewing and amending authorised water uses.	Requiring the licensee to obtain the written consent of an affected person before amending or substituting a licence or to make a formal application for the amendment or substitution.
s 51(1) – reviewing and amending authorised water uses.	Adjudicating upon conflicting claims between a licensee and a successor-in-title, or between different successors-in-title, in respect of claims for the amendment or substitution of licence conditions.
s 51(2)(b) – reviewing and amending authorised water uses.	Being informed of the succession, for the substitution of the name of the licensee, for the remainder of the term.
s 52(1), (2)(a), (3) and (4) – reviewing and amending authorised water uses.	Dealing with an application for the renewal or amendment of the licence before the expiry date of a licence.
s 53(1), (2)(b) and (3) – taking action to rectify a contravention.	Directing in writing that a person, or owner of the property in relation to which the contravention occurred, take the action specified in the notice to rectify the contravention.
s 53(2) – taking action to rectify a contravention.	Carrying out the works and taking action necessary to rectify the contravention and recover the reasonable costs from the person on whom the notice was served or applying to a competent court for the appropriate relief.
s 54(1) – taking action to rectify a contravention.	Suspending or withdrawing an entitlement to water if a person fails to comply with any condition of the authorisation or to pay a charge.
s 54(5) – taking action to rectify a contravention.	Reinstating a withdrawn entitlement to water.
s 55(1) – taking action to rectify a contravention.	Accepting and cancelling a surrendered licence.
s 55(2) – taking action	Refunding a charge or part of a charge paid in respect of a licence

to rectify a contravention.	surrendered.
-----------------------------	--------------

Table 6- Schedule 3 Assignments

<i>Items and Sections:</i>	<i>Contents of section³⁴:</i>
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	To manage and monitor permitted water use within the WMA
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	To conserve and protect the water resources and resources quality within the WMA.
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	Subject to the provisions of the NWA, to develop and operate a waterworks in furtherance of the CMS
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	To do any necessary to implement CMS within the WMA
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	By notice to a person taking water, and after having given that person a reasonable opportunity to be heard, to limit the taking of water in terms of Schedule 1.
Item 3 of Schedule 3	To make rules to regulate the different water uses in the area.
Item 4 of Schedule 3	To require the establishment of management systems
Item 5 of Schedule 3	To require alterations to waterworks.
Item 6 of Schedule 3	To control, limit or prohibit the use of water during water shortages.

Section 4 below will begin to flesh out the legal distinctions between assignment and delegation, and present various challenges and issues around these tasks.

4. Delegation versus assignment

This section presents a comprehensive discussion of the legal implications between delegation and assignment. Because of the lack of guidance from the NWA, the meaning of

³⁴See Thompson, H *op cit* note 20 at 629-30.

the terms delegation and assignment will be explored drawing from other legal contexts, as a way to shed more light on its application in the NWA.

4.1.Delegation

In the public law setting, delegation refers to the transfer of powers conferred on a functionary to another functionary in order to facilitate the exercise of powers by the transferee.³⁵ More specifically, delegation is ‘a revocable act by which an organ of state transfers a power or function, vested in it by legislation, to another organ of state.’³⁶ The basis for public law delegation is found in section 238 of the Constitution. Section 238(a) of the Constitution provides that an executive organ of state in any sphere of government may delegate a power or function to any other executive organ of state. Despite its paramount application in any functioning system of government, the Constitution does not define delegation, nor does it distinguish it with assignment, necessitating a study of its scope and application in other areas to provide clarity as to its proposed application in the NWA. Fortunately, this is not a hard task as the concept has been developed to vast degree both in the common law and by the courts in South Africa’s post-Apartheid dispensation.³⁷ The problem, however, lies in its interaction with assignment, discussed in section 4.2.

There are a number of elements that define the facets of delegation, namely: the delegation must be authorised, either expressly or implicitly, with regards to legislation under which such power or function is to be performed; the *delegans* retains the ultimate authority for the transferred power or function; the delegated authority is exercised on behalf of the *delegans*; the *delegans* may, accordingly, intervene in the exercise of such delegated authority by revoking or amending the conditions or issuing instructions for exercise of the act; the financial risks and obligation remains with the *delegans* upon delegation; conditions can be attached to a specific delegation and the exercise of such power is, arguably, constrained by the principles of co-operative governance and; the delegation is a temporary transfer of powers and functions.³⁸

³⁵ WA Joubert (ed) *LAWSA* vol 20, part 2 (2000) at para 179.

