

Natalie J. Havlina (ISB # 7498)  
 Laurence (“Laird”) J. Lucas (ISB #4733)  
 ADVOCATES FOR THE WEST  
 P.O. Box 1612  
 Boise, ID 83701  
 208-342-7024  
 208-342-8286 (fax)  
[nhavlina@advocateswest.org](mailto:nhavlina@advocateswest.org)  
[llucas@advocateswest.org](mailto:llucas@advocateswest.org)  
 Attorney for Intervenors

**BEFORE THE IDAHO TRANSPORTATION DEPARTMENT**

LINWOOD LAUGHY <i>et al.</i> ,	)	
Intervenors,	)	<b>INTERVENORS’ POST-</b>
v.	)	<b>HEARING BRIEF</b>
	)	
CONOCOPHILLIPS AND EMMERT	)	Hearing Officer: Merlyn Clark
INTERNATIONAL,	)	Hearing Date: December 8-9, 2010
Applicants,	)	
	)	
and	)	
	)	
IDAHO TRANSPORTATION	)	
DEPARTMENT,	)	
<u>Respondent.</u>	)	

**INTRODUCTION**

The evidentiary record from the contested case hearing confirms that the Idaho Transportation Department (“ITD”) violated its regulatory duties in at least three respects when it approved the overlegal permits issued to ConocoPhillips (“Conoco”) and Emmert International (“Emmert”) for the Coke Drum Transport Project.

**1. No “primary concern” on public safety and convenience.**

First, ITD did not place a “primary concern” on the “safety and convenience of the general public,” as required by IDAPA 39.03.09.100.01. As the record shows, ITD never conducted a public hearing on the proposed Conoco shipments; it did not

independently investigate how local residents and emergency service providers might be impacted by the Conoco loads; and it shrugged off the opposing comments submitted by Intervenors and others as being “subjective” and “speculative.”

In both his testimony and Updated Memorandum of Decision, Motor Vehicle Division Administrator Alan Frew further admitted that ITD “balanced” the interests of Conoco with those of the general public – an admission which alone demonstrates that ITD did not place a primary concern on the public’s safety and convenience, as required.

Moreover, the record reveals that ITD in fact elevated Conoco’s interests above the public’s interests in safe and convenient use of Highway 12 – to the point that the public will now be barricaded out of turnouts on Highway 12, just to facilitate the Conoco shipments, despite the safety risks and inconvenience that barricades will cause for users of Highway 12 who will be unable to use these public highway turnouts.

Simply put, ITD’s primary concern has been to authorize the Conoco permits, not protect the public convenience and safety; and that violates ITD’s regulatory duties.

**2. No “reasonable determination” of necessity.**

Second, ITD also did not make a “reasonable determination of the necessity” of the proposed shipments up Highway 12, as required by IDAPA 39.03.09.100.02.

As ITD staff admitted, the Conoco loads are the largest ever allowed up Highway 12 – yet ITD did not even consider the importance of Highway 12 as a scenic byway. Neither did ITD consider how allowing such mega-loads up the Clearwater/Lochsa corridor may harm the central Idaho tourism economy, including by setting a precedent that allows many other mega-shipments to proceed up Highway 12 – a precedent that Mr. Frew dismissed as “speculative” in his Memorandum of Decision, even though he

admitted at hearing that he knew of proposals from both Exxon Mobil/Imperial Oil and Harvest Energy to use Highway 12 to ship similar mega-loads in the future.

The record also refutes ITD's contention that it only considered whether Highway 12 was a necessary route within the state of Idaho. The Traffic Control Plan shows that ITD was expressly advised months ahead of time that Emmert intended to ship the coke drums to the Port of Lewiston; and ITD based its approval of the overlegal permits on this Traffic Control Plan. Mr. Frew's original and Updated Memorandum of Decision confirm that, rather than limiting its consideration to routes within Idaho, ITD relied on Emmert's assertion that no other route exists outside of Idaho – an assertion that ITD never questioned or evaluated on its own. The hearing also produced serious reason to question this assertion by Emmert, since it just hauled another mega-load from Oklahoma to an Exxon refinery in Montana.

Under the special circumstances presented by this case – where the public has expressed serious concerns about turning scenic Highway 12 into a new route for massive shipments, beginning with the Conoco coke drums – ITD was obligated to do more than simply rely on Emmert to decide it needed to use Highway 12 to get the Conoco mega-loads to Billings. ITD's failure to make a case-specific and reasonable determination of necessity for the Conoco permits at issue here thus violates its regulatory duty.

### **3. Traffic Delays: 10-Minute And 15-Minute Limits.**

Finally, the hearing record also confirms Intervenors' contentions that ITD approved the Conoco permits to delay traffic for periods of longer than ten or even fifteen minutes, in violation of the "frequent passing" and "10-minute delay" rules of Chapters 11 and 16 of the ITD regulations, IDAPA 39.03.11.100.05 & 39.03.16.100.01.

As a matter of law, ITD is not reading these regulations correctly. ITD contends that Chapter 16 only applies in special circumstances where no traffic control plan can be adopted for overlegal loads; but the structure and language of Chapter 16 refute that argument – showing that Chapter 16 is the only provision of the ITD regulations that expressly addresses “non-reducible” loads, such as the Conoco coke drums.

Chapter 16 says that overlegal permits for such loads should normally be denied, unless they can allow for “frequent passing” of traffic under Chapter 11. Because Chapter 11 does not define “frequent passing,” it must be construed together with Chapter 16. Doing so leads to only one logical conclusion – 10-minute delays are the outside limit of allowable delays for non-reducible loads under Chapter 16, if more “frequent passing” cannot be achieved under Chapter 11. Accordingly, ITD has erred as a matter of law by interpreting “frequent passing” as meaning every 15 minutes in approving the Conoco permits.

Even if ITD’s interpretation of the regulations is accepted as correct, however, the hearing evidence raises serious questions about whether ITD has properly determined that the Conoco shipments will not delay traffic by more than 15 minutes. Specifically,

- ITD confessed that it did not independently assess the likely traffic delays from the Conoco shipments, nor did it check Emmert’s traffic delay estimates;
- Emmert strenuously refused at hearing to disclose the travel time and speeds that underlie its traffic delay estimates, rendering it impossible to determine the basis for its delay projections and whether they are accurate;
- Emmert and ITD used a definition of traffic “delay” that only accounts for time that vehicles are actually stopped at flagging stations, and does not include delays

associated with slowing traffic before it is stopped, while traffic is slowly routed around the loads, or other delays caused by the convoys; and

- Emmert’s measurements concerning the size of planned turnouts appear to be inaccurate in at least several key locations, as admitted by ITD traffic engineer Doral Hoff at the hearing, raising troubling issues about whether Emmert’s representations to ITD about the turnouts and traffic delays are reliable.

All of these factual issues undermine Emmert’s assurances that ITD and the public should simply trust Emmert to meet the 15-minute traffic delay rule that ITD applied in this case; and are grounds for the Hearing Officer to recommend that the current permits be withdrawn – at least until ITD has fully and independently investigated traffic delays associated with the proposed Conoco shipments.

## **STATEMENT OF FACTS**

### **I. STRUCTURE OF ADMINISTRATIVE RECORD.**

Before addressing the relevant facts established at the contested case hearing, it may be useful for the Hearing Officer to understand the structure and general content of the Administrative Record filed by ITD. It is composed of roughly five parts:

Traffic Control Plan: Tab 1 of the Administrative Record contains the Traffic Control Plan submitted by Emmert. *See* ITD 0001-729. This includes the latest version, submitted in July 2010; and prior versions going back to September 2009.

ITD’s Approval Process: The record next contains a variety of documents – including correspondence, notes, emails, and others – relating to ITD’s approval process for the Conoco shipments. *See* ITD 730 (Tab 2) to ITD 1327 (Tab 152).

Scenic Byway Materials: The third major section of the Administrative Record contains materials provided by ITD to *Advocates for the West*, in response to a public information request, concerning designation and management of Highway 12 as a scenic byway within the Wild and Scenic corridor of the Middle Fork Clearwater and Lochsa Rivers. *See* ITD 1328 (Tab 153) to ITD 1694 (Tab 218). These materials include deeds and easements, management agreements, project authorizations, and others. *Id.*

Public Comments: The fourth major section of the Administrative Record has documents relating to public comments that ITD received with respect to its approval of “mega-shipments” up Highway 12, whether those comments specifically addressed the Conoco shipments, the Exxon Imperial shipments, or both. *See* ITD 1695 (Tab 219) to ITD 2223 (Tab 231).

ITD Decision Documents: Finally, the Administrative Record concludes with the decision documents by which ITD approved the Conoco permits. *See* ITD 2252 (Tab 233) to ITD 2374. These begin with draft permits issued on August 12, 2010; and the final permits issued on August 20, 2010, along with Mr. Frew’s original Memorandum of Decision. *See* ITD 2290 (Tab 237) to ITD 2294 (Tab 241). The last documents are part of ITD’s Supplemental Administrative Record, and include the revised November 2010 permits and Updated Memorandum of Decision by Mr. Frew. *See* ITD 2335-374.

