MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
Saint Paul, Minnesota 55101

Mailing Address:
P.O. Box 64620
St. Paul, Minnesota 55164-0620

Voice: (651) 361-7900
TTY: (651) 361-7878
Fax: (651) 361-7936

February 20, 2014

Helen J.M. Bassett
Rules and Legislation Coordinator
Minnesota Department of Public Safety
445 Minnesota St
Saint Paul, MN 55101

Re: ***In the Matter of the Proposed Rules Governing Motorcycle Road Guard Certification and Qualification Requirements***
OAH 8-2400-22867; Revisor R-4088

Dear Ms. Bassett:

Enclosed please find the Order of the Chief Administrative Law Judge in the above-entitled matter and the Order of Administrative Law Judge Eric L. Lipman. The Agency may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Judge reconsider the disapproval.

If the Agency chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the agency must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any further questions, please contact Denise Collins of our office at 651-361-7875.

Sincerely,

Eric L. Lipman

Eric L. Lipman
Administrative Law Judge

Enclosure
cc: Office of the Governor
Office of the Attorney General
Office of the Revisor of Statutes (paul.marinac@revisor.mn.gov)
Legislative Coordinating Commission

[22052/1]

OAH 8-2400-22867
Revisor R-4088

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules Governing Motorcycle Road Guard Certification and Qualification Requirements; Minnesota Rules, Chapter 7422

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minnesota Rules, part 1400.2240, subpart 4. Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge, dated February 13, 2014, in all respects.

In order to correct the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall either take the action recommended by the Administrative Law Judge, make different changes to the rule to address the defects noted, or submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minnesota Statutes, section 14.15, subdivision 4.

If the agency chooses to take the action recommended by the Administrative Law Judge, or if the agency chooses to make other changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the *State Register*, the agency's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated this 20th day of February, 2014

TAMMY L. PUST
Chief Administrative Law Judge

[21831/1]

OAH 8-2400-22867
Revisor R-4088

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules Governing Motorcycle Road Guard Certification and Qualification Requirements; Minnesota Rules, Chapter 7422

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on December 18, 2013. The public hearing was held in Room 300 South of the State Office Building in Saint Paul, Minnesota.

The Minnesota Department of Public Safety (DPS or the Department) proposes to promulgate a new rule chapter that will include administrative, safety, equipment, curriculum and certification standards for the Motorcycle Road Guard Program (MRGP).

The Department's regulatory purpose is to "increase safety for motorcycle riders and their passengers who engage in group ride activities, for sport, charity, and recreational purposes."[1]

The Department's proposal to add new insurance and equipment requirements were controversial among several of Minnesota's charitable organizations. These organizations had successfully organized and completed group motorcycle rides for the purpose of raising funds for local charities and service organizations.[2]

The rulemaking hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[3] The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

---

[1] Ex. D at 2 (Statement of Need and Reasonableness or SONAR).

[2] *See,* Ex. I.

[3] *See,* Minn. Stat. §§ 14.131 through 14.20.

The agency must establish that the proposed rules are within the agency's statutory authority; that the rules are needed and reasonable; and that any modifications that the agency made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[4]

Approximately 32 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Twenty-one members of the public made statements or asked questions of the agency panel during the hearing.[5]

The agency panel at the public hearing included E. Joseph Newton, General Counsel, Department of Public Safety; Helen Bassett, Driver and Vehicle Services, Rules and Legislation Coordinator; Donna Berger, Director, Office of Traffic Safety, Minnesota Department of Public Safety; Debra Carlson, Driver Exam Program Manager, Department of Public Safety; Kenneth Johnson, Work Zone Engineer, Minnesota Department of Transportation; Patricia McCormack, Director, Driver and Vehicle Services, Department of Public Safety; William Shaffer, Program Administrator, Minnesota Motorcycle Safety Center, Department of Public Safety; Major Nancy Silkey, Minnesota State Patrol; Amanda Spuckler, Management Analyst, Department of Public Safety; and Lieutenant Robert Zak, Minnesota State Patrol.[6]

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until Tuesday, January 7, 2014 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[7] The hearing record closed on Tuesday, January 14, 2014.

