

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF PUBLIC SAFETY

In the Matter of the Proposed  
Rules of the Department of Public  
Safety Governing Training and  
Certification of Over-Dimensional  
Load Escort Drivers; Minnesota  
Rules Chapter 7455

**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 March 29, 2012, 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 defects have been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated this 3rd day of April, 2012.



RAYMOND R. KRAUSE  
Chief Administrative Law Judge



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In the Matter of the Proposed Rules  
of the Department of Public Safety  
Governing Training and Certification of  
Over-Dimensional Load Escort Drivers;  
Minnesota Rules Chapter 7455

**REPORT OF THE  
ADMINISTRATIVE LAW  
JUDGE**

Administrative Law Judge Barbara L. Neilson conducted a hearing in this rulemaking proceeding on November 29, 2011, and January 17, 2012, in Room 200 of the State Office Building, 100 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, Minnesota. The hearing continued until everyone present had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>1</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Jeffrey S. Bilcik, Assistant Attorney General, and E. Joseph Newton, General Counsel, represented the Department of Public Safety (the Department or DPS) at the hearing. The members of the Department's hearing panel were Lieutenant Tom Nelson of the Minnesota State Patrol; Randy Sorenson, RSA Network; Gene Halverson, Minnesota Department of Transportation, Office of Freight and Commercial Vehicle Operations; and Tim Worke, Associated General Contractors of Minnesota. Forty-four individuals signed the hearing register on November 29, 2011, and thirteen individuals signed the hearing register on January 17, 2012.

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<sup>1</sup> Minn. Stat. §§ 14.131 through 14.20. Unless otherwise specified, all references to Minnesota Statutes are to the 2010 version.

After the second day of hearing concluded, the Administrative Law Judge kept the administrative record open for an additional twenty calendar days, until Monday, February 6, 2012, to allow interested persons and the Department to submit written comments. Thereafter, the record remained open for an additional five business days, until Monday, February 13, 2012, to allow interested persons and the Department to file a written response to any comments received during the initial comment period.<sup>2</sup> Thirteen written comments were received and considered during the rulemaking process,<sup>3</sup> along with the Department's responses.<sup>4</sup> To aid the public in participating in this matter, comments were posted on the website of the Office of Administrative Hearings shortly after they were received.<sup>5</sup> The hearing record closed for all purposes on February 13, 2012.<sup>6</sup>

## NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this report, 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 his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he 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. The Department 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

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<sup>2</sup> See Minn. Stat. § 14.15, subd. 1.

<sup>3</sup> The submissions from members of the public have been marked and received into the record as Public Exhibits (Exs.) 1-13.

<sup>4</sup> Responses received from Lt. Nelson and Mr. Sorenson on behalf of the Department were marked and received into the record as Exs. P and Q.

<sup>5</sup> See <http://mn.gov/oah/administrative-law/comments/rule/dps-over-dimensional-load-escort-drivers.jsp>.

<sup>6</sup> On March 14, 2012, the Chief Administrative Law Judge extended the deadline for completion of this report to March 29, 2012.

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.

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

## **FINDINGS OF FACT**

### **Nature of the Proposed Rules**

1. Following an accident in California in 2000 involving a commuter rail train and an oversized load that became lodged on the railroad tracks, the National Transportation Safety Board published an investigation report in which it recommended that the Federal Highway Administration (FHWA) develop a model pilot car training program applicable to drivers who escort oversized loads and model movement guidelines for oversized/overweight vehicles. The FHWA funded a committee to undertake a study and, in 2004, published two documents in conjunction with the Commercial Vehicle Safety Alliance and the Specialized Carriers & Rigging Association: "Pilot/Escort Drivers Best Practices Guidelines" and "Law Enforcement Escort Best Practices Guidelines." The FHWA sent these two documents to the Departments of Transportation in each state for consideration.<sup>7</sup>

2. Several states (including Virginia, Utah, New York, Florida, Oklahoma, North Carolina, Washington, Kansas, Colorado, Wisconsin, Arizona, and Georgia) have implemented certification requirements for those involved in escorting oversized loads. Some of these certification requirements meet the FHWA guidelines and some do not. In addition, New Mexico and Alaska require the certification of flaggers.<sup>8</sup>

3. In Minnesota, an informal Pilot/Escort Car Steering Committee was formed in approximately 2009 to study safety and training issues. The Steering Committee was led by the Minnesota Associated General Contractors (the AGC), which is interested in

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<sup>7</sup> Testimony (Test.) of Randy Sorenson; Ex. P (Post-Hearing Submission of Randy Sorenson dated Feb. 10, 2012); SONAR, Ex. 2 (Law Enforcement Escort Best Practices Guidelines); SONAR, Ex. 3 (Pilot Car Escort Best Practices Guidelines).

<sup>8</sup> Ex. P (Post-Hearing Submission of R. Sorenson dated Feb. 10, 2012).

these issues because AGC members often move heavy equipment with their own personnel. The AGC invited Randy Sorenson to participate in the group as an expert because of its interest in ensuring that Minnesota training and certification would be accepted by other states. Mr. Sorenson participated in the development of certification requirements in Utah and operates RSA Network, a firm that trains pilot/escort drivers from various states who seek to become certified in Utah and Colorado.<sup>9</sup>

4. In addition to Mr. Sorenson and Tim Worke and Dan Hannan of the AGC, other members of the Steering Committee included Gene Halverson and Ted Coulianos, Minnesota Department of Transportation; Lt. Tom Nelson, Ken Urquhart, and Tim Rogotzke, Minnesota State Patrol; Adam Chelseth and John Hausladen, Minnesota Trucking Association; Jeff Peltier, who is affiliated with a trucking firm; Rick Johnson, Tiller Corporation; Thomas Johnson, Midstate Reclamation and Trucking, Inc.; Brian Knutson, Hardrives, Inc.; Fred Kovall, Anderson Trucking; Charles Thibodeau, American Society for Industrial Security; Tom Fitzhenry, Metro Motorcycle Escort; Marie Ohman, Minnesota Private Detective and Protective Agent Services Board; Dwight Patterson of Pats LLC; and Minnesota State Senator Ken Kelash.<sup>10</sup> The Committee members reviewed the national best practices reflected in the two 2004 FHWA publications, the NTSB report on the California accident, and the FHWA's Manual on Uniform Traffic Control; examined the rules issued in other states; and reviewed existing Minnesota statutes. Based upon its review, the Steering Committee determined that existing Minnesota statutes needed to be clarified and urged the Legislature to pass additional legislation. The Steering Committee issued its Final Recommendation on November 9, 2010.<sup>11</sup> Mr. Sorenson was introduced at the rule hearing as the person who had drafted the proposed rules.

5. During 2010, a bill was enacted which amended Minn. Stat. §§ 169.06 and 169.86 and added new provisions to be codified as Minn. Stat. § 299D.085.<sup>12</sup> The grant of rulemaking authority to the Department in section 3, subdivision 5, was effective on May 12, 2010 (the day following final enactment); the other provisions do not take effect until one year after the rules finally adopted by the Department are published in the State Register.<sup>13</sup>

- Section 1 of the law amends Minn. Stat. § 169.06, which relates to traffic signs, signals, and markings. The amendment to subd. 4(a) makes it clear that drivers shall obey traffic control devices unless otherwise directed by a police officer "or by a certified oversized load escort driver," subject to certain exceptions for authorized emergency vehicles. The new subdivision 4(f) added by the law states:

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<sup>9</sup> Test. of Tim Worke; Test. of Tom Johnson; Test. of Tom Nelson.

<sup>10</sup> Test. of T. Nelson.

<sup>11</sup> Test. of R. Sorenson; SONAR, Ex. 1. Objections to the composition of the Steering Committee are discussed below in Findings 74-76.

<sup>12</sup> Minn. Laws 2010, Chapter 311, Sections 1-4 (signed by the Governor on May 11, 2010).

<sup>13</sup> *Id.*, Section 4.

An overdimensional load escort driver with a certificate issued under section 299D.085, while acting as a flagger escorting a legal overdimensional load, may stop vehicles and hold vehicles in place until it is safe for the vehicles to proceed. A person operating a motor vehicle that has been stopped by an escort driver acting as a flagger may proceed only on instruction by the flagger or a police officer.

- Section 2 of the law amends Minn. Stat. § 169.86, which relates to special permits that may be issued by the Minnesota Department of Transportation (MnDOT) and local authorities to authorize the movement of vehicles exceeding the maximum size, weight, or load set forth in Chapter 169 of the Minnesota Statutes. The law adds a new subdivision 3b which states:

**Escort vehicles.** The commissioner [of MnDOT] or local authority shall specify in the permit:

(1) the minimum number of escort vehicles required to escort the overdimensional load; and

(2) whether the operators of the escort vehicles must be certified licensed peace officers or may be overdimensional load escort drivers who hold a current certificate under section 299D.085.

- Section 3 of the law adds new provisions to be codified as Minn. Stat. § 299D.085. Section 299D.085 requires persons who operate pilot or escort vehicles that accompany oversize vehicles in Minnesota to obtain a certificate from the Commissioner of Public Safety or from another state with which the Commissioner has entered into a reciprocal agreement. To obtain a certificate, the statute requires that an individual be at least 18 years of age, possess a valid operator's license for the type of vehicle being operated, successfully complete an escort driver certification course developed by the Commissioner of Public Safety, and meet vehicle and safety equipment standards and other requirements specified by the Commissioner. The statute further specifies that the Commissioner must assess a fee for each certificate applicant that is calculated to cover the Commissioner's cost of establishing and administering the program. The Commissioner is directed to adopt rules to carry out the provisions of the statute and, notwithstanding the provisions of Minn. Stat. § 16A.1283,<sup>14</sup> specify in the rules the fee that will be assessed.

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<sup>14</sup> Minn. Stat. § 16A.1283(a) states, "(a) Notwithstanding any law to the contrary, an executive branch state agency may not impose a new fee or increase an existing fee unless the new fee or increase is approved by law."

6. In this rulemaking proceeding, the Department proposes to add a new chapter 7455 to its rules to govern pilot/escort vehicles that accompany oversized vehicles. The proposed new chapter will include fourteen new rule provisions which:

- define the terms used in the rules (part 7455.0100);
- require that escort services may only be provided by a certified licensed peace officer or a certified pilot/escort driver (part 7455.0200);
- generally describe the certification process (part 7455.0300);
- specify that certification shall be suspended or revoked if a pilot/escort driver has committed a disqualifying offense within the previous four years (part 7455.0400);
- specify that drivers may appeal the denial, suspension, or revocation of certification under the Minnesota Administrative Procedure Act (part 7455.000);
- require that individuals operating a pilot/escort vehicle meet certain requirements (part 7455.0600);
- set forth various vehicle requirements that must be met by pilot/escort vehicles (part 7455.0700);
- require that certain signs and flags be displayed on pilot/escort vehicles (part 7455.0800);
- require that pilot/escort vehicles be equipped with particular lights (part 7455.0900);
- specify that pilot/escort vehicles must be equipped with certain safety items (part 7455.1000);
- set forth insurance requirements for drivers and vehicles (part 7455.1100);
- define the duties that may be performed by certified pilot/escort drivers (part 7455.1200);
- require that a pretrip planning and coordination meeting with specified parties be conducted before load movement (part 7455.1300); and
- set forth flagging duties to be performed by pilot/escort drivers (part 7455.1400).

## Rulemaking Legal Standards

7. Under Minnesota law, one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts.<sup>15</sup> In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.<sup>16</sup> The Department prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by comments made by staff and witnesses who spoke on behalf of the Department at the public hearing, and by the written post-hearing submissions provided on behalf of the Department.

8. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.<sup>17</sup> Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.<sup>18</sup> A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.<sup>19</sup> The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."<sup>20</sup>

9. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.<sup>21</sup>

10. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department complied with the rule adoption procedure, whether the proposed rules grant undue discretion, whether the Department has statutory authority to adopt the rules, whether the rules are unconstitutional or illegal,

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<sup>15</sup> Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100. Unless otherwise specified, all references to Minnesota Rules are to the 2011 version.

<sup>16</sup> *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

<sup>17</sup> *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

<sup>18</sup> *Greenhill v. Bailey*, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

<sup>19</sup> *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>20</sup> *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d at 244.

<sup>21</sup> *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

whether the rules involve an undue delegation of authority to another entity, or whether the proposed language is not a rule.<sup>22</sup>

11. Because the Department suggested changes to the proposed rules after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether 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; 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.<sup>23</sup>

12. 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.<sup>24</sup>

#### **Procedural Requirements of Chapter 14**

13. The Minnesota Administrative Procedures Act<sup>25</sup> and the rules of the Office of Administrative Hearings<sup>26</sup> set forth certain procedural requirements that are to be followed during agency rulemaking.

14. By letter dated December 21, 2010, the Department requested that the Office of Administrative Hearings review and approve its Additional Notice Plan for publishing a Request for Comments concerning the proposed rules. By letter dated January 4, 2011, Administrative Law Judge Eric L. Lipman approved the Additional Notice Plan, contingent upon the Department adding all members of the Pilot and Escort Car Steering Committee.

15. On January 3, 2011, the Department published a Request for Comments on Possible Rules Governing Training and Certification of Over Dimensional Load Escort Drivers, Minnesota Rules Chapter 7585, in the State Register. The Request for Comments was published at 35 State Reg. 995.<sup>27</sup>

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<sup>22</sup> Minn. R. 1400.2100.

<sup>23</sup> Minn. Stat. § 14.05, subd. 2(b).

<sup>24</sup> Minn. Stat. § 14.05, subd. 2(c).

<sup>25</sup> The provisions of the Act relating to agency rulemaking are codified in Minn. Stat. §§ 14.001-14.47.

<sup>26</sup> The OAH rules governing rulemaking proceedings are set forth in Minnesota Rules part 1400.2000 through 1400.2240.

<sup>27</sup> Ex. A.

