EXECUTIVE OFFICER HEARING

STATE OF CALIFORNIA

AIR RESOURCES BOARD

OWENS LAKE DUST CONTROL REVISED FINAL 2011

SUPPLEMENTAL CONTROL REQUIREMENTS DETERMINATION

JOE SERNA, JR. BUILDING

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

SIERRA HEARING ROOM

1001 I STREET

SACRAMENTO, CALIFORNIA

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TIFFANY C. KRAFT, CSR
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CALIFORNIA REPORTING, LLC
52 LONGWOOD DRIVE
SAN RAFAEL, CA 94901
(415) 457-4417

APPEARANCES

HEARING OFFICER

Mr. James Goldstene

ATTORNEY GENERAL'S OFFICE

Mr. Randy Barrow

Mr. Stephen Lerner

AIR RESOURCES BOARD

Ms. Christina Morkner Brown

Ms. Linda Murchison

Ms. Sylvia Oey

Mr. Earl Withycombe

LADWP

Mr. Stuart Somach

Ms. Carole Denardo

Mr. Mark Schaaf

Mr. William Van Wagoner

DISTRICT

Ms. Grace Holder

Mr. Peter Hsiao

Mr. Duane Ono

Mr. Theodore Schade

INDEX

	PAGE
Introductions	1
Presentation by Petitioner	5
Presentation by District	76
Presentation by ARB	111
Adjournment	155
Reporter's Certificate	156

PROCEEDINGS

HEARING OFFICER GOLDSTENE: Good morning, everybody. I'm James Goldstene. I'm the Hearing Officer for today's hearing.

The is the Owens Lake administrative appeal of the 2011 SCRD between the City of L.A. and the Great Basin Air District.

This hearing is being conducted pursuant to Health and Safety Code 42316.

So I'm with Randy Barrow on my far right and Stephen Lerner on my close right from the Attorney General's Office. They're my legal team.

And I think what I'd like to do is ask the parties to introduce themselves, starting over here.

MS. HOLDER: My name is Grace Holder. I'm with Great Basin. I'm a geologist/senior scientist with the district.

MR. ONO: I'm Duane Ono with Great Basin. I'm the Deputy Air Pollution Control Officer.

MR. SCHADE: Theodore Schade, the Air Pollution Control Officer for Great Basin.

MR. HSIAO: Peter Hsiao from Morrison & Foerster, representing the Great Basin.

MS. MURCHISON: I'm Linda Murchison with the California Air Resources Board.

MS. OEY: Sylvia Oey, California Air Resources Board.

MR. WITHYCOMBE: Earl Withycombe, California Air Resources Board.

MS. MORKNER BROWN: Christina Morkner Brown with the Air Resources Board.

MR. SOMACH: Stuart Somach. I'm with the Law Firm of Somach Simmons & Dunn here in Sacramento. We represent the City of Los Angeles, Los Angeles Department of Water and Power.

MR. VAN WAGONER: William Van Wagoner with the Los Angeles Department of Water and Power. And I'm the Manager of the Owners Lake Dust Mitigation Program.

MR. SCHAAF: My name is Mark Schaaf with Air Sciences. I'm an air quality scientist. And I'm here on behalf of DWP.

MS. DENARDO: I'm Carole Denardo with Garcia and Associates. I'm their Cultural Resources Manager. And I'm here on behalf of LADWP.

HEARING OFFICER GOLDSTENE: Okay. Good. Very good.

So we're scheduled from now 9:00 to 5:00 today. The City and the Great Basin have each been budgeted two hours of time. You can divide it as you wish between your presentation and your rebuttal. We'll be starting with

the city of L.A. for the presentation. The Air Resources Board has an hour-and-a-half budgeted. I know that they'll have a presentation and then they'll be available certainly for questions and answers.

We'll probably take a lunch break around 12:30 and have various breaks in between.

In terms of housekeeping matters, the rest rooms are straight out the door and then to the left, all the way down past the other hearing rooms. There is a cafeteria downstairs. And at lunch, there are lots of place around to get something to eat.

And also, if there is an emergency, we are to leave the building and proceed to the park that's kittycorner to the building that's right across from City Hall and kittycorner to us at 10th and I Street.

So as the Hearing Officer in this proceeding, I'll only be considering evidence that's included in the administrative record, statutes, rules, regulations, and case law in rendering my final decision.

I request that parties limit their presentations accordingly. Also, pursuant to the Health and Safety Code Section 42316, a written decision is required. So I will not be rendering a decision today from the bench.

We have a court reporter here today. So when you speak, if you would please identify yourself, that would

be appreciated.

I think all of the parties received a letter dated June 12th from the State Lands Commission, which we will include as part of the public comment. And at the end of the hearing today, I'll ask each party to prepare a proposed Findings of Fact and Conclusions of Law which will assist me in preparing my final written decision.

So with that, and before we proceed with the City's opening presentation, are there any questions or comments?

All right. So if the City of L.A. would proceed with their opening presentation.

Before you begin, Mr. Somach, how much time do you want to use for your presentation and how much time do you want to reserve for your rebuttal?

MR. SOMACH: I wanted you, if you could, to let me know when we have a half-hour left. I'm not certain that we'll stop at that point in time if we're still going. I think that our direct testimony quite frankly is -- argument is more important than the rebuttal. So if you can at least let me know when there is a half an hour left, then I can make a determination of whether we want to stop or whether we want to complete what we're doing in terms of our direct argument.

HEARING OFFICER GOLDSTENE: We can do that. We

had thought about taking a break at the hour and a half point, around 10:45 or so. Would that --

MR. SOMACH: That will work. And that way I can evaluate. In fact, even if someone is talking at that time, it may be good just to interrupt and I can make a decision on whether I think we need more time or not.

HEARING OFFICER GOLDSTENE: As we're approaching 90 minutes, we'll let you know.

MR. SOMACH: If you do that, I'll be in great shape.

HEARING OFFICER GOLDSTENE: Good. Go ahead and proceed.

MR. SOMACH: Thank you.

I think as we've indicated in some materials that we've provided, some exchanges actually -- e-mail exchanges, my intention here is to split the argument among the folks that are sitting in this front table. And I want to underscore the fact that what we are going to be talking about is -- it's argument and that we understand that it's not evidence. It's not testimony. But I want to address that very issue in a moment with you because I'm concerned about that in a very fundamental level in terms of the nature of the proceedings we have here.

I thought, however, it's probably appropriate for me to start with a bit of candor in terms of where the

City is on these issues. Unfortunately, the issues that we're debating, the legal issues that focus on exactly the scope and extent of the district's jurisdiction, the nature even of this appeal before the Air Resources Board has been in dispute over a long period of time. I mean, I think back in 97/98, the last time CARB was directly involved, there was litigation associated with that, which was settled.

And the problem, however, is it wasn't settled, from our perspective, satisfactory as things turned out in terms of the way the world moved forward. And as a consequence, all of these issues just simply cropped up again. And we're dealing with something that probably if we -- with perfect 20/20 hindsight we should have resolved through litigation back in 1997/98.

So the first thing I wanted to indicate to you, to everybody quite frankly, is we're done. We're absolutely done in terms of going around and around and around with these arguments. We feel that we're done in terms of our obligations under Health and Safety Code 42316, but we're also done with this continual argument that we have. It's draining resources and creates uncertainty. It's not good for the City. It's quite frankly not good for the district. It's not good for anybody.

So our intention is that, absent a court order establishing that criteria contained in 42316 has been met and that 42316 is being applied in an appropriate fashion and in a constitutional fashion, we're going to proceed with a challenge. And I just don't want anybody here to misunderstand that. That means continue with a judicial challenge of the 2011 SCRDs challenge to the fees, which one of the things I'm going to ask procedurally at a certain point in time is those are kind of stuck in a corner somewhere, our challenge to fees. And I'm not exactly certain what you intend to do with those.

Quite frankly, we're going to challenge -- you'll be seeing that soon, certain aspects of the district's fee order that just has been issued. And we have no intention of doing anything moving forward.

In that context, we intend to challenge any order of this Board that is not consistent with 43316. And I don't want to predetermine that, but if the Board staff's briefing is anything like what your thinking might be, there is no question that we'll be challenging not just the district but, of course, the CARB determination.

And I also want to note that the litigation will not be pursuant to 1094.5. We think there are much larger deficiencies that are out there. And it won't just involve the district and CARB. We also intend to involve,

at a minimum, the State Lands Commission and others who have had an impact upon this process who own lands that are the bed and banks of Owens Lake.

And I think it's appropriate for me to provide that context, because, you know, we've been at this. You've been at this. And here I mean institutionally. I haven't been at this very long at all. But institutionally, we've been at this a very long time. And it's time to come to grips one way or another, yes or no. We're all big boys and girls. And we need to resolve these issues.

I want to start a little bit with 42316 itself, because it is the four corners of the jurisdiction that this Board, the district has over the City. There is no other. And it simply is, as a matter of law, that the four corners of that statutory provision is the beginning and end of what the district can do and appeal what CARB can do and at a very fundamental level. And of course, we briefed this a million times. And I have no intention of sitting here with the limited time we have available re-briefing this issue orally. But we believe that the criteria in that statute has not been met in terms of these supplemental control requirement determinations.

And you've seen this written about a hundred times. But basically, according to the statute, the

orders that are involved must be reasonable. They must create or be involved with some kind of a nexus between what the City is doing and the thing that's been remediated. And much what we're going to talk today about is the absolute absence of any real control. Here I use control, not in that technical concern, but in terms of what the district is doing. There's not really any control of being exercise to ensure that what is being dealt with in terms of these orders is stuff that under the statute the City is responsible for.

And also that there needs to be substantial evidence in the record that creates that relationship, that nexus between the City's water-gathering activities and the dust problems.

In that context, I think it's important to say that one of the fundamental aspects of statutory provisions is that the district's orders have no impact on those water-gathering activities. That was the quid pro quo when the legislation was drafted back in the 80s that the City would remediate or address dust control problems, but there could be no impact upon the City's water supply. We sit here all these years later. I shouldn't say all these years later, but a long time ago. And I was thinking in my own life there, and I was thinking that's not so long ago.

And we find a dedication of 95,000 acre feet of water for dust control in the lake. How that comports with the notion that the activities and the remediation activities can't interfere with the City's ability to divert through the aqueduct when part of these orders require us to not divert that water through the aqueduct, but rather spread in the lake befuddles me. It's just absolutely inconsistent with exactly why that statute was written the way it was.

In fact, I note that the statute is written in an interesting way in the fact that it is permissive with respect to dust control and what the district may do. It is mandatory with respect to the inability to effect the City's use of water. The word "shall not" is used there and in the rest of the provisions of the statute dealing with what the district may do is purely permissive in terms of the words "may." Those words have significance. They're particularly significant in that they fall in the same subsection of the statute and they're used in a very deliberate manner by the Legislature. Yet, that's been ignored as we move forward through this process.

Now I want to kind of shift a little bit to the nature of this hearing. And that is a fundamental disagreement we have with you all. And that is we believe that we're entitled to a full evidentiary hearing where

you pit witnesses on, where you cross-examine the other side, where evidence is introduced as we move forward. There is just no reason, no underlying rational for not having that hearing. And moreover, I think that the statutory structure mandates a hearing. You can't deal with a statute that requires substantial evidence to support the district's action and then refuse to actually evaluate the quality of that evidence.

And of note is that the statute provides that a challenge from your decision is through -- is to be, number one, your decision is to be based upon an independent hearing. And there is no way that you can have an independent hearing that is dependent upon merely looking at the record that is established by the district.

Secondly, the mandatory mechanism for challenging is Code of Civil Procedure 1094.5. 1094.5 presumes there's been an evidentiary hearing in the tribunals or the agency below for which the appeal is emanating from. That's what 1094.5 deals with. It deals with the review of evidence coming out of hearing. And by definition and it's very terms, 1094.5 applies to a "final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given. Evidence is required to be taken and discretion in the determination effects is vested in the inferior tribunal."

1 That's never happened. That hasn't happened before the
2 district and it's not happening here.
3 And I would prefer you, as you're deliberating
4 when we're done here, deciding, you know, maybe we should
5 have taken some evidence because quite frankly, the remedy
6 in the reviewing court will be a remand right back here
7 anyway. And if these things are important to resolve,
8 they ought to be resolved in the first instance here so at
9 least that procedural defect is cured before we move up on
10 appeal under or pursuant to 1094.5. I don't think there
11 is any question what a review court says, well, where is
12 the record of that evidentiary hearing? I have no idea
13 what you're going to be telling them at that point in
14 time.
15 There was a lot of time spent in the briefs,
16 particularly the district's briefs about the 1998/2006
17 agreements. We have addressed all those issues in writing
18 and I don't want to belabor that now. But I will say
19 this. We simply dispute the underlying contentions that
20 are being made with respect to what those agreements call
21 for. And I think that the disputes are both factual and
22 legal disagreement about what the agreements mean and what
23 has or has not occurred with respect to performance or
24 lack of performance under those agreements.
25 However -- and I want to underscore this again.

On a very fundamental level, what is in the agreements is not within the purview of CARB. CARB is bound by the pervisions of 42316 just like the district. It's a stranger to the district and the LADWP's agreements. It's not in privity with any of the parties. It has no contractual relationship. It's not a third party beneficiary. And more importantly, it's not a court. You have no jurisdiction whatsoever to, in any way, resolve any disputes among the contracting parties with respect to those agreements. If the district has a problem with LADWP's performance under these agreements, it can sue us for breach of contract. Pure and simple. It can sue us for breach of contract. In that context, a whole host of issues about whether an agreement like the ones that are being discussed in these briefs I will say can ever be lawful. It is questionable to me.

In any event, the whole discussion has no place in this process at all, that what's in those contracts or agreements is immaterial. The only material question is whether or not the actions being taken are consistent or inconsistent with 42316.

I want to just say a couple words with respect to the staff brief. What was that all about? The reading the brief brings such a clear meaning to the word "rubber stamped" that I don't have any other way of being able to

describe it. To write a brief that just simply says "me too" is an exercise in futility and it ought to have embarrassed this Board, just my opinion.

Moreover, unfortunately, it calls into question the impartiality of the Board. And I understand that you've got yourself walled off from these folks. But you know, I'm sorry. You're the Executive Director of this organization. These people work for you. You know that. They know that. And this wall cannot be so opaque as to not create some concern at least on my part of the impartiality of the decision we're going to get when I get a "me too, me too" brief from CARB staff.

With respect to the State Lands Commission, I don't even know where hardly to start with respect to the State Lands Commission. Reading the letter that is evidently being put into -- I guess they requested it be in the formal record. I guess the formal record includes public comment because I was going to inquire as to exactly what being put in the formal record means, because it certainly can't be evidence of anything, except perhaps the odd way that they've decided to proceed.

I was reading through all the stuff. I find these proceedings has an Alice in Wonderland quality. And I was thinking that the district and the State Lands Commission on some of these issues the way they addressed

them was kind of like Tweedledee and Tweedledum. I was trying to figure out which one was which, because they back and forth so much that it was kind of interesting.

In effect, that's one of the interesting problems that has existed here, is that we have the perverse situation where the owner of the land involved is able to have essentially a veto authority over the City's ability to actually comply with orders.

Moreover, they have the most peculiar analysis of the public trust doctrine that I've ever seen anywhere. And I'm a guy that actually was an attorney of record in the Audubon case and I've dealt with the public trust doctrine since the early 80s.

They even said in their letter that they don't give advisory opinions when we've come to them to ask them about whether or not certain control methodologies would be acceptable so that we could go back to the district and take a look at BACMs that might utilize these less water-intensive control strategies that they don't give advisory opinions. What's that all about? They're not an article three court. There doesn't have to be a case and controversy in front of the State Lands Commission.

And oddly enough, the Audubon decision itself was an advisory opinion. It was an advisory opinion rendered ultimately by the California Supreme Court in response to

a set of questions asked by the federal district court here in Sacramento. It was an advisory opinion. So they can't give an advisory opinion, but the California Supreme Court can. Odd. It's just odd.

The bottom line is, too, that both the district and the State Lands Commission talk about the City having to comply with other laws, other than just the Clean Air Act that they've got to worry about CEQA in their permitting process. They have to worry about all kinds of stuff.

But when we raise a CEQA issue, as we've done here, that doesn't appear to be important. The district will tell you that what they do is more important than any other law. That it essentially preempts every other law, that their orders are not CEQA pre-determinations, notwithstanding the fact we've been ordered to do the very thing that we have to go through a CEQA analysis to do.

They appear to be absolutely unconscious of any obligations in terms of the preservation of cultural resources associated with these remediation activities.

And most important, both the State Lands Commission and the district appear to be absolutely unmindful of their obligations under Article 10, Section 2 of California State Constitution not to waste water.

And the use of water as it exists out in Owens

Lake, it can only be described as the most wasteful and shameful thing that is existing in California, but for the fact that it's sitting on the eastern sierra where it's not visible to as many folks as other activities might be, it would be sanctioned from north to south.