SUMMARY OF CONCLUSIONS

The Agency has established that it has the statutory authority to adopt the proposed rules, that it followed the required rulemaking procedures and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

---

[4] Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

[5] HEARING ROSTER, at 1-4; DIGITAL RECORDING OF RULEMAKING HEARING (December 18, 2013).

[6] *See,* DEPARTMENT'S POST-HEARING REBUTTAL COMMENTS, OAH 2400-22867, at 10 (January 14, 2014).

[7] *See,* Minn. Stat. § 14.15, subd. 1.

FINDINGS OF FACT

I. Rulemaking Authority

1. The Agency cites Minn. Stat. § 171.60 as its source of statutory authority for these proposed rules. This statute provides in relevant part:

> Subdivision 1. Certificate required. No person may perform traffic control as a motorcycle road guard as provided under chapter 169 without a valid motorcycle road guard certificate issued by the commissioner.
>
> Subd. 2. Certification qualifications and standards. Through the Minnesota Motorcycle Safety Center, the commissioner of public safety shall:
>
> > (1) establish qualifications and requirements for a person to obtain a motorcycle road guard certificate under this section, which must include:
> >
> > > (i) a minimum 18 years of age;
> > >
> > > (ii) possession of a valid driver's license; and
> > >
> > > (iii) successful completion of a motorcycle road guard certification course;
> >
> > (2) develop and offer, whether by the Minnesota Motorcycle Safety Center or authorized agents, a motorcycle road guard certification course; and
> >
> > (3) establish safety and equipment standards for a person who operates under a motorcycle road guard certificate, including but not limited to specifying requirements for a reflective safety vest.
>
> ....
>
> Subd. 5 Rulemaking. The commissioner of public safety shall adopt rules to carry out the provisions of this section....[8]

2. Following a review of the rule text and Minn. Stat. § 171.60, the Administrative Law Judge concludes that the Agency has the statutory authority to adopt the proposed rules.

---

[8] Minn. Stat. § 171.60.

II. Procedural Requirements of Chapter 14

A. Publication and Filings

3. On June 25, 2012, the Department published in the *State Register* a Request for Comments seeking comments on possible amendments to the state's motorcycle road guard program.[9]

4. On October 18, 2013, the Department filed documents with the Office of Administrative Hearings seeking review and approval of its Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice) and its additional notice plan. By way of an Order dated October 21, 2013, the Dual Notice and additional notice plan were approved.[10]

5. On November 4, 2013, the Department published a Dual Notice of Intent to Adopt Rules in the *State Register*. The Dual Notice set December 6, 2013 as the deadline for comments or to request a hearing.[11]

6. On October 25, 2013, the Department mailed a copy of the Dual Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. On the same date, it sent electronic notices to the persons and associations identified in the additional notice plan.[12]

7. On October 24, 2013, the Department mailed a copy of the Dual Notice and the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over transportation and road safety.[13]

8. On October 24, 2013, the Department mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.[14]

9. The Notice of Hearing identified the date and location of the hearing in this matter.[15]

---

[9] Ex. A; 36 *State Register* 1622 (June 25, 2012).

[10] Ex. H.

[11] Ex. F.

[12] Ex. G.

[13] Ex. K-3.

[14] Ex. E.

[15] Exs. F and K-5.

10. At the hearing on December 18, 2013, the Department filed copies of the following documents as required by Minn. R. 1400.2220.[16]

B. Additional Notice Requirements

11. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

12. On October 24, 2013, the Department provided the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- The Dual Notice of Intent to Adopt Rules was posted on the Department's website and the Department has maintained these materials continuously since they were posted.
- Notice of the rulemaking was sent by first class mail to the notice list the Department maintains pursuant to Minn. Stat. § 14.14.
- A copy of the Dual Notice of Intent to Adopt and the proposed rules was sent by electronic mail to a wide-ranging set of associations of motorcycle riders, driver safety groups and law enforcement organizations as detailed in its Additional Notice Plan.
- Agency staff shared drafts with members of an Advisory Group that it empaneled – the Motorcycle Road Guard Advisory Committee.[17]

C. Notice Practice

13. The Department queried its program managers to identify potentially interested persons and associations. It included these persons and groups on its list to receive notices of DPS's plans to propose rules for the motorcycle road guard certificate program.[18]

14. The Administrative Law Judge concludes that the Department fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6, to mail the Dual Notice "at least 33 days before the end of the comment period" to potential stakeholders.[19]

---

[16] Exs. A through N.

