

**Department of Public Safety
Final Response
Response to Public Comments
Transmittal Memorandum
January 14, 2014**



Driver and Vehicle Services

Post Administrative Hearing for Motorcycle Road Guard Certificate Program

OAH: 8-2400-22867 ~ RD 4088

Judge Eric L. Lipman Presiding

Comment Period December 18, 2013 – January 7, 2014, 4:30 P.M.

Rebuttal Period January 7, 2014 – January 14, 2014 4:30 P.M.

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

Introduction

The Department of Public Safety is sensitive to important efforts by various organizations to support charitable efforts in behalf of Minnesota residents, and others who are in need. “While sensitive to the importance of charitable, recreational, and sport, activities, the Department has the responsibility to monitor, maintain, and enforce laws and rules that prioritize public safety.”¹ It is also important to note, “...there is no requirement for any entity to use certified road guards. They {road guards} can comply with traffic regulations – as currently required. Those currently controlling intersections are doing so illegally and in violation of MSS 169.34.”²

Need and Reasonableness Affirmation

The Department has carefully considered the public testimony relating to the proposed Motorcycle Certificate Road Guard Program, and asserts that the proposed rules submitted to the Office of Administrative Hearings and to Judge Eric Lipman, are reasonable and necessary. The Department has provided rationale and justification in the Statement of Need and Reasonableness (SONAR), submitted for the record, as Exhibit D, wherein we address each Part and Subpart of the proposed rules for the Motorcycle Road Guard Certificate program. The Department has now considered the comments, and provides further clarification regarding certain Parts and Subparts of the proposed rules. The Department provides these clarifications and some adjustments without altering the meaning, and substance of the rules as proposed in the record.

Clarification and Possible Adjustment Areas

This document will provide important information about certain parts of the rules and highlight the areas where slight adjustments to current language will address public concerns, and preserve the meaning and intent of the rules as proposed in the SONAR. The Department has limited its preliminary responses to the areas of concern, which the public shared at the hearing, or raised in comments received prior to the public hearing. The testimony read into the record by the DVS rules and legislation coordinator is included as an attachment to this memorandum³. In addition, members of the Departments panel, who attended the hearing, have provided preliminary responses, targeted to questions where more clarification might be useful to increase public understanding.

The table that follows identifies a part of the rule that generated a question from the public, provides an actual comment shared by the public or the Department’s summary of comments about a particular topic. Department panelists, who attended the hearing, provide clarifications in the last column of the table, in support of the justification of the proposed rule.

¹ Major Nancy Silkey, Minnesota State Patrol.

² Lt. Robert Zak, Minnesota State Patrol.

³ Helen Bassett Testimony Motorcycle Road Guard Administrative Hearing. December 18, 2013. See Document 1

attached to this transmittal memorandum

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

Clarifications/adjustments or slight changes are noted in red ink and underlined.
Strikeout means the language is proposed to be stricken from the proposed rule.

Current Part/Subpart	Public Comment ⁴	DPS clarification/justification
7422.0100. Definitions. Subpart 16.		<p>A slight correction in the definition adds 107-2010 as an additional option in standards.</p> <p>Supb. 16. For the purposes of this chapter, “ANSI/<u>ISEA 107-2004</u> or <u>ANSI/ISEA 107 -2010</u> standard” means the standard for the design and performance of high-visibility apparel that is developed by the International Safety Equipment Association (ISEA), and published by the American National Standards Institute (ANSI), required under 7422.1100.</p>
7422.0200, Subpart 1. Statutory authority. Items D. and E. “Obtain consent from the chief of police, or the chief’s designee, of any city of the first class through which the group is proceeding; and, “notify each statutory or home rule charter city through which the motorcycle group is proceeding.”	Public comments arose regarding the difficulty of always planning a route and following through because of the spontaneous nature of some of the group rides.	<p>Minnesota Laws, 2012, Chapter 287, article 3, section 27 amends Minnesota Statutes Chapter 169.06, subdivision 4. To provide authority for the road guard to function as a flagger, and requires the road guard to meet provisions in item (g). Sub-items 1-5; including the notice requirements to local police chiefs, through which the group ride is proceeding and to fulfill traffic control, duties as a flagger.</p> <p>DPS Response: The requirement for route notification is in statute and DPS has no authority to change this requirement to provide notice.</p> <p>DPS Comment: The slight change that follows this statement in Item B, clarifies that a road guards primary function is that of flagger during the group ride.</p> <p>Subpart 1. Statutory authority. A motorcycle road guard who is certified by the commissioner is authorized under Minnesota Statutes, section 169.06, subdivision 4 and successor requirements, to: A. stop and hold vehicles in place until it is safe for vehicles to proceed;</p>

