Opinion No. 78-15

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OPINION OF: Toney Anaya, Attorney General

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ENVIRONMENTAL LAW; ENVIRONMENTAL PROTECTION AGENCY (EPA); ENVIRONMENTAL IMPROVEMENT AGENCY (EIA); AUTHORITY OF COUNTIES UNDER TITLE 2, PUBLIC LAW 92-500, FEDERAL WATER POLLUTION CONTROL ACT

Authority of counties under Federal Water Pollution Control Act to carry out portions of state's water quality management plan including construction and operation of wastewater treatment program.

BACKGROUND

The Environmental Protection Agency has questioned whether counties in New Mexico possess the requisite authority under Title 2 of Public Law 92-500, the Federal Water Pollution Control Act, 1972 Amendments (33 U.S.C. § 1251 **et seq.**) to carry out portions of the state's water quality management plan including the construction, operation and maintenance of publicly owned wastewater treatment works and to participate in the grant assistance program.

Federal regulations were promulgated to implement this act. Included within this regulatory scheme is 40 C.F.R. 131.11(B) which establishes certain criteria which must be met by a county, municipality or any other agency of the state prior to being able to carry out portions of the state's plan.

QUESTIONS

In this regard you have asked four basic questions:

1. Do counties meet all the management agency criteria for wastewater systems contained in 40 C.F.R. 131.11(o)(2)(ii-ix)?

2. Are counties legally able to issue revenue bonds, or other types of funding, necessary to finance the planning, design and construction of wastewater systems?

3. Are there any constitutional or statutory limitations which would prevent counties from being eligible to receive wastewater system construction grants from the Environmental Protection Agency?

4. (A) Are there any differences between a municipality's and county's authority to plan, design, contract, operate and pass ordinances regarding wastewater treatment systems?

(B) Can a county own the physical components of such a system?

CONCLUSIONS

1. (A-H) Yes.

2. Yes.

3. No.

4. (A) No.

(B) Yes.

ANALYSIS

1. A. 40 C.F.R. 131.11(o)(2)(ii) requires an agency (municipality, county, etc.) to have the authority:

"To effectively manage waste treatment works and related point and nonpoint source facilities and practices serving such area in conformance with the approved plan."

OPINION

According to Section 15-36A-1, N.M.S.A. 1953 Comp.:

"All counties are granted the same powers that are granted municipalities except for those powers which are inconsistent with statutory or constitutional limitations placed on counties."

Section 14-25-1(A)(1), N.M.S.A. 1953 Comp., provides that a municipality may:

"acquire and maintain facilities for the collection, treatment and disposal of sewage."

Thus, pursuant to Sections 15-36A-1, and 14-25-1(A)(1), **supra,** counties would have the authority to acquire and maintain sewage facilities and thereby meet the requirements of 40 C.F.R. 131.11(o)(2)(ii).

B. 40 C.F.R. 131.11(o)(2)(iii) requires that counties have the authority:

"Directly or by contract, to design and construct new works, and to operate and maintain new and existing works as required by an approved water quality management plan developed under this part."

Counties could meet this requirement, since municipalities have the authority under Section 14-17-1(B)(C), N.M.S.A. 1953 Comp., to enter into contracts or or leases and to acquire and hold property, both real and personal, and under Section 14-25-1(a)(1), **supra,** the authority to acquire and maintain sewage plants.

C. 40 C.F.R. 131.11(o)(2)(iv) requires that counties have the authority:

"To accept and utilize grants or other funds from any source for waste treatment management or non-point source control purposes."

Section 15-36-1.4, N.M.S.A. 1953 Comp., provides that:

"A county may act as an agent of the United States government for the expenditure of money authorized by any act of the United States Congress."

Furthermore, according to Section 14-36-6, N.M.S.A. 1953 Comp., municipalities, and therefore counties, may:

"accept or borrow funds from the United States of any of its agencies or instrumentalities for any purpose authorized by the laws of this state."

Thus, there is little question that counties can accept and utilize grant monies.

D. 40 C.F.R. 131.11(o)(2)(v) requires that counties have the authority:

"To raise revenues, including the assessment of user charges."

Counties clearly have this authority, because municipalities are granted this authority by statute. Section 14-17-1(H), N.M.S.A. 1953 Comp., states that a municipality may:

"establish rates for services provided by municipal utilities and revenue-producing projects, including amounts which the governing body determines to be reasonable and consistent with amounts received by private enterprise in the operation of similar facilities."

Also, Section 14-25-2(A), N.M.S.A. 1953 Comp., provides that for the purpose of maintaining, enlarging, extending, constructing and repairing sewage facilities and for paying the interest and principal on revenue bonds issued for the construction of sewage facilities, municipalities may levy by way of general ordinance a just and reasonable service charge.

