EXPLANATORY MEMORANDUM TO THE

WATER FLUORIDATION (CONSULTATION) (ENGLAND) REGULATIONS 2005

2005 No.921

WATER SUPPLY (FLUORIDATION INDEMNITIES) (ENGLAND) REGULATIONS 2005 No.920

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1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Water Fluoridation (Consultation) Regulations 2005 ("the Consultation Regulations") elaborate on the consultation requirements provided for in section 89 of the Water Industry Act 1991 ("the 1991 Act"), where a Strategic Health Authority ("SHA") propose to enter into, vary, terminate or maintain arrangements with a water undertaker to increase the fluoride content of water supplied by the undertaker. The Regulations provide for the SHA's proposal to be published and set out the details to be included. They prescribe the circumstances in which consultation is required in respect of a proposal to vary or maintain fluoridation arrangements. They provide for the requirements which must be satisfied before any of the steps mentioned may be taken.

2.2 The Water Supply (Fluoridation Indemnities) Regulations 2005 ("the Indemnities Regulations") make provision in relation to indemnities to be given by the Secretary of State to water undertakers and licensed water suppliers. Section 58(2) of the Water Act 2003 makes provision for the fluoridation of water supplies at the request of health authorities by inserting a new section for section 87 of the 1991 Act. Under that section water undertakers may be required to enter into arrangements to increase the fluoride content of water supplies where an indemnity is provided. In addition, where licensed water suppliers supply water to which fluoride has been added, they too may benefit from a similar indemnity.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 In regulation 2(1) of the Consultation Regulations the definition of "local authority" is intended to cover every organ of local government above the level of parish councils.

3.2 Regulation 2(2) of the Consultation Regulations ensures that not only the resident population is consulted, but also people who work in the area which is subject to the proposal.

3.3 In regulation 3(1)(a) of the Consultation Regulations "bodies with an interest" is intended to cover organisations such as Local Authority Overview and Scrutiny Committees.

3.4 New section 89(2)(d) of the 1991 Act provides for consultations on the maintaining of fluoridation arrangements in prescribed circumstances. The "prescribed circumstances" are described in regulation 4(2) namely if the maintaining of fluoridation arrangements *"…involves the upgrading or replacement of fluoridation plant, otherwise than for the purpose of meeting operational or health and safety standards"*. This is intended to avoid the need for consultation in respect of purely technical works that make no substantial difference.

3.5 In accordance with section 89 of the 1991 Act, regulation 5 sets out the requirements that must be satisfied before any step pertaining to fluoridation arrangements may be taken. The requirement is that the SHA must not take any such step unless, having regard to the extent of support for the proposal and the cogency of the arguments advanced, the SHA are satisfied that the health arguments in favour of proceeding outweigh all arguments against proceeding. Thus the SHA will be able to consider the cogency to be attached to any representations made and to look at the extent of support for the proposal.

3.6 The expression "licensed water supplier" has not been defined in the Indemnities Regulations as its meaning is defined in section 219 (general interpretation) of the 1991 Act, as inserted by the Water Act 2003, section 101(1) and Schedule 8, paragraph 2 and 50(1) and (2)(c). The definition would include a company which has a water supply licence authorising it to use a water undertaker's supply system for the purpose of supplying water to the premises of customers of the company in accordance with Chapter 2A of Part 3 of the 1991 Act. Chapter 2A was inserted by the Water Act 2003, section 56 and Schedule 4, paragraphs 1 and 3.

3.7 The indemnity in respect of water undertakers is set out in the Schedule to the Indemnities Regulations. The same schedule will apply to water suppliers but with the modifications set out in Schedule 2. The modification reflects the fact that only a water undertaker may fluoridate water, but either a water undertaker or a licensed water supplier may supply it.

3.8 Except as provided in 3.9 below, clause 2 of the indemnity (Schedule 1) is intended to be widely drawn so that, as far as possible, water undertakers and licensed water suppliers will not suffer loss as a result of entering into an

agreement to increase the fluoride content of water or to supply such water. The indemnity covers both claims that arise under new arrangements and claims that arise under earlier provisions. It covers the liability of officers and employees of water undertakers and licensed water suppliers. Indeed, it covers the costs incurred in successfully defending criminal proceedings so that, for example, where a water undertaker or licensed water supplier is subject to a series of frivolous and unsuccessful prosecutions, the defence costs will be covered.