⁴ Note: Where multiple individuals expressed the same concern, we list only one representative comment, and addresses the comments collectively.

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

<p>7422.0200, Subpart 3 (a) and (c) Liability insurance restrictions;</p>	<p>“The additional liability insurance for the ride and for the road guards would be enough to put a good share of upstanding organizations out in the cold.....I investigated the cost of liability insurance with an agent that works with many companies none of these companies were within a cost what would allow us to take care of our charities.”⁵</p>	<p>B. act as a flagger for escorting a motorcycle group ride; and C. direct operators of motorcycles within a motorcycle group ride or other vehicle traffic, notwithstanding any contrary indication of a traffic-control device, including stop signs or traffic-control signals; and must: D. obtain consent from the chief of police, or the chief’s designee, of any city of the first class through which the group is proceeding; and E. notify each statutory or home rule charter city through which the motorcycle group is proceeding.</p> <p>DPS Response: DPS clarifies that only the road guard must have liability insurance coverage. Either the road guard or the entity/organization sponsoring the group ride may purchase the liability coverage for the road guard. Each participant on the group ride would continue to be required to carry their own liability insurance however; the individual functioning in the capacity of the road guard must have explicit liability insurance coverage. A road guard directing traffic and functioning in that capacity on behalf of the entity must have liability coverage over and above their own individual policy. This should reduce the concerns of sponsoring organizations or entities regarding cost prohibitions to cover each individual along for the group ride.</p> <p>Proposed clarification: Subpart 3. Restrictions. <u>Subp. 3. Restrictions.</u> In order for a motorcycle road guard to stop and hold traffic for escort a motorcycle group ride, the motorcycle group ride must be an organized gathering of motorcyclists of at least 20 motorcyclists that:</p> <p>A. is sponsored by an entity a road guard must have liability insurance in force all participants and organizers in order to escort stop and hold traffic</p>
---	--	--

⁵ Richard J. Martin, Sr. Testimony provided at the Motorcycle Road Guard Administrative Hearing. December 18, 2013. See Exhibit T at: <https://dps.mn.gov/divisions/dvs/news/Documents/7422-MC-Road-Guard-Exhibit-T.pdf>