³⁶ Joanna Amy Eastwood ‘Managing the relationship between the national government and the provinces. A discussion of provincial environmental initiatives with reference to section 24 of NEMA’ (unpublished LLM dissertation) at 21.

³⁷ See Cora Hoexter *Administrative Law in South Africa* (2007) at 232.

³⁸ Nico Steyler and Jaap de Visser *op cit* note 23 at 5-47.

4.2. Assignment

Assignment is less privy to the depth of legal development that delegation has undergone historically and more recently by the courts. Accordingly, the public law understanding of assignment is, at most, vague and still in its infancy. This makes fleshing out the meaning and distinction between delegation and assignment in the NWA is particularly relevant topic.

The Constitution provides for the assignment between spheres of government in section 99 and section 126. These sections respectively provide for the assignment of an executive statutory power or function from a Cabinet Member, which is to be exercised or performed in terms of legislation, to a Municipal Council and from an MEC to a Municipal. These assignments: require an agreement between the relevant Cabinet Member or MEC and the Municipal Council; must be consistent with the Act in terms of which the relevant power or function is exercised or performed and; takes effect upon proclamation in the gazette by the President or Premier, as the case may be. The provision for assignment in the Constitution, however, lacks any guidance as to the application of the assignment principle in practice. Therefore, a workable definition must come from elsewhere.

According to the *Assignment and Delegation Guidelines* under the Municipal Systems Act, ‘assignment’ is defined as the ‘permanent transfer of the authority role in relation to a function from national or provincial government to local government.’³⁹ This definition clearly accords with the vertical arrangement between spheres of government and does not apply to other cases, such as an assignment from DWA to the CMA.⁴⁰

A definition of assignment that would apply more broadly can be drawn from the housing sector. There, the Department of Human Settlements has defined assignment as ‘a permanent

³⁹*Assignment and Delegation Guidelines* op cit note 7 at item 1. The ‘authority role’ is defined to mean ‘the role exercised by the sphere of government with responsibility for ensuring that a particular function is exercised competently and which involves responsibility in relation to the function for administration, planning, revenue raising through grant funding, taxes or user fees, policy development, supply related legislation, appointment of service providers, monitoring service provision and intervening in the case of poor performance and ownership of fixed assets associated with the function.’

⁴⁰See Joanna Amy Eastwood *op cit* note 36 at 22-27.

transfer of the function, which includes the transfer of the authority role – and this includes the right to receive directly the funds and the assets necessary to perform the function.’⁴¹

Common elements can be extracted from these definitions. Firstly, when an assignment process is finalised, an assignee acts in its own name when it exercises powers or performs functions in terms of an assigned power.⁴² Secondly, assignments are permanent and irrevocable. Thirdly, an assignment is a complete transfer of powers and functions. This means that once the power or function has been assigned, it is no longer possible for the assigning functionary to issue individual instructions as to how the function is to be performed or the power exercised. Fourthly, once an assignment has taken place, the role of the assigning functionary shifts towards regulating and supervising the way in which the assignment is implemented. Such a role prohibits the intervention of the assigning functionary, preventing the transfer of authority to the assignee from becoming meaningless, and disallows the issuing of individual instructions. This prohibition is in keeping with the attempt to distinguish the application of delegation and assignment found in the Constitution.⁴³ Lastly, an assignment of a function is accompanied by the financial risks and obligations of an assigned power. Implicit in this is that an assignment of power will be accompanied by such funding as would be necessary to fulfill the function assigned. Such a view is aligned with the principle in the *Assignment and Delegation Guidelines* which holds that finance follows function.⁴⁴

4.3. The principle of institutional subsidiarity

Confusion as to the ambit and application of delegation and assignment in the NWA is a serious obstacle inhibiting the realisation of WRM at the catchment level. The way that the NWA has been drafted provides the Minister with broad discretion to delegate or assign any of the powers it has as a responsible authority. In other words, the NWA provides little guidance on whether the Minister should delegate powers under section 63 or assign powers under section 73. This presents major confusion because the vast majority of powers the NWA envisions CMAs to undertake are powers that a responsible authority can undertake

⁴¹DHS, 2011. Accreditation Framework for Municipalities to Administer National Housing Programmes: Managing the incremental delegation of housing functions to local government, *Department of Human Settlements, Pretoria*, at 2.