Again, by virtue of Section 15-36A-1, **supra,** counties would have this authority.

E. 40 C.F.R. 131.11(o)(w)(vi) requires that counties be legally able:

"To incur short and long term indebtedness."

Counties have this authority. See the answer to question 2 below.

F. 40 C.F.R. 131.11(o)(2)(vii) requires that counties have the authority:

"To assure, in implementation of an approved water quality management plan, that each participating community pays its proportionate share of related costs."

According to Section 15-36A-2, N.M.S.A. 1953 Comp.:

"County ordinances are effective within the boundaries of the county, including privately owned land or land owned by the United States. However, ordinances are not effective within the limits of any incorporated municipality."

It would appear that, except for incorporated municipalities, counties could, by means of an appropriate ordinance, insure payment of proportionate costs.

However, payment from incorporated municipalities could certainly be secured by way of adequate contractual language. In any contract between a county and a municipality, it could easily be provided that the county would refuse to accept sewage from those incorporated municipalities who refused to pay their respective costs.

G. 40 C.F.R. 131.11(o)(2)(viii) requires that counties have the authority:

"To refuse to receive any wastes from a municipality or subdivision thereof, which does not comply with any provision of an approved water quality management plan, applicable to such areas."

There do not appear to be any statutory references to this particular point. However, since municipalities do have the general statutory authority to enter into contracts and the specific authority to construct, operate and maintain sewage facilities, by way of a properly drafted contract a municipality and/or county could refuse to accept wastes from an entity that did not comply in any particular with the water quality management plan.

H. 40 C.F.R. 131.11(o)(2)(ix) requires that counties be legally able:

"To accept for treatment industrial wastes."

Sections 14-25-1 **et seq., supra,** which deal with municipal sewage facilities are not limited to domestic wastes, but speak in terms of waste in general. Counties' authority would, therefore, also include acceptance of industrial wastes.

2. According to Sections 14-30-1 **et seq.,** N.M.S.A. 1953 Comp., municipalities have the authority to issue revenue bonds for the creation, maintenance, operation, etc., of a sewage system or facility. These revenue bonds are repayable solely from the net income derived from the operation of such sewage system. See Section 14-30-1.1, **supra.** Furthermore, Section 14-25-2, N.M.S.A. 1953 Comp., provides that:

"A municipality, for the purpose of maintaining, enlarging, extending, constructing and repairing sewage facilities, and for paying the interest and principal on revenue bonds issued for the construction of sewage facilities, may levy, by general ordinance, a just and reasonable service charge."

See also Sections 14-22-1 **et seq.** N.M.S.A. 1953 Comp.

In light of Section 15-36A-1, **supra,** counties also have these powers, unless they would be inconsistent with any statutory or constitutional provisions. The only relevant provision is Article 9, Section 10, of the New Mexico Constitution, which places certain restrictions on the issuance of bonds by counties. This provision reads as follows:

"No county shall borrow money except for the purpose of erecting, remodeling and making additions to necessary public buildings, or constructing or repairing public roads and bridges, and in such cases only after the proposition to create such debt has been submitted to the qualified electors of the county, who paid a property tax therein during the preceding year, and approved by a majority of those voting thereon. No bonds issued for such purpose shall run for more than fifty [50] years. Provided, however, that no moneys derived from general obligation bonds issued and sold hereunder, shall be used for maintaining existing buildings and, if so, such bonds shall be invalid."

However, this constitutional provision has been interpreted by the New Mexico Supreme Court to pertain exclusively to general obligation bonds which are retired by funds resulting from the levy of a general property tax and not to revenue bonds which are repayable from a special fund created for their retirement. See **State v. Connelly,** 39 N.M. 312, 46 P.2d 1097 (1935), which dealt with the similar provisions of Article 9, Sections 8, 10 and 12, involving respectively state, county and municipal indebtedness. See also **Wiggs v. City of Albuquerque,** 56 N.M. 214, 242 P.2d 865 (1952), and **Hutcheson v. Gonzales,** 41 N.M. 474, 71 P.2d 140 (1937).

Under Section 14-30-1.1, **supra,** sewage system revenue bonds will not be retired with the aid of any general taxation revenue, but from a "special fund," income from the operation of the sewage facility. See **Wiggs v. City of Albuquerque, supra.** Therefore, we can conclude that counties have the same authority as municipalities to issue revenue bonds and other types of funding for sewage systems.

3. No. See 1(C) above.

4. (A) No. See 1(B) above.

As previously stated under Section 15-36A-1, **supra,** counties have the same powers as municipalities except where otherwise prohibited by statute or constitutional provision. We are aware of no provision which would so restrict counties in the area of sewage treatment facilities.

(B) Counties can own the physical components of wastewater treatment systems. See Sections 14-17-1(C) and 15-36A-1, **supra.**

ATTORNEY GENERAL

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