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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB Plaintiffs/Respondents, vs. IDAHO TRANSPORTATION DEPARTMENT, Defendant/Appellant, CONOCOPHILLIPS COMPANY, Intervenor/Appellant	Case No. CV 40411 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED PLAINTIFFS, LINWOOD LAUGHY, KAREN HENDRICKSON, AND PETER GRUBB, regarding ConocoPhillips Company's ("Conoco") over-legal permit.

NOTICE IS HEREBY GIVEN THAT:

1. The Intervenor-Appellant ConocoPhillips Company ("ConocoPhillips") appeals against the above-named Respondents to the Idaho Supreme Court from the oral ruling on August 23, 2010, denying ConocoPhillips Motion to Strike and from the Opinion, entered in the above-entitled action on August 24, 2010, the Honorable John Bradbury presiding ("District Court Decision").

2. On August 20, 2010, the Idaho Transportation Department ("ITD") issued over-legal permits ("Permits") allowing for the transport of four shipments of ConocoPhillips property pursuant to specified terms.

3. The District Court Decision reversed and remanded ITD's issuance of the Permits.

4. ConocoPhillips has a right to appeal to the Idaho Supreme Court, and the Order described in paragraph 1 above is appealable under and pursuant to Rule 11(f), I.A.R.

5. Through separate motion, ConocoPhillips will seek to have this appeal expedited pursuant to Idaho Appellate Rule 44.

6. The following is a preliminary statement of the issues on appeal:

(a) Whether Respondents lack standing because their alleged injuries are speculative, hypothetical, abstract, and are not causally related to the four shipments that are at issue;

(b) Whether Respondents fail to meet their burden under I.C. § 67-5279(4) to demonstrate that their substantial rights have been prejudiced where their alleged injuries are speculative, hypothetical, abstract, and are not causally

related to the four shipments that are at-issue or the alleged defects in ITD's issuance of the Permits;

(c) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied the "reasonable determination of necessity" language in IDAPA 39.03.09.100.02 in a manner that was arbitrary, capricious, an abuse of discretion, or contrary to law;

(d) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied IDAPA 39.03.09.100.01 in a manner that was arbitrary, capricious, an abuse of discretion or contrary to law;

(e) Whether Respondents failed to meet their burden under I.C. § 67-5279(2) to establish that, in issuing the Permits, ITD interpreted and applied IDAPA 39.03.09.16.100.01 in a manner that was arbitrary, capricious, an abuse of discretion or contrary to law;

(f) Whether the district court erred in refusing to give ITD deference regarding interpretation of its own regulations;

(g) Whether the district court erred in considering evidence that was outside of or inappropriately included in the administrative record;

(h) Whether the district court erred in ignoring evidence in the record, including, but not limited to, evidence relating ITD's consideration of public safety and convenience;

(i) Whether the district court erred in denying ConocoPhillips' Motion to Strike Portions of Affidavits dated August 23, 2010.

7. The Intervenor-Appellant requests the preparation of the following portions of the reporter's transcript in electronic or hard copy form:

Hearing dated August 23, 2010

8. The Intervenor-Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: all pleadings in the district court's files, including the administrative record filed with the District Court on August 23, 2010.

9. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address: Keith Evans,
Idaho County District Court
320 W Main
Grangeville, ID 83530

Name and Address: Linda Carlton
425 Warner
Lewiston, ID 83501

(b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript;

(c) That the estimated fee for preparation of the clerk's or agency's record has been paid;

(d) That the appellate filing fee has been paid;

(e) That service has been made upon all parties required to be served pursuant to Rule 20 and the attorney general of Idaho pursuant to I. C. § 67-1401(1).

Dated this 25th day of August, 2010.

HOLLAND & HART LLP

By _____
Erik F. Stidham, of the firm
Attorney for ConocoPhillips Company

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Natalie J. Havlina Advocates for the West P.O. Box 1612 Boise, Idaho 83701	☐ ☒ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)
J. Tim Thomas Deputy Attorney General Idaho Department of Transportation 3311 W. State St. Boise, Idaho 83707-1129	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)
Keith Evans, Idaho County District Court 320 W Main Grangeville, ID 83530	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)
Linda Carlton 425 Warner Lewiston, ID 83501	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (Fax)

_____
for HOLLAND & HART LLP

DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 3:55 O'CLOCK P .M.
AUG 24 2010
ROSE E. GEHRING
CLERK OF DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

LINWOOD LAUGHY, et al Plaintiffs, vs. IDAHO DEPARTMENT OF TRANSPORTATION Defendant. CONOCOPHILLIPS CO. Intervenor.	CASE NO. CV 10-40411 OPINION

This case comes before me on a Petition for Judicial Review (Petition) of final action taken by the Idaho Department of Transportation (Department) to permit Emmert International (Emmert) to transport four coke drums from the Port of Lewiston to the Montana border along U.S. Highway 12.

