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BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY, KAREN HENDRICKSON, and PETER GRUBB, et al

Petition/Proposed Intervenors,

vs.

CONOCOPHILLIPS COMPANY,

Applicants,

IDAHO TRANSPORTATION DEPARTMENT,

Respondent.

CONOCOPHILLIPS COMPANY AND EMMERT INTERNATIONAL'S OPPOSITION TO INTERVENORS' EXCEPTIONS TO THE ITD DIRECTOR RE: HEARING OFFICER CLARK'S FINDINGS OF FACTS, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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Applicant and real party in interest ConocoPhillips Company ("ConocoPhillips"), on behalf of itself and Emmert International ("Emmert") (collectively, "ConocoPhillips"), submits this Opposition to Intervenors' Exceptions to the ITD Director re: Hearing Officer Clark's Findings of Facts, Conclusions of Law and Recommended Order.[1]

I. Introduction.

A. The Permitting Process Worked As It Should.

The delays must end. ConocoPhillips needs to get two coke drums to Billings in order to make much needed repairs to its refinery which is a critical source of domestic energy, supplying over 7% of Idaho's gasoline alone. It is undisputed that ConocoPhillips and its transporter, Emmert International, have satisfied every requirement and have addressed every question posed by ITD. Throughout the years of planning that led to the permits being issued, the process of developing a transportation plan worked exactly as it should. During the process, ConocoPhillips relied upon the representations and guidance of ITD regarding ITD's requirements and process. ITD correspondingly ensured that its requirements were satisfied by ConocoPhillips and Emmert. All experts, including the experts at ITD, agreed that the trip was feasible, could be done safely, and could occur with minimal inconvenience to the traveling public. Moreover, ITD and ConocoPhillips agreed that U.S. Highway 12 ("U.S. 12") is the right route. U.S. 12 is not only the right route in that it is a feasible route which experiences high levels of commercial use; U.S. 12 is the right route to use as a matter of law. U.S. 12 is a highway that was built with federal dollars for the purpose of furthering interstate commerce, exactly the purpose here.

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[1] Within this brief the transcript form the contested case hearing is abbreviated as "Tr." and the administrative record is abbreviated as "AR".

B. ConocoPhillips Has Incurred Substantial Damages Due To Delays In Making The Needed Repairs To The Billings Refinery.

Although the process of developing a transportation plan with ITD worked as it should, the Intervenors Linwood Laughy, Karen Hendrickson, and Peter Grubb, et al (the "Laughy Group") have delayed the transport at great cost to ConocoPhillips's Billings Refinery. The losses caused by the Laughy Group's legal maneuvering to date exceed $4,000,000 and continue to mount as ConocoPhillips continually must spend money to delay and work around the needed repairs. Owing to factors and milestones described in other pleadings and at the November Hearing regarding Intervention, the losses will soon escalate into the tens of millions of dollars. Further delays increase the risk of an interruption in production in Billings, an event that would put hundreds of refinery employees out of work for an extended period of time, damage the hundreds of ConocoPhillips's wholesalers selling fuel in Idaho, and harm the purchasers of fuel in this state.

C. The Laughy Group Was Given An Opportunity To Be Heard.

The Laughy Group has been given every opportunity to challenge the permits. Against ConocoPhillips's objection and while the costs of delays rapidly mounted, ITD and Hearing Officer Merlyn Clark ("Hearing Officer") have extended every possible opportunity to the Laughy Group to be heard on the merits of their objections, including (1) granting a stay on the permits without requiring payment of any bond by the Laughy Group, (2) allowing the Laughy Group a hearing on intervention, (3) allowing the Laughy Group to intervene without an actual showing of individual harm, (4) extending the process so that the Laughy Group's counsel could take a personal vacation to Las Vegas, and (5) allowing the Laughy Group to have a full hearing on the merits.

Although accorded all manner of opportunity to be heard, the Laughy Group could not and cannot win on the merits. Over the course of the hearing in December, the Laughy Group did not introduce much, if any, proper evidence that supported their case. They failed to introduce any meaningful evidence regarding safety or inconvenience to the travelling public, for example. Moreover, the examinations of witnesses revealed that the Laughy Group had not meaningfully endeavored to learn the transportation plan. In short, the Laughy Group had not studied the transportation plan that for so long and in so many press releases they had contended was flawed. Instead of introducing evidence, counsel for the Laughy Group focused most of their energy on playing to the media present, implying the existence ill-defined conspiracies, accusing ConocoPhillips of being arrogant for proposing to use a federal highway for commercial purposes, and insulting the integrity and competence of ITD and Emmert personnel.

In line with the evidence presented by ITD and ConocoPhillips and reflecting the lack of proper evidence introduced by the Laughy Group at the December Hearing and other evidence in the record, the Hearing Officer issued a 57-page, extremely detailed recommendation on December 28 that the permits be affirmed.

Despite the Hearing Officer's Recommendation, ITD again delayed making a decision regarding ConocoPhillips' use of the permits based on the representation by counsel for the Laughy Group that exceptions would be filed.

D. The Exception Is Unprofessional And Without Merit.

On January 10, 2010, in conjunction with a press release accusing the Hearing Officer of being unfair and "regurgitating" facts presented by ITD and ConocoPhillips, the Laughy Group filed its Exception. (Press Release from Advocates of the West dated January 10, 2011 and attached hereto as Exhibit A.)

The Exception, signed by counsel Laird Lucas, is in large part an attack on the integrity of the Hearing Officer, the same man that approximately 60 days ago, Lucas referred to as a man who " commands the respect of all of the lawyers in the state." (AP story dated November 10, 2010 and attached hereto as Exhibit B.) In the Exception, among other things, the Laughy Group now accuses Hearing Officer of a lack of integrity, "regurgitating" the case presented by ITD, being unfair and one-sided, performing a disservice to the ITD Director and the general public, purposefully ignoring evidence, refusing to consider the Laughy Group's evidence and "regurgitating" information provided by ITD, making no effort to consider and disregarding the Laughy Group's evidence, utterly ignoring evidence, simply ignoring evidence, sweeping evidence under the rug, being entirely unfair, "sandbagging" the Laughy Group, not paying attention whatsoever, ignoring evidence, and being unfair. *See* Exceptions at 2, 3, 6, 7, 11-13, 15, 19, and 21-23. These unprofessional attacks on the Hearing Officer are all unjustified. Attorneys certainly may disagree with rulings (ConocoPhillips disagreed with Hearing Officer Clark's ruling regarding intervention), but the Laughy Group has no basis to challenge a Hearing Officer's integrity or competence.

In addition, the Exception is empty of all merit. It raises nothing new, mischaracterizes applicable law, and provides only assertion, not substance. The Hearing Officer applied the proper standard of review in finding that the Laughy Group failed to meet their burden of proof. The Hearing Officer properly deferred to ITD's reasonable interpretation of its regulations related to traffic delay. Substantial evidence supports a finding that ITD gave primary consideration to public safety and convenience, the necessity of the use of U.S. 12, and the findings that the transport will not delay traffic on U.S. 12 for more than 15 minutes. Further, while the Laughy Group asserts a number of miscellaneous "exceptions" to the Hearing Officer's

Recommended Order dated December 28, 2010 ("Recommended Order"), these "exceptions" are all either irrelevant or false.

ConocoPhillips urges to ITD proceed promptly and allow the use of the permits needed to repair the Billings Refinery.

II. The Hearing Officer Properly Placed The Burden Of Proof On The Laughy Group And Correctly Applied The Standard Of Review For Challenges To Factual Findings.