That 95,000 acre feet that is being spread on the lake is being spread for dust control. And that dust control could be accomplished by other non-water intensive activities. The City of Los Angeles simply does not have a surplus of 95,000 acre feet of water, the amount of water, I might add, the City of San Francisco uses on a daily basis for the entire City.

But the City of Los Angeles doesn't have water hanging around that surplus. It's got to be made up from somewhere. We all know about the shortages on the Colorado River. We all know ironically there's state law that requires Los Angeles and other folks that take water from the delta to reduce by 20 percent their reliance upon delta flow. That's ignored in this process.

Alternative water supplies, groundwater supplies in the L.A. area suffer from contamination problems. This 95,000 acre feet is critically important. And the way it's being dealt with and the backing and forthing between Tweedledee and Tweedledum in terms of who's making the City use 95,000 acre feet of water is inexcusable as a

matter of law. But more importantly, it's inexcusable as a matter of state policy.

Well, I've now exhausted my hour and a half and no one else has talked. I'm going to stop there and ask Bill to kind of take over.

MR. HSIAO: I'm sorry, Mr. Goldstene. At this point, the district will have to object to Mr. Van Wagoner err providing any type of comments for today's proceeding.

First, the district objects to the reply declarations that were filed by the City. These declarations correspond to each of the three other presenters that are sitting at the City's table.

The first procedural order incurred, and that's J and K, prohibit the introduction of additional declarations and testimony that is not contained in the administrative record. It further prohibits the introduction of any argument based upon materials that were not properly admitted by the Executive Officer in prior hearings.

On February 1st, the City was required to move to supplement or amend the record with whatever additional material they requested. And none of this information was submitted at that time or ruled upon in the 5th procedural order.

For that reason, we don't think Mr. Van Wagoner,

Mr. Schaaf, or Ms. Denardo have any business providing any type of input to these proceedings today.

HEARING OFFICER GOLDSTENE: Thank you. Your objection is noted.

I think I'll let Mr. Wagoner proceed. But the objections is noted for the record.

MR. SOMACH: Let me say that this argument, I could do this. But it wouldn't be as good for you, if I did it. I would probably confuse you more than anything else.

And secondly, to the extent there is evidence that's been introduced, you know, the Board is free to accept or reject that evidence based upon its rulings. As I've indicated, I think its rulings have been in error. And I hope you will reconsider and actually ask for an evidentiary hearing or require an evidentiary hearing at some point in time.

But I do want to say this: It is -- if nothing else, what we offer here is an offer of proof in an evidentiary -- from an evidentiary perspective. If we are in a courtroom and there was an objection to evidence that we wanted to introduce and it was sustained, I would undoubtedly ask for an offer of proof in which we summarize the objected to testimony that had been excluded. That way, the reviewing court will have a

summary of that evidence and will be able to determine whether or not the sustaining of that type of an objection was appropriate.

And I'm asking for this in order to not have -- and this could be subject to his continuing objection. But I'd just as soon have the information come in. And if you can do it in a courtroom, you sure can do it in an administrative proceeding.

HEARING OFFICER GOLDSTENE: So Mr. Van Wagoner, are you ready?

MR. VAN WAGONER: Yes. Thank you.

(Whereupon a slide show presentation was made as follows.)

MR. VAN WAGONER: Good morning. I'm William Van Wagoner, and I'm the Manager of the Owens Lake Dust Mitigation Program.

DWP has constructed approximately 40 square miles of dust control on Owens Lake, the majority of which requires substantial water use. Even though we have been constructing dust control for more than a decade, there are still only three approved best available control measures, or BACM, including shallow flooding, managed vegetation, and gravel. Shallow flooding is the predominant form of dust control and use. As in many cases, it was the only method that can be constructed

quickly and placed into service in accordance with the dust control orders and deadlines.

Managed vegetation is not suited for use on many places on the lake bed due to poor soil and drainage conditions. And establishing vegetation to the point it controls dust is very time-consuming.

The three-and-a-half square miles of managed vegetation that has been constructed require the planting of almost 30 million individual plants, grown in greenhouses to ensure that the site would be in compliance, on time. Clearly not a method that can be used in a widespread manner, particularly when under tight time constraints and deadlines.

While gravel can be placed relatively quickly, similar to shallow flooding, getting permission to use it on the lakebed has been a major hindrance to its use. LADWP has been required to obtain leases for its dust mitigation projects from the California State Lands Commission after receiving the dust control orders. This has been resulted in strong resistance of our gravel BACM, well as other waterless dust control measures really since 1994.

If I can get the next slide, please.

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MR. VAN WAGONER: This slide is just a summary of

some of the communications that we are aware of from the State Lands Commission showing basically there is destain for the gravel BACM. The 2006 settlement agreement provided for DWP to test the waterless dust control method called moat and row. However, the California State Lands Commission strongly objected to this project and despite several years of effort, including supplemental environmental impact report, moat and row was ultimately rejected by State Lands. The net result of these years of effort turned a $20 million project into a $226 million effort, including the $60 million Phase 8 project that we agreed to due to being late the first time, the $160 dollar Phase 7/8 project to replace the moat and row project after it was thumbed down, and a payment of $6 million to Great Basin due to LADWP's ability to complete the project by the second deadline.

Next slide.

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MR. VAN WAGONER: This slide shows a very brief, very brief chronology of major events associated with the moat and row project.

Great Basin has long said that it is DWP's choice to use water for dust control. However, as a result of the circumstances I've just described, DWP's choices were, in fact, strictly limited. And DWP had no choice but to

select water-intensive shallow flooding BACM in order to comply with the dust control orders.

As a result, 95,000 acre feet of water every year are allocated for dust control on Owens Lake. That's more than enough water to serve the entire City of San Francisco.

Next slide, please.

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MR. VAN WAGONER: This slide just shows how our water use has increased at Owens Lake over the course of the project. DWP has adopted aggressive water conservation measures and has developed alternative sources of water supply so that Los Angeles now has the lowest per capita water use of any City in the United States, with more than a million people.

However, these efforts are not enough to make up for water used at Owens Lake and elsewhere for environmental mitigation projects.

Historically, more than 400,000 acre feet of water per year were delivered to Los Angeles from the L.A. aqueduct. However, per the 2010 Urban Water Management Plan, almost half of the water historically delivered to Los Angeles is now used for environmental enhancement commitments. And almost half of this environmental water is going onto Owens Lake.

Next slide, please.

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MR. VAN WAGONER: This slide shows the breakup of how water is used for the environmental commitments. As you can see, Owens Lake is at 95,000 out of about 205,000 acre feet. You can also see on the right side how deliveries have diminished substantially through the aqueduct to the City of Los Angeles.

LADWP must replace this water to meet the needs of the citizens of Los Angeles by purchasing this water that come from the Sacramento/San Joaquin delta, placing further environmental stresses on an already limited supply. In essence, the Owens Lake project is affecting the entire state because of this water demand. DWP has requested development of more water efficient BACM measures but has met substantial resistance, first with the moat and row project which was denounced by Great Basin and State Lands and presently with a tillage BACM test where Great Basin staff have made it clear they believe it will not work, thus predetermining the outcome of this $3 million effort.

Without new water efficient or waterless BACM measures, dust mitigation at Owens Lake is not sustainable from a statewide perspective. To address this issue, in August of 2009, the DWP Board of Water and Power

Commissioners passed a resolution requiring DWP meet to implement water conservation measures on Owens Lake to reduce Los Angeles aqueduct diversions for existing and future Owens Lake dust control projects to below 95,000 ache are feet per year. That's my charge. Additionally, the 2010 Urban Water Management Plan does not allocate any further water for Owens Lake dust mitigation.

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MR. VAN WAGONER: However, the Phase 9 project and any future dust mitigation projects on Owens Lake will likely require additional water resources, particularly in light of the limitations of managed vegetation use, extreme difficulties in getting gravel approved, and the absence of other water-efficient BACM choices. DWP cannot meet its municipal needs and also support the ever-increasing diversion of water required by Great Basin for Owens Lake dust control.

Next slide.

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MR. VAN WAGONER: In addition to increased stresses placed on the delta's declining eco system due to our need to replace this replacement water, the current BACM limitations resulting in high water demand for dust control are having wide spread impacts relating to greenhouse gases at a time when California is seeking to

be a world leader in combating global warming.

Water that flows down the Los Angeles aqueduct actually generates green power. However, the water purchased by DWP from the State Water Project to replace water used on Owens Lake must be pumped to Los Angeles. Pumping 95,000 acre feet of water results in generation of approximately 83,000 tons of carbon dioxide to control less than 80,000 tons of PM10 at Owens Lake.

Implementation of a Phase 9 and possible Phase 10 project at Owens Lake may require up to an additional 8,452 acre feet of water each year for dust mitigation if gravel or other non-water dust control methods are allowed and would contribute another 7,425 tons of CO2 from pumping the replacement State Water Project water, assuming it's even available given restrictions in recent years.

If efforts are made to construct a Phase 9 and 10 project without increasing water use, reconstruction of large areas of existing dust control would result in temporary loss of compliance method would be required at a cost exceeding $400 million again of gravel if other water/non-water methods are allowed.

However, the SIP does not have workable provisions for transition of existing dust control measures. The current bankrupt policies and BACM

limitation at Owens Lake have resulted in 95,000 acre feet per year of water for use for dust control with no end in sight. Coupled with the uncertainties of what climate change will bring, major changes are needed to ensure that dust control efforts are sustainable into the future.

Replacement of water-intensive dust control measures with waterless or more water efficient dust control methods will greatly reduce the amount of greenhouse gas emissions associated with the Owens Lake program, as well as ease demands on the State's limited water resources while continuing to control the PM10.

Great Basin has expressed their belief that the 3600 foot elevation contour defines Owens Lake before the Los Angeles Aqueduct went into service. However, Owens Lake has only reached 3,597 feet in elevation, or three feet below this 3600 foot mark, once in several hundred years.

The remainder of the time, that has been considerably lower, due to the shallowness of the lake substantial lake bed area would have been exposed naturally, almost all the time. This means that Owens Lake itself would have been a significant source of dust in its natural state, which would not be related to DWP's water-gathering activities. Recent archeological studies in the lake bed have revealed Native American dwelling

sites and artifacts located well below the 3600 foot regulatory shoreline, providing direct physical evidence of a much lower lake level. Many of the areas associated with our current Phase 7/8 project have such archeological resources indicating that we are mitigating dust in areas that would have been dry long before DWP water-gathering activities began.

Next slide, please.

--o0o--

HEARING OFFICER GOLDSTENE: Can I interrupt you for a second, Mr. Van Wagoner?

Back to the point Mr. Hsiao made about the evidence being shared under his objection, but DWP I presume had the opportunity to enter this information that you're presenting now into evidence before the SCRD decision was made by the district. And of course, could have maybe submitted this under the motion to augment. I'm just wondering why this was not presented much earlier.

MR. SOMACH: Well, you know, we contend, number one, that this is merely an extension of the materials that -- we only had one -- let me restate that to say we had only one opportunity before the district to really introduce anything. And that was the materials that we presented at the time that we responded to the initial

alternatives work on these SCRDs that the district did. That's it. That's the only opportunity before the district that we ever had to introduce anything in the way of evidence. And then they issued a final order, and that was it. In that --

HEARING OFFICER GOLDSTENE: Mr. Somach, I'm asking why this wasn't submitted at that time.

MR. SOMACH: Well, much of this material was referenced in that document. This is an extension and a summary of a lot of that evidence.

Whether or not the specific words that Bill is using were in that document, you know, I suggest there is really three categories of materials that we're talking about here.

Number one, that which was word for word provided for in that material.

Number two, that which we put into the briefs that we submitted that have been objected to.

And quite frankly, we've continued to do work and much of that work is relevant. It's an extension of everything else that we've talked about and that, in fact, we attempted to put in the record at various times and quite frankly think you ought to be listening to this stuff.

But as I've said, if nothing else, we're offering

this information as an offer of proof because we think that the reviewing court will want to see this stuff because it is not only the nature, but it summarizes the nature and extent of the material we think you should be looking at this point in time in terms of your independent review of the issues that are before you.

HEARING OFFICER GOLDSTENE: Thank you.

MR. HSIAO: Forgive me. I understand I have a standing objection. I simply wish to add at this point an offer of proof requires a brief summary of the evidence offered and not this prolonged discussion we're being presented with now. If Mr. Somach would like to make that summary in five minutes, I would be happy to hear it.

MR. SOMACH: I will tell you this is a brief summary.

MR. HSIAO: If I could finish.

Otherwise, what's being done here is exactly the opposite to what Mr. Somach said would be done.

On June 1st, Mr. Somach sent e-mail to the Air Resource Board hearing and said, one, he agreed that today's hearing would be limited to the administrative record. And two, that nothing new would be submitted at today's hearing. Both of those representations prove my thoughts. So I understand I have a standing objection.

HEARING OFFICER GOLDSTENE: Yes, you do. So

noted. Thank you.

MR. VAN WAGONER: The photograph up on the screen up there is not new. It was taken in 1901. It's a USGS photograph entitled "South End of Owens Lake looking west of Olancha Peak Sand Storm in the Distance, 1901." There you have a picture of a dust storm before the aqueduct was built.

Great Basin has ignored the fact that the level of Owens Lake would have fluctuated normally in response to changes in hydrology with associated natural dust emissions. Additionally, Great Basin has failed to properly study and quantify other significant sources of dust in the surrounding desert environment.

There are numerous historic accounts of major dust events in the Owens Valley, long before the Los Angeles Aqueduct was placed into survey.

Next slide, please.

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MR. VAN WAGONER: Some of these are depicted on this slide. Newspaper articles dating back into the 1800s describing some pretty horrific dust storms.

Properly defining true background conditions, including the contribution of dust from Owens Lake itself under pre Los Angeles aqueduct conditions, is essential to determining the impact and extent of Los Angeles's water

gathering activities on air quality. Thank you.

MR. SCHAAF: My name is Mark Schaaf. Over the next hour or so, I will be addressing four major technical areas.

May I have the first slide, please?

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MR. SCHAAF: They are: The performance of the dust ID model; the deficiencies in the modeling process; the influence of off rate sources; and the justification or the lack of for setting the historical shoreline at 3600 feet. I'll start first with a discussion of modeling performance.

But before then, I'd like to say that the next hour or so is covering some very detailed topics. And I've kept -- to the extent I'm able, I kept all the details out of this presentation. And this is at a high level. Even though it's an hour, it is a brief summary. I think it would take days to present this information in its full detail.

So with that, I'll dive into model performance.

HEARING OFFICER GOLDSTENE: Can I just give you a time check, as a courtesy, Mr. Schaaf?

Used about 42 minutes so far of the hour-and-a-half here this morning.

MR. SCHAAF: I've been accused of speaking

quickly. And I will try this time, too.

HEARING OFFICER GOLDSTENE: You kept referencing an hour. I don't know how Mr. Somach wants to --

MR. SCHAAF: It's a lot of very detailed information and important. This is what is underlying the supplemental control requirements determination.

MR. SOMACH: Moreover, I think that he does a very good job of responding to arguments made within the briefing. And so I think that it is directly relevant to some of the concerns that have been raised.

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MR. SCHAAF: The dust ID model is the principle tool used by the district to identify new dust control areas on Owens Lake. The model actually is a process that involves mapping dust sources on the file, collecting data within those sources, calculating emission rates, and calculating the shoreline PM10 impacts.

The district uses this model to determine which areas to control on the Owens playa. For over ten years, DWP has shadowed the district in running the dust ID model. We understand very well the strengths and limitations of the model and have on countless occasions provided critical feedback on various expects of the modeling process.

The 2011 alternative analysis summarized our

concerns. Central to our concern is that the dust ID model has been used by the district in the past as a black box, generating output that the district takes at face value without providing additional critical review before making decisions.

In their opposition brief, the district stated the dust ID model is not the only basis for making the decisions. We disagree. Without the model, the district has no objective way to determine whether the admissive area exceeds the standards or not and therefore requires control.

Critical review must extend to the performance of the model. If the dust ID model is to be used at all, it must be reasonably fit for the task at hand. The model must be able to accurately predict the total shoreline concentrations, as well as the contributions for discrete source areas included in the model.

Both sides stand to gain by having an accurate dust ID model. The public gains by having the right areas targeted for dust control at the right control efficiencies, thereby ensuring rapid progress toward attainment of the federal standard. DWP benefits by having the right areas targeted for dust control also. No more, no less, ensuring that the public's dollars are being spent efficiently. If the model performs poorly,

both sides lose.

DWP evaluated the performance of the dust ID model in the 2011 alternative analysis submitted just more than a year ago.

First, I'll provide a bit more background and then summarize the results.

In July 2008, district and DWP staff met with a group of experts and agreed to evaluate the dust ID model using three specific measures of performance. These three measures are shown on the next slide.

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MR. SCHAAF: I'm not going to give any of the math or any of the detail descriptions behind these. We can if it's requested. I'll just simply state what they are and show you in the next slide what they look like.