⁴²Item 2(a)(i)-(ii) and (b)(ii)-(iii) of Assignment and Delegation Guidelines.

⁴³Nico Steyler and Jaap de Visser *op cit* note 23 at 5-49.

⁴⁴See item 9 of Assignment and Delegation Guidelines.

(see Table 5). Moreover, the NWA refers directly to the CMA to undertake major functions under the Act, not the Minister or the responsible authority (see Table 2). Under both circumstances, the Minister does not seem to be required to assign or delegate the powers and functions to the CMA, but has considerable discretion to undertake one of three actions: 1) to maintain those powers within DWA; 2) to delegate some or all such powers to the CMA; 3) or to assign some or all such powers to CMAs. As we urge below, the principle of institutional subsidiarity suggest that the Minister should heavily weigh its actions toward the third option, that of assignment.

The subsidiarity principle is a conceptual term that exists in many disciplines, representing itself in the fields of legal reasoning and institutional organisation.⁴⁵ In essence, its overall objective remains the same, namely to recognise a preference for the small. The ‘small’ may be in the form of local government in preference to national or provincial government or the family unit compared to the state in the provision of care. Legal experts refer to section 156(4) of the Constitution as the foundational basis for the principle of subsidiarity in South Africa.⁴⁶ Section 156(4) states:

The national government and provincial governments must assign to a municipality, by agreement, and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –
(a) that matter would most effectively be administered locally; and
(b) the municipality has the capacity to administer it.

Although this section is designed for the assignment of additional functions and powers as between spheres of government, particularly to municipalities, its inclusion in the Constitution arguably represents the recognition of the principle of subsidiarity’s fundamental purpose in shaping the division of institutional powers and functions generally.

At a general level, the principle of subsidiarity has an automatic preference for the exercise of public power at a level as close as possible to the citizenry.⁴⁷ Du Plessis explains that institutional subsidiarity refers to the process of identification and empowerment of an

⁴⁵See Jaap de Visser ‘Institutional Subsidiarity in the South African Constitution’ (2010) *Stell LR* 1; Lourens du Plessis “‘Subsidiarity’: What’s in the name for constitutional interpretation and adjudication?” (2006) *Stell LR* 207. The former is hallmarked by the *Ferreira* case which in essence provided that in constitutional cases; there should be a preference for lower-levels norms of greater particularity over higher-level norms of greater abstraction. See *Ferreira v Levin* NO 1996 (1) SA 984 (CC).

⁴⁶ Jaap de Visser op cit note 45.

⁴⁷ Constitutional law of South Africa p 2.

appropriate subordinate institutional actor to perform a certain function. He remarks that the principle ‘constrains any more encompassing or superordinate institution (or body or community) to refrain from taking for its account matters which a more particular, subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or civil society.’⁴⁸ The rationale for subsidiarity lies primarily in the efficiency argument of locating the implementation of legislation or policy with those closest to resources and the people affected by these results.⁴⁹ By locating the functions of power at decentralised power points scattered across the country, developmental objectives of the state can more effectively be achieved. A further related basis for subsidiarity lies in democratic participation. Decentralised institutions gives those with a material interest in the outcome of decisions a chance to participate in and hopefully influence the end result.⁵⁰

The principle of subsidiarity accords with the institutional framework of CMAs in a number of ways. Firstly, by allocating the management of water resources at a catchment level, the NWA has recognised river systems as ecological and functional management units, responsible for the overall management for an entire river basin.⁵¹ Managing water at the catchment level allows a CMA to concentrate on the integrated factors specific to a catchment in the co-ordination, development, and implementation of a catchment management strategy.⁵² Thus, catchment management, premised on the decentralisation of powers and functions, is logically better suited for the effective and efficient implementation of WRM.⁵³ As the NWRS and National Water Policy recognise, CMAs, as decentralised institutions, will play the key role in establishing co-operative relationships with the wide range of stakeholders in a catchment necessary to effectively implement WRM.⁵⁴ The NWRS states:

These agencies will be responsible, among other things, for ensuring that there is consonance between their water-related plans and programmes and the plans and programmes of all

⁴⁸Du Plessis *Op cit* note --, 209.

