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STATUTORY INSTRUMENTS

2005 No. 920

WATER INDUSTRY, ENGLAND

The Water Supply (Fluoridation Indemnities) (England) Regulations 2005

Made - - - - *24th March 2005*

Coming into force - - *1st April 2005*

Whereas a draft of the following Regulations was laid before Parliament in accordance with section 213(1A) of the Water Industry Act 1991(1) and approved by resolution of each House of Parliament:

Now, therefore, the Secretary of State, in exercise of the powers conferred by sections 90(3) and 213(2)(e) of the Water Industry Act 1991(2), hereby makes the following Regulations:—

Citation, commencement and application

1.—(1) These Regulations may be cited as the Water Supply (Fluoridation Indemnities) (England) Regulations 2005 and come into force on 1st April 2005.

(2) These Regulations apply to agreements to indemnify water undertakers and licensed water suppliers whose areas are situated wholly in England.

Indemnities in respect of fluoridation

2.—(1) Where the Secretary of State agrees to indemnify a water undertaker under section 90(1) of the Water Industry Act 1991 (indemnities in respect of fluoridation), the form of that indemnity and its terms shall be those set out in Schedule 1 to these Regulations.

(2) Where the Secretary of State agrees to indemnify a licensed water supplier under section 90(2) of that Act, the form of the indemnity and its terms shall be those set out in Schedule 1 to these Regulations, subject to the modifications set out in Schedule 2 to these Regulations.

(1) 1991 c. 56; section 213(1A) was inserted by section 58(8) of the Water Act 2003 (c. 37). As these are the first Regulations under section 90, the affirmative procedure applies.

(2) Section 90 was substituted by the Water Act 2003 (c. 37), section 58(6).

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Signed by authority of the Secretary of State for Health

24th March 2005

Melanie Johnson
Parliamentary Under Secretary of State,
Department of Health

SCHEDULE 1

Regulation 2(1)

FLUORIDATION OF WATER SUPPLIES: INDEMNITY

Definitions

1. In this indemnity—

- (a) “the Act” means the Water Industry Act 1991 as amended by the Water Act 2003;
- (b) “the agreement” means the agreement or agreements which are specified in an annex hereto and any other schemes for the fluoridation of water to which section 87 of the Act applies and in respect of which the water undertaker has or may have liability, and any agreement or arrangements for the supply of fluoridated water to which the water undertaker is a party, including in each case any agreement to vary the agreement or arrangement;
- (c) “the water undertaker” means *[insert name of undertaker]* and, where the context requires, its predecessor water authority and includes their respective directors, employees and agents for whom the undertaker is liable;
- (d) “fluoridated water” means water supplied in accordance with the agreement with *[insert name of relevant strategic health authority]*, being water fluoridated in compliance, or in purported compliance, with the Act;
- (e) “predecessor water authority” means *[insert name of relevant authority]* or any predecessor acting as a statutory water undertaker in the whole or any part of the water region which performed functions which have been transferred to the water undertaker;
- (f) “the water region” means the geographical area for which the water undertaker has been appointed pursuant to the Act or, in relation to a predecessor water authority, the area within which it had a duty to supply water under section 11 of the Water Act 1973 (3) (excluding any area in respect of which that authority discharged its duty through a statutory water company pursuant to section 12 of that Act) or pursuant to any equivalent provision of a previous enactment.

Indemnity

2.—(1) Pursuant to section 90 of the Act and subject to clauses 3 to 5 below, the Secretary of State for Health hereby indemnifies the water undertaker—

- (a) against all claims, proceedings, actions, damages, legal costs, expenses and any other liabilities;
- (b) in respect of any death or personal injury, or loss of or damage to property;

which is caused directly or indirectly by any action or failure to act by the water undertaker to which paragraph (2) below applies.

(2) This paragraph applies to any action or failure to act—

- (a) in supplying;
- (b) in having supplied; or
- (c) in proposing to supply;

fluoridated water to any person in pursuance, or in purporting to pursue, any obligation or duty to supply water under the agreement.

(3) 1973 c. 37.

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- (3) In particular, subject to clause 3 below, this indemnity applies to liabilities, costs and expenses—
- (a) arising directly or indirectly from any action or failure to act by the water undertaker in increasing the fluoride content of any water supplied by the water undertaker pursuant to the agreement;
 - (b) incurred by the water undertaker, or for which the water undertaker is liable, in connection with any proceedings which have been or may be brought by any person in respect of acts carried out or proposed to be carried out pursuant to the agreement, where such proceedings are with respect to acts carried out or proposed to be carried out for the purpose of increasing the fluoride content of any water;
 - (c) transferred to the water undertaker in accordance with a scheme made by its predecessor water authority under Schedule 2 to the Water Act 1989(4), which were liabilities, costs or expenses of the predecessor water authority which fall within sub-paragraph (a) or (b) above;
 - (d) incurred in respect of defending criminal proceedings where those proceedings have not resulted in a conviction and where no appeal in respect of those proceedings is pending;
 - (e) incurred in respect of any civil liability which arises in consequence of an action or a failure to act which constitutes a criminal offence where that action or failure to act is attributable solely to a requirement made by the Secretary of State for Health in connection with the supply of fluoridated water to any person;
 - (f) incurred by the water undertaker in respect of the execution, or purported execution, of their duties by any director, employee or agent of the water undertaker.