A. The Laughy Group Bears The Burden Of Showing Factual Determinations Were Clearly Erroneous.

The Hearing Officer properly recognized (and the Laughy Group does not dispute) that the Laughy Group bears the burden of proof to establish that the decision of ITD to issue the permits was clearly erroneous and that a substantial right has been prejudiced by ITD's decision. Recommended Order at 12 (citing *Wheeler v. Idaho Dep't Health & Welfare*, 147 Idaho 257, 207 P.3d 988 (2009); Idaho Code § 67-5279; Pre-Hearing Order dated December 6, 2010 at 2).

B. To Meet Their Burden, The Laughy Group Must Make A Specific Showing Regarding The Factual Determinations Believed To Be Clearly Erroneous.

The Hearing Officer properly held that he "will not substitute his judgment for that of the agency as to the weight of the evidence on questions of fact, but will defer to the agency's findings of fact unless they are *clearly erroneous*." Recommended Order at p. 13 (citations omitted) (emphasis added). Defining what constitutes reversible error in this context, the Hearing Officer properly states:

> When the agency is required to issue an order, a court will affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) *not supported by substantial evidence on the record as a whole*; or (e) *arbitrary, capricious, or an abuse of discretion.*

Recommended Order at p. 12 (citing Idaho Code § 67-5279) (emphasis added). In short, absent a statutory, procedural or constitutional violation, ITD's factual findings are "clearly erroneous" only when "not supported by substantial evidence on the record as a whole" or "arbitrary, capricious, or an abuse of discretion." *See Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 129, 176 P.3d 126, 134 (2007).

"[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion." *In re Masterson*, No. 37385, ___ P.3d ___, 2010 WL 5140825, at *1 (Idaho Ct. App. 2010). "Substantial evidence is more than a scintilla, but less than a preponderance." *Id.* Stated otherwise, "[o]nly clearly erroneous findings are overturned, which means a reasonable person would not have relied on them in concluding as the fact finder did." *Idaho Dep't. of Health & Welfare v. Doe*, No. 38026, ___ P.3d ___, 2010 WL 4824770, at *2-3 (Idaho Ct. App. 2010) (quoting *Doe v. Roe*, 142 Idaho 202, 203, 127 P.3d 105, 106 (2005)). Likewise, a decision is not arbitrary and capricious where the conclusions and decision of the agency are "sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision . . . based on substantial evidence in the record." *Brett v. Eleventh Street Dockowner's Ass'n, Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 811 (2005).

Here, the Hearing Officer applied the proper framework. Reviewing the decision to issue the permits, the Hearing Officer found, and went to great length to detail, the relevant evidence which a reasonable mind could accept.

C. The Laughy Group Cannot Meet Their Burden By Simply Asserting That Other Evidence Is Not Expressly Noted In The Hearing Officer's Findings.

In its Exceptions, the Laughy Group wrongly adopts a different standard, asserting that supposedly conflicting facts need to be specifically acknowledged in the Findings of Fact. The Laughy Group's position is incorrect. The substantial evidence and arbitrary and capricious

standards do not require that ITD "discuss each document in the record" in explaining its decision. *Am. Lung Ass'n of Idaho/Nevada v. State Dep't of Agric.*, 142 Idaho 544, 549, 130 P.3d 1082, 1087 (2006). It is not necessary that Findings of Fact index each of the facts that were considered and rejected. *Neighbors*, 145 Idaho at 129, 176 P.3d at 134; *see also In re Masterson*, 2010 WL 5140825 at *1 (Idaho Ct. App. 2010). For the standards to be met, ITD needs only to "adequately address the factors required by" statute or rule because it is within the agency's "province to decide the weight to be given the various items of evidence." *See Am. Lung*, 142 Idaho at 549 (noting that there is no need for agency to identify and discuss document contained in the record); *see also Neighbors*, 145 Idaho at 129, 176 P.3d at 134 (explaining that "[t]he Court defers to the agency's findings of fact unless they are clearly erroneous, and the agency's factual determinations are binding on review, even when there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record").

Here, ITD and the Hearing Officer weighed the evidence offered by the Laughy Group and properly relied on the substantial evidence supporting issuance of the permits. Even if the assertions made by the Laughy Group are accepted, there is competing evidence supporting the Hearing Officer's findings, thus there is no clear error. The Recommended Order should be accepted.

III. The Hearing Officer Properly Concluded That ITD's Interpretation Of Its Travel Delay Regulations Was Reasonable And Entitled To Deference.

A. ITD's Interpretation That The Regulations Do Not Create A 10-Minute Limitation On Delay Was Reasonable.

The Laughy Group asserts that the Hearing Officer clearly erred in deferring to ITD's interpretation of its regulations regarding traffic interruption. Exceptions at 4-5.[2]

The Laughy Group's assertion conflicts with the applicable rules of regulatory construction. As the Hearing Officer correctly recognized, ITD is entitled to deference because it is charged with managing Idaho's roadways, and in managing its "administrative area of responsibility," ITD's expertise must be given deference. *J.R. Simplot, Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 859, 820 P.2d 1206, 1215 (1991); *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001). Moreover, ITD's interpretation of its own regulations is entitled to deference because it is supported by a plain reading of the regulations at issue. *See State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001) (words must be given their plain, ordinary meaning). ITD's reading of IDAPA 39.03.16.100 is also due deference because it provides a practical interpretation that has proven effective in managing Idaho's roadways. *See J.R. Simplot Co.*, 120 Idaho at 858, 820 P.2d at 1215; *see also* Hearing Exs. 53-55.

As the Hearing Officer correctly found,

> Chapter 11 provides that the movement of an overlegal load shall be made in such a way that the roadway remains open "as often as is feasibly possible" and to allow for "frequent" passage of traffic. IDAPA 39.03.11.100.05. There is no specific time limitation associated with these terms. *See id.*, IDAPA 39.03.16.100.01; Tr. 175:23-0176:5. ITD has been interpreting these regulations as providing guidance that overlegal travel may be allowed if there

[2] Generally, the Laughy Group contends that any interpretation of IDAPA 39.03.11.100.05 ("Chapter 11") or IDAPA 39.03.16.100.01 ("Chapter 16") that does not impose a hard-and-fast 10-minute limitation on traffic interruption is clearly erroneous and entitled to no deference.

> exists a traffic control plan as provided in IDAPA 39.03.11 or, alternatively, in "special circumstances when an interruption of low volume traffic may be permitted (not to exceed ten (10) minutes) or when adequate detours are available.

Recommended Order at ¶ 132.

The Hearing Officer appropriately held that ITD's interpretation of Chapters 11 and 16 is entitled to deference because it is reasonable and consistent with the plain language of the regulations. The Laughy Group wrongly asserts that ITD is without discretion to determine appropriate traffic "delays", that the regulations impose a 10-minute limitation on traffic "delays," and that "delays" are broader than traffic stoppage, including any time period that a vehicle is somehow slowed. This assertion is unsupported by the plain language of the applicable regulations.

Subsection .05 of Chapter 11 states:

> 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. 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 exceeds one hundred fifty (150) feet.
>
> b. The traffic control plan shall be prepared by a licensed engineer or an American Traffic Safety Services Association (ATSSA) certified traffic control supervisor and include the following information:
>
> i. Locations and mileposts of where the vehicle/load can pull over to allow for traffic relief;
>
> ii. How pilot cars and traffic control personnel will be utilized;
>
> iii. Identification of any railroad tracks being crossed and the emergency contact number for the governing entity; and

> iv. Procedure for allowing emergency vehicles to navigate around the vehicle/load when necessary.
>
> c. The over legal vehicle shall not be loaded, unloaded or parked, upon any State highway, except for emergencies, without the specific permission or by direction of the Department or policing agency having jurisdiction over such highway.