⁴⁹ De Visser, *op cit* note 45, 93

⁵⁰ *ibid.*

⁵¹ See DWAF. 1997. *Op cit* note 2.

⁵² NWA, Ch. 2.

⁵³ See Jaap de Visser *op cit* note 45 102.

⁵⁴ See NWRS, *Op cit* note --, at 11; DWAF. 1997, *Op cit* note 2, at 36.

other role players in the catchments they manage. The agencies will therefore have to establish co-operative relationships with a range of stakeholders, including other water management institutions, water services institutions, provincial and local government authorities, communities, water users ranging from large industries to individual irrigators, and other interested parties.⁵⁵

Furthermore, Principle 23 of the National Water Policy recognises that managing water at the catchment or regional level will “enable interested parties to participate”.

Secondly, CMAs also have greater access to information with regards to their specific WMA and various stakeholders’ interests, thereby improving the quality of decision-making process and increasing the chances of successful implementation. This is because a CMAs active involvement in the management of water related issues in its catchment and the broad spectrum of stakeholders that make-up its board means that it would have greater access to stakeholders’ information and knowledge.⁵⁶ Access to information invariably aids achieving the delicate balance between interdependent environmental, social and economic factors.⁵⁷

Lastly, by virtue of the participatory elements of CMAs functioning, which strives to achieve an equitable balance between various stakeholders, having a subordinate institution in which the various stakeholders can represent their interests is vital to the credibility of outcomes produced.⁵⁸ By necessity, this requires a platform of reasonable proximity to the interested persons so that all can be heard. Otherwise, the results would be grossly skewed towards those who have access to the resources to make the long journey to the place where decisions are taken. Section 80 (a) and (e) of the NWA facilitates this participation obligation by

Comment [RP1]: Cite literature on benefits of decentralisation and public participation?

⁵⁵ Ibid.

⁵⁶ See e.g. NWA section 81, which requires that a governing board must “achieve a balance among the interests of water users, potential water users, local and provincial government, and environmental interest groups. In addition to governing boards, CMAs are accompanied by non-statutory catchment management forums that consist of stakeholder representatives from specific catchments (for a in depth discussion of the various participatory mechanisms at a CMAs disposal, see e.g. Burt J, Du Toit D and Neves D, Tensions of participation in WRM in South Africa: a national review. AWARD document, (undated), available at http://www.award.org.za/file_uploads/File/Inkomati_case_study_from_PRP_.pdf (accessed on Aug. 24, 2011))

⁵⁷ A counter-argument against such efficiency and functionality strands is that at times a superordinate institution may have greater access to civil expertise by virtue of greater budgets, thereby making larger units better placed to make decisions than small institutions hamstrung in terms of financial and human capacity. See Jaap de Visser *op cit* note 45 at 103.

⁵⁸ *Doctors for Life International v The Speaker of the National Assembly and Others* 2006 416 (CC) at para 116.

requiring a CMA as part of its functions to promote community participation in and investigate interested person on the protection, use, development, conservation, management and control of the water resources in its WMA. Furthermore, section 9 of the NWA requires that a CMS enable the public to participate in managing the water resources within its WMA. This aligns with one of the main tenets supporting institutional subsidiarity: the people who are to participate in deliberative process around the allocation of public goods should be those who have a significant interest in their distribution.⁵⁹

In sum, there are cogent reasons rooted in the principle of subsidiarity for the establishment and progressive development of CMAs in the overall quest for IWRM. Such recognition of the role of CMAs ought to direct the Minister towards the goal of assigning rather than delegating the CMA the vast majority of functions that the NWA in fact envisions CMAs to undertake.

4.4. Critical discussion of delegation and assignment in the NWA

As described in Part 3 above, it is apparent that the NWA clearly envisions the vast majority of CMA functions to be assigned rather than delegated. This also accords with the principle of subsidiarity discussed above. Unfortunately, however, many would most likely disagree as to when and how this assignment is to be implemented in practice.