The first one is called quantile/quantile plots or QQ plots. It's an unpaired test. I'll explain what that means in a moment.

There are two pair tests. First, XY scatter plots with regression statistics and fractional bias. The whole reason I'm presenting this type of information to you is to let you know, to really understand what the dust ID modeling does, you have to understand how the model performs. And the only way to get there is using statistics.

Next slide.

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MR. SCHAAF: The results that are shown here don't count as much as the format. Really, I'm trying to illustrate and put some life into these three measures.

The first one on the upper left are the YX scatter plots. Here, we have the observed PM10 concentration on the vertical axis. We have the model PM10 concentrations on the horizontal axis and the number of points which represent the daily average values, XY scatter plots. And we can refute statistics on the regression scatter points.

The next one to the right is called QQ plots. This has the same two axis. But in this case, these points are being arrayed in a different manner, which I'll describe in a moment. The lower left is the fractional bias plot. This statistical measure essentially tells you whether or not the model is biased either towards over-prediction or under prediction and by how much. And in this case, the fractional bias statistic is displayed against four classes of concentrations.

Next slide.

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MR. SCHAAF: Actually, let's keep it on this slide for a moment.

For many years, the district has relied principally on QQ plots to support their position that the dust ID model performs well. Again, that's this plot up here. QQ plots are constructed using unpaired data. That means that the maximum observed concentration is plotted against the maximum predicted concentration without being paired in time and space. So the two data points can be separated by miles or by months apart.

The second highest is then plotted against the second highest, third against the third, and so on until this entire line is built. And a model is assumed to perform well if the points lie within a factor of two difference of the diagonal. That's what those two outer diagonal lines show.

QQ plots have been used in EPA studies for validating stationary source models. However we're not validating a stationary source model on Owens Lake. The dust shores on the Owens Playa are not stationary. They move around in space and time.

The dust ID model is attempting to track those changes in time and space when it computes time and space emission rates. The emission rates are computed using a pair of observed and predictive PM10 concentrations at a particular location for a particular hour, day, and year.

And here's the upshot of that. Because the

emission rates are being computed on a time and space dependent basis, the model evaluation should also be performed on the same basis. That is, using paired data, paired in time and space. For this reason, we put greater emphasis on the two paired evaluations than on the QQ plots.

So how well did the dust ID model perform against these three measures? The results are summarized on the next slide.

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MR. SCHAAF: Here, on the first column on the left we see the three measures, QQ, XY, fractional bias, and the conclusions and details.

The QQ plots performed acceptably well, at least to the extent that the points lay well within a factor of two difference.

However, as I said before, Owens Lake is not a stationary source. They move around in time and space. And therefore, an unpaired statistic like QQ doesn't provide the best evaluation of the model. The other two are much better. Both of those show unacceptable results. They show, in brief, that the model has poor predictive capability, and that it's biased towards over prediction.

HEARING OFFICER GOLDSTENE: Mr. Schaaf, is that always the case? If you were doing this modeling in

different locations and comparing the three approaches, would you always get the same conclusion, in your view?

MR. SCHAAF: In this case, we evaluated all of the data for the period of time that was included in this supplemental control requirement determination. That is from 2006 through '10. How well it performed in the past, if that's what you're asking, I don't know. I can only address that period.

HEARING OFFICER GOLDSTENE: I'm just wondering if there is predictability in your conclusion with regard to the opinion you're rendering about the different --

MR. SCHAAF: I can only say that it did not perform well for that period of time. And we evaluated all of the on-lake data. And the next slide shows a little bit more information.

HEARING OFFICER GOLDSTENE: Go ahead.

MR. SCHAAF: That might help you understand how global this is.

MR. SCHAAF: Let's go ahead and turn to the next slide.

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MR. SCHAAF: What we have here is a summary of one of the paired test. These are the XY scatter plots. This is the summary for 2006 through '10.

In this plot, we see the monitoring of location

is showed in Column 1. Column 2 has the sample size, and this is the number of daily average concentrations that were used in the analysis at each point.

The R squared value is a measure of the percent of the variation in the observed concentration that's explained by the model. So the observed concentrations at a regulatory monitoring station. So the signal at that station varies. And the model tries to explain that variation, so the R squared really reflects the percentage of time that explains that variation.

The column in -- the last column -- if there is a "yes" in the last column, it means the slope of the line that gets fit to a scatter of points is significantly different from zero. If there is a "no" in the last column, it means that it is not discernibly different from zero and therefore there's no relationship.

So the first thing to note about this table is the number of no's in that last column. Seven of the nine monitors did not have a significant difference between the plotted line and zero. In other words, no significant relationship.

If we go up to the first row, Keeler, for on-lake sources only -- on-lake sources, not off lake R squared value was zero. The model had no predictive capability for on-lake sources at Keeler. We didn't include Keeler

Dunns, because we were only evaluating the performance of the model against on-lake sources. That's what DWP is responsible for.

Go down to the next slide, just explain a little bit more. Flat Rock, three percent of the variation in Flat Rock monitor was explained by the model, 97 percent was not. At Shell Cut, 99 percent was not.

In fact, we skip down to Lizard Tail, the only point at which the model performed well -- and I would say that it did perform well -- was at Lizard Tail. 57 percent of the variation was explained by the model. In this case, however -- there is a lesson here. In this case, the reason the model performed so well, it's located adjacent to a very large and active dust source.

All the other PM10 monitors that are shown up here, all of them, record dust from a variety of more distant scattered and short-lived sources on the playa. Under these conditions, the dust ID model performs poorly. Whatever is causing the PM10 concentrations to vary at the shoreline monitors, we know it is not being explained very well by the dust ID model. Many things could be going wrong. Either the model is not reflecting the complexity of the system, which is highly likely. No model actually gets it all right. You do it in varying levels of success.

The data are incomplete and unrepresentative. We know that to be the case. Even though there are more than 200 sand motion sites out on the playa, it's a very complicated playa and there probably needs to be more or should have been more.

Four sources are missing from the model. What some of the problems occurring, that's skewing the outcome. One example of this is not properly accounting for off-lake source contributions.

The bottom line is that the dust ID model is a very poor predictive PM10 concentrations and is biased towards over-prediction. Based on these results, the dust ID model can no longer be relied upon to tell us with confidence which areas to control or to assign the right control efficiency within the targeted areas.

Now I'd like to move onto the second major topic area, deficiencies in the modeling process. The performance results that I've just presented clearly demonstrate that the model is flawed. I've mentioned a couple of the reasons for this, but many others are possible. In this section --

HEARING OFFICER GOLDSTENE: Just out of curiosity, is what you're presenting peer reviewed? Or this work you did yourself? Who did this work?

MR. SCHAAF: I have a couple of colleagues here,

Kip Norville and Martin Schroder and we have a team in the company I work with. We have a collection of people. It's not just me and not just the three people here in this room from Air Sciences.

HEARING OFFICER GOLDSTENE: Was the work peer reviewed or evaluated?

MR. SCHAAF: It has not been peer reviewed. Occasionally, usually we're so busy working, we don't take time to present papers. But when we do and we are planning to, we do have it reviewed prior to presentation. But no, this has not been published in a journal and undergone peer review.

HEARING OFFICER GOLDSTENE: Thank you.

MR. SCHAAF: In this exercise, I'd like to highlight five major concerns with the model.

As pointed out in DWP's opening brief, the dust ID model is being used in an atypical and from a regulatory modeling standpoint, inappropriate manner.

Let me explain. In a standard dispersion modeling analysis, information on sources, receptors, and meteorology is gathered together along with an estimate of the emission rates and fed into a dispersion model to predict the pollutant effects of receptors.

In the dust ID model, the process has been reversed to back calculate the emission rates, not to

predict the forward source impacts. The source impacts are determined later in the spreadsheet. This process to back calculation emission rates is a form of model calibration, which the EPA clearly states is an unacceptable practice. Section 7.2.9 of the EPA's guideline on air quality models which deals with calibration reads in its entirety, and I quote next slide, please.

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MR. SCHAAF: "Calibration of models is not common practice and its subject to much error and misunderstanding. There have been attempts by some to compare model estimates and measurements on an event by event basis and then to calibrate a model with results of that comparison." Next slide.

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MR. SCHAAF: This approach is severely limited by uncertainties in both source and meteorological data, and therefore it is difficult to precisely estimate a concentration at an exact location for a specific increment of time. Such uncertainties make calibration of models of questionable benefit. Therefore, model calibration is unacceptable.

This statement describes precisely what the district is doing with the dust ID model. The model is

calibrated to force a match between the hourly observed and the hourly predicted concentrations.

The district argued in their opposition brief that the dust ID model is not calibrated because the hourly values are not being used to represent the emission rates and the 75 percentile are. This is only partly true. Taking the 75 percentile of the calibrated hourly emission rates doesn't change the fact that the model is calibrated, although through a lesser degree than if the strict hourly values are used.

Besides, the EPA rule doesn't say calibration must occur hour by hour. It says that attempts have been made to calibrate on an event-by-event basis and the dust ID model is currently being used to calculate event-specific factors.

At this point I'd like --

HEARING OFFICER GOLDSTENE: Mr. Schaaf, when did you do your -- do all this work? Is it recent work or done a while ago? Again, I'm going to ask you the same question that I asked Mr. Van Wagoner, which is if it was prior to the SCRD being finalized, how come this was not submitted?

MR. SCHAAF: All of this was done and submitted June 3rd, 2011, in the response to the preliminary order for control.

MR. SOMACH: This is material that, in fact, is in the record. It was talked about back and forth in the briefs. And that's why we're referring back and why he's referring back and forth.

HEARING OFFICER GOLDSTENE: It was discussed in the brief. I'll be very honest. As far as me to know what is new and what is not new, this is not new?

MR. SCHAAF: Not new.

HEARING OFFICER GOLDSTENE: Thank you.

MR. SCHAAF: The reason that the district is calibrating the model in this manner is to determine the emission rates. That's the reason it's being done.

Otherwise could have been devised to estimate emission rates. Perhaps they should have done this long ago, at least have a couple of measures. But the district essentially has locked itself into this one approach. This is not simply a matter of professional judgment or out of the box thinking. It is an unacceptable practice that has serious consequences for DWP.

The problem is that the back calculating values contain only the signal that represents the true emission rates, whatever they are. Nobody knows because they aren't being measured directly. But also a hodgepodge of modeling errors and uncertainties. These the same uncertainties that the EPA warned about in the passage

that I quoted above. These errors and uncertainties drive up the emission rates, which not only causes higher levels of dust control than would otherwise be required, but also raise the likelihood that the wrong areas would be targeted for control.

I'll provide one illustration of a modeling uncertainty that can lead to errors in the computed emission rates. By the way, at this point, I'll say that the emission rates calculated by the district are not really emission rates at all. They are the product of sand fluxes that are measured at points and an hourly proportionality constant, which is calculated and applied to give emission rates. And the district calls these hourly proportionality K factors. So from here on, you'll hear the word K factor a lot. This is that calibration factor. So this illustration deals with K factor errors caused by differences between the predicted and observed wind fields.

Next slide, please.

MR. SCHAAF: In this slide -- this is just an illustration of what's going on. We have a square emissive area here. Winds are coming from the north to the south, generating a dust plume shown here. There are two arrows on this figure. One is showing the direction of the true wind. This is the wind that the monitor sees,

and the other is the wind that the model sees. In this case, the two line up.

In our example here, the observation at this monitor, which is the red star, is 150 micrograms per cubic meter and the predicted is a hundred. So the K factor then is the observed over the predicted, 150 over 100 is 125. Now let's see what happens if the modeled wind field is different.

Next slide.

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MR. SCHAAF: Same emissive area. Now the plume is going off to one side. The observation at this monitor is still the same. It's still 150. But because now the plume is getting just -- the monitor is hitting just the edge of the plume where the concentrations are less, the model prediction is less. In this case, 150 over 10 is 15. K factor is 15. So in this brief example, we can see that deviations between true wind field and the model wind field can produce variations in the K factors.

Move onto the second of the five points. The district is operating a model that does not conform to the EPA's guideline or air quality models, which is a federal rule. This was pointed out in DWP's reply brief. The dispersion modeling engine inside the dust ID model is CALPUFF. CALPUFF is an EPA approved dispersion model for

long range pollutant transport. CALPUFF is being used to model near-field source impacts. By near-field, I mean distances of less than 50 kilometers from the source. However, CALPUFF is not the EPA recommended model for near field applications. AERMOD is. Nonetheless, the EPA allows CALPUFF to be used for near-field applications, but only if three conditions are met first.

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MR. SCHAAF: Those are shown here. First, a determination that treatment of complex wind is critical to estimating design concentrations.

Two, determination that the preferred model, AERMOD, is not appropriate or less appropriate than CALPUFF.

And three, demonstration that five criteria listed in the guideline air quality models have been adequately addressed.

To our knowledge, the district has not provided any of the required demonstrations and EPA has not approved the use of CALPUFF for near-field applications on Owens Lake. Therefore, the district is operating a model that does not conform to EPA requirements.

Third point, the district operates an extensive network of sand motion and aerometric monitoring devices on the Owens playa. The sole purpose of this network is

to provide inputs to the dust ID model. However, as pointed out in DWP's opening brief, the district does not have an approved quality assurance project plan, or QAPP, for the entire monitoring network. QAPPs are required in order to ensure the high quality of data being used in subsequent analyses.

The district claimed in their opposition brief they have covered under the ARB QAPP, which has been approved by the EPA. This is true, at least for the PM10 and the meteorological monitors in place on Owens Lake. As noted in the EPA's 2007 audit, the ARB QAPP does not cover all the data collection systems that are in place on Owens Lake and used for these SCRDs. It doesn't include the sand motion monitoring network, which consists of more than 200 censors and sand catchers scattered across the playa. It doesn't include the source delineation procedures that are used to outline emissive areas. And it doesn't include the shoreline camera network used to verify the locations of dust plumes during high wind events.

These network components play a crucial role within the process of identifying supplemental control areas in Owens Lake. And all are missing from the ARB QAPP. The district's failure to provide a comprehensive QAPP for Owens Lake to make it available for public review

and comment and to obtain formal EPA approval of the QAPP before starting the process of data collection is a major deficiency that calls into question the integrity of the entire Owens Lake data set.

And I'll go into a little more detail about K factors. This the fourth point. As we pointed out in the 2011 alternative analysis and in our opening brief, the data screening criteria and the dust ID model are inadequate and have introduced air and uncertainty into a process that is already fraught with much error and uncertainty.

The K factors computed by the district routinely varied by two to three orders of magnitude within a season and sometimes by that amount even within a single dust event and by orders of magnitude -- three orders of magnitude -- I mean going from one to a thousand. That much variation within a season or sometimes within a certain event.

This variation cannot be due solely to changes in the surface emission potential and the district has produced no evidence to show that it is. DWP believes much of this variation is caused by the same modeling uncertainty warned about in the EPA section on model calibration. DWP has long sought to impose tougher criteria as a means of reducing this variability and in

that way to improve the quality of the emission rate estimates. The district has been equally persistent in rejecting these requests, mainly on the grounds that stricter screening would eliminate too many "good" data points for use in determining the seasonal K factors. The district's logic the flawed. The purpose of screening is not to ensure an adequate number of data points. It is to ensure a high quality data set for use in later analysis.

Improvements could be made to many of the data screening criteria listed in the 2008 SIP. However, there are two major deficiencies in the dust ID model that require immediate attention. They are: Extreme to account for plume measure effects; and two, a method to screen to account for incoming PM10 concentrations. Plume measure effects are thought to be a major cause of the variation in the BACT calculated K factors as I illustrated in that earlier figure showing wind direction differences. A screen criteria would help to reduce but not eliminate this source of error. But despite repeated requests from DWP, the district has refused to implement a plume edge effect screen.

A much greater problem is the failure of the dust ID model to account for incoming PM10 concentrations. This is because it increases the computed K factors and falsely attributed the off-lake dust concentrations to the

on-lake dust source areas. The dust ID model makes the Owens playa appear more emissive than it really is because the off-lake concentrations are being added to the on-lake concentrations. The district claimed in their opposition brief that off-lake sources are already screened out of the model. This is only partly true, as I will show in the following two figures.

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MR. SCHAAF: In this figure, we have the outline of Owens Lake. This is a 3600 foot contour. Winds are coming from the north to south. And I've shown only three of the nine monitors, North Beach on the north, Dirty Socks and Shell Cut. The circles around each of those are to divide the directions into on-lake and off-lake directions. So the red hemisphere up here, North Beach, this is the storm coming the north, means that these are from the off-lake wind directions and all of these data get screened out at North Beach.

However, that same dust plume is going to be screened out of the record here, but it travels across North Beach, across the playa, and arrives at these downwind monitors where it arrives from on-lake wind directions. And therefore, it is admitted into the record and used in the analysis.

Next slide.

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MR. SCHAAF: This is the same thing in reverse. Again, you have a dust coming from -- dust storm coming from south to north. It's carrying in concentrations. Gets screened out at the upwind monitors, travels across the lakes, and admitted into the record at the downwind monitor.

