

## Summary of meeting held December 12, 2017

Due to contaminated groundwater, several towns (including Windham, Salem, Hampstead, Atkinson, and Plaistow), are looking into connecting to Manchester Water Works (MWW). The Department has been communicating with state and local officials to facilitate the process of extending MWW service to those areas. During the discussions, staff noted (internally) that MWW fluoridates its water and, therefore, the referendum provisions of RSA 485:14 might apply.

The focus of the discussion at yesterday's meeting was the potential impact that the referendum process could have on the ongoing efforts and whether RSA 485:14 even applies. The short answer is that RSA 485:14 appears to apply to any town that does not already fluoridate its water and that wishes to introduce fluoridation, whether directly or by connecting to another water system such as MWW. However, the Department has no role in that process and should not advise any of the towns as to the applicability or potential impact of RSA 485:14. Nonetheless, we reviewed the legal issues so we could have a better understanding of the situation. A summary of that discussion follows.

RSA 485:14 was enacted in 1989 and originally provided:

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 supply of said municipality, and the voters of such municipality have approved such action pursuant to RSA 44:16 or 52:23.

The N.H. Supreme Court ruled in *Balke v. City of Manchester*, 150 N.H. 69 (2003), that a referendum is required in each municipality prior to introduction of fluoride into the water supply, not just in the municipality in which the water system is located:

The statute requires a public hearing in each "municipality *using* said waters," not merely the municipality that introduced the fluorine into the water. RSA 485:14. Any municipality that has residents using water from MWW is a "municipality using said waters" within the meaning of RSA 485:14. Therefore, we agree with the trial court that "before a public water supply which is used within a municipality may be fluoridated[,] there must be a hearing and referendum in that municipality."

*Balke*, 150 N.H. at 72 (brackets and emphasis in original).

RSA 485 was amended in 2004 to more specifically address the introduction of fluoride to water systems serving multiple municipalities. RSA 485:14 now provides:

No fluoride shall be introduced into the public water supply unless and until the municipality or municipalities using said waters have held a public hearing as to the introduction of fluoride into the public water supply of said municipality or municipalities, and the registered voters of such municipality or municipalities have approved such action pursuant to RSA 44:16 [cities and wards], RSA 31:17-a [towns], RSA 52:23 [village districts], or RSA 485:14-a [systems serving more than one political subdivision]. For purposes of this section "municipality" means a municipality that has 100 or more user connections that are served from the public water supply.

RSA 44:16, RSA 31:17-a, and RSA 52:23 also were amended, but the substantive provisions relative to triggering the referendum process were not changed. Specifically, for towns and village districts a written application of 10% of the registered voters in the town/district must be presented to the selectmen/commissioners at least 15 days before the town/district annual meeting. (No cities or wards are involved in this situation, so they are not addressed here).

RSA 485:14-a was added to address service to multiple municipalities. That statute provides:

Upon the written application of the aggregate of 10 percent of the registered voters in all of the towns served by a water system, presented to the clerk of the town owning the water system at least 90 days before the day prescribed for an annual town meeting or city election, the clerk shall forward a copy of the petition to each town served by the water system. (Emphasis added.)

Most of the towns involved in the current situation would have to proceed under RSA 485:14 because they are not one of the towns currently served by a water system that is considering introducing fluoride. Because they are not currently part of such a system, they would each be acting independently under RSA 485:14 to initiate the referendum process.

Two towns – Hampstead and Atkinson – are jointly served by the Hampstead Area Water Company (HAWC). Because HAWC serves more than one political subdivision, Hampstead and Atkinson would have to follow the process in RSA 485:14-a. This is significant because of the 90-day presentation requirement in RSA 485:14-a, as contrasted with the 15-day requirement for towns/districts acting independently. That longer presentation period would prevent the referendum question from being placed on the ballot at the 2018 annual meeting. If that is the case, any progress on the proposed extension could be delayed for all of the towns on the proposed line.

Another question raised at the meeting was whether the petition/referendum process was the only mechanism by which the question could be put on the ballot. On this point, the language of the last sentence of RSA 485:14-a, I is instructive: “After such popular referendum, the selectmen shall not insert an article relative to the use of fluoride in the public water system in the warrant nor shall such question be inserted on the official ballot for a minimum period of 3 years from the date of the last popular referendum **and only upon written application** at that time of not less than the aggregate of 10 percent of the registered voters of all of the towns.” (Emphasis added.)

Because the Department has regulatory authority only to approve design plans for the extension and for fluoridation components of the system, it should not advise any of the towns on the underlying issue of whether or to what extent RSA 485:14 applies. While it may be appropriate to point out to those involved that the statute might be implicated, we should not go beyond that.