



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 13, 1979

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ATTORNEY GENERAL OPINION NO. 79-205

Mr. J. Patrick Hyland
Washington County Attorney
115 East Third
Washington, Kansas 66968

Re: Roads and Bridges--Unsafe Bridges--Duties of
County Officers

Synopsis: National bridge inspection standards incorporate the recommendation of the American Association of State Highway and Transportation Officials that bridges not capable of carrying three tons should be closed, but there is no specific requirement in federal law that such bridges must be closed.

Kansas law provides that the county engineer has discretion to erect structures sufficient to prevent travel on condemned bridges, but makes no provision for the erection of gates on such bridges by which access may be restricted to certain persons. However, the board of county commissioners may exercise its home rule powers to establish such authority in the county engineer to erect such gates. The exercise of discretion by the board and by the county engineer should be guided by consideration of L. 1979, ch. 186 and the potential liability for damages to which the county is exposed because of that act.

* * *

Dear Mr. Hyland:

You advise that certain Washington County bridges located on county and township roads have been closed following an inspection of bridges conducted pursuant to the 1978 Federal Highway Act.

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You relate that the bridges were closed because they were found to be defective and rated at load limit capacities under three tons, some rated at zero-ton capacity. In response to these findings, the board of county commissioners has inquired whether there are any viable alternatives to condemnation and the closing of the bridges found to be defective, and on behalf of the board you have asked for the opinion of this office in answer to three specific questions.

First, you inquire whether bridges found to have a load limit capacity of less than three tons must be closed to traffic. The bridges in question were inspected as required by the Federal-Aid Highway Act of 1978 (P.L. 95-599, Title I, hereinafter referred to as "the Act"). The Act amends the former law, which provided for inspection and classification of bridges on the federal-aid highway system, by expanding the highway bridge replacement and rehabilitation program to include all bridges, both on-system (the federal-aid highway system) and off-system (i.e., state, county and township roads not part of the federal highway system).

As provided by the Act, national bridge inspection standards have been established by regulations found in the Code of Federal Regulations at 23 CFR 650.301 et seq. (as amended), a copy of which are herewith enclosed. Please note that 23 CFR 650.303 (as amended; see 44 FR 25435, May 1, 1979, enclosed) imposes the following requirement:

"(a) Each highway department shall include a bridge inspection organization capable of performing inspections, preparing reports, and determining ratings in accordance with the provisions of the AASHTO Manual and the Standards contained herein."

That regulation further provides, at subsection (c), as follows:

"(c) Each structure required to be inspected under the Standards shall be rated as to its safe load carrying capacity in accordance with section 4 of the AASHTO Manual. If it is determined under this rating procedure that the maximum legal load under State law exceeds the load permitted under the Operating Rating, the bridge must be posted in conformity with the AASHTO Manual or in accordance with State law."

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The "AASHTO Manual," portions of which you submitted with other materials for our review in conjunction with your request and referred to in the above-quoted regulations, is the "Manual for Maintenance Inspection of Bridges 1978," published by the American Association of State Highway and Transportation Officials. Federal regulations incorporate the rating procedure and engineering standards developed by AASHTO as integral elements of the Federal Highway Administration's National Bridge Inspection Standards. Note that 23 CFR 650.303(c) (as amended) requires that each bridge inspected "shall be rated as to its safe load carrying capacity in accordance with section 4 of the AASHTO Manual." Section 4.7.2 of the Manual sets the following standard:

"No bridge will be limited to a weight of less than three (3) tons. A bridge should be closed if not capable of carrying three (3) tons." (Emphasis added.)

The above-quoted standard is phrased in language directory rather than mandatory. AASHTO recommends that bridges rated at less than a three-ton load limit capacity be closed, but neither the Manual nor the federal regulations into which it is incorporated mandate that the bridge shall be closed. The regulations merely provide that such bridges "must be posted in conformity with the AASHTO Manual or in accordance with State law." 23 CFR 650.303(c), as amended, 44 FR 25435, May 1, 1979. (Emphasis added.)