IDAPA 39.03.11.100.01.05. Accordingly, Chapter 11, Subsection .05 indicates that a traffic control plan is required to address keeping the "traveled way . . . open as often as feasibly possible" and "to provide for frequent passing of vehicles." The Hearing Officer correctly recognized ITD's discretion to determine acceptable traffic interruption in this context depending on the particular circumstances presented.

Chapter 16 likewise does not impose any specific time limitation. Instead, the Hearing Officer rightly held that Chapter 16 gives discretion to ITD to determine acceptable periods of traffic interruption. Subsection .01 of Chapter 16 states:

> The maximum dimensions of oversize vehicles or oversize loads shall depend on the character of the route 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 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.

IDAPA 39.03.16.100.01 (emphases added).

Contrary to the interpretation urged by the Laughy Group, these regulations do not require compliance with a 10-minute limitation where a traffic control plan is in place. This is

consistent with public statements by ITD's Director in connection with the appeal of the litigation filed by the Laughy Group to the Idaho Supreme Court.[3]

The Hearing Officer recognized ITD's discretion to determine acceptable traffic interruption. The Hearing Officer observed that:

> ITD correctly concluded that Emmert's traffic control plan ensures that the proposed overlegal movements will be made in such a way that the traveled way will remain open as often as feasibly possible and provides for frequent passing of vehicles traveling in the same direction. AR ITD002371. ITD further correctly concluded that because the contemplated movement of the four coke drums over U.S. 12 allows for the passage of vehicles as provided in IDAPA 39.03.11, the reference in IDAPA 39.03.16.100.01 to a ten minute limitation does not apply in this case.

Recommended Order at ¶ 132.

The Laughy Group's challenge to the Recommended Order on this basis should be denied where the Hearing Officer correctly recognized that this is an area committed to ITD's "administrative area of responsibility" and that ITD is "charged with managing Idaho's roadways." Recommended Order at p. 14. ITD's interpretation of these regulations is consistent with the plain language and is logical given that overlegal movements such as these require advance planning.

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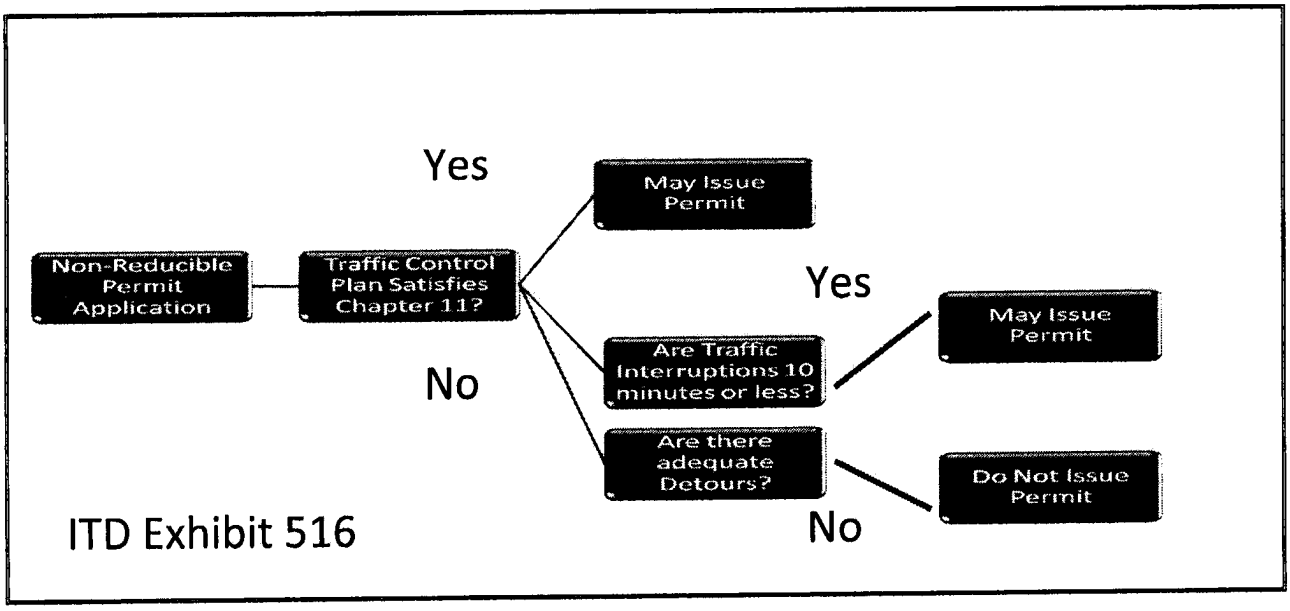
[3] In a media statement, ITD's Director stated that the mandatory 10-minute rule urged by the Laughy Group does not apply. Director Ness observed that "[i]f the department is not allowed discretion in determining acceptable delays, we will end up restricting commerce and limiting business opportunities[.]" *See* Affidavit of Erik F. Stidham dated December 15, 2010, Ex. C at 2. "For example [Ness continued], there are many communities in Idaho where a manufactured home could not be located, because it is not possible to get it there without delaying traffic for more than 10 minutes. The department is committed to doing the right thing for highway users by ensuring minimal delays." *Id.*

At the hearing, ITD relied on an exhibit that displays how it interprets these regulations:



The chart shows how ITD's interpretation of Chapter 16 provides a preferred alternative of a traffic control plan and visually depicts how the 10-minute limitation or the adequate detour alternative come into consideration only if a traffic control plan is not in place. The Hearing Officer's Recommended Order is consistent with this interpretation and adopts the reasoned interpretation of Chapters 11 and 16 by ITD.

In contrast to ITD's construction, the Laughy Group urges an untenable interpretation of the regulations. The Laughy Group contends that by reading Chapters 11 and 16 together, ITD's discretion is removed and all traffic control plans must limit traffic interruptions to 10 minutes or less. But there is no record of anyone at ITD or anywhere else misconstruing the regulations as the Laughy Group does now to create a mandatory, non-discretionary 10-minute "rule". Hearing Exs. 53-55 (Overlegal Permits for U.S. 12). ITD has never applied, disagrees with, and continues to reject any 10-minute "rule". *Se, e.g., id.*

The Laughy Group's so-called 10-minute "rule" rewrites Chapter 11 Subsection .05.a by replacing the terms "feasibly possible" and "frequent passing" with the term "not to exceed ten

(10) minutes" from IDAPA 39.03.16.100.01. The Laughy Group ignores the obvious. If ITD had wanted to limit the traffic interruption for shipments proceeding with an approved traffic control plan to ten minutes, it is presumed that ITD would have written IDAPA 39.03.11.100.05.a that way. *See Kopp v. State*, 100 Idaho 160, 164, 595 P.2d 309, 313 (1979) ("Where a [regulation] with respect to one subject contains a certain provision, the omission of such provision from a similar [regulation] concerning a related subject is significant to show that a different intention existed."); *accord City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003). ITD did not place a 10-minute limitation into Chapter 16. Instead, ITD drafted Chapter 16 to allow that shipments be "made in such a way that the traveled way will remain open as often as feasibly possible and to provide for frequent passing." IDAPA 39.03.11.100.05.a. The drafter of a statute or regulation must be assumed to have meant what he wrote in the statute or regulation. *See, e.g., Federated Publ'ns, Inc. v. Idaho Bus. Review, Inc.*, 146 Idaho 207, 210, 192 P.3d 1031, 1034 (2008).

Also, the Laughy Group's interpretation of IDAPA 39.03.16.100.01 is internally inconsistent. There would be no good reason to require a traffic control plan if Chapter 16 also required strict adherence to a 10-minute "rule". Instead, if the 10-minute limitation were a strict requirement, ITD could rely on the secondary alternative allowed by Chapter 16 by limiting delays to periods of 10 minutes or less and rendering the "as often as feasibly possible" language superfluous. *See In re Idaho Dep't. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, ___, 220 P.3d 318, 329 (2009) ("It is a fundamental rule that courts will construe a statute or regulation 'so that effect is given to [all of] its provisions, and no part is rendered superfluous or insignificant.'") (quoting *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007)).