Exclusions

- 3.—(1) The Secretary of State for Health will not indemnify the water undertaker—
- (a) except where clause 2(3)(d) or (e) above applies, in relation to any action or failure to act which constitutes a criminal offence on the part of the water undertaker, its directors, employees or agents;
 - (b) in relation to any action by, or failure to act by, the water undertaker which is the result of fraud, or other deliberate wrongdoing or negligence on the part of the water undertaker or its directors, employees or agents;
 - (c) to the extent that the liabilities, costs and expenses in respect of which an indemnity is sought have been satisfied by the Secretary of State for Health otherwise than under the agreement;
 - (d) subject to paragraph (2) below, to the extent that the water undertaker is entitled to recover a payment from a third party and the water undertaker has not taken reasonable steps to recover that payment before making a claim under this indemnity;
 - (e) in relation to any liabilities, costs or expenses attributable to the failure of the water undertaker to notify the Secretary of State for Health, as soon as reasonably practicable, of any matter mentioned in paragraph (3) below.
- (2) The water undertaker shall not be bound to take any steps to recover a payment under paragraph (1) (d) above before making a claim (whether the claim is made under the indemnity or otherwise) in any case where the water undertaker—
- (a) is or might be entitled to a payment under or in connection with the agreement from—

(4) 1989 c. 15.

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(i) a County Council, a County Borough Council, or a Regional, an Area, a District or a Strategic Health Authority; or

(ii) a body which is liable under the agreement in place of a council or authority mentioned in (i); or

(iii) a body from which a council or authority mentioned in (i) acquired liability under the agreement; or

(b) is or might be entitled to a payment under a policy of insurance;

provided that if the water undertaker receives any such payment, the Secretary of State for Health may deduct its amount from any payment due to the water undertaker under this indemnity or, where the Secretary of State for Health has made a payment to indemnify the water undertaker, recover its amount from the water undertaker.

- (3) The water undertaker shall notify the Secretary of State for Health of the following matters—
- (a) any proceedings or action against the water undertaker which might result in the Secretary of State for Health being required to make a payment under this indemnity;
 - (b) any threat of proceedings or action which might result in the Secretary of State for Health being required to make a payment under this indemnity;
 - (c) any admission of liability or prejudicial statement made by the water undertaker;
 - (d) any agreement by the water undertaker to settle or compromise any such proceedings or action without the prior approval of the Secretary of State for Health.

Conduct of cases

4.—(1) Where the Secretary of State for Health is, or may be, required to make any payment under this indemnity, he shall provide such assistance to a water undertaker as the water undertaker may reasonably require to assist it—

- (a) to defend proceedings brought by a third party against the water undertaker and to participate in any related proceedings; and
- (b) to recover any payment due from a third party.

5. Where the Secretary of State for Health is, or may be, required to make any payment in respect of a claim under this indemnity, he shall have the right to conduct, or take over the conduct of—

- (a) the defence to any legal proceedings taken by a third party against the water undertaker (including the right to participate in any related proceedings); and
- (b) proceedings to recover a payment due from a third party;

and where he exercises this right the water undertaker shall provide such assistance to him as he may reasonably require.

Communications

6. Any communication relating to this indemnity shall be in writing and sent by pre-paid first class recorded delivery post addressed to the intended recipient at the following address as appropriate (or such other address as may have been notified for the purpose)—

- (a) to the Secretary of State for Health at Wellington House, 133-155 Waterloo Road, London SE1 8UG
- (b) to the water undertaker at *[insert address]*

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SCHEDULE 2

Regulation 2(2)

LICENSED WATER SUPPLIERS: MODIFICATIONS TO SCHEDULE 1

1. In clause 1—
 - (i) in paragraph (b), after “water undertaker” where it first appears add “or licensed water supplier”;
 - (ii) add as an additional sub-paragraph—
 - “(g) “the licensed water supplier” means [*insert name of supplier*] and includes its directors, employees and agents for whom the supplier is responsible”.
2. In clause 2—
 - (a) in paragraph (1)—
 - (i) for “water undertaker” where it first appears, substitute “licensed water supplier”;
 - (ii) in paragraph (1), after “the water undertaker” where it appears for the second time, add “or the licensed water supplier”;
 - (b) in paragraph (2), at the end, add “or, in the case of a licensed water supplier introducing water into the water undertaker’s supply system, in complying with any obligation imposed on it by the undertaker in consequence of the agreement”;
 - (c) in paragraph (3)—
 - (i) in sub-paragraph (a), after “supplied by the water undertaker” add “or by the licensed water supplier”;
 - (ii) after sub-paragraph (a), insert—
 - “(aa) arising directly or indirectly from any action or failure to act by the licensed water supplier if it is introducing water into the water undertaker’s supply system, in complying with any obligation imposed on it by the undertaker in consequence of the agreement;”;
 - (iii) in sub-paragraphs (b) and (f), for each reference to the water undertaker substitute a reference to the licensed water supplier.
3. In clauses 3 to 6, for each reference to the water undertaker substitute a reference to the licensed water supplier.
4. In clause 3(2)(a), add at the end—
 - “(iv) the water undertaker; or”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations which apply to England only set out the form and terms of the indemnity which the Secretary of State, with the consent of the Treasury, may agree with a water undertaker or a water

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supplier in respect of liabilities that may arise where water supplies are fluoridated at the request of a health authority.

A Regulatory Impact Assessment has been prepared in respect of these Regulations and a copy has been placed in the library of each House of Parliament. Copies of the Regulatory Impact Assessment are published on the Department of Health's website (www.dh.gov.uk) and can be obtained from Room 330, Department of Health, Wellington House, 133-155 Waterloo Road, London SE1 8UG.

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