The only Kansas law we can find applicable to this question is K.S.A. 68-1126, which provides as follows:

"Whenever the county engineer deems any bridge or culvert unsafe for traffic, he shall condemn the same and shall cause to be put up at each end of such structure in a substantial manner a notice, which shall be printed in conspicuous letters with the following words, "condemned by the county engineer," with his signature to same, and shall, if necessary, erect structures sufficient to prevent travel upon such condemned bridge. The county engineer or township trustee shall immediately report the condition of said bridge or culvert to the county or township board,

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as the case may be, with his recommendations as to what improvements are necessary, and such board shall commence at once the proceedings necessary to repair or reconstruct the same."

Stated more concisely, Kansas law vests considerable discretion in the county engineer to determine whether an "unsafe bridge" should be closed to traffic until such time as the board of county commissioners takes action to repair or reconstruct the defective bridge.

We think it important to note, however, that the exercise of the county engineer's discretion in such matters should be guided by consideration of the risk of liability to which the county is exposed by the new Tort Claims Act (L. 1979, ch. 186). The Act provides, at section 3, in pertinent part:

"Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

Two exceptions to that rule of liability, set forth at section 4 of the Tort Claims Act, are relevant to this discussion. Section 4 provides, in part, as follows:

"A governmental entity or an employee acting within the scope of his or her employment shall not be liable for damages resulting from:

. . . .

"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused;

. . . .

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"(g) the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless the same is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity." (Emphasis added.)

Notwithstanding the above-quoted exceptions to tort liability, which provisions have not yet been judicially construed, we think a reasonable argument could be made, and that a court could find, that the county's failure to close a bridge in accordance with the above-quoted AASHTO standard is negligence and should make the county liable for injuries suffered by persons crossing the bridge. Assuming arguendo that the AASHTO standards establish a reasonable standard of care for maintenance by which the county's duty to maintain bridges may be defined, county action or inaction in contravention of those standards would arguably constitute a breach of duty for which the county would be liable in damages.

You next inquire whether under K.S.A. 68-1126, quoted above, the county may construct gates at the ends of condemned bridges in order to allow area residents, farmers and livestock operators to have access to the bridge by issuance of keys to such persons to unlock the gates. Access would be denied all other persons and those persons with keys would waive any claims of county liability.

K.S.A. 68-1126 only empowers the county engineer to "erect structures sufficient to prevent travel" on condemned bridges; the county engineer has no specific statutory authority to erect a gate allowing restricted access to a condemned bridge. Moreover, we note that when the county engineer condemns a bridge, the statute provides that he or she "shall immediately report the condition of said bridge . . . to the county [commissioners] . . . with his [or her] recommendations as to what improvements are necessary, and such board shall commence at once the proceedings necessary to repair or reconstruct the same." (Emphasis added.) In our opinion, the statute imposes

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a positive duty on the board of county commissioners (or the township board, as the case may be): the legislature contemplates repair or reconstruction only, and not continued use of said bridge, once the county engineer condemns it. Accordingly, if the county engineer deems it necessary to prevent travel upon a bridge, the board of county commissioners must proceed to repair or reconstruct said bridge.

Absent any statutory prohibition, however, the board of county commissioners may exercise its home rule power to establish by resolution the requisite authority in the county engineer to erect such gates (see K.S.A. 19-101a et seq.), since K.S.A. 68-1126 imposes no absolute duty upon the county engineer to close a condemned bridge to traffic. Accordingly, the board of county commissioners, in the exercise of its powers of "local legislation and administration," may authorize the county engineer to make other provisions for the routing of traffic across such bridges. We emphasize, however, that the exercise of such authority--by the board or by the engineer--should be guided by consideration of the potential liability to which the county is exposed by the new Tort Claims Act, as discussed above.

Finally, you inquire whether we agree with the conclusion reached by former Attorney General Vern Miller in Attorney General Opinion No. 74-297. The question considered by the Attorney General in that opinion concerned the tax authorized by L. 1974, ch. 102, now codified at K.S.A. 1978 Supp. 68-5,100 (as amended by L. 1979, ch. 52, §166). The Act authorizes the levy of a tax "for the purpose of providing funds for the construction, reconstruction, improvement, repair and maintenance of county roads" after approval by a majority of votes cast in a county election on such proposition. Dickinson County electors voted in favor of the tax, but the proposition before them stated that the funds derived from the levy would be used for roads "and bridges." The question raised was whether the tax was invalidated by inclusion of the phrase "and bridges" on the ballot. The Attorney General concluded that it was not, and we think rightly so. Applying the rule of statutory construction found at K.S.A. 77-201, Fifth, he determined that the term "county roads" includes and refers to public bridges on those roads. Thus, use of the phrase "and bridges" on the ballot "merely clarifies, for the information of the electorate, the uses of the levy which are in fact permitted by law," and does not invalidate the tax. We agree with that conclusion.