## **II. CHRONOLOGY OF EVENTS.**

The Administrative Record and testimony at hearing establish the following general chronology of events relevant to ITD’s approval of the Conoco overlegal permits for the Coke Drum Transport Project:

**Sept. 2007:** ITD's bridge division analyzed and gave "pre-approval" for the proposed Conoco coke drum shipments. *See* ITD 929 & 967 (both stating this); ITD 992 (9/18/07 "permit approval" from ITD bridge section).

**Sept. 2009:** First version of Emmert's Traffic Control Plan was submitted to ITD, dated September 14, 2009. *See* ITD 674-729. This original plan stated that it "does not address the removal of overhead wire and cable obstructions. These route improvements will be addressed as a separate activity at a later date and influence by the work performed by the utilities in connection with the Exxon-Tar Sands Module moves." ITD 692.

**Nov. 2009:** Following communications between Emmert and ITD, Revision One of the Traffic Control Plan was submitted to ITD (prepared November 12, 2009). *See* ITD 623-73. It included the same statement about overhead wire and cable obstructions being addressed as part of the Exxon-Tar Sands Module moves. ITD 631.

**March 2010:** Following further communications with ITD, Emmert submitted a "Supplementary Report" which greatly expanded the size of its proposed Traffic Control Plan, to nearly 250 pages. *See* ITD 375-622. This revision include a "River Transport Plan" which provided ITD with details about how Emmert would ship the loads from Vancouver to Lewiston. ITD 404-64. This revision does not include the prior statement about overhead utility lines and cables as posing any obstacle – presumably because they had already been mostly moved by then.

**May 2010:** Emmert shipped the coke drums to the Port of Lewiston by barge. At that time, ITD had not given final approval for any permits to haul the loads up Highway 12 (per testimony of Alan Frew).

**June 2010:** ITD held three “open houses” in Kooskia, Orofino, and Moscow over the Kearsarge Tar Sands Module project, by which Exxon Mobil and its Canadian affiliate Imperial Oil seek authority to ship 207 mega-loads of equipment up Highway 12. *See* ITD 1304-12 (“Kearsarge Open House Meeting Plan” and related materials); ITD 2128-29 (ITD announcement of meetings). Conoco and Emmert were not part of these public meetings, and the meetings were not for the purpose of getting public input on the proposed Conoco coke drum shipments. *Id.*; Testimony of Raymundo Rodriguez and Adam Rush.

**July 2010:** The final version of the Traffic Control Plan, entitled “Supplementary Report, Revision One,” and dated July 2, 2010, was submitted by Emmert to ITD. *See* ITD 001-374. This Plan began with a section entitled “Risk Assessment & Management” which states:

It is inevitable that on a transportation project of this size and complexity, which uses the variety of equipment types that Emmert International will have to employ, some abnormal and/or emergent situations may occur. These may be caused by a variety of factors including equipment breakdown or malfunction, meteorological, environmental, structure failures in the load or in the ground under the transportation equipment, human error or the impact of third parties. It is essential that contingencies be in place to deal with these situations....

ITD 016. Emmert also provided a chart entitled “Health, Safety and Environmental Risk Assessment” that addresses barge berthing and unloading at the Port of Lewiston, as well as “Transportation (Hydraulic Trailers),” in which very summary “actions” are identified to address such risks. *See* ITD 018-027.

Notably, for “potential hazards” of the “ground surface giving way” during either transport or temporary parking of the loads, this chart states: “Ground to be prepared such that it is capable of taking the ground bearing pressure.” *See* ITD 022 (emphasis



added). Yet there is no evidence in the record that such ground preparations have been performed.

Apparently in response to questions from ITD, this last version of the Traffic Control Plan also included a three-page section entitled “State of Idaho Highway Contingency Planning.” *See* ITD 042-44. This section again acknowledged that structural failure of the road or bridges, or of the equipment, “could potentially result in a dangerous situation.” But rather than provide any actual contingency planning for such events, Emmert simply stated: “All are mitigated by detailed design assessment of all components, physical inspections of the structures and equipment and the experience and extensive training of the personnel involved.” *See* ITD 042.

This last version of the Traffic Control Plan included an extensive Appendix B with detailed analysis of mileage posts, turnouts, and photographs of key areas – including many of the photographs shown by Intervenors during the contested case hearing. *See* ITD 158-256.

Notably, Appendix B also included the “15 Minute Delay Rule Spreadsheet,” by which Emmert asserts that it can meet the 15-minute maximum traffic delay rule used by ITD in approving the requested permits. *See* ITD 289-95. The spreadsheet identifies by milepost the primary turnouts that Emmert may use; and briefly describes how traffic will be stopped or routed around the loads at these locations. *Id.* The end of the spreadsheet also included a listing of potential secondary turn-outs. *See* ITD 295.

**August 2010:** ITD issued draft permits for the Conoco loads dated August 12, 2010. ITD 2252-89. On August 16, 2010, Intervenors Linwod Laughey, Karen Hendrickson, and Peter Grubb filed a state court lawsuit seeking to enjoin ITD from

allowing the shipments to proceed up Highway 12. ITD 756-99. On August 20, 2010, ITD issued final permits and the supporting Memorandum of Decision, signed by ITD Motor Vehicles Division administrator Alan Frew. ITD 2290-2334. Further proceedings in the state district court resulted in a ruling on August 24, 2010 by District Judge Bradbury holding that ITD violated its regulations in all three respects challenged here.

**November 2010:** On November 1, 2010, the Idaho Supreme Court issued its decision in *Laughy et al. v. IDT*, 2010 Idaho S.Ct. Opinion No. 110 (Nov. 1, 2010), holding that jurisdiction was lacking to consider plaintiffs' challenges to the August permits, because they had not intervened as parties to the "contested case" created by ITD's approval of the Conoco permits; and there was no final agency action to review under the Idaho APA. The Idaho Supreme Court thus reversed the district court's rulings for lack of jurisdiction.

Petitioners *Laughy et al.* thereafter promptly filed their Petition To Intervene in the Conoco contested case hearing, which this Hearing Officer subsequently granted (and the ITD Director affirmed).

On November 10, 2010, ITD issued new permits for the Conoco coke drums, plus the Updated Memorandum of Decision signed by Mr. Frew, dated November 10, 2010. ITD 2336-374. The November 10 permits incorporate the 15-minute traffic delay spreadsheet prepared by Emmert, based on use of the primary turnouts.

Those documents thus represent ITD's determination to approve the Conoco overlegal permits, which Intervenors now challenge via the claims that were the focus of the contested case proceeding conducted December 8-9, 2010, and that are addressed further below.

### **III. RELEVANT FACTS ESTABLISHED AT HEARING.**

#### **A. Overview.**

The testimony at the contested case hearing was presented by the following ITD staff: Raymundo Rodriguez, manager of the commercial services division (which issues overlegal permits); Alan Frew, administrator of the Motor Vehicles Division (which includes commercial services); Adam Rush, an ITD public affairs staffer; Jim Carpenter, the district engineer for ITD's District 2, based in Lewiston, which administers traffic on Highway 12; and Doral Hoff, the District 2 maintenance engineer, who had primary responsibility for reviewing and approving the Traffic Control Plan submitted by Emmert.

Additional testimony was presented by Intervenor Linwood Laughy; and by Terry Emmert and Mark Albrecht of Emmert International, and Steven Steach, manager of the Conoco refinery in Billings.

Following are highlights from the witness testimony, with references to supporting Administrative Record or exhibits, which Intervenors believe are relevant to their claims in this matter:<sup>1</sup>

#### **B. Rodriguez Testimony.**

Mr. Rodriguez testified that ITD approved some 64,000 overlegal permits during the last fiscal year, of which about 30,000 were for "non-reducible" loads, meaning they cannot be broken down further. He stated that Conoco/Emmert have certified that the coke drum shipments, which were cut in half in response to ITD's earlier advice that full-sized drums could not be permitted in Idaho, are "non-reducible" loads.

---

<sup>1</sup> Intervenors' counsel did not have the benefit of the hearing transcripts in preparing this brief; and hence the brief recounts the testimony below based on notes and recollection.

Mr. Rodriguez admitted that virtually all of ITD's prior overlegal permits for travel on Highway 12 require daytime travel, for safety reasons. However, the Conoco permits require night time travel, ostensibly for safety and convenience reasons.

Mr. Rodriguez admitted that ITD's necessity determination was limited to routes from Lewiston to Billings, and concluded that Highway 12 was the only viable option, because the height of the Conoco loads – which he mistakenly said are 28 feet tall – could not go up Highway 95, which has lower vertical restrictions. Mr. Rodriguez acknowledged that Exxon Mobil has undertaken to raise or bury utility and other lines that otherwise obstruct use of Highway 12 for tall shipments; and that he received a memorandum stating that Exxon was “permanently raising or burying utility lines at approximately 180 locations.” *See* ITD 947-48.

Mr. Rodriguez explained that ITD always applies a 15-minute delay requirement for overlegal loads. This 15-minute rule, he admitted, is an unwritten policy, but one which ITD has always followed in his experience.

Mr. Rodriguez also acknowledged that no load the size of the Conoco shipments has ever been authorized to travel on Highway 12; and that he has never seen public opposition to any overlegal permit as he has seen with the Conoco shipments.