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MR. SCHAAF: I'll give you a recent example of a southerly wind event like this.

On May 25th, 2012, only a couple weeks ago, there was a southerly high wind event that produced a 24-hour PM10 concentration at the Shell Cut monitor over a thousand micrograms per cubic meter. That's against the standard of 150. The one-hour maximum was 5,000. This dust was from off-lake sources.

DWP is not responsible for any of these off-lake emissions. The district should long ago have implemented a procedure to subtract the upwind concentrations arriving at the downwind monitors. But despite repeated requests from DWP to impose a screen or do this through a subtraction process, the district has refused to do so.

And the last of the five points. The district has also refused to implement other changes that might also improve the model. An example of this was the

district's refusal to implement the recommendations of an expert panel convened for the sole purpose of helping to improve the dust ID model. The 2006 settlement agreement stipulated that both sides would --

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MR. SCHAAF: -- work cooperatively with the participation of a mutually agreeable independent third party technical expert or exports in a good faith develop and approve dust ID. The Air Pollution Control Officer will implement all mutually agreeable changes for the dust ID program and notify the City in writing of those changes.

I worked with district staff to mutually agree on three members of an Expert Panel. The first expert panel meeting was convened in February of 2008. And then joint meetings involving DWP, the District, and the Expert Panel were held roughly once a quarter for the next two years. The expert panel produced two reports: A report of preliminary findings dated March 29th, 2010, and a final report dated May 10th of the same year.

The two reports contained a total of 33 recommendations, 27 of which dealt with ways to better understand or improve the dust ID model. The district and DWP reached mutual agreement on one of these recommendations, the use of five-minute modeling to better

resolve source impacts. There was varying levels of disagreement on all the rest.

From the beginning -- and I'm stating my opinion as a participant in these proceedings -- from the beginning, DWP has been motivated to improve the dust ID model because, like it or not, this was the district's chosen method for identifying new dust control areas. DWP worked for and had every reason to expect a better performing model. We lobbied very hard for more change, not less.

District staff, on the other hand, did not hide their feelings in these proceedings. But as far as they were concerned, the expert panel process was a waste of time and that the sooner they got back to businesses as usual, the better. And so it was.

There has been no discussion of refinements to the dust ID model since the last expert panel meeting which was held in May of 2010. And the dust ID model has undergone very little change from the version that was in use prior to the settlement agreement.

I'd like to move on and how are we doing for time?

MR. SOMACH: Just keep going.

MR. SCHAAF: The third section I'd like to talk about is the influence of off-lake sources.

HEARING OFFICER GOLDSTENE: You have about little more than 15 minutes.

MR. SOMACH: You're fine.

MR. SCHAAF: As I've stated already, DWP believes a major cause of highly variable emission rates and poor model performance is the district's failure to account for off-lake dust emissions. The 2008 SIP estimated combined emissions from all off-lake sources to be slightly less than 10,000 tons per year.

According to DWP's estimate, this figure is too low by a factor of perhaps four to eight. But whether the number is four or eight or two, the district is clearly under-reporting the off-lake emissions. This has two major implications. Number one, the Owens Valley planning area might never be in attainment, even if Owens Lake is 100 percent controlled.

And secondly, the off-lake dust is being falsely attributed to the on-lake dust source areas. The model has no way to screen out the incoming dust, unless those rules are placed in the model and they're not there. Right now, the off-lake dust is forced to be assigned to the on-lake dust source areas. The following table shows the importance of off-lake sources --

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MR. SCHAAF: -- during the years 2006 through

'10.

This table shows the ten highest 24-hour average dust concentrations from off-lake wind direction only. So here we have some dates. This is during the 2006 through '10 period. We have the off-lake 24-hour concentration, the off-lake maximum one hour, and the monitoring.

This is North Beach, Olancha, Shell Cut, Lone Pine, Lizard Tail. So a total of 42 day monitor combinations were found that exceeded the standard of 150 during this one period, 42 combinations. Only two of the days were removed from the analysis, and those are at DWP's request. All the rest stayed in.

On this list of the high ten, only the 21308 data was removed. All the rest stayed in, including this high -- these high values up here at the top.

Clearly, off-lake source are important. DWP believes all of these off-lake events should be designated as exceptional events and excluded from the record.

Now I'd like to talk about the last of my four topics, which is the historical shoreline. DWP has been ordered to control dust emissions below the 3600 foot elevation contour because the district assumes any emissions below this level resulted from DWP's water gathering activities --

MR. HSIAO: Forgive me, Mr. Goldstene. I have to

object. Now Mr. Schaaf as an air modeling expert is trying to talk about water levels. So he lacks qualification. Many of the points that are being made by Mr. Schaaf in his presentation are not in the administrative record. I'll enter my objection.

MR. SOMACH: Let me make a quick response --

HEARING OFFICER GOLDSTENE: Let me note the objection. So noted.

MR. SOMACH: All I want to say it is incorrect to say he's testifying as a witness. I have said he's summarizing the testimony. He's summarizing evidence that's either in the record or that we would have provided to the extent that we would be able to in an evidentiary hearing. In other words, he's not testifying as an expert. But he's arguing this. And I want to make certain that's consistent with what I've said all the way along.

None of this is evidence. It's argument. Some of it as an offer of proof; some of it coming right out of the record that exists.

HEARING OFFICER GOLDSTENE: Thank you, Mr. Somach.

Mr. Schaaf, go ahead.

MR. SCHAAF: The DWP has been ordered to control dust emissions below the 3600 foot contour elevation

because the district assumes any emissions below this level results from DWP's water-gathering activities in the early part of the 20th century. Is this true? And why 3600 feet?

The 2008 SIP contains only a single statement justifying the use of the 3600 foot contour as the historical shoreline. And that statement is as follows.

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MR. SCHAAF: I'm going to read in its entirety. This first slide will set the stage for what occurs on the next slide.

I'll read it: "In 1913, the City completed a freshwater aqueduct system and began diverting waters of the Owen River south to the city of Los Angeles. Demand for exported water increased as Los Angeles grew and diversions for irrigation continued in the Owens Valley mainly on City-owned property. These factors resulted in Owens Lake becoming virtually dry by 1930, its level having dropped to its current ordinary high water elevation of about 3,554 feet."

Next slide.

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MR. SCHAAF: And this is the upshot of that. A former or stranded shoreline was left behind at an approximate elevation of 3600 feet. This is the sole

justification that's in the 2008 SIP for setting the historical shoreline now called regulatory, but in the SIP historical shoreline at 3600 feet.

This passage, everything that I've read here, reflects a commonly held belief this the surface elevation of Owens Lake was somehow historically stable at 3600 feet and only began to drop when water was diverted into the Los Angeles aqueduct. This is not the case. In fact, there is no stranded shoreline at 3600 feet and no real justification for assigning the 3600 foot elevation as the regulatory shoreline.

Owens Lake is a closed system. It has no surface outlet. It's located in a desert environment with a climate that has varied greatly over time. The surface elevation of the lake has risen and fallen many times over the millennia, from its current low stand at 3,554 to its high as 25,000 years ago 3,760 when water last spilled over the sill and into the valley towards Ridgecrest.

Old shorelines are visible all around Owens Lake, both above and below the 3600 foot elevation contour.

Owens Lake has been dry several times in the last 1,000 years. In the year 2000, Lee and others published a study in the journal entitled -- this is a bit long -- "Climate Variability in East Central California During the Past 1,000 Years Reflected by High Resolution Geochemical

and Isotopic Records from Owens Lake Sediment." This is a study dealing with core samples at the depocenter that is the lowest point on Owens Lake. Core samples of sediments that have been analyzed for certain isotope ratios that tell them something about lake levels. And in the abstract of the paper states and I quote on the next slide --

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MR. SCHAAF: Wet climates prevail during AB 1220 to 1480. The point of this is to show the surface elevation variable and over a long period of time.

Wet climates prevail during AD 1120 to 1480, producing relatively large and deep lakes. Beginning about AD 1550, the climate turned colder, but frequently oscillating precipitation. Six wet/dry cycles with 50 year duration occurred between AD 1480 and 1760 during the later half of which Owens Lake became a playa.

HEARING OFFICER GOLDSTENE: Can I interrupt you for a second? I think this is fascinating and very interesting.

But my understanding is, and it was conveyed in the briefs, that as part of a settlement the level that you are explaining to us is fluctuating was agreed to at 3600 feet; is that not right?

So again, this is interesting, but I think you

already agreed to 3600 feet.

MR. SOMACH: See, again, I don't know that in agreement. Remember, an agreement has to have mutuality. And agreement has to have agreement --

HEARING OFFICER GOLDSTENE: It was a settlement, was it not?

MR. SOMACH: But it wasn't a consent decree. And the fundamental legal question, you know, I think you need to grapple with is whether or not an agreement can somehow supplant the requirements of the statutory provision that provides sole jurisdiction.

Let me give you an inverse example. If the agreement had been that the statutory or that the regulatory limit would be 3200 acre feet as opposed to 36. In other words, it would be one that would be very beneficial from the City's perspective. Could the district legitimately abrogate its statutory obligation and agree to something that would have that kind of an impact upon its regulatory capabilities? I don't think so.

You know -- and I don't think that the City could agree to something that would expose or to create jurisdiction beyond the four corners of the statutory provision.

As I say, the question of what that contract does

can't be looked at from the provision of just one provision in the contract. There are many provisions in the contract, and there has to be mutuality in terms of the benefits and bargains. You must look at the entire contract and take a look at it in context.

If the district believes that our view that you have to look at the actual levels of the lake in order to meet the statutory provisions, notwithstanding whatever may be in the agreement, is a breach of that agreement, as I said earlier, their proper remedy is to sue us for that. And quite frankly, if we were to lose that lawsuit, I assume they could plead that judgment into this Board as something that would bind us.

But this Board doesn't have the ability to make any legal determination on the contractual dispute that may exist between us and the district. And I think that inverse example gives you the exact kind of underpinning of why that would be entirely inappropriate for this Board to do.

HEARING OFFICER GOLDSTENE: Okay. Thank you, Mr. Somach.

Mr. Schaaf, continue. You've got ten minutes left.

MR. SCHAAF: Taken together, the body of available evidence shows Owens lake has not been static,

at least for any length of time. The history of Owens Lake is marked by changes in both surface elevation and area.

The next slide shows a brief history of the high and low water marks on Owens Lake.

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MR. SCHAAF: Here, we have the date in the left column, the elevation change, and then some notes on source attribution.

MR. SOMACH: Mark, let me interrupt you for a moment, because I want to actually -- because I got so caught up in the agreement thing.

I will say we contend -- because this goes to the actual question as opposed to what I responded. We contend there is no such agreement with respect to that level. There was an agreement to where monitors could be placed. And somehow that's been extrapolated into an agreement that's the "regulatory or historic shoreline."

That's why I'm so concerned about this Board going into contract interpretations because we contend we never agreed as they've characterized it and as they've used it that our agreement had to do with something else and that was a placement of monitors. That's quite different in our view than agreeing that that was the shoreline that ought to be utilized for the purposes of

regulation under 42360.

HEARING OFFICER GOLDSTENE: Okay.

MR. SCHAAF: Just explaining this table, in 1760, again this is from Lee, 250 years ago, the lake was a playa. And this is inferred from sediment core samples. And the elevation was somewhere around 3,554. That's the current high level -- ordinary high level mark now.

120 years later, we know that the lake level from an estimate was 3,597. This was a survey value. That's a rise of 43 feet. We don't know what happened in those ensuing 20 years. In all likelihood, the lake went up and down in response to climate, as it always has. We know in 1880 it was roughly 43 feet higher.

Twenty-five years later, due to drought and with irrigation demand in the valley, the lake level dropped 32 feet, down to 3,565. Seven years later, the drought had ended. But under the continued high irrigation demand, the lake had risen again 14 feet.

After that point, it started dropping slowly. And to reach this level of 3574, just before water diversions began to Los Angeles. And then after that, it dropped some more.

So the point of this slide is to tell you that even in the last 250 years, the surface level of Owens Lake has been anything but static. It may stay static for

a few years, but over time it's rising up and down and doing it naturally.

Another point to make about this 3,597 value that was surveyed in 1880. This was the historical high mark. Even though it's a survey value, it wasn't measured and surveyed. This is the only estimate.

The district rounded up the survey number to 3600. In the shallow bowl that is the Owens Valley, that three feet of vertical difference makes a big difference in the terms of the amount of exposed playa.

In responding to DWP's 2011 alternative analysis, the district argued that the 3600 foot elevation was used because their 1997 modeling analysis demonstrated that without the L.A. aqueduct the lake would have risen to that level for a six-year period in the 80s, the early 1980s. However, this ignores the fact that for the previous 250 years or more, the lake level was consistently and naturally lower than 3500 feet.

It also ignores the fact that in the same modeling analysis showed the lake levels dropping again after it reached its peak in 1987, dropping by a total of 16 feet in the five-year period, all without the L.A. Aqueduct.

LADWP believes that the most representative shoreline in Owens Lake is the October 1913 shoreline.

This is the elevation that occurred just before water diversions began in the Los Angeles aqueduct. And it is also the most reliable premised on measurements and not model predictions.

The next figure shows the October 1913 shoreline of 3,574. So this is -- the dark line again is the 3600 foot elevation contour. And this -- beginning the margin of this blue shaded area which represents water is the 3,574 foot elevation contour. This was the contour elevation that occurred in October 1913.

HEARING OFFICER GOLDSTENE: Let me give you a two-minute warning. I don't know how you want to.

MR. SCHAAF: I'll just make it.

HEARING OFFICER GOLDSTENE: Mr. Somach, when we come back from the break, I don't know if you'll want to continue this or allow the district --

MR. SOMACH: I'm going to think about that during the break, if I can do that.

MR. SCHAAF: Okay. This slide also shows the control areas above and below the shoreline. These are the red shaded areas here. Merge them all together, this is Phase 1 through 8. Doesn't include the area that was in this 2011 SCRD. This blue globby area is the middle is the brine pool and other perennial non-emissive area.

Of the area that's been controlled or committed

to be controlled, which totals 45 square a miles above the shoreline, is nine square miles above the shoreline. This is nine square miles that would have been naturally dried emissive without the aqueduct. In Phases 9 and 10, there is a total of 1.9 square miles above that shoreline and 2.83 square miles below the shoreline. So the nine square miles -- these nine square miles here shown in the dark red more than offsets that 2.83 square miles that is in the order below the shoreline.

So with that, I'll turn the mike over to Carol Denardo who's going to present some more information.

MR. SOMACH: If we can take a break.

HEARING OFFICER GOLDSTENE: I think we should take a break. I'd like to take a 20-minute break. Let's come back at five to 11:00. And then we'll pick up from there.

Mr. Somach will make a decision about whether they're going to continue to use the balance of your time or have the district make their presentation. Take a break.

(Whereupon a recess was taken at 10:34 a.m.)

HEARING OFFICER GOLDSTENE: All right. It's 11:00. And the court reporter is ready. So we last met Mr. Somach was going to decide how he wanted to use the last 30 minutes and 30 seconds.

MR. SOMACH: Oh, well that makes a world of difference. I wish you would take another quick break.

HEARING OFFICER GOLDSTENE: I just looked more carefully at the clock.

MR. SOMACH: What I decided to do, I want to take about another five minutes. I want to preface by saying this is testimony -- that this is not testimony. This is an offer, purely an offer of proof. We think this is the type of evidence that the Board would have been benefited by if you decided to hold an evidentiary hearing rather than doing the whole presentation because I'm concerned about time and also concerned about the objection that is continuing. We've got this down to like five minutes.

So that's what I'd like to do and then stop at that point. And whatever time we have remaining, I'll then reserve for any rebuttal I might want to do.

HEARING OFFICER GOLDSTENE: Do you want me to tell you --

MR. SOMACH: I don't think it will take more. If it takes more, it's fine. I will reduce my rebuttal.

(Thereupon an overhead presentation was presented as follows.)

HEARING OFFICER GOLDSTENE: Will you introduce yourself and speak clearly into the microphone.

MS. DENARDO: I'm Carole Denardo with Garcia and

Associates.

Garcia and Associates archeologist excavated and evaluated 73 archeological sites within Phase 7A of the dust mitigation project at Owens Lake. Gander recommended eleven archeological sites qualify as California registered historical resources eligible resources. Evaluative testing revealed these sites contained dense and tech primary cultural deposits that have yielded information important to the pre-history of local areas and California under Criteria 4.

Three sites exhibit association with events and patterns of events that have made a significant contribution to broad patterns of local and regional history and the cultural heritage of California under Criteria 1. Namely, the Owens Valley Indian War of 1861 to 1867. This map shows the distribution of ethnographic artifacts associated with the Indian war and their elevations along with color coded photographs.

So just to show you, muscat balls are in red. Bullets are also in red. And all of these date to the 1860s, as do the gun flints that are indicated in yellow.

Also projectile points are the blue dots throughout the area. There is a copper bracelet up here. We also had a thermal feature which is located right here at the 3,750 elevation. And rock cairns, which are

indicated by green dots. Most of them are between 3590 and a little bit below 3580.

