

May 4, 2023

VIA EMAIL ONLY

William Jensen-Kowski
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Mail Stop 420
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**Re: *In the Matter of the Proposed Rules of the Department of
Transportation Governing Special Transportation Service
Minnesota Rules, Chapter 8840
OAH 71-9037-38819; Revisor R-4593***

Dear Mr. Jensen-Kowski:

Enclosed please find the Report of the Chief Administrative Law Judge in the above-entitled matter and the Report of the Administrative Law Judge Jessica A. Palmer-Denig. The Department may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval. If the Department does not wish to follow the suggested actions of the Chief Administrative Law Judge to correct the defects found, the Department may follow the process outlined in Minn. Stat. § 14.26, subd.3(c).

If the Department chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, the agency must file the documents listed in Minn. R. 1400.2300, subp. 8, within 30 days of when the agency received written notice of the disapproval, as contained in Minn. Stat. § 14.26, subd. 2.

If you have any questions regarding this matter, please contact William Moore at (651) 361-7893, william.t.moore@state.mn.us or via facsimile at (651) 539-0310.

Sincerely,



NICHOLE HELMUELLER
Legal Assistant

Enclosure

cc: Office of the Governor
Office of the Revisor of Statutes
Legislative Coordinating Commission

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Department of Transportation Governing Special Transportation Service, Minnesota Rules, Chapter 8840

**ORDER OF CHIEF ADMINISTRATIVE
LAW JUDGE ON REVIEW OF
RULES UNDER
MINN. STAT. § 14.26**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.26, subd. 3(b) (2022), and Minn. R. 1400.2300 subp. 6 (2021). These authorities require the Chief Administrative Law Judge to review an Administrative Law Judge's findings that a proposed agency rule is defective and should not be approved.

On April 14, 2023, the Department of Transportation (Department) filed a request for review and approval of the above-entitled rules under Minn. Stat. § 14.26 (2022) and Minn. R. 1400.2310 (2021). Administrative Law Judge Jessica A. Palmer-Denig issued an Order on Review of Rules on April 28, 2023.

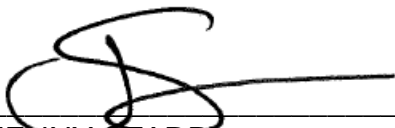
Based upon a review of the Order, written submissions and filings, Minnesota Statutes and Rules, and the rulemaking record, the Chief Administrative Law Judge issues the following:

ORDER

1. The findings of the Administrative Law Judge in the April 28, 2023, Order on Review of Rules are affirmed. Proposed Minn. R. 8840.5700, subp. 1a; Minn. R. 8840.5900, subp. 15a; and Minn. R. 8840.6300, subps. 1 and 6, are **DISAPPROVED**.

2. The reasons for the disapproval of the rule and the recommended corrective changes are set forth in the Order dated April 28, 2023.

Dated: May 4, 2023



JENNY STARR
Chief Administrative Law Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the
Department of Transportation Governing
Special Transportation Service, Minnesota
Rules, Chapter 8840

**ORDER ON REVIEW OF
RULES UNDER
MINN. STAT. § 14.26**

The Minnesota Department of Transportation (Department) seeks review and approval of the above-entitled rules pursuant to Minn. Stat. § 14.26 (2022). On April 14, 2023, the Department filed all documents required under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2021).

Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons explained in the Memorandum that follows,

IT IS HEREBY DETERMINED:

Except as to proposed Minn. R. 8840.5700, subp. 1a; Minn. R. 8840.5900, subp. 15a; and Minn. R. 8840.6300, subps. 1 and 6;

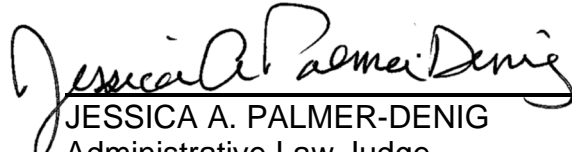
1. The Department has the statutory authority to adopt the rules.
2. The Department has complied with the procedural requirements of Minn. Stat. §§ 14.001-.69 (2022) and Minn. R. 1400.2000-.2310 (2021).
3. Modifications to the rule made by the Department following publication of the proposed rules in the *State Register* do not result in substantially different rules within the meaning of Minn. Stat. §§ 14.05, subd. 2, .24.
4. The record demonstrates the rules are needed and reasonable.