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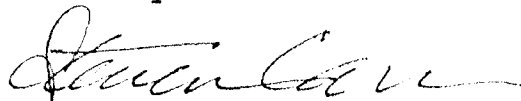
In summary, national bridge inspection standards incorporate the recommendation of the American Association of State Highway and Transportation Officials that bridges not capable of carrying three tons should be closed, but there is no specific requirement in federal law that such bridges must be closed.

Kansas law provides that the county engineer has discretion to erect structures sufficient to prevent travel on condemned bridges, but makes no provision for the erection of gates on such bridges by which access may be restricted to certain persons. However, the board of county commissioners may exercise its home rule powers to establish such authority in the county engineer to erect such gates. The exercise of discretion by the board and by the county engineer should be guided by consideration of L. 1979, ch. 186 and the potential liability for damages to which the county is exposed because of that act.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steven Carr
Assistant Attorney General

RTS:WRA:SC:gk

Enclosures: 23 CFR 650.301 et seq.
44 FR 25435

§ 650.209

Title 23—Highways

Chapte

§ 650.209 Construction.

(a) Permanent erosion and sediment control measures shall be installed at the earliest practicable time consistent with good construction practices.

(b) Temporary erosion and sediment control measures shall be coordinated with permanent measures to assure economical, effective and continuous control throughout the construction phase. Temporary measures shall not be constructed for expediency in lieu of permanent measures specified in the contract.

(c) Erosion and sediment control measures shall be adequately maintained to perform their intended function during construction of the project.

(d) Erosion and sediment control measures necessary because of contractor negligence, carelessness or failure to install contract measures as scheduled shall be installed at no cost to Federal aid funds.

(e) Pollutants used during highway construction or operation and material from sediment traps shall not be stockpiled or disposed of in a manner which makes them susceptible to being washed into any watercourse by runoff or high water. No pollutants shall be deposited or disposed of in watercourses.

Subpart C—National Bridge Inspection Standards

SOURCE: 36 FR 7851, Apr. 27, 1971, unless otherwise noted. Redesignated at 39 FR 10430, Mar. 20, 1974.

§ 650.301 Application of standards.

The National Bridge Inspection Standards in this part apply to all structures defined as bridges located on any of the Federal-aid highway systems. In accordance with Federal-aid Coding Manual Standards and the AASHTO (American Association of State Highway and Transportation Officials) Highway Definitions Manual, a "bridge" is defined as a structure including supports erected over a depression or an obstruction, as water, highway, or railway and having a track or passageway for carrying traffic or other moving loads, and having an

opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines or arches, or extreme ends of openings for multiple boxes; it may include multiple pipes, where the clear distance between openings is less than half of the smaller contiguous opening.

(36 FR 7851, Apr. 27, 1971. Redesignated at 39 FR 10430, Mar. 20, 1974, and amended at 39 FR 29589, Aug. 16, 1974)

§ 650.303 Inspection procedures.

(a) Each highway department shall include a bridge inspection organization capable of performing inspections and preparing reports and determination of ratings in accordance with the provisions of the AASHTO Manual¹ and the standards contained herein.

(b) Bridge inspectors shall meet the minimum qualifications stated in § 650.307.

(c) Each structure required to be inspected under the Standards shall be rated as to its safe load carrying capacity in accordance with section 4 of the AASHTO Manual. If it is determined under this rating procedure that the maximum legal load under State law exceeds the load permitted under the Operating Rating Stress Level, the bridge must be posted in conformity with the AASHTO Manual or in accordance with State law.

(d) Inspection records and bridge inventories shall be prepared and main-

¹The "AASHTO Manual" referred to in this part is the "Manual for Maintenance Inspection of Bridges 1974" published by the American Association of State Highway and Transportation Officials. A copy of the Manual may be examined during normal business hours at the office of each Division Engineer of the Federal Highway Administration, at the office of each Regional Federal Highway Administrator, and at the Washington headquarters of the Federal Highway Administration. The addresses of those document inspection facilities are set forth in Appendix D to Part 7 of the regulations of the Office of the Secretary (49 CFR Part 7). In addition, a copy of the Manual may be secured upon payment in advance of a fee of \$1.50 plus postage by writing to the American Association of State Highway and Transportation Officials, 341 National Press Building, Washington, D.C. 20004.