16. On January 10, 2011, the Department certified that it gave notice of the Request for Comments in accordance with the Additional Notice Plan approved by the Office of Administrative Hearings on January 2, 2011.<sup>28</sup>

17. On July 22, 2011, the Department asked Keith Bogut, Executive Budget Officer, Minnesota Management and Budget, to evaluate the fiscal impact and fiscal benefits of the proposed rules on local units of government.<sup>29</sup> The Department did not receive any response from Mr. Bogut prior to the rulemaking hearing. At the request of the Administrative Law Judge, the Department again contacted Mr. Bogut and, on March 12, 2012, Mr. Bogut responded that he had reviewed the proposed rules and concluded that they will not impose a cost on local governments.<sup>30</sup>

18. By letter dated August 12, 2011, the Department requested that the Office of Administrative Hearings review its proposed rules, proposed SONAR relating to the rules, and its Dual Notice of Hearing. On the same date, the Department also asked that the Office of Administrative Hearings review and approve its Additional Notice Plan relating to the proposed rules as described in pages 4-5 of the SONAR.

19. By letter dated August 22, 2011, Judge Lipman approved the Department's Additional Notice Plan. Because the draft Dual Notice of Hearing submitted by the Department did not include a hearing date or identify the Administrative Law Judge who would preside at the hearing, the Dual Notice was not approved at that time.

20. By letter dated August 23, 2011, the Department submitted the completed Dual Notice of Hearing for review by the Office of Administrative Hearings and, by letter dated August 24, 2011, the Dual Notice was approved by Judge Lipman.

21. On August 25, 2011, the Department certified that it gave notice of the Dual Notice of Hearing in accordance with the Additional Notice Plan.<sup>31</sup>

22. On September 6, 2011, the Department electronically sent a copy of the SONAR to the Legislative Reference Library as required by law.<sup>32</sup>

23. On September 6, 2011, the Department sent a copy of the Dual Notice of Hearing and SONAR to the chairs and ranking minority member of the Senate Transportation Committee and the House Transportation Committee, as well as to the chief authors of the legislation that was later enacted and codified as Minn. Stat. § 299D.085.<sup>33</sup>

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<sup>28</sup> Ex. H

<sup>29</sup> Ex. M.

<sup>30</sup> See Ex. M (Memorandum from Keith Bogut to Tom Nelson dated March 12, 2012).

<sup>31</sup> Ex. H.

<sup>32</sup> Ex. E.

<sup>33</sup> Ex. L.

24. On September 12, 2011, the Department published the Dual Notice of Hearing in the State Register at 36 State Reg. 265.<sup>34</sup>

25. On October 31, 2011, the Department sent the Dual Notice of Hearing by U.S. mail or email to all persons who requested a hearing.<sup>35</sup>

26. Shortly before the first day of hearing was held on November 29, 2011, it was discovered that the Department had not provided notice of the proposed rules to individuals who had previously registered with the DPS or various divisions of the Department to receive notice of rule proceedings. Because this type of notice is required under Minn. Stat. § 14.14,<sup>36</sup> the Administrative Law Judge directed the Department to compile an appropriate list and send notice to those individuals that an additional day of hearing would be held on January 17, 2012.

27. During the first day of hearing on November 29, 2011, the following documents were received into the hearing record:

A. the Request for Comments as published in the State Register on June 27, 2011 (35 State Reg. 2042);<sup>37</sup>

B. a copy of the proposed rules dated September 20, 2011, including the Revisor's approval;<sup>38</sup>

C. a copy of the SONAR, with attached copies of (1) the Final Recommendation as of November 9, 2010, of the Minnesota Pilot/Escort Car Steering Committee, (2) the Law Enforcement Escort Best Practices Guidelines issued by the Commercial Vehicle Safety Alliance, the Federal Highway Administration, and the Specialized Carriers and Rigging Association in October 2004, and (3) the Pilot Car Escort Best Practices Guidelines issued by the Specialized Carriers and Rigging Association, the Federal Highway Administration, and the Commercial Vehicle Safety Alliance in October 2004;<sup>39</sup>

D. the Certificate of Mailing a copy of the SONAR to the Legislative Reference Library on September 6, 2011;<sup>40</sup>

E. a copy of the Department's Dual Notice of Hearing as published in the State Register on September 12, 2011 (36 State Reg. 265);<sup>41</sup>

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<sup>34</sup> Ex. F.

<sup>35</sup> Ex. G.

<sup>36</sup> Minn. Stat. § 14.14, subd. 1a, requires that each state agency maintain a list of persons who have registered with the agency to receive notice of proposed rulemaking proceedings and provide notice of its intention to adopt rules to all persons on its list at least 30 days before the date set for the hearing.

<sup>37</sup> Ex. A.

<sup>38</sup> Ex. C.

<sup>39</sup> Ex. D.

<sup>40</sup> Ex. E.

F. a Certificate attesting that the Notice of Hearing was mailed to all individuals and organizations identified in the Additional Notice Plan;<sup>42</sup>

G. copies of written comments received by the Department from members of the public prior to the public hearing;<sup>43</sup> and a copy of a letter the Department sent in response to several of the inquiries;<sup>44</sup>

H. a certificate attesting that the Dual Notice of Hearing and SONAR were mailed to the chief authors of legislation that was later enacted and codified as Minn. Stat. § 299D.085 and to the Chairs and Ranking Minority Members of the Senate Transportation Committee and the House Transportation Policy and Finance Committee, along with a copy of the transmittal letter;<sup>45</sup> and

I. a copy of the Department's July 22, 2011, letter to Keith Bogut, Executive Budget Officer, Minnesota Management & Budget, asking that MMB evaluate the fiscal impact and benefits of the proposed rules with respect to units of local government.<sup>46</sup>

28. On November 30, 2011, in keeping with the directive issued by the Administrative Law Judge, the Department issued an Amended Dual Notice of Hearing stating that the Department would be holding an additional day of public hearing regarding the proposed rules on January 17, 2012.<sup>47</sup>

29. On December 1, 2011, the Department sent the Amended Dual Notice of Hearing and proposed rules via U.S. Mail or email to all persons and associations on the Department's Rulemaking List.<sup>48</sup>

30. During the second day of hearing on January 17, 2012, the following additional documents were received into the hearing record:

A. a Certificate attesting to the accuracy of the Department's mailing list as of November 21, 2011,<sup>49</sup> and

B. a Certificate attesting that, on December 1, 2011, the Amended Dual Notice of Hearing was sent via U.S. Mail or email to all persons and associations on the Department's rulemaking list.<sup>50</sup>

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<sup>41</sup> Ex. F.

<sup>42</sup> Ex. H.

<sup>43</sup> Ex. I.

<sup>44</sup> Ex. J.

<sup>45</sup> Ex. L.

<sup>46</sup> Ex. M.

<sup>47</sup> Ex. G.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

31. Under Minn. Stat. § 14.101, agencies must solicit comments from the public on the subject matter of a proposed rulemaking proposal under active consideration within the agency by causing a notice to be published in the State Register "within 60 days of the effective date of any new or mandatory law requiring rules to be adopted, amended, or repealed." In this proceeding, the Department's statutory authority to adopt the proposed rules became effective on May 12, 2010. Accordingly, the Department should have published its Request for Comments with respect to the possible rules on or before July 12, 2010, as required by Minn. Stat. § 14.101. However, the Department did not publish the Request for Comments until January 3, 2011. The Request for Comments noted that the Department had not yet drafted the possible rules, indicated that the Department planned to appoint an advisory committee to comment on the possible rules, and provided the name of an individual who could be contacted to receive a draft of the rules when one had been prepared.

32. The failure of the Department to publish the Request for Comments by July 12, 2010, constitutes a procedural defect in this proceeding. A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3(d), if "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process." The language of Minn. Stat. § 14.101 is directory in nature and not mandatory and the statute does not specify any penalty for a failure to comply with its provision.<sup>51</sup> Presumably, the purpose of the requirement that an agency publish a Request for Comments within 60 days of the effective date of its authorizing legislation is to ensure that an agency begins the process of public notification so that it will stay on schedule to publish its Notice of Intent to Adopt Rules within 18 months, as required by Minn. Stat. § 14.125. In this instance, the Request for Comments was published more than 60 days before the Dual Notice of Hearing was published and the comment period remained open until the Dual Notice was published on September 12, 2011 (approximately 16 months after the legislation authorizing rulemaking became effective). The Department received many comments from members of the public in response to the Request for Comments. The Department provided additional notice of the rule hearing to an extensive number of persons. Numerous individuals and groups participated in the rule hearing and provided oral and written comments.

33. Because the language of Minn. Stat. § 14.101 is directory and not mandatory, and because the Administrative Law Judge does not believe that the procedural error in the timing of the publication of the Request for Comments deprived anyone of the opportunity to meaningfully participate in the rulemaking process, the Administrative Law Judge finds this procedural defect to be a harmless error.

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<sup>51</sup> This differs from Minn. Stat. § 14.125, which explicitly states that an agency's rulemaking authority will expire if it fails to publish its Notice of Hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted.

34. The Department notified numerous individuals and groups of the proposed rules and the rule hearing. However, as noted above, the Department failed to provide notice of the rulemaking hearing to individuals who had previously registered with the Department or various divisions of the Department to receive notice of rule proceedings prior to the November 29, 2011, hearing date, as required by Minn. Stat. § 14.14. To remedy this procedural flaw, the Administrative Law Judge required during the November 29, 2011, hearing that: (1) an additional day of hearing be held on January 17, 2012; (2) the Department compile an appropriate rulemaking list and provide at least 30 days' advance notice of the additional hearing date and the proposed rules to the persons and organizations on that list; and (3) the time period for submission of written comments extend to February 6, 2012 (for initial submissions) and February 13, 2012 (for rebuttal). This approach ensured that individuals and organizations who had asked to receive notice of the Department's rulemaking proceedings did, in fact, receive notice of this proceeding and have an opportunity to submit written or oral comments.

35. Under the circumstances, the Administrative Law Judge concludes that the Department has adequately complied with the procedural requirements under applicable law and rules.

#### **Additional Notice**

36. Minn. Stat. §§ 14.131 and 14.23 require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules. By letter dated August 12, 2011, the Department requested that the Office of Administrative Hearings approve an Additional Notice Plan under which it would: request that notice of the proposed rules be posted on the websites of the Minnesota Trucking Association and the Association of General Contractors; send notice of the proposed rules to the business addresses of all licensed protective agencies that do business in Minnesota since many of them provide over-dimensional load escort services in Minnesota; notify members of the Pilot Car Steering Committee of the notice to adopt the proposed rules; send notice of the proposed rules to the individuals who responded to the Request for Comments; and provide the other notice required by statute. The Additional Notice Plan was reviewed and approved by Judge Lipman on August 22, 2011.

37. During the rulemaking proceeding, the Department certified that it had provided notice according to the Additional Notice Plan approved by the Office of Administrative Hearings and had sent the Notice of Hearing and proposed rules to the individuals and organizations identified in the Additional Notice Plan. The Department also posted the Dual Notice of Hearing and the proposed rules on its website.<sup>52</sup>

38. The Administrative Law Judge finds that the Department has fulfilled its additional notice requirements.

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<sup>52</sup> Ex. H.

## Statutory Authority

39. The Department relies upon Minn. Stat. § 299D.085, subd. 5, as the source of its statutory authority to adopt these rules. As noted above, Section 299D.085 was added by Laws 2010, Chapter 311, Section 3. That law specifies that subdivision 5, which grants rulemaking authority to the Department, was effective the day following final enactment, and that the remainder of section 299D.085 is effective one year after the Department publishes its adopted rules in the State Register.<sup>53</sup>

40. Section 299D.085 relates generally to overdimensional load escort drivers. It contains five subdivisions:

- Subdivision 1 defines “overdimensional load” as “a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in [Minnesota Statutes] chapter 169 [relating to traffic regulations], or otherwise not in conformity with the provisions of chapter 169.”
- Subdivision 2 specifies that “[n]o person may operate as an overdimensional load escort driver in this state without a certificate issued by the commissioner [of Public Safety], or by a state with which the commissioner has entered into a reciprocal agreement,” and requires the commissioner to assess a fee for each certificate applicant, “calculated to cover the commissioner’s cost of establishing and administering the program.”
- Subdivision 3 states that, in order to obtain a certificate to operate as an overdimensional load escort driver, persons must be at least 18 years old, possess a valid operator’s license for the type of vehicle being operated, successfully complete an escort driver certification course developed by the commissioner and offered by the commissioner or authorized agents, and meet all additional requirements specified by the commissioner, including vehicle and safety equipment standards.
- Subdivision 4 makes it a petty misdemeanor to violate or aid or abet the violation of the statute.
- Subdivision 5 states that “[t]he commissioner of public safety shall adopt rules to carry out the provisions of this section” and states that, “[n]otwithstanding section 16A.1283, the rules must specify the fee to be assessed under subdivision 2.”

41. The Administrative Law Judge concludes that the Department has general statutory authority to adopt the proposed rules under Minn. Stat. § 299D.085, subd. 5.

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<sup>53</sup> See Laws 2010, Chapter 311, Section 4.

Challenges to the Department's authority to adopt particular portions of the proposed rules will be discussed in more detail in the Part-by-Part Analysis below.

### **Impact on Farming Operations**

42. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state. In its SONAR, the Department noted that the proposed rules would not affect farming operations.<sup>54</sup>

43. Because there is no evidence that the proposed rules affect farming operations, the Administrative Law Judge concludes that the Department was not required to notify the Commissioner of Agriculture.

### **Regulatory Analysis in the SONAR**

44. Minn. Stat. § 14.131 requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. Each of these factors, and the Department's analysis, are discussed below.

45. The first factor requires "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." In its SONAR, the Department indicated that the proposed rule will affect companies that provide over-dimensional load escort services as well as a motor carrier companies that use their services. The Department further stated that the companies that provide the services will bear the costs that will be required for the training and certification of their employees. According to the Department, those who provide over-dimensional escort services, the motor carriers who use them, and the general public will benefit from the proposed rules because they "will ensure uniform training and certification regarding vehicle, driver, and safety equipment standards currently recognized as best practice guidelines in several other states."<sup>55</sup>

46. The second factor requires consideration of "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." In the SONAR, the Department stated that the proposed rules will not result in any costs to the Department or other state agencies, and there will be no effect on state revenues.<sup>56</sup> The Department did not provide further explanation. Since Minn. Stat. § 299D.085, subd. 2, specifies that the fee assessed for each certificate applicant must be calculated to cover the Commissioner's cost of establishing and administering the program, the Department's projection appears to be warranted.

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<sup>54</sup> SONAR at 5.