DWA has issued a *Guide Series* on the establishment of CMAs that sheds some light on how it envisions the process of assignment and delegation will unfold.⁶⁰ It is worthwhile to describe DWA's approach before continuing. The *Guide Series* present the general legal distinction between assignment and delegation and refers to the relevant sections of the NWA which allow for them.⁶¹ It then proceeds to discuss what potential functions and powers a CMA can be assigned or delegated under the Act.⁶² In doing so, however, they do not refer to powers where the NWA specifically refers to the CMA (see table 2 above), nor do they make any distinction as to whether the CMA's powers or duties should be assigned or delegated under the Act, but instead conflate or muddle these terms together. Finally, the

⁵⁹ Jaap de Visser op cit note 45 at 93.

⁶⁰ See CMA and WUA Guides Series, Guide 1: establishing a catchment management agency, (*Guide Series, Guide 1*) and Guide 2: Catchment Management Agency as an Organisation Guide 2 (*Guide Series, Guide 2*), DWA, Pretoria (undated).

⁶¹ Guide Series: Guide 2 at section 2.

⁶² *Ibid.* at 2.4.

Guide Series suggest two approaches to delegated and/or assigning CMAs powers and duties, both of which would take place in a progressive or phased manner: 1) to delegate and assign according to proven ability and capacity; and 2) to progressively delegate and assign according to a plan developed jointly between the CMA and DWAF.⁶³

Under the first option, the *Guide Series* explains that a CMA will only receive additional powers and duties once it can demonstrate that “it is effectively carrying out its initial functions”, that “it has the capacity to carry out the additional functions sought” and that “a CMA may also need to show that the additional functions sought are necessary to enable it to effectively implement its Catchment Management Strategy.”⁶⁴ The *Series* further explain that the first approach is preferable in WMAs with “relatively low management capacity or financial potential”. The *Guide Series* describes the second approach as more pro-active, and is preferable in WMAs “with relatively good management capacity and proven income-generating capacity.”⁶⁵

The *Guide Series*, although shedding some light on how DWA envisions delegation and assignment to play out under the NWA, raises more questions than answers. These include the following inter-related problems: 1) the level of agreement and consultation necessary to assign and delegate functions; 2) the conflation between assignment and delegation; and 3) the discretionary nature of the decision made by the Minister in section 73(3) of the NWA. Each is discussed in turn.

4.4.1 Level of consultation

Firstly, the NWA is unclear as to whether agreement is needed in the process of assignment as compared to delegation. Section 73 of the NWA which deals with assignment allows for, at most, consultation with the CMA,⁶⁶ which does not necessarily mean that consensus must be reached. The *Guide Series* recommends that “a proposal to assign or delegate additional powers or duties to a CMA should preferably be initiated jointly by DWAF and the CMA concerned”.⁶⁷ Sections 99 and 126 of the Constitution, however, clearly provide for

⁶³Ibid.

⁶⁴Ibid.

⁶⁵Ibid.

⁶⁶Consultation is at the discretion of the Minister, and may or may not take place.

⁶⁷*Guide Series: Guide 2 note 56 at 2.4.*

agreement to be reached between assignor and assignee.⁶⁸ Yet, as discussed above, because of the peculiar legal nature of CMAs, the Constitutional provisions that govern assignment between spheres of government do not on their face apply to an assignment from DWA to a CMA, even if a CMA is seen to be an extension of DWA. Nonetheless, we believe that although sections 99 and 126 of the Constitution is limited to assignment between spheres of government, there is no logical reason to exclude the assignment process as envisioned in the Constitution to the assignment process required under the NWA. The purpose for assignment and the circumstances under which assignment take place under sections 99 and 126 of the Constitution is conceptually no different than what is envisioned under the NWA around devolving management to the catchment level. Indeed, because there is absolutely no guidance on how and when the assignment process should work under the NWA, it is imperative that one looks to the Constitution for normative guidance on this matter.⁶⁹

One might assert that in practice, despite not being required to by the NWA, the Minister is unlikely to delegate a power or a function without some level of consultation, albeit at an informal level; and the *Guide Series* suggest that this is the case. Despite this, it is recommended, firstly, that section 73 of NWA, which lacks basis for agreement, should be read in line with section 99 and 126 of the Constitution. Or, at the very least, this section should be amended to require agreement with the CMA. Secondly, due to the interconnectedness between delegation and assignment in the process of the progressively establishment and building of the institutional capacity of CMAs (with the view of taking on more responsibilities), section 63 of the NWA should be read or amended so as to include consultation but not necessarily agreement. This position is taken because delegation is merely a temporary transfer of responsibilities compared to assignment which inevitably involves the full allocation of authority.⁷⁰ This position is further supported by the principles of co-operative government which, among other things, require organs of state ‘to co-operate with one another in mutual trust and good faith.’⁷¹

⁶⁸ This is compared to section 63 of the NWA where neither agreement nor consultation is provided for.