3.9 By clause 3 the indemnity does not cover any criminal liability or civil liability which is attributable to wrong doing or negligence. Provision is made for the set off of receipts. Under clause 4 the Secretary of State may pursue claims on behalf of water undertakers and licensed water suppliers if he might incur liability under the indemnity. Clause 5 makes provision for communications between the Secretary of State for Health and water undertakers and licensed water suppliers.

3.10 Section 90(1) of the 1991 Act provides that the Secretary of State may enter into indemnities under that section with the consent of the Treasury. However, the Indemnities Regulations do not restrict the manner in which that consent may be given. As a result there is flexibility for Treasury consent to be given either to each individual indemnity or to a number of indemnities by a single instrument.

4. Legislative Background

4.1 Sections 87 to 91 of the 1991 Act allowed health authorities to request water undertakers to fluoridate water supplies but placed no duty on water undertakers to accede to such requests. New section 87, once fully commenced, will put water undertakers under an obligation to accede to requests from SHAs to enter into arrangements to fluoridate water supplies.

4.2 New section 89 provides for SHAs to consult and ascertain opinion in accordance with regulations made by the Secretary of State before they can take certain steps. The steps are: requesting a water undertaker to increase the fluoride content of water supplied by that undertaker to premises in the area specified in the arrangements, requesting a water undertaker to vary such arrangements, giving notice to a water undertaker to terminate such arrangements or maintaining any such arrangements in “prescribed” circumstances. Under section 219 of the 1991 Act, “prescribed” is defined as prescribed by regulations made by the Secretary of State.

4.3 Section 89 provides for the regulations to include provision about the process which SHAs are to follow for the purposes of consultation. These Regulations set out that the process. Section 89 also provides for the regulations to include the requirements which must be satisfied before the steps mentioned above may be taken. These regulations set out those requirements.

4.4 Section 58 (8) of the Water Act 2003 makes an addition to section 213 of the 1991 Act to provide that on the occasion of the first exercise by the Secretary of State of the regulation-making power under sections 89 and 90, a draft of the instrument containing the regulations must be laid before, and approved by a resolution of, each House of Parliament. These regulations comprise the first exercise of those powers and are accordingly made by affirmative resolution procedure.

5. Extent

5.1 Both draft instruments apply only to England.

6. European Convention on Human Rights

The Public Health Minister, Melanie Johnson, has made the following statements regarding Human Rights:

In my view the provisions of The Water Fluoridation (Consultation)(England) Regulations 2005 are compatible with the Convention rights.

In my view the provisions of The Water Supply (Fluoridation Indemnities) (England) Regulations 2005 are compatible with the Convention rights.

7. Policy background

7.1 It has been the policy of successive governments to support the addition of fluoride to drinking water in areas with high levels of dental decay because it strengthens resistance to decay and has the potential to reduce inequalities in oral health. Fluoridation is opposed by a small minority of the population, who are represented by a few active pressure groups on the grounds that it poses risk to long term health and is an unjustified and unethical form of mass medication.

7.2 A Water Fluoridation Bill was introduced in 1985. The Water Fluoridation Act 1985, which was consolidated in sections 87 to 91 of the 1991 Act gave water undertakers discretion whether or not to accede to requests from health authorities to fluoridate their water. By the late 1990s the water industry were lobbying government to take them out of the decision making process because they felt they were being required to make judgments on what were essentially public health rather then water management issues. Accordingly the Government introduced these amendments to the Water Act.

7.3 It is intended that SHAs should have some discretion over the detailed arrangements for consultation and that these will cover matters such as help lines and web sites. The regulations therefore concentrate on the main principles and leave the details to be covered in guidance notes.

7.4 The policy is that not only the resident population should be consulted, but also people who work in the area which is subject to the proposal and this has been reflected in the regulations.

7.5 A consultation has taken place with SHAs, Primary Care Trusts, the Dental Confederation, the Medical Confederation, the Dental Professional, various lobby groups, water companies, local authorities, MPs and the public on the Water Fluoridation (Consultation) Regulations. As a result the method by which SHAs will assess the outcome of consultations has been clarified (regulation 5 of the consultation regulations) and guidance on application of the regulations will give greater emphasis to the –

- need to involve Local Authorities at all stages of a consultation
- require the SHA to give a balanced view of the reasons why they propose to fluoridate an area drawing upon the full range of research evidence available; and
- enlarge upon the role of Primary Care Trusts who have responsibility for assessing the health needs of their populations and commissioning services to meet these needs.

8. Impact

8.1 A Regulatory Impact Assessments has been prepared.

8.2 The impact on the public sector would be beneficial. The need for treatment of dental disease under the NHS would reduce and there would be benefits from a healthier workforce taking less time off for dental treatment.

9. Contact

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