<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.*

47. The third factor requires “a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.” The Department stated in the SONAR that the proposed rules “have been drafted to provide as little cost and intrusiveness as possible.” It pointed out that the training and certification encompassed in the proposed rules are required by the statute.<sup>57</sup>

48. The fourth factor requires “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.” The Department stated in its SONAR that it did not consider any other methods for achieving the purpose of the proposed rule.<sup>58</sup>

49. The fifth factor specifies that the agency must assess “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.” In the SONAR, the Department addressed this factor as follows:

- The training and certification program for over dimensional load escort drivers is anticipated to be modeled after the successful Minnesota State Patrol commercial vehicle safety inspection program and is expected to be efficient, affordable and accessible. The current cost of the safety inspection certification is \$180.00. It is anticipated that the cost of the over dimensional load escort training and certification will be similar.
- The entire portion of the cost will be borne by the companies that hire and employ over dimensional wide load escort drivers.<sup>59</sup>

The Department did not explain the basis for its assumption that all costs would be borne by the companies, and not individual employees.

50. The sixth factor requires a description of “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.” In the SONAR, the Department asserted that, if it failed to adopt the proposed rules, the Department would not be able to fulfill its statutory responsibilities that were recently added to Minn. Stat. §§ 169.06, 169.86, and 299D.085. In addition, the Department stated that a failure to adopt the rules would be contrary to the goal of adopting uniform training and certification standards for the vehicles, drivers, and safety equipment, and result in an

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<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

inability to ensure that escort companies operating in Minnesota would be in line with the best practices guidelines currently being used in other states.<sup>60</sup>

51. The seventh and final factor requires “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.” In the SONAR, the Department noted that there are no differences between the proposed rules and existing federal regulations regarding the training and certification of over-dimensional load escort drivers.<sup>61</sup>

52. Mark Brunner, President of the Manufactured and Modular Home Association of Minnesota, contended that the Department did not adequately address the third and fourth factors. Mr. Brunner argued that the testimony of Mr. Worke during the rulemaking hearing made it clear that the Steering Committee members did, in fact, discuss the alternative of having the Board of Private Detective and Protective Agent Services conduct the pilot/escort training and asserted that the SONAR’s discussion of the third and fourth factors is deficient because it failed to mention this.<sup>62</sup> Dwight and Laurie Patterson, co-owners of Pat’s, LLC, also expressed this concern. They pointed out that the Board of Private Detective and Protective Agent Services (which is also in the Department of Public Safety) already provides for an “Escort Only” license for individuals escorting oversize loads. They urged that the pilot/escort certification process proceed under the authority of that Board rather than under the State Patrol, to avoid the confusion associated with having two entities within the Department overseeing pilot car escort drivers.<sup>63</sup>

53. It is not clear from the evidence presented that it would be less costly or less intrusive if escort drivers were required to attend training sponsored by the Board of Private Detective and Protective Agent Services rather than training “accepted, approved, or authorized” by the Department; in fact, the training courses eventually approved by the Department may include courses provided by the Board of Private Detective and Protective Agent Services. Moreover, because the fourth factor merely requires a description of alternative approaches that were seriously considered by the agency, the fact that other approaches might have been discussed by the Steering Committee is not relevant unless the Department also seriously considered those alternatives. Accordingly, the Administrative Law Judge does not find the Department’s consideration of the third and fourth factors to be inadequate.

54. Mike Ives, who is involved in moving manufactured homes in the Grand Rapids area, and Mr. Brunner also contended that the Department failed to adequately consider the fifth factor (probable costs of compliance with the proposed rules). They pointed out that the Department failed to mention in the SONAR the costs associated

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Test. of Mark Brunner; Public Ex. 7 (Nov. 29, 2011, Comments of M. Brunner); Public Ex. 12 (Jan. 17, 2012, Comments of M. Brunner).

<sup>63</sup> Test. of Dwight Patterson; Test. of Laurie Patterson; Public Ex. 10 at 4-5 (Jan. 17, 2012, Comments of Laurie Patterson).

with the insurance requirements set forth in Part 7455.1100 of the proposed rules, and argued that the requirement will lead to dramatically increased costs. For example, Mr. Brunner asserted that at least one part-time civilian escort has been quoted a premium that is 400% higher than his current premium, and Mr. Ives estimated that there would a cost of \$2,000 per vehicle to comply with the proposed rules.<sup>64</sup> Mr. Brunner and Mr. Ives also argued that the actual costs incurred by an individual to obtain certification (including the costs of the course, exam, meals, and travel and lodging expenses for out-of-town applicants) would be far more than the \$180 cost estimated in the SONAR. Mr. Brunner pointed out that the cost of a Minnesota seminar offered by Mr. Sorenson on the Utah certification requirements in February 2012 was \$223 and contended that the total costs could exceed \$500. Mr. Ives asserted that it would cost approximately \$1,400 for him to send an employee to the Twin Cities to receive training. Both Mr. Ives and Mr. Brunner alleged that costs associated with transportation of manufactured homes will be doubled under the proposed rule, the cost of manufactured housing will increase, and there will be a decline in manufactured home sales. They contended that the Department improperly failed to discuss the likely impact of the proposed rules.<sup>65</sup>

55. In his post-hearing response, Mr. Sorenson maintained that persons with good driving records can obtain the insurance required by the proposed rules for a cost of approximately \$3,000 to \$4,000 per year and contrasted this cost with the average earnings of pilot/escort drivers, which he contended were \$350-\$500 per day when they were engaged in pilot/escort services. He contended that drivers working on a mileage basis who travel with oversized loads earn \$675 to \$750 per day plus the costs of motels. Mr. Sorensen asserted that the Manufactured & Modular Home Association's contention that the cost of insurance will raise its members' operational costs is unfounded. He argued that, in a supply and demand economy, the raising of rates by one pilot/escort driver will lead to the lowering of rates by another. Mr. Sorenson also indicated that the cost of a four-year certification in other states varies from \$75 to \$200 and he expects that the costs in Minnesota will be similar. Even if the Minnesota training costs \$200, Mr. Sorensen pointed out that the cost would amount to only \$50 per year when spread over the four year period the certification would be effective, and contended that this would be a small price to pay for ensuring that pilot/escort drivers have the requisite knowledge, ability, and financial responsibility to protect the public.<sup>66</sup>

56. For purposes of consideration of the fifth regulatory factor, the Administrative Law Judge finds that the Department's discussion of the anticipated cost of the training and certification program could have been more complete but was minimally adequate.<sup>67</sup> However, the SONAR did not include any discussion of the probable costs of complying with the insurance requirements set forth in part 7455.1100

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<sup>64</sup> Test. of M. Brunner; Public Ex. 7 at 2, 3; Test. of M. Ives.

<sup>65</sup> Test. of M. Ives; Test. of M. Brunner; Public Ex. 7 at 3-6; Public Ex. 12 at 4. Neil Anderson, owner of Anderson Building Movers, testified during the hearing that the cost of compliance if the proposed rules are implemented will exceed \$25,000 per year, but did not explain the basis for this estimate.

<sup>66</sup> Ex. P at 3-4.

<sup>67</sup> However, as discussed in the Part-by-Part Analysis of Part 7455.0300 below, the Administrative Law Judge finds that the failure of the proposed rule to state the fee to be charged to each certificate applicant is a defect in these rules.

of the proposed rules. Based upon the public comments and as acknowledged in Mr. Sorenson's post-hearing submission, those costs are quite significant. As a consequence, the Administrative Law Judge concludes that consideration of the fifth regulatory factor in the SONAR was inadequate. This failure constitutes a procedural defect in this proceeding. A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3(d), if "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process." Several members of the public commented at the rule hearing on the costs of the insurance-related provisions of the proposed rules and submitted written comments addressing this issue, and Mr. Sorenson provided additional information regarding his estimate of insurance costs in his February 13, 2012, post-hearing submission. There is no evidence that anyone was deprived of an opportunity to participate or weigh in on this issue by virtue of the Department's failure to expressly discuss insurance costs in its SONAR. Accordingly, the Administrative Law Judge finds that this procedural defect was a harmless error.

### **Performance-Based Regulation**

57. The Administrative Procedure Act requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002.<sup>68</sup> 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.<sup>69</sup>

58. In its SONAR, the Department indicated that it "carefully considered the need for performance-based standards that are expected to be efficient, affordable and accessible" and asserted that the proposed rules are in keeping with the Department's performance goal of ensuring uniform training and certification standards recognized as best practice guidelines in other states.<sup>70</sup>

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

### **Consultation with the Commissioner of Management and Budget**

60. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

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<sup>68</sup> Minn. Stat. § 14.131.

<sup>69</sup> Minn. Stat. § 14.002.

<sup>70</sup> SONAR at 4.

61. By letter dated July 22, 2011, the Department requested that Minnesota Management and Budget conduct a review of the proposed rule amendments under Minn. Stat. § 14.131. The Department did not receive a response from MMB prior to the rulemaking hearing. At the request of the Administrative Law Judge, the Department again contacted the MMB on March 9, 2012. In a response dated March 12, 2012, Keith Bogut, Executive Budget Officer with MMB, stated that he had reviewed the proposed rules and the related SONAR on behalf of the Commissioner of Management and Budget with respect to their potential impact on local governments. Mr. Bogut noted that the proposed rules apply only to companies or individuals that wish to be authorized to serve as escort drivers, do not impose any requirements relating to training, education, or enforcement on local governments, and do not require local governments to provide the required training. Mr. Bogut concluded that the proposed rules will not impose a cost on local governments.<sup>71</sup>

62. In its SONAR, the Department indicated that it will have the responsibility to administer and enforce the proposed rules, and they will not affect any units of local government.<sup>72</sup>

63. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131.

#### **Compliance Costs for Small Businesses and Cities**

64. Under Minn. Stat. § 14.127, the Department must “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 must review the determination and approve or disapprove it.

65. In its SONAR, the Department stated that it has determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any small business or small city.<sup>73</sup>

66. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.127 and approves that determination.

#### **Adoption or Amendment of Local Ordinances**

67. Under Minn. Stat. § 14.128, the agency 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 agency must make this determination before

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<sup>71</sup> Ex. M; SONAR at 6.

<sup>72</sup> SONAR at 6.

<sup>73</sup> *Id.*

the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>74</sup>

68. The Department determined that no town, county, or home rule charter or statutory city would be required to adopt or amend an ordinance or other regulation to comply with the proposed rule and emphasized that the Department will be responsible for administration and enforcement of the proposed rules.<sup>75</sup>

69. Laurie Patterson commented that peace officers at all levels of government, including local government, must be certified in order to escort oversize loads, and questioned whether this will require the adoption or amendment of any ordinance or regulation.<sup>76</sup> However, there is no evidence that this will be the case, or that local governments will be required to incur any costs associated with the proposed rules.

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

### **Analysis of the Proposed Rules**

71. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined; it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that all comments, including those made prior to the hearing, have been carefully read and considered.

72. 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 not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

73. During this rulemaking proceeding, the Department proposed some modifications to the proposed rules. These proposed modifications are discussed in the Part-by-Part Analysis below.

### **General Concerns**

74. Prior to the hearing and during this rulemaking proceeding, the Department received a number of comments from individuals and groups who are opposed to the proposed rules. Several of those commenting on the proposed rules, including Mark Brunner of the Manufactured & Modular Home Association of Minnesota; Mike Ives, who is involved in moving manufactured homes; Robert Swift of Swift Housemoving and the Minnesota Building Movers Association; and Christopher LaNave, Attorney at Law, objected to the composition of the Steering Committee that spurred enactment of Minn.

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<sup>74</sup> Minn. Stat. § 14.128, subd. 1.

<sup>75</sup> SONAR at 6.

<sup>76</sup> Public Ex. 10 (attached annotated SONAR at 7).

Stat. §299D.085 and also drafted the proposed rules.<sup>77</sup> Mr. Brunner asserted at the rule hearing and in his post hearing comments that he was only invited to attend one meeting of the Steering Committee. He stated that he provided an accurate email address at the meeting and also raised an issue regarding the proposed rules not allowing civilian escorts. He contended that he did not receive any other notifications of meetings of the Committee. Mr. Swift similarly noted that the Minnesota Building Movers Association had no input into the proposed rules prior to the hearing. Mr. LaNave argued that the Steering Committee did not include a fully representative sample of those directly affected by the proposed rules, such as manufacturers of mobile homes, house movers, and civilian escorts, and requested that this matter be remanded to the Steering Committee with instructions to include a broader group of affected interests.

75. Tim Worke of the AGC asserted that the AGC had tried to be inclusive and denied that anyone had been intentionally excluded from participating in the Steering Committee. He indicated that there was a problem with the email address he had for the Manufactured & Modular Home Association and the messages that the AGC had attempted to send to Mr. Brunner had "bounced." He apologized to Mr. Brunner for the oversight. Members of the Department's panel also pointed out that interested parties had the opportunity to be heard when the Legislature considered Minn. Laws 2010, Chapter 311, Sections 1-5. The Department is not willing to withdraw or postpone the proposed rules, and argues that individuals and associations who were not involved in the Steering Committee have had an adequate opportunity to comment on the proposed rules during the legislative and rulemaking process.

76. It is unfortunate that some interests apparently were not represented on the informal Steering Committee that was organized by the AGC. However, the Minnesota Administrative Procedure Act (MAPA), which governs this rulemaking proceeding, does not require that agencies use task forces or steering committees to draft rules. If agencies do elect to involve individuals outside the agency in drafting rules, the MAPA does not offer any guidance on the composition of the group or require that consensus be reached with all interested parties before the agency may proceed with rulemaking. The MAPA also does not give the Administrative Law Judge authority to order suspension of the rulemaking process where the composition of the task force or steering committee may have been flawed. Moreover, the rulemaking process in Minnesota ensures that members of the public have ample opportunity to participate in the formulation of administrative rules by submitting oral and written comments on the proposed rules after they are published in the State Register. Accordingly, the Administrative Law Judge concludes that proposed rules are not defective because of issues relating to the composition of the Steering Committee.