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§ 650.305

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[36 FR 7851, Apr. 27, 1971. Redesignated at
39 FR 10430, Mar. 20, 1974, and amended at
39 FR 29590, Aug. 16, 1974]

§ 650.305 Frequency of inspections.

(a) Each bridge is to be inspected at regular intervals not to exceed 2 years in accordance with section 2.3 of the AASHTO Manual.

(b) The depth and frequency to which bridges are to be inspected will depend on such factors as age, traffic characteristics, state of maintenance, and known deficiencies. The evaluation of these factors will be the responsibility of the individual in charge of the inspection program.

[36 FR 7851, Apr. 27, 1971. Redesignated at
39 FR 10430, Mar. 20, 1974, and amended at
39 FR 29590, Aug. 16, 1974]

§ 650.307 Qualifications of personnel.

(a) The individual in charge of the organizational unit that has been delegated the responsibilities for bridge inspection, reporting, and inventory shall possess the following minimum qualifications:

(1) Be a registered professional engineer; or

(2) Be qualified for registration as a professional engineer under the laws of the State; or

(3) Have a minimum of 10 years' experience in bridge inspection assignments in a responsible capacity and have completed a comprehensive training course based on the "Bridge Inspector's Training Manual," which has been developed by a joint Federal-State task force and is published by the Department of Transportation.¹

(b) An individual in charge of a bridge inspection team shall possess the following minimum qualifications:

(1) Have the qualifications specified in paragraph (a) of this section; or

(2) Have a minimum of 5 years' experience in bridge inspection assignments in a responsible capacity and have completed a comprehensive

¹The "Bridge Inspector's Training Manual" may be purchased (at a cost of \$2.50) from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

training course based on the "Bridge Inspector's Training Manual," which has been developed by a joint Federal-State task force and is published by the Department of Transportation.

§ 650.309 Inspection report.

The findings and results of bridge inspections shall be recorded on standard forms. The data required to complete the forms and the functions which must be performed to compile the data are contained in section 3 of the AASHTO Manual.

[39 FR 29590, Aug. 16, 1974]

§ 650.311 Inventory.

(a) Each State shall prepare and maintain an inventory of all bridge structures subject to the Standards. If a State wishes to expand the inventory to include structures not subject to the Standards, the bridges which are subject to the Standards shall be separately identifiable in the records.

(b) Under the Standards certain structure inventory and appraisal data must be collected and retained within the various departments of the State organization for collection by the Federal Highway Administration as needed. A tabulation of these required data is contained in the structure inventory and appraisal sheet distributed by the Federal Highway Administration along with its Coding Guide in July of 1972. Annual reporting procedures will be developed by the Federal Highway Administration in consultation with the State highway departments.

(c) The inventory shall be completed for all bridges on any Federal-aid highway system over waterways and other topographical barriers as required by section 204(a) of the Federal-Aid Highway Act of 1970 (23 U.S.C. 144) no later than July 1, 1972. All other bridges on the Federal-aid system, such as grade separations and railroad crossings, must be completely inventoried by July 1, 1973. Newly completed structures or any modification of existing structures which would alter previously-recorded data on the inventory forms shall be entered in the State's records within 90 days.

ADDRESS: Anyone wishing to submit written comments may do so, preferably in triplicate, to FHWA Docket No. 79-2, Federal Highway Administration, Room 4205, HCC-10, 400 Seventh Street, SW., Washington, D.C. 20590. All comments and suggestions received will be available for examination at the above address between 7:45 a.m. and 4:15 p.m. ET, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley Gordon, Bridge Division (202/472-7697), or Mrs. Kathleen S. Markman Office of the Chief Counsel, (202/428-0348), Federal Highway Administration, United States Department of Transportation, Washington, D.C. 20590. Office hours from 7:45 a.m. to 4:15 p.m. ET, Monday-Friday.

SUPPLEMENTARY INFORMATION: On November 6, 1978, the President signed into law the Surface Transportation Assistance Act of 1978, Pub. L. 95-599, 92 Stat. 2689. Section 124 of the Act amended 23 U.S.C. 144 which necessitates an amendment of the regulations regarding the national bridge inspection standards. The amendment provides that all bridges located on all public roads must be inventoried. Formerly, the standards applied only to bridges on the Federal-aid system. Technical revisions regarding the publication of the Bridge Inspector's Training Manual are also included in this document.