Finally, the Laughy Group asserts that the two ITD regulations must be construed together. While this is true as a general principle of regulatory construction, it is not what the Laughy Group is doing. Rather than construing the regulations together, the Laughy Group turns one of the regulation's alternatives in IDAPA 39.03.16.100.01—an exception of limited applicability that only applies in special circumstances—into the general rule. This is the opposite of reading the regulation together. Instead, the Laughy Group violates the canon of regulatory construction that exceptions should be narrowly construed. Where a general provision like IDAPA 39.03.11.100.05 has certain limited exceptions, such as the ones presented in IDAPA 39.03.16.100.01, "all doubts should be resolved in favor of the general provision rather than the exceptions." *See* Norman J. Singer, Sutherland Statutes and Statutory Construction, § 47:11 (6th ed. 2002) (quoted and applied in *State v. Yzaguirre*, 144 Idaho 471, 481, 163 P.3d 1183, 1193 (2007)).

The Hearing Officer properly rejected the Laughy Group's attempts to strip ITD of its authority to determine acceptable periods of traffic interruption. The Exceptions on this issue add nothing, and instead rehash tired old arguments that the Hearing Officer heard, considered, and rejected in his reasoned and detailed Recommended Order.

IV. The Laughy Group Failed To Meet Their Burden Of Proof On The Challenged Issues; The Decision To Issue The Permits Should Be Upheld And The Hearing Officer's Recommended Order Should Be Adopted.

The Laughy Group failed to satisfy its burden of showing by a preponderance of the evidence, that ITD abused its discretion by: (1) not making its primary concern the safety and convenience of the general public; (2) failing to make a reasonable determination of necessity; and (3) determining that the transport would not delay traffic for more than 15 minutes.

A. The Record Supports The Hearing Officer's Conclusion That ITD Placed A Primary Concern On The Safety And Convenience Of The Public.

1. Substantial Evidence Supports The Finding Of Primary Concern For Safety And Convenience.

There is substantial evidence in the record that ITD made public safety and convenience its primary concern. *See, e.g.*, Recommended Order at ¶ 127 (citing hundreds of pages in the record and transcript supporting this conclusion); *see also id.* at ¶¶ 18, 29, 33-67, 69-72, 75-78, 81-83, 101-102, 110-112, 116-120, 122-123, 132-134; Tr. 124:19-136; ConocoPhillips Post-Hearing Brief ("COPC Bf.") 23-25, and Exhibit A thereto (containing numerous more cites to the record and transcript supporting this conclusion). The record demonstrates that ITD prioritized safety and convenience throughout the process and only approved the permits after it was satisfied that the permits adequately addressed these essential issues.[4]

2. The Laughy Group Has No Evidence That The Transports Will Travel At Unsafe Speeds.

The Laughy Group takes exception based on a supposed absence of findings regarding specific traveling speeds. Exceptions at 11. The Laughy Group points out that Mr. Frew testified that the transports may travel more than 25 miles-per-hour. But no where in the record is there any evidence that speeds over 25 miles-per-hour are inherently unsafe. In fact, the only evidence in the record establishes the loads are able to travel safely at speeds greater than 25 miles-per-hour. *See, e.g.*, Tr. 123:6-10; 643:24-25 (transporters can travel 30 miles-per-hour in

[4] The Laughy Group's attempt to characterize the testimony by Mr. Alan Frew regarding balancing as contrary to ITD's obligations is improper. Mr. Frew consistently testified that ITD's primary concern was the safety and convenience of the general public. *See, e.g.*, Tr. 124:19-130:10 (convenience); 130:11-136 (safety). ITD's interpretation is consistent with cases in other contexts requiring primary consideration of certain issues. *See* COPC Bf. at 26-28.

straight areas). Further, as Mr. Frew recognized, the loads will at all times be escorted by state police officers who will ensure safe speeds are maintained. Tr. 189:25-190:4; 192:16-18.

3. The Laughy Group Fails To Show The Reserving Of Pulloffs Should Negate The Permits.

The Laughy Group also asserts that safety and convenience was not a priority because the permits allow for the reserving of pulloffs along the route. Exceptions at 19. First, the Laughy Group misrepresents the facts. The Laughy Group wrongly implies that the pulloffs will be completely blocked off for an entire day at a time. *Id.* The record shows that the intent of reserving the sites was not to block the pulloffs all day but simply to post signs and to have off-duty local police officers monitor the turnouts during the moves and inform travelers coming into a pulloff that the load is approaching and the load or other traffic may need to use the pulloff when it arrives. Tr. 658:16-659:22. Second, the barricading is being done to further safety. The process resulted from the request of the Idaho State Police and will only be used if groups supportive of the Laughy Group's political agenda make an effort to barricade the pulloffs with their vehicles. Tr. 657:20-658:13. This process was necessitated by the civil disobedience urged by followers of the Laughy Group's political agenda.

B. The Record Supports The Hearing Officer's Conclusion That ITD Made A Reasonable Determination Of Necessity.

Substantial evidence supports the Hearing Officer's conclusion that ITD made a reasonable determination of necessity. Recommended Order at ¶¶ 1-5, 7-8, 13-14, 93-97, 121, 129-30, p. 53, ¶¶ 8-10, and corresponding record citations. The Recommended Order is filled with record citations supporting ConocoPhillips' need to replace the drums, *id.* at ¶¶ 1-5, 8, and supporting the conclusion that truck transportation on U.S. 12 is not only the best but the only available route to get these drums to the Billings Refinery, *id.* at ¶¶ 7, 94, 96-96, 130. The

Recommended Order also contains numerous record citations supporting the conclusion that the drums need to be transported in their current condition and cannot be reduced any further. *Id.* at ¶¶ 13-14, 94-95, 129.

C. The Record Supports The Hearing Officer's Conclusion That No Delay Will Exceed 15-Minutes.

1. Substantial Evidence In The Record Proves That Delays Will Not Exceed 15 Minutes.

Whether Emmert can meet ITD's 15-minute rule was explored mile-by-mile at the hearing. Exceptions at 14. It was also a key focus of the planning of the shipments and is addressed throughout the record. *See, e.g.*, AR ITD00289-95, 317-20, 624, 631-34, 1021. The Hearing Officer addressed the issue and made, complete with record citations, numerous findings that Emmert can meet the 15-minute rule and avoid delaying any other vehicle for more than 15 minutes. *See, e.g.*, Recommended Order at ¶¶ 38, 40, 42-43, 50-61, 75-76, 81, 90, 110-11, 116, 118-20. As the Hearing Officer explained, Emmert will use its sophisticated communication systems, primary and secondary turnouts, and coordination with the flagger crews to prevent any delays over 15 minutes. Recommended Order at ¶ 118.

2. The Laughy Group Fails In It's Attempt To Redefine "Delay".

In an ongoing misdirection, the Laughy Group redefines the term "delay." Exceptions at 15. For support the Laughy Group cites the testimony of Jim Carpenter and Doral Hoff, *id.*, but disingenuously fails to acknowledge that both Messrs. Carpenter and Hoff testified that for purposes of measuring traffic delay under the ITD regulations at issue here, ITD has always

defined the term "delay" as meaning traffic is stopped.[5] Tr. 274:24-275:17, 277:23-278:3; 278:21-25 (testimony of Jim Carpenter); Tr. 338:4-7; Tr. 398:10-12 (Doral Hoff).