[17] Ex. D at 4-7.

[18] *Id.* at 7.

[19] Exs. F and G.

15. The Administrative Law Judge concludes that the Department fulfilled its responsibilities, to mail the Dual Notice "at least 33 days before the end of the comment period" to designated legislators.[20]

16. The Administrative Law Judge concludes that the Department fulfilled its responsibilities, to make the Statement of Need and Reasonableness available for "at least 30 days following the notice ... [to] afford the public an opportunity to request a public hearing and to submit data and views on the proposed rule in writing."[21]

D. Impact on Farming Operations

17. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register.*

18. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Department was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

19. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness.[22] Those factors are:

(a) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(b) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(c) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(d) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

---

[20] Exs. F and K-3.

[21] Ex. G; *see also,* Minn. Stat. § 14.23.

[22] Minn. Stat. § 14.131.

(e) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(f) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

(g) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

(h) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.[23]

1. The Agency's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

20. The Department asserts that among those who are likely to be affected by the proposed rules are "motorcycle enthusiasts, individuals interested in holding road guard certification [and] entities providing instructional staff and materials" regarding the rules.

21. The Department does not know, nor does it forecast, the number of persons who will later seek certification as a motorcycle road guard.[24]

(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

22. Minn. Stat. § 171.60, subd. 3, requires that the Department "assess a fee for each applicant for a motorcycle road guard certificate, calculated to cover the commissioner's cost of establishing and administering the program."[25]

---

[23] Minn. Stat. § 14.131.

[24] Ex. D at 7.

[25] Minn. Stat. § 171.60, subd. 3.

23. While the Department does not forecast the number of persons who will later seek certification as a motorcycle road guard, it does predict that it will be able to administer the certification program within its existing staff compliment and cover overall program administration costs through the proposed certification fees.[26]

24. It predicts that that the overall program costs and impact upon state revenues will be minimal.[27]

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

25. The Department concluded that there was no less costly or less intrusive method of fulfilling the mandate to "adopt rules" to carry out Minn. Stat. § 171.60.[28]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

26. The Department concluded that there was no alternative method of fulfilling the mandate to "adopt rules" to carry out Minn. Stat. § 171.60.[29]

27. As to the substance of the proposed standards, however, the Department did consider different methods of controlling traffic at intersections, requirements for training and techniques for implementing the proposed rules. Moreover, in response to stakeholder comments, the Department proposed additional revisions so as to improve the performance of the Motorcycle Road Guard certification program.[30]

(e) The probable costs of complying with the proposed rules.

28. The Department forecasts that in addition to the certification fee, the costs of complying with the new rule may be "costs associated with the purchase of safety equipment, such as vests, and flagging equipment" and "classes required for certification." In each instance, the Department projects that these costs will be nominal.[31]

---

[26] Ex. D at 8.

[27] *Id.*

[28] *Compare,* Ex. B at 8 *with* Minn. Stat. § 171.60.

[29] *Id.*

[30] Ex. D at 5–6; *see also,* DEPARTMENT'S POST-HEARING REBUTTAL COMMENTS, at 3–9.

[31] Ex. D at 8–9.

29. The Department further projects that there will be insurance costs that, under the proposed rule, will be borne by the entity sponsoring the event.[32]

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

30. The Department asserts that if the proposed standards are not adopted that there could be significant public safety impacts. The Department states that "traffic delays and confusion at intersections in cities where group rides occur can negatively impact cities and increase crash potential." Moreover, when motorcycle crashes do occur "damage to property and potential loss of life represent significant costs including the loss of productivity as a result of injury, or the loss of income to the family of a loved-one can be dramatic."[33]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

31. The Department states that there are no known federal regulations that address state certification of Motorcycle Road Guards.[34]

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

32. As noted above, the Department states that there are no known federal regulations that address state certification of Motorcycle Road Guards.[35]

2. Performance-Based Regulation

33. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[36]

---

[32] *Id.*

[33] *Id.*

[34] *Id.* at 6.

