

**CALENDAR ITEM**

**52**

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08/11/09  
PRC 8079.9  
J. Brown  
S. Mindt

**INFORMATIONAL**

**LESSEE:**

City of Los Angeles, Department of Water and Power  
William Van Wagoner  
111 North Hope Street, Room 1460  
Los Angeles, CA 90012

**AREA, LAND TYPE, AND LOCATION:**

Sovereign lands in Owens Lake, Inyo County.

**SUMMARY:**

Based on Commission staff's review of the draft Supplemental Environmental Impact Report (SEIR) for the Owens Lake Revised Moat and Row Dust Control Measures project, the SEIR does not comply with the California Environmental Quality Act (CEQA). The CEQA process to date may have excluded public participation in a key aspect of the analysis of dust control alternatives because the City of Los Angeles (City) declared at the beginning of the planning process that the water supply analysis in the prior 2008 Final Subsequent EIR (2008 FSEIR) certified by the Great Basin Unified Air Pollution Control District (District) was adequate and would not be evaluated further in the City's process.

However, the City did re-evaluate water supply available for dust control measures, which overreaches beyond the stated scope of the SEIR. Additionally, the City used the new water supply analysis to conclude that shallow flooding and managed vegetation dust control measures (DCMs) were not feasible, a conclusion in direct conflict with the 2008 FSEIR. Based on a faulty alternatives analysis, the City selected the Moat and Row DCM as the environmentally superior alternative, also in direct conflict with the 2008 FSEIR.

Commission staff has advised that the City could revise the draft SEIR to eliminate these inconsistencies with the FSEIR to avoid the possibility of delaying consideration by the Commission of the Revised Moat and Row DCM project.

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Alternatively, the City should prepare a subsequent EIR that fully analyzes the water supply issue and presents a new alternatives analysis. Commission staff has concerns about the Revised Moat and Row DCMs impacts on biological resources, visual resources, and air quality. Commission staff is also concerned that the Revised Moat and Row DCM may not be consistent with the Public Trust values associated with Owens Lake.

Commission staff is well aware and understands the human health issues involved with the PM<sub>10</sub> emissions on air quality and strongly supports the City's efforts to control dust emissions. There are, however, many unresolved issues and concerns regarding the Moat and Row DCM that warrant a vigorous public discussion. These issues generally relate to whether the Moat and Row DCM is an appropriate way to conserve water despite significant environmental impacts.

**BACKGROUND:**

The United States Environmental Protection Agency (EPA) has designated the southern part of the Owens Valley as a Serious Non-Attainment Area for PM<sub>10</sub>. PM<sub>10</sub> is an abbreviated reference for suspended particulate (dust) less than or equal to ten microns in mean aerodynamic diameter (approximately 1/10 the diameter of a human hair). The District has subsequently designated the Non-Attainment area as the "Owens Valley PM<sub>10</sub> Planning Area."

The District has determined that dust emissions from the dry lakebed of Owens Lake are responsible for causing the air in the Owens Valley PM<sub>10</sub> Planning Area to exceed the PM<sub>10</sub> national ambient air quality standards and that water diversions by the City have caused Owens Lake to become dry and the lakebed to be in a condition that produces dust.

On July 28, 1998, the District and the City entered into a Memorandum of Agreement (MOA) for the control of the dust from the lakebed of Owens Lake which requires the City to implement specified DCMs, which include shallow flooding, managed vegetation, and gravel, to control dust emissions at Owens Lake.

On June 14, 1999, the Commission authorized the issuance of Lease No. PRC 8079 to the City for the installation of the Owens Lake South Sand Sheet Air Quality and Sand Fence Monitoring System. This project provided data for the design and implementation of DCMs as required by the Owens Valley PM<sub>10</sub> Planning Area Demonstration of Attainment State Implementation Plan (SIP) dated November 16, 1998.

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On June 27, 2000, the Commission amended Lease No. PRC 8079 so that the City could construct and operate a shallow flooding project located on 13.5 square miles on the North Sand Sheet area of the dry lakebed of Owens Lake. On November 26, 2001, the Commission amended Lease No. PRC 8079 so that the City could construct and operate an additional 154 acres of shallow flooding at the south Zone Dust Control Project.

On October 1, 2002, the Commission authorized the issuance of a Sublease to the California Department of Water Resources to access, maintain, and monitor the existing California Irrigation Management and Information System (CIMIS) Weather Station located on the lease premises for the North Sand Sheet Shallow Flooding Project.

On April 17, 2006, the Commission amended Lease No. PRC 8079.9 so that the City could construct and operate additional acreage of shallow flooding for Phases IV and V of the Owens Lake Dust Control Project.