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

		<p>for a motorcycle group ride that is following a route in accordance with the notification provided under Minnesota Statutes, Section 169.06, subdivision 4; B. is riding only in daytime hours; and C. complies with the Minnesota Manual on Uniform Traffic Control Devices, authorized under Minnesota Statutes, Section 169.06, Subdivision 1.</p> <p>Subpart 4. Requirement to produce proof of insurance.</p> <p>A. A motorcycle road guard must:</p> <ol style="list-style-type: none"> (1) Carry proof of liability insurance required under subpart 3; and (2) Produce proof of such insurance on demand of a peace officer.
<p>7422.0500. Subpart 1. Issuance A. Road guard certificate issuance and recertification.</p>	<p>The cost and inconvenience of getting recertified every two years was raised as a concern. "Some groups only do one group ride a year."</p>	<p>DPS Response: The Department believes that lengthening the certification period does not alter the meaning of the proposed rule.</p> <p>Proposed adjustment: Item A. Upon successful completion of the motorcycle road guard course and payment by an applicant of the program course fee under part Minnesota Rules, Part 7422.0900, the commissioner shall issue a motorcycle road guard certificate for a period of two four years. There is no automatic renewal for a motorcycle road guard certificate.</p>
<p>7422.0600. Alcohol and controlled substance use prohibition, violation. Subpart 1. Item A. – B.</p>	<p>Public comment. "The alcohol consumption prohibitions are vague," what is the standard, how much time must elapse before a person can function as a road guard?</p>	<p>DPS Response: The Department wishes to apply the same standard for motorcycle road guards as is set in Minnesota Statutes, Section 169A.31 ALCOHOL-RELATED SCHOOL BUS OR HEAD START BUS DRIVING.</p> <p>Subdivision 1. Crime described. It is a crime for any person to drive, operate, or be in physical control of any class of school bus or Head Start bus within this state when there is physical evidence present in the person's body of the consumption of any alcohol.</p> <p>Proposed adjustment: Subpart 1. Prohibition of alcohol consumption and controlled substances use. A person who holds a motorcycle road guard certificate shall not perform</p>

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

		<p>the duties of a motorcycle road guard, either while operating a motor vehicle or while standing in, or in proximity to, an intersection, under Minnesota Rules, Part 7422.0200:</p> <p style="padding-left: 40px;">“A. while consuming alcoholic beverages or while using controlled substances; or, B. after having consumed alcoholic beverages or after having used controlled substances.”</p> <p>MSS 169A.31 Describes alcohol-related school bus or head start driving. The same standard is allowed in the new proposed subpart below.⁶</p> <p><u>Subpart 2. Crime described. It is a crime for any person functioning as a road guard, to drive, operate, or be in physical control of a motor vehicle within this state where there is physical evidence present in the person’s body of the consumption of any alcohol.</u></p> <p>Subpart 2 3. Use of preliminary screening test.</p>
7422.0900 Course Fee	Cumulative comments from the public expressed concern about the prohibitive effect of the rules due to the cost of functioning as a road guard, when the costs for equipment, class room instruction, insurance and the certificate fee is calculated.	<p>DPS Response: The estimated costs of training and for equipment are nominal. See additional information on program costs for equipment in section 7422.1100; and in the Document # 3, attachment to this transmittal memorandum.</p> <p>Estimate of Training Costs DPS anticipates that training which consists of a three-hour, three-section course, would cost \$ 30.00⁷.</p>
7422.1100 Flagging Equipment; Apparel requirements. .	A number of comments were made about the impractical nature of the equipment. The stop/slow paddle and the safety vest and pants were of particular concern. An “18 x 18 paddle is too large. It is cumbersome and difficult to handle.”	<p>DPS Response: A motorcycle road guard’s primary function is to escort a group of riders and to function as a flagger who stops and controls traffic at intersections. Rules required by the Legislature allow for training and certification.</p> <ol style="list-style-type: none"> 1. Ensuring the efficient accomplishment of their function with maximum safety consideration to flaggers and motorists remains priority. 2. Traffic control direction and compliance requires adequate visibility and signage to pre-warn, direct and control traffic. Controlling traffic at intersections generates inherent safety risks to the flagger and

⁶ Debra Carlson, DPS, Driver Exam, Manager.

⁷ William Shaffer, Program Administrator, Department of Public Safety Office of Traffic Safety, Minnesota Motorcycle Safety Center (MMSC). See Document 3 attached to this Memorandum.