77. Numerous individuals objected to the certification requirement in general, including Dan Joyce of DJ's Pilot Car; Mark Brunner of Manufactured & Modular Homes

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<sup>77</sup> Test. of Robert Swift; Public Ex. 1 (Nov. 29, 2012, Comment of Robert Swift); Test of M. Brunner; Public Ex. 12 (Jan. 17, 2012, Comment of M. Brunner) at 2-3; Test. of Christopher LaNave; Public Ex. 13 (Feb. 6, 2012, Comment of Christopher LaNave) at 1-2.

of Minnesota; Mike Ives, who is involved in moving manufactured homes; Scott Lund, a licensed manufactured home retailer and Mayor of Fridley; and Arnie Paraols, who primarily transports wind turbines.<sup>78</sup> Several of them noted that very few states require certification, and they questioned whether it is necessary or reasonable for Minnesota to impose this requirement. They also argued that requiring that everyone be certified amounted to "overkill," particularly since there have been no serious accidents in Minnesota. Mr. Lund argued that the need for the proposed rules does not justify the costs. Mr. Brunner also expressed concern that there will be delays and increased costs because it will be difficult to find available certified pilot/escort drivers. Mr. Brunner indicated that 80 percent of the manufactured homes moved in Minnesota today use civilian escorts, with some companies using eight civilian escorts a day, and urged that non-certified escort drivers continued to be allowed to provide the services they provide currently. Mr. Paraols expressed concern about the economic impact of the proposed rules and contended that Minnesota ports and workers would be adversely affected. Mr. Brunner and Mr. Lund asserted that none of the states that border Minnesota have a certification requirement and contended that the certification requirement will increase costs and cause logistical concerns for builders who ship their homes to Minnesota. Mr. Sorenson responded that Wisconsin currently requires formal training or certification of pilot car drivers.

78. The Legislature required in Minn. Stat. § 299D.085 that no person operate as an overdimensional load escort driver in Minnesota without a certificate, and directed the Commissioner of Public Safety to adopt rules to carry out that requirement. The Administrative Law Judge concludes that it would be contrary to the statute for the Department to ignore this directive.

79. Ms. Patterson and Mr. LaNave also expressed concern about what they described as a policy by MnDOT to allow only State Patrol troopers to be the lead escort on "encroaching" overdimensional loads (i.e., those with loads that extend over the center of the roadway into the other lane). They pointed out that licensed protective agents (LPAs) have extensive experience escorting such loads and argued that companies who seek a permit to transport overdimensional loads should be given the choice of who to hire as the lead escort.<sup>79</sup> As noted above, MnDOT and local authorities are expressly authorized under Minn. Laws 2010, Chapter 311, Section 2, to specify in permits whether operators of escort vehicles must be certified licensed peace officers or certified overdimensional load escort drivers. Accordingly, it appears that MnDOT has the requisite statutory authority to make such a determination.

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<sup>78</sup> Test. of Dan Joyce; Public Ex. 7; Test. of M. Ives; Test. of Scott Lund; Test. of Arnie Paraols; Test. of M. Brunner.

<sup>79</sup> Public Ex. 13 at 9-13.

## Part-by-Part Analysis of Proposed Rules

### Minn. Rule Part 7455.0100 - Definitions and

### Minn. Rule Part 7455.0200 – Overdimensional Load Escort Requirement

80. Part 7455.0100 of the proposed rules contains definitions of “certified licensed peace officer,” “certified pilot/escort driver,” and other terms used throughout the rules. The SONAR states that the definitions are reasonable because they reflect “common definitions of each term,” and are necessary to ensure proper and uniform implementation of the rules.<sup>80</sup>

81. Part 7455.0200 of the proposed rules states:

When escort services are required by law in the movement of an overdimensional load, the services may only be provided by:

- A. a certified licensed peace officer; or
- B. a certified pilot/escort driver.

In its SONAR, the Department stated that part 7455.0200 “is necessary to comply with state statute and is reasonable because it imposes only restrictions that are in the interest of public safety and defines those entities allowed for safe oversize load transportation. It is reasonable in that it gives two choices to those needing oversize load transportation services.”<sup>81</sup>

82. Mr. LaNave asserted that the Department’s rulemaking authority is limited to qualifications of the drivers, vehicle safety equipment standards, completion of certification courses, penalties for violating Minn. Stat. § 299D.085, and issuing certificates to drivers. He argued that the Department lacks statutory authority to issue proposed rule part 7455.0200 which delineates who can be an overdimensional load escort driver.<sup>82</sup> Laurie Patterson, co-owner of Pats LLC, a private security business, similarly argued that the Department exceeded its statutory rulemaking authority by describing who may operate as an overdimensional load escort driver. She pointed out that Minn. Stat. § 299D.085 does not include any identification of who can serve as an overdimensional load escort driver but merely states that no person may operate in that capacity without a certificate.<sup>83</sup>

83. As noted above, Minn. Stat. § 299D.085 specifies that, to obtain a certificate to operate as an overdimensional load escort driver, individuals must not only successfully complete a certification course but also must “meet all additional requirements, including vehicle and safety equipment standards specified by the commissioner,” and authorizes the commissioner to “adopt rules to carry out the

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<sup>80</sup> SONAR at 7.

<sup>81</sup> SONAR at 8.

<sup>82</sup> Public Ex. 13 at 2-3.

<sup>83</sup> Public Ex. 10 at 2-3 (Jan. 17, 2012, Comments of Laurie Patterson).

provisions of this section.” Moreover, the 2010 amendments to Minn. Stat. §§ 169.06 and 169.86 refer to the same two categories of drivers as the proposed rules (certified licensed peace officers and certified overdimensional load escort drivers). Under the circumstances, the Administrative Law Judge concludes that the Department has adequate authority for its identification of two categories of drivers in parts 7455.0100 and 7455.0200.

84. Mr. LaNave and Ms. Patterson further objected to parts 7455.0100 and 7455.0200 of the proposed rules on the ground that there is no express statutory authority for the State Patrol to enter into contracts with private entities to provide this service. They alleged--and the Department witnesses agreed--that State Patrol officers are paid overtime when escorting oversized loads. Based on their review of data relating to the State Patrol’s contracted services fund, Mr. LaNave and Ms. Patterson further alleged that the State Patrol is losing money (at the expense of Minnesota taxpayers) because the overtime paid to the officers is not covered by the amounts paid by moving companies for the service. They contended that qualified private businesses can provide this service, with resulting economic benefit to the private sector, and argued that it is not necessary or reasonable for the State Patrol to escort oversized loads at a monetary loss.<sup>84</sup>

85. In response, the Department asserted that the State Patrol is not “in the business” of escorting overdimensional loads for financial gain but merely provides personnel who, for a fee, will perform the escorting while on an “off-duty” status. The Department contended that the rate charged for this service is set by Minnesota Management and Budget. The Department acknowledged that overdimensional load escort driving is not explicitly identified in Minn. Stat. § 299D.03 as one of the duties to be performed by State Patrol officers, but argued that that does not mean that the statute precludes such off-duty activity.<sup>85</sup>

86. Minn. Stat. § 299D.03, subd. 1(b)(2), broadly states that the members of the Minnesota State Patrol have the power and authority “at all times to direct all traffic on trunk highways in conformance with law . . . or to expedite traffic or to insure safety, to direct traffic on other roads as conditions may require notwithstanding the provisions of law.” Moreover, Minn. Laws 2010, Chapter 311, Section 2 amended Minn. Stat. § 169.86, subd. 3b, to authorize MnDOT to specify in the permits it issues that certified licensed peace officers must operate escort vehicles. The Administrative Law Judge concludes that there is adequate statutory authority for peace officers, including State Patrol troopers, to serve as overdimensional load escort drivers.

87. Several individuals, including Mr. LaNave, Scott Kuehn, Laurie Patterson, and Thomas Fitzhenry of Metro Motorcycle Escort, requested that the proposed rules explicitly state that licensed protective agents (LPAs) are authorized to provide pilot/escort services. They pointed out that LPAs are authorized under Minn. Stat. § 326.338, to “control[ ] motor traffic on public streets, roads, and highways for the

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<sup>84</sup> Public Ex. 10 at 5-6 ; Public Ex. 13 at 5-9.

<sup>85</sup> Ex. Q.

purpose of escorting a funeral procession and oversized loads<sup>86</sup> and to perform these traffic-control duties "in place of a police officer when a special permit is required, provided that the protective agent is first-aid qualified."<sup>87</sup> They also emphasized that the Board of Private Detective and Protective Agent Services has established an "Escort Only" license for individuals who escort oversized loads.<sup>88</sup>

88. Mr. LaNave and Ms. Patterson argued that the proposed rules impermissibly conflict with existing statutes by failing to mention LPAs and apparently allowing otherwise unlicensed individuals to provide escort services after receiving a certificate. Because LPAs are the only individuals who are explicitly authorized by Minnesota Statutes to escort overdimensional loads, Ms. Patterson contended that the rules should explicitly require that individuals who wish to escort oversize loads first obtain an "Escort Only" license from the Board of Private Detective and Protective Agency Services and then complete the training course to be a certified overdimensional load escort driver under Minn. Stat. § 299D.085.<sup>89</sup> Scott Kuehn of Escort Service, Inc., suggested that the proposed rules be revised to indicate that escort services may only be provided by: "A. a certified licensed peace officer or protective agent; or B. a certified pilot/escort driver."<sup>90</sup> Thomas Fitzhenry requested that a new item C be added to recognize that "a certified protective agent as defined in Minnesota Statutes 326.338, subd. 4(4)" may provide escort services or, in the alternative, that the word "only" be removed from part 7455.0200. Mr. Fitzhenry supported the inclusion of a requirement that LPAs also receive training and be certified.<sup>91</sup>

89. In response, the Department asserted that the proposed rules do not conflict with Minn. Stat. § 326.338, subd. 4(4), but merely impose additional requirements in keeping with Minn. Stat. § 299D.085.<sup>92</sup> Mr. Sorenson indicated that the enactment of the broad certification requirement for all drivers was in part prompted by the fact that, under current law and practice in Minnesota, only the owner of an LPA company needs to be licensed and trained as an LPA. He maintained that LPAs typically have been allowed to hire untrained employees to perform pilot/escort services under the guidance and direction of the owner. He further asserted that the current LPA training in Minnesota does not include specific instruction relating to the traffic management necessary during the movement of overdimensional loads.<sup>93</sup>

90. The Administrative Law Judge concludes that the proposed rules do not impermissibly conflict with Minn. Stat. § 326.338, subd. 4, or preclude LPAs and their employees who obtain the appropriate certification from serving as "certified pilot/escort drivers." The enactment of Minn. Stat. §§ 299D.085 and the amendments to 169.06,

<sup>86</sup> Minn. Stat. § 326.338, subd. 4(4).

<sup>87</sup> Minn. Stat. § 326.338, subd. 4.

<sup>88</sup> Minn. Stat. § 326.3382, subd. 5. Individuals who wish to obtain such a license are not required to meet the 6,000-hours of experience standard set forth in Minn. Stat. § 326.3382, subd. 2(c).

<sup>89</sup> Public Ex. 13 at 3-4; Public Ex. 10 at 2-3, 5.

<sup>90</sup> Public Ex. 8.

<sup>91</sup> Test. of Thomas Fitzhenry; Public Ex. 6 (Nov. 29, 2011, Comments of Thomas Fitzhenry).

<sup>92</sup> Ex. Q.

<sup>93</sup> Minn. Stat. § 169.06, subd. 4(a) and (f). Like Minn. Stat. § 299D.085, these amendments are effective one year after publication in the State Register of rules adopted under Minn. Stat. § 299D.085, subd. 5.

subd. 4, merely make it clear that *all* persons operating as escort drivers in Minnesota and directing traffic while doing so must meet the additional training and certification requirement. These statutes do not specify any exception to the certification requirement for LPAs or licensed peace officers; to the contrary, Minn. Stat. § 299D.085 states that "*no person* may operate as an overdimensional load escort driver in this state without a certificate . . . ." <sup>94</sup> While the Department may, if it wishes, modify the proposed rules to include an explicit reference to certified LPAs licensed under Minn. Stat. § 326.338, subd. 4(4), the rules as proposed are not defective because they fail to include such a reference.

91. Mr. LaNave suggested that the proposed rules make it clear that peace officers and State Patrol officers are required to undergo the same training and certification as other individuals who wish to serve as pilot/escort drivers. <sup>95</sup> In response to these comments, the Department proposed in its post-hearing submissions to modify the definitions of "certified licensed peace officer" and "certified pilot/escort driver" set forth in subparts 2 and 3 of part 7455.0100. The modifications would add additional language to the definitions clarifying that "certified licensed peace officer" means a law enforcement officer who is "licensed in the State of Minnesota under Minn. Stat. 626.84 to 626.863 and who holds a certificate under Minn. Stat. 299D.085" and "certified pilot/escort driver (CPED)" means an individual "who holds a certificate under Minn. Stat. 299D.085." <sup>96</sup>

92. The modifications proposed by the Department clarify that both licensed peace officers and other individuals seeking to be pilot/escort drivers must receive certification under Minn. Stat. 299D.085, as suggested by Mr. LaNave. The proposed modifications are consistent with the language of Minn. Stat. § 299D.085. They also are in keeping with the statement in part 7455.0200 of the proposed rules that only "certified" licensed peace officers or "certified" pilot/escort drivers may provide escort services in the movement of an overdimensional load. These modifications are within the scope of the rulemaking as originally announced in the Dual Notice of Hearing and were made in response to comments made by members of the public. The final version of the proposed rule is not substantially different from the rule as originally proposed.

93. The definition of "certified pilot/escort driver" in subpart 3 indicates that the term means "an individual authorized to control and direct traffic as a flagger during the movement of an overdimensional load following the Manual on Uniform Traffic Control Devices (MUTCD) standards as defined by the Federal Highway Administration (FHWA) and adopted by reference under Minnesota Statutes, section 169.06." However, Minn. Stat. § 169.06 does not, in fact, incorporate the FHWA's MUTCD by reference. Section 169.06, subd. 1, merely states:

The commissioner shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this

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<sup>94</sup> Emphasis added.

<sup>95</sup> Public Ex. 13 at 13.

<sup>96</sup> Ex. Q at 1-2.

chapter for use upon highways within this state. Such uniform system shall correlate with and so far as possible conform to the system then current as approved by the American Association of State Highway Officials. The manual and specifications must include the design and wording of minimum-maintenance road signs. The adoption of the manual and specifications by the commissioner as herein provided is specifically exempted from chapter 14, including section 14.386.