HEARING OFFICER GOLDSTENE: Can I just ask historically in the California Indian war, which is what you're talking about, was this a known battle field or is this -- have you connected to actually a documented battle?

MS. DENARDO: Yes. And plus, there have been oral interviews with Native Americans.

MR. SOMACH: That would have been the rest of the presentation.

MS. DENARDO: Exactly. So artifacts represented on this map are all located between an elevation of 3,560 and 3,591 feet, which is a lower depth than presently indicated as the historic shoreline.

In particular, bullets, gun flints, and projectile points range between 3,560 and 3,580 feet.

Next slide, please.

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MS. DENARDO: The thermal feature that I pointed out right here, as indicated on the map, comprises a cluster of melded sandstone and cobbles measuring about 1.25 meters square and located at an elevation of 3,571 feet, which using the 3600 foot historic shoreline would have meant that this thermal feature, which is basically a

fire pit would have been underwater.

Archeologists recorded one milling stone slab with the feature and the excavation of the feature demonstrated the burn rocks continued for a depth of approximately four inches below the ground surface, suggesting this was a fire pit.

And then the other thing I wanted to talk about are the rock cairns. And rock cairns are groupings, mounds of rock that were found within elevations of 3,580 to 3,590 feet. There was one outlier in 3,610 feet. They are basically oval, circular, or oblong shaped with beach gravels. They're mounds, beach gravels and other types of stones. And they range in size from 25 centimeters to one meter in diameter.

And there appears to be speculation that these are, indeed, cairns to mark the burial locations of Native Americans who perished in an Indian war battle. And U.S. Army records document a particular battle along Owens Lake that corresponds directly with the physical evidence that we found.

HEARING OFFICER GOLDSTENE: Okay. Thank you. Where are these artifacts found in relationship to the SCRD that we're here about?

MR. SOMACH: Why don't you put the -- you've got it. And either Bill or Mark, can you assist?

MR. VAN WAGONER: We need to be a little bit careful because of the confidentiality of the type of information. We can't tell you exactly where it is. But what we can tell you is that some of the Phase 9 and 10 areas directly extend. They're immediately adjacent to the site where this battle field was.

MR. SOMACH: And I just wanted to make clear that again, this is the kind of evidence we think that the Board should take evidence on. And I hope you'll reconsider again, as I've said before, and do so.

It relates to two things, of course. And one is the elevation issue. These things are not associated with underwater activities, like fire pit. Doesn't get built underwater.

And the second thing is the cultural resource issues. Those are issues that the City has to grapple with, both in the context of CEQA as well as other cultural antiquity statutes and so forth. And those are the things that the district is taking into consideration as it issues the orders. That was the purpose of doing that.

Do you want to try to be more specific on that or do you want to pass it by?

MR. VAN WAGONER: Again, I don't want to point to exactly where than that map is.

MR. SOMACH: You realize the problem is those exact locations under the law really can't be disclosed because of the nature of archeological and cultural what they are.

So we've depicted them in their approximate locations. So the problem that they're grappling with here is too being too precise for those purposes. Why don't you generally show.

MR. VAN WAGONER: On that map you're looking at right there, the area of the Indian war -- I'm not going to point to it -- is immediately next to one of the areas under the supplemental control order. Immediately next to it.

HEARING OFFICER GOLDSTENE: Okay.

MR. SOMACH: Didn't help very much.

HEARING OFFICER GOLDSTENE: Are you --

MR. SOMACH: We're done.

HEARING OFFICER GOLDSTENE: So you have about 22 minutes left for rebuttal.

MR. SOMACH: That's fine.

HEARING OFFICER GOLDSTENE: Thank you. All right.

District's turn. How much time do you want to use for your presentation?

MR. HSIAO: Why don't we take us to noon and then

take a break at noon and decide if we are finished or whether we have a little bit more.

With that in mind, can I take a moment just to set up our slide presentation and I'll have some handouts.

HEARING OFFICER GOLDSTENE: We're ready. Go ahead and introduce yourself and please proceed. Thank you.

MR. HSIAO: Mr. Goldstene, Hearing Officer team, my name is Peter Hsiao from Morrison and Foerster. It is a great privilege of mine to appear today to represent the Great Basin Unified Air Pollution Control District.

I think the place we'd like to start is we'd like to start with data and the data that's in the administrative record. What you see that are on the slides before you is one piece of that data. It's a photograph that's taken of one of the dust storms from the Owens Dry Lake Bed. The Owens Dry Lake Bed it's undisputed is the largest source of particulate air emissions in the country.

And Great Basin picture that you're looking at is a demonstration of one of those storms. You can see this happens during the period of a supplemental control requirements determination. And to help you orient yourself, the picture shows from left to right a space of about six miles long. There is a wiggly line that goes

through the middle. That is the California Aqueduct -- the L.A. Aqueduct. And then slightly to the north of that, somewhat obscured by the dust, you can see a four lane freeway. That's the freeway Highway 395 that passes by the lake.

So this gives you some idea of the scale of one of the dust storms. This is just one of hundreds of thousands of pieces of site-specific data that make up the bulk of today's administrative record. There are photographs. There's time lapse video. There are measurements. There's meteorological data. There's personal observations. There's GPS mapping. There is a wealth of data that demonstrates that there are emissive areas of the lake bed that require control.

None of that data is contested by the city in their briefs or in their presentation.

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MR. HSIAO: So we have this large data set. And who's doing the analysis of that data? The people that are doing the analysis are the Great Basin staff. And we introduced them a little bit earlier in the day. The Great Basin staff have between them more than a decade's worth of percipient experience. They've analyzed the lake bed. They've looked at the soils. They've looked at the

weather. They've looked at that PM10 concentration. They've designed means to measure it, means that didn't exist when this process started. And in large part, they did that in cooperation, not just with all of the other regulatory agencies, with the ARB, with the EPA, but also with the Department of Water and Power. The Great Basin staff is the world's leading experts on the Owens Lake Bed and on PM10 emissions.

Now consistent with the City's failure to contest any of the site-specific data, there is not a single expert and not a single person from the City in the record that is attesting to their personal observations of what's taking place on the lake. And that is the record that forms the substantial evidence for today's appeal.

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MR. HSIAO: So we have the data. We have the people who are interpreting that data. The heart of this appeal is how will you apply the data to make the supplemental control determination. And on this, the City has an inconsistent position.

In the proceedings before the district, the alternative analysis submitted by the City stated that a rejection of the State Implementation Plan of the dust control strategy and the procedures that are embodied

within that State Implementation Plan, but there is an evolution in that thinking.

So in the last brief that the City filed in these proceedings, the reply brief -- and we quoted here because we want to be precise about what the City is saying. "The City takes the position that they are not, as part of this this appeal, challenging the entirety or any specific provision of the 2006 agreement between the parties or the 2008 State Implementation Plan district order."

The City goes on to directly quote the settlement agreement that they will support and will not appeal or in any other way challenge that 2008 State Implementation Plan. And so what we have here is a powerful duality. There is both a settlement agreement and there is a District Board order. And I want to talk about those individually.

So next slide, please.

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MR. HSIAO: I apologize for the denseness of the slide, but there is a lot of discussion about this without the context without the specificity. And I think that context and specificity is important.

So looking at the 2008 agreement which the City does not challenge, there are three provisions I'd like to focus on.

The first provision is the specific contemplation of this very proceeding. The parties in 2006 talked about a future appeal under Section 42316 and stated that for that appeal the City may take the appeal, provided that there would be a final resolution of certain issues that were talked about between the parties in 2006.

And then the agreement goes on to talk about what are those issues that were given a final resolution. For those issues, they include the provision and determination, the measures and procedures that were written into the agreement. They shall be deemed valid and reasonable, the exact test that's used for Section 14316 and the City stipulates they will not challenge both provisions in this proceeding or any other proceeding.

The last part of their agreement was that if they do challenge the supplemental control determination, they would only use data that's new and not data that existed at the time of the agreement.

HEARING OFFICER GOLDSTENE: Can I ask you a question?

MR. HSIAO: Please.

HEARING OFFICER GOLDSTENE: You're stating in your argument that the City is not disputing the agreement, although I think Mr. Somach may be is disputing the agreement. I'm trying to make sure I understand if

that's the case. Mr. Somach, is that right?

MR. SOMACH: What I'm disputing -- you know, an agreement has two sides. And what we are -- in essence, we're saying two things.

Number one, they've misconstrued what's in the agreement in the context of what is being argued. And one example I gave you was this elevation of shoreline.

And secondly, it takes two sides to have an agreement. We think that they have not adhered to many of the things that were assumptions in the 2006 agreement and thereby putting us in a position where they are trying to argue you're bound on one hand, but we're not bound on the other hand. So as a consequence, we are questioning the validity of the 2006 agreement in that context.

HEARING OFFICER GOLDSTENE: Thank you. Go ahead.

MR. HSIAO: And this of course, explains my first slide about the City's inconsistent position. They're going to go back and forth on this issue. So remember their reply brief says we do not contest the settlement agreement or the 2008 SIP. We just looked at the settlement agreement. Let's look at the 2008 SIP.

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MR. HSIAO: The 2008 SIP adopted all of the operative provisions of a settlement agreement into a district Board order. And three of the provisions I want

to talk about now. One is the definition of the regulatory shoreline.

Now, I challenge you -- and our slides are quite careful to tell you exactly in the record where you can find the information as opposed to the City's submissions that have no record signs.

So if you look exactly at our record site, you are not going to see a single word about where monitors are placed on the regulatory shoreline. What you are going to see is a definition this shall be the shoreline. Shoreline shall be defined as 3600 feet above mean sea level. So interesting attempt to create ambiguity. There's absolutely no ambiguity in this agreement. It's so plain what the parties agreed to on regulatory shoreline.

But there are two other provisions. There is Attachment B, a step-by-step procedure for exactly how the supplemental control determination is goings to be made. And there is Attachment C, the Dust Source ID protocol, which contains the CALPUFF model, exactly the presentation that Mr. Schaaf was discussing. So the parties agreed to how it would be done and the tools that would be used, the measures, the procedures, and the model.

Now, here's where that powerful duality comes into play. Mr. Somach talked about, well, it's an

agreement between the parties; that the Air Resources Board should not get involved in. But it's more than that. It's both an agreement and a District Board order operative as law. If there is any doubt about the fact it is operative as law beyond a settlement agreement, we can resolve that with the next slide.

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MR. HSIAO: In 2011, the City was coming to the district because they were late in installing the control measures on Phase 7 of their work on the Owens Lake Bed. So the parties entered into yet another settlement agreement. In this agreement, the first provision finding of fact number three confirmed that each and every provision we just talked about step-by-step procedure, the use of the model, the regulatory shoreline, was operative law. And was operative law that was adopted both as part of the 2008 SIP and adopted as part of the Coso Junction planning area SIP.

I'm going to come back to that later in this presentation. You can see again we put the exact words of the Stipulation that the City agrees this order requires them to take certain steps. Then if you look at order paragraph number 14, there is a direct agreement that the supplemental control determination will take place this year and it will follow those procedures -- precise

procedures we just talked about.

And then if you look at order number 19 yet again, the City waives and agrees not to challenge those procedures in a Section 42316 proceeding.

Next slide please.

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MR. HSIAO: Here's their signature page that shows their signature to this from the general manager and from their counsel. So there is no ambiguity about what the terms mean. It's perfectly clear what these terms mean.

So this is the import. The import of this is there is an agreement and existing law. Even if Mr. Somach can renege on his agreement. He cannot walk away from existing law. And that existing law binds him and binds the City as well. Binds the City and binds the district as well.

I think we'll see that in the next slide. This is again from the City's reply brief. Their section heading on Page 4 is the district must follow the law. We absolutely agree the district must follow the law.

In the 2008 SIP and the 2006 settlement agreement, first, there is an express provision that the supplemental control requirement determination will be made. And in paragraph 11 exactly the procedures, the

measures, and the model that will be used in order to make that determination. It's going to be the procedures in Attachment B. It's going to be the measures and models in this Attachment C.

So I would suggest a friendly amendment to the City's brief. The district and the City must follow the law. The 2006 agreement, and the CARB procedural orders which have been repeatedly violated in today's hearing. Next slide, please.

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MR. HSIAO: So if the district and the City must follow the law, then we look at paragraph 10A again in the SIP and the settlement agreement that this Air Pollution Control Officer is bound. He shall issue a supplemental control requirement if those steps and those procedures give you that answer. So this Air Pollution Control Officer has no discretion on that point.

There was both the duality of an agreement and the law that compels him to issue that order. The City, of course, if we looked at that settlement agreement, they can challenge this order if he doesn't follow the procedures. But that's not what this appeal is about. This appeal is about the City saying those procedures don't apply at all. And that's where they're going to fail in today's appeal.

Next slide, please.

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MR. HSIAO: What we've done is created a summary chart. And the summary chart shows those issues on the left-hand column that the City has raised in their brief.

The next column shows that each of the issues they've raised goes to an issue that's already settled the 2008 SIP order.

Let's recall the procedure about the 2008 SIP order apart from the agreement. Section 42316 requires within 30 days that the City make an appeal of the measures, the models, and the procedures that were in the SIP order.

Within 30 days of 2008, no such appeal was taken. In fact, pursuant to their agreement the City supported the adoption of the Board order and the 2000 SIP order. So their time period to challenge under 42316, four years too late to bring the challenges they're trying to bring today.

The next two boxes show how the City has not complied with the rules set by the Air Resources Board to limit their arguments to those that were raised before the district in the first instance. And instead, are being forwarded with extra record arguments.

I think this repeated mantra that there was no

hearing, that repeating it doesn't make it true. The City had fair warning and in fact agreed to the provision for exactly how their evidence would come before the district. It would come in response to a preliminary supplemental control determination.

And every opportunity was given to the City to put in Ms. Denardo's information, Mr. Schaaf's modeling effort, Mr. Van Wagoner, that testimony that he gave today. There was no need for an offer of proof. This added information should have been put in the administrative record and considered.

The fact there wasn't -- there's only one party responsible for that, and that's the City. It goes beyond that, beyond the fact they didn't put the evidence in before the district. They haven't complied with the Air Resources Board rules. Those rules and the first procedural order required motion to be filed by February 1st to amend the record with all of this new information. No such motion was filed and their briefs are silent as to the reason why.

The first procedural order goes onto state that the City shall not refer to any declaration or any argument that was not previously approved by the Air Resources Board and they've spent the entire morning on this hearing doing exactly that.

So next slide, please.

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MR. HSIAO: We put all of their arguments on two pages so there can be an overview. But we reiterate the same point that the City has made that the City and the district must follow all of the rules. They have to follow the agreements, the rules, and the Air Resources Board rules.

All right. Let's go ahead and go to the next slide.

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MR. HSIAO: We think that this structure pretty much brings an end to this appeal we're going to address the rest of the arguments that we see in the City's briefs for the sake of completeness.

But as a matter of law, we just don't think the Air Resources Board ever gets there because of the bars that have been raised by the prior proceedings in this case, not just their agreement, but the bars raised as a matter of law. But let's go through anyway for the sake of completeness.

So first we ask this question: As the City goes back and forth, why are they reneging on the agreement, despite their pleas to the Air Resources Board not to consider this issue?

There's been 15 years of cooperation between the parties. And during those 15 years starting with the initial dispute in 1996, leading to the first agreement in 1998, there was an agreement precisely to measure the regulatory shoreline at 3600 feet and to monitor for exceedances at that point. What if the parties had measured closer to the center of the lake bed and gotten their monitors closer to the source of PM10 air emissions? This negotiations was for the City's benefit to put the regulatory shoreline at a fixed location and their pleas now are inconsistent with both their objectives and with their statements.

In 2003, the parties agreed to a jointly developed air model that's being attacked today, the CALMOD. The model was being adopted in the 2008 SIP with no objection from the City. It was adopted because the City supported the model until their position has changed today.

Then we have a series of other agreements, the 2006 settlement agreement, the 2008 SIP, the 2011 stipulated order for abatement. Through all these agreements, progress has been made. The City has committed to control about 45 square miles on the lake bed, seven of those phases have been successfully completed, about two phases in progress.

When the 45 square miles are in place, there will be a 96 percent PM10 in pollution reduction. But more needs to be done. There are still exceedances of the federal and State standard at the regulatory shoreline. The implementation of the 2011 supplemental controls will result in a reduction of additional 6800 tons of PM10 air pollution per year. Again, at the largest source of PM10 air pollution in the country.

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MR. HSIAO: So what we're going to do now is going through each of the City's arguments. I'm going to go through them pretty quickly.

We think we and the Air Resources Board staff have thoroughly discussed these issues in our brief. But I would like to talk about them just in overview.

First, the City raises an argument which Mr. Somach started with today that they have contested the jurisdiction of the Air Resources Board and the district for the last 15 years. They've lost every one of those challenges. And there's two reasons why.

