

Fact Sheet: Public Health Law and Community Water Fluoridation

(April 2013)

1. Who decides whether to fluoridate community drinking water?

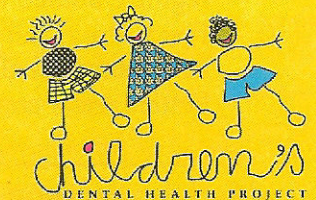
The decision to add fluoride to community water systems is made at the state or local municipality level and is not mandated by any federal agency.¹ Almost all water systems have some natural amount of fluoride² but usually at a level that is lower than is recommended by the U.S. Department of Health and Human Services (DHHS).³ States and local communities whose water systems do not contain the recommended level of fluoride may choose to add fluoride to their community drinking water. Some states require fluoridation for community water systems meeting certain criteria, such as size of population served.

2. On what legal authority do states and local governments regulate community drinking water?

States' authority to fluoridate public water systems is based on the inherent authority reserved to the states through the Tenth Amendment of the U.S. Constitution to protect public health and safety.⁴ States may exercise this authority directly or delegate it to subsidiary, local governments.⁵ Courts have upheld state and local governments' use of this authority to protect and promote public health in a wide range of areas, including sanitation requirements,⁶ licensure of health care practitioners,⁷ compulsory vaccinations,⁸ and fluoridation of community water systems.⁹

3. Has state authority to fluoridate community water systems ever been successfully challenged on constitutional grounds?

No. Courts have consistently upheld water fluoridation programs as a valid public health measure.¹⁰ Moreover, the United States Supreme Court has repeatedly denied requests to review state court decisions upholding the constitutionality of water fluoridation.¹¹



4. What role does the federal government have in regulating community water fluoridation?

The federal government sets *maximum* levels for fluoride concentration allowed in community water systems and issues *voluntary* recommendations on optimal fluoridation levels for preventing tooth decay. Under the Safe Drinking Water Act of 1974, the U.S. Environmental Protection Agency (EPA) must set a maximum contaminant level goal (MCLG) and a maximum contaminant level (MCL) for fluoride.¹² The MCLG is a non-enforceable goal at which no known or expected health effects will occur. The MCL is an enforceable standard that the EPA sets as closely as possible to the MCLG after taking into account the economic costs and available technologies. Currently, the MCLG and the MCL for fluoride are both set at 4 mg/L.¹³ The EPA also has set a secondary maximum contaminant level (SMCL) for fluoride of 2 mg/L to avoid cosmetic effects; exceeding the SMCL requires water systems to notify their customers.

In contrast to EPA, DHHS issues voluntary, evidence-based recommendations on the optimal levels of water fluoridation for preventing cavities while minimizing the risk of dental fluorosis.¹⁴ DHHS is expected to issue new recommendations soon.

5. Does the U.S. Food and Drug Administration (FDA) regulate community drinking water?

The FDA does not have jurisdiction over community water systems. The FDA does regulate bottled water as a food under The Food, Drug, and Cosmetic Act of 1964 and sets maximum allowable fluoride limits for bottled water containing fluoride.¹⁵

³ Current recommendations from the U.S. Public Health Service/DHHS are that fluoride levels be set between 0.7 and 1.2 mg/L, depending on the annual average air temperature within a particular region. In January 2011, DHHS proposed setting a single target concentration of 0.7 mg/L based on evidence that fluid intake among children does not vary across regions with different annual temperatures. See 76 F.R. 2383 (2011).

⁴ U.S. CONST. amend. X (reserving to the states the powers not delegated to the federal government through authority often referred to as “police power.”).

See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) (“[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”); *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824) (describing the police powers as “that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government”).

⁵ See Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* 92, 94 (2008). University of California Press, Berkeley, CA (2d ed. 2008).

⁶ See, e.g., *Finkelstein v. City of Sapulpa*, 234 P. 187 (Okla. 1925); *Devines v. Maier*, 728 F.2d 876 (7th Cir. 1984).

⁷ See, e.g., *State v. Otterhold*, 15 N.W.2d 529, 531 (Iowa 1944); *Thompson v. Texas State Medical Board*, 570 S.W.2d 123, 128 (Tex. App. 1978).

⁸ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 24 - 25 (1905).

⁹ *Young v. Board of Health of Borough of Somerville*, 293 A.2d 164, 166 (N.J. 1972). (stating that “courts throughout the nation have been virtually unanimous in resisting these as well as other arguments, and in upholding fluoridation of drinking water as a valid public health measure whenever a challenge has been presented.[...] The unanimity of appellate state court holdings is matched only by the frequency and persistent regularity with which the United States Supreme Court has declined review.”).

¹⁰ E.g., *Coshov v. City of Escondido*, 132 Cal. App. 4th 687, 705 (2005) (“courts throughout the United States have uniformly held that fluoridation of water is a reasonable and proper exercise of the police power in the interest of public health”); see also, Edwin Pratt, Raymond Rawson and Mark Rubin, *Fluoridation at Fifty: What Have We Learned*, 30 J.L. Med. & Ethics 117, 119 (2002) (“fluoridation has been thoroughly tested in the court system of the United States and found to be a proper means of furthering public health and welfare”).

¹¹ *Safe Water Foundation of Texas v. City of Houston*, 661 S.W.2d 190, 192 - 193 (Tex. App. 1983); see also *supra* note 9.

¹² Safe Drinking Water Act of 1974, Pub. L. 93-523.

¹³ 40 C.F.R. §141.51 (2001); 40 C.F.R. §141.62 (2001).

¹⁴ See *supra* note iii.

¹⁵ 21 C.F.R. §165.110 (2011).

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¹ Marie Tiemann, *Fluoride in Drinking Water: A Review of Fluoridation and Regulation Issues*, Congressional Research Service, April 21, 2010.

² *Id.* at 2.