3. The Laughy Group Mischaracterizes The Evidence Related To Potential Causes Of Delay And Sites For Traffic Relief.

The Laughy Group suggests the Hearing Officer should address every piece of evidence in the record, a notion that is neither reasonable nor required by law. *Am. Lung Ass'n*, 142 Idaho at 549, 130 P.3d at 1087. In doing so, the Laughy Group makes the same arguments that were presented to the Hearing Officer. Substantial evidence in the record contradicts each of their arguments.

For example, the Laughy Group argues that the use of helper dollies at Maggie Creek, Fish Creek,[6] and Arrow Bridges "threaten further delays that Emmert has not accounted for." Exceptions at 14. But there is substantial evidence in the record showing that Emmert did indeed "account for" use of the helper dollies at those bridges in developing the 15-minute spreadsheet. Emmert's project manager, in discussing use of the helper dollies on those bridges, specifically testified that Emmert's bridge operation plan was tied to and necessarily accounted for in the 15-minute spreadsheet. Tr. 653:6-14. Furthermore, the only witnesses with any experience using helper dollies testified that the helper dollies will not cause any significant delay because they will be preloaded and can be lowered and raised while the transport is in motion without

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[5] The Laughy Group also asserts that the hearing officer did not account for traffic delays that vehicles following the loads will experience. Yet, they again fail to acknowledge that substantial evidence in the record shows that the methods the Hearing Officer specifically stated will prevent traffic delays of over 15 minutes to oncoming traffic will also prevent delays of over 15 minutes to following traffic. *See* Tr. 611:7-19; Recommended Order at ¶ 118.

[6] The Laughy Group's exceptions also seem to suggest that the transportation plan did not recognize the location of the Maggie Creek and Fish Creek Bridges. Exceptions at 14. This is demonstrably false. For just a few examples, the transportation plan addresses Maggie Creek Bridge at AR ITD00117, 119, 146-47, 150-51, 207, and 213, and Fish Creek Bridge at AR ITD00117, 119, 146-47, 150-51, 209, and 223.

stopping, and slowing only while approaching and on the bridge. Tr. 549:15-550:22; 567:6-17; 619:17-624:5. The Hearing Officer recognized this. Recommended Order at ¶ 119.

Additionally, the Laughy Group suggests some pulloffs are too small, resulting in delays exceeding 15 minutes. Exceptions at 12-13. This assertion is incorrect and unsupported by the record. The Laughy Group does not understand the configuration in which the transport can be parked. In turn, the Laughy group mischaracterizes the amount of area needed for traffic relief. Moreover, there can be no reasonable question that a highway pulloff is unusable to park regular traffic. And there is substantial evidence in the record that the measurements in the transportation plan were derived using equipment and methods standard in the transportation industry. Tr. 627:24-628.

Furthermore, the Laughy Group mistakenly asserts that specific pulloffs are not useable. In contrast to the Laughy Group's assertions, there is substantial evidence in the record that the turnout at milepost 31.5 can be used to park traffic as well as the load. Tr. 628:6-12; AR ITD00165, 183, 290. Further, what the Laughy Group identifies at milepost 48.5 is not even a pullout, but a rock wall identified on the 15-minute rule spreadsheet as such. AR ITD00291; *see also* AR ITD00192-93. The pulloffs for that segment are at mileposts 46 and 48.8.[7] *Id.*

Similarly, the Laughy Group mischaracterizes what the 15-minute rule spreadsheet expressly says about the pulloff at milepost 116.6, *see* AR ITD00292; COPC Br. at. 42, and in any case provides absolutely no evidence why the transport cannot use the pulloff and some portion of the inside lane while traffic is cleared via the outside lane. Finally, with regard to the

[7] Using the spreadsheet properly, that segment is shown to be 2.8 miles and will cause a delay of no greater than minutes. AR ITD00291. There is also a secondary pulloff at milepost 46.5. AR ITD00295.

pulloff at milepost 77.4, there is substantial evidence in the record that the pulloff can be used to park either traffic or the transporter there. Tr. 624:9-627:13; AR ITD00207, 214.

The Laughy Group also misreads the 15-minute rule spreadsheet with regard to the Fish Creek Rest Area. Under the 15-minute rule spreadsheet, the Fish Creek Rest Area will be used for an "Emergency Stop Only." AR ITD00292. But that does not preclude Emmert from parking oncoming traffic in the rest area—parking of course being a central purpose of a rest area—and allowing the transport to proceed *without stopping.*[8] *Id.*; *see also* COPC Bf. at 43. More importantly, the Laughy Group ignores the flagger station at milepost 120.73 and the secondary pulloff at milepost 125 that can and will be used to avoid any delay over 15 minutes. AR ITD00292, 295. Through communications with the flaggers, travel can be timed so as to avoid or minimize traffic delays.

Similarly, the Laughy Group makes passing reference to the final two segments of the route near Lolo Pass, Exceptions at 14, but offer absolutely no evidence why the segments cannot be completed in the time designated on the 15-minute rule spreadsheet or why two segments of similar but not identical distances can take the same amount of time to travel.

4. The Laughy Group Mischaracterizes The Clarification Mr. Frew Made To His Memorandum Of Decision.

The Laughy Group also asserts that it was error for the Hearing Officer to hold that traffic will only be delayed in twelve segments along the route when "Mr. Frew testified at hearing that traffic on additional segments could experience longer than 10 minute delays." Exceptions at 12; *see also* Tr. 123:11-18 (Mr. Frew testifying that there "*may* be additional locations" along the

[8] In fact, because the record demonstrates that the Fish Creek Rest Area does not get much use in the winter, Tr. 386:21-387:1, 389:15-18, it would be reasonable for ITD to allow Emmert to use this pulloff like any other primary pulloff, at least until some date in the spring.

route where the delay may exceed 10 minutes" (emphasis added)). It is unclear what distinction the Laughy Group is trying to make, but the bottom line is the record clearly supports the following:

(1) ITD required extensive study of the route by Emmert so that delay will be minimized and will not exceed 15-minutes, *see, e.g.*, AR ITD00289-95, 317-20, 624, 631-34, 1021;

(2) Pursuant to the 15-minute rule spreadsheet, delay is estimated to exceed 10-minutes in only twelve of the seventy-eight segments, AR ITD00289-95;

(3) Emmert has an extensive plan and numerous options to clear traffic as soon as safely possible after traffic encounters the transporter, *id.*; *see also, e.g.*, Tr. 344:20-25; 595, 599-601, 610, 639; AR ITD00335, 339; COPC Bf. at 14-15; and

(4) The Transportation Plan includes numerous methods for minimizing delay including advanced communication systems, coordination with flaggers, and over one-hundred primary and secondary pulloffs throughout the route, *see, e.g.*, COPC Bf. at p. 11, 13; AR ITD114-15, 289-95; Tr. 174, 595, 599-601, 610, 639, 643.

Substantial evidence in the record supports a finding that ITD and Emmert worked extensively to minimize the number of delays exceeding 10 minutes and were successful in doing so.

5. The Laughy Group's Assertions That The Hearing Officer Erred In Calculating Travel Time Is False And Irrelevant To The Findings.

Equally unavailing is the Laughy Group's assertion that Hearing Officer Clark committed clear error by approximating the actual travel time each night of the route using the time of estimated delay listed on the 15-minute spreadsheet. Exceptions at 16. Whatever distinction this red-herring argument is trying to make, the record clearly supports the following:

(1) Emmert has a 7.5 hour window each night to travel, Tr. 28:11-15, 125:8-14; 134:1-15; 597:1-7; AR ITD002336;

(2) The four nights of travel are between 34.9 and 53.1 miles each, AR ITD00290-94;

(3) It will take much less than 7.5 hours for the transport to travel each night. For example, if the transport averaged just 15 miles-per-hour, even the longest night of travel will only take approximately 3.5 hours to complete.