On December 4, 2006, the City and the District entered into a Settlement Agreement that requires the City to implement 9.2 square miles of shallow flood dust controls and another 3.5 square miles of shallow flood, managed vegetation, gravel cover (all approved Best Available Control Measures (BACM)), or Moat and Row (not approved by the Air District as a BACM) at the City's option. No consultation with Commission staff occurred concerning the requirements of the Settlement Agreement for implementing dust control measures on State property.

In early April 2007, the City submitted an application for a Moat and Row Demonstration Project. On May 1, 2007 the City awarded a contract for construction of the Moat and Row Demonstration Project, even though the City's application remained incomplete and no lease had been authorized. The City insisted that the Commission approve the project immediately.

On May 10, 2007, the Commission authorized Lease No. PRC 8745 for a term of three years, for the construction, operation, maintenance, and monitoring of a Moat and Row Demonstration Project, including installation and maintenance of associated monitoring equipment, and sand fences at two locations. The Lease requires that the City restore the project demonstration sites to the satisfaction of the Commission upon conclusion of the demonstration project, unless the City obtains an amendment to Lease PRC 8079.9 to include one or both of the demonstration areas.

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In February, 2008 the City shared Air Sciences Inc.'s preliminary results of the Moat and Row Demonstration Project that included a three-page informational sheet on Moat and Row Basics, and performance efficiency based on one major wind event on February 13-14, 2008. Air Sciences Inc. prepared a Technical Memorandum dated March 7, 2008, which subsequently concluded that the Moat and Row Demonstration Areas met an overall control efficiency of 99 percent or more, and that the control efficiency was compliant with or greater than the required efficiency values from the 2006 Settlement Agreement between the District and the City. The control efficiency estimates were identified as preliminary and the analysis was to be updated as additional data became available. Since receipt of the Air Sciences Technical Memorandum described above, Commission staff has received no further information on the Moat and Row Demonstration Project performance results.

**CURRENT SITUATION:**

On August 8, 2007, the City submitted an application to the Commission to amend Lease PRC 8079.9 to allow the City to construct and operate Phase VII of the Owens Lake Dust Control Project. The project included an additional 9.2 square miles of shallow flooding, 3.5 square miles of the experimental Moat and Row DCM, and two new access roads on the west shore of the dry bed of Owens Lake. As agreed between the City and the District in the 2006 Settlement Agreement, the District acted as Lead Agency under the California Environmental Quality Act (CEQA) and prepared a Subsequent Environmental Impact Report (Subsequent EIR). The Commission participated as a Responsible agency (as well as a Trustee agency) in the District's CEQA process because it would need to rely on the Subsequent EIR to consider a lease amendment to the City.

The District certified the Subsequent EIR on February 1, 2008, after issuing three "Supplemental Information" reports to the District's Board with dozens of "clarifications and minor revisions" to the Final Subsequent EIR in the final week before the District Board's consideration. District staff explained that

Most of the revisions clarify the description for the Moat & Row dust control measure, [sic] The District originally received a conceptual description of the Moat & Row measure from the City when EIR preparation began one year ago. However, as the City has continued to develop a design for Moat & Row, their description of the measure has been in a nearly constant state of change. This

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has made it difficult for the District to provide a clear description of the measure for the public and it has been difficult for us to analyze Moat & Row's environmental impacts. The clarifications to the EIR are our best attempt to provide a description of Moat & Row, while allowing the City a certain amount of flexibility to refine their final design. [Supplemental Information for January 28, 2008, Board Meeting, p. 1]

After the District Board certified the Subsequent EIR, the Moat and Row design continued to change. Commission staff received 90 percent design plans in late February 2008 and the Bid Set Drawings in late April 2008, with the provision that the plans were subject to further change. Commission staff expressed concern that the current Moat and Row design did not match that analyzed in the District's Subsequent Final EIR for slope, density, and fencing, and that there were issues related to biological, visual, and construction air quality impacts. The Moat and Row design as originally presented and analyzed in the District's Subsequent Final EIR was a serpentine layout of dunes with a natural appearance. The modified design included straight moats and rows laid out in a grid pattern and the moats had steep slopes and the rows had a five-foot high fence on top.

At a meeting in Sacramento in early August 2008, City staff met with staff from the Commission, Department of Fish and Game (DFG), and the District to discuss the status of the Moat and Row portion of the lease application. Commission staff expressed strong support for controlling dust at Owens Lake but concern that Moat and Row has no public trust benefits and that the adverse visual and biological impacts were not adequately addressed in the District's Final Subsequent EIR. DFG staff expressed concern over the steepness of the slopes of the moats and the sand fencing as an impediment to wildlife movement adjacent to a newly restored wildlife area. The major areas of concern were slope steepness, density of Moat and Row elements, fencing, and the extensive grid pattern.