In consideration of the foregoing, the Federal Highway Administration hereby amends Subpart C of Part 650, Chapter I of Title 23, Code of Federal Regulations as set forth below:

1. Section 650.301 is amended to read as follows:

§ 650.301 Application of standards.

The National Bridge Inspection Standards in this part apply to all structures defined as bridges located on all public roads. In accordance with the AASHTO (American Association of State Highway and Transportation Officials) Highway Definitions Manual, a "bridge" is defined as a structure including supports erected over a depression or an obstruction, such as water, highway, or railway, and having a track or passageway for carrying traffic or other moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of openings for multiple boxes; it may also include multiple pipes, where the clear distance between openings is less

than half of the smaller contiguous opening.

§ 650.303 [Amended]

2. Paragraph (a) of § 650.303 is amended to read as follows:

(a) Each highway department shall include a bridge inspection organization capable of performing inspections, preparing reports, and determining ratings in accordance with the provisions of the AASHTO Manual¹ and the Standards contained herein.

3. Paragraph (c) of § 650.303 is amended to read as follows:

(c) Each structure required to be inspected under the Standards shall be rated as to its safe load carrying capacity in accordance with section 4 of the AASHTO Manual. If it is determined under this rating procedure that the maximum legal load under State law exceeds the load permitted under the Operating Rating, the bridge must be posted in conformity with the AASHTO Manual or in accordance with State law.

§ 650.307 [Amended]

4. Paragraph (a)(3) of § 650.307 is amended to read as follows:

(a) * * *

(3) Have a minimum of 10 years experience in bridge inspection assignments in a responsible capacity and have completed a comprehensive training course based on the "Bridge Inspector's Training Manual,"² which has been developed by a joint Federal-State task force.

5. Paragraph (b)(2) of § 650.307 is amended to read as follows:

(b) * * *

(2) Have a minimum of 5 years experience in bridge inspection assignments in a responsible capacity

¹ The "AASHTO Manual" referred to in this part is the "Manual for Maintenance Inspection of Bridges 1978" published by the American Association of State Highway and Transportation Officials. A copy of the Manual may be examined during normal business hours at the office of each Division Administrator of the Federal Highway Administration, at the office of each Regional Federal Highway Administrator, and at the Washington Headquarters of the Federal Highway Administration. The addresses of those document inspection facilities are set forth in Appendix D to Part 7 of the regulations of the Office of the Secretary (49 CFR Part 7). In addition, a copy of the Manual may be secured upon payment in advance by writing to the American Association of State Highway and Transportation Officials, 444 N. Capitol Street, NW., Suite 225, Washington, D.C. 20001.

² The "Bridge Inspector's Training Manual" may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

and have completed a comprehensive training course based on the "Bridge Inspector's Training Manual," which has been developed by a joint Federal-State task force.

6. Section 650.311 is amended to read as follows:

§ 650.311 Inventory.

(a) Each State shall prepare and maintain an inventory of all bridge structures subject to the Standards. Under these Standards, certain structure inventory and appraisal data must be collected and retained within the various departments of the State organization for collection by the Federal Highway Administration as needed. A tabulation of this data is contained in the structure inventory and appraisal sheet distributed by the Federal Highway Administration as part of the Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges (Coding Guide) in January of 1979. Reporting procedures have been developed by the Federal Highway Administration.

(b) All bridges subject to these Standards shall be inventoried by December 31, 1980, as required by section 124(a), and (c) of the Surface Transportation Assistance Act of 1978. Newly completed structures or any modification of existing structures which would alter previously recorded data on the inventory forms shall be entered in the State's records within 90 days.

Note.—The Federal Highway Administration has determined that this document does not contain a significant proposal according to the criteria established by the Department of Transportation pursuant to E.O. 12044.

(23 U.S.C. 144, 116(d), 315; 49 U.S.C. 1655; 23 CFR 1.48(b)).

Issued on April 17, 1979.

John S. Hassell, Jr.,
Deputy Administrator.

[FHWA Docket No. 79-2]
[FR Doc. 79-13435 Filed 4-30-79; 8:45 am]

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