IT IS HEREBY ORDERED THAT:

1. The following proposed rule parts are **DISAPPROVED**:
 - Minn. R. 8840.5700, subp. 1a,
 - Minn. R. 8840.5900, subp. 15a, and
 - Minn. R. 8840.6300, subps. 1 and 6.

2. Except as to proposed Minn. R. 8840.5700, subp. 1a; Minn. R. 8840.5900, subp. 15a; and Minn. R. 8840.6300, subps. 1 and 6, the rules are **APPROVED**.

Dated: April 28, 2023


JESSICA A. PALMER-DENIG
Administrative Law Judge

MEMORANDUM

I. Introduction

The Department is revising rules governing special transportation service. The Department's Office of Freight and Commercial Vehicle Options administers the special transportation service program under Minn. Stat. § 174.30 (2022). Under Minn. Stat. § 174.29, subd. 1 (2022), the term "special transportation service" refers to motor vehicle transportation services for individuals who are elderly or disabled and certain other nonemergency medical transportation services.

Minn. Stat. § 174.30, subd. 2, requires the Department to "adopt by rule standards for the operation of vehicles used to provide special transportation service which are reasonably necessary to protect the health and safety of individuals using that service," including rules regulating the qualification of drivers and attendants, vehicle safety, and minimum insurance requirements. On April 14, 2023, the Department submitted its request for review and approval of the proposed rule amendments under Minn. Stat. § 14.26.

When an agency intends to adopt a rule without conducting a hearing under Minn. Stat. § 14.26, the agency is required to submit the rule to the Office of Administrative Hearings for review and approval.¹ The Administrative Law Judge must then determine whether the proposed rules comport with applicable legal standards.² When a rule is disapproved, the Administrative Law Judge must provide a written explanation of the reasons for disapproval and make recommendations regarding revisions that will allow the agency to overcome any defects.³

The Administrative Law Judge has identified defects in three of the Department's proposed rules, which are discussed below. The Administrative Law Judge approves the remainder of the Department's rule amendments.

¹ The Department published a Dual Notice, but it canceled the scheduled hearing because it received fewer than 25 hearing requests. See Dual Notice (Dec. 8, 2022); Letter from William Jensen-Kowski to the Administrative Law Judge (Feb. 7, 2023).

² See Minn. R. 1400.2100; Minn. R. 1400.2300, subp. 3.

³ Minn. Stat. 14.26, subd. 3(a).

II. Disapproved Proposed Rules

A. Proposed Minn. R. 8840.5700, subp. 1a

The Department's amendments identify a document titled "Minnesota Vehicle Requirements for Special Transportation Services and Limousines" which the Department selected to replace the existing rule's reference to the "North American Out-Of-Service Criteria."⁴ The Department explains that the Minnesota Vehicle Requirements for Special Transportation Services and Limousines contains standards "used to determine whether a vehicle is in a condition that is likely to cause an accident or breakdown."⁵ The Department maintains that this document is a "tool the Department has developed for these types of vehicles, specifying the standards to determine whether a covered vehicle is likely to cause an accident or breakdown based on state statutes, state rules, and applicable federal guidelines and regulations."⁶ The Department's Statement of Need and Reasonableness (SONAR) states that:

This amendment is reasonable because the implementation of this standard will allow the Department to have a single standardized tool to use when determining whether a vehicle is likely to cause an accident or breakdown. Additionally, if a member of the public wishes to obtain a copy of the "North American Out-Of-Service Criteria," he or she would need to purchase it from the Commercial Vehicle Safety Alliance. The Department will be able to distribute the "Minnesota Vehicle Requirements for Special Transportation Services and Limousines" for free at the Department's physical locations and online. This will allow providers to access the Department's standards for vehicles and vehicle inspections much more easily.⁷

As originally proposed, Minn. R. 8840.5700, subp. 1, identified this document but did not incorporate the Minnesota Vehicle Requirements for Special Transportation Services and Limousines by reference.⁸ The Department subsequently modified its proposed amendment of this rule to move this section to a new subpart 1a, identified the date of the document as February 3, 2023, and incorporated it by reference into the rule.⁹

Incorporation by reference is governed by Minn. Stat. § 14.07, subd. 4. That statute provides:

An agency may incorporate by reference into its rules the text from Minnesota Statutes, Minnesota Rules, United States Statutes at Large, United States Code, Laws of Minnesota, Code of Federal Regulations, the

⁴ Proposed Rules at 9 (Nov. 8, 2022) (Proposed Rules); see also Minn. Stat. § 221.031, subd. 9 (2022) (adopting the North American Uniform Driver, Vehicle, and Hazardous Materials Out-Of-Service Criteria).