Mr. Rodriguez also testified that ITD did not consider the fact that Highway 12 is designated as a scenic byway in approving the Conoco permits; that the November 2010 permits added a new provision allowing Emmert to barricade turnouts on Highway 12 up to 24 hours before the shipments; and that Conoco was not involved in the public “open house” conducted by ITD in June 2010 over the proposed Exxon Imperial mega-shipments, which he attended.

Finally, with respect to winter weather conditions, Mr. Rodriguez admitted that snow or icy conditions could affect the safety of the shipments; and he stated that District 2 has responsibility to determine whether adverse weather conditions might preclude allowing the shipments. He acknowledged that if a winter storm hits while the shipments are in progress, they could be parked beside Highway 12 for some period of time until road conditions improve.

**C. Frew Testimony.**

As administrator of the Motor Vehicles Division, Mr. Frew has broad responsibilities, including supervision of the commercial services section and its issuance of overlegal permits.

Like Mr. Rodriguez, Mr. Frew acknowledged that he has never seen public opposition to overlegal permits before; and that the Conoco permits are unusual – both because of the public opposition, and because no loads that size have been previously approved to be shipped up Highway 12.

The fact that Mr. Frew was involved in approving the Conoco shipments illustrates how unusual they are. As a supervisor, Mr. Frew is normally not involved in approving overlegal permits, and he relied on his staff here to review and approve the Emmert application, including the Traffic Control Plan. Mr. Frew was only generally familiar with the Traffic Control Plan, and he has not read all of its contents.

Although ITD has never before taken such a step in approving overlegal permits, Mr. Frew and ITD's legal counsel drafted the August 2010 "Memorandum of Decision" to make "transparent" the process by which ITD approved the Conoco permits here, in order to explain their reasoning to the district court in the *Laughy v. ITD* litigation. Mr.

Frew later signed the Updated Memorandum of Decision on November 10, 2010, which updated his prior analysis with subsequent information that ITD obtained and to make certain modifications to the permits.

During his direct examination by ITD counsel, Mr. Frew confessed that his original and updated decision memos contained three “problems” or information that was “not accurate.” He testified that he “made a mistake” and had “bad information.” Mr. Frew identified these “mistakes” or “problems” as follows:

- Maximum/Average Speed: Both the original and updated Memorandum of Decision emphasized that the “maximum speed” of the Emmert transports would be 25 mph and the average speed would be 15 mph, which are facts that Mr. Frew cited in the memos as ensuring safety and stability of the loads. *See* ITD 2332 (August 2010 memorandum, stating: “To ensure safety and stability of the loads along the proposed U.S. 12 route, the maximum speed of the loads will be 25 mph, and they will average 15 mph”); ITD 2372 (November 2010 updated memo, repeating same language).

On direct examination, however, Mr. Frew stated that this information was wrong; and that the Emmert shipments can and may actually move faster. He was vague in cross-examination about how this “error” came about, saying only that he relied on a “non-subject matter” source, when he should have relied on information from Emmert instead. He further testified that Emmert did not notify him of this error until December, 2010 – presumably when Frew was meeting with Conoco’s counsel to prepare for the hearing, as he admitted occurred.

- Exceed 10-Minute Delays: The August 2010 Memorandum of Decision stated that ITD applied a 15-minute delay rule in approving the Conoco shipments, *see* ITD

2329, which Mr. Frew, like Mr. Rodriguez, acknowledged is the long-standing policy of ITD in approving overlegal loads.

After the *Laughy v. ITD* litigation raised the question of whether ITD actually must follow the 10-minute delay rule in Chapter 16 of its regulations, ITD began shifting course, however; and Mr. Frew asserted in the November 2010 Updated Memorandum of Decision that the Conoco shipments would cause no more than 10-minute delays, with some exceptions. *See* ITD 2369 (“it is appropriate in this instance to permit the vehicles to travel uninterrupted for a period not to exceed 10 minutes, except in certain unavoidable locations identified on the permit”). Likewise, the November 2010 permits included an “ITD Travel Requirements” page, which stated that “there are 12 zones where Emmert will be allowed to exceed the 10 minute time frame,” based on the “15-minute delay spreadsheet” that Emmert prepared and is attached to the permits. *See* ITD 2339-44.

In his direct testimony, Mr. Frew stated that this information was also in error, because there would be “additional locations” where the loads would delay traffic for more than 10 minutes. Mr. Frew did not identify where these additional locations would be, or how he came to realize that the Conoco loads would require more than 10-minute traffic delays in additional locations that were not identified in the spreadsheet. But Mr. Frew emphasized on cross-examination that Emmert would be required to adhere to the 15-minute delay limit originally imposed by ITD, and that he relied on ITD’s staff analysis and Emmert’s Traffic Control Plan to conclude that the 15-minute delay rule would be met in this case.

- Single Moves/Not in Convoy: The third error in the Updated Memorandum of Decision identified by Mr. Frew in his direct examination was to correct the statement that the Conoco coke drums would travel in two convoys, of two shipments each. *See* ITD 2368. Mr. Frew testified that the Conoco loads would in fact travel singly, on separate nights. This means, of course, that there will be four shipments up Highway 12, not the two convoys identified in Mr. Frew’s decision memoranda. With twice as many shipments, the public will experience twice as many delays as the projections in Mr. Frew’s original and updated decision memos.

In addition to these three “errors” admitted by Mr. Frew, the cross-examination of Mr. Frew produced other notable points, including the following:

- Scenic Byway values: Mr. Frew’s decision memos never even mention the fact that Highway 12 is both a state-designated “scenic byway” and a federally-designated “national scenic byway” and “All-American Road.” *See* ITD 2328-34, 2368-74. Mr. Frew acknowledged that Highway 12 is both a state-designated “scenic byway” and a federally-designated “national scenic byway” and “All-American Road,” on cross-examination, but admitted these scenic values were not considered by ITD in approving the Conoco permits.

Mr. Frew sought to defend that omission by asserting that ITD does not “make policy,” yet acknowledged that the ITD Board is the entity that approved the scenic byway designation as a matter of policy.

- “Necessity” determination: Mr. Frew stated that the definition of “necessity” he used “means the load can move on the proposed route” – which is really whether the route is feasible, not whether the route is necessary. Aside from this confusion about the



meaning of “necessity,” Mr. Frew testified that ITD’s “inquiry ends at the Idaho border” and asserted that ITD lacks the staff or information to evaluate alternative routes outside Idaho’s boundary.

Mr. Frew was not aware, however, that Emmert’s Traffic Control Plan – which is the basis for ITD’s approval of the permits – included a “River Transport Plan” for barging the loads up the Columbia and Snake Rivers to the Port of Lewiston. *See* ITD 45-105, 404-64. This “river transport plan” thus shows that ITD had notice of Emmert’s intention to transport the coke drums first to the Port of Vancouver, then to the Port of Lewiston, long before the equipment arrived in Idaho and before ITD approved the Highway 12 permits.

Mr. Frew’s assertion that ITD’s “inquiry ends at the Idaho border” is also refuted by Frew’s original and Updated Memorandum of Decision, which both state identically:

Emmert investigated the feasibility of the transportation of the coke drums by considering several different options, including transporting the drums by various combinations of barge, rail and truck and from several different ports of entry. The extreme dimensions of the drums precluded the possibility of shipping the drums by rail, leaving only barge and truck options. The only viable option for the transport of the coke drums to Billings, Montana, is from Lewiston, Idaho – the nearest navigable water to Billings – along U.S. 12.

*See* ITD 2330, 2370. As this language shows, Mr. Frew and ITD did consider potential routes outside of Idaho’s borders, but relied on Emmert’s representations that no other viable routes exist.

The Emmert “investigation” referenced in the decision memos is the 1-page undated analysis that Emmert provided to ITD, which stated that other routes outside of Idaho were not available for shipment of the coke drums. *See* ITD 744. Mr. Frew could not explain where in the Emmert memo it stated that the coke drums were too large to

ship by rail, which is cited in the original and updated decision memos as a factor supporting the “necessity” analysis for Highway 12. *See* ITD 2330, 2370.

- Barricades: The August 2010 permits did not provide for Emmert to barricade turnouts, but that authority was added in the November 2010 permits. *See* ITD 2297 (August 2010 “ITD Travel Requirements For Conoco/Philips – Emmert, US 12,” with no provision for barricades); ITD 2339 (November 2010 “ITD Travel Requirements For Conoco/Philips – Emmert, US 12,” stating that: “To ensure safe public travel during the move, Emmert is authorized to barricade the approved turnouts for exclusive use for the wide loads up to 24 hours in advance of each move”).

Mr. Frew explained on cross-examination that this authority for Emmert to barricade turnouts along Highway 12 was added because of ITD’s concern that “nuts” might use the turnouts to block or hinder the shipments. He admitted that the general public will be affected by the barricades, because vehicles traveling Highway 12 may not be able to pull out for traffic emergencies, rest, or to view the scenery. He acknowledged that this could affect public safety as well as convenience; but called the barricades a “necessary evil.”