One, their challenge today is postured as a Clean Air Act challenge. First, as a matter of State law, Section 42316 expressly gives the district and the Air Resources Board the authority to make the City of Los

Angeles responsible for particulate air emissions that are caused by their diversion of water.

Now, when Mr. Somach tells you I can't understand why that statute is written the way it is, every other court that has considered this issue can understand it. It's very straight forward. The air pollution caused by the water diversion has to be mitigated by the party that's diverting the water. So 42316 gives express statutory authority to the State.

But more so -- and this is a point that we think the City has not paid enough attention to -- more so, these rules are federally enforceable under the Clean Air Act. All of these rules and the State Implementation Plan in the Board order have been copied verbatim into the Code of Federal Regulations and into the Federal Register as part of the maintenance plan for Coso Junction.

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MR. HSIAO: So what we have is record sites for you and legal sites for you. 75 Federal Register 54032 and 40 Code of Regulations Part 52.220. Verbatim word for word adoption of the three points I raised before. Where the regulatory shoreline is, step by step procedure that's going to be used to make a supplemental control determination, and the model the Dust ID protocol and the

use of a CALPUFF model. So it has been federalized.

If the Air Pollution Control Officer was going to make a decision that's at variance with those rules, that would require a SIP revision. So what we have is every agency that has considered these procedures has unanimously supported them: The district, the Air Resources Board, the United States Environmental Protection Agency, and most importantly, the City and its Department of Water and Power. And a meaningful time at a meaningful place, they have also supported the adoption of these rules with the force of law. And that's what our challenge is going to show today.

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MR. HSIAO: We talked enough about the regulatory shoreline. This has been adopted multiple times at multiple agreements. I can cite five of those, but I think I already have. Every time, I talked about where the regulatory shoreline would be.

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MR. HSIAO: We talked a lot about Mr. Schaaf's modeling attats. Part of the problem with his attats is they're not presented to the district. And I know the Executive Officer had difficulty ascertaining which part

of this is new and which part of this was a proffer of evidence. But the fact of it is when you look closely at the record, these discussion about CALPUFF were first presented on appeal. They don't appear in the alternative analysis that was presented to the district.

Again, to the point, these allegations about the modeling should have been brought in 2008 when the City supported the adoption of Attachment B and Attachment C which have precisely this model and precisely this protocol.

Now I appreciate the fact that Mr. Schaaf is bringing these arguments now because he's directed to bring these arguments now. But there's really no excuse for those arguments not to have been brought at the proper place at the proper time. And there is no reason they're not barred by the 30-day rule of Section 42316 from having those arguments heard today.

Some of these other arguments, it is interesting -- and I do think this is one of the most interesting parts of a technical debates. We have lots to say about the technical presentation of Mr. Schaaf. But I just don't think this is the proper forum for it.

One of the things we're going to do when we take our lunch break is ask whether or not the Executive Officer or his team wants to hear those thoughts. If they

do, we'll come back after lunch and go point by point and give our response. We don't think that data has been presented fairly. We don't think it's been presented accurately.

Recall again the beginning of my presentation. The vast majority of this administrative record is comprised of site-specific data, meteorological observations, data collection, none of which is being contested. There are lots of other tools that are being used other than the model to identify the supplemental control requirement determination area.

And then finally, I want to turn to the expert panel peer review. It is kind of interesting that the City and Mr. Scaaf's presentation showed the settlement agreement and said this settlement agreement should apply to the parties. Whereas, the rest of the City's presentation says you shouldn't consider a settlement agreement. So this sort of inconsistency of moving back and forth is something we've seen throughout this appeal.

But here is the fact, the take-away fact that expert panel review was agreed to by the parties. They did agree to try to improve the modeling that took place. If you look closely at the exact language Mr. Schaaf put up on the screen, it's only by the mutual agreement of the City and the district that one of those procedures were

changed. None of the points Mr. Schaaf raises about the Dust ID Model were accepted by the expert panel. The expert panel didn't say your modeling predicted the capacity is zero. They said exactly the opposite. They said using this protocol has been highly successful in reducing dust emissions and their associated on shore impacts.

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MR. HSIAO: In fact, the district and the city developed this action as Mr. Schaaf talked about of items from the expert panel to take action upon. It was the City that stopped talking, not the district. If you look at the time period in which the City stopped its discussions, it's right around the time that the City moved away from a stipulated order of abatement to the position they submitted in their alternative analysis.

So in meeting was set on February 2nd to discuss improving model performance, making changes in the dust ID protocol to get to consensus and work together with the City the way the parties have for 15 years previously. And it was the City that walked out of the meeting and thereafter refusing to discuss those changes suggested by the expert panel.

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MR. HSIAO: Even without the SIP, the district implemented the changes they could remember. That provision in the agreement requires mutual consent to change portions of the agreed-upon protocol. And without the City's participation, some of these items along the asterisk couldn't be agreed upon. But the others that didn't require the City's agreement were all adopted. And so for the City to say the expert panel recommendation were rejected is completely false. It's exactly the opposite. And again, we provide an exact record site where you can see the evidence of that.

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MR. HSIAO: Now, one of the things that the ARB staff report and the district brief talks about is it talks about this very complicated idea of model performance. In the alternative analysis that the City submitted when the district came out with its model, the City ran its model, their assumptions, their methods, their data set. And what they came up with is a larger area for control on the lake bed than the district came out with.

So all of the assumptions that are being drawn by the City and their modelers to support their arguments

come up with, one, areas that require control. And two, a larger area of control than the districts model.

Now why is that? The district's model, if you just ran the model, the district model came out with about 4.9 square miles of control required on the lake. That's pretty close to 4.16. But then what the district did was they went through and they culled that set down with all of the other evidence that we talked about that's in the record that's uncontested by the City. All of the video, all of the observations, all of the GPS mapping, all of the personal observations of what's happening on the lake bed to pick out only those areas where there are multiple days of exceedance, where there is multiple cross corroborating sets of data that show that that's an area that's causing an exceedance of the federal standard. And by picking up only their strongest areas, they reduced their model from 4.9 down to 2.86.

And that is why fundamentally the City cannot and does not contest most of the data that appears in the record, because only the strongest data sets are being presented for the supplemental control requirement determination. And every time the City raises some argument, the argument is presented in hypothetical. Well, it could be background sources. Well, it could be construction impacts. And all they had to do was come to

the meeting and present the information that they had or come with their alternative analysis and say on this particular part of the lake bed, it wrong. We have documentary evidence. We have photographs. We have personal observations that says that lake bed was not low or that dust wasn't causing an exceedance.

And I think it's really striking that this record has zero -- zero evidence presented by the City of any particular area where the district got it wrong. And why is it zero? Because the district used a stipulated legally required step-by-step process to come up with where the controls would be and they supported that with an overwhelming data set. And that's how they got to 2.86.

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MR. HSIAO: Mr. Schaaf talked a little bit about quality assurance program. I think both ARB staff and the district identified this argument was never presented to the district. And in fact, there is an approved QATP program. Parts of it, as Mr. Schaaf said, are approved through the ARB program. And part of it is approved through the federally approved Coso Junction maintenance plan where EPA approved every element of the procedures, the methods, and the monitoring that are used in the 2011

SCRD.

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MR. HSIAO: Now we're just down to blaming somebody else. So the City's arguments are looking for a way to say that our emissions from our water diversions should be a responsibility of somebody else. Let's look at one of those arguments. An argument that there are natural or exceptional events that are taking place, and we shouldn't be required to control for those natural or exceptional events.

I want to be clear about this. As Mr. Somach says, we are all big boys here. These are sophisticated agencies. The district is one of the most sophisticated agencies I've ever had the privilege of working with. The Air Resources Board is one of the most sophisticated in the world. I think all of these agencies are able to discern what is a natural event, what is an exceptional event, and what is an event being caused by water diversion, the policies that's been applied.

There is not a single agency, not the EPA or any of the others that have accepted this argument about natural or exceptional events. And the reason why is quite simple: A natural or exceptional event has to be beyond their control. Not man-made. All of their events

are man-made. It is their water diversion that's causing the excess particulate PM10 air pollution at the lake bed. And none of their evidence, not only in this administrative record, but in any other record they've submitted has ever demonstrated the contrary. So their plea these are natural exceptional events have generally been rejected, and I should say more than generally uniformly been rejected.

There was an argument that the district is failing to screen out background concentrations. And again, there is a process. If you look at Attachment B and Attachment C, of course, when the parties agree to a protocol for when you would decide to control, of course they thought about background concentrations. And of course, they put provisions into the agreement to not take key factors that were built on days of high background concentrations to look at upwind monitors and take out high background concentrations.

And again, remember, this SCRD appeal -- this 42316 appeal, all the City has to do is put the evidence before you that we blew it, this data is wrong. That we didn't take break down concentrations into account and that will take some area of the lake bed out of control. Zero. You have zero evidence of that on any given day. Any day that the City can find high background

concentrations, there is ten other days where there's no background concentrations and that are is still causing an exceedance of the federal standard. That's because that's exactly how the protocol works. The district picked only the strongest cases with multiple piece of corroborating information to decide when the City would need to control.

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MR. HSIAO: This argument is -- I shouldn't speak for the State Lands Commission. I should allow them to speak for themselves so I will simple say this argument is meritless. Section 42316 directly makes the City responsible for air emissions caused by their water diversion. The fact that the State Lands Commission is the owner of the underlying land is argument that has been rejected multiple times.

Again, the City's position here is inconsistent on at least two -- and I would say three different occasions the City has directly accepted their responsibility for air pollution control. First in stating their intent to cooperate with the 2006 settlement agreement which Mr. Somach now tries to walk away from and in another letter as late as June of last year in the middle of the process before the district stating that they acknowledge their commitment to 42316, which puts the

responsibility on the City, not on the State Lands Commission to mitigate the particulate PM10 air pollution.

The other argument raised by the City is one of impossibility that the State Lands Commission affirmatively blocks their air pollution control efforts and there is two pieces to this. One piece is that the State Lands Commission just won't approve our ability to go in and put in air pollution control.

Again, we're sophisticated agencies. There are multiple reasons why moat and row, a non-backup method, is not consistent with the public trust. And nobody is asking the State Lands Commission to obfuscate their legal responsibilities and their duties to comment and to allow those methods that aren't consistent.

But the point of the matter for our purposes is the State Lands Commission has never, never stopped the City from putting in an ordered dust control measure. And where the City is talking about the hypotheticals, it is speculative and unsupported hypothetical, they say it's impossible for them to carry out the supplemental control order.

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MR. HSIAO: In the same vain, now we're talking about CEQA being a problem or historic artifacts being a

problem. That this environmental impact of pumping water into the lake, that this is a problem as well.

But let's recall again it's been 15 years of cooperation. There have been seven phases of dust control put in on the Owens's lake bed. Never once has there been an issue about historic artifacts, about greenhouse gas being produced when you put water into the lake bed, about there being a CEQA obstacle when the agreement specifically spells out the City's CEQA responsibilities and there is no CEQA lawsuit filed here. The only lawsuit that's been filed here is by the City against the Air Resources Board or your procedures and by the City against the district. Both case being dismissed.

So this problem that is being raised by the City simply lacks any supporting evidence in the record. The truth of the matter is that the 2008 SIP has provisions in it to the look for historical artifacts, to perform surveys, to take proper account. And the district has taken proper account of those areas that require specific investigation and special care. There is nothing in the record that shows otherwise.

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MR. HSIAO: Cost. One of the reasons you see so much extra record evidence which the district objects to

all of these declarations is the absence of that evidence in the record.

One of the places there is an absence of evidence is the cost of performing the supplemental controls. In the alternative analysis, we could only find one sentence on the question of cost. It appears in a PowerPoint presentation that the City made not backed up with any other evidence. And that estimate is $120 million.

And then there is the extra record improper declarations that are submitted to try to inflate that number. But, okay. Even using the City's cost estimates as our brief shows, we compare the cost per ton of PM10 control for Owens Lake to the cost per ton control that has been accepted as reasonable by other big boys, air quality management districts. And the cost per ton is much less at Owens Lake than it is for these other sources.

Now the City's going to tell you, well, nobody is trying to control an area that's that big. I think the district would tell them nobody poses a risk like your risk. Nobody is putting 6800 tons of particulate air emissions in the air. They have historically, legally, the largest source of particulate air emissions in the country and there are going to be costs to control those sources. But the cost measures that are being imposed are

valid cost effective by any standard and reason.

Recall a source in the 2008 SIP, there was a best available control measure analysis that took into account these measures the reasonableness, their effectiveness, and again every agency that is considered this issue nominally has approved the reasonableness of the measures. The district, the ARB, the EPA, and most importantly, the City and the Los Angeles Department of Water and Power, all of which supported this analysis in the 2008 SIP.

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MR. HSIAO: You know when we talk about cost, this is what it really comes down to. It's also undisputed in the brief, uncontested in the record that PM10 is the most dangerous -- one of the most dangerous of all of the criteria pollutants. And that's because of its direct health impacts. PM10 is especially dangerous to the most sensitive of our population: Our parents, our children, people who already have respiratory illness. And for all of the great benefits there are living in a beautiful place like the district, it's one of the most debilitating horrible things you can have to have some respiratory ailments, some bronchial disease.

But Owens Lake Bed is not only the largest source of particulate air emission, it is the highest recorded

source of particulate air emission. So from the federal safety standard of 100 micrograms per meter changes at the Owens Lake shoreline range up to 30 times higher that standard. And there are 112 monitored that can't be contested. And they're not contested by the City.

The 2008 SIP talks about this, talks about the stage one and stage two alerts that the Air Pollution Control District has to issue during one of these dust storms when particulate air emissions exceed these safe health levels. Isn't that really what 42316 is? Really, 42316 is a balance of statute. It balances exactly as the City says. The City's right to divert water with their responsibility, their responsibility to mitigate the impacts of that water diversion on public health and on the environment. And there is nothing the City puts into these proceedings or in their brief that disputes that simple fact.

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MR. HSIAO: I'm compelled to comment a little bit about the opening of the City's presentation where our City said our message is no more. So it's pretty clear from the City they do intend to take this to judicial review, regardless of the Air Resource's Board's decision.

That's why I'd like to talk about the forum of

the Air Resource Board's order. The Air Resources Board earlier in these proceedings in the first procedural order adjudicated two issues. And the two issues were the burden of proof and the presumption of administrative correctness. They adjudicated these two issues consistent with the rulings they issued 15 years ago when the same issues were presented to the Air Resources Board.

What the district would suggest to the Air Resources Board is that there are some cases where the evidence is so overwhelming, where there is so little contest that the burden of proof essentially becomes marginalized regardless of who the burden of proof is on one party would one. Regardless of whether there was a presumption of administrative correct necessary, one party would follow the stipulated legally required procedure in order to make a supplemental control requirements determination.

So in the proposed findings of facts and conclusion of law that we submit to the Air Resources Board, we will include alternative findings not only on every ground the 2008 SIP, the failure to present evidence before the district, the failure to follow the ARB rules, the reliance on barred extra record evidence, but also on this subject that regardless of who the burden of proof is on, regardless of whether there is a presumption of

administrative correctness, the fundamental data, the steps, the procedures, measures, and models that were used all favor the district. So that's why at the heart of this appeal 2008 SIP compels its outcome the methodology and decisions that were contained in the 2011 supplemental control determination are reasonable. And the City has not demonstrated otherwise. And the administrative record contains ample substantial evidence to support that determination.

With that, I think I've come to my lunch hour. So what I'd like to do is take our break and then talk a little bit with the staff. But I would like to ask if I may is the material that the City presented in its argument is brand-new. Lots of it we just haven't seen before. We can come back and we're prepared that to address those brand-new extra record points or we'll simply rely on briefs.

HEARING OFFICER GOLDSTENE: I have a question first. In the photo the first slide that you showed -- I don't know if we can go to that. Is that -- how common is that event, this is March 2010? Is this a typical or is it unusual event?

MR. SCHADE: A large event but not --

HEARING OFFICER GOLDSTENE: Introduce yourself.

MR. SCHADE: My name is Ted Schade, the Air

Pollution Control Officer for Great Basin.

That is a large day, but not completely untypical day. I believe high value on that day was 4300 micrograms. We've actually measured values at Owens Lake over 10,000, as high as 20,000 micrograms. You could argue we've had storms four times as large as that. And you can see on this photo there is virtually no dust coming from up the valley. The wind is blowing from left to right on your photo there.

HEARING OFFICER GOLDSTENE: Thanks. Okay.

With regard to your question, Mr. Hsiao, I think it's really up to you about whether or not you would like to try to respond to the arguments that were made earlier that are fresh. So that will be your decision. You have about 45 minutes left in your opening and then you'd have another half hour on top of that for rebuttal. So I think it's your decision

MR. HSIAO: If I may, after the break, we'll come back and inform you what our decision on how much more we have.

HEARING OFFICER GOLDSTENE: All right. That would be fine. So it is just after noon. We'll take a one hour break. Come back at 1:00. And Mr. Hsiaro will let us know how he'd like to proceed at that point. When the District is done, the Air Resources Board will give

their presentation in the afternoon. Thank you.