⁵ SONAR at 19.

⁶ *Id.*

⁷ *Id.* at 19-20.

⁸ Proposed Rules at 9.

⁹ Modified Copy of Adopted Rules at 8 (Mar. 15, 2023) (Modified Rules).

Federal Register, and other publications and documents which are determined by the revisor of statutes, to be conveniently available to the public. If the rule incorporates by reference other publications and documents, the rule must contain a statement of incorporation. The statement of incorporation by reference must include the words “incorporated by reference”; must identify by title, author, publisher, and date of publication the standard or material to be incorporated; must state whether the material is subject to frequent change; and must contain a statement of availability.¹⁰

When the Revisor of Statutes certifies rule language containing an incorporation by reference of publications or documents, the Revisor should so indicate in the certification.¹¹ Further, “[i]f the revisor certifies that the form of a rule is approved, that approval constitutes the revisor’s finding that the publication or other document other than one listed by name in this subdivision, and which is incorporated by reference into the rules, is conveniently available to the public.”¹²

The Department’s modified proposed rule does not comply with the requirements of Minn. Stat. § 14.07, subd. 4, and so does not validly incorporate the Minnesota Vehicle Requirements for Special Transportation Services and Limousines by reference. The proposed language seeks to incorporate a “publication or document” and, therefore, must (1) identify by title, author,¹³ publisher, and date of publication the standard or material to be incorporated; (2) state whether the material is subject to frequent change; and (3) contain a statement of availability. The proposed rule references the title of the document and its date, but it does not contain any of the other required information.

The Department states that “[t]he modifications to the proposed rules are reflected in the rules as adopted and are approved by the Revisor of Statutes.”¹⁴ The Department’s filing does not include a certification by the Revisor related to the modified proposed language.¹⁵ Therefore, the record does not demonstrate that the Revisor has reviewed and approved the form of the modified proposed rule or that the Revisor has determined that the document is conveniently available to the public.

The Administrative Law Judge encourages the Department to consult with the Revisor regarding the proposed incorporation by reference. The Department should then revise the language of proposed Minn. R. 8840.5700, subp. 1a, to include all information required by Minn. Stat. § 14.07, subd. 4. Because the proposed incorporation by reference was not part of the Department’s original rule language, the SONAR does not discuss this issue. Therefore, on resubmission, the Department should supplement the SONAR by providing additional information regarding the

¹⁰ Minn. Stat. § 14.07, subd. 4(a).

¹¹ *Id.*

¹² *Id.*

¹³ As noted, the SONAR states that the Department developed the document, but the proposed rule does not specifically identify an author.

¹⁴ Letter from William Jensen-Kowski to Administrative Law Judge (Apr. 14, 2023).

¹⁵ See Modified Rules.

Minnesota Vehicle Requirements for Special Transportation Services and Limousines, including explaining the circumstances under which the Department prepared this document, whether the Department anticipates revising the document and how often such revisions will occur, and where the document may be found by members of the public. Finally, the Order Adopting Rules states that this amendment is in subpart 1, and not subpart 1a.¹⁶ The Department should revise the Order to clarify that this amendment is in subpart 1a.

B. Proposed Minn. R. 8840.5900, subp. 15a

The Department proposed the following amendment of Minn. R. 8840.5900, subp. 15:

Subp. 15. **Provider responsibility; statement of physical qualifications qualification.** Before using or hiring a driver to provide special transportation service, a provider must obtain and review a copy of the statement of physical ~~qualifications~~ qualification or other evidence of physical ~~qualifications~~ qualification listed in subpart 5 or 6 that the driver meets the physical ~~qualifications~~ qualification in subpart 1.

The provider must periodically review a copy of each driver's valid medical examiner's certificate or other evidence of physical qualification listed in subpart 5 or 6 as required in subpart 1. This review must be performed in such a way as to ensure the driver is not used to perform services without a current and valid medical examiner's certificate or other evidence of physical qualification. The provider must keep a record of this review in the driver's file under part 8840.6100.¹⁷

In its modified proposal, the first paragraph remains in subpart 15, while the second paragraph is in a new subpart 15a.¹⁸ Modified proposed subpart 15a contains a defect.

The word “periodically” is vague and requires disapproval of this proposed rule part. “A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.”¹⁹ A rule must be sufficiently specific to provide fair warning of the standard of conduct to which the rule applies.²⁰ The requirement that a provider review documentation “periodically” does not clearly articulate how often the Department expects a provider to conduct such a review or provide an enforceable standard.