- “Balancing” User Needs: Mr. Frew testified at hearing that ITD engaged in “balancing” what he called the needs of all highway users in approving the Conoco permits. Similar statements about “balancing” the concerns of the public with Conoco’s needs are made in the decision memos. *See* ITD 2334, 2374 (both stating that “the Department must use its discretion to weigh the likelihood of the alleged impacts, how certain or uncertain they might be, the potential severity of the potential impacts, and

other similar factors when balancing competing concerns and making its decision”) (emphasis added).

- “Speculation” about other mega-loads: In justifying the decision to approve the Conoco shipments, Mr. Frew’s decision memoranda both state, “In this application, ITD has before it a single application for a set number of loads. It cannot speculate as to the number, type, or scope of future requests.” *See* ITD 2334, 2374 (emphasis added).

This statement is extraordinarily misleading. As Mr. Frew admitted on cross-examination, he is aware of proposals by both Exxon Imperial and Harvest Energy to transport other mega-loads of massive equipment up Highway 12 from Lewiston to Montana, and then on to the Alberta tar sands. Mr. Frew is aware that Exxon Imperial has delivered a number of modules to the Port of Lewiston already; and that there has been substantial media attention and public outcry about these proposals, including their potential impacts on Highway 12’s scenic and recreational values.

- 10/15 Minute Traffic Delays: Finally, Mr. Frew admitted that he was not knowledgeable about the 15-minute traffic delay spreadsheet which is attached to the November 2010 permits. *See* ITD 2339-344. Mr. Frew even thought – mistakenly, as Conoco’s counsel confirmed – that ITD staff had prepared the 15-minute delay spreadsheet. He emphasized on both direct and cross-examination, however, that ITD’s 15-minute delay policy is a “hard and fast rule” that the Emmert shipments must meet under ITD’s approval of the Traffic Control Plan.

#### **D. Rush Testimony.**

Intervenors called Mr. Rush, who handles public relations for ITD, to establish facts relating to public notice and input to ITD’s decision-making about the Conoco

permits. Mr. Rush became involved in the issue of massive shipments up Highway 12 in March or April of 2010; and is familiar with the comments that ITD received.

He confirmed that ITD received a petition in July 2010 from Mr. Laughy and Ms. Hendrickson, which was signed by 3500 individuals opposing use of Highway 12 for the Conoco or Exxon Imperial mega-loads; and that ITD has never made an official response to this petition.

Mr. Rush further testified that ITD never solicited comments from the public about the Conoco shipments. However, ITD received 700-800 comments in total about the proposals for mega-shipments up Highway 12; and these are in the Administrative Record. *See* ITD 1695-2223. The vast majority of these comments expressed opposition to using Highway 12 for such large shipments; and Mr. Rush confirmed that ITD has never experienced public opposition to overlegal permits like this before. Mr. Rush confirmed that public comments voiced concern that the Conoco shipments would establish a precedent for other mega-loads to use Highway 12; and that the mega-loads would damage the area's tourism industry.

Mr. Rush also confirmed that the "open houses" conducted by ITD in June 2010 were only for the Exxon Imperial loads (the Kearl project), and not about the Conoco proposed shipments. No public hearing has been held by ITD specifically on the Conoco loads, he acknowledged.

**E. Carpenter Testimony.**

Mr. Carpenter testified that he had limited involvement in the Conoco permits, although he did attend one or more of the "open houses" on the Exxon Imperial proposed

shipments in June 2010. He admitted telling attendees there that ITD uses a 15-minute delay rule, and that he was not aware of a 10-minute delay requirement.

Mr. Carpenter is familiar with the state and federal designations of Highway 12 as a scenic byway, and the management agreements between ITD and federal agencies for the wild and scenic corridor. He acknowledged describing Highway 12 as a “unique scenic byway.” He admitted that the easement deed requires protecting scenic values, *see* ITD 1388; and that the federal designation calls Highway 12 a “destination unto itself” because motorists enjoy traveling its scenic length. *See* Ex. 68 (copy of federal designation).

Mr. Carpenter admitted that the Forest Service previously objected when ITD installed metal posts on a section of Highway 12 instead of wooden posts, because the metal posts were not consistent with the scenic qualities of the corridor. *See* ITD 1498-1510 (correspondence between Mr. Carpenter and Forest Service on this issue).

With respect to traffic delays, Mr. Carpenter testified that he was not familiar with Emmert’s 15-minute delay spreadsheets, but relied on Mr. Hoff to assess the traffic plan. Mr. Carpenter did acknowledge, however, that the Highway Capacity Manual (published by the Transportation Research Board) is used by ITD District 2; and that it defines traffic delay as “the additional travel time experienced by a driver, passenger, or pedestrian.”

Mr. Carpenter further agreed that traffic delays caused by the Conoco shipments will include delays associated with traffic that is required to slow down for flaggers, while following the loads, or while traveling slowly around the Emmert loads.

**F. Hoff Testimony.**

Darrell Hoff testified that he was the ITD staff person responsible for reviewing and approving Emmert's Traffic Control Plan for the shipments up Highway 12. He became involved in July or August 2009; and does not know about ITD's pre-approval of bridge permits in 2007.

Mr. Hoff sits on a District 2 permit committee, and knows that "a good number" – or "30-some" – utility lines were moved along Highway 12 in the period 2009-10. *See* Ex. 1003 (Intervenor's summary of right-of-way permits granted by ITD during 2009-10 for burying or raising of utility lines). These have facilitated the Conoco loads, which otherwise would have had to deal with the height obstructions they pose. Likewise, Mr. Hoff testified that a traffic island was removed near Lewiston in 2010, to help facilitate the Conoco shipments

Mr. Hoff provided information to the ITD Board in April 2010 about the proposals to use Highway 12 for mega-shipments, including the Exxon and Conoco proposals, because he believed the Board should be informed "due to the size and nature of the loads. . . taking up the entire highway." Mr. Hoff confirmed that "no loads this size" have ever previously been authorized up Highway 12.

Mr. Hoff described the length of the convoy of vehicles accompanying each Emmert shipment as being 270 feet. In fact, the Traffic Control Plan submitted by Emmert shows that the length of the coke drum transporter itself is 225 feet, but the convey accompanying the transport – including state police, flaggers, support vehicles, etc. – will extend more than four miles in front of the transport, and more than a mile behind it. *See* ITD 273 (diagram showing length of convoy vehicles).

This was not the only area where Mr. Hoff was unfamiliar with the details of the Emmert Travel Control Plan. He admitted that “I am not an expert” on how fast the Emmert shipments might travel, but was told they could “easily” exceed 20-30 mph. Mr. Hoff does not know what travel times Emmert has projected for the various stages of the trip up Highway 12; or how fast the loads will travel around cliffs and curves, other than he relies on Emmert to transport them safely.

Mr. Hoff further admitted that he did not calculate travel delays independently, but relied on the 15-minute traffic delay spreadsheet prepared by Emmert. Mr. Hoff also has not independently measured turnouts or distances.

For instance, Mr. Hoff has not measured the turnout at milepost 31.5, and does not know if it is big enough to handle cars, logging trucks, or other traffic that might be delayed by the Conoco shipments. *See* ITD 183 (photo of turnout from Traffic Control Plan, stating it measures 200’ by 35’); ITD 2340 (15-minute spreadsheet, simply describing this as “turnout”).

At milepost 48.5, where there is a rock wall on the right and sharp drop to the river on the left, Mr. Hoff did not know whether Emmert will have to “hand-crab” the loads around the cliff, or how long it will take the loads to pass this location. *See* ITD 192 (photos from Traffic Control Plan); ITD 2341 (15-minute spreadsheet, projecting 5-minute traffic delay at milepost 48.5)

Milepost 77.4 is the first turnout past the Maggie Creek bridge – which Mr. Hoff acknowledge is at milepost 76.8, but is not included in the 15-minute delay spreadsheet. The turnout at milepost 77.4 measures 250’ long by 25’ wide, according to Emmert’s Traffic Control Plan and 15-minute delay spreadsheet. *See* ITD 214 (photo of turnout);

ITD 2342 (15-minute delay spreadsheet). Again, Mr. Hoff did not independently measure this turnout, but by viewing the photo he can tell it is only 12-13 feet wide. He admitted that he does not know if there is enough room for cars to pull over here and allow the Conoco loads to pass by.

At milepost 109.9, Emmert states that the turnout is 80' long by 15' wide. *See* ITD 2342 (15-minute traffic delay spreadsheet). Mr. Hoff is not familiar with this location, and does not know if it is large enough for cars to allow the loads to pass. He estimated that the public would have “one lane or less” to pass; and stated that there would not be any escort vehicle to take traffic around the loads at this location.

Mr. Hoff admitted that the Fish Creek bridge is located at milepost 120, but does not appear on the 15-minute traffic delay spreadsheet. According to the 15-minute spreadsheet, Conoco intends to travel from milepost 117.6, over the Fish Creek bridge, and on to the turnout at milepost 126.9. The Fish Creek Rest Area is identified on the spreadsheet as available for “emergency stop only.” This rest area is maintained by ITD along with the Forest Service, and has an emergency phone box that travelers may need because there is little or no cell phone coverage in the Lochsa River canyon. Mr. Hoff admitted that Emmert will need to lower and then raise dollies to cross the Fish Creek bridge; and that travel delays will be significantly longer than projected by Emmert if it cannot use the Fish Creek Rest Area as a primary turnout. Mr. Hoff admitted that ITD did not consult with the Forest Service about Conoco’s potential use of the Fish Creek Rest Area.

