

June 30, 2023

**VIA EFILING ONLY**

Andrea Barker  
Minnesota Department of Transportation  
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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 Ms. Barker:

Enclosed herewith and served upon you please find the **ORDER ON REVIEW OF RESUBMITTED RULES UNDER MINN. STAT. § 14.26, SUBD. 3 AND MINN. R. 1400.2300, SUBP. 8** in the above-entitled matter. On June 26, 2023, the Office of Administrative Hearings received for review the submissions of the Minnesota Department of Transportation as modified pursuant to the April 28, 2023, Report of Administrative Law Judge Jessica A. Palmer-Denig. The rules, Revisor's Draft R-4593, are approved as to legality. The Office of Administrative Hearings has closed this file and is returning the rule record so that the Department can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. If the Minnesota Department of Transportation has not already done so, please ensure that a signed order adopting the rules is filed with the Office of Administrative Hearings. The Office of Administrative Hearings will request copies of the finalized rules from the Revisor's office following receipt of that order. The Office of Administrative Hearings will file the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the Department for its rulemaking record.

The Department's next step is to arrange for publication of the Notice of Adoption in the State Register. Two copies of the Notice of Adoption provided by the Revisor's office should be submitted to the *State Register* for publication. A permanent rule without a hearing does not become effective until five working days after Notice of Adoption is published in the State Register in accordance with Minn. Stat. § 14.27.

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

Sincerely,

A handwritten signature in black ink that reads "Dara Xiong". The signature is written in a cursive style with a large, looping "D" and "X".

DARA XIONG  
Legal Assistant

Enclosure

cc: Legislative Coordinating Commission  
Ryan Inman  
Representative Ginny Klevorn  
Senator Erin P. Murphy

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

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

**ORDER ON REVIEW OF  
RESUBMITTED RULES UNDER  
MINN. STAT. § 14.26, SUBD. 3 AND  
MINN. R. 1400.2300, SUBP. 8**

This matter came on for review by the Chief Administrative Law Judge pursuant to Minn. Stat. 14.26, subd. 3 (2022) and Minn. R. 1400.2300, subp. 8 (2021).

This rulemaking concerns the proposed rules of the Minnesota Department of Transportation (Department) regulating special transportation service, which includes motor vehicle transportation services for individuals who are elderly or disabled and certain other nonemergency medical transportation services.<sup>1</sup>

Administrative Law Judge Jessica A. Palmer-Denig disapproved portions of the proposed rules in an Order on Review of Rules dated April 28, 2023.<sup>2</sup> The Chief Administrative Law Judge concurred with the determinations of the Administrative Law Judge by Order dated May 4, 2023.<sup>3</sup>

On June 26, 2023, the Department resubmitted the proposed rules and requested the Chief Administrative Law Judge review and approve its modifications. The modifications incorporate Judge Palmer-Denig's recommended changes.

The Chief Administrative Law Judge finds that the defects identified in the prior Order have been corrected. In addition, the Chief Judge finds that the Department's modifications do not render the final proposed rules substantially different from those published in the *State Register* on January 3, 2023.<sup>4</sup>

Based upon a review of the modifications made by the Department as presented in its submissions of June 26, 2023, and the rulemaking record, and as further explained in the accompanying Memorandum,

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<sup>1</sup> Minn. Stat. § 174.29, subd. 1 (2022).

<sup>2</sup> Order on Review of Rules under Minn. Stat. § 14.26 (Apr. 28, 2023).

<sup>3</sup> Order of Chief Administrative Law Judge on Review of Rules under Minn. Stat. § 14.26 (May 4, 2023).

<sup>4</sup> See Minn. Stat. § 14.05, subd. 2(b)(2) (2022). ("A modification does not make a proposed rule substantially different if . . . the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice.").

**IT IS HEREBY ORDERED THAT:**

The proposed rules, as modified on May 25, 2023, are approved as to legality.