¹⁶ Order Adopting Rules at 3.

¹⁷ Proposed Rules at 14-15.

¹⁸ Modified Rules at 15.

¹⁹ *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985), *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

²⁰ *Cullen v. Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

The Department recognized the variability suggested by the word “periodically” in its SONAR.²¹ The Department states:

The addition of the requirement for providers to periodically check medical examiner’s certificates or other evidence of physical qualification is necessary to ensure that drivers do not perform special transportation service trips after a medical examiner’s certificate has expired or a waiver has lapsed. The Department proposes “periodic” checks because not all types of evidence of physical qualification are valid for the same length of time. Waivers of physical qualification in particular, can vary by the type and severity of the condition in question. It is the provider’s responsibility to ensure that drivers have current and valid medical examiner’s certificates or other evidence of physical qualification.²²

The Department’s goal is to prohibit providers from using a driver who lacks a current medical examiner’s certificate or other evidence of physical qualification to provide special transportation service. There are several ways that the rule could be revised to eliminate the defect and still meet this goal.

For example, the Department could specify the particular types of documents a provider must review and establish a schedule for driver documentation reviews or indicate the minimum number of times a provider must conduct a check of documentation within a certain period or until a waiver is no longer necessary. Based on the Department’s discussion of this issue in the SONAR, it chose the word “periodically” because there is no set schedule for the expiration of driver qualification documents. As a result, establishing a review schedule or minimum frequency of review may be difficult.

Alternatively, the Department could simply eliminate the word “periodically” entirely because a standard by which the review can be measured, whether it ensures “the driver is not used to perform services without a current and valid” form of documentation, is already included in the rule. If the provider does not perform reviews that meet this standard, and if it allows a driver without documentation of physical qualification to provide services, the provider violates the rule regardless of how often the provider conducts a documentation review. The Department proposed Minn. R. 8840.5700, subp. 1c, to grant authority for it to audit provider records, including by examining driver and attendant records at least annually.²³ The Department can check the provider’s performance by reviewing a driver’s file to see whether the provider has maintained a current certificate or other documentation for the driver, and it can measure the provider’s ongoing compliance efforts by examining whether the provider kept a record showing that it engaged in documentation reviews. Rule part 8840.5900, subp. 15a would then read as follows:

²¹ SONAR at 25-26.

²² *Id.* at 26.

²³ Modified Rules at 9.

The provider must periodically review a copy of each driver's valid medical examiner's certificate or other evidence of physical qualification listed in subpart 5 or 6 as required in subpart 1. This review must be performed in such a way as to ensure the driver is not used to perform services without a current and valid medical examiner's certificate or other evidence of physical qualification. The provider must keep a record of this review in the driver's file under part 8840.6100.

C. Proposed Minn. R. 8840.6300, subs. 1 and 6

The Department has proposed amendments to Minn. R. 8840.6300 (2021), which governs the standards for variances from the special transportation service rules. By way of background, Minn. Stat. §§ 14.055, .056 address variances. The standards for reviewing and granting a rule variance are found in Minn. Stat. § 14.055, while Minn. Stat. § 14.056 contains requirements for the contents of a variance petition, notice requirements, and directions to the agency regarding the timing of its review and the substance of the order granting or denying the variance. Minn. Stat. § 14.055, subd. 5, allows an agency to promulgate rules establishing its own variance standards. The statute contemplates an “either-or” proposition regarding variance standards, because when an agency has adopted a rule governing variances, Minn. Stat. §§ 14.055, .056, no longer apply.²⁴

In its original proposal, the Department intended to amend the language of Minn. R. 8840.6300 as follows:

Subpart 1. **Elements.** The commissioner may grant a variance from parts 8840.5100 to 8840.6300, except part 8840.5400. ~~An application for To request a variance must be in writing, state the specific rule part or subpart from which a variance is requested, an applicant must submit a petition according to the requirements of Minnesota Statutes, section 14.056, and show that:~~ demonstrate that the applicant meets the criteria in item A or B.