City staff submitted a proposed addendum to the Subsequent EIR to address the modifications to the Moat and Row design and potential impacts. In a letter dated August 18, 2008, Commission staff informed the City that the addendum was inadequate:

This decision is based on Commission staff's current understanding of the City's construction bid package and the perpendicular

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elements now contained in the City's moat and row design that were not analyzed in the certified EIR. Further, it is Commission staff's opinion that until all of the impacts of the moat and row design elements, including but not limited to, the grid layout, spacing, density, fencing, and slopes of the moats and rows, are fully analyzed and circulated for public review and comment, the moat and row portion of the City's Phase 7 project cannot be recommended to the Commission for consideration. The design of many of these elements was substantially changed in last minute "clarifications" to the EIR that were never publicly circulated. [p. 2]

To avoid unnecessary delay, Commission staff offered to proceed with consideration of a lease amendment for the 9.2 square miles of shallow flooding that had been adequately analyzed in the District's Subsequent EIR. Commission staff suggested that the Moat and Row portion of the project be treated as a separate application and that "a **subsequent EIR or supplement to the EIR** would be necessary as provided by [CEQA] Guidelines sections 15162(c) or 15163 [emphasis added]." (p. 3) The City accepted this suggestion and the lease amendment for the shallow flooding portion was approved on August 22, 2008, by the Commission. Although Commission staff expressed willingness to act as lead agency under CEQA for the revised Moat and Row portion of the project, the City preferred to assume lead agency status and Commission staff agreed.

The City issued a Notice of Preparation (NOP) of a Supplemental Environmental Impact Report [Supplemental EIR or SEIR] for the Owens Lake Revised Moat and Row Dust Control Measures Plan on December 16, 2008, "to evaluate the potentially significant environmental effects related to **minor** additions and changes to dust control measures previously approved for construction within the Owens Lake Planning Area [emphasis added]." (p. 1) The NOP stated that [t]he City "has determined that a **supplemental** EIR is appropriate, based on Section 15163 of the CEQA Guidelines." (p. 6) The NOP and accompanying Initial Study concluded that "with the exception of four resource areas (biological resources, construction-related air quality, construction-related traffic, and visual resources), the project would not result in any new potentially significant environmental impacts that were not sufficiently addressed and mitigated in previous environmental documents [emphasis added]." (p. 6)

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The Initial Study further explained that:

“[t]he project would result in changes to the design of the moat and row elements and a more robust operations and maintenance plan is proposed. These changes were not known at the time the 2008 FSEIR was prepared; therefore, an analysis of their environmental effects is required under CEQA. However, these changes only affect the moat and row dust control areas (DCAs), as opposed to the larger dust control program evaluated in the 2008 FSEIR. In cases where only **minor** additions or changes to a previous EIR are required to make the previous EIR apply to the changed project, CEQA Section 15162 allows the preparation of a **supplement** to a previous certified EIR if any of the conditions that require the preparation of a Subsequent EIR are present. Further, CEQA states that the Supplement to the EIR need only contain the information necessary to make the previous EIR adequate.

The proposed project would only be a change to one element of the larger dust control program evaluated in the 2008 FSEIR. **The majority of land use-related issues** (e.g., geology, hydrology, land use, hazards, **public services and utilities**, recreation, mineral resources, agricultural resources, and noise) **have been appropriately evaluated in the 2008 FSEIR and the project would not result in any new significant impacts in these areas.** As such, LADWP has determined that a **Supplemental EIR** that focuses on the issues of construction-related air quality, visual resources, biological resources, and construction-related traffic would be appropriate in compliance with CEQA requirements. [Initial Study, p. 1-2)

The Initial Study examined the issues of water facilities and water supply and found that the 2008 FSEIR had adequately analyzed these issues and that any impacts would be less than significant. As a result, the Initial Study declared that water facilities and water supply would not be evaluated further in the Supplemental EIR for the Moat and Row Project. The conclusion that these issues would not be evaluated further is so at odds with the analysis and conclusions reached in the City’s draft Supplemental EIR that it is worth quoting extensively from these sections of the Initial Study.

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In the detailed discussion concerning whether new *water facilities* would be needed, the Initial Study disclosed that:

The 2008 FSEIR identified that all DCMs (i.e., moat and row, shallow flooding) would use an additional 20,000 AF [acre-feet]/yr of water and may use up to 28,000 AF/yr if all DCMs implemented shallow flooding DCMs. The water supply needed for DCMs would be provided by existing entitlements and supplies of the City of Los Angeles which has planned for the water demands of all DCMs and would supply this water via the Los Angeles Aqueduct (Section 3.9.4, Water Supply, pages 3.9-6 and 3.9-7). [Initial Study, p. 3-49 (item b)]

This discussion confirms the analysis in the District's 2008 FSEIR and the Initial Study states this issue will not be evaluated further in the Supplemental EIR.