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

	<p>“A group ride is fluid and not like a construction site or a parade.” “In addition, the safety pants will melt when up against the hot exhaust pipe.”⁸</p>	<p>motorists.</p> <p>a. Flaggers are low profile and may present with limited visibility to drivers approaching intersections.</p> <p style="padding-left: 20px;">i. High visibility flagging signage equipment and safety apparel increase visibility to oncoming traffic and driver recognition of a flagger.</p> <p>b. A flagger’s normal station is on the shoulder of the road, not in or on their vehicle or motorcycle while flagging.⁹</p> <p>Estimated Equipment Costs</p> <ul style="list-style-type: none"> • Checking with vendors on the internet resulted in finding that a “discount ANSI 2 vest” yielded a vest for 4.02 each from Enviro Safety Products, and by calling 1.800.637.6606. • An Internet search for more information on “discount ANSI pants” yielded one for pair of ANSI 2 rain pants for \$16.00 from Discount Safety Gear by calling 1.877.734.2458.¹⁰ (Safety pants are optional, and cost information is included to provide additional context). • Suppliers in Fergus Falls sourced the stop/slow paddle shown as in Exhibit L1 – L3, for \$74.00¹¹ <p>Proposed adjustment: DPS will revise the following to Part 7422.1100: Subpart 1. Flagging equipment. A motorcycle road guard who is performing traffic control in accordance with part 7422.0200 must use a STOP/SLOW paddle that:</p> <ul style="list-style-type: none"> A. has an octagonal shape; B. is at least 18 inches wide with letters at least 6 inches high; C. on the STOP face, has white letters and white border on a red background; D. on the SLOW face, has black letters and a black border on an orange background; E. is retro-reflective; and
--	--	---

⁸ Jim Woodruff, public testimony, December 18, 2013. See Exhibit R at:

<https://dps.mn.gov/divisions/dvs/news/Documents/7422-MC-Road-Guard-Exhibit-R.pdf>

⁹ Major Nancy Silkey, Minnesota State Patrol. See additional comments regarding safety and traffic control presented by Major Silkey in Document 4 Attached to this Memorandum.

¹⁰ Part 7422.1100, Subp. Required high-visibility safety apparel. The safety pants requirement is omitted.

¹¹ William Shaffer, Program Administrator for the Minnesota Motorcycle Safety Center, DPS Office of Traffic Safety. See additional rationale on program costs in Document 3 of this Memorandum.

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

		<p>F. E. A collapsible STOP/SLOW paddle that meets the requirements of items A. – D.F. may be used.</p> <p>Subpart 2. A motorcycle road guard must wear the following high visibility apparel when acting as a flagger and performing traffic control in accordance with part 7422.1000 and 7422.1100:</p> <p style="padding-left: 40px;">A. a safety vest; shirt, jacket labeled as meeting the ANSI standard listed in 7422.1100 Subp. 3.; and</p> <p style="padding-left: 40px;">B. safety pants during low-visibility situations, low light conditions, or inclement weather.</p> <p style="padding-left: 40px;">C. B. T the apparel in item A. must be orange-red, fluorescent yellow-green, or a combination of the two as defined in the ANSI standard.</p> <p style="padding-left: 40px;">D. the retro-reflective material of the apparel in items A. – B must be orange, yellow, white, silver, yellow-green, or a fluorescent version of these colors and must be visible at a minimum distance of 1,000 feet.</p> <p style="padding-left: 40px;">E. a shirt or jacket may be substituted for a vest provided that it meets the color and visibility requirements of this subpart.</p> <p>DPS response. DPS will omit the requirement of the safety pants, as required safety apparel, and will instead recommend their use as part of the coursework. The 18” STOP/SLOW paddle is collapsible and is the identified hand-signaling device approved for flagging operations, under the Minnesota Manual on Uniform Traffic Control MN-MUTCD. Road guards may make their own paddles, which must meet the prescribed requirements described in the MUTCD. The retro-reflective characteristic is only required at night. Road guards may not control traffic at night. Retro-reflectivity requirement is not necessary.¹² Subp. 3.ANSI/ISEA 107-2004 or 107-2010 requirement. A motorcycle road guard who is acting as a flagger and performing traffic control in accordance with part 7422.0200 must wear high-</p>
--	--	---

¹² Kenneth Johnson, MNDOT, State Work Zone Engineer.