~~A. the rationale for the rule or rules in question can be met or exceeded by the specific alternative practice which the applicant proposes to substitute; If the commissioner finds that the rule's requirements, as applied to the circumstances of the applicant, would not serve any of the rule's purposes, the commissioner must grant a variance.~~

~~B. the application of the rule in question would impose an excessive burden on the applicant; and~~ If the commissioner finds

²⁴ See REPORT OF THE ADMINISTRATIVE LAW JUDGE, *In the Matter of the Proposed Rules of the Minnesota Department of Health Governing Assisted Living Facilities, Minnesota Rules Chapter 4659*, OAH 65-9000-37175, 2021 WL 1567081 at *30 (Minn. Office Admin. Hearings Mar. 29, 2021) (“If the Department seeks to have the requirements of §§ 14.055 and 14.056 apply, then it must specifically incorporate them into the proposed rule. The Department cannot have it both ways – it cannot establish its own governing variance standards and procedures but then rely on the procedures of Minn. Stat. §§ 14.055 and 14.056.”).

that failure to grant the variance would result in hardship or injustice to the applicant, the variance would be consistent with the public interest, and the variance would not prejudice the substantial legal or economic rights of any person or entity, the commissioner may grant a variance according to Minnesota Statutes, section 14.055, subdivision 4.

~~C. the granting of the variance will not adversely affect the public health and safety.~~

...

Subp. 6. **Conditions and duration.** The commissioner may impose conditions on the granting of a variance according to Minnesota Statutes, section 14.055. The commissioner may limit the duration of a variance and may renew a variance.²⁵

As originally proposed, subpart 1(A) adopted the language provided for mandatory variances in Minn. Stat. § 14.055, subd. 3. Proposed subpart 1(B) used the standards found in Minn. Stat. § 14.055, subd. 4, to govern consideration of a discretionary variance. Proposed subpart 6 is a new provision, allowing the agency to impose conditions on a variance, as allowed under Minn. Stat. § 14.055, subd. 2(1). The Department's SONAR explains that it intended to clarify the standards the Department will use in considering variance requests, provide information to providers regarding those standards, and establish the Department's ability to impose variance conditions.²⁶

The Department subsequently modified its proposal. As modified, subpart 1 provides that the Commissioner of the Department "may grant a variance" from Minn. R. 8840.5100-.6300 (2021), except Minn. R. 8840.5400, "according to Minnesota Statutes, section 14.055."²⁷ The Department's modified rule no longer recites the standards found in Minn. Stat. § 14.055, subs. 3 and 4, but instead reverts to the variance standards currently found in Minn. R. 8840.6300, subp. 1(A)-(C). The Department's Order Adopting Rules provides its reasoning for the modification, stating:

These changes are reasonable because they do not add new requirements, but rather keep existing ones. The new language adds references to Minnesota statutes, sections 14.055 and 14.056. The language that has been cut was proposed to ensure these rules complied with those statutory requirements for variances, which is now addressed by the above-mentioned references.²⁸

²⁵ Proposed Rules at 31-32.

²⁶ SONAR at 40.

²⁷ Modified Rules at 30.

²⁸ Order Adopting Rules at 8.

It appears that the Department seeks to adopt the provisions of Minn. Stat. § 14.055 by rule. It first did so by proposing to use the exact language of the statute, and it now proposes including a reference to the statute instead. But the modified proposal creates conflicting language,²⁹ resulting in an impermissibly vague rule that does not provide fair warning of the standards governing the Department's consideration of whether to grant a variance.

First, proposed subpart 1 phrases the Commissioner's grant of a variance as discretionary, but Minn. Stat. § 14.055 provides standards for mandatory variances.³⁰ The Department originally proposed adopting the specific language found in Minn. Stat. § 14.055, subd. 3, governing mandatory variances. Now the revised language does not make clear whether it still intends to adopt standards that would require it to grant a variance request. The Department should clarify whether it only intends to adopt standards for discretionary variances, or whether the Department must grant a variance if the applicant complies with Minn. Stat. § 14.055, subd. 3.

Second, Minn. Stat. § 14.055, subd. 4, would apply to variance requests under the Department's rule as currently proposed. This statute identifies the standards for granting a discretionary variance, stating:

An agency may grant a variance if the agency finds that:

- (1) application of the rule to the petitioner would result in hardship or injustice;
- (2) variance from the rule would be consistent with the public interest; and
- (3) variance from the rule would not prejudice the substantial legal or economic rights of any person or entity.³¹

Minn. R. 8840.6300, subp. 1(A)-(C), which the Department now proposes to leave unchanged, states the standards required to obtain a discretionary variance differently. Under the Department's current rule, an applicant for a variance must show that:

- A. the rationale for the rule or rules in question can be met or exceeded by the specific alternative practice which the applicant proposes to substitute;
- B. the application of the rule in question would impose an excessive burden on the applicant; and

²⁹ See Minn. R. 1400.2100(D).