Mr. Hoff was aware of public concerns about safety and convenience associated with the Conoco loads, including the question of what happens if a load falls into the



river. Although he is “not a crane guy,” Mr. Hoff knows that a large crane would be required to lift the 350-ton load from the river; and would require a “very large space” which may not be available, depending on where the load fell. Mr. Hoff asked Emmert to respond on this issue, and its response did not specify where a crane would come from, how long it would take, or other details. *See* ITD 1190-92 (Hoff raising the issue with Emmert); ITD 306 (Emmert response).

Mr. Hoff confirmed that the 15-minute traffic delay spreadsheet counts “delay” only when traffic has stopped at a flagger station; and does not include delays caused by vehicles slowing at the first flagger, then proceeding to the second flagger; or while vehicles may be slowly following or going around the loads.

**G. Laughy Testimony.**

Mr. Laughy has long-standing ties to the Clearwater region, having attended grade school through high school there. His family owned property along the Middle Fork Clearwater for many years; and as an adult he returned frequently. Beginning in the early 1990’s, he and his wife Karen “Borg” Hendrickson moved back to the area; and lived in a home where they had to cross the river by boat or cable car. Eventually, concerns about health issues and convenience led them to buy another property, located at about milepost 77.4 on Highway 12, where they now live – approximately 220 yards from the turnout past the Maggie Creek bridge, discussed by Mr. Hoff. Their property is bisected by the highway, and they have investment lots there as well as their home.

Mr. Laughy and his wife researched and wrote a guide called “Clearwater Country,” which offers mile-by-mile information on notable historical, natural and other locations along Highway 12 and the Middle Fork and Lochsa Rivers. Mr. Laughy also

leads tours for visitors in the area, including along Highway 12 and the Lewis and Clark trail. He is thus very familiar with Highway 12 based on his personal knowledge and experiences.

Mr. Laughy testified that he first learned that mega-loads of equipment might be shipped up Highway 12 when the power was cut off to his home in about April this year. He investigated and learned of the Exxon Imperial proposal to ship 207 mega-loads up Highway 12 to the Alberta tar sands, and the Conoco proposal for the coke drum shipments.

In May 2010, he submitted a public records act request to ITD seeking the traffic control plan proposed by Emmert for the coke drum shipments. *See* ITD 1136. He analyzed that document and had many questions and concerns, which he attempted to raise with ITD through a variety of comments and “alerts” that he submitted – including Alert #5 which addresses problems in the 15-minute delay spreadsheet projects. *See* ITD 1185-89 (Alert # 5); *see also* ITD 1273-76 (another Laughy email to ITD re problems in spreadsheet projections).

Mr. Laughy also discovered an ITD grant request to the federal government on the ITD website, which states that: “If one oil company is successful with this alternative transportation route, many other companies will follow their lead.” *See* Ex. 1004 (ITD TIGER grant application, p. 20). Mr. Laughy believes that the precedent set by the Conoco shipments will dramatically affect his wife and himself by opening the route for many other mega-loads

Mr. Laughy described the numerous special designations that Highway 12 and the Clearwater/Lochsa Region have received, including as a state scenic byway; national

scenic byway; All-American Road; Nez Perce National Historical Trail and Nez Perce National Historic Park; and Lewis and Clark Historical Trail. He also explained that the Middle Fork Clearwater and Lochsa Rivers are two of the rivers originally designated by Congress when it passed the Wild and Scenic Rivers Act in 1968. These special qualities attract tourists and visitors from all over the nation and from overseas.

Mr. Laughy, his wife, and others will be adversely affected by the mega-loads on Highway 12, including because of the harm that the tourism industry there may suffer; and because of the personal inconvenience and safety threats they pose. Mr. Laughy briefly described how Intervenor Ruth May and Peter Grubb – who both own lodging businesses on Highway 12 that cater to tourism and recreationalists – will be harmed by the mega-loads.

Mr. Laughy also emphasized how ITD's approval of barricading turnouts along Highway 12 for the Conoco shipments would threaten public safety and convenience – including by blocking Nez Perce tribal members from access to ancestral fishing areas, and preventing travelers from using the turnouts. He testified that the turnouts are used extensively by the public, including in the winter.

Mr. Laughy has inspected and measured various turnouts identified in the Emmert Traffic Control Plan, and testified that the turnouts at mileposts 31.5 and 77.4 are not as large as Emmert represented to ITD. He also noted that at the top of the Lolo Pass – with which he is familiar – the Emmert spreadsheet shows 15 minute delays to go .5 mile from milepost 172 and another 15 minutes to go 2.2 miles to milepost 174.2, but these stretches of the highway are very similar in grade. It is unclear why Emmert is projecting

15 minute delays on a half-mile stretch and 15 minute delays on the next 2.2 mile stretch, when they are similar stretches of highway.

In his analysis, it is unlikely that Emmert can meet the 10-minute or even 15-minute traffic delays projected in the ITD permit and accompanying traffic delay spreadsheets, for many reasons including the curves and rock faces along the highway and inadequate turnouts.

**H. Emmert Testimony.**

Mr. Emmert testified that Emmert International has been retained to clean up the accident involving a Mammoet transport in Indiana, *see* Ex. 1001. He admitted that Emmert stands to profit if Highway 12 becomes established as a transportation route for mega-loads. Mr. Emmert underscored that the Emmert transport equipment is powerful and can accelerate quickly. He also testified that he is not too familiar with the details of the Conoco shipments; and deferred to Mr. Albrecht for those details.

**H. Albrecht Testimony.**

Mr. Albrecht is the Emmert supervisor for the Conoco shipments. He confirmed that Emmert first approached ITD in 2007 about the shipments, and received pre-approval from the Bridge Section then; and that it was Emmert that determined to ship the coke drums from Lewiston to Billings via Highway 12.

Mr. Albrecht described the Traffic Control Plan as a “living document,” and disputed on cross-examination that Emmert had to follow all its provisions. He also disagreed with the permit requirements imposed by ITD – stating, for example, that dollies are not required to cross the Arrow Bridge, even though the ITD permit requires this. *See* ITD 2337.

Mr. Albrecht also disputed Emmert's written statement to ITD that it would require five minutes to lower and raise dollies before the loads cross the Arrow, Maggie Creek, and Fish Creek bridges. *See* ITD 850 & 1162 (both Emmert statements that five minutes required to lower and raise dollies at the bridges).

Mr. Albrecht conceded that barricading turnouts for the Conoco shipments would impact the public, and that Emmert has not consulted with the Nez Perce Tribe or the U.S. Forest Service about the barricades.

The most notable feature of Mr. Albrecht's testimony on cross-examination was his refusal to say how fast the Emmert transports will travel on the four-day route up Highway 12 from Lewiston to the Lolo Pass. Rather than discuss actual or projected speeds or travel times, Mr. Albrecht repeatedly responded that Emmert exercised its professional judgment in calculating traffic delay times for the 15-minute spreadsheet; and that Emmert was confident it could meet those projections. However, Mr. Albrecht also revealed that the speed any given load will actually travel will be left entirely up to the discretion of the driver.

Mr. Albrecht also confirmed that Emmert's traffic delay projections only include time that vehicles are actually stopped while they wait to get by the Conoco loads; and thus do not include other delays that the shipments will cause to highway traffic.

Mr. Albrecht admitted that Emmert shipped a massive load of refinery equipment from Oklahoma to Billings on behalf of Exxon, which arrived the day of his testimony.

#### **I. Steach Testimony.**

Mr. Steach is the Billings refinery manager for Conoco. He relied on Emmert to address traffic control and other issues with ITD.

## ARGUMENT

### **I. APPLICABLE LEGAL STANDARDS.**

The Hearing Officer has been appointed to “preside over a contested case hearing to determine the merits of the challenges made to the overlegal permit regarding the Coke Drum Transport project” on behalf of ITD. *See* Letter from Brian W. Ness, Director, Idaho Transportation Department, to Merlyn W. Clark (November 29, 2010); IDAPA 4.11.01.410. Those challenges are stated in the Amended Petition to Intervene, which the Hearing Officer granted (and the ITD Director affirmed); and are identified in the Pre-Hearing Order issued by the Hearing Officer.

In general, the Hearing Officer should review Intervenors’ challenges under the standards of the Idaho Administrative Procedure Act, to determine whether ITD’s decision approving the Conoco permits was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, and/or contrary to law. *See* I.C. § 67-5279(3).

If the Hearing Officer concludes that ITD did not comply fully with the regulatory duties that are the focus of Intervenors’ challenges, then he should recommend that ITD withdraw the Conoco permits – at least until ITD has fully complied with these duties and all questions raised by the Conoco proposal have been addressed.

### **II. THE CONOCO PERMITS VIOLATE THE TRAFFIC DELAY LIMITS OF CHAPTERS 11 AND 16.**

The Coke Drum Transport Project permits are unlawful, first, because they allow Conoco to delay traffic longer than allowed under the ITD regulations for such overlegal, non-reducible shipments.

