

## **Opinion No. 66-43**

April 6, 1966

**BY:** OPINION OF BOSTON E. WITT, Attorney General George Richard Schmitt,  
Assistant Attorney General

**TO:** Dr. Edwin O. Wicks, Director, Health Department, Att'n: Mr. Charles G. Caldwell,  
Associate Director, Sanitation Division, Santa Fe, New Mexico

### **QUESTION**

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Does the Department of Public Health have the statutory authority to adopt a regulation requiring the fluoridation of public water supplies?

#### **CONCLUSION**

It is extremely doubtful.

### **OPINION**

#### **{\*51} ANALYSIS**

A search of the New Mexico Statutes reveals no law directly relating to the fluoridation of water. The Department of Health, under § 12-1-13 N.M.S.A. 1953 Compilation, is given the power of regulation "insofar as the protection of public health is concerned, of plumbing, drainage, water supply, sewage and waste disposal . . .". The above cited statute constitutes the source of authority by which the Department of Health can regulate water supplies unless the broad powers of the Health Department under § 12-1-3 and 12-1-4 N.M.S.A., 1953 Compilation, which relate to the protection and supervision of the health of the people of the State, are also considered.

One of the basic problems which must be considered in reviewing your proposed administrative regulation for legal validity is the source of authority under which such regulation could be adopted. A very complete legal dissertation on the subject of regulatory authority of administrative agencies is contained in 1 Am. Jur. 2d 865-870. As the author so clearly explains, the source of power of the administrative agency lies in the statute which has created it. Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statutes warrant for the exercise of any authority which they claim. They have no general or common law powers but only such as have been conferred upon them by law, expressly or by necessary implication. Official powers cannot be merely assumed by administrative officers, nor can they be created by the Courts. Statutory authority,

however, may be implied as well as expressed, but an implied power must be necessarily or reasonably incident to the express powers granted.

In view of the general legal propositions expressed above, it is difficult for us under the laws previously cited to find any express or implied authority of your Department to mandatorily prescribe the fluoridation of the public waters of this State. There is no question but that the Department of Public Health is charged by law to see that the public water supplies are pure and safe for human consumption. However, it appears to us that fluoridation of water goes beyond maintaining minimum standards {52} of purity and safety. Rather such fluoridation, under the prevailing scientific view, as you have described to us would in effect confer an additional benefit to the health of the public in the development and preservation of sound healthy teeth, especially in young children. Noble as this purpose might be, it is not the test to determine the legal validity of a rule or regulation. The test simply is whether the Department has the power, express or implied, under the law to pass such a regulation. This office believes it to be extremely doubtful whether such authority is vested in the Department because the proposed regulation does not go to the protection of the health of the people but rather to the promotion of public health.

This matter, we believe, is something that should be decided by the people themselves in the municipalities and local communities by appropriate ordinances, or through the Legislature. In this connection, we invite your attention to a very comprehensive and extensively annotated article on fluoridation written by Ruth Roemer, LLB, entitled **Water Fluoridation: Public Health Responsibility and the Democratic Process** appearing in the September, 1965 issue of the **American Journal of Public Health**, beginning at page 1337. In her analysis, the author points out that the "legality of fluoridation legislation is clearly established . . ." and that "the highest courts of thirteen states have upheld the constitutionality of fluoridation ordinances and the United States Supreme Court has dismissed appeals or refused review in six of these cases . . .". In the decisions the Courts have extended the exercise of the state's police power in controlling contagious diseases to fluoridation as a "measure to protect and promote the public health -- even though no contagion is involved . . .".

It is our opinion that your existing fluoridation regulation adopted May 19, 1956, which sets forth standards to be followed if fluoridation of public waters is voluntarily undertaken by the various communities, is about as far as the Department can safely extend its control in this area without further and specific legislative mandate.