³⁰ See Minn. Stat. § 14.055, subd. 3.

³¹ *Id.*, subd. 4.

C. the granting of the variance will not adversely affect the public health and safety.

While there is some overlap between the two sets of standards, and possibly some redundancy, the statute and rule are not the same.³² The proposed rule conflicts with Minn. Stat. § 14.055 by referring to the statute, but then retaining the Department's own standards. It is no longer clear whether a variance applicant must comply with one set or the other, or meet both sets of standards in seeking a variance. If the Department wishes to adopt only the standards provided in Minn. Stat. § 14.055, subd. 4, it could clarify this issue by amending the rule to delete the requirement that an applicant demonstrate that it meets (A) through (C) of subpart 1. Alternatively, the Department could specify the particular provisions of the statute and rule it intends to apply to its variance reviews.

Third, the Department proposes that an applicant must apply for a variance by submitting a petition that complies with Minn. Stat. § 14.056. The statute provides seven areas of information that must be included with a variance petition.³³ It is not clear whether the Department seeks only to require that an application contain this information, or whether the Department also intends to adopt the remainder of the procedures in Minn. Stat. § 14.056 to govern the application process. Adopting the statutory procedure for considering variance requests creates a conflict with a portion of its rule that the Department had not identified for amendment. Under Minn. Stat. § 14.056, subd. 5, an agency must issue a written order within 60 days of receiving the complete application and if it does not act within that timeline, the petition is considered approved. Under Minn. R. 8840.6300, subp. 2, however, the Department must act on a variance request within 30 days and there is no provision for automatic approval. Minn. R. 8840.6300, subp. 2, also provides a right to a contested case hearing if a variance request is denied, but Minn. Stat. § 14.056 does not provide the right to obtain further review.

The Department should clarify whether it intends only to require that an application contain the information listed in Minn. Stat. § 14.056, subd. 1. If so, it can remedy this issue by revising the rule to read “an applicant must submit a petition ~~according to the requirements~~ containing all information required by of Minnesota Statutes, section 14.056, subdivision 1.” If the Department intends to do more than that and seeks to apply other standards from Minn. Stat. § 14.056 to a variance application, it should clarify the rule to explain the specific processes it intends to adopt, and it should address the procedural conflicts between Minn. Stat. § 14.056 and Minn. R. 8840.6300.

³² The statute refers to hardship or injustice to an applicant by application of the rule, while the rule requires showing an excessive burden. Arguably the hardship standard in the statute is lower than the excessive burden standard of the rule. A variance may be granted if it is consistent with the public interest under the statute, or if it does not adversely impact public health and safety under the rule. An applicant could certainly satisfy both standards, but it is not clear whether showing that there is no adverse impact to public health and safety is the same thing as establishing more broadly that a variance is in the public interest. The statute contemplates considering the legal and economic rights of others, while the rule contains no such requirement.

³³ Minn. Stat. § 14.056, subd. 1.

Fourth, the Department's attempt to meld the original proposed rules and modified rules in the Order Adopting Rules is confusing. The Order states that Part 8840.6300, subpart 1, is amended, but then recites as amended language the current rule provisions that the Department decided to leave unchanged.³⁴ If the Department leaves the existing standards in place, that language is no longer being amended. When the Department resubmits the proposed rule, it should revise the Order Adopting Rules to clearly convey only new language as an amendment.

Finally, in proposed subpart 6, the Department seeks to adopt the authority to impose conditions on variances. In isolation, this is not problematic, but given the lack of clarity regarding the Department's intent under the other proposed rules, uncertainty as to the degree of coordination between the rule and statute, and the possibility that the Department's revisions to the proposed rule could end up including subpart 6, the Administrative Law Judge defers approval of subpart 6 until the remainder of the proposed rule is resubmitted and the language can be considered as a whole.

III. Conclusion

The record shows that the Department engaged in substantial efforts to involve the public in the rulemaking process and to draft clear rules for regulated parties. The Administrative Law Judge commends the Department on these efforts, and the majority of the Department's proposed rules are approved. Three rule parts are disapproved. As a result of the disapproval, this Order will be submitted to the Chief Administrative Law Judge for further review under Minn. Stat. § 14.26, subd. 3(b), and Minn. R. 1400.2300, subp. 6.

J. P. D.

³⁴ Order Adopting Rules at 8.
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