⁶⁹ Such an assertion is consistent with South Africa’s ultimate commitment to Constitutional Supremacy. Accordingly, in any interpretative exercise consistency with Constitutional provisions has to be met. See section 39(2) of the Constitution.

⁷⁰ Our suggestion is in spite of the fact that section 238 of the Constitution, which deals with delegation, similarly lacks a consultation element.

⁷¹Section 41(h) of the Constitution.

4.4.2 Conflation of assignment and delegation

The discussion of what level of agreement or consultation is necessary for assignment and delegation cannot be resolved without addressing what appears to be an increasing trend within DWA to muddle these distinct legal concepts. The manner that DWA has framed the process of establishing and developing CMAs couples delegation and assignment into one box.⁷² This conflation has no basis in the NWA, which, as described in section 3 above, clearly separates the application of the terms, and fails to recognise the very real consequences that result from using one over the other.⁷³ As discussed, the distinction between delegation and assignment is one of degree, facets of which fall on the extent and nature of transfer of powers and functions. Whereas assignment is the complete and permanent transfer of assigned powers, delegation is merely the temporary reallocation of a power or function with fundamentally different consequences for the relationship between assignor and assignee. For example, assignment divests the Minister of the authority for the day-to-day implementation of a function so assigned, thereby making a CMA accountable for the risks it undertakes in the exercise of powers or performance of function upon assignment. The temporary nature of delegation coupled with the recognition that ultimately those responsibilities will be subject to full assignment, means that delegation ought to be used as a joining mechanism in capacitating CMAs for future devolution.

Moreover, the muddling of these two doctrines undermine the efficiency arguments used to substantiate the subsidiarity principle. One would expect that if the Minister insistently uses delegation as a guise for assignment, absent of the intention of using delegation to evaluate the capacity of a CMA to undertake such tasks, that such an approach would undermine the legislative basis for CMAs. It is clear from section 73(4) of the NWA that the Minister *must* promote CMAs through the assignment of powers and functions. Thus, if the authority for the exercise of powers and performance of functions is retained by the Minister using delegation, the capacity of CMAs would never be able to be fully developed as envisioned by the NWA. If a CMA has the requisite capacity for further assignment, the Minister should not default in

⁷² *Guide Series 1*, *op cit* note 56 at section 5.1.3, and *Guide Series 2* at section 2.1.3 to 2.1.5.

⁷³ Furthermore, such an approach is contrary to similar attempts made in the Constitution to keep the application of assignment and delegation distinct and separate in practical implementation.

relinquishing his or her authority for those powers or functions or continue to give that power to CMAs through delegation.⁷⁴

Consequently, assignment is to be preferred to delegation when the capacity and desirability requirements are met, and that when delegation and assignment are used in conjunction, delegation ought to be used as a means to an end. In making this last point, although we acknowledge that DWA's approaches in the *CMA and WUA Guide Series* have some basis⁷⁵, it cannot be over-stated that in no way should delegation and assignment be used interchangeably or arbitrarily. Delegation can play a fundamental role in testing and assessing the capabilities of CMAs to undertake more responsibilities in WRM, and despite its legal distinction to assignment, should not be overlooked in the progressive development of CMAs institutional capacity. This view accords with item 35 of *Assignment and Delegation Guidelines* which provides that delegation should only be preferred when assignment is not appropriate. It also accords with the *Guide Series*' intention to progressively develop CMAs.

We further propose that, considering the vast differences between the powers and functions subject to assignment when it is a 'responsible authority' compared to schedule 3, delegation in the process of evaluating the capacities of CMAs should be used more with regards to the former. This is because the powers and functions of a responsible authority have greater depth, which by implication entails that such responsibilities are essential for the realisation of the NWA. The Minister should err on the side of caution when deciding whether or not to relinquish full authority over such responsibilities, however not use caution as an excuse for avoiding assignment. Such a view would also hold that CMAs would have to be more patient as to the process of delegation and assignment of responsible authority powers and functions.