As the hearing record shows, ITD approved the Conoco permits based on the unwritten policy that traffic may not be delayed for more than 15 minutes. ITD staff who

testified at the hearing – Rodriguez, Frew, Carpenter, and Hoff – all concurred that ITD has historically applied this 15-minute traffic delay limit to overlegal permits; and that ITD followed that same 15-minute delay rule here. In light of that uncontested fact, the key questions for the Hearing Officer are thus:

(1) Did ITD err, as a matter of law, in using a 15-minute delay limit for the Conoco permits, rather than limiting traffic delays to 10 minutes under Chapter 16 of its regulations?

(2) Even if the Hearing Officer concludes that the 10-minute delay limit of Chapter 16 does not apply here, has ITD reasonably determined that Emmert will meet the 15-minute delay rule for the Conoco shipments?

**A. The 10-Minute Delay Rule Of Chapter 16 Applies Here.**

Whether the 10-minute delay rule of Chapter 16 applies to the Conoco shipments is a question of law for the Hearing Officer to decide, based upon construction of the relevant regulations.

As the Idaho Supreme Court has held, the proper construction or interpretation of agency regulations is a question of law, which is reviewed *de novo* by the courts; and follows the same tenets as statutory construction. *See Dry Creek Partners, LLC, v. Ada County Com'rs*, 217 P.3d 1282, 1287 (2009) (“Determining the meaning of a statute, its application, and whether the statute was violated are matters of law subject to plenary review”); *Stafford v. Idaho Dept. of Health & Welfare*, 145 Idaho 530, 181 P.3d 456, 459 (2008) (“Interpretation of a statute is an issue of law over which this Court exercises free review . . . Administrative regulations are subject to the same principles of statutory construction as statutes”); *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (“It is fundamental that the judiciary has the ultimate responsibility to construe

legislative language to determine the law . . . This principle extends to our review of administrative rules”).

The starting point for analysis here is Chapter 16 of the ITD regulations, in Title 39.03 of the Idaho Administrative Code. *See* IDAPA 39.03.16. The title of Chapter 16 is: “Rules Governing Over-size Permits For Non-Reducible Vehicles and/or Loads,” and the scope of this chapter is stated as: “This rule states the maximum sizes allowed by overlegal permit. It does not apply to the transport of oversize manufactured homes or office trailers.” IDAPA 39.03.16.001.02.

The title and scope of Chapter 16 thus initially refute the testimony by ITD witnesses Rodriguez and Frew that Chapter 16 only applies to unusual or “special” circumstances, where a traffic control plan cannot be adopted under Chapter 11. As Mr. Rodriguez testified, the Conoco drums – now that they are each cut in half – are “non-reducible” loads under the ITD regulations, and have been certified as such by Emmert. Thus, Chapter 16’s provisions for non-reducible loads unquestionably apply here.

Section 100 of Chapter 16 is the portion of the non-reducible load regulations at issue here, and it states in relevant part:

100. GENERAL OVERSIZE LIMITATIONS.  
.01 Maximum Dimensions Allowed.

. . . Overlegal permits will not normally be issued for movements which cannot allow for passage of traffic as provided in IDAPA 39.03.11, “Rules Governing Overlegal Permittee Responsibility and Travel Restrictions,” Subsection 100.05, except under special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes) or when adequate detours are available.

IDAPA 39.03.16.100.01 (underscore added).



The underscored terms above show that Chapter 16, Section 100.01 is focused on whether non-reducible loads allow for the “passage of traffic” in compliance with Chapter 11, Subsection 100.05. Nothing in this regulatory language states that non-reducible load permits should be granted or denied based on whether a “traffic control plan” is adopted or not – the term “traffic control plan” does not even appear in Chapter 16. Instead, the focus is on “passage of traffic.”

Moreover, under the plain terms of this section, a non-reducible load should normally be denied a permit if “passage of traffic” cannot be accomplished in accordance with Chapter 11, Subsection 100.05 – except in special circumstances of light traffic, where a maximum delay of ten (10) minutes is allowed.

By providing that non-reducible loads “will not normally be permitted” unless they can satisfy traffic passage requirements under Chapter 11, Subsection 100.05, the regulations under Chapters 16 and 11 obviously must be construed together to determine their meaning. This is consistent with well-established principles of statutory and regulatory construction. *See Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 208 P.3d 289 (2009) (“Provisions should not be read in isolation, but must be interpreted in the context of the entire document”); *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903, 907-908 (2001) (relevant administrative rules must be construed together, and given their plain, obvious and rational meaning).

Chapter 11 is entitled “Rules Governing Overlegal Permittee Responsibility And Travel Restrictions.” *See* IDAPA 39.03.11. The “scope” of this Chapter 11 is: “This rule states the responsibility of the permittee and the travel restrictions for overlegal loads.” IDAPA 39.03.11.001.02. Subsection 100.05 reads, in relevant part:

- a. The movement of over legal loads shall be made in such a way that the traveled way will remain open as often as feasibly possible and to provide for the frequent passing of vehicles traveling in the same direction. In order to achieve this a traffic control plan is required to be submitted when operating on two (2) lane highways and exceeding the following dimensions:
  - i. Width exceeds twenty (20) feet.
  - ii. Length exceed one hundred fifty (150) feet.

IDAPA 39.03.11.100.05 (underscore added).

The underscored terms here thus again focus on the passage of traffic – with Chapter 11, Section 100.05 requiring that overlegal permits must allow for “the frequent passing of vehicles traveling in the same direction.” As this section expressly states, a traffic control plan is required “in order to achieve this” frequent passing of vehicles. In other words, the traffic control plan is not an end unto itself, as ITD maintains – the very purpose of a plan is to assure “frequent passing.”

Chapter 11 does not, however, define the term “frequent passing of vehicles.” Under the familiar principles of statutory and regulatory construction noted above, the meaning of “frequent passing” in Chapter 11 thus must be construed within the context of Chapter 16, which establishes the requirements for non-reducible loads and expressly references this provision. *See Mason v. Donnelly Club, supra*, 21 P.3d at 907-08.

When read together, the phrase “frequent passing of vehicles” from Chapter 11 can only mean passing more often than every 10 minutes, since Chapter 16 sets 10 minutes as the outer boundary for traffic delays that may be caused by non-reducible loads when the “frequent passing” standard of Chapter 11 cannot otherwise be met. This is the only logical way to construe the provisions together; and it is the reading that

District Judge Bradbury gave in his August 2010 decision (which was subsequently vacated on other grounds by the Idaho Supreme Court).

ITD's contrary interpretation must be rejected because it conflicts with the plain language of the regulations, and reaches an absurd result. Under ITD's reading, traffic delays of 15-minutes constitute "frequent passing" for overlegal permits authorized under Chapter 11; yet that interpretation reads Chapter 16's 10-minute delay language out of existence. If "frequent passing" means every 15 minutes, then there is no reason for Chapter 16 to provide that 10-minute delays are acceptable in "special circumstances" if Chapter 11's "frequent passing" standard cannot be met. If ITD can approve non-reducible loads to delay traffic by 15 minutes under Chapter 11, then it will never need to invoke the 10-minute delay limit of Chapter 16 for non-reducible loads that cannot allow for 15-minute delays. ITD's reading thus writes this provision of Chapter 16 out of existence.

Of course, the Hearing Officer should not accept a reading of the regulations that effectively rewrites them to eliminate existing language. *See Farber*, 208 P.3d at 292-93 ("the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant").<sup>2</sup>

---

<sup>2</sup> Because ITD's interpretation is inconsistent with the plain language of the regulations and reaches an absurd result, it does not deserve any deference under the *Simplot* standards previously cited by ITD and Conoco. *See J.R. Simplot Co. v. Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). *Simplot* makes clear – and the Supreme Court has held many times since that decision – that no deference is owed to an agency interpretation that is not reasonable. *See Simplot*, 820 P.3d at 1219. *See also Hillcrest Haven Conv. Center v. Idaho Dept. of Health and Welfare*, 142 Idaho 123, 125, 124 P.3d 999, 1001 (2005) (reversing because agency decision was contrary to unambiguous language of regulation); *Parker v. Underwriters Laboratories*, 140 Idaho 517, 520-22, 56 P.3d 618, 621-23 (2004) (reversing agency denial of severance benefits based on ordinary meaning of "severance pay," which was not defined in the regulations); *Mason, supra*, 21 P.3d at

There are no cases construing the meaning of “frequent passing” as used in the ITD regulations at issue here – other than Judge Bradbury’s opinion in *Laughy v. ITD*, which agreed with Intervenor’s in their reading of the regulations. The closest authority that Intervenor’s have found is *Mason v. Donnelly Club, supra*, an unemployment benefits case. The Idaho Supreme Court there considered whether the Industrial Commission properly construed its regulations addressing whether a discharge occurred a “short time” prior to resignation of the employee – in that case, a two week gap. *See* 21 P.3d at 908. The Commission held that two weeks was not a “short time” under the regulations, but the Supreme Court disagreed and reversed. *Id.*

The Court noted that the regulations did not define “short term,” so the Court looked to the broader statutory context to determine a meaning. *Id.* It held that since unemployment benefits are provided for in compensable weeks, not days, and two-week notices of termination were commonly used, the Commission’s interpretation “would render the rule inapplicable in almost all cases.” The Court thus held that it was unreasonable for the Commission to hold that two weeks was not a “short time” under the implementing regulations. *Id.*

Similarly here, the ITD regulations do not provide a meaning for the term “frequent passing,” so the Hearing Officer must look to the broader context of the regulations – and particularly the provision of Chapter 16, applicable to non-reducible loads, which states that 10-minute delays are the maximum allowed. Under ITD’s reading, as explained above, this 10-minute outside limit for traffic delays will never

---

905, 908 (not deferring to agency reading of regulation, because “we find unreasonable the Commission’s interpretation that a two-week period is not a ‘short time’ under the rule”).

have any application, because ITD's interpretation that "frequent passing" means every 15 minutes will always apply instead. Just as it was unreasonable for the Industrial Commission to read its regulations in way that renders the rule inapplicable, ITD has done the same thing here – thus requiring the Hearing Officer to reject ITD's unlawful reading.