(4) The extra time allotted for each night of travel gives Emmert significant flexibility to clear traffic at every available opportunity and to further minimize any inconvenience to the traveling public.

See, e.g., Recommended Order at ¶ 51-53; Tr. 28:11-15, 125:8-14, 134:1-15, 597:1-7; AR ITD00290-94, 2336.

Finally, the Laughy Group takes issue with the loads traveling one at a time up U.S. 12, as opposed to together (i.e. in tandem), and asserts this will cause additional delay. Exceptions at 12. Quite the opposite, having only one load on the road at a time will ensure easier passage of traffic thereby reducing delay. *Compare* AR ITD00273 *with* AR ITD00280. In any case, the Laughy Group offered no evidence to the contrary.

As can be seen, the Hearing Officer's Recommended Order is supported by substantial evidence in the record, while the arguments made by the Laughy Group are rebutted by it.

V. Intervenor's Remaining, Miscellaneous Exceptions Do Not Justify Overturning The Permits.

As stated previously, there is substantial evidence in the record to support the permits. However, putting that aside, the remaining, miscellaneous exceptions urged by the Laughy Group are all either false or irrelevant.

A. The Hearing Officer Properly Ruled That Commercial Use Of U.S. 12 Was Appropriate.

Without any authority, the Laughy Group asserts that the Hearing Officer's Recommended Order is clearly erroneous because it did not evaluate the "unique values" of U.S. 12. *See* Exception at 7-8. However, as the Hearing Officer accurately stated, "[n]othing in the designations as a Scenic Byway or an All American Road prohibits the transport of the drums over U.S. 12." *See* Recommended Order at ¶ 31.[9] This finding equally applies to the other "designations" identified by the Laughy Group. There is no requirement that ITD consider Highway "designations" in its evaluation of overlegal permits. U.S. 12 is a "commercial highway that is frequently used by logging trucks and other commercial vehicles," and notwithstanding any of the "designations" identified by the Laughy Group, it is proper use of the highway to move the coke drums from Lewiston to the refinery in Billings. *Id.*[10]

As established before, U.S. 12 was constructed with federal funds for the primary purposes of furthering "national defense and interstate commerce". *United States v. Certain Parcels of Land in Peoria Co., Ill.*, 209 F.Supp. 483, 488 (D. Ill. 1962) (citing the Federal Aid Highway Act of 1956, 23 U.S.C. § 101(b)). Those primary interests cannot be trumped. *Id.*

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[9] *See* Affidavit of Carolyn R. Montgomery dated November 17, 2010, Ex. B (noting that more than 2,412 miles of Idaho highway are designated as a scenic byway).

[10] *See also* COPC Bf. at 51-52 ("Whether these designations should be considered in the permitting process is a policy decision for the Legislature. ITD does not have the authority to make these types of policy decisions."); ("U.S. 12 is a east-west United States highway that runs from Grays Harbor on the Pacific Ocean to Downtown Detroit, Michigan. The highway is nearly 2,500 miles long and passes through Washington, Idaho, Montana, North Dakota, South Dakota, Minnesota, Wisconsin, Illinois, Indiana and Michigan"); ("It is a trade corridor that has evolved over time and intensive commercial use impacts both landscape and roadways."); ("Commercial truck traffic along the byway can be substantial and aggressive.").

B. The Size And Nature Of The ConocoPhillips Loads Were Properly Considered By The Hearing Officer.

The Laughy Group argues that the Hearing Officer's Recommended Order is clearly erroneous because it did not acknowledge that there have never been shipments of this size allowed up U.S. 12. *See* Exceptions at 8. This argument fails for the simple reason that no authority requires such a finding.

The Laughy Group also argues that the Hearing Officer made a finding "that other 'large' loads have gone up U.S. 12," and that this finding is clear error. *See* Exceptions at 8 (citing Recommended Order at ¶ 68). The record supports the Hearing Officer's finding. In fact, "[a] number of wide loads have gone up U.S. 12 and there have not been any accidents." *See* Recommended Order at ¶ 68; Tr. 151:9-14; 318:6-19; Hearing Exs. 53-55.

The Laughy Group also asserts the Hearing Officer's Recommended Order is clearly erroneous because it fails to list the full size of the convoy. *See* Exceptions at 8-9. Making an irrelevant distinction, the Laughy Group asserts that the Recommended Order "discusses only the size of the coke drums, not the size of the shipments nor the size of the accompanying convoy of escort, maintenance, state police, and other vehicles that will accompany them up U.S. 12." *Id.* However, the length and size of the transporter and the size of the convoy is included in the record and the Recommended Order. *See, e.g.*, Recommended Order at ¶¶ 47-48; Hearing Ex. 62 and 63. Moreover, there is no requirement that Hearing Officer specifically restate these facts in the Recommended Order. *See Am. Lung Ass'n,* 142 Idaho at 549, 130 P.3d at 1087. As the testimony and other record evidence supporting the Hearing Officer's findings demonstrates the size and nature of the loads were properly considered. The Laughy Group's assertion is both false and irrelevant.

C. The Alleged Precedential Impact On Exxon Imperial Shipments Is Irrelevant To Whether ITD Properly Issued The Permits.

The Laughy Group asserts clear error, arguing that there was no mention in the Recommended Order of the proposed Exxon Mobil shipments up U.S. 12. However, the Laughy Group cites no legal standard or argument requiring the Hearing Officer to make factual findings about other proposed shipments.[11] Exceptions at 9. The Hearing Officer's findings are consistent with his ruling throughout the contested case that he was evaluating only the merits of the four ConocoPhillips shipments. *See, e.g.*, Tr. 234:7-25; 238:2-11. The ConocoPhillips shipments are unrelated to the Imperial Oil project and ConocoPhillips should not have to speculate about or answer for Imperial Oil or other third parties.

The Laughy Group next asserts that they "presented substantial evidence showing that Exxon Imperial has cleared the way for U.S. 12 to be used as a high and wide corridor for such mega-shipments." Exceptions at 9 (citing Exhibit 1003 and generally the testimony of Darrell (sic) Hoff and Linwood Laughy). Again, the Laughy Group offers no legal standard or argument to suggest why this alleged omission rises to the level of clear error. Moreover, at best, the testimony elicited by the Laughy Group was muddled and unclear. It is up to the Hearing Officer to weigh the evidence, and in this case he properly determined that evidence of the proposed Exxon shipments was not relevant to the determination of whether ITD properly issued the four permits in question.

The Laughy Group also cites to a federal grant request. *See* Exceptions at 9 (citing Exhibit 1004). The grant request has nothing to do with the overlegal permitting process, is not

[11] *See also* Brief in Response to Letter from Idaho Transportation Department Director Brian W. Ness Dated November 10, 2010 at 17; 23-24.

an ITD document, and does not in anyway undermine the record testimony that ITD determines overlegal permits on a permit by permit basis. *See* AR ITD002374.

Finally, the Laughy Group argues that the ConocoPhillips loads are "intertwined with the Exxon shipments in the mind of the public." Exception at 10. ITD cannot be held accountable for misconceptions or misunderstanding in the "mind of the public." ITD can only address the facts and the law, and that is precisely what the Hearing Officer did in his well-reasoned 57-page Recommended Order.