94. Minn. Stat. § 14.07, subd. 4, permits agencies to incorporate other documents by reference in their rules in certain instances, as long as the documents are determined by the Revisor of Statutes to be conveniently available to the public and the rule contains information identifying the title, author, publisher and date of publication of the material to be incorporated; states whether the material is subject to frequent change; and contains a statement of availability to the public. Because subpart 3 of the proposed rules does not set forth all of the required information, it does not comply with the statutory requirements for incorporation by reference. Adding to the confusion, subpart 6 of the proposed rules defines "MUTCD" to mean "the Manual on Uniform Traffic Control Devices," without further explanation or description, and the SONAR merely repeats these definitions verbatim and generally asserts that all of the definitions in this part are necessary for proper and uniform application of the rules and are reasonable because they use "common" definitions of each term.<sup>97</sup> Accordingly, it is not clear whether the Department intended to incorporate by reference the Minnesota MUTCD adopted by the Commissioner of Public Safety under Minn. Stat. § 169.06, subd. 1, or the MUTCD adopted by the FHWA. It is likely that these documents are virtually identical, but the proposed rules must make clear what is being referenced to ensure that those affected by the proposed rules have fair notice of what is being required. This constitutes a defect in subparts 3 and 6 of the proposed rule. Because of the uncertainty about the precise document the Department intended to incorporate by reference, the Administrative Law Judge has insufficient information to suggest language that might cure this defect. It is suggested that the Department consult with the Revisor of Statutes for further assistance regarding incorporation by reference. In revising the language of this rule part, the Administrative Law Judge recommends that the Department also consider including a reference to Minn. Stat. § 169.06, subd. 4, since the 2010 amendments to that statute expanded the duties of flaggers beyond those set forth in the MUTCD.

95. The last sentence of the definition set forth in subpart 3 of the proposed rules states, "A certified pilot/escort driver is prohibited from allowing the driver's vehicle to cross the roadway center during traffic direction and shall not control traffic within an intersection controlled by a lighted traffic control device." The SONAR merely restates this sentence and does not explain any reason for inclusion of this limitation.<sup>98</sup> The definition of "certified licensed peace officer" in subpart 2 does not include a similar restriction, so presumably the rules intend that only certified licensed peace officers will

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<sup>97</sup> SONAR at 7.

<sup>98</sup> *Id.*

be permitted to cross the roadway center during traffic direction or control traffic within an intersection controlled by a lighted traffic control device.

96. Several individuals objected to the inclusion of the center line and traffic control restrictions in subpart 3 of the proposed rules. For example, Robert Swift, owner of Swift Housemoving and representative of the Minnesota Building Movers Association, commented that escorts used in his business need to be able to cross the center line to give others directions to pull into a driveway or get traffic off the road far enough, since the load itself extends across the center line. He also indicated that escorts need a limited ability to direct traffic in controlled intersections, and noted that it typically takes only two light cycles to move a building through a controlled intersection. He urged the Department to allow a private escort alternative to the lead police escort because private escorts are more widely available and are willing and able to change their work schedule on short notice. In contrast, he indicated that State Patrol officers require at least 24-hours' notice after the state permit is issued, and that the state permit typically takes 2- to 5-days to issue. Because his customers have many people on standby to finish up their projects and often have an exposed house foundation that is vulnerable to the weather, timing is critical.<sup>99</sup>

97. Several other individuals, including Christopher LaNave, Scott Kuehn, Megan Rassmussen, Matthew Kuehn, Laurie Patterson, and Paula Quarberg, objected to the center line and traffic control restrictions because they believe that companies moving oversized loads will be forced to hire State Patrol officers as escorts rather than using private individuals who work for LPAs. They contended that private drivers have been ticketed and "harassed" by police officers in recent years for going over the center line of the roadway despite the fact that they have always done that in the past without safety problems. They agreed with Mr. Swift that it is necessary to drive over the center line and control traffic in order to perform the job properly, and asserted that private sector escort companies will be forced out of business if only law enforcement is allowed to engage in these activities. They asserted that LPAs have been specifically trained in this field and have had significant experience in providing safe escort services.<sup>100</sup> Ms. Patterson argued that this portion of the proposed rule conflicts with existing statutes that allow protective agents to "control[ ] motor traffic on public streets, roads, and highways for the purpose of escorting . . . oversized loads" and authorize security guards to "control, regulate, or direct the flow or movements of the public, whether by vehicle or otherwise, to assure protection of private property."<sup>101</sup>

98. The Administrative Law Judge concludes that the Department has not shown that it is needed or reasonable to include the last sentence setting forth the center line/traffic control restriction in the proposed rules' definition of "certified pilot/escort driver." Contrary to the statement in the SONAR, it does not appear that this

<sup>99</sup> Test. of R. Swift; Public Ex. 1.

<sup>100</sup> Test. of Megan Rassmussen; Public Ex. 2 (Nov. 29, 2011, Comments of Megan Rassmussen); Test. of Matthew Kuehn; Public Ex. 3 (Nov. 29, 2011, Comments of Matthew Kuehn); Public Ex. 9 (Nov. 29, 2011, Comments of Paula Quarberg); Public Ex. 8 (Nov. 29, 2011, Comments of Scott Kuehn).

<sup>101</sup> Public Ex. 10 at 3; Minn. Stat. §§ 326.32, subd. 13(a)(3), and 326.338, subd. 4(4); see also Minn. Stat. §§ 299C.22, subd. 1(a)(3) and 626.88, subd. 1(c)(3).

is part of the "common definition" of the term; in fact, it is evident that whether or not such drivers may cross the roadway center or direct traffic at controlled intersections is a matter of significant controversy. Moreover, to the extent that current statutes prohibit this activity, it is unnecessary to set forth the requirement in the rules. The Administrative Law Judge also finds that the traffic control restriction in the proposed rules conflicts with Minn. Stat. § 326.338, subd. 4(4), which authorizes licensed protective agents to "control motor traffic on public streets, roads, and highways for the purpose of escorting a funeral procession and oversized loads" and makes it clear that such persons "may perform the traffic-control duties . . . in place of a police officer" when a special permit is required and the LPA is first-aid qualified. To remedy the defect in subpart 3, the Administrative Law Judge recommends that the Department withdraw the last sentence.

99. Ms. Patterson suggested that the proposed rules define the term "flagger" as having the meaning given in the version of the MUTCD that is incorporated by reference in the proposed rules. The Department did not respond to this suggestion. While the proposed rule is not rendered defective by virtue of its failure to include a definition of this term, the Administrative Law Judge recommends that the Department consider doing so because it would serve to clarify the proposed rules. The Administrative Law Judge recommends that any such definition refer to Minn. Stat. § 169.06, subd. 4, as well as the MUTCD. For similar reasons, the Administrative Law Judge also suggests that the proposed rules include a definition of "tillerman/steerman" to clarify the reference to that term that is contained in part 7455.0600(E) of the proposed rules. The inclusion of these definitions would be within the scope of the matter announced in the Dual Notice of Hearing, would be a logical outgrowth of the contents of the Dual Notice and the comments submitted by members of the public, and would not render the rule as finally proposed substantially different from the rule as originally published in the State Register.

## **Minn. Rule Part 7455.0300 – Pilot/Escort Driver Certification Process**

### **Subpart 1 – Certification Course**

100. Subpart 1 of part 7455.0300 of the proposed rules requires drivers who are "domiciled" in Minnesota to complete a pilot/escort certification course "accepted, approved, or authorized" by the Department. Charles Thibodeau, who is Chairman of the Legislative Liaison Committee of the American Society for Industrial Security and also provides training in Minnesota for security guards, suggested that the word "residence" be used rather than "domicile" based on his belief that the word "domiciled" means a temporary place to live. Mr. Thibodeau also warned the Department that it may be subject to lawsuits if the Department accepts, approves, or authorizes inadequate training, and he suggested that the course simply be "certified" by the Department rather than "accepted, approved, or authorized."<sup>102</sup>

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<sup>102</sup> Testimony of Charles Thibodeau; Public Ex. 4 (Nov. 29, 2011, Comments of Charles Thibodeau).

101. The common meaning of "domicile" is a place where a person has his or her "true, fixed, and permanent home," and does *not* mean a location in which the person intends to stay only temporarily.<sup>103</sup> Accordingly, it appears that the use of the term "domiciled" in the proposed rules adequately conveys the Department's intent and no modification is necessary. Because it would be confusing for the rule to state that the Department "certified" the training that drivers are required to be complete to obtain "certification," substitution of that word for "accepted, approved or authorized" is not recommended. The latter phrase is not defective as proposed; however, the Department may, if it wishes, streamline the proposed rule by using a single word to describe the action that will be taken by the Department when it sanctions a particular program.

102. Subpart 1 goes on to state that, upon successful completion of the certification course, drivers "must be issued a certification card by a Minnesota-authorized training program." However, Minn. Stat. § 299D.085, subd. 2, makes it clear that a driver must not only successfully complete the training course to be granted a certificate, but must also be at least 18 years of age, possess a valid operator's license for the type of vehicle being operated, and meet all additional requirements specified by the Commissioner, including vehicle and safety equipment standards. The proposed rules do not require the training program to verify that these requirements have been met before issuing the certification. Moreover, Minn. Stat. § 299D.085, subd. 2, states that the certificate must be issued by the *Commissioner* and it is not clear that the Commissioner is empowered to delegate his or her authority if the training program is run by a private individual.<sup>104</sup> Accordingly, the Administrative Law Judge finds that the language of the proposed rule is at odds with the statute that grants the Department rulemaking authority. To correct this defect, the Administrative Law Judge suggests that the second sentence of Subpart 1 be revised to state:

Upon a driver's successful completion of a training program authorized by the commissioner, the training program must issue the driver proof of course completion. The commissioner shall issue a certification card to drivers who demonstrate that they are at least 18 years of age, possess a valid operator's license for the type of vehicle being operated, have successfully completed a training program authorized by the commissioner, and meet all additional requirements set forth in Part 7455.

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<sup>103</sup> See, e.g., *Black's Law Dictionary* (Rev. 4<sup>th</sup> ed. 1968) at 572 (defining "domicile" as "[t]hat place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning") and at 1473 (defining residence as "[a] factual place of abode" and distinguishing it from "domicile" by stating that "[r]esidence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home"); see also *O'Sell v. Peterson*, 595 N.W.2d 870, 872 (Minn. App. 1999) (based on definition of "residence" in *Black's Law Dictionary* 1308-09 (6<sup>th</sup> ed. 1990), court ruled for purposes of service of process that "'residence' means 'something more than mere physical presence and something less than domicile'").

<sup>104</sup> See Minn. Stat. § 299D.01, subd. 3.

The proposed modification would not render the rule as finally proposed for adoption substantially different from the rule as originally proposed.

103. Several members of the public expressed concerns about the failure of the proposed rule to describe with any specificity the training that will be necessary for drivers to obtain certification. Mr. Thibodeau asked who would provide the training, what minimum qualifications they would need to have, what minimum requirements the training program would be required to meet, and what the training would cost, and argued that the proposed rules should provide at least provide a skeletal outline of the training to be required. Because part 7455.0300 lacks critical content regarding the training program, Mr. Thibodeau suggested that this part of the proposed rules be sent back to the Department to be reworked.<sup>105</sup> Ms. Patterson similarly argued that the proposed rule does not bear a reasonable relationship to the statutory purposes expressed in Minn. Stat. § 299D.085 because it fails to address the training curriculum requirements that an overdimensional load escort driver must complete to be certified; lacks content regarding how many hours of training are needed; fails to address whether there will be a test before certification is obtained; and does not state what the qualifications of the trainer will be. Ms. Patterson also emphasized that the proposed rules fail to specify a fee for the training.<sup>106</sup>

104. Mr. Sorenson responded during the hearing that training cannot be established until the current rule is finalized. He indicated that virtually every state that requires pilot/escort driver certification has not established the training curriculum until after initial rules are finalized. He stated that, after these rules are finalized, the Department will develop the training that meets the statutes, rules and regulations. He asserted that the Department is allowed to determine the entities that will provide training, such as state colleges or private individuals and, if it wishes, could allow those entities to develop the curriculum. He stated that the Department does not anticipate that it will need to have additional rulemaking regarding this topic.<sup>107</sup> As noted earlier, Mr. Sorenson stated in his post-hearing submission that “[t]he cost of the training will be determined when the Rule is finalized and the training is defines [sic] but I cannot see MNDOT/MNDPS doing anything different than other States.” He indicated that the cost of a four-year certification in other states varies from \$75 to \$200 and pointed out that even a \$200 cost would be minimal when spread over the four year period the certification would be effective. He contended that this would be a small price to pay for ensuring that pilot/escort drivers have the requisite knowledge, ability, and financial responsibility to protect the public.<sup>108</sup>

105. In the view of the Administrative Law Judge, a fair reading of Minn. Stat. § 299D.085 suggests that the Legislature intended that the Department would adopt rules that would provide at least minimal information about the **nature and cost** of the required training in order to (1) ensure that drivers providing escort services would have a full year before the statute takes effect to come into compliance with the certification

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<sup>105</sup> Public Ex. 4.

<sup>106</sup> Public Ex. 10 at 4.

<sup>107</sup> Test. of R. Sorenson.

<sup>108</sup> Ex. P at 4.

requirement; and (2) ensure that companies using drivers would find adequate numbers of available certified drivers at the time the statute takes effect. It appears to the Administrative Law Judge that the Department's approach to these rules has not been consistent with that intent.

106. The Administrative Law Judge concludes that the language of the proposed rule is defective because it is overly vague with respect to the nature of the training to be provided and how instructors or courses will be selected. As a result, it confers undue discretion on the Department. The Administrative Law Judge agrees that the Department is not required to set forth a detailed curriculum in its rules and understands the value of allowing those providing the training the flexibility to ensure that the curriculum can be modified to address evolving areas of concern. However, the proposed rules fail to provide any information whatsoever about the topics to be covered during the training course. Minn. Stat. § 299D.085, subd. 3, states that the certification course shall be "developed by the commissioner" and "offered by the commissioner or authorized agents." This language suggests that the Legislature did not intend for the Department to delegate the entire responsibility for developing the course to others. The proposed rules also do not set forth any criteria to guide the Department in determining which instructors and courses it will "accept, approve, or authorize." Discretionary power may be delegated to administrative officers "[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers."<sup>109</sup> The proposed rule does not furnish a reasonably clear policy or standard of action regarding the training requirement and the selection of instructors and courses, and is contrary to relevant case law. This is a defect in the rule.