(Whereupon a lunch recess was taken at 12:55.)

AFTERNOON SESSION

1:03 P.M.

EXECUTIVE OFFICER GOLDSTENE: Good afternoon, everybody. It looks like we're back.

When we left, Mr. Hsiao was going to make a decision about how to proceed this afternoon. So what have you decided?

MR. HSIAO: We'll maintain our objection to the extra record evidence that was presented and reserve the rest of our time for rebuttal.

EXECUTIVE OFFICER GOLDSTENE: Okay. Very good. So you have an hour and twelve minutes remaining. Thank you, Steve.

Well, then the next item that we want to hear is the ARB staff's presentation, if you are ready. Who's doing the presentation? Just Christina Morkner Brown?

MS. MORKNER BROWN: Are we waiting for more --

MR. SOMACH: We're fine. From our perspective, important people are here.

MS. MORKNER BROWN: Good afternoon. My name is Christina Morkner Brown. I'm Staff Counsel at the Air Resources Board, or ARB. I will be presenting the first part of the staff presentation. Earl Withycombe, Air Resources Engineer with the Planning and Technical Support Division, will present the second part of this

presentation.

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MS. MORKNER BROWN: The first procedural order directs the ARB staff on this appeal to provide an assessment of the legal and technical issues raised to the reasonableness of the appealed 2011 Supplemental Control Requirement Determination, or SCRD.

Staff's review is based on administrative record and the issues raised by the city. In this presentation, I will provide you a with an overview of staff's approach to the assessment, overview of staff's assessment of the legal issues raised, and then Earl will provide you with an overview of staff's assessment of the technical issues raised.

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MS. MORKNER BROWN: Staff's general approach. Staff began by looking to Health and Safety Code 42316 from which the district derives its authority to issue the Appeal 2011 SCRD.

To summarize, Health and Safety Code Section 42316 states that the district may require the city to undertake reasonable measures to mitigate the air quality impacts of its water-gathering activities based on substantial evidence establishing that the water diversions caused or contributed to violations of state or

federal ambient air quality standards.

The statute also assigns a role for ARB to review the validity of the measures imposed by the district. In this appeal, ARB Executive Officer Mr. Goldstene is the Hearing Officer and decision maker.

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MS. MORKNER BROWN: To assist the Executive Officer, staff has conducted an assessment of the reasonableness of the 2011 SCRD. In doing so, staff has applied its expertise to assess legal issues raised and technical issues raised. As required by the first procedural order, the ARB staff has had no contact with the Executive Officer on this matter outside of this hearing.

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MS. MORKNER BROWN: Staff has had no ex parte contacts with either the district or the city.

I will now provide you with an overview of staff's assessment of the legal issues raised in this appeal. Staff's review of the record found that the 2011 SCRD was issued in accordance with the detailed process and protocols spelled out in a document called the 2008 Owens Valley Planning Area Supplemental Control Requirements Determination Procedure referred to here as the SCRD Procedure. This document provides a detailed

procedure by which the District Air Pollution Control Officer makes determinations of the need for additional PM10 controls.

Overall, staff concludes it was reasonable for the district to use -- to issue the 2011 SCRD in accordance with the SCRD procedure, and the issues raised by the city do not establish the 2011 SCRD process was unreasonable or that the 2011 SCRD is not valid.

More specifically, regarding the SCRD procedure, staff found that it was agreed upon by the city and the district in a 2006 settlement agreement -- it was incorporated into District Board Order Number 08-028-01 adopted by the District Board in 2008 pursuant to its authority under Section 42316. That Board Order was not challenged by the City and remains effective under State law.

That Board order was also incorporated into the 2008 District State Implementation Plan approved by ARB and awaiting action by the US Environmental Protection Agency, which as I will discuss in a few minutes is a related but separate issue.

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MS. MORKNER BROWN: Next, I will cover staff's assessment of the specific legal issues raised by the City which fall into five general areas:

Issues based on the Federal Clean Air Act;

District authority to establish watch areas;

Issues related to the fact the California State Lands Commission manages the lands on which the controls are to be implemented;

Issues related to the California Environmental Quality Act;

And the possible presence of cultural resources;

And the cost of implementation of the 2011 SCRD.

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MS. MORKNER BROWN: First, the 2011 SCRD and the Federal Clean Air Act. The City argues that because the SCRD procedure is identified as a contingency measure in the District's 2008 State Implementation Plan, or SIP, the 2011 SCRD cannot be implemented unless the Owens Valley fails to meet the Federal Clean Act reasonable further progress milestones or fails to attain the PM standard by 2017.

Staff does not agree. The 2011 SCRD was issued in accordance with requirements of the SCRD procedure specified in the 2008 Board Order, which as stated earlier was adopted by the district and is currently in effect under State law.

Staff believes the SCRD procedure's independent existence and validity under State law is not effected by

the fact it is also identified as a contingency measure in the 2008 SIP.

The City also argues that the 2011 controls are not necessary to attain the PM10 standard because the 2008 SIP predicted the Owens Valley would attain the PM10 standard by 2017 without controlling any additional areas of the lake bed.

Staff does not agree. Attainment demonstrations and SIPs represent the best prediction of what actions must be taken to reach attainment based on the best information available at the time the SIP was adopted. But new information is constantly being acquired and nothing in the Clean Air Act prohibits a state from acting to prohibit public health based on newly learned information.

The SCRD procedure is structured to incorporate newly learned information expeditiously and expeditiously impose control measures. The Clean Air Act does not require that the 2017 attainment date be missed before any action can occur.

In short, staff concluded that the 2011 SCRD was adopted under State law in accordance with the SCRD procedure specified in the 2008 Board order, and nothing in the Clean Air Act or the 2008 district SIP prevents the SCRD procedure from being implemented as written.

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MS. MORKNER BROWN: The next issue is the City's argument that the district did not have authority to designate watch areas because the district has not found -- has not determined these areas to cause or contribute to violations of the PM10 national ambient air quality standards as required by Section 42316.

Staff's review of the record finds that the watch area requirements and the 2011 SCRD are within the required provisions of the SCRD procedure. Specifically, the SCRD procedure calls for the Air Pollution Control Officer to direct the City to commence with environmental impact analysis, design, and permitting for source areas when the Dust ID Model predicts shoreline PM10 concentrations at or greater than 100 micrograms per cubic meter with the inclusion of 20 micrograms per cubic meter background concentrations.

The areas designated as watch areas in the 2011 SCRD meet the PM10 concentration levels and other specified criteria. Therefore, staff found the designation of the watch areas in accordance with the SCRD procedure in the 2011 SCRD to be reasonable.

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MS. MORKNER BROWN: Next, the City raised several issues related to the California State Lands Commission

management of the lands upon which the City must implement the controls.

Overall, staff finds the City's challenges regarding the role of State Lands Commission are not specific only to the appealed 2011 SCRD. These arguments are relevant to any control measure imposed by the City.

Staff believes ARB's role is to review the reasonableness of the specific appealed measure, not the general validity of the statute or measures generally.

Nonetheless, overall, staff finds the 2011 SCRD is reasonable and valid, despite the State Lands Commission issues raised by the City.

The first specific issue related to State Lands Commission is the City's argument that the district improperly immunized the State Lands Commission from liability for dust controls. Staff notes that Section 42316 specifically assigns the City, not the State Lands Commission, the responsibility for implementing controls for violations caused by its water-gathering activities.

The City argues the State Lands Commission will impede implementation of required controls, require more water controls, which would impose requirements that would interfere with the City's right to divert water and that implementation of controls by way of greater water use would result in other types of adverse environmental

impacts, such as greenhouse gas emissions caused by greater water transfers from the delta.

Staff's review found that the evidence in the administrative record does not support these arguments. They appear to be based on speculation and opinion.

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MS. MORKNER BROWN: Next, I address the City's argument that the 2011 SRCD forces the City to violate CEQA or other cultural resource laws. The City states this goes to the enforceability of the SCRD and therefore its validity.

Staff's review of the record finds nothing in the 2011 SRCD or the SCRD procedure that prevents the city from conducting any required CEQA review. That is, if any cultural resource impacts are found during the environmental review process, staff found nothing in the record that would prevent the City from mitigating such impacts to the degree feasible and proceeding with implementation of required controls.

Therefore, staff finds this issue does not effect the reasonableness or the validity of the 2011 SCRD.

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MS. MORKNER BROWN: The final legal issue is the City's argument that the 2011 SCRD is unreasonable because it is not cost effective. Although the City's argument is

framed as a challenge to the cost effectiveness of the 2011 SCRD, the City focused on the estimated overall cost for implementation of the SCRD and the city provided no criteria to evaluate cost effectiveness of the measure and the City does not attempt to quantify the cost per ton of PM10 emissions.

Staff's review of the record finds the district has previously conducted cost effectiveness analyses of lake bed controls. And the cost per ton estimates are well documented and substantially below the PM10 cost effectiveness ceiling values used by four of the largest air quality districts in the state.

Furthermore, the Clean Air Act requires attainment of the PM10 standard, even if controls are very costly. And Section 42316 assigns the cost to the City if violations of air quality standards result from its water-gathering activities.

Now Earl will present an overview of staff's assessment of the technical issues.

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MR. WITHYCOMBE: Good afternoon. My name is Earl Withycombe. I'm an Air Resources Engineer here at the Air Resources Board.

I'll be presenting the staff's assessment of the technical issues raised in the City of Los Angeles' appeal

of the 2011 SCRD. The City's technical concerns fall into three categories.

Before I go into that, let me stop for a minute and respond to a question that the Hearing Officer raised during the City's presentation.

And that question was: Is the first slide of the dust storm on Owen's lake an example of a typical dust storm?

Slide 24 in the district's presentation -- I'm sorry -- the City's presentation shows that this particular day, March 30th, 2010, recorded the highest 24-hour PM10 concentrations at Owens lake over the study period covered by the SCRD. We just wanted to respond to that question with our own opinion.

First, the City objects to the use of 3600 feet as the historic shoreline boundary used to determine the lake bed area the City is responsible to control.

The City also challenges:

The selection of an air quality model;

The adequacy and accuracy of the air quality modeling process used to suggest lake bed areas requiring thus control;

The district's methodology for identifying and addressing emissions from other sources that are not related to the City's water-gathering activities;

And the district's failure to implement all modeling recommendations rendered by an expert panel.

Finally, the City objects to the district's refusal to seek exceptional event status for emissions from desert soils under an existing U.S. EPA policy.

I'll now provide greater detail of the City's concerns and the staff's assessment of each of these issues in this order.

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MR. WITHYCOMBE: The City argues that the SCRD is unreasonable because the district relied on 3600 feet above mean sea level as the historic shoreline of the lake, requiring the City to control lake bed areas near to or adjacent to this boundary. The City contends that the historic shoreline boundary should be at a lower elevation and the dust emitted between the lower elevation and the 3600 foot level are not the result of the City's water-gathering activities.

Staff disagrees with this argument. We independently reviewed the record and found it reasonable for the district to rely on the 3600 foot shoreline level for several reasons. 3600 feet is the level established in the SCRD procedure and other documents approved by the City as discussed earlier in this presentation.

The record includes a study by the Desert

Research Institute that used meteorological and other recorded data to forecast what lake levels would have been between 1913 and 1996 in the absence of the City's water diversions. That study supports the district's use of a 3600 foot level.

And the City's newly submitted information is not persuasive with respect to a historic shoreline at any level other than 3600 feet, and this new information was not part of the record.

We conclude that the district's technical approach regarding the historic shoreline elevation is reasonable.

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MR. WITHYCOMBE: The City raised several concerns about the methodology the district uses to identify emissive areas for control. That methodology, which is generally referred to as the Dust ID Model, consists of several layers of analysis. One of these layers is a dispersion model, a computer program that is used to estimate PM10 concentrations at shoreline locations.

Input values to this model include the estimated emissions from source areas, hourly whether data, and information about the local terrain. The City's concerns address both this dispersion model, which is known as CALPUFF, and other analyses that are part of the Dust ID

Model. I'm going to start by discussing the district's use of the CALPUFF model in its methodology.

The City argues that the CALPUFF model is not approved by U.S. EPA for this use and that it doesn't perform within the range of scientific acceptability. The City further argues that an expert panel called upon by the district to review the district's Dust ID Model concluded that CALPUFF performed poorly in this application.

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MR. WITHYCOMBE: ARB staff's review finds the district use of the CALPUFF model is appropriate and reasonable under Health and Safety Code Section 42316.

U.S. EPA supports the use of CALPUFF in situations involving complex wind fields and multiple emission sources. The Owens lake bed is such an area.

U.S. EPA's regulation also states that CALPUFF "is intended for use on scales from tens of meters from a source to hundreds of kilometers." The distances modeled in the SCRD process fall within the range.

More importantly, CALPUFF is the only dispersion model approved by EPA that can simulate the complex wind situation that exists at Owens Lake which can be impacted by winds coming simultaneously from several different directions during the weather conditions that cause dust

storms.

All other dispersion models approved by U.S. EPA are designed to model only a uniform wind field blowing in a single direction each hour. These other models are not capable of modeling the situation that exists on Owens lake.

The record indicates that the expert panel did not dispute the use of CALPUFF or recommend the use of an alternative model, although it did recommend additional analyses to improve CALPUFF modeling results. The record also shows that the City specifically agreed to the use of the Dust ID Model process, including the use of the CALPUFF model as recently as 2011 when it entered into a stipulated order of abatement with the district.

Since the expert panel issued its report in May of 2010, the City approved this agreement with knowledge of the expert panel's findings.

In addition to its concerns about the CALPUFF model, the City also contends that other aspects of the district's Dust ID Model are flawed. Specifically, the City argues that the Dust ID Model relies on air quality monitoring data collected from a network not operating under an approved quality assurance plan and that the district uses CALPUFF modeling results to calibrate the model in violation of EPA policy. The City also argues

ARB failed to approve or solicit comment on the use of the Dust ID Model.

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MR. WITHYCOMBE: Staff finds first that the record contains no evidence to indicate that the district's air monitoring network is operating in a manner inconsistent with EPA quality assurance protocols. Although the district is seeking EPA approval of its own quality assurance program, the Owens Lake monitoring network to date continues to operate under the oversight of the ARB quality assurance plan, which extends to the district's operations.

With respect to the model calibration, we believe U.S. EPA's policy regarding calibration is directed at prohibiting changes to the fundamental science imbedded in the model as a result of comparison to other models or measurements. Doing so would tie a model to a specific event rendering it unusable for a different set of conditions.

The district source assessment process, however, does not change the inner workings of the model, but rather uses the model together with monitored PM10 values to improve emission estimates. Emission estimates are a key input for any model. Unlike emissions from a source like an industrial stack or an automobile tailpipe, which

can be measured directly, fugitive dust emissions, like those coming from Owens Lake, must be estimated indirectly using the tools available.

In the Dust ID Model, an initial estimate of emissions is fed into CALPUFF. CALPUFF produces a predicted downwind PM10 concentration that is compared to a concentration measured at the monitor. Once the relationship between emissions and am ambient is established, the model can then be used to predict the impact of emissions at other shoreline locations not served by fixed monitors and determine which areas contributed to measured exceedances. These model results may then be used along with other data, such as visual and monitoring data, in a weight of evidence approach to identify sources requiring control.

The Dust ID Model was part of the locally adopted 2008 SIP for Owens Lake that was sent to ARB upon adoption by the district. ARB staff reviewed the plan and the public comments received by the district and submitted the plan to U.S. EPA for inclusion in California's State Implementation Plan on June 11th, 2008.

Although U.S. EPA has not acted on the 2008 Owens Valley SIP, it did approve the Coso Junction 2010 Maintenance Plan, which relied on the same modeling approach. The City argues if a district implemented all

of the modeling recommendations --

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MR. WITHYCOMBE: -- made by the expert panel, the accuracy of the Dust ID Model would be improved.

By way of background, the expert panel was established as a requirement of the 2006 settlement agreement to review the Dust ID Model and comment on its adequacy and make any recommendations for its improvement.

The panel met between 2008 and 2010 and made a number of recommendations for improvement of the process.

Several recommendations call for expanding data collection efforts by adding shoreline air quality monitors, sand motion monitors, and upwind/downwind air quality monitoring in close proximity to lake bed emission hot spots.

The panel also recommended a number of statistical analyses of soil, meteorological and emission characteristics to improve the understanding of lake bed emission variability and the accuracy of the Dust ID Model.

Finally, the panel recommended changes in model operation, such as using five-minute average data, instead of hourly average data.

ARB staff reviewed the expert panel final report and concentrated on the recommendations related to the

district's modeling program, as this was the focus of the City's comments. The record indicates that the district has implemented several recommendations. These include:

Establishing additional fixed monitors;

Using portable versions of the shoreline monitors to monitor at other shoreline locations using five-minute averaging times for sand motion and meteorological data in the modeling process;

Relocating sand motion monitors from completed control areas to new emission hot spot areas;

Analyzing area emission factors known as K factors for sensitivity to wind direction;

And reevaluating K factors using more recent data.