D. Alleged Speculation About Other Shipments Is Irrelevant To Whether ITD Properly Issued The Permits.

Without any specific citation to the transcript, the Laughy Group asserts that it was clear error for the Hearing Officer to fail to address Mr. Frew's testimony that he was aware of some overlegal permit applications submitted by Exxon at the time he prepared his memorandum decisions. Exceptions at 10. The Laughy Group contends that Mr. Frew's statements at the hearing contradicted his statement in the memorandum decisions that ITD cannot "speculate as to the number, type, or scope of future requests." *Id.*

As an initial matter, the Laughy Group offers no legal standard or even an explanation as to how Mr. Frew's testimony constitutes clear error requiring rejection of the Recommended Order. Moreover, as explained at the hearing, unlike the ConocoPhillips permit applications that had been fully evaluated, the Exxon applications were at the very beginning of the permitting process. There was no way to know if Exxon was going to meet ITD's overlegal permitting requirements. Tr. 233:15-25. Thus, not only was Mr. Frew's testimony not an admission, it further supported the statement made in his memorandum decisions.[12]

[12] *See also* COPC Bf. at 50-51.

Most importantly, it is undisputed that each permit application is evaluated on a case-by-case basis. "If the circumstances arise that the number, type and scope of permits requested rises to the level of impacting the safety and convenience of the traveling public of the preservation of the highway system, it may be necessary for ITD to take appropriate action to address those issues." AR ITD002374.

E. The Hearing Officer's Reliance On The Affidavit Of Terry Emmert Was Not Clear Error.

The Laughy Group asserts that the Hearing Officer clearly erred in basing findings on the affidavit of Terry Emmert rather than making findings based on the affidavits submitted by the Laughy Group. Exceptions at 23. In truth, the Recommended Order confirms that the Hearing Officer did not ignore the affidavits by the Laughy Group and instead considered all of the affidavits submitted. *See* Recommended Order at p. 4. While the Hearing Officer may have credited testimony from the Emmert Affidavit with more weight than the testimony of the Laughy Group, that decision is the prerogative of the Hearing Officer and does not constitute clear error. *See Am. Lung Ass'n*, 142 Idaho at 549, 130 P.3d at 1087 (it is within the agency's "province to decide the weight to be given the various items of evidence").

F. While ITD Did Review Documentation Regarding Interstate Routes, It Considered Only Intrastate Routes In Its Determination Of Reasonable Necessity.

The Laughy Group misstates the record, asserting that the Hearing Officer's Recommended Order failed to consider evidence that undermines ITD's statements that it only "only examined intra-state routes." Exceptions at 17. ITD did not assert that it only "examined" intrastate routes. As the record demonstrates, ITD examined and reviewed information regarding other routes in the United States and Canada, but in making its reasonable determination of necessity only considered routes within the borders of Idaho. Tr. 139:19-141:7.

The Laughy Group also argues that the record does not support the Hearing Officer's findings that Emmert "performed an extensive analysis of potential routes," and concluded that "ground transportation from Lewiston to Billings was the only feasible route." Exceptions at 17. The Laughy Group's argument fails because Emmert's evaluation of other interstate routes is irrelevant to whether ITD properly issued the permits, and also because the Hearing Officer's specific citations to the record demonstrate that Emmert performed a thorough analysis. *See* Recommended Order at ¶ 7 (citing Tr. 555:11-18, 574:16-578:4). The record citations are to the testimony of Mark Albrecht at the December 8-9 hearing. That testimony demonstrates that Emmert both "performed an extensive analysis of potential routes," and concluded that "ground transportation from Lewiston to Billings was the only feasible route." *Id.*

The Laughy Group next asserts that Emmert has recently transported a similar load from the Port of Tulsa in Oklahoma to Billings. Exceptions at 18.[13] This is a blatant misrepresentation. The Laughy Group knowingly disregards the testimony that those loads were smaller than the four loads at issue, did not have the same overhead clearance limitations, and therefore could be transported up from Tulsa, Oklahoma while the ConocoPhillips loads in question could not. Tr. 576:-17, 663:18-664:25.

The Hearing Officer properly concluded that ITD and Emmert made a reasonable determination of necessity and properly determined that ground transportation over U.S. 12 is the only feasible route to get the coke drums from Lewiston to Billings. Recommended Order at ¶ 7.

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[13] The Laughy Group also suggests transport was feasible on a rail system out of Duluth Minnesota. *See* Exceptions at 18. But there is no evidence in the record that the coke drums could travel on that rail system. The only evidence in the record is Mr. Frew's testimony that rail is not an option in Idaho because of the extreme dimensions of the drums. *See* Tr. 219:11-17.

G. Whether ITD Provided Public Notice And Hearing Is Irrelevant To Whether ITD Properly Issued The Permits.

The Laughy Group contends that the Hearing Officer's Recommended Order is clearly erroneous because it does not acknowledge that ITD did not require a public hearing or any public notice regarding the proposed ConocoPhillips shipments. Exceptions at 18. As an initial matter, there is no statutory, regulatory or other legal requirement mandating notice or a hearing to the public before allowing the movement of the four shipments in question. Even so, ConocoPhillips provided notice of the anticipated shipments through publication in local newspaper. *See* Tr. 672:17-673:18; Hearing Exs. 71 and 72. ConocoPhillips has committed to publish similar notifications and to provide other public information several days before and a day before loads are allowed to be moved on U.S. 12. *See* Recommended Order at ¶ 126; Tr. 675:25-676:3. This argument provides no basis to conclude that Recommended Order is clearly erroneous.

H. Whether The Laughy Group's Claims Of Harm Are "Speculative" Is Irrelevant To Whether ITD Properly Issued The Permits.

1. Allegations Of Personal Harms May Have Been Relevant To The "Direct And Substantial Interest" Analysis Under The Intervention Rules, But Are Irrelevant To Contest The Merits Of The Permits.

The Laughy Group contends that the Hearing Officer "sandbagged" them by excluding "claims of various kinds of harm from the shipments" and somehow improperly limited their time at the Hearing. Exceptions at 21. These assertions are simply false. The Hearing Officer specifically reviewed and evaluated each of the affidavits submitted by the Laughy Group that detailed the alleged harm they asserted they would suffer if the four shipments proceeded up U.S. 12. *See* Recommended Order at p. 4. After evaluation of the affidavits, the Hearing Officer concluded that all of the harm allegedly attributable to the four ConocoPhillips loads was unfounded speculation. *See id.* at ¶ 135. Although the Hearing Officer's conclusion on this

point is well-supported by the record, it is of no practical consequence because the alleged injuries suffered by the Laughy Group are not relevant to whether ITD properly issued the permits under its regulations.

Also, the Laughy Group's time at the hearing was not improperly restricted. The Laughy Group decided to offer Mr. Laughy as the only witness for the Laughy Group. His testimony primarily covered irrelevant areas of testimony.

2. Allegations Of Potential Precedent From Issuance Of The ConocoPhillips Permits Is Irrelevant To Whether ITD Properly Issued The Permits.

The Laughy Group contends that the Hearing Officer erred by refusing to consider record evidence regarding the Exxon Imperial shipments intended for the Kearl Tar Sands Project in Alberta. Exceptions at 22. In support of its argument, the Laughy Group asserts that there was "substantial public opposition" to those shipments, and thus they should have been considered by the Hearing Officer in his Recommended Order. *Id.* The Laughy Group has not, however, identified any legal authority that requires the Hearing Officer to discuss this issue in reaching his decision regarding the four permits. Nor could they because it is undisputed that ITD considers the permits on a case-by-case basis and there is no precedential effect from one set of permits to another. *See* AR ITD002374.

3. The Hearing Officer Was Not Required To Address The Speculative Concerns Raised By The Laughy Group In The Affidavits.

