

OPINION NO. 95-036**Syllabus:**

1. R.C. 4513.34, as in effect on July 1, 1956, authorized the Director of Highways, now the Director of Transportation, to issue special permits that were valid for a certain period of time in any circumstances that the Director, in a reasonable exercise of his discretion, determined to be appropriate.
2. The discretion granted to the Director of Highways, now the Director of Transportation, by former R.C. 4513.34, as in effect on July 1, 1956, to issue special permits for a certain period of time was sufficiently broad to accommodate the current scheme of issuing permits for a certain duration, as described in 16 Ohio Admin. Code Chapter 5501:2-1.
3. Because the Director of Highways, now the Director of Transportation, was authorized by former R.C. 4513.34 as in effect on July 1, 1956, to issue special permits for divisible loads, the Director's issuance of such permits at the present time is consistent with the weight limitations imposed by state law as in effect on that date for purposes of 23 U.S.C.A. § 127(a). (1983 Op. Att'y Gen. No. 83-049, syllabus, paragraph three, approved and followed.)

To: Jerry Wray, Ohio Department of Transportation, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, December 8, 1995

I have before me your letter of September 5, 1995, in which you ask several questions about the statutory authority of the Director of Transportation as it existed on July 1, 1956, to issue permits for the operation or movement of vehicles that exceeded statutory weight limits. Your questions arise out of the provisions of 23 U.S.C.A. § 127(a), governing the apportionment of certain federal highway moneys to the states.

Limitations Imposed upon States by 23 U.S.C.A. § 127

Pursuant to 23 U.S.C.A. § 127(a), no funds may be apportioned under 23 U.S.C.A. § 104(b)(1) to any state unless that state permits the use of the Dwight D. Eisenhower System of Interstate and Defense Highways¹ within that state by vehicles of a certain weight. 23 U.S.C.A. § 127(a) also fixes maximum axle weights and gross weight of vehicles that each state may allow to be used on the portion of such system of highways located in that state, *see* 23 C.F.R. § 658.17(b)-(d) (1995) (maximum vehicle and axle weights), subject to the following:

¹ *See generally* 23 U.S.C.A. § 103(e) (describing the Dwight D. Eisenhower System of Interstate and Defense Highways).

Provided, That such overall gross weight may not exceed eighty thousand pounds, including all enforcement tolerances, except for those vehicles and loads which cannot be easily dismantled or divided and which have been issued special permits in accordance with applicable State laws, or the corresponding maximum weights permitted for vehicles using the public highways of such State under laws or regulations established by appropriate State authority in effect on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles on any vehicle..., on the date of enactment of the Federal-Aid Highway Amendments of 1974, whichever is greater.² (Footnote added.)

23 U.S.C.A. § 127(a) further explains that, "[t]his section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof, other than vehicles or combinations subject to [23 U.S.C.A. § 127(d)],³ which the State determines could be lawfully operated within such State on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway Amendments of 1974." Accordingly, pursuant to 23 U.S.C.A. § 127(a), so long as a state does not allow highways within the state to be used by vehicles exceeding the greater of eighty thousand pounds or, with certain exceptions, the maximum weight allowed, by special permit or otherwise, under state law as of July 1, 1956, it remains eligible for the apportionment of federal funds under 23 U.S.C.A. § 104(b)(1). *See State ex rel. Dick Irvin, Inc. v. Anderson*, 164 Mont. 513, 525 P.2d 564 (1974); 1983 Op. Att'y Gen. No. 83-049. In light of this scheme, your primary concern is whether the issuance of special permits for overweight vehicles by the Director of Transportation under R.C. 4513.34, as currently in effect, was also authorized by state law as in effect on July 1, 1956.⁴

Vehicle and Load Weight Limitations Imposed by State Law on July 1, 1956⁵

In order to discuss the authority of the Director as of July 1, 1956, to issue special permits for overweight vehicles, it is first necessary to examine the statutory scheme existing at that time governing vehicle weight limitations in the state. In July 1956, R.C. Chapter 5577 prescribed load limits for highways and roads throughout the state. Specifically, R.C. 5577.02 established a general prohibition against the operation or movement upon various highways, bridges, and culverts in the state of vehicles weighing in excess of the limits established by R.C. 5577.01-.14. R.C. 4513.34, however, established an exception to this prohibition by authorizing the Director of Highways (now the Director of Transportation) to issue special permits allowing the operation or movement on the highways under his authority of a vehicle or combination of vehicles that exceeded the weight or size limitations established by R.C. 5577.01-.09 or that

² The date of enactment of the Federal-Aid Highway Amendments of 1974, 88 Stat. 2281 (1974), is January 4, 1975.

³ 23 U.S.C.A. § 127(d) concerns the operation of longer combination vehicles.

⁴ A member of your staff has stated that your questions concern the Director's present authority to issue special permits under R.C. 4513.34 in relation to such authority as it existed only as of July 1, 1956. Thus, the status of the Director's authority as of January 4, 1975, *see* note two, *supra*, will not be discussed.