The detailed discussion in the Initial Study addressing whether sufficient *water supplies* are available also relies on the 2008 FSEIR and found a less-than-significant impact:

The 2008 FSEIR evaluated the water demands of the moat and row DCMs in combination with the water demands of all other proposed DCMs. The 2008 FSEIR identified that DCMs are expected to utilize an additional 20,000 AF/yr of water and may use up to 28,000 AF/yr if **all** DCMs implemented shallow flooding DCMs. This would bring the total water demand associated with all dust control activities on Owens Lake to between 75,120 AF/yr or 83,120 AF/yr, respectively. Projected water demands for DCMs would be provided by existing entitlements and supplies of the City of Los Angeles which has planned for the water demands of all DCMs. See item b above. Furthermore, the project is consistent with the Urban Water Management Plan of the City of Los Angeles, which specifies the current and future demands and sources of water for the City of Los Angeles, (Section 3.9.4, Water Supply, pages 3.9-6 and 3.9-7). Because the project would not change how water is delivered to the DCAs or increase demand for water supplies, the conclusions made in the 2008 FSEIR would apply to the proposed project and the project would not result in any new significant impacts related to inadequate water supplies that were not previously identified. Therefore, less-than-significant



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environmental impacts would occur and **this issue will not be evaluated further in the Supplemental EIR** [emphasis added].  
(Initial Study, p. 3-50)

This analysis is repeated from the 2008 FSEIR. It quantifies the amount of water needed for the proposed project as 20,000 AF/yr and states that if the entire project utilized the shallow flood DCM, an additional 8,000 AF of water may be needed. It is not clear whether “entire project” includes the 1.9 sq. mi. of study areas and 0.5 sq. mi. of channel areas that were also part of the 2008 FSEIR proposed project as well as the 3.5 sq. mi. of Moat and Row; if so, then some amount less than 8,000 AF would be required to substitute shallow flood DCM for the Moat and Row DCM. If the study areas and channel area are not included, then the maximum amount required to substitute shallow flood for Moat and Row would be 8,000 AF. Since the Moat and Row DCM is still an experimental control, it is possible that shallow flood or another approved Best Available Control Measure would need to replace Moat and Row if it fails to control PM<sub>10</sub> to specified levels. Thus, the maximum amount of water analyzed, 28,000 AF, represented this possibility.

On February 20, 2009, Commission staff received an Administrative Draft Supplemental EIR (Administrative Draft ) for a short, ten-day review period. Commission staff reviewed and commented on the document based on the project description and limited scope disclosed in the NOP and Initial Study. The staff comments submitted to the City accepted as axiomatic that the document was a **Supplemental** EIR to the 2008 FSEIR with the limited purpose of adequately analyzing the impacts of the modified moat and row design.

It was in this context that staff comments contained in the March 3, 2009, letter should have been considered. Staff regarded the statements in the Administrative Draft that managed vegetation and shallow flooding were not feasible alternatives as erroneous conclusions derived from a misreading of the 2008 FSEIR. That is what was meant by the statement “[t]he DSEIR needs to be revised to correctly address Managed Vegetation and Shallow Flooding alternatives.” (p. 2, March 3, 2009, comment letter) As pointed out in the comments, Shallow Flooding and All Managed Vegetation were not found infeasible in the 2008 FSEIR at all. They met most of the basic objectives of the proposed project.

It is in this same context that the statement concerning the environmentally superior alternative should have been considered: “Once the Shallow Flooding

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and Managed Vegetation alternatives are reassessed with regard to feasibility, then the environmentally-superior alternative will also need to be reassessed.” (p. 2, March 3, 2009, comment letter) Given the framework established by the NOP and Initial Study for a Supplemental EIR of very limited scope, Commission staff’s comment was intended to ensure that the City’s conclusions in the Supplemental EIR are consistent with the parent 2008 FSEIR.

The District’s *Findings of Fact and Statement of Overriding Considerations* (Findings) determined that the All Shallow Flooding and All Managed Vegetation alternatives were feasible and selected the All Shallow Flooding Alternative as the environmentally superior alternative. All Gravel Cover was found to be infeasible because it:

would not minimize the long-term significant, adverse changes to sensitive resources as it would essentially cover all potential resources. It would not provide a high likelihood of success as it would require large amounts of gravel. Available sources of aggregate are difficult to obtain. Gravel Cover would not conform to adopted plans and policies. This alternative would not minimize the cost per ton of particulate pollution controlled since there are high costs associated with mining, processing, and hauling the aggregate. In addition, this alternative is incompatible with the State of California’s public trust values. [p. V-14, Findings]

**PROJECT DESCRIPTION:**

As described in the draft Supplemental EIR, Moat and Row is a method of dust control that does not, as initially designed, require the addition of supplemental water to reduce dust emissions from the lake bed. Moat and Row has **not** been approved as a DCM by the District, the California Air Resources Board, or the U.S. Environmental Protection Agency because it has not been shown to meet required performance standards. There are currently three approved DCMs; shallow flooding, managed vegetation, and gravel cover. If Moat and Row does not meet the required performance standards after it is constructed, one or more of the approved measures will be required to replace the Moat and Row design. As discussed above, gravel cover was found infeasible in the District’s 2008 FSEIR.