The Laughy Group attacks the Hearing Officer's decision by asserting that he improperly failed to consider the various claimed injuries raised by the Laughy Group in the affidavits supporting intervention. As with their other *ad hominem* attacks on the Hearing Officer, the Laughy Group does not cite any authority that the Hearing Officer erred in failing to address in detail each of the Laughy Group's speculative concerns. The exception lacks merit for this

reason alone. Even further, there was no good reason to credit the conclusory affidavits submitted by the Laughy Group, because those affidavits reveal the following assertions of injuries, which are charitably described as speculative.

Gail and Richard Ryan did not offer any legitimate evidence of injury.[14] The Ryans allegedly live 70 feet from the highway. Gail Ryan Affidavit dated November 17, 2010, ¶ 6. Ms. Ryan claims that her dogs will awake if the Emmert personnel use their brakes nearly one mile away from her home. While her dogs do not bark at logging trucks, Ms. Ryan anticipates that her dogs will somehow distinguish between logging trucks and the Emmert trucks, which have not yet passed by her home and which do not make any unique sounds. *Id.* The Hearing Officer properly rejected this evidence as speculative.

The other affidavits submitted by the Laughy Group are similar and the Hearing Officer properly elected not to discuss each of the affidavits line-by-line in his decision. There is no requirement that he do so, and the Laughy Group has not offered any legal reason why additional discussion regarding these affidavits would have resulted in a different decision. Thus, the exception should be denied on this issue.

VI. Conclusion.

For the forgoing reasons, ConocoPhillips respectfully requests that the Department adopt the Hearing Officer's Recommended Order and issue a final order. Moreover, pursuant to the authority provided in Idaho Code § 67-5246, ConocoPhillips respectfully requests the final order specifically provide that it is effective upon

[14] Richard Ryan has not submitted an affidavit describing his interest. Even if Gail Ryan is permitted to intervene, Mr. Ryan should not have been permitted to intervene as he has offered no evidence supporting his alleged direct and substantial interest.

issuance. The Laughy Group has delayed the four ConocoPhillips shipments long enough.

Dated this 12th day of January, 2011.

HOLLAND & HART LLP

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

CERTIFICATE OF SERVICE

I hereby certify that on this ___ 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
Laird J. Lucas
Advocates for the West
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Boise, ID 83701

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- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

Karl Vogt
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- ☒ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (Fax)

_____
for HOLLAND & HART LLP

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FOR IMMEDIATE RELEASE

HIGHWAY 12 RESIDENTS CHALLENGE HEARING OFFICER'S RECOMMENDATIONS; ASK ITD DIRECTOR TO DENY PERMITS FOR CONOCO MEGA-SHIPMENTS

Boise, Jan. 10, 2011:

A group of 13 residents and business owners along Highway 12 today challenged the recommendations by a hearing officer and asked Idaho Transportation Department director Brian Ness to deny permits for ConocoPhillips' proposed shipments of massive coke drums up Highway 12 from Lewiston to Lolo Pass.

The group, led by long-time Highway 12 residents Linwood Laughy and Karen "Borg" Hendrickson, have opposed the mega-shipments in court and administrative proceedings since last August, when ITD initially approved the shipments. The group is concerned that the massive loads will harm central Idaho's tourism and outdoor recreation economy and local communities.

Following a December 8-9 hearing in Boise, ITD hearing officer Merlyn Clark issued proposed findings of fact and conclusions of law on December 28, 2010, recommending to the ITD Director that the ConocoPhillips' shipments be approved.

The filing today took exception to those recommendations, and asked the ITD Director to overrule them. (A copy is attached.) The filing begins by stating:

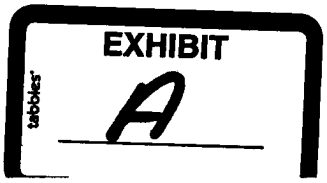
"Regrettably, the Hearing Officer's Recommended Decision does not present a full and fair evaluation of the facts and law. Just the opposite – the Hearing Officer has simply regurgitated the case presented by ITD staff and Conoco/Emmert, without bothering to address key points and evidence presented by Intervenors."

"ITD has never authorized loads of this size to travel on Highway 12 before," noted Laird Lucas, Executive Director of Advocates for the West. "ITD has a duty to consider all of the relevant facts and evidence before making a final determination . We're taking exception to the Hearing Officer's recommendation because he didn't do that."

The exceptions brief filed by residents and business owners spends 22 pages itemizing evidence that the hearing officer ignored in his 57-page recommended decision – which they described as "one-sided, unfair, and clearly erroneous." "Remarkably, not once in all these pages does the Recommended Decision identify – much less discuss in detail – any of the evidence or testimony submitted by Intervenors," the filing adds.

The filing concludes by asking the ITD Director to reject the hearing officer's recommendations, and issue a final decision denying the overlegal permits sought by Conoco and its contractor, Emmert International.

The next step is for attorneys representing ITD and Conoco to file responses. It is unknown when Director Ness will issue a final decision on the requested permits.



Idaho issues permits, but stays shipments for now

By TODD DVORAK - Associated Press - Associated Press Wednesday, November 10, 2010

The Idaho Transportation Department issued permits Wednesday allowing oil giant ConocoPhillips to haul four massive, oversized loads of refinery equipment along scenic U.S. Highway 12 in northern Idaho.

The permits carry an important condition: The big rigs can't roll along the curvy roadway until opponents of the shipments have a chance to argue before an administrative judge their right to intervene and challenge the permits.

"There will be no trucks rolling tonight," said Laird Lucas, an attorney for Boise-based Advocates for the West. "This is an important step, and we're pleased that the department has agreed that this case should go through the administrative appeal process. It will allow us to present the facts fully and fairly."

ConocoPhillips wants to haul the loads — four separate sections of two giant coke drums — from the port in Lewiston to its refinery operation in Billings, Mont. The Idaho section of the journey is along Highway 12, a two-lane, 175-mile stretch that passes through a federally designated river corridor and parallels the Clearwater and Lochs rivers.

The plan has irritated a band of environmentalists and residents who live along the highway. In state courts, they have denounced the loads, saying they present a threat to tourism, public safety and convenience and the pristine rivers.

In August, a state judge revoked permits previously issued by the state highway agency, ruling that not enough had been done to ensure public safety.

That decision was then appealed to the Idaho Supreme Court, which in a 3-2 decision vacated the lower court ruling. It didn't rule on the merits of the case, instead concluding it was premature because neither the Idaho Transportation Board nor Transportation Department director Brian Ness had technically issued a final order on whether the shipments could proceed.

That ruling set the stage for the agency issuing permits Wednesday with the caveat allowing for an administrative hearing.

Ness has appointed Merlyn Clark as the administrative hearing judge. Clark is an attorney with the Boise firm of Hawley Troxell Ennis & Hawley and a senior member of the Idaho Bar Association.

"He commands the respect of all the lawyers in the state," Lucas said of the appointment.

ITD Spokesman Jeff Stratten said no timetable has been set for scheduling the hearing or when a ruling would be issued.

The conditional permits are another setback for the oil company, which had been making preparations at the Lewiston port in hopes of being able to begin hauling this week.

Attorneys for ConocoPhillips have already filed a legal brief with the agency arguing that it's improper to hold a hearing in the case and that its trucks should take to the highway immediately.

The ConocoPhillips shipments represent the first legal tussle over the ability of oil companies to haul giant refinery equipment along the scenic roadway.

Exxon Mobil Corp. is proposing to haul more than 200 oversized loads of heavy oil machinery from the port in Lewiston along Highway 12 into Montana, then north to the tar sands of Alberta, Canada.

Each of the Exxon loads would weigh 300 tons, stretch 227 feet long, reach 27 feet high and 29 feet in width — wide enough to take up both lanes of the highway. Trucks would move only at night and pull over in newly designed turnouts during the day.

Montana highway officials have not yet issued permits for either company, saying they would respond after Idaho.