

Opinion No. 58-44

March 4, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Assistant Attorney General

TO: Mr. Charles G. Caldwell, Director, Environmental Sanitation, Services Department of Public Health, P. O. Box 711, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. What entities are included in the term "public bodies" in the State of New Mexico?
2. Does New Mexico law establish the right for public bodies to construct, maintain and operate sewage facilities in public rights-of-way?
3. Are State Highways rights-of-way considered to be public rights-of-way for the purpose of constructing sewer lines by public bodies?
4. Do the terms "Public right-of-way" and "public easement" have the same meaning under New Mexico law?

CONCLUSION

1. See Opinion
2. Yes.
3. Yes.
4. Yes.

OPINION

ANALYSIS

The Federal Water Pollution Act (33 U.S.C.A. 466-466J) provides for thirty (30) percent federal participation in the cost of certain sewage works construction. Section 55.26 of one of the regulations for the administration of this act states as follows:

"Regulations for Water Pollution Control Construction Grants, from the Federal Register of November 8, 1956 and April 26, 1957. Title 42, Public Health. Chapter I, Public Health Service, Department of Health, Education and Welfare, Subchapter D, Part 55 -

Grants for Water Pollution Control; Sub-part B, Grants for Construction of Treatment Works. Authority issued under Sec. 10, 70, Stat. 506; U.S.C. 466 to interpret or apply sec 6, 70 Stat. 502; 33 U.S.C. 466 e."

"Sec. 55.26 Assurance from Applicant (m) That the applicant has or will have prior to awarding of the construction contract, a fee simple or such other estate or interest in the site of the project, including necessary easements and right-of-way, as the Surgeon General finds sufficient to assure for a period of not less than fifty years undisturbed used and possession for the purposes of construction and operation of the project."

Turning to the specific inquiries presented we find no statutory or case law definition of the term "public bodies". Such term, however, we believe contemplates the State of New Mexico and its political subdivisions including counties, cities, towns and villages and possibly school districts. Using a broad definition the term could possibly also include Conservancy Districts, Soil Conservation Districts, Wind Erosion Districts and other entities created by legislative acts. It would appear, however, that in applying this definition to the Federal Water Pollution Control Act, the term "public bodies" should be applied only to the state's political subdivisions since apparently they are the only entities empowered under our statute with the authority to construct and maintain sewage facilities.

In answer to Question No. 2, we are of the opinion that New Mexico law does establish the right for public bodies to construct, maintain and operate sewage facilities in public rights-of-way where the definition is limited to counties, cities, towns and villages. In regard to cities and towns such authority is contained in Section 14-21-5, N.M.S.A., 1953 Compilation whereby such cities and towns are authorized to open streets, alleys, and avenues for the building and repairing of sewers. Such authority is extended to villages with a population of 1200 or less under Section 14-22-7, N.M.S.A., 1953 Compilation wherein they are authorized to construct, repair, maintain and keep in order sewers and drains in streets, alleys and public highways.

As indicated in the conclusion to Question No. 3 above, we are of the opinion that State Highway rights-of-way may be considered to be public rights-of-way for the construction of sewer lines, although we have no expressed statutory authority to that effect. Under Section 14-21-5, supra, the power to regulate the use of state highways within a municipality has been delegated to such municipality. This delegation of power to the municipality does not, however, give them absolute control of existing streets and proposed roads to the exclusion of the State Highway Commission. See **Gallegos v. Conroy**, 38 N.M. 154, 29 P. 2d 334. In Attorney General's Opinion 5624, we state:

"This would seem to require the Commission and the county to foresee the use by utilities of the rights-of-way and to obtain sufficient rights-of-way to accommodate them. Their location, however, would be within the discretion of the Highway Commission, with foremost thought to public need and necessity and the safety of the traveling public. The rights of the state come first and the acceptance of the easement by the utilities was

with this understanding. See Attorney General's Opinion No. 5222 to Burton G. Dwyre, June 9, 1949."

From the foregoing it would appear that public bodies may use State Highway rights-of-way, the location of which being within the discretion of the New Mexico State Highway Department.

In answer to Question No. 4, we have found no New Mexico law distinguishing the terms "public rights-of-way" and "public easement". Our research of the general law indicates that ordinarily no distinction exists between the two terms. Ordinarily a public right-of-way is nothing more than an easement or a right to control and enjoy the use of the right-of-way, such right reverting should the right-of-way be abandoned. Having found no distinction made in our statutory or case law, we hold that the terms "public right-of-way" and "public easement" have substantially the same meaning.