107. To cure this defect and avoid undue vagueness and delegation of unbridled discretion to the Department, the rule must, at a minimum, identify the subject matter to be covered during training and what standards or criteria the Department will use in deciding which instructors and training courses will be approved. Because a detailed record was not developed during this proceeding regarding these matters, the Administrative Law Judge does not have a proper basis upon which to suggest language to cure this defect and it will be necessary for the Department to submit proposed language for review by the OAH. If the revisions proposed by the Department are based upon the substantive requirements contained in the proposed rules or other materials that are in the record of this proceeding, such as the Pilot Car Escort and Law Enforcement Escort Best Practices Guides or the Steering Committee's Final Recommendation as of November 9, 2010, it is possible that the modification may not result in a substantial change. However, if the revisions proposed by the Department would render this provision of the rules substantially different than the rule as originally proposed, it will be necessary for the Department to conduct an additional rulemaking proceeding to address this information.

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<sup>109</sup> *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); accord *Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964).

108. The Administrative Law Judge also finds that the language of subpart 1 of the proposed rule is defective because it does not state the fee to be charged to each certificate applicant as required by Minn. Stat. § 299D.085. That statute makes it clear that the Commissioner "shall" assess a fee for each certificate applicant, calculated to cover the Commissioner's cost of establishing and administering the program, and that the rules "must" specify the fee to be assessed. The Department's failure to do so is contrary to explicit legislative intent. To remedy this defect, the Department must specify the fee in the rules. The Department has established a rational basis in the SONAR for charging a fee in the amount of \$180 for the overdimensional load escort training and certification program, based upon the cost of the State Patrol commercial vehicle safety inspection program. If the Department chooses to specify this amount in its rule, the provision would be needed and reasonable and the rule would not be substantially different from the rule as originally published in the State Register. If the Department specifies a different fee in the rules, it is possible that the modification may be deemed to render the rule substantially different from the original version, and the Department may be required to address this issue in a new rulemaking proceeding.

**Subparts 2 – Certification Period  
Subpart 5 - Expiration**

109. Subparts 2 and 5 of the proposed rules both address the length of time certification will last. Subpart 2 states that initial certification is valid for four years from the date of issue and one additional four-year certification may be obtained through a mail-in or online recertification process provided by a Minnesota-authorized training program. However, subpart 5 indicates that certification "expires four years from the date issued" and, "upon expiration of the certification, the operator must again comply with the department's certification process."

110. The language of Subpart 5 is arguably at odds with the indication in Subpart 2 that a more streamlined recertification process will be available at the end of four years. While this lack of clarity is not a defect in the rule as proposed, the Administrative Law Judge suggests that these two subparts be combined into a single subpart, and that the language be modified to more clearly convey the intention of the Department. One possibility would be to withdraw Subpart 5 and simply revise the last sentence of Subpart 2 by eliminating the word "one" to clarify that, following initial certification, each additional recertification may be obtained through a mail-in or online recertification process. An additional possibility would be to withdraw Subpart 5, retain the reference to "one" as originally proposed, and add an additional sentence to the end of Subpart 2 that makes it clear that drivers must attend a full certification course every eight years. The suggested modifications would not result in a rule that is substantially different than the rule as originally proposed and would clarify the requirements of the rule.

**Subpart 3 – Certification Reciprocity**

111. Subpart 3 of the proposed rules states that pilot/escort drivers domiciled outside of Minnesota may operate as a certified pilot/escort driver with another state's

certification credential, "provided the course meets the minimum requirements outlined in the Pilot/Escort Training Manual - Best Practices Guidelines as endorsed by the Specialized Carriers and Rigging Association, Federal Highway Administration, in cooperation with the Commercial Vehicle Safety Alliance, which is incorporated by reference."

112. As noted above, in order for documents to be incorporated by reference in agency rules, Minn. Stat. § 14.07, subd. 4, requires that the rule contain information identifying the title, author, publisher and date of publication of the material to be incorporated; state whether the material is subject to frequent change; and contain a statement regarding the availability of the document to the public. The first sentence in subpart 3 does not identify the publisher or date of publication of the material to be incorporated and does not include a statement regarding whether the document is subject to frequent change or whether it is available to the public. As a result, it does not comply with the requirements of Minn. Stat. § 14.07, subd. 4. To correct this defect, the required additional information must be added to this provision.

113. The second sentence of subpart 3 of the proposed rules specifies, "The department may enter into a reciprocal agreement with any other state if that state demonstrates that its course materials are comprehensive and meet the requirements outlined by the department, which must include flagging, height pole operations, insurance, instructor credentials, and auditing of this state's program." Mr. LaNave suggested that the proposed rules specify that the only states that will be allowed reciprocity are those whose standards meet or exceed Minnesota's standards.<sup>110</sup>

114. A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies.<sup>111</sup> The second sentence of subpart 3 merely indicates that the Department "may" enter into a reciprocal agreement with other states under certain circumstances, and thereby fails to furnish a reasonably clear policy to guide the Department in making that determination. This portion of subpart 3 is defective because it grants unfettered discretion to the agency to grant or deny reciprocity. Moreover, the language in the remainder of the second sentence of subpart 3 is impermissibly vague. A rule is impermissibly vague if it fails to provide sufficient standards for enforcement<sup>112</sup> or is so indefinite that one must guess at its meaning.<sup>113</sup> Here, it is unclear what states must do to show that their course materials are "comprehensive," and there is no evidence that the Department has "outlined" any other requirements that must be met in order for other states to be granted reciprocity. Although the proposed rules address pilot/escort flagging requirements (part 7455.1400); height pole use (part 7455.1000 K); and insurance requirements (part

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<sup>110</sup> Test. of C. LaNave; Public Ex. 13 at 16.

<sup>111</sup> *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

<sup>112</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

<sup>113</sup> *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001); *Humenansky v. Minnesota Bd. of Md. Exam'rs*, 525 N.W.2d 559, 564 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995).

7455.1100), there is nothing in the proposed rules relating to instructor credentials or audit requirements. To correct these defects, the Administrative Law Judge recommends that the language of the second sentence of subpart 3 be modified as follows:

The department shall enter into a reciprocal agreement with any other state if that state demonstrates that its course meets the minimum requirements outlined in the Pilot/Escort Training Manual – Best Practices Guidelines referenced in this subpart and complies with the requirements set forth in Minnesota Rules Chapter 7455.

The language, as modified, appears to be consistent with the intent of the Department as reflected in the first sentence of subpart 3 and during the hearing. It would also provide greater certainty to other states regarding what they must show to be granted reciprocity and establish adequate policies to guide the Department in making reciprocity determinations. Instructor credentials and audit requirements could be added to the rules in a future rulemaking proceeding if the Department wishes to apply those factors as well. If the proposed rules are modified as suggested, the rules would not be substantially different from the rules as originally proposed.

#### **Minn. Rule Part 7455.0400 – Suspensions and Revocations of Certification**

115. Part 7455.0400 addresses situations warranting a *denial*, suspension, or revocation of the certification of the pilot/escort driver; therefore, the Administrative Law Judge recommends that the title of this part of the rules should be revised to also refer to denial of certification.

116. The proposed rules state that the Commissioner "shall deny, suspend, or revoke the certification" if the Commissioner determines that a driver has committed a "disqualifying" offense within the previous four years. Item A states that "disqualifying" offenses are convictions of the following traffic violations during the movement of an overdimensional load: driving under the influence of alcohol or controlled substances, reckless driving, careless driving, excessive speeding (15 miles per hour or more above the posted speed limit), driving left of roadway center, failing to obey a traffic control device, and any other driving violation likely to result in injury. Item B states that the Department "shall suspend the certification for a first offense for up to one year" and that "[s]ubsequent offenses may result in the permanent revocation of the convicted driver's certification."

117. Although it does not rise to the level of a defect in the proposed rule, the Administrative Law Judge finds the reference to "disqualifying" offenses in the proposed rules to be confusing because convictions of those offenses do not pose an absolute bar to certification; for example, Item B recognizes that a first offense results in a suspension of up to one year. To avoid confusion, the Administrative Law Judge recommends that the rule be revised to eliminate the use of that term.

118. Ms. Patterson pointed out that this part of the proposed rules applies only to "pilot/escort drivers." She argued that it would be unreasonable not to also apply this rule part to licensed peace officers.<sup>114</sup> The SONAR indicates that this rule was designed to provide a uniform disciplinary policy.<sup>115</sup> As discussed above, the Department has clarified in its proposed modifications to the rules that licensed peace officers will also be required to be certified in order to provide escort services. The Department did not provide any reason why peace officers should not be subject to the same grounds for denial, suspension, or revocation of certification as other drivers. The Administrative Law Judge concludes that the Department has not shown that it is necessary or reasonable to exclude peace officers from the requirements of this rule part.

119. The Administrative Law Judge also finds that part 7455.0400 is defective for a number of other reasons. First, the reference in Item A to "any other driving violation likely to result in injury" is impermissibly vague and gives the Department unfettered discretion, since virtually any driving violation could meet this standard. Second, the statements in Item B that certification shall be suspended after a first offense for "up to one year," without further explanation, and that subsequent offenses "may" result in permanent revocation of certification do not provide adequate standards to guide the Department's exercise of discretion. Finally, the Department has not shown that it is needed or reasonable to require "permanent" revocation of the certification where a second conviction occurs. Requiring a permanent revocation in such situations is inconsistent with the rule provision that establishes a four-year "look-back" period for convictions. Under that provision, individuals who are denied certification because they have had a conviction during the past four years would be eligible to reapply for certification after expiration of the four-year period. The Department has not demonstrated that it is reasonable or necessary to treat certified individuals more harshly than new applicants by permanently barring them from receiving certification if they have a second conviction within a four-year period.

120. To correct the defects noted in Findings 117-118 above, the Administrative Law Judge recommends that the proposed rule be revised as follows:

Conviction of one of the following traffic violations during the movement of an overdimensional load within the past four years shall constitute grounds for denial of certification or disciplinary action against a certification: driving under the influence of alcohol or controlled substances, reckless driving, careless driving, excessive speeding (15 miles per hour or more above the posted speed limit), driving left of roadway center, failing to obey a traffic control device, or a driving violation that resulted in bodily injury. The certification shall be suspended for up to one year following the first conviction, depending upon the seriousness of the underlying conduct. Subsequent convictions shall constitute grounds for revocation of certification.

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<sup>114</sup> Public Ex. 10 (attached annotated SONAR at 12).

<sup>115</sup> SONAR at 8.

121. Ms. Patterson further contended that the proposed rules conflict with Minn. Stat. §§ 326.3384 and 326.3387, and Minn. R. 7506.0170.<sup>116</sup> Those statutes and rules specify various grounds for the Board of Private Detective and Protective Agent Services to take disciplinary action against private detectives and LPAs. However, the Department's proposed rules relate to grounds for denial, suspension or revocation of pilot/escort driver certification. As a result, the proposed rules are not required to be consistent with or identical to the standards set forth for LPAs.

122. This part states that one of the traffic violations that provides a basis for disciplinary action is driving left of roadway center. Ms. Patterson and others argued that this portion of the proposed rule conflicts with existing statutes.<sup>117</sup> The Administrative Law Judge concludes that the inclusion of this provision in the proposed rule does not render it defective. Minn. Stat. § 169.18 specifies, with certain exceptions, that vehicles shall be driven upon the right half of a roadway and as nearly as practicable entirely within a single lane, and shall not be driven left of roadway center. Because only convictions will constitute grounds for discipline under the proposed rules, those who allege that they were improperly charged will have an opportunity to contest the violation and raise any defenses they may have under other statutory provisions.

#### **Minn. Rule Part 7455.0500 – Appeals Process**

123. Part 7455.0500 specifies that an individual may file an appeal when his or her certification is denied, suspended, or revoked. It further states that "all appeals and hearings must be requested, provided, and conducted pursuant to the Administrative Procedure Act in Minnesota Statutes, Chapter 14" and requires that "[a]ppeals must be made in writing and filed with the section commander." The proposed rules define Section to mean the Commercial Vehicle Enforcement Section of the State Patrol.

124. Although this language is not defective, the Administrative Law Judge suggests that the language of the rule more clearly set forth the obligations of Department personnel and the individual filing the appeal. It is recommended that the rule be revised to state:

When a driver's certification is denied, suspended, or revoked, the Department shall notify the individual of his or her right to appeal the Department's determination under the procedures of the Minnesota Administrative Procedure Act, Minnesota Statutes, Chapter 14. The notice of appeal shall be in writing and shall be filed with the Section Commander, Commercial Vehicle Enforcement Section, State Patrol [include street address], within 30 days of the individual's receipt of the Department's determination. The section commander shall thereafter initiate a contested case proceeding following the procedures of the Administrative Procedure Act, Minnesota Statutes, Chapter 14.

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<sup>116</sup> Public Ex. 10 (attached annotated SONAR at 12).

<sup>117</sup> Public Ex. 10 at 3.

This revision would clarify the proposed rules and would not result in a substantial change in the rules.

### **Minn. Rule Part 7455.0600 – Pilot/Escort Driver Requirements**

125. Ms. Patterson pointed out that the proposed rules apply only to pilot/escort drivers and fail to mention licensed peace officers. The Department did not provide any reason why the requirements set forth in this part should not also apply to licensed peace officers who are providing pilot/escort services. The Administrative Law Judge concludes that the Department has not shown that it is necessary or reasonable to exclude peace officers from the requirements of this rule part. To correct this defect, the Administrative Law Judge suggests that the title of this part be revised to refer more generally to “Driver Requirements,” and the first sentence of the proposed rule be modified to state, “certified pilot/escort drivers and certified licensed peace officers operating a pilot or escort vehicle must meet the following requirements . . . .” These modifications would not render the rule substantially different from the rule as originally proposed.

126. The SONAR indicates that this rule part was designed to provide uniform pilot/escort driver requirements and put Minnesota in line with the current best practices guidelines currently being used in the safe movement of permitted overdimensional loads on North American roads.<sup>118</sup> Ms. Patterson argued that the Department's statement that the proposed rules are reasonable because they follow the requirements that exist in other states falls short because the escorting requirements in other states vary dramatically. Ms. Patterson did not explain which provisions she found objectionable.<sup>119</sup> The Department did not provide a response to this comment.