A. The Parties

Linwood Laughy and Karen "Borg" Hendrickson own property along Highway 12, reside there, and operate Mountain Meadows Press, a book publishing company, and a decorated apparel business there.

Peter Grub and his wife own the River Dance Lodge on Highway 12 at Syringa, and ROW Adventures which takes customers on rafting trips down rivers that include the Lochsa.

All the petitioners use Highway 12 for necessities such as food and medical care

and the Lochsa River for its esthetics and amenities.

The Department is charged with overseeing the construction, maintenance and use of all highways, roads and bridges in Idaho that come under its jurisdiction.

B. Background

ConocoPhillips Company (Conoco) is replacing its two coke drums at its Billings, Montana, refinery. Conoco engaged Emmert to transport the drums. Depending on their configuration, the loads will approximately be 110 feet long, 27 feet wide, 29 feet high and weigh 646,204 pounds, or 225 feet long, 29 feet wide, 27 feet high and weigh 636,200 pounds. To accomplish the transit Emmert applied in July of 2009 to the Department for special permits to haul the drums because they exceed the weight and size limits for Highway 12.

C. Special Permits standards

The legislature set the weight and size limits for vehicles traveling highways within the Department's jurisdiction. See *I.C.* §49-1001. The Department, in its discretion, is authorized to issue permits for oversized and overweight loads. *I.C.* §49-1004. The permits must be in writing and may include limits on the times during which the highways and bridges can be traversed. *I.C.* §49-1004(1)(a). The permits may also require security to indemnify the Department for damage to the highway and bridges and also for damages to persons or property resulting form the operation. *Id.*

The Department regulations set the standards with which a special permit applicant must comply to receive a permit.

.01 Primary Concerns The primary concerns 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.

.02 Permit Issuance The Department shall, in each case, predicate the issuance of a [sic] overlegal permit on a reasonable determination of the necessity and the feasibility of the proposed movement.

IDAPA 39.03.09.100

When the width of the load exceeds twenty feet and the length exceeds one hundred fifty feet and it is being hauled on a two lane highway, the Department standards include:

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 frequent passing of vehicles traveling in the same direction.

IDAPA 39.03.11.100.05

A traffic control plan to implement those standards is required and it must include a "[p]rocedure for allowing emergency vehicles to navigate around the vehicle load when necessary." *Id.*

The Department regulations that specifically apply to non-reducible loads, which the subject loads are, provides:

.01 Maximum Dimensions Allowed The maximum dimensions of oversized vehicles or oversize loads shall depend on the character of the route to be traveled, width of roadway, alignment and sight distance, vertical or horizontal clearance, and traffic volume. 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 Permit Responsibility and Travel Restrictions," Subsection 100.05, except under circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10)

minutes) or when adequate detours are available."

D. The Decision

Division of Motor Vehicles Administrator Alan Frew issued his Memorandum of Decision (Decision) on August 20, 2010, authorizing the issuance of overlegal permits to Emmert. He relied on the administrative record. (AR) He concluded the permits were feasible and necessary.

Mr. Frew explained the permits were predicated on a "reasonable determination of the necessity and feasibility of the proposed movement" as required by *IDAPA* 39.03.09.100.02. As to the necessity of the permit, he pointed to Emmert's exploring other routes and he then concluded Highway 12 was the "only viable option." *Decision* at AR, ITD 02330.

He explained the permit was feasible because of the traffic plan that had been agreed to between Emmert and the Department which included four surveys and its coordination with the repair of the Arrow Bridge. *Id.*

Mr. Frew concluded that the ten minute rule specified by IDAPA 39.03.16.100.01 did not apply to these permits because he found the proposed permit met the requirements of IDAPA 39.03.11 regarding traffic flow. He based this on the traffic management plan that provides for turnouts at fifteen minute intervals, the use of pilot cars and traffic control people, and arrangements for emergency vehicles to get around the loads. AR, ITD 02331. The emergency vehicle plan contemplates the transport being notified in advance of its arrival so the load can be circumvented.