A Moat and Row element is up to an 89-foot wide corridor that contains an earthen berm (row) approximately five-feet-high with 1.5:1 (horizontal to vertical) sloping sides and a base of up to 19 feet wide, an access road on both sides of

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the row of up to 15 feet wide, flanked on the other side by ditches (moats) approximately 4 to 5.5 feet-deep and up to 20 feet wide at the widest point.

Rows serve as wind breaks to capture sand. Moat and row elements would be arrayed in a grid pattern oriented to be perpendicular with the primary and secondary wind directions. Minimum spacing of the elements would be approximately 100 feet center to center. Rows are proposed to be placed along the length of the dust control area with breaks in the rows at distances determined to be suitable for the habitat requirements for biological species present in the area.

Sand fences would be constructed of a mesh fabric up to five feet tall with 14-inch diameter round or square arsenic-free wood treated posts supporting the fabric. The sand fences would be placed on top of rows or in open playa areas as determined to be appropriate through on-site monitoring of prevailing wind direction and speed.

Moat and Row DCMs may also include the placement of a variety of enhancements within the Moat and Row areas to gain greater dust control efficiencies within the Owens Valley Planning Area, as determined through ongoing monitoring of air quality by the City and the District.

**CEQA Process and Procedure Concerns:**

Staff reviewed the draft Supplemental Environmental Impact Report (SEIR) (State Clearinghouse # 2008121074) for the Owens Lake Revised Moat and Row Dust Control Measures that was released in June 2009 for public review. A copy of staff's letter to the City, dated July 22, 2009, constitutes Exhibit B. Staff continues to have concerns with the City's CEQA process and with specific content of the draft SEIR.

CEQA Guidelines 15162 and 15163(c) state that a subsequent EIR should be prepared if the previous EIR requires major revisions, whereas a supplemental EIR may be prepared if the revisions include "only minor additions or changes." As described in the Current Situation section above, the NOP and Initial Study established that a Supplemental EIR would be prepared that would examine the potential for increased impacts to visual, biological, and air resources caused by the changed project design. However, the draft SEIR states that water is not available for any new DCMs, which is new information of substantial importance and is in direct conflict with the 2008 FSEIR.

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Commission staff has concerns that the scope of the supplemental EIR has over-reached what is allowed under CEQA (see CEQA Guidelines sections 15162 and 15163), and as written, a subsequent EIR should have been prepared instead to allow for adequate public disclosure and participation concerning the water supply issue. Specific areas that over-reach the content of a supplemental EIR include:

- the introduction of new, narrowly-defined Project Objectives;
- the addition of significant new information that was not previously known (insufficient or no water for new DCM's);
- a new Alternatives Analysis based on the new narrowly defined project objectives; and
- changed conclusions from those reached in the 2008 FSEIR based on new information contained in this draft SEIR.

The Environmentally Superior Alternative (p. ES-5) is identified as the proposed project based on the improper alternatives analysis, inadequately noticed objectives, and underlying assumptions. It also contradicts the determination made by the District in its Findings: "Based on the data collected during the analysis and resulting from coordination with the City [of Los Angeles], the EIR does not make the determination that the Moat & Row DCM is the environmentally superior alternative for dust control on Owens Lake." (p. V-7)

The draft SEIR's conclusion that Moat and Row DCM is the environmentally superior alternative overreaches beyond the scope of what is allowed in a supplemental EIR. The limited purpose of this SEIR is to remedy the inadequate environmental analysis of the Moat and Row design in its final configuration as a grid pattern of moats and rows with sand fencing on top of the rows for four impact areas: biological resources, visual resources, and construction-related air quality and traffic (see p. 6 of Notice of Preparation).

The DSEIR concludes that shallow flooding and managed vegetation are infeasible based on the lack of a water supply. Water supply is an issue that was excluded from further analysis at the beginning of the CEQA process for this Supplemental EIR. As a result, members of the public, other agencies, and organizations who may be keenly interested in water supply issues may have disengaged themselves prematurely based on the (inadequate) notice that water supply would not be reconsidered.