If the Hearing Officer agrees with Intervenors that the 10-minute delay rule of Chapter 16, Subsection 100.01 applies to the Conoco shipments, then the permits must be held invalid, since they expressly allow traffic delays longer than that. Accordingly, the Hearing Officer should recommend that the Conoco permits be withdrawn based on ITD's unlawful reading of its own traffic delay regulations.

**B. The Conoco Loads Will Delay Traffic For Longer Than 15 Minutes.**

Even if the Hearing Officer agrees with ITD's interpretation of the regulations, the evidence from the contested case hearing has raised serious questions about whether Emmert can achieve the 15-minute traffic delays that ITD has required in approving the permits; and those serious questions require that the Hearing Officer recommend the Conoco permits be withdrawn, at least until ITD has fully and independently analyze the traffic delays associated with the Conoco shipments.

Most troubling here is the fact – fully established by the testimony of Mr. Frew, Mr. Carpenter, and Mr. Hoff – that ITD has not itself calculated traffic delays likely to result from the Conoco shipments; but instead has simply relied on Emmert's projections, without independently checking or verifying Emmert's measurements or calculations. Given the unprecedented nature of these massive shipments up Highway 12, and given the serious concerns raised by the Intervenors and other members of the public about how the Conoco

shipments may substantially delay and inconvenience traffic on Highway 12, surely the public – and the Hearing Officer – are right to demand that ITD itself analyze and determine what the likely traffic delays are from the Conoco shipments.

Moreover, the evidence from the hearing raises serious questions and doubts about the credibility of Emmert's traffic delay calculations, as set forth in the Traffic Control Plan and 15-minute delay spreadsheet. Again, Emmert's lead person on the Conoco shipments, Mr. Albrecht, refused to disclose or discuss the speeds and travel times anticipated for the transports to haul the coke drums through each section of the four-day route up Highway 12. There is absolutely no way to independently verify Emmert's travel delay projections without knowing how long it will take the loads to move from point A to point B.

The testimony of Mr. Laughy and Mr. Hoff further exposes numerous apparent flaws in Emmert's assurance and calculations for the projected traffic delays. As explained above, key turnouts – such as milepost 31.5 and 77.4 – are not nearly as large as Emmert has represented to ITD; and Emmert should not be able to project travel delays based on using the Fish Creek Rest Area past the Fish Creek bridge, since it is for “emergency use only.” If these turnouts are not available or able to accommodate waiting traffic or the Conoco mega-loads, then traffic delays will be far longer on these sections of the route than Emmert has projected. And if it takes Emmert longer than expected to move its loads past the steep cliff places along the route – such as mileposts 48.5 and 116.6 – again traffic delays will be much longer than Emmert has estimated.

The point of this contested case hearing is to get all the facts on the table, so that the Hearing Officer can determine whether ITD properly approved the Conoco permits.

These unanswered questions from the hearing demand, at a minimum, that the permits be withdrawn while ITD fully explores and resolves these traffic delay issues.

**III. ITD DID NOT MAKE A REASONABLE DETERMINATION OF NECESSITY.**

The Coke Drum Transport Project permits are likewise unlawful because ITD failed to make a “reasonable determination of the necessity” of the proposed shipments up Highway 12 as required by IDAPA 39.03.09.100.02. ITD decided to issue the permits long before it considered the issue of necessity; and when ITD finally did so, it relied entirely on Emmert’s unsupported assertions instead of conducting any independent analysis and without considering the unique circumstances of the proposed moves.

Chapter 9 sets forth the “General Conditions and Requirements” for overlegal permits, and provides, “In each case, the Department shall predicate its issuance of an overlegal permit on a reasonable determination of the necessity and feasibility of the proposed movement.” IDAPA 39.03.09.100.02 (underscore added).

This language imposes a mandatory duty on ITD to make a “necessity” determination before deciding whether or not to issue an overlegal permit. The inclusion of the phrase “in each case” in the regulation indicates that ITD must take the unique characteristics and circumstances of each load into consideration. And ITD’s determination of necessity must also be “reasonable.”

**A. ITD Failed to Consider Necessity Before Deciding to Issue the Permits.**

The record and the evidence presented at hearing demonstrate that ITD decided to issue the Conoco permits before it considered the issue of necessity. At the very latest, ITD had decided to issue the requested permit by August 12, when it issued draft permits.

ITD 2262-89. Yet, the first—and only documentation—that ITD considered whether the use of Highway 12 was necessary appears in Frew’s Memorandum of Decision of August 20. As Frew admitted on cross examination, this document was prepared for the specific purpose of “explaining” ITD’s position to the district court in response to the plaintiffs’ claims in *Laughy v. ITD*, which included the necessity claim presented here.

ITD thus failed to “predicate” its decision to issue the Conoco permits on a determination of necessity as required by Section 9.

**B. ITD’s “Necessity Determination” Was Unreasonable.**

When ITD did finally consider the issue of necessity, its determination was unreasonable under the particular circumstances at issue in this case. ITD relied on the assertions of Emmert in concluding that routes outside Idaho were not available rather than making an independent determination. Such an independent determination was called for in this case by the unprecedented size of the shipments, the numerous public comments that called to ITD’s attention other potential routes outside Idaho, and the unique characteristics of Highway 12.

Contrary to Mr. Frew’s contention at hearing, ITD did consider routes outside of Idaho. The Traffic Control Plan on which ITD premised its approval of the Conoco permits contains an extensive explanation about Emmert’s plan to barge the coke drum from the Port of Vancouver to the Port of Lewiston. ITD 45-105, 404-64. If ITD’s consideration had been limited solely to Idaho routes, the inclusion of this River Transport Plan would have been unnecessary in either the Traffic Control Plan or the Administrative Record.



Likewise, Frew’s own Memoranda of Decision—including the “Updated” memorandum dated November 10—reference and rely upon Emmert’s one-page memorandum asserting that route outside of Idaho were unavailable. *See* ITD 744 (Emmert one-page analysis); ITD 2330 & 2370 (discussion in Frew decision memos). On the basis of Emmert’s assertions, Frew concluded, “The only viable option for the transport of the coke drums to Billings, Montana, is from Lewiston, Idaho—the nearest navigable water to Billings—along U.S. 12.” ITD 2330, 2370 (emphasis added). This statement indicates that ITD did not limit its consideration to Idaho or the Port of Lewiston.

ITD’s unquestioning deference to Emmert’s claims of necessity was unreasonable in view of the unique circumstances of this case. All four ITD witnesses admitted that the Coke Drum Transport Project loads are larger than any load that has ever traveled up Highway 12. They also admitted that the level of public opposition to the Coke Drum Transport Project distinguishes it from all prior applications for overlegal loads.

ITD’s complete reliance on Emmert’s claim that it had to ship the loads to Lewiston is likewise unreasonable in view of the numerous public comments indicating that other routes were available to transport the coke drums. *See* Testimony of Adam Rush (acknowledging this fact); ITD 1799 (public comment urging ITD to “use the train rails”); ITD 1782-83 (Ms. Hendrickson explaining to ITD, “I know that until now Imperial Oil and other corporations have used the Panama Canal-Houston-Billings-Canada route for transport of huge industrial equipment. That route is presumably still usable”); ITD 1980 (“These huge pieces of equipment should either be assembled at their destination or they should be hauled through the Panama Canal and shipped through the

Plains States as has been done previously”); ITD 1867 (“Before this application Imperial Oil transported machinery from Houston to Alberta and it worked just fine. They can continue to do so now”).

Finally, ITD’s refusal to make an independent necessity determination was unreasonable in light of the unique characteristics of Highway 12. Carpenter admitted that Highway 12 is a nationally designated Scenic Byway and All American Road that parallels two Wild and Scenic Rivers. These designations place additional responsibilities on ITD. As Carpenter acknowledged, the Highway Easement Deed that gives ITD its interest in the portion of Highway 12 that goes through the Clearwater National Forest requires ITD to “protect and preserve soil and vegetative cover and scenic and esthetic values on the right of way outside of construction limits.” *See* ITD 1388.