⁷⁴One can only speculate as to why the Minister would fail to assign when a CMA is capable enough for further assignment, but one would assume that if any reason existed it would be financial. In other words, a fear that once an assignment had taken place, DWA would have to reallocate funds for the performance of those functions and powers. In light of the pressures that executive departments face in meeting highly ambitious goals with limited human and financial resources, faced with the option of reallocating funds to another institution, this could restrain the Minister in taking the plunge, as it were.

⁷⁵Catchment Management Agency as an Organisation Guide *2op cit* note 56 at 7.

4.4.3 Discretionary nature of Minister's decision to assign

According to O'Regan in *Dawood and Others v The Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*⁷⁶ discretion:

'plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.'

The Minister's decision in section 73(1) of the NWA is clearly discretionary, to be exercised taking into consideration the capacity and desirability to assign more responsibilities to a CMA. The presence of the word 'may' rather than a peremptory word 'must' is indicative of imposing a discretionary directive on the Minister. There are no guidelines in the NWA as to how and when assignment should take place. However, as mentioned above, the Minister's must be cognisant of the over-arching mandate in subsection 73(4) to promote CMAs through assignment. This raises the question as to whether or not it would be appropriate for DWA to issue some guidance as to when and how the Minister should exercise such discretion. Providing guidelines would not be contrary to the broad discretionary power conferred to the Minister as similar guidance has been provided for the assignment and delegation in the Municipal Systems Act. Furthermore, imposing some constraints on the Minister exercise of power would not usurp the Minister's discretion in this area. Notwithstanding this, if any such imposition did unduly limit the Minister's discretionary role in particularised circumstances, this would amount to a fettering of his or her responsibilities and therefore be reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000.⁷⁷

A possible option for guidelines can be found in item 19(1) of the Assignment and Delegation Guidelines to the Municipal Systems Act. It is worth quoting in full:

⁷⁶2000 (3) SA 936 (CC) at para 53.

⁷⁷Section 6(f)(ii) of PAJA.

'19. Criteria for Decision Making

(1) In considering whether responsibility for a function should be transferred to local government, the administrator must have regard to the following factors:

- (a) any legislation or policy that relates to the function and any indication in existing or draft legislation that the function is suitable for transfer;*
- (b) any technical, operational or financial factors specific to the function that make the function suitable for transfer;*
- (c) the capacity of a municipality or municipalities, as the case may be, to receive and exercise the function;*
- (d) a comparative assessment of the capacity or potential capacity of the administrator's department and the municipality or municipalities to undertake the function, which shall favour transfer if both entities have the same capacity;*
- (e) the extent to which transfer would allow for greater accountability to the individuals who are intended to benefit from the exercise of the function;*
- (f) the extent to which the function requires a single authority across a whole province or across the Republic, as the case may be;*
- (g) the extent to which there would be any benefit in terms of cost or efficiency in managing the function broadly across a whole province or across the Republic, as the case may be, because-*
 - (i) a high-level of technical and managerial expertise is required;*
 - (ii) the provision of the service or function requires substantial crossing of municipal boundaries or large-scale bulk infrastructure; or*
 - (iii) this is appropriate in terms of any other factor which the administrator reasonably considers relevant;*
- (h) the implications for inter-governmental fiscal arrangements; and*
- (i) the transfer costs relating to staff, assets and professional or expert advice.'*

It is suggested that undertaking a similar feat would go a long way in resolving many of the confusing aspects between delegation and assignment evident in the NWA. It would also decrease the chances of disputes between the Minister and certain CMAs arising from the scope and application of section 73 of the NWA.

5. The example of the Inkomati Catchment Management Agency

After reviewing the legal nature of CMAs, the distinction between assignment and delegation, and potential emerging issues around the transfer of powers and functions to CMAs, it is beneficial to briefly use the ICMA as a case study to illustrate how some of these issues are unfolding on the ground. This discussion draws from interviews conducted with various representatives from the ICMA and DWA, and documents that the ICMA has provided to the authors.

The ICMA was established in 2004 and at the time it was the first CMA in South Africa.⁷⁸ It is also listed as a national public entity in Schedule 3A(a) of the Public Finance Management Act No 29 of 1999. Apart from its initial functions pursuant to section 80 of the NWA that the ICMA obtained upon establishment, the Minister of Water and Environmental Affairs delegated certain powers and duties to the ICMA on 17 December 2011.⁷⁹ The initial delegation document highlights several issues around transferring powers and functions to the ICMA.