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If the water supply is insufficient for new DCMS or enhancements to Moat and Row, then a subsequent EIR should fully analyze the water supply issue. A detailed analysis should examine all possible sources including diverting less water from the Owens Lake watershed to the Los Angeles Aqueduct, the use of brine and groundwater, and alternative sources that could be available by increased efficiency in existing and approved shallow flood areas, as well as by purchase. For example, the District stated in its comment letter dated June 23, 2009, that “[c]urrent water control efficiency improvement efforts on the existing and proposed water-based dust control areas should result in significant water savings.” (see comment 5)

In addition, the faulty alternatives analysis states that a managed vegetation DCM will have the same level of environmental impacts as a Moat and Row DCM (p. ES-4), even though vegetation also provides habitat value, has no entrapment potential, possesses no biological barrier to movement, and the vegetation would have no potential to obstruct views from the lake bed. The draft SEIR states that “[t]he All Shallow Flooding Alternative would have been identified as the environmentally superior alternative, but it had already been considered and rejected in the 2008 FSEIR.” (p. ES-5). Although the All Shallow Flooding Alternative was rejected in the 2008 FSEIR in favor of the proposed mixed project of shallow flooding (9.2 square miles) and Moat and Row (3.5 square miles), it was found to be both feasible and effective. (p. 12-5 and Section 4.0, Alternatives to the Proposed Project); and Shallow Flooding was designated as the “environmentally superior alternative.” (Findings, p. V-7). It is not logical to assume that because the “All Shallow Flooding Alternative” was rejected in the 2008 FSEIR project approval, that shallow flooding does not remain the environmentally superior alternative under CEQA.

Commission staff believes that shallow flooding and managed vegetation are feasible alternatives as described in the 2008 FSEIR and Findings. Therefore, if a subsequent EIR is prepared, an alternative to the proposed project that includes a combination of DCMs should be evaluated. Variations or combinations of the alternatives could be very effective, as evidenced by the suggested use of vegetation and water or brine application as enhancements to the Moat and Row elements.

However, to avoid delaying consideration of the Revised Moat and Row Project, the City could delete or revise the draft SEIR’s alternatives and water supply analyses to be consistent with the 2008 FSEIR. The conclusions about the infeasibility of shallow flooding and managed vegetation should be deleted.

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Additionally, the project objectives should be revised to those identified at the outset in the Initial Study (p. 2-7). These changes would maintain consistency with the 2008 FSEIR project objectives and alternatives analysis and meet CEQA requirements. At some time in the future, a subsequent EIR could be prepared, if necessary, that analyzes the water supply issue.

**Draft SEIR Content Concerns:**

Throughout the process of this draft SEIR, staff's concerns have consistently centered on three CEQA resource areas: impacts to air quality (Greenhouse Gases (GHG)), visual resources, and wildlife. In addition, staff have consistently noted concern with the City's determination through an improper alternatives analysis that previously approved and feasible dust control measures (shallow flood and managed vegetation) are now infeasible, as well as whether or not Moat and Row is consistent with the Public Trust Doctrine. Of the three resources areas, staff finds the draft SEIR inadequate with regard to both the visual resources analysis and with regard to mitigation for wildlife impacts. A new GHG analysis was not included in the draft SEIR; instead the draft SEIR states that the GHG emissions will be similar to that disclosed in the 2008 FEIR, that it is a significant and unavoidable impact, and that a statement of overriding considerations was previously adopted for this impact.

Specifically, staff is concerned about inconsistencies and conclusions within the Visual Resources section of the document. Staff concurs with the statement, that "the dry, desert character of the historic Owens Lake bed, combined with further expanses of desert landscape immediately surrounding Owens Lake, creates a relatively unique and dramatic visual landscape" and that the visual objective for this area is "management activities may attract attention but should not dominate the view of the casual observer." The presence of many square miles of Moat and Row elements on the lakebed in proximity to SR 395 will add color, texture, and artificial structural elements that will interrupt the unique and dramatic visual landscape that Owens Lake affords the public. The casual observer will easily note these features; therefore, staff believes that the Moat and Row elements will have a "substantial adverse effect on a scenic vista" and that they will "substantially degrade the existing visual character or quality of the site and its surroundings." Staff disagrees that the impacts to the degradation of a scenic vista and the degradation of the visual character of Owens Lake is less than significant, as stated in section 3.3 of the draft SEIR. However, staff does concur with the statement in section 4.2.2 that "the proposed project would result in significant and unavoidable adverse impacts on...visual resources," a conclusion that is inconsistent with the impact analysis in section 3.3.