Mr. Frew submits that the Department also considered and provided for the publics safety and convenience by scheduling the loads movements between 10:00 p.m. and 5:30 a.m., when the traffic flow is light, and a maximum of fifteen minute

delays between turnouts.

Mr. Frew is dismissive of the public's comments and the Laughy petition for review regarding the permits' effects on tourism, vacationers, and medical emergencies as being subjective. He states, however, the concerns were considered and were addressed by the requirement for a $10,000,000 bond that will indemnify the Department for any damages to the highway and the bridges.

E. Petitioners' Contentions

The petitioners allege the Department did not reasonably determine that the project was necessary and feasible and that the safety and convenience of the public was not its primary concern, contrary to the requirements of *IDAPA* 39.03.09.100. They complain that the permits now at issue are just a forerunner of an effort to transform a federally designated scenic byway into a high and wide corridor to transport "massive oil industry equipment that is manufactured and shipped from overseas to distant inland locations." *Petition* at 5.

More specifically they allege the project will threaten the safety of highway residents by interfering with access to local hospitals. At its core, however, the petitioners' complaint is that the Department was arbitrary and capricious because it did not have a reasonable basis for deciding the project was necessary and feasible, that the safety and convenience of the public was not a primary concern as required by *IDAPA* 39.03.09.100, and that a delay of not more than ten minutes was required by *IDAPA* 39.03.16.100.

F. The Record

While I am obliged to limit my review to the administrative record when deciding if the Department's final action passed statutory muster, I am permitted to go beyond

that record to determine what process the Department followed. See, *Clow v. Board of County Commissioners* 105 Idaho 714 (1968), *University of Utah Hospital v. Board of County Commissioners* 113 Idaho 441 (Ct. App. 1987).

It is extremely difficult to determine when the decision was made and therefore what portion of the record was relied on by the person who made the decision. The Memorandum Decision was dated August 20, 2010. Neither counsel for the Department nor for Conoco could tell me when the decision Mr. Frew memorialized occurred. The drums have been at the Port of Lewiston since May. It would be difficult to accept Mr. Frew's statement that he considered the publics comments if the decision that he memoriallzed was made before the drums were shipped to Lewiston and the comments were lodged with the Department.

The difference between making findings and conclusions to justify a decision already made and the rigor of reasoned discretion to arrive at a decision is one of kind, not degree. The United States Supreme Court has held that these types of "post hoc rationalizations" are not entitled to the substantial deference they otherwise would enjoy. See *Martin v. Occupational Safety and Health Review Commissioners,* 499 U.S. 144, 156-157 (1991); *Burlington Truck Lines, Inc. v. United States* 371 U.S. 156, 168-169 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action;...").

The Decision reads like a legal brief, rebutting even the allegations in the petition for review. There are no findings of fact based on specific data; merely representations that the record has been considered. I question whether the decision to issue the permits was deferred until after the lawsuit was commenced and only two days before the hearing on August 23, 2010, when the Department previously and publicly

announced that it planned to issue the permits on August 18, 2010. As a result I give very little deference to the Department's interpretation of its own regulations.

G. Discussion

1. Safety and Convenience of the General Public and Preservation of the Highway System

I harbor no doubt that there is substantial evidence that the Department honored its duty to preserve Highway 12. The four traffic studies and the extensive discourse between the Department and Emmert regarding what the highway could tolerate and ensuring that the loads came within that tolerance are thorough and replete. A $10,000,000 bond was required to indemnify the State for any damage that might occur to the highway. The same cannot be said about the public's safety and convenience.

The Department argues that scheduling the transport of the drums at night when traffic is light mirrors the Department's concern for safety and convenience. The Department never solicited public comments about what would best serve its safety and convenience. Those who commented, notwithstanding the lack of an invitation to do so, expressed their concern about reaching a hospital if a medical emergency occurred, See, e.g. *comments of Ruth Graham,* AR, ITD 1792-93; *Affidavit of Karen Hendrickson* at AR, ITD at 790-791. Ms. Hendrickson avers that 85 percent of Clearwater Valley Hospital emergency room patients arrive in personal vehicles with about half of them traveling by way of Highway 12. Despite this record, the Department has not required or arranged for any means for private vehicles involved with emergent medical situations to contact it, or Emmert, or the state Police to arrange for access to the local hospital. *Decision*, AR, ITD 2331. Nor has the Department or Emmert dealt with responding to an emergent situation in the transportation process itself.