[35] *Id.* at 6.

[36] Minn. Stat. §§ 14.002 and 14.131.

34. The Department states only that "[t]he proposed rule meets this standard."[37]

35. The SONAR does not include the description required by Minn. Stat. § 14.131.

36. Notwithstanding the lack of a description, the Administrative Law Judge concurs in the Department's determination that the proposed rules meet the objectives of Minn. Stat. § 14.002. The proposed rules are expressed in terms of desired results instead of the specific means for achieving those results. They likewise avoid the incorporation of specifications of particular methods or materials. For example, the Department proposes use of the safety apparel standards of the American National Standards Institute (ANSI) and the International Safety Equipment Association (ISEA). ANSI / ISEA 107-2004 and ANSI / ISEA 107-2010 are performance standards which permit compliance by a wide-ranging set of materials that have the stated characteristics of visibility and durability.[38]

37. The Administrative Law Judge concludes that the Department's failure to "describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems" was a harmless error under Minn. Stat. § 14.26, subd. 3(d). The omission did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

38. As required by Minn. Stat. § 14.131, the Commissioner of Minnesota Management and Budget (MMB) evaluated the fiscal impact of the proposed rules on local units of government. In a Memorandum dated September 10, 2014, MMB concluded that because the regulatory costs of the certification program would be borne by applicants for Motorcycle Road Guard certificates, and the Department, "the proposed changes will not impose a cost on local governments."[39]

4. Compliance with Minn. Stat. § 14.131

39. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

---

[37] Ex. D at 9.

[38] Ex. D at 19; Ex. C, at 11-12.

[39] Ex. K-4.

5. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

40. Minn. Stat. § 14.127, requires the Department to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Department must make this determination before the close of the hearing record and the Administrative Law Judge approve or disapprove it.[40]

41. The Department determined that the cost of complying with the proposed rule changes will not exceed $25,000 for any business or any statutory or home rule charter city.[41]

42. The Administrative Law Judge finds that the Department has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

6. Adoption or Amendment of Local Ordinances

43. Under Minn. Stat. § 14.128, the Department must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[42]

44. The Department concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Department's proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.[43]

45. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.128 and approves that determination.

III. Rulemaking Legal Standards

46. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[44]

---

[40] Minn. Stat. § 14.127, subds. 1 and 2.

[41] Ex. D at 8-10.

[42] Minn. Stat. § 14.128, subd. 1.

[43] Ex. D at 11.

[44] *See,* Minn. R. 1400.2100.

47. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[45] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[46] and the agency's interpretation of related statutes.[47]

48. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[48] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[49]

49. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[50] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[51]

50. Because the Department proposed further changes to the rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

- "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice";

---

[45] *See, Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

[46] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[47] *See, Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[48] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[49] *See, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

[50] *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. App. 1999).

[51] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

- the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice"; and

- the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

51. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

- whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests";

- whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing"; and

- whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

IV. Rule by Rule Analysis

52. As noted above, the role of the Administrative Law Judge during a legal review of rules is to determine whether the Department has made a reasonable selection among the regulatory options that it has available. The judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. This is because the delegation of rulemaking authority is drawn from the Minnesota Legislature and is conferred by the Legislature upon the agency. The legal review under the Administrative Procedure Act begins with this important premise.[52]

53. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

54. The Administrative Law Judge finds that the Department has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

---

[52] *See, Manufactured Housing Institute, supra,* 347 N.W.2d at 244 (The Court instructs that the state courts are to restrict the review of agency rulemaking to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency"); *see also, In the Matter of the Proposed Rules of the Minnesota Pollution Control Agency Governing Permits for Greenhouse Gas Emissions*, REPORT OF THE ADMINISTRATIVE LAW JUDGE, Minnesota Rules Chapters 7005, 7007 and 7011, OAH 8-2200-22910-1 at 20 (2012) (http://mn.gov/oah/images/2200-22910-GreenhouseGas-dismissal.pdf).

55. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

56. At the public hearing, and in later written comments received from interested persons, there were five principal critiques of the proposed rules:

(a) The liability insurance requirements of Minn. R. 7422.0200, subp. 3 were unreasonably restrictive;

(b) The length of the certification period under Minn. R. 7422.0500, subpart 1 was unreasonably short;

(c) The standards for abstinence from alcohol under Minn. R. 7422.0600, subp. 1 were unreasonably vague;

(d) The safety apparel requirements of Minn. R. 7422.1100 were unduly restrictive; and,

(e) The flagging equipment requirements of Minn. R. 7422.1100 were unduly restrictive.[53]

A. Minn. R. 7422.0200, subpart 3; 7422.0500, subpart 1; and 7422.1100.

57. In response to stakeholder comments, the Department proposed a series of revisions to the proposed rules so as to address some of these concerns. In its supplemental comments it proposed to revise the proposed rules so as to:

(a) clarify that the insurance requirements of Minn. R. 7422.0200, subp. 3 did not apply to the entity sponsoring the group motorcycle ride;

(b) double the length of the certification period from two to four years; and,

(c) delete the requirement to wear reflective safety pants in low-light and low-visibility situations.[54]

58. Each of these proposed changes is needed and reasonable and would not be a substantial change from the rule as originally proposed.

---

[53] *See, e.g., Comments of Mark Backlund; Comments of Robert Beers; Comments of Mark Ceminsky; Comments of Richard Martin; Comments of Donovan McKigney; Comments of Jim Woodruff.*

[54] *See,* DEPARTMENT'S POST-HEARING REBUTTAL COMMENTS, at 4 - 8.

B. The Imposition of Criminal Sanctions in Minn. R. 7422.0600, subpart 1(B) and Minn. R. 7422.1300

59. With respect to the standards for abstinence from alcohol and use of controlled substances while serving as a Motorcycle Road Guard, the Department originally proposed that a person could not serve in this capacity "after having consumed alcoholic beverages or having used controlled substances." This prohibition is included in Minn. R. 7422.0600, subp. 1(B).[55]

60. Several stakeholders responded that because the rule was not time-delimited, it presumably barred anyone who had ever consumed alcohol or used a controlled substance from later serving as a Motorcycle Road Guard.[56]

61. In its post hearing comments, the Department proposed to revise Part 7422.0600, subpart 1 so to add clarifying text in a new subpart 2:

> 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.

The comments explain that the "no physical evidence present" standard is drawn from abstinence requirements applicable to school bus drivers under Minn. Stat. § 169A.31.[57]

62. Likewise, in Minn. R. 7422.1300, the Department proposes a more general rule imposing criminal sanctions. This proposed rule states: "As provided in Minnesota Statutes, section 171.60 a person who violates any provisions or requirements of this chapter is guilty of a petty misdemeanor."[58]

63. Both Minn. R. 7422.0600 and 7422.1300 purport to establish criminal penalties for misconduct by Motorcycle Road Guards.

64. The state courts have ruled that the Minnesota Legislature maintains the "exclusive province to define by statute what acts constitute a crime."[59]

---

[55] *See,* Ex. C, at 8.

[56] *See,* DIGITAL RECORDING OF RULEMAKING HEARING.

[57] *See,* DEPARTMENT'S POST-HEARING REBUTTAL COMMENTS, at 6 and Minn. Stat. § 169A.31.

[58] *See,* Ex. C, at 13.

[59] *See, State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990) (citing *State v. Soto*, 378 N.W.2d 625, 627 (Minn.1985) ("Minnesota is a 'code state,' *i.e.,* the legislature has exclusive province to define by statute what acts constitute a crime"); *accord, Schumann v. McGinn*, 240 N.W.2d 525, 537 (Minn. 1976); *State v. Dendy*, 598 N.W.2d 4, 6 (Minn. Ct. App. 1999).