127. The requirements set forth in Items A and B are drawn directly from Minn. Stat. § 299D.085. Item C simply requires that the driver has the certification card in his or her possession while providing escort services. These Items have been shown to be needed and reasonable, and are consistent with statutory authority.

128. Item D specifies that drivers operating a vehicle in excess of 10,000 pounds gross vehicle weight or gross vehicle weight rating must comply with the regulations of the Federal Motor Carrier Safety Administration set forth in 49 C.F.R. parts 300-399. The Pilot Car Escort Best Practices Guidelines attached to the SONAR merely mention the need to comply with 49 C.F.R. §§392.22 and 393.95.<sup>120</sup> The Department did not point to any state with pilot/escort rules that requires compliance with 49 C.F.R. §§300-399, and, based upon a brief review, many of the provisions in that part of the Code of Federal Regulations do not appear to apply.<sup>121</sup> Accordingly, the Administrative Law Judge concludes that the Department has not demonstrated the

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<sup>118</sup> SONAR at 8.

<sup>119</sup> Public Ex. 10 (annotated SONAR at 12).

<sup>120</sup> SONAR, Ex. 3 at pp. 4, 5, 11, 12, 13,

<sup>121</sup> For example, several of the provisions merely set forth state program requirements, rulemaking procedures, and rules of practice, and several other provisions (specifically, 49 C.F.R. §§ 300-302, 304-324, 326-349, 351-354, 357-359, and 361-364) do not currently contain any rules.

need for or reasonableness of requiring compliance with 49 C.F.R. §§300-399 in its entirety. To correct this defect, the Department must identify only the applicable portions of the FMCSA rules in the proposed rules. This modification would not cause the proposed rules to be substantially different from the rules as originally proposed.

129. Item E requires that drivers operating as a front or rear pilot car driver “may not perform as a tillerman/steerman for the load being escorted” and that a tillerman/steerman “may not be in the pilot/escort vehicle when a steering activity is being performed.” No one objected to this rule provision. As noted previously, the Administrative Law Judge suggests that the term “tillerman/steerman” be defined in Part 7455.0100. For clarity, the Administrative Law Judge also recommends that the word “may” in each sentence of Item E be replaced with “shall.”

### **Minn. Rule Part 7455.0700 – Pilot/Escort Vehicle Requirements**

130. Ms. Patterson and Matthew Kuehn of Escort Service, Inc., commented that this rule part should apply to licensed peace officers as well as pilot/escort drivers.<sup>122</sup> The SONAR indicates that this rule part was designed to provide uniform vehicle requirements and impose restrictions that are in the best interest of public safety.<sup>123</sup> The Department did not provide any reason why the vehicles used by peace officers providing escort services should not be subject to the same requirements as those used by other certified drivers. The only reference in this proposed rule that appears to restrict its applicability to vehicles driven by pilot/escort drivers is contained in the heading of the rule. The heading itself is not part of the rule.<sup>124</sup> According, the Administrative Law Judge recommends that the heading of this rule part be revised to refer to “Vehicle Requirements.” This modification would not render the rule substantially different from the rule as originally proposed.

131. As originally proposed, item C of the rules required that only a passenger automobile, light-duty van, two-axle pickup or two-axle single unit truck be used as a pilot or escort vehicle, and item G prohibited trailers from being towed during the movement of the overdimensional load. During the first day of hearing on the proposed rules, Mr. Swift indicated that the State of Minnesota requires house movers to have an emergency tow vehicle in case the truck pulling the house breaks down, and requested that the proposed rules be modified to allow house movers to have the emergency truck tractor also serve as the rear escort vehicle. He indicated that he uses a 3-axle semi tractor as a rear escort in his business. In addition, Mr. Swift noted that lots of equipment is needed when a building arrives at its new location, including a skid loader, extra tires, pointing, and dollies, and requested that house movers be allowed to pull a trailer in order to transport additional support equipment for the move.<sup>125</sup> Rick Rossow, another member of the Minnesota Building Movers Association, and Neil Anderson.

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<sup>122</sup> Public Ex. 3; Public Ex. 10 (annotated SONAR at 13).

<sup>123</sup> SONAR at 10.

<sup>124</sup> See Minn. Stat. § 645.49 (headnotes printed in boldface before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute); Minn. Stat. § 645.001 (the statutes on statutory construction also apply to rules).

<sup>125</sup> Test. of R. Swift; Public Ex. 1.

Owner of Anderson Building Movers, similarly requested that the rules be modified to permit the pulling of a trailer. Mr. Rossow suggested that the rear escort vehicle be allowed to be a large 2- or 2½-ton class 6, 7 or 8 truck.<sup>126</sup>

132. After the first day of hearing, the Department announced that it was willing to modify the proposed rules to address some of the concerns raised by members of the public. First, the Department acknowledged that towing a trailer behind the rear escort vehicle is a unique necessity for the house moving industry. Due to the logistics of house moving (slow speeds, time of day) and the fact that, during such moves, the roadway is for the most part closed, the Department noted that house movers would have the ability to better maneuver a trailer that is attached to an escort vehicle. The Department stated that it is willing to amend Part 7455.0700, item G, of the proposed rules to include an exemption allowing Minnesota licensed building movers to tow a trailer on their rear escort vehicle during the movement of an overdimensional load.<sup>127</sup> The Department proposed the following modification to the language of item G to accomplish this:

G. Trailers must not be towed during the movement of the overdimensional load. Exceptions to this Rule are for "Minnesota Licensed Building Movers". This exemption does not apply to the movement of Manufactured Housing or temporary structures.

133. While the language of the modification proposed by the Department is not defective, the Administrative Law Judge suggests that it be clarified as follows: "Trailers must not be towed during the movement of the overdimensional load unless: (1) the party involved is a building mover licensed by the Commissioner of Transportation under Minn. Stat. § 222.81; and (2) the building being moved is not a temporary structure or manufactured housing."

134. The Department did not indicate whether or not it would also be willing to modify item C of the proposed rules to allow a larger vehicle to serve as the rear escort for licensed building movers. Should it decide to make such a modification, the modification would be within the scope of the matter that was announced in the Dual Notice of Hearing and would not render the rules substantially different from the rule as originally proposed.

135. Item E states, "The vehicle must not use equipment designated for use by emergency vehicles." Scott Kuehn and Laurie Patterson objected to this requirement on the grounds that it is overly vague and contrary to Minn. Stat. § 169.04(c). Ms. Patterson asserted that she could find no current statute defining equipment or lighting that can only be used by emergency vehicles.<sup>128</sup> The Department did not respond to these arguments during the hearing or in its post-hearing submissions.

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<sup>126</sup> Testimony of Rick Rossow; Public Ex. 5 (Nov. 29, 2011, Comments of Rick Rossow); Test. of Neil Anderson.

<sup>127</sup> See Department's Email Messages dated Dec. 21, 2011, and Jan. 25, 2012.

<sup>128</sup> Public Ex. 8; Public Ex. 10 at 3 and attached annotated SONAR at 13-14.

136. Minn. Stat. § 169.04(c)(1) states that no ordinance or regulation adopted by a local authority “or any other provision of law shall prohibit . . . the use of motorcycles or vehicles utilizing flashing red lights for the purpose of escorting funeral processions, oversize buildings, heavy equipment, parades or similar processions or assemblages on the highways.”

137. The Administrative Law Judge concludes that the reference in Item E to “equipment designated for use by emergency vehicles” is impermissibly vague because it fails to give members of the regulated public fair notice of what is encompassed within the prohibition. Moreover, because the proposed rule could be interpreted to prohibit the use of flashing red lights, it conflicts with Minn. Stat. § 169.04(c)(1). To correct this defect, the Department could either withdraw Item E or revise the language to include a specific description of the equipment encompassed which clarifies that the prohibition does not extend to flashing red lights.

138. Several individuals, including Mr. Swift, Mr. Rossow, and Mr. Fitzhenry, objected to the requirement in Item I of the proposed rules that pilot/escort vehicles contain a two-way simplex communication device compatible with utility company vehicles if involved in the movement of the overdimensional load. They indicated that utility company employees frequently decline radios and prefer to communicate with cell phones or face-to-face and requested that utility companies be removed from the rule.<sup>129</sup> The Department did not provide a specific response to these comments.

139. The Department should consider whether or not to modify this requirement based upon the comments submitted. If it determines that the clause relating to utility company vehicles should be deleted or that the rule should be revised to permit parties involved in movement of an overdimensional load to agree to use a different mode of communication, such a modification would not render the rules substantially different from the version of the proposed rule published in the State Register. However, should the Department decline to modify the proposed rule, the Administrative Law Judge finds that the language of the rule as proposed is needed and reasonable to ensure that a compatible device is available in the event that it is needed to communicate with a utility company vehicle that is involved in the move.

### **Minn. Rule Part 7455.0800 – Pilot/Escort Vehicle Signing Requirements**

140. Ms. Patterson contended that the proposed rules are unreasonable because they apply only to “pilot/escort drivers” and not to licensed peace officers.<sup>130</sup> The Department did not respond to this comment. The Department should consider whether this part of the rules should simply refer to “Vehicle Signing Requirements” and be modified to encompass vehicles used by licensed peace officers. However, because it is likely that the authorized emergency vehicles used by certified licensed peace officers are already conspicuously marked and lighted, the language of this rule part as originally proposed is not rendered defective by referring only to pilot/escort vehicles.

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<sup>129</sup> Test. of R. Swift; Public Ex. 1; Test. of R. Rossow; Public Ex. 5.

<sup>130</sup> Public Ex. 10 (annotated SONAR at 14).

141. As originally proposed, item A of the rules specified that pilot/escort vehicles must display a "LONG LOAD" or "WIDE LOAD" sign mounted on the top of a vehicle. Several interested parties, including Mr. Swift on behalf of the Minnesota Building Movers Association and Mr. Fitzhenry of Metro Motorcycle Escort, recommended that the sign requirement contained in the proposed rules be modified to allow the use of an "OVERSIZE LOAD" sign, since that is the sign that many of them currently use and they would like to be able to avoid the expense of new signs.<sup>131</sup>

142. During the first day of hearing, the Department noted that it was willing to delete the "WIDE LOAD" and "LONG LOAD" sign requirements contained in Part 7455.0800, item A of the rules as originally proposed and instead merely impose an "OVERSIZE LOAD" sign requirement because most, if not all, escort vehicles already use such signs.<sup>132</sup> The Department proposed to modify the first sentence of item A of the proposed rules to simply state: "A pilot/escort vehicle must display an "OVERSIZE LOAD" sign mounted on the top of the vehicle."

143. The Administrative Law Judge finds that Item A, as modified, has been shown to be needed and reasonable. The modification made to the language of the rule is within the scope of the matter announced in the Notice of Hearing and in response to comments made by members of the public, and does not make the rule as substantially different from the rule as originally proposed.

144. Mr. Swift commented that the use of flags on escort vehicles at night is ineffective and unnecessary, and stated that the lighting on the trucks makes it impossible to see the flags.<sup>133</sup> Mr. Rossow asserted that flags that are positioned at a 45-degree angle from the "oversize load" sign as described in item C would protrude more than six inches beyond the widest part of the body of the pilot/escort vehicle, in violation of item F, and suggested that the language of those items be revised. He also urged that the rule take into consideration that the flags will shrink in size slightly when they are cold since they are made of vinyl.<sup>134</sup> The Department did not respond to these comments.

145. The Administrative Law Judge urges the Department to consider the comments made by Mr. Swift and Mr. Rossow and revise the rules if it deems appropriate, and does not believe that such modifications would render the rules substantially different. However, the Administrative Law Judge does not find the rule as originally proposed to be defective.

### **Minn. Rule Part 7455.0900 – Pilot/Escort Vehicle Lighting Requirements**

146. Ms. Patterson contended that the proposed rules are unreasonable because they apply only to "pilot/escort drivers" and not to licensed peace officers.<sup>135</sup>

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<sup>131</sup> Test. of R. Swift; Public Ex. 1.

<sup>132</sup> Test. of T. Nelson.

<sup>133</sup> Test. of R. Swift; Public Ex. 1.

<sup>134</sup> Test. of R. Rossow; Public Ex. 5.

<sup>135</sup> Public Ex. 10 (annotated SONAR at 15).

The Department did not respond to this comment. The Department should consider whether this part of the rules should simply refer to “Vehicle Lighting Requirements” and be modified to encompass vehicles used by licensed peace officers. However, because it is likely that the authorized emergency vehicles used by certified licensed peace officers are already conspicuously marked and lighted, the language of this rule part as originally proposed is not rendered defective by referring only to pilot/escort vehicles.

147. Item D states, “Pilot/escort vehicles must not be equipped with lighting or equipment that is reserved for emergency vehicles.” Scott Kuehn objected to the inclusion of this provision in the proposed rules and noted that state law allows the use of red lights on motorcycles and other vehicles used in providing escort services.<sup>136</sup> Mr. Fitzhenry and Ms. Patterson also argued that this item was vague and in conflict with existing statutes.<sup>137</sup> The Department did not address this comment in its post-hearing submissions.

148. The Administrative Law Judge concludes that Item D is impermissibly vague and conflicts with Minn. Stat. § 169.04(c)(1), for the same reasons set forth above with respect to part 7455.0700, Item E. To correct this defect, the Department could either withdraw Item D or revise the language to include a specific description of the equipment encompassed which clarifies that the prohibition does not extend to flashing red lights.

#### **Minn. Rule Part 7455.1000 – Pilot/Escort Vehicle Safety Equipment Requirements**

149. Ms. Patterson contended that the proposed rules are unreasonable because they apply only to “pilot/escort drivers” and not to licensed peace officers.<sup>138</sup> The SONAR indicates that this rule part was designed to provide uniform vehicle safety equipment requirements and impose restrictions that are in the best interest of public safety.<sup>139</sup> The Department did not provide any reason why the safety equipment in vehicles used by peace officers providing escort services should not be subject to the same requirements as those used by other certified drivers. The Administrative Law Judge concludes that the Department has not shown that it is necessary or reasonable to exclude certified licensed peace officers from the requirements of this rule part. To correct this defect, the first sentence of this rule should be revised to refer to “vehicles used in escort operations.” It is also recommended that the heading of this rule part be revised to simply refer to “Vehicle Safety Equipment Requirements.” These modifications would not render the rule substantially different from the rule as originally proposed.