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

	<p>Other comments of the public (including Mr. Toninato), suggested that utilization of the same standard or protocol currently in use by individuals escorting funeral processions should be considered for adoption by DPS for road guard signage.</p>	<p>visibility safety apparel that meets the performance Class 2 or 3 requirements of the ANSI/ISEA 107-2004 or 107-2010 publication entitled “American National Standard for High-Visibility Apparel and Headwear” and labeled as meeting the ANSI/ISEA 107-2004 or 107-2010 standard performance for Class 2 or 3 risk exposure. Copies of the ANSI/ISEA Standards are available at https://www.safetyequipment.org/profile-acct/index.cfm?action=store.main. This standard is not subject to frequent change. A copy of the standard is available at the U.S. Department of Transportation, Federal Highway Administration, 1300 New Jersey Avenue, SE, Washington, D.C., 20590, or on the Internet at http://muted.fhwa.dot.gov/resources/interpretations/pdf/6-09-12.pdf.</p> <p>Funeral Procession Lights Comparison: Minnesota Statutes, Section (MSS)169.64 PROHIBITED LIGHTS; EXCEPTIONS. Subdivision 3. Flashing Lights. “All flashing warning lights shall be of the type authorized by section 169.59, subdivision 4., unless otherwise permitted or required in this chapter.”</p> <p>MSS 169.20 Right of Way. Subdivision 6. Funeral procession. This section describes how funeral processions are governed with regard to traffic right of way. This type of provision is not provided under MSS 170.60 for motorcycle road guards, and an exception would need to be added to MSS 169.20 for motorcycle road guards.</p> <p>DPS/DOT Response: MSS 169.06, Subd.4 (g) “authorizes the motorcycle road guard to control traffic, and the road guard field guide (identified in the Rule as part of the curriculum) is intended to be the standard of performance for road guards. Technically, the statute does not define specifically how the traffic control is supposed to be done – so if flaggers or road guards don’t follow the standard of performance, <i>it’s not directly illegal; however,</i></p>
--	--	--

*Administrative Hearing for Motorcycle Road Guard Certificate Program
Preliminary Post-Hearing Comments
Judge Eric L. Lipman Presiding*

		<p><i>not following the standard of care opens them up to legal liability.”¹³</i></p> <p>DPS does not have the authority to make an addition to MSS 169.64, to allow a road guard to fall under this statute. DPS does not recommend seeking a statutory change.</p>
--	--	---

Department Panelists

Mr. Joseph Newton, Legal Counsel, Minnesota Department of Public Safety (DPS)
Ms. Patricia McCormack, Director, Driver and Vehicle Services (DVS), Department of Public Safety
Ms. Debra Carlson, Driver Exam Program Manager, (DVS)
Ms. Donna Berger, Program Director, Department of Public Safety Office of Traffic Safety (OTS)
Mr. William Shaffer, Program Administrator, Minnesota Motorcycle Safety Center (MMSC) (DPS) (OTS)
Ms. Helen Bassett, DVS, Rules and Legislation Coordinator
Mr. Kenneth Johnson, Work Zone Engineer, Minnesota Department of Transportation (MNDOT)
Lt. Robert Zak, Minnesota State Patrol
Major Nancy Silkey, Minnesota State Patrol

The documents below are appendices to the transmittal memorandum.

Appendices

Document 1. Testimony of Helen Bassett, DVS Rules and Legislation Coordinator
Document 2. Statement of Kenneth Johnson, MNDOT
Document 3. Statement of William Shaffer, MMSC
Document 4. Statement of Major Nancy Silkey, MN State Patrol
Document 5. Summary of DPS Panelist Background

¹³ Kenneth E. Johnson, Minnesota Department of Transportation, Work Zone Engineer, Public testimony and statement. See Document 2 attached to this memorandum.