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Staff is concerned that the mitigation proposed for impacts to wildlife resources incorrectly determines the quantity of lost habitat (as 1,503.8 acres, instead of 2,238 acres), suggests using prior mitigation areas as compensation, defers defining performance standards for any compensatory mitigation for wildlife habitat, and defers mitigation for snowy plover mortality. The draft SEIR states in various locations that mitigation for previous projects will be used to mitigate the new Moat and Row project. Unless these previous mitigation areas are not fully allocated to the previous projects, they are not available for the new Moat and Row project. Without adequate compensation for lost snowy plover habitat, the impact to wildlife resources would not be fully mitigated.

**Public Trust Concerns:**

Commission staff has expressed concerns about whether the Moat and Row DCM is consistent with the Public Trust values of the Owens Lake from the initial planning stages. The State of California acquired sovereign ownership of all tidelands and submerged lands upon its admission to the United States in 1850. The State holds these lands for the benefit of all people of the State for statewide Public Trust purposes, which include waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation and open space. The State's sovereign interests are under the jurisdiction of the Commission.

The proposed project involves the historic bed of Owens Lake, which is State sovereign land under the jurisdiction of the Commission. Consequently, the Commission is a trustee agency under CEQA, "a state agency that has jurisdiction by law over natural resources affected by a project, that are held in trust for the people of the State of California." (Public Resources Code section 21070) Under the CEQA Guidelines section 15386(b), the Commission is recognized as a trustee agency "with regard to state owned 'sovereign' lands such as the beds of navigable waters and state school lands."

Despite the significant changes to Owens Lake in the nearly one hundred years since the Los Angeles Aqueduct has diverted most of its water, Owens Lake retains important Public Trust assets. The Owens Lake brine pool, shallow flood and managed vegetation DCMS, and dry lake bed provide important habitat for numerous species of birds and other wildlife. Audubon has recently designated Owens Lake as an "Important Bird Area" because it is once again a major stop-over for migrating shorebirds and waterfowl. 50,000 birds at a time may use the lake area and include over 100 different species. Recreational activities that take place at Owens Lake include bird-watching, wildlife viewing, hunting, horseback

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riding, hiking, and sight-seeing. As noted previously and as stated in the SEIR, the Owens Lake area is a “unique and dramatic visual landscape” of expansive open space.

Nearly 2 ½ years ago, Commission staff raised Public Trust concerns in their comments on the District’s NOP and Initial Study for Phase 7:

CSLC staff is interested in Dust Control Measures that restore and enhance the historic public trust and natural resource values of the lands within the jurisdiction of the CSLC. Staff is in agreement that water conservation is important and that attainment of dust control emissions are a high priority. However, the City has re-established the presence of water to mitigate the significant air quality impacts that resulted from the City’s early 20<sup>th</sup> century water diversion actions. Shallow flooding of the Owens lake bed has provided habitat that is important to the wildlife that depend upon it.

Alternative dust control measures other than shallow flooding, such as, but not limited to, gravel and moat and row designs, may not be the best use of sovereign lands to protect, preserve, and restore the public trust resources. [p. 2, March 27, 2007 letter to District]

Staff commented on the District’s draft Subsequent EIR that the Moat and Row “technique may significantly modify the habitat and visual quality of the Owens Lake dry lake bed...” (p. 2, October 29, 2007 letter)

As discussed in previous pages, the Moat and Row portion of Phase 7 was withdrawn from consideration by the Commission because the revised design was not adequately analyzed in the District’s 2008 FSEIR. Commission staff informed the City in its comments on the NOP and Initial Study for the Revised Moat and Row project that “the CSLC has not yet considered the moat and row dust control measure and has not made a determination whether the moat and row measure is or is not consistent with the public trust” and asked that the Supplemental EIR acknowledge that there is a possible conflict. (pp. 2-3, Letter dated January 13, 2009 to City)

In its March 3, 2009, comments on the Administrative Draft SEIR, staff requested that the project objective “Be consistent with the State of California’s obligation to preserve and enhance the public trust values associated with Owens Lake” be included in the draft SEIR and used in the analysis. This project objective was included in the District’s original 2008 FSEIR and staff emphasized to the City



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that the project objectives of the draft SEIR needed to be consistent with the FSEIR. Staff asked again that the draft SEIR disclose that there is a possible conflict with the Public Trust Doctrine.

Staff reiterated its concern for the revised Moat and Row project in its April 23, 2009, letter to the City regarding its application to amend the lease. Staff requested the City to elaborate on its statement that it “will assist the State of California in its obligation to preserve the public trust values associated with Owens Lake.” Staff noted that the Commission considers numerous factors when considering a proposed use of Public Trust lands including protection of natural resources and other environmental values, and public access. Staff expressed “strong reservations” about the Moat and Row project’s compatibility with the Public Trust values of Owens Lake. (pp. 2-3, Letter dated April 23, 2009 to City)

Although the City included the Public Trust project objective in the draft SEIR, it failed to disclose the possible conflict with the proposed Moat and Row project. This conflicts with one of the main purposes of the CEQA process to fully disclose the impacts of a proposed project to the public and decision-makers so that better, more informed decisions can be made.