Emmert's Risk Assessment and Management states in part:

> 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, structural failures in the load or in the ground under transportation equipment, human error or the impact of third parties. It is essential that contingencies be in place to deal with these situations and Emmert International constantly review and update as necessary their procedures and detailed scheduling to cover these occurrences.

AR, ITD 16.

Yet there is no contingency response plan to deal with a breakdown in transit, except for Emmert's recognition of the possibility of having to recover a load and the possibilities a recovery of the drum might entail. AR, ITD 43-44. There is no contingency plan as such. The citizens who submitted comments alerted the Department to how dire the consequences of this risk could be. For example, Cheryl Halverson described the problem of using a crane in the event a mishap occurred in transit.

> There has been a change in Imperial oil/Exxon Mobil's transportation plan and they now address the problem of overturning the load and transporter into the water. Their plan cites the need for a crane "with up to approximately 500-ton capacity." Unfortunately that large a mobile crane requires a larger surface area to place its outriggers. And according to local research (where is ITD's?)" to achieve maximum lift capacity, the outriggers must be placed on outrigger floats,

which extend beyond the required 39-foot pad (would take up to 45x45 feet). This space requirement eliminated the possible use of a 500-ton crane on approximately 80 percent of U.S. 12's 174 miles in Idaho, and likely 100% of the route along the 100+ miles close to or hugging the riverbank."

AR, ITD 1964.

Nick Gier, a professor emeritus at the University of Idaho, described the difficulty of getting a crane with 500 ton capacity to an accident site and the likely consequences of having to do so.

Transporting and setting up a crane is a complex task. For example, the largest mobile crane available in Spokane, a 440-ton hydraulic boom crane, requires a separate 60-ton crane on site just to lift the main boom into place. The boom itself has to be transported by a separate truck. Three more trucks are required to haul the necessary counter balance. The luffer jib and other equipment require more trucks. The assembly of the crane on site requires significant time. Even if it were possible to site a crane on a pad of sufficient size and density, and even if that crane could reach out over the Clearwater and Lochsa Rivers -- neither of which is the case – getting a 500-ton crane in place and operational would likely require several days. The IO/EM transportation plan further states the company would take appropriate measures during a "recovery" period "so as to disrupt traffic as little as possible." The reality is, of course, there wouldn't be any traffic because north central Idaho's single east-west highway would be blocked. With a 22-23 foot roadbed, a river on one side and rock bluffs or steep hills on the other, U.S. 12 would be closed for several days, probably weeks.

IO/EM lists 16 crane companies in an appendix to their transportation plan. However, 8 of them have no cranes with the needed 500-ton capacity, including Spokane. Companies with cranes this size are in locations like Edmonton, Calgary, Seattle, Portland, and Salt Lake City.

Imperial Oil/Exxon Mobile recognizes the need in their transportation plan for an adequate emergency response plan to address a "module overturning incident," including such an incident that involves water. As 1-5 above show, they have not provided such a plan. The above information in fact indicates that any such plan for U.S. 12 in Idaho would be highly suspect and could likely not be executed. At best, U.S. 12 would be closed to all traffic for days or weeks and the probability of highway and environmental damage and economic loss to the residents of Idaho would be significant, along with their inability to travel freely for everyday purposes or medical emergencies.

AR, ITD 1969. See also the comments of David Hall, AR, ITD 1841, *Gary McFarlane* AR, ITD 1854, *Dr. Laura Earles AR ITD* 1859-60, *David Bearman,* AR, ITD 1880, and *Jim and Zoe Cooley,* AR, ITD 1980-81.

If what Emmert predicts as "inevitable" occurs, Highway 12 could be blocked to traffic for hours or days. There is no substantial evidence that the Department dealt with the most serious safety risks to the people who live along the Highway 12 corridor. Mr. Frew does not even acknowledge this risk and concludes as follows:

> Emergency vehicle access will be maintained throughout the entire route through the continued communication between Emmert personnel on each vehicle, the Emmert driver, state police, and the lead flagger/escort.... If a non-emergency vehicle has an emergency situation and needs to pass, Emmert will make the

necessary accommodations to allow the vehicle the pass.