Firstly, the delegation document explains that by virtue of its establishment, the ICMA has initial functions set out in section 80 of the NWA as well as other functions, such as those included in sections 19 and 20 of the NWA. As explained above, sections 19 and 20 refer expressly to the CMA to undertake the functions set out in those respective sections, and it is unclear on its face whether these should be treated as initial functions akin to those set out in section 80 or whether these should also be delegated and/or assigned progressively. The Minister has clarified her understanding of these powers to be akin to initial functions; however she does not explain how she came to this conclusion.

Secondly, the initial delegation document does not assign any powers or functions to the ICMA, but only delegates them. This includes the powers and functions under Schedule 3, which as explained above, the NWA clearly foresees as assigned functions to the CMAs. Although, the delegation of Schedule 3 powers instead of assignment is not in and of itself flawed; as we discuss above, such a delegation should be done with a clear eye towards the eventual assignment of these functions. The Minister is silent in this regard, and it is unknown whether she delegated these functions with an eye toward assignment.

Finally, notably absent from this initial delegation documents are powers and functions of a responsible authority, such as the powers to authorise water use, the powers to verify, existing water uses, and the power to enforce against unlawful water use. These are significant powers that, as we have expressed above, the NWA foresees being assigned to the ICMA. One can only speculate as to why the Minister has excluded all of these functions from the initial delegation document; however a major theme that several water managers

⁷⁸ [Government Notice No. 397 of March 26, 2004, published in Government Gazette No. 26185.](#)

⁷⁹ See Delegation of powers and duties to the Inkomati Catchment Management Agency in terms of the National Water Act, 1998, 17th Dec. 2010 (initial delegation document), provided to AWARD by the ICMA.

within DWA have expressed to AWARD is that the ICMA cannot undertake water management functions around authorising water use while also undertaking enforcement activities against unlawful water use, whether they be unauthorised or in violation of permit conditions. The analogy that is often used is that the ICMA cannot be a referee and a player at the same time because it will result in impartiality. Others within DWA disagree and believe that the ICMA can undertake both these functions with time. Although we cannot comment on the validity of these concerns around the ICMA undertaking both enforcement and authorisation functions, the NWA clearly envisions that the CMA can do both- as DWA has been doing up to now. In other words, we believe that such a position would violate the intention of the NWA.

In summary, the issue of fleshing out the distinctions between delegation and assignment of functions is not just a theoretical exercise, but a very real concern on the ground.

6. Conclusion

The effective realisation of the policy goals underlying the creation of CMAs ultimately hinge on two fundamental steps; 1) the establishment of CMAs and 2) the transfer of additional responsibilities through either delegation or assignment.

Related to this, is a confusion as to the legal nature of CMAs which creates ambiguity in the process of delegation and assignment in the NWA. We assert that CMAs, although governed by principles peculiar to corporate governance, should be understood as institutions incorporated within the institutional framework of DWA as opposed to outside of it.

Due to lack of explanation of the distinction between delegation and assignment in the NWA and a palpable lack of academic literature on the subject, this paper sought to gain insight into this distinction from other areas of the law. Primary reference was made to the Constitution and to the Municipal Systems Act, which provide greater clarity as to the differences between the terms that practitioners dealing with the NWA should embrace. As is clear from these other sources, the primary difference between assignment and delegation is the degree of devolution and the transfer of authority. Since the NWA envisions an almost complete transfer of responsibilities around WRM to CMAs through assignment, assignment is to be preferred to delegation in the devolution process. Delegation does, however, have an important role in the progressive transfer of additional responsibilities to CMAs, and in fact

has independent application in section 63 of the NWA; but that role should be used as a stepping stone to eventual assignment.

To clarify uncertainty around the process of assignment and delegation, DWA must draft guidelines similar to that of the one provided for in the Municipal Systems Act for assignment and delegation. Guidelines would administer great clarity to the implementation of the NWA, of which the practical components of delegation and assignment are particularly important to the realisation of its objectives in WRM. Moreover, such guidelines should not conflate the two legal terms, as DWA has had a tendency to do in past documents and representations.