In its most recent comment letter to the City on the draft SEIR, staff emphasized again that the Commission has not made a determination whether the proposed Moat and Row DCM is consistent with the Public Trust values of Owens Lake and that staff continues to have doubts (p. 5, July 22, 2009, letter to City).

**OTHER PERTINENT INFORMATION:**

1. The City owns/has the permission to use the lands adjoining the lease premises.
2. The City has submitted an application to amend the lease to construct, implement and monitor DCMs for the Phase VII Moat and Row components as described above.
3. An EIR and Mitigation Monitoring Program were prepared and certified for this project by the District, and a Supplemental Environmental Impact Report and Mitigation Monitoring Program were prepared for this project by the city of Los Angeles. The City is scheduled to consider certification of the SEIR on September 15, 2009.

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**APPROVALS OBTAINED:**

Great Basin Air Pollution Control District

**FURTHER APPROVALS REQUIRED:**

City of Los Angeles, Department of Water and Power  
California State Lands Commission  
California Regional Water Quality Control Board  
California Department of Fish and Game  
United States Army Corps of Engineers

**EXHIBITS:**

- A. Location and Site Map
- B. July 22, 2009 Letter from Commission staff to the City

**PERMIT STREAMLINING ACT DEADLINE:**

To be determined (the application is incomplete; CSLC is a responsible agency)

**UNRESOLVED ISSUES AND CONCERNS:**

Commission staff is well aware and understands the human health issues involved with the PM<sub>10</sub> emissions on air quality and strongly supports the City's efforts to control dust emissions. Commission staff was asked to present information on the proposed Moat and Row DCM to more fully disclose its impacts and consequences on Owens Lake. Fully-informed decision-making requires a balancing of all of the issues and concerns associated with a proposed project. Commission staff believes an open and vigorous public discussion concerning the merits of the Moat and Row DCM should occur. This Informational Calendar Item is offered as a step in that direction.

The revised Moat and Row Project design could potentially control PM<sub>10</sub> emissions from the Owens Lake dry lake bed without using water; however, Moat and Row is still experimental. If the Moat and Row project is constructed and fails to control dust, several enhancement measures could be tried. Some of these such as managed vegetation and shallow flooding use water; gravel would not. If the enhancements do not work, the City is required under the Settlement Agreement with the District to replace the Moat and Row DCM with one (or more) of the three approved Best Available Control Measures: shallow flooding, managed vegetation, or gravel cover.

Shallow flooding and managed vegetation were found feasible by the District in its 2008 FSEIR. Gravel was found infeasible because it failed to meet most of

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the project objectives and is inconsistent with Public Trust values of Owens Lake. The City, in the draft SEIR, has concluded that managed vegetation and shallow flooding are infeasible because insufficient water is available. If Moat and Row does not work, then based on the City's draft SEIR there is no identified feasible alternative. This is an unresolved issue.

**CONCLUSION:**

In addition to the issues and concerns discussed in this staff report that need to be resolved regarding the City's Moat and Row Project, it is staff's opinion that the following questions should be discussed and answered prior to the Commission's future consideration of the City's application to amend its existing lease:

- Will the Moat and Row DCM meet the required dust control performance standards? To date, the City has spent an estimated \$500 million on dust control measures at Owens Lake. The Moat and Row DCM is estimated to cost about \$105 million. Does it represent good economic value? (Cost estimates from L.A. Times article dated April 19, 2009)
- The City estimates that in fiscal year 2009-10, it will use over 87,000 AF of water for dust control at Owens Lake, and that when Phase 7 is complete, this amount is expected to rise to 95,000 AF per year. The City expects to purchase this water from the Metropolitan Water District for \$46 million. (p. 8, City Memorandum dated May 15, 2009, contained in Appendix D of the draft SEIR.) Why is the amount of water so much higher than the 83,120 AF estimated in the 2008 FSEIR?
- Is the amount of water identified in the District's 2008 FSEIR that would be needed to implement the shallow flooding DCM instead of Moat and Row on 3.5 sq. mi. — 8,000 AF — unavailable from any source or combination of sources?
- Could water used in existing shallow flooding areas be used more efficiently, making the conserved water available for new shallow flooding DCMS or areas of managed vegetation?
- Is the Moat and Row DCM an appropriate way to conserve water, when viewed against the loss of habitat, wildlife entrapment potential, and visual impacts?
- If the Moat and Row DCM is successful, would it set a precedent for converting existing shallow flooding and managed vegetation DCMS to Moat and Row to save additional water?

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- Is the Moat and Row DCM consistent with the Public Trust values of Owens Lake?