150. Item B requires that a pilot/escort vehicle be equipped with “[a] hardhat approved by the federal Occupational Safety and Health Administration, for use by the pilot/escort driver.” Mr. Rossow and Neil Anderson objected to the hardhat requirement as unnecessary and pointed out that it was unclear when the driver was required to

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<sup>136</sup> Public Ex. 8.

<sup>137</sup> Test. of T. Fitzhenry; Public Ex. 6; Public Ex. 10 (annotated SONAR at 15).

<sup>138</sup> Public Ex. 10 (annotated SONAR at 16).

<sup>139</sup> SONAR at 12.

wear the hardhat.<sup>140</sup> The Department clarified during the hearing that it intended that the hardhat be worn when the driver was outside the vehicle, not when driving.<sup>141</sup> Although item B is not defective as proposed, the Administrative Law Judge suggests that the Department consider adding clarifying language at the end of item B indicating that the hardhat is for use by the pilot/escort driver "when outside the vehicle on any roadway." The suggested modification is consistent with a Steering Committee Overview dated February, 2009,<sup>142</sup> and would not render the final rule substantially different from the rule as originally proposed.

151. If a driver must have nine reflective triangles or reflectorized 18-inch orange traffic cones under Item F of the proposed rule, Mr. Rossow questioned why a driver must also have three additional standard 18-inch orange traffic cones under Item H. He also raised concern about the height pole requirement set forth in Item K, given the extremely high height of the mega-oversized loads that he hauls.<sup>143</sup> The Department did not respond to these comments.

152. The Administrative Law Judge urges the Department to consider the comments made by Mr. Rossow and revise the rules if it deems appropriate, and does not believe that such modifications would render the rules substantially different. However, the Administrative Law Judge does not find the rule as originally proposed to be defective.

153. Finally, to improve public understanding of the rule, the Administrative Law Judge recommends that the word "frangible" in Item K be replaced with "readily breakable." This would not result in a substantially different rule.

### **Minn. Rule Part 7455.1100 – Insurance Requirements**

154. Mr. Brunner and Mr. Ives asserted that the proposed rules impose an unreasonable insurance burden by mandating a \$1 million per occurrence commercial liability policy which must be maintained continually during the time that an individual is certified. Mr. Brunner projected that the proposed rules would double the costs associated with transportation of manufactured homes. He indicated that one of his Association's Minnesota members has been told by a part-time civilian escort driver that he would not be able to continue working because (1) his auto insurance premium would increase by 400% if he complied with the proposed rules' \$1 million insurance policy requirement; and (2) he has no desire to become a certified pilot/escort driver because he has no interest in stopping and directing traffic.<sup>144</sup> Mr. Ives estimated that the cost of the required insurance would be approximately \$2,000 per vehicle. He stated that some drivers will not qualify for the required coverage, and asserted that the

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<sup>140</sup> Test. of R. Rossow; Public Ex. 5; Test. of Neil Anderson.

<sup>141</sup> Test. of T. Nelson.

<sup>142</sup> The Overview was attached to Public Ex. 10 (Jan. 17, 2012, Comments of L. Patterson).

<sup>143</sup> Test. of R. Rossow; Public Ex. 5.

<sup>144</sup> Test. of M. Brunner; Public Ex. 7 at 3.

proposed rules reflect an unreasonable and unacceptable attempt to control the industry.<sup>145</sup>

155. In his post-hearing submission, Mr. Sorensen indicated that the insurance requirement was included in the proposed rules to ensure coverage of repairs and restitution in the event that the pilot/escort or flagger caused an accident. According to Mr. Sorensen, the Steering Committee looked at the rules of other states and interviewed insurance company representatives to determine the proper level of insurance to require, and learned that most pilot/escorts operating within Minnesota carried only personal line insurance policies which would not cover a commercial application. He noted that Pennsylvania, Florida, Georgia, Oklahoma, Colorado, Arizona and Utah require documentation showing that drivers have commercial insurance covering their job functions and work operations. He stated that automobile insurance policies do not cover flagging operations, and a professional liability policy is needed. He asserted that LPAs are not required to have professional liability coverage or proper vehicle insurance coverage. Based on Mr. Sorensen's experience, persons with good driving records can obtain the insurance required by the proposed rules for a cost of approximately \$3,000 to \$4,000 per year. He indicated that, on average, a pilot/escort driver is paid \$350-\$500 per day for working on projects. If the driver is working on a mileage basis, Mr. Sorensen stated that the average pay is between \$1.35-\$1.60 per loaded mile; if the pilot/escort travels with the load for 500 miles, which Mr. Sorensen contended is an average distance, the driver will earn \$675 to \$750 per day plus the cost of motels. Mr. Sorensen asserted that the Manufactured & Modular Home Association's contention that the cost of insurance will raise its members' operational costs is unfounded.<sup>146</sup>

156. The Administrative Law Judge concludes that the insurance requirements have been shown to be needed and reasonable. As noted in the SONAR, the required insurance coverage will provide an avenue for indemnification of drivers and also provide some protection to members of the public who may be injured as a result of the activities of the drivers.

157. To clarify the meaning of subpart 1, the Administrative Law Judge suggests that the Department consider revising the language of the first sentence as follows:

A driver must possess a current certificate of insurance or endorsement that indicates that the driver, or the driver's employer, has in full force and effect insurance coverage for bodily injury and property damage resulting from the operation of the pilot/escort vehicle, an act or omission by the operator of the pilot/escort vehicle, or both.

The suggested modification will not render the rule substantially different from the rule as originally proposed.

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<sup>145</sup> Test. of M. Ives.

<sup>146</sup> Ex. P at 3-4.

## **Minn. Rule Part 7455.1200 – Certified Pilot/Escort Duties**

158. Ms. Patterson contended that this part is unreasonable because it applies only to "pilot/escort drivers" and not to licensed peace officers.<sup>147</sup> The SONAR indicates that this rule part was designed to provide uniform job duties for drivers and impose restrictions that are in the best interest of public safety.<sup>148</sup> The Department did not provide any reason why the duties of peace officers providing escort services should not be subject to the same requirements as those of other certified drivers. The Administrative Law Judge concludes that the Department has not shown that it is necessary or reasonable to exclude certified licensed peace officers from the requirements of this rule part. To correct this defect, the Administrative Law Judge suggests that Item A be revised to refer to "a vehicle used in escort operations by certified licensed peace officers and certified pilot/escort drivers," and the remainder of the rule be revised to refer to "vehicles used in escort operations." It is also recommended that the heading of this rule part be revised to simply refer to "Certified Driver Duties." These modifications would not render the rule substantially different from the rule as originally proposed.

159. Scott and Matthew Kuehn objected to Item D(2) of the proposed rules. As proposed, Item D(2) states that, if the overdimensional vehicle or load goes through the traffic light but the rear pilot/escort vehicle does not, then the overdimensional vehicle or load must reduce speed until the pilot/escort resumes position behind the load. Matthew Kuehn commented that it would be more dangerous to require the load to slow down or stop under such circumstances.<sup>149</sup> Scott Kuehn also expressed concern about the safety of the approach required by the rules, and felt that it would only be appropriate if the rear escort was not close to the overdimensional load when proceeding through a light that is changing to red. He commented that, when going through traffic lights, the rear escort should be close enough to be seen by cross traffic.<sup>150</sup> The Department did not provide a response to these comments.

160. The Administrative Law Judge urges the Department to consider the comments made by Scott and Matthew Kuehn and revise the rules if it deems appropriate, and does not believe that such modifications would render the rules substantially different. However, the Administrative Law Judge does not find the rule as originally proposed to be defective.

## **Minn. Rule Part 7455.1300 – Pretrip Coordination Meeting**

161. Subpart 2, item A of the proposed rules indicates that pilot/escort drivers "shall ensure that all copies of permits and routing documentation are distributed to all appropriate individuals involved with the permitted load movement." Scott Kuehn noted that this should be required only if the escort obtained the permit.<sup>151</sup> Matthew Kuehn

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<sup>147</sup> Public Ex. 10 (annotated SONAR at 18).

<sup>148</sup> SONAR at 14.

<sup>149</sup> Public Ex. 3.

<sup>150</sup> Public Ex. 8.

<sup>151</sup> *Id.*

similarly commented that pilot/escort drivers should be concerned with safely escorting the load, and the responsibility for checking permits and measuring dimensions should be left to the moving companies that obtain the permits.<sup>152</sup>

162. Subpart 2, item B(2) of the proposed rules indicates that the load dimensions must be measured or verified during the pretrip coordination meeting, “with permitted dimensions verified jointly by the operator of the overdimensional vehicle or load and the pilot/escort driver.” Scott Kuehn commented that it should not be the responsibility of the escort to do this, but rather the moving company or the Department of Transportation.<sup>153</sup>

163. The Department did not respond to any of these comments. The Administrative Law Judge urges the Department to consider the comments and revise the rules if it deems appropriate, and does not believe that such modifications would render the rules substantially different. However, the Administrative Law Judge does not find the rule as originally proposed to be defective.

#### **Minn. Rule Part 7455.1400 – Pilot/Escort Flagging Requirements**

164. This part of the proposed rules specifies that pilot/escort drivers may, in the performance of the flagging duties required by the rules, control and direct traffic to stop, slow, or proceed in any situation when deemed necessary to protect the motoring public from the hazards associated with the movement of the overdimensional load. The proposed rules also state that pilot/escort drivers acting as a flagger may aid the overdimensional load in the safe movement along the highway designated on the overdimensional load permit and shall:

- A. assume the proper flagger position outside the pilot/escort vehicle and, as a minimum standard, have in use the necessary safety equipment as defined in section 6E.1 of the MUTCD;
- B. use “STOP” or “SLOW” paddles or a 24-inch red/orange square flag to indicate emergency situations, and other equipment as described in section 6E.1 of the MUTCD; and
- C. comply with the flagging procedures and requirements as set forth in the MUTCD and the Department of Transportation Flagger Training Handbook.

165. Mr. LaNave and Ms. Patterson argued that this part of the proposed rules conflicts with Minn. Stat. § 169.06 and the Minnesota Manual on Uniform Traffic Control Devices with respect to what flaggers are allowed to do. They asserted that the Minnesota MUTCD, section 6C.1, describes only three instances in which flaggers can control traffic (in work zones, incident areas, and where other events occur that temporarily disrupt normal road user flow) and contended that the escorting of an

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<sup>152</sup> Public Ex. 3.

<sup>153</sup> Public Ex. 8.

overdimensional load does not fall into any of these three situations. Ms. Patterson maintained that a pilot/escort driver can set up a temporary traffic control zone and act as a flagger only if the overdimensional load breaks down or an accident occurs while escorting services are being provided. Mr. LaNave suggested that the proposed rules use the same terminology as the Minnesota MUTCD.<sup>154</sup>

166. However, the Administrative Law Judge concludes that the amendments to Minn. Stat. § 169.06 that were made by Minn. Laws 2010, Section 311, Section 1, expanded the duties of flaggers beyond those set forth in the Minnesota MUTCD, and provide sufficient authority for this rule part. Those amendments make it clear that drivers shall obey traffic control devices unless otherwise directed by a police officer “or by a certified overdimensional load escort driver,” subject to certain exceptions for authorized emergency vehicles,<sup>155</sup> and that “[a]n overdimensional load escort driver with a certificate issued under section 299D.085, while acting as a flagger escorting a legal overdimensional load, may stop vehicles and hold vehicles in place until it is safe for the vehicles to proceed.”<sup>156</sup>

167. As noted in Finding 94 above, the Department must clarify and properly incorporate by reference in part 7455.0100 the version of the federal MUTCD or Minnesota MUTCD mentioned in the proposed rules.

168. Item C of the proposed rules also requires compliance with the flagging procedures set forth in the “Department of Transportation Flagger Training Handbook.” As noted above, in order for documents to be incorporated by reference in an agency rule, Minn. Stat. § 14.07, subd. 4, requires that the rule contain information identifying the title, author, publisher and date of publication of the material to be incorporated; state whether the material is subject to frequent change; and contain a statement regarding the availability of the document to the public. Item C does not indicate whether the U.S. Department of Transportation or MnDOT issued the handbook; does not identify the publisher or date of publication of the handbook; and does not include information about whether the handbook is subject to frequent change or is available to the public. As a result, it does not comply with the requirements of Minn. Stat. § 14.07, subd. 4. To correct this defect, the required additional information must be added to this provision.

169. Ms. Patterson also contended that the proposed rules are unreasonable because they apply only to “pilot/escort drivers” and not to licensed peace officers.<sup>157</sup> Because licensed peace officers have broad authority under Minnesota law to direct

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<sup>154</sup> Public Ex. 10 at 3-4; Public Ex. 13 at 13-14.

<sup>155</sup> Minn. Stat. § 169.06, subd. 4(a) (as amended effective one year after the Department’s final rules are published). See also Minn. Stat. § 169.06, subd. 4(f) (as amended effective one year after the Department’s final rules are published) (“[a] person operating a motor vehicle that has been stopped by an escort driver acting as a flagger may proceed only on instruction by the flagger or a police officer”).

<sup>156</sup> Minn. Stat. § 169.06, subd. 4(f) (as amended effective one year after the Department’s final rules are published).

<sup>157</sup> Public Ex. 10 (annotated SONAR at 21).

and control traffic, there is a reasonable basis to exclude them from the requirements of this rule provision.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted in Findings 94, 98, 102, 106, 108, 112, 114, 119, 137, 148, and 168.

3. 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, subd. 4; and 14.50 (iii), except as noted in Findings 98, 118, 119, 125, 128, 149, and 158.

4. The amendments 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.

5. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 2 and 3, as noted in Findings 94, 98, 102, 107, 108, 112, 114, 120, 125, 128, 137, 148, 149, 158, and 168.

6. Due to Conclusions 2 and 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

7. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

8. 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 on facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

**RECOMMENDATION**

IT IS RECOMMENDED that the proposed rules, as modified, be adopted, except where otherwise noted above.

Dated: March 29, 2012.



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BARBARA L. NEILSON  
Administrative Law Judge

Digitally Recorded; No Transcript Prepared.