Carpenter also acknowledged that ITD has adopted the Northwest Passage Scenic Byway Corridor Management Plan (Ex. 89) concerning management of Highway 12. Under the Federal Highway Administration’s governing policy, the State of Idaho has the responsibility “to assure that the intrinsic qualities of the National Scenic Byways and All-American Roads are being properly maintained in accordance with the corridor management plan.” Ex. 88 at 3.

According to the corridor management plan, the byway’s mission is to, “welcome, serve, and educate the motoring public; advocate for transportation safety; and promote economic development while sustaining a way of life that is valued by its residents.” Ex. 89 at 10. While the corridor management plan acknowledges the volume of truck traffic on Highway 12, Ex. 89 at 17, the plan places a priority on protecting and enhancing the

area's tourism industry. *See* Ex. 89 at 10 (establishing the plan's first goal is to "Actively project the Northwest Passage identity. Encourage partners in the travel and tourism industry to adopt the byway as a cornerstone of regional marketing, particularly in regard to its scenic, historic, and cultural attributes"); Ex. 89 at 22-23 (describing North Central Idaho Travel Association's success in marketing the byway as a tourist destination); *id.*, at 65 (explaining, "Continuing NCITA's marketing and promotion strategies [for tourism] is paramount to the success of NWPSB.")

ITD thus failed to predicate the issuance of the Coke Drum Transport Project permits on a reasonable determination of necessity and the permits should be withdrawn.

#### **IV. ITD DID NOT PLACE A PRIMARY CONCERN ON PUBLIC SAFETY AND CONVENIENCE.**

Finally, Intervenors demonstrated at hearing that ITD violated Chapter 9 of its regulations by failing to place a "primary concern" on the safety and convenience of the general public in deciding to grant Conoco's application for overlegal permits.

Chapter 9 of the ITD regulations is entitled: "Rules Governing Overlegal Permits – General Conditions and Requirements." *See* IDAPA 39.03.09 *et seq.* Section 100 of Chapter 9 provides:

100. RESPONSIBILITY OF ISSUING AUTHORITY.  
.01 Primary Concerns. The primary concern of the Department, in the issuance of overlegal permits, shall be the safety and convenience of the general public and the preservation of the highway system.

IDAPA 39.03.09.100.01 (underscore added). This language thus requires ITD to prioritize public safety and convenience above other issues, such as the economic needs of the permit applicant.

Here, the record shows that ITD did not meet this duty, including by failing to give the public full information about the Conoco shipments and brushing off their concerns. Again, the hearing confirmed that no massive shipments of this size have ever been authorized to go up Highway 12; and that the public – including many residents and business owners along Highway 12 – have expressed serious concerns about how the shipments will affect the lives of residents and users of the highway, as well as the reputation of the scenic byway. *See, e.g.*, ITD 1732, 1735, 1750, 1815, 1972, 2192 (public comments expressing concern about precedent set in approving Conoco loads); ITD 1744, 1794, 1825, 1864 (public comments expressing concerns about impacts to tourism).

Even though ITD issues many thousands of overlegal permits a year, these shipments are qualitatively different – including because this is the first time that members of the public have spoken out in opposition to such permits. Given its regulatory duty to place a “primary concern” on public safety and convenience, ITD should have heeded the public’s views closely.

But it did not do so. As with its “necessity” determination, ITD paid little or no attention to this regulatory requirement that it place a “primary concern” on public safety and convenience until litigation was brought over the Conoco permits last summer. ITD is now scrambling to pretend it has placed a primary concern on public convenience and safety, when the record reveals otherwise.

The agency’s summary dismissal of public concerns belies any attempt it may make to claim that it gave public convenience and safety due priority. Again, ITD staff confirmed that ITD did not hold any public meetings or solicit public comments about the

Coke Drum Transport Project proposal. Even though it did not solicit public comments, ITD did receive numerous comments about ways in which the Conoco loads would inconvenience and endanger the public – yet it failed to investigate the facts underlying these concerns. Instead, ITD attempted to placate the public with “generic” mass emails, *see* ITD 1817 & 2128; and ultimately dismissed the public’s concerns as “subjective” and “speculative,” as stated in Mr. Frew’s decision memos.

Moreover, ITD’s assertions now that it placed a priority on public convenience and safety are refuted by the testimony of Mr. Frew and the statements made in his decision memos that ITD has “balanced” the concerns of the public with the needs of Conoco. These admissions that ITD “balanced” the public’s concerns with Conoco’s needs are notable, because they show that ITD did not actually put public convenience and safety first, as the regulations require.

The hearing record confirms that ITD staff worked long and hard to facilitate the Conoco permits, yet paid little attention to public convenience – other than to insist on the 15-minute traffic delay rule, which ITD did not verify and simply assumed Emmert would meet. While the Administrative Record is filled with analyses and memos concerning the capacity of Highway 12 bridges to handle the loads and other details, there is no documentary evidence that ITD staff similarly investigated how the public could be inconvenienced.

For example, the Administrative Record contains only a single set of hourly traffic reports from March 2010, apparently from two locations on Highway 12. *See* ITD 742-43. Mr. Hoff, Mr. Albrecht, and others mentioned these hourly traffic reports briefly in their testimony, as underscoring that Highway 12 only has light traffic at night that

may be delayed and inconvenienced by the Conoco shipments. Yet ITD approved the Conoco loads to travel originally in August – the height of the summer tourism season – and now may apparently authorize the loads to move in the dead of winter. There is no evidence in the record that ITD examined hourly traffic flows at these different times of the year; or that it evaluated traffic at different locations along the highway.

Similarly, the Frew decision memos themselves demonstrate that ITD has placed a priority on accommodating Conoco's needs to get the coke drums to Billings – after Conoco took the corporate risk of shipping them to Lewiston – rather than placing public convenience and safety as the top priority. Even after all the litigation in state court during the period August-October this year, in which the Laughy plaintiffs repeatedly raised the claim that ITD violated its Chapter 9 duty to place a primary concern on public safety and convenience, still Mr. Frew's Updated Memorandum of Decision – signed on November 10, 2010 – begins by underscoring Conoco's need to replace its Billings refinery coke drums. *See* ITD 2368. The Updated Memorandum of Decision ends by acknowledging that ITD “balanced” the concerns of the public with Conoco's needs, and rejecting public concerns as being “speculative” and “subjective.” ITD 2373-74.

Perhaps the most telling fact showing that ITD has not placed a primary concern on public safety and convenience, however, is ITD's decision to authorize Emmert to barricade turnouts along Highway 12, as set forth in the November 2010 permits. ITD is allowing Emmert to block any or all of the many turnouts listed in the 15-minute traffic delay spreadsheet up to 24 hours in advance – for each of the four Conoco shipments. These barricades will thus prevent the traveling public from being able to use turnouts in the event of emergencies, to rest, or just to view the scenic area.

ITD's action allowing a private company to barricade public highway turnouts – and thereby inconvenience and even endanger the traveling public – is really all the proof the Hearing Officer needs to conclude that ITD has not met its Chapter 9 duty of placing a primary concern on public safety and convenience.

In sum, the contested case hearing record reveals that ITD did not place a “primary concern” on public safety and convenience, as required by Chapter 9 of the regulations. Instead of recognizing that the Conoco mega-shipments are unusual and pose special concerns for the public, ITD treated them in a “business as usual” fashion. That may be appropriate for the many thousands of overlegal permits that ITD processes each year – but it is not appropriate in this unique circumstance. Accordingly, the permits should be withdrawn.

### **CONCLUSION**

Based on any or all of these legal violations, the Hearing Officer should thus render a Recommended Decision that the permits for the Coke Drum Transport Project were unlawfully issued and must be withdrawn.

Dated this 15th day of December, 2010.

Respectfully submitted,

/s/ Laird J. Lucas

Natalie J. Havlina  
Laurence (“Laird”) J. Lucas  
*Advocates For the West*  
P.O. Box 1612  
Boise, ID 83701

Attorneys for Intervenors

**PROOF OF SERVICE**

I HEREBY CERTIFY that on this 15th day of December, 2010, I caused to be served the foregoing Intervenor's Post-Hearing Brief upon all parties of record in this proceeding by the means indicated below:

Stephanie Wright  
Idaho Transportation Department  
Legal Section  
PO Box 7129  
Boise ID 83707  
**Original, sent via first class mail**

J. Tim Thomas  
[tim.thomas@itd.idaho.gov](mailto:tim.thomas@itd.idaho.gov)  
Deputy Attorney General  
Idaho Transportation Department  
3311 West State Street  
Boise, ID 83707  
**Via email and first class mail**

Erik Stidham  
[EFStidham@hollandhart.com](mailto:EFStidham@hollandhart.com)  
Holland & Hart  
Suite 1400, US Bank Plaza  
101 S. Capitol Blvd.  
Boise, ID 83701  
**Via email and first class mail**

Hearing Officer Merlyn W. Clark  
[mclark@hawleytroxell.com](mailto:mclark@hawleytroxell.com)  
Hawley Troxell Ennis & Hawley  
877 W. Main Street  
Suite 1000  
Boise ID 83702  
**Via email and first class mail**

/s/ Laird Lucas \_\_\_\_\_