⁵ The sections of the Ohio Revised Code referred to in this portion of the opinion as being effective on July 1, 1956, appear in the Ohio Revised Code of 1953, except as otherwise noted.

failed to conform with R.C. 4513.01-.37. R.C. 4513.34 further stated, in pertinent part, "[a]ny such permit may be issued for a single or a round trip or, in *special instances*, for a certain period of time." (Emphasis added.) If the Director issued such a permit, R.C. 4513.34 allowed him to "limit or prescribe conditions of operation for such vehicle or vehicles" and to "require bond or other security necessary to compensate for any damage to a roadway or road structure."

Your first four questions concern the extent of the Director's authority under R.C. 4513.34, as in effect on July 1, 1956, to issue permits "in special instances, for a certain period of time." Examination of R.C. 5577.01-.09 and R.C. 4513.01-.37,⁶ as in effect on July 1, 1956, reveals no statutory definitions or limitations upon this authority. Rather, the General Assembly delegated to the Director the authority to exercise his discretion in determining what circumstances constituted "special instances" for which permits for a certain period of time, rather than for a single or a round trip, could be issued. See *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365, 372 (1960) ("[w]here a statute clearly confers power to do a certain thing without placing any limitation as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption is that it should be performed in a reasonable manner *not in conflict with any law of the state*"). See generally *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 122 N.E. 39 (1918) (a public officer is required to exercise an intelligent discretion in the performance of his official duty). I conclude, therefore, that R.C. 4513.34, as in effect on July 1, 1956, authorized the Director to issue special permits that were valid for a certain period of time in any circumstances that the Director, in a reasonable exercise of his discretion, determined to be appropriate. See 1983 Op. Att'y Gen. No. 83-049.

Duration of Special Permits Issued under R.C. 4513.34

You next ask whether the Director's issuance of special permits at the present time under R.C. 4513.34, allowing multiple trips over a period of time of up to one year, is consistent with such authority as it existed on July 1, 1956. The authority of the Director under former R.C. 4513.34 extended to the issuance of special permits "for a single or a round trip, or, in special instances, for a certain period of time." Currently, pursuant to R.C. 4513.34, "[p]ermits may be issued for any period of time, not to exceed one year, as the director in his discretion...deems advisable or for the duration of any public construction project."

Because the issuance of single and round trip permits was expressly authorized by former R.C. 4513.34 as it existed on July 1, 1956, your concern is whether the Director had authority at that time to issue permits for more than a single or a round trip over a period of time. Of the various types of special permits currently issued by the Director of Transportation, only

⁶ Various sections, not pertinent to your inquiry, appear in legislative enactments other than the Ohio Revised Code of 1953.

"continuing permits"⁷ and "construction equipment permits"⁸ authorize other than a single or round trip movement.⁹ Although, pursuant to R.C. 4513.34 and 16 Ohio Admin. Code 5501:2-1-08(B), all special permits are issued for a certain period of time, only "continuing permits" and "construction equipment permits" are, by definition, valid for other than a single or a round trip movement. Given the broad discretion granted to the Director by former R.C. 4513.34 to determine what constituted the "special instances" for which permits for a certain period of time could be issued, I cannot say that it was outside the authority of the Director under R.C. 4513.34 as it existed on July 1, 1956, to include as "special instances" for purposes of former R.C. 4513.34 the circumstances in which continuing and construction equipment permits are currently issued. See generally *State ex rel. Butram v. Industrial Comm'n*, 124 Ohio St. 589, 180 N.E. 61 (1932) (a court will not substitute its judgment for that of an administrative body, but determinations made by such body are subject to judicial review for abuse of discretion); 1992 Op. Att'y Gen. No. 92-037 at 2-145 (authorizing a state agency to "adopt any reasonable interpretation of its rule that it believes will advance [its] regulatory goals and objectives"). Rather, the Director's authority to issue special permits for a certain period of time under former R.C. 4513.34, as in effect on July 1, 1956, was sufficiently broad to accommodate the current scheme of issuing permits for a certain duration, as described in 16 Ohio Admin. Code Chapter 5501:2-1.

Permits for Non-divisible Loads

Your final question asks whether the Director's issuance of special permits for loads that do not meet the definition in 23 C.F.R. § 658.5 of a "non-divisible load" would alter the foregoing conclusions. By way of background, I note that pursuant to 23 U.S.C.A. § 127(a), vehicles and loads that cannot be easily dismantled or divided and that have been issued special

⁷ 16 Ohio Admin. Code 5501:2-1-01(D) defines a "continuing permit" as "any permit for an *unlimited number of movements* of the same vehicle, including any approved load and axle spacing, between the same two specific locations over the same specified route." (Emphasis added.)

⁸ 16 Ohio Admin. Code 5501:2-1-01(C) defines a "construction equipment permit," in pertinent part, as "any permit granted for the *unlimited number of movements* of construction equipment to or from a construction worksite." (Emphasis added.)

