

March 9, 1999

Robert W. Varney, Commissioner  
Department of Environmental Services  
6 Hazen Drive  
Concord, New Hampshire 03301

Dear Commissioner Varney:

By letter dated November 6, 1998, the Office of Health Management of the Department of Health and Human Services requested, through the Department of Environmental Services, an opinion concerning the proper interpretation of RSA 485:14, which prohibits the introduction of fluoride into domestic water supply sources without voter approval. A short review of the relevant statutes and responses to specific questions follow.

RSA 485:14 states:

No fluorine shall be introduced into the water of any lake, pond, reservoir or stream tributary from which the domestic water supply is taken unless and until the municipality using said waters has held a public hearing as to the introduction of fluorine into the public water supplies in said municipality, and the voters of such municipality have approved such action pursuant to RSA 44:16 or 52:23. RSA 485:14.

RSA 44:16 provides a detailed procedure for residents of a city to consider the desirability of public water supply fluoridation:

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Upon the written application of 10 percent of the voters in any city, presented to the city clerk prior to the municipal election, the city clerk shall insert on the ballot to be used at said elections the following questions:

"Shall permission be granted to introduce fluorides into the public water system?" Beside this question shall be printed the word "yes" and the word "no" with the proper boxes for the voter to indicate his choice. If a majority of the voters at said election do not approve the use of fluorides in the public water system for said city, no fluorides shall be introduced into the public water supply system.

If fluorides have, prior to said vote, been so introduced, such use shall be discontinued until such time as the voters of the city shall, by majority vote, approve the use of such fluorides. After such popular referendum, the city clerk shall not insert the aforementioned question relative to the use of fluorides in public water system on the ballot to be used at the municipal election for a minimum of three years from the date of the last popular referendum, and only upon written application at that time of not less than 10 percent of the registered voters of said city.

RSA 44:16.

In similar language, RSA 52:23 establishes a procedure for voters in any village water district to consider the fluoridation issue. RSA 31:17-a provides a comparable procedure for voters residing in a town.

In addition to the public hearing and voter referendum requirement described above, the engineering and public health merits of a fluoridation proposal must be demonstrated to the Department of Environmental Services (DES). RSA 485:8 and Env-Ws 375.03 require a "supplier of water" to submit detailed technical information concerning a fluoridation proposal for review by DES. A supplier of water is defined by law to mean "a person who controls, owns or generally manages a public water system." RSA 485:1, XVI.

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There is no legal requirement that the DES's review of a fluoridation proposal either precede or come after the public hearing required by RSA 485:14 or the popular referenda required by RSA 31:17-a, 44:46 or 52:23. It might be preferable, however, for DES to have completed at least a preliminary review of a fluoridation proposal before any public hearing or voter referendum, so that sufficient information about the proposal is made available to the public.

Question No. 1

If a petition in accordance with RSA 44:16 or RSA 52:23 has not been filed, and a public water supply wishes to ask DES for approval to fluoridate the water source, do the provisions of RSA 485:14 direct and authorize a city or village district to cause a question worded as specified in RSA 44:16 or 52:23 to be included on the next ballot?

Question No. 2

If the answer to Question No. 1 is yes, do the provisions of RSA 485:14 also direct and authorize a town where the public water supply seeks to fluoridate its water source to place a question on the ballot worded as specified in RSA 31:17-a, even though that statute is not mentioned in RSA 485:14?

Response to Questions 1 and 2

RSA 485:14 and the voter referendum statutes can be viewed as complementary. RSA 485:14 prohibits the introduction of fluoride into a public water supply unless a public hearing has been held and a majority of the voters in the municipal jurisdiction have approved the proposal. RSA 31:17-a, 44:16 and 52:23 establish the procedures for conducting the voter referenda. The provisions of RSA 485:14, do not, however, require or authorize a city, town or village water district to present a fluoridation proposal to the voters in the absence of a petition therefor. Compliance with the applicable referendum statute, including "the written application of 10

percent of the voters" in a city, town or village district, is required to put the question on the ballot.

### Question No. 3

If a public water supply located in city A also supplies water to towns B, C and D, is approval by the voters of city A sufficient to allow DES to approve fluoride treatment of the water supply, or must the voters of towns B, C and D also approve treatment with fluoride?

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### Response to Question 3

Any person operating a public water system is prohibited by RSA 485:14 from fluoridating the water until "the municipality using said waters" has held a public hearing and the voters of "such municipality" have approved the fluoridation proposal in accordance with the referendum statutes. RSA 485:14 requires that the voters in the core political subdivision "using said waters" as a public water supply system must vote on a fluoridation proposal. In my opinion, voters in other political jurisdictions, who may be "using" the water for drinking water purposes as contract customers of a supplier of public water, are beyond the scope and authority of RSA 485:14. Thus, in the hypothetical posed in your question, approval by the voters in towns B, C and D would not be required.

Please note that Question No. 3 appears to assume incorrectly that the scope of DES's technical review will include, or is dependent upon, the voter referendum on a fluoridation proposal. DES is authorized to review the engineering and public health merits of a fluoridation proposal, but it is not authorized to assess the validity of a voter referendum. A proponent of a fluoridation project must address two related but independent legal requirements: approval by DES of the engineering and scientific merit of a fluoridation proposal and popular approval by the statutorily-required voter referendum, following a public hearing.

### Question No. 4

If the public water supply is a privately owned utility, as opposed to a municipally owned utility, does RSA 485:14 still require voter approval before DES can allow introduction of fluoride?

### Response to Question 4

Yes. All persons subject to RSA chapter 485, including a private entity operating public water system, are prohibited by RSA 485:14 from fluoridating a water supply prior to public hearing and approval by voter referendum. Thus, a municipality conducting a referendum may, or may not be, the owner or operator of the public water system at issue.

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I trust that I have responded clearly to your questions. If you would like to discuss these matters further, please do not hesitate to contact me.

Very truly yours,

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Environmental Protection Bureau  
(603) 271-3679

MJW/cmc

cc: Diane Luby, Director, Office of Health Management, Dept. of Health & Human Services  
Brook Dupee, Office of Health Management, Dept. of Health & Human Services