Decision, AR, ITD 2332. Mr. Frew does not explain how that can occur if the entire highway is blocked for hours or days. There is no substantial evidence to support his conclusion in view of the record.

The overall record reflects that the Department was very careful to protect itself and the highways and bridges. The traffic management plan has been engineered in great detail. It has required a bond and a hold harmless agreement from Emmert for any damage to the Department.

Yet it has required no bond for damages to people or their property which may result from the project. Counsel for Department indicated during argument the citizens were left to their own devices. There is no requirement that Emmert or Conoco submit to jurisdiction in Idaho state courts or in any other way to make themselves amenable to service or to answer for any damages that might occur.

2. Reasonable determination of the necessity and feasibility of the proposed movement.

Mr. Frew states that Emmert investigated the feasibility of "transporting the drums by various combinations of barge, rail, and truck from several different ports of entry. *Decision*, AR, ITD 2330. He concludes from the investigation that "[t]he 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." *Id.* Mr. Frew relies on memorandum in which Emmert says it conducted several surveys and studies and considered Houston, New Orleans, Duluth and Minneapolis with negative results. AR, ITD 40. That survey apparently assumed the drums would be transported in one piece. Emmert represented that permits could be acquired in other states if the drums were

cut in half. The drums that are being transported along Highway 12 will have been cut in half. It is unclear therefore how Mr. Frew drew his conclusion that Highway 12 is the only viable option. There is no evidence in the record to support it. As pointed out by Anastasia Telesetsky, "The Idaho Department of Transportation have [sic] not made a neutral determination of necessity as required by the rules." AR, ITD 1966. I agree.

While the transportation of the drums has inherent risks, Mr. Frew had substantial evidence to support his conclusion that the project is feasible.

3. IDAPA §39.03.16.100.01 and 39.03.11.100.05(a) Limit ITD's Discretion to Issue Overlegal Permits

IDAPA §39.03.16.100.01 states as follows:

> **01. Maximum Dimensions Allowed.** . . . Overlegal permits will not normally be issued for movements which cannot allow for the 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. (4-5-00).

It is clear to me that the regulation provides that overlegal permits will normally not be issued if the provisions for passage in 39.03.11.100.05 will not be met during the course of the movement. The regulation then goes on to state that, although movements are not normally permitted when the requirements of 11.100.05 are not met, movements can still be permitted, but only if they will only interrupt low volume traffic for a period of time not exceeding ten minutes (or if adequate detours are available, though the Department does not contend that

any adequate detours are available). Under this plain language reading of 16.100.01, the Department's discretion in issuing overlegal permits is limited in that they can only issue a permit if either the passage of traffic provisions in 11.100.05 are met, or if the interruption will be to low volume traffic, and for a time not exceeding ten minutes.

IDAPA § 39.03.11.100.05(a) states, in pertinent part: "a. The movement of overlegal loads shall be made in such a way that the traveled way will remain open as often as feasibly possible and to provide for frequent passing of vehicles traveling in the same direction."

It is clear to me that the language of 39.03.16.100.01 requires that 11.100.05 be read in conjunction with 16.100.01. This is because, as previously stated, 16.100.01 essentially states that a movement must either meet the requirements of 11.100.05, or meet the ten minute limitation. As 16.100.01 therefore wholly incorporates 11.100.05, that provision must be read in conjunction with 16.100.01.

If one substitutes the passage restriction of 11.100.05(a) that is at issue, the "frequent passing" limitation, for the language "the passage of traffic . . . Subsection 100.05" in 16.100.01, then 16.100.01 would read as follows:

> **01. Maximum Dimensions Allowed.** . . . Overlegal permits will not normally be issued for movements which cannot allow for [frequent passing of vehicles in the same direction], 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. (4-5-00).

When the "frequent passing" restriction is thus viewed within the context of 16.100.01, it is clear that "frequent" must mean something less than ten minutes; any other interpretation would be incompatible with the context of 16.100.01. For instance, the interpretation proffered by the Department would mean that, after placing the "frequent passing" restriction within the context of 16.100.01, the regulation would read as follows:

> **01. Maximum Dimensions Allowed**. . . . Overlegal permits will not normally be issued for movements which cannot allow for [passing of vehicles in the same direction at least every fifteen minutes], 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. (4-5-00).