⁹ See generally 16 Ohio Admin. Code 5501:2-1-01(A) (defining "active permits" as "any permit granted for the *one-way movement only* of an overweight and/or overdimension vehicle between two specific locations over a specified route. Such permit may also include a *return trip movement* of the same vehicle over the same route if such privilege is requested and granted" (emphasis added)); 16 Ohio Admin. Code 5501:2-1-01(I) (defining "inactive permits" as "an approved permit application representing the prequalification of a vehicle, with or without load, for subsequent movement under an active permit. The inactive permit does not authorize a movement. A movement is only authorized by the issuance of an active permit"); 16 Ohio Admin. Code 5501:2-1-01(H) (defining "emergency permit" as "any permit granted for a *movement* necessitated by any occurrence which causes or threatens to cause the loss of life or otherwise endangers public health, safety or welfare" (emphasis added)); *Webster's New World Dictionary* 1 (2d college ed. 1978) (defining the indefinite article "a" as meaning in part, "one; one sort of [we planted a tree]"). Pursuant to the permit scheme established by 16 Ohio Admin. Code Chapter 5501:2-1, regardless of the duration for which active, emergency and inactive permits are valid, none are valid for other than a single or round trip movement.

permits under applicable state law are expressly excepted from the eighty thousand pound weight limitation set forth therein. See 23 C.F.R. § 658.17(h) (1995). In addition to the exception for nondivisible loads, however, an exception also exists for those vehicles or loads of weights in excess of eighty thousand pounds that were permitted by state law as in effect on July 1, 1956, by special permit or otherwise, to move on its highways. See *State ex rel. Dick Irvin, Inc. v. Anderson, supra*; 23 C.F.R. § 658.17(i) (1995). Thus, even if a vehicle or load is not excepted from the maximum weight limits described in 23 C.F.R. § 658.17(b)-(d) as a nondivisible load under 23 C.F.R. § 658.17(h), it may still conform to the weight limits imposed by 23 U.S.C. § 127(a) if movement of such vehicle or load was permitted by state law as in effect on July 1, 1956. See 23 U.S.C.A. § 127(a) (stating, in part, "[t]his section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof, [with certain exceptions], which the State determines could be lawfully operated within such State on July 1, 1956"). Accordingly, you question whether a state remains eligible to receive federal funds under 23 U.S.C.A. § 127(a) if it issues a special permit for movement of an overweight load that is not a nondivisible load, as defined in 23 C.F.R. § 658.5.¹⁰

As of July 1, 1956, former R.C. 4513.34 authorized the Director to issue special permits for vehicles or loads that exceeded the maximum weight limitations otherwise imposed by state law. Former R.C. 4513.34 established no maximum weight of vehicle or load for which a permit could be issued under that section. Moreover, at that time R.C. 4513.34 did not restrict the issuance of special permits to only nondivisible loads. 1983 Op. Att'y Gen. No. 83-049. Thus, pursuant to former R.C. 4513.34, the Director had authority to issue special permits for both divisible and nondivisible loads that exceeded the weight limitations otherwise imposed by state law. Accordingly, as of July 1, 1956, former R.C. 4513.34 authorized the operation in the state of a vehicle or load, whether or not such load was divisible, that exceeded the weight limitations otherwise imposed by state law, so long as the vehicle or load was operated under a special permit issued under former R.C. 4513.34. The current practice of issuing permits under R.C. 4513.34 for divisible loads that exceed weight limitations imposed by state law, having been authorized by state law as of July 1, 1956, is not, therefore, in conflict with the weight limitations imposed upon states by 23 U.S.C.A. § 127(a). 1983 Op. Att'y Gen. No. 83-049 (syllabus, paragraph three).

¹⁰ 23 C.F.R. § 658.5 (1995) states in part:

(1) As used in this part, *nondivisible* means any load or vehicle exceeding applicable length or weight limits which, if separated into smaller loads or vehicles, would:

(i) Compromise the intended use of the vehicle, i.e., make it unable to perform the function for which it was intended;

(ii) Destroy the value of the load or vehicle, i.e., make it unusable for its intended purpose; or

(iii) Require more than 8 workhours to dismantle using appropriate equipment. The applicant for a nondivisible load permit has the burden of proof as to the number of workhours required to dismantle the load.

(2) A state may treat emergency response vehicles and casks designed and used for the transport of spent nuclear materials as nondivisible vehicles or loads.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. R.C. 4513.34, as in effect on July 1, 1956, authorized the Director of Highways, now the Director of Transportation, to issue special permits that were valid for a certain period of time in any circumstances that the Director, in a reasonable exercise of his discretion, determined to be appropriate.
2. The discretion granted to the Director of Highways, now the Director of Transportation, by former R.C. 4513.34, as in effect on July 1, 1956, to issue special permits for a certain period of time was sufficiently broad to accommodate the current scheme of issuing permits for a certain duration, as described in 16 Ohio Admin. Code Chapter 5501:2-1.
3. Because the Director of Highways, now the Director of Transportation, was authorized by former R.C. 4513.34 as in effect on July 1, 1956, to issue special permits for divisible loads, the Director's issuance of such permits at the present time is consistent with the weight limitations imposed by state law as in effect on that date for purposes of 23 U.S.C.A. § 127(a). (1983 Op. Att'y Gen. No. 83-049, syllabus, paragraph three, approved and followed.)