Dated: June 30, 2023



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JENNY STARR  
Chief Administrative Law Judge

**MEMORANDUM**

The Department's resubmitted rules correct all of the defects identified during Judge Palmer-Denig's review of this matter. The Department's modifications also support approval of Minn. R. 8840.6300, subp. 6, a portion of the rule for which approval was originally deferred.<sup>5</sup>

The Chief Judge determines, however, that some additional discussion of the process for incorporation by reference in rules is warranted here and will aid agencies in future rulemakings. Minn. Stat. § 14.07, subd. 4 (2022), governs the incorporation by reference in rules of "Minnesota Statutes, Minnesota Rules, United States Statutes at Large, United States Code, Laws of Minnesota, Code of Federal Regulations, the Federal Register, and other publications and documents which are determined by the revisor of statutes, to be conveniently available to the public."<sup>6</sup>

The statute requires that if a rule incorporates by reference other publications and documents, the rule must include a statement of incorporation that: (1) identifies the document title, author, publisher, and date of publication; (2) states whether the material is subject to frequent change; and (3) contains a statement of availability.<sup>7</sup> Minn. Stat. § 14.07 (2022) also provides that 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.<sup>8</sup> Finally, "[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."<sup>9</sup>

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<sup>5</sup> Judge Palmer-Denig deferred approval of Minn. R. 8840.6300, subp. 6, until resubmission of the proposed rule so that its language could be considered in light of other recommended revisions. See Order on Review of Rules at 11.

<sup>6</sup> Minn. Stat. § 14.07, subd. 4(a).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

In its rules as initially proposed, the Department did not incorporate any materials by reference. The modified proposed rule the Department submitted for review on April 14, 2023, however, included a statement of incorporation in part 8840.5700, subpart 1a. The Department sought to incorporate by reference a document entitled “Minnesota Vehicle Requirements for Special Transportation Services and Limousines.”

The modified proposed rule did not comply with the requirements governing incorporations by reference. It referenced the title of the document and its date but did not contain any of the other required information, and the Statement of Need and Reasonableness (SONAR) submitted in support of the rules did not contain information sufficient to provide a record supporting the incorporation. Further, the modified rule was not certified by the Revisor, and so did not carry the approval of the Revisor as contemplated by Minn. Stat. § 14.07, subd. 4(a). As a result, Judge Palmer-Denig disapproved the proposed rule and encouraged the Department to consult with the Revisor’s Office about options for compliance with the incorporation requirements.<sup>10</sup>

In its resubmission, the Department states that it worked with the Revisor’s Office to properly incorporate the document by reference and requested a certification of the modified rule.<sup>11</sup> According to the Department, the Revisor’s Office explained that it certifies approval as to form only for rules originally proposed by agencies.<sup>12</sup> It does not certify approval of subsequent modifications to proposed rules.<sup>13</sup> Therefore, if an agency modifies a proposed rule by adding a statement of incorporation by reference, as happened here, the burden is on the agency to demonstrate that the proposed rule complies with Minn. Stat. § 14.07, and that the publication or document proposed for incorporation by reference is conveniently available to the public. To meet this burden, the agency may supplement the rulemaking record.

The Department has demonstrated upon resubmission that its newly modified proposed rule complies with the requirements of Minn. Stat. § 14.07, subd. 4. The Department supplemented its SONAR to provide additional information regarding the incorporated publication, including making clear that the document is freely available to the public on the Department’s website and upon request from the Department. The Department also further modified proposed Minn. R. 8840.5700, subp. 1a, to include the language required to validly incorporate the Minnesota Vehicle Requirements for Special Transportation Services and Limousines by reference. Based upon the revision to the rule language and the supplemented record, this proposed rule may now be approved.

**J. L. S.**

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<sup>10</sup> Order on Review of Rules at 4.

<sup>11</sup> Letter from Andrea Barker, Department Policy and Rules Coordinator, to Chief Administrative Law Judge Jenny Starr (June 26, 2023).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*