65. There is doubt the Minnesota Legislature could delegate to the Department of Public Safety, an agency within the Executive Branch, the power to create new crimes through promulgation of an administrative rule.[60]

66. The Administrative Law Judge concludes that Minn. Stat. § 171.60 does not delegate to the Commissioner of Public Safety the power to create new crimes by promulgating an administrative rule. The statute provides that "a person who violates any provision of *this section* is guilty of a petty misdemeanor." The plain meaning of those terms criminalize the one act that is prohibited by Minn. Stat. § 171.60 itself – undertaking "traffic control as a motorcycle road guard ... without a valid motorcycle road guard certificate issued by the commissioner."[61]

1. Minn. R. 7422.0600, subpart 1 (B)

67. Because proposed rule 7422.0600, subpart 1 (B), as originally drafted, fails to provide reasonable notice of when the regulatory standards apply, it is defective.[62]

68. This ambiguity is not cured by the recently-proposed revision to subpart 2. The Commissioner of Public Safety does not have the authority to designate acting as a Motorcycle Road Guard while there is "physical evidence" of alcohol "present in the person's body" a petty misdemeanor.

69. One possible cure to the defects in proposed rule 7422.0600, subpart 1(B) is to revise this subpart to read: "while there is physical evidence present in the person's body that the person has consumed alcohol or a controlled substance."

70. Modifying 7422.0600, subpart 1 (B) so as to specify time-frame within which abstinence from alcohol or use of controlled substances is required, is needed and reasonable and would not make a substantial change from the rules as they were originally proposed. Moreover, the Commissioner does have authority to "establish safety ... standards for a person who operates under a motorcycle road guard certificate" through rulemaking.[63]

---

[60] *See, Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) ("A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields").

[61] *See,* Minn. Stat. § 171.60, subds. 1 and 4.

[62] *See e.g., In the Matter of Proposed Amendments to Rules Governing Apprenticeship Wages,* OAH 7-1900-17022, slip op. at 26-27 (2006) (http://www.oah.state.mn.us/aljBase/190017022.rr.htm).

[63] *See,* Minn. Stat. § 171.60, subds. 2(3) and 5.

2. Minn. R. 7422.1300

71. Minn. Stat. § 171.60, subd. 4 does not grant authority to the Commissioner to make any violation of the "provisions or requirements" of Minnesota Rules Chapter 7422 a petty misdemeanor.[64]

72. Similarly, Minn. Stat. § 169A.31, subd. 1 does not grant authority to the Commissioner to make any violation of the "provisions or requirements" of Minnesota Rules Chapter 7422 a petty misdemeanor. This statute regulates the driving, operating or control of a school bus or Head Start bus.[65]

73. Because the Commissioner of Public Safety does not have the authority to establish new petty misdemeanors, Minn. R. 7422.1300 is defective.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Excepted as noted in Findings 67, 68 and 73, the Department has demonstrated its statutory authority to adopt the proposed rules.

2. The Notice of Hearing complied with Minn. R. 1400.2080, subp. 5.

3. The Department gave notice to interested persons in this matter.

4. The Department has fulfilled its additional notice requirements.

5. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.05, subd. 1; 14.14; 14.15, subd. 3; and 14.50 (i) and (ii).

6. The Department has fulfilled the procedural requirements of law or rule.

7. Excepted as noted in Findings 67, 68 and 73, the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

8. The modifications to the proposed rules suggested by the Department after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

---

[64] *Compare,* Minn. Stat. § 171.60, subd. 4 *with* proposed rule Minn. R. 7422.1300.

[65] *See,* Minn. Stat. § 169A.31, subds. 1 - 3.

9. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

10. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions Number 1 and 7, as noted in Finding Number 69.

11. Due to Conclusions Number 1 and 7, this Report has been submitted to the Chief Administrative Law Judge for her approval pursuant to Minn. Stat. § 14.15, subd. 3.

12. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted, except as otherwise noted.

Dated: February 13, 2014

ERIC L. LIPMAN
Administrative Law Judge

Reported: Digital Recording; No Transcript

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Department makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.