Under the plain meaning reading of 16.100.01 announced above, the Department's interpretation would thus be that one cannot normally obtain a permit if traffic will be delayed more than fifteen minutes, but, even if it will be delayed more than fifteen minutes, one can still obtain a permit if a movement will at least not delay traffic more than ten minutes. Such an interpretation of "frequent" is untenable at best, and it is clear to me that, when the "frequent passing" restriction is read in the context of 16.100.01, as it must be, the term "frequent" must mean something less than every ten minutes.

In summary, 39.03.16.100.01 plainly states that, if a movement will not meet the passage requirements of 39.03.11.100.05, then, to be permitted, the movement must at least not interrupt the flow of traffic for more than ten minutes. Furthermore,

11.100.05(a)'s passage requirement that "frequent passing" be provided for during a movement, when read in the context of 16.100.01, as it must be, necessarily means that passing must be possible at least every ten minutes.

H. Conclusion

Idaho Code §67-5279 limits the bases for which agency action can be reversed. They include decisions that are not supported by substantial evidence on the record as a whole or if they were arbitrary, capricious or an abuse of discretion. *I.C.* 67-5227(d) & (e).

When the Department has acted, it has done well. Evidence of its engineering expertise is replete. When it has not acted, its lack of interest is equally apparent. I do not for a moment question the Department's good faith. The project is daunting in all of its dimensions. However, the public is entitled to have the regulations observed in their totality. I conclude that there was not substantial evidence to support the Department's decision that the public's safety and convenience was given the priority that IDAPA 39.03.09.100.01 requires. Its failure to address the "inevitable" accident or breakdown that could shut down Highway 12 for days or weeks overlooks the quintessential disaster and its effects on the users of Highway 12 that Emmert itself forecasts as possible.

Likewise, the record reflects no evidence that the Highway 12 corridor was the "only viable option." It was the Department's duty to independently make that determination or verify the accuracy of information on which it relied. The duty is solely on the Department to "predicate the issuance of a [sic] overlegal permit on a *reasonable determination of the necessity* .... of the proposed movement. (Emphasis added). There is no substantial evidence for such a reasonable determination.

Although no Idaho case law explicitly states that an action by an agency in violation of its own regulations is arbitrary, capricious, or an abuse of discretion, the Idaho Supreme Court has stated that agency regulations have the "same effect of law as statutes," *Huyett v. Idaho State University,* 140 Idaho 904, 908 (2004), and tht an agency certainly cannot act outside of the limits of its statutory discretion. *Fritchman v. Athey,* 36 Idaho 560, 211 P. 2d 1080, 1081 (1922). It is only logical then, that it would be arbitrary, capricious and an abuse of discretion for an agency to act outside of the limits of its self imposed regulatory discretion. Indeed, other courts have specifically so held. See, e.g., *Aerial Banners, Inc. v. F.A.A.,* 547 F.3d 1257, 1260 (11th Cir. 2008).

As previously stated, the Department's own regulations, 39.03.16.100.01, limits its discretion by requiring that a permit can only issue if the passage requirements of 39.03.11.100.05 are met, including the requirement that frequent passing (passing at least as often as every ten minutes) be allowed, or if traffic will not be delayed more than ten minutes. On the face of the Department's Memorandum of Decision, it is clear that the permits were issued while allowing for delays of up to fifteen minutes, which of course would also not allow for passing at least more frequently than every ten minutes, and thus its decision is arbitrary, capricious, and an abuse of discretion.

ORDER

The issuance of the overlegal permits to Emmert International for the dates 8/25/2010 through 8/29/2010, is REVERSED and REMANDED to the Idaho Transportation Department for further proceedings consistent with this opinion.

IT IS SO ORDERED, this the 24th day of August, 2010.

JOHN BRADBURY
DISTRICT JUDGE

Mailing Certificate

I, the undersigned Deputy Clerk, do hereby certify that I mailed or delivered a copy of the foregoing document to the following persons on August 24, 2010:

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ROSE E. GEHRING, CLERK
BY: Kathy Johnson
Deputy Clerk