Our qualitative assessment of the individual expert panel recommendations led us to conclude those implemented by the district would benefit the Dust ID Model. Certainly, the supplies to the addition of more shoreline monitors and the re-evaluation of K factors using more recent data.

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MR. WITHYCOMBE: The record also indicates that the district dismissed two recommendations issued by the expert panel. These recommendations were: Using a portable wind tunnel to assess emissivity of uncontrolled

portions of the lake bed and using specific portable particle counting monitors to increase data collection efforts at the shoreline and upwind/downwind of hot spot areas.

With respect to the portable wind tunnel, the record indicates that includes district correspondence indicating that wind tunnels could not accurately replicate conditions under which exceedances occur. The district had previously used it and later deemed this approach inadequate which led to development of the current sand motion-based emission factor method found in the Dust ID Model.

The record also indicates that the non-EPA approved portable monitors recommended by the expert panel did not provide the level of precision that the district deemed to be necessary for the development of K factors. We additionally concur with this conclusion and agree that use of these two recommended approaches would not improve the accuracy of the Dust ID Model.

Overall, staff analysis of the record indicates that as of August 1st, 2011, the date that the final SCRD was issued, the district had implemented or acknowledged as worth considering a majority of the expert panel recommendations related to model improvement.

As I indicated earlier, we believe that the

district's modeling approach, together with the other tools used, is inherently sound and that the recommendations the district implemented would improve the model's performance.

As a result, we conclude that the lack of full implementation of the expert panel's recommendations does not result in a flawed SCRD or detract from its reasonableness.

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MR. WITHYCOMBE: The City contends that emissions from sources other than those resulting from its water-gathering activities are not probably accounted for in the district's modeling process.

Among these are off-lake sources, including naturally emissive desert soils surrounding the lake emitting dust during high wind events, and other disturbed soil surfaces, including landfills, unpaved roads, and unpaved parking lots, among others, contributing to high background PM10 concentrations transported to Owens Lake during regional dust storms.

After assessment of the record, ARB staff concluded that the district's 2011 SCRD decisions are reasonable with respect to the possible influence of emissions from off-lake sources.

Regarding high PM10 background concentrations,

whether generated by nearby man-made sources, windblown dust from desert soils, or regional dust storms, we conclude that all of these conditions could produce high PM10 concentrations at upline shoreline monitors, but these impacts did not invalidate the 2007 SCRD control decisions.

We came to this conclusion by assessing the impact of removing all days of high background concentrations identified by the City from the district's analysis and concluded that such removal would not have altered the conclusions reached by the district with respect to areas requiring control in the 2011 SCRD.

In other words, there was evidence in record to justify each of the new control areas mandated by the SCRD even after we excluded each of the days with high background concentrations identified by the City.

That being said, we also observed that the City's methodology for overriding some control recommendations generated by the modeling process is not explicitly spelled out in the mutually approved protocol documents. We determined, however, that the district's post-modeling review process did result in a significant reduction in the total area designated for control in the final SCRD order.

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MR. WITHYCOMBE: The City contends that emissions from on-lake sources other than emissive lake bed areas are also not properly accounted for in the district's modeling process. These sources are: Sand movement from construction areas onto uncontrolled areas that would increase the estimated emissions from these uncontrolled areas, and sand movement from areas where the surface crust has been broken by all-terrain vehicle movement related to district monitoring activities onto uncontrolled areas that also increases the estimates of emissions from these candidate areas.

We assess the data and arguments presented by both parties on the potential for areas under active construction and for district monitoring activities using all-terrain vehicles to adversely impact area control decisions. When we eliminated construction days from consideration, we found sufficient remaining loan violator or exceedance days to support the district's control decisions.

We also compared the total surface area disturbed by all-terrain vehicle use to the total surface area designated for control and concluded that this activity was not significantly influencing sand movement at areas designated for control.

As a result, we found the district's conclusions,

i.e. the emissions from these activities, did not significantly impact the sand motion measurements on which the SCRD was based to be reasonable.

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MR. WITHYCOMBE: The City also argues that the district should be using EPA's exceptionable events policy to exclude some monitored exceedance days at Owens Lake from regulatory consideration.

The City argues that the policy covers days when usually high wind overwhelm many controls on lake bed areas and when high background conditions occur as a result of wind entrainment of dust from upwind desert lands.

The City further argues that the use of the exceptional events policy by the district would allow it to avoid controlling emissions not generated by its water-gathering activities.

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MR. WITHYCOMBE: Staff finds that the district's choice not to seek exceptional events exclusions for those exceedances occurring on days with high background concentrations at Owens Lake does not impose additional or unreasonable control requirements on the City.

As a practical matter, exceptional event exclusions do not effect planning and control requirements

until an area is approaching attainment. And current EPA policies require extensive documentation for these requests. Because of this, air districts do not generally submit requests to exclude exceedances until an exceptional event interferes with a finding of attainment for the region.

Given the 100-plus exceedances recorded during this period of record, it does not appear that the Owens Valley non-attainment area is at this juncture. EPA's regulations allow for one exception per calendar year of the PM10 standard averaged over a three-year period. Because of a large number of exceedances and evidence showing an overwhelming impact by lake bed emissions, staff concludes that seeking exceptional events exclusions for the period in question would not change the areas identified for control.

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MR. WITHYCOMBE: Our review of the administrative record and the issues raised in this appeal lead us to conclude that the process and methodology used and the decisions reached in the 2011 SCRD are reasonable.

We conclude that the City did not demonstrate that the 2011 SCRD is unreasonable with respect to the requirements of Health and Safety Code Section 42316.

This concludes the staff's assessment of the 2011

SCRD appeal.

MR. SOMACH: Mr. Goldstene I'd like to object to the technical discussion that was just provided.

EXECUTIVE OFFICER GOLDSTENE: Do you want to save it for your rebuttal?

MR. SOMACH: No, I want to make an objection because I'm going to move to strike all of the technical information that was just conveyed to you.

And this goes back to the somewhat peculiar situation I find myself in where I either have two quasi-judicial bodies making judicial decisions. And in fact, I note that staff even spoke in terms of making findings and having absolutely no ability to see any underlying data, evidence, information upon which all of what was just testified to was based upon.

And I think that that adversely prejudices the City in terms of responding to any of the technical conclusions made by staff. It certainly is understandable that when you make your determinations as a matter of finality, it is a quasi-judicial final decision. And I'm not entitled to have that type of background, although I assume he'll make certain findings and conclusions of law based upon the record.

I have none of that to deal with here. I've not been able to cross-examine any of these folks. I haven't

been able to take a look at the underlying technical analysis. And it puts the City in a position that I think the law tries to avoid. And it's absolutely prejudicial and I move to strike all of the technical materials that were just discussed.

EXECUTIVE OFFICER GOLDSTENE: All right. Your objection is noted, Mr. Somach. Thank you.

I thank you Ms. Morkner Brown and Mr. Earl for your presentation.

At this point, we're moving back to the district to see if they would like to use the balance of their time for rebuttal and comment.

MR. HSIAO: Thank you, Mr. Goldstene.

If you don't mind, I'll sit down for this. I think that the City's positions further isolate them from the various agencies --

EXECUTIVE OFFICER GOLDSTENE: I think you need to get closer to the mike.

MR. HSIAO: The City's position seems to further isolate them from the various agencies, the State Lands Commission, the Air Resources Board, and the District.

The district has a long history of trying to work with the Los Angeles Department of Water and Power. In particular, issues that pertain to water usage, the City has not availed itself of various means to save water and

to use water in a more efficient manner. The district has repeatedly extended the offer of technical assistance to the City to assist them in that process.

I think that we find the Air Resources staff report to be supported by the evidence in the administrative record and to be reasoned based upon applicable law in that evidence.

And with that, I think that the district regrets we're in this hearing today. This should be an issue where agencies representing the public and the public interest should be able to talk with technical experts around a table and work these issues out.

EXECUTIVE OFFICER GOLDSTENE: Okay. Thank you.

Is that the extent of the response from the district? Or is there anything else you would like to add at this point? If not, I'll go back to the City then for their rebuttal and comments.

MR. HSIAO: I'll certainly make the district staff and myself available to answer any questions the Hearing Officer team may have. If there are no questions, then that would be our submittal.

EXECUTIVE OFFICER GOLDSTENE: Okay. Thank you, Mr. Hsiao.

Mr. Somach, back to you. The City had about 20 minutes.

MR. SOMACH: I'm certain I'll fill that, just knowing me. I'll certainly fill that. I'll try not to, I might add.

I'm going to agree wholeheartedly with Mr. Hsiao's last statement or maybe it was the penultimate statement he made where he said that the City is Isolated from the State agencies. And I say absolutely, that unfortunately is where we appear to be. And I don't want to leave an impression here that anything that we heard here changed our fundamental views with respect to the defects and deficiencies that we found.

And again, I want to reiterate, part of the problem we're having is the inability to in an effective way really put on the kind of evidence that we believe is necessary. In many respects, the City's counter-views are derivative of what the district does or what the district suggests. And it isn't one of those situations because of the complexity of the situation where the City can immediately concoct, produce, make up evidence that addresses many of the evidentiary issues that the district finds and faults us in for not rebutting at earlier stages in this process.

The reality is we've been working very diligently and very hard to analyze and provide the kinds of information that would appropriately rebut the evidentiary

conclusions that the district relies upon, but that simply takes time.

And I will note, you know, that we did attempt to augment the record. We apparently didn't do it to the satisfaction of the Executive Officer. But then the less, it was an attempt to provide an appropriate time according to the rules that have been established additional information.

If as we believe an evidentiary hearing had been held instead of this type of a hearing, we would have been able to provide the kinds of evidence that prior to the time of the implementation of the SCRD would have I think rebutted much of what was provided there.

You know, again, I think critical of the staff analysis -- and actually that criticism is much a process-based analysis than my belief that there is anything nefarious or wrongful dealings there. It just puts us in a terrible position in terms of attempting to address what they're talking about and what they're saying.

I will say I have some very fundamental disagreements with the legal conclusions that were made. In particular, I noted the discussion of CEQA in the slide. And I'll tell you, that discussion of CEQA is alien to any notion of CEQA that I've ever dealt with.

And I've litigated I can't tell you how many CEQA cases because I don't remember how many, but a lot. And it juxtaposes the whole CEQA analyses. You don't do CEQA after you're ordered to do something. You do CEQA prior to the time of the order. And it is -- CEQA, unlike other environmental statutes, is absolute in terms of not creating a situation where there are unmitigated, adverse, and significant impacts to the environment. That's just one example. I don't want to pick through that type of stuff in any event.

One of the things that was said though in the context of the discussion by the CARB staff I think highlights something that I've been trying to articulate all day today. And that was a discussion of the 2008 SIP and it's relationship to all of this. Remember, a lot of the argument has to do with somehow we made these agreements and the agreements were or could have been one sided. And so then they got put in the 2008 SIP and that bound us.

And four years ago -- I might add, four years ago, which is what? Three years prior to the order that we're actually complaining about where we would have no idea what was going to be in that order, somehow, something happened back in that period of time precluded us from ever challenging some future action that nobody

knew about in 2008.

But if you take a look at the 2011 SCRDs which are the subject of this hearing, they state that it is -- that they are a federal Clean Air Act contingency measure from the 2008 SIP. That's what they say, notwithstanding whatever CARB staff characterizes them in the context of State law.

As we've noted, the 2008 SIP has not been approved by EPA. So the SCRD process is not the applicable contingency measure because that whole thing was triggered by the adoption -- would have been triggered by the adoption of 2008 SIP by EPA, which has never occurred. Okay.

Now, that's what it says. I mean, when you go back and read it, it says it is a Federal Clean Air contingency measure from the 2008 SIP. Your staff has characterized it as something else in order I guess to change the rules of the game a little bit on us. And that, of course, is one of the criticisms.

I've also articulated the fact that depending upon what day of the week or what issue it is, they point to a different set of laws, a different set of supposed agreements to justify an action.

Now, even if the 2008 SIP was federally approved as a contingency measure, a contingency measure can only

be triggered when the attainment deadline for reasonable further progress is not met. The 2008 SIP determines attainment of the PM10 acts will be met in 2017 with controls on 43 square miles. That's what the SIP says. And the fact is that LADWP is already under orders to control 45 square miles in excess of what the 2008 SIP provides.

No failure of the 2008 SIP attainment strategy has been declared. The contingency has simply not been triggered under the SIP. And so as a consequence, there is simply no legitimate way one can walk through the very documents they're talking to and reach the conclusions that they're reaching.

And moreover, they can't meet the requirements of Section 42316 that our water-gathering activities cause or contribute to violations of the PM10 acts when the 2008 SIP approved by CARB demonstrates that LADWP's control of 43 square miles is sufficient to achieve attainment of the PM10. In other words, the rules apply when they want to change them and apply them, but somehow they don't apply on our side of the table.

Another good example is if you take a look at the 2006 agreement, which I might add has expired among other things it's expired, but moat and row is a big element within that. That was part and partial of the

consideration, the back and forth bargaining that went on between the district and the City. And the City believes that the district breached its agreement with respect to moat and row by the way it interacted with the State Lands Commission to preclude moat and row. Again, these are matters for breach of contact lawsuit.

The other thing the district does is it cherrypicks from these agreements. It takes various portions of these agreements, puts them into orders, and interestingly enough, it is the provisions that provide benefits to the district in terms of the control that it wants to entertain and it leaves behind those things that are of benefit to the City. We think that to be inappropriate. We believe it to be a breach of contract. And that's one of the reasons why -- and of course Mr. Hsiao has said somehow the City is not honest, is not truthful, doesn't live up to its agreements, when in fact we would love to live up to our agreements, but that means we live up to the four corners of everything in the agreement, not just those things that the district has cherrypicked from time to time to its benefit.

I think the last thing that I want to say -- and I can go for another hour-and-a-half, but we won't do that because you won't let me, among other things reasons.

But I did want to leave with this. I was very

serious when I said at the beginning we take this serious. And I wanted to make sure and underscore that. It's not that we don't respect CARB. It's not that I don't appreciate the time and effort that you're putting in here.

But when I say we're done, what we're really saying is we believe that under the law we should be done. We've spent $1.2 billion out there. And we have controlled more than what was provided in the 2008 SIP.

And let me also say something. We have no intention of walking away from what we've done. When I say we're done, I don't mean we're walking away. We have ongoing O&M obligations. What we would like to do in terms of ongoing O&M obligation is to move from a very water-intensive use of water to control methodologies that don't require the use of 95,000 acre feet of water.

I want to end on that note in the context of I haven't heard anything from anyone that addresses what we believe to be among the most significant issues here. And I addressed it earlier, but I'm going to address it a bit here again. It is the use of 95,000 acre feet of water runs against State policy, statewide policy. It has adverse public trust impacts on the delta. And on top of everything else, it violates Article 10, Section 2 of the California State Constitution which precludes the use of

water in the manner that it is being used here when there are reasonable and feasible alternatives to control dust.

And the constitution binds you. It binds the district. It binds the California State Lands Commission. The public trust doctrine is subject to the California Constitution. And I have not heard one rational response to the argument that we're making that the ongoing and continued use of water for these purposes simply violates one of the most significant constitutional provisions we have in California, an arid western state.

That's what I have.

EXECUTIVE OFFICER GOLDSTENE: Thank you, Mr. Somach.

At this point, I think the Air Resources Board gets an opportunity to respond, if they wish.

MS. MURCHISON: I'm Linda Murchison.

I don't know that we have anything additional to add. I think the presentation that was given by staff sums up what we saw and reviewed in the record. And I think that that is our position at this time.

EXECUTIVE OFFICER GOLDSTENE: Okay. Thank you.

I know we're running early. I think what we'd like to do is take a ten-minute break. And then after we come back, I may have a few questions, and then we'll take public comment.

Who is here to make public comment? Anybody? Okay. Why don't we come back at ten after 2:00.

(Whereupon a recess was taken at 1:55 p.m.)

EXECUTIVE OFFICER GOLDSTENE: All right. Let's start up again for a few minutes.

I have to clarify just a couple things that I wasn't sure about. And I'd like to ask just some clarification about this February 2011 meeting that didn't happen. And I'm not sure where to start.

The district says that a meeting was to be held and the City either didn't come or they walked -- they came and they walked out. I'd like to know a little more about that. And I'd like to ask the City to respond.

So I don't know if it's Ted or Mr. Hsiao.

MR. SCHADE: I don't know where to start. Yes, I do. We went through a two-and-a-half-year expert panel process. And as a result of that and when we've talked about the conclusions here today, as a result of that process, we had a number of items on our kind of to-do list, things to look at, 20 or so issues that really needed to be addressed, some of which could improve the results of the Dust ID Model.

The district was willing to really work with the City on all those. And I've always made it very clear to them is that when they show me something that improves the

model that I will recommend adopting it. But you know what I won't do is incorporate some sort of a change for the sake of change before we know whether it improves the model or not. So we had a meeting in November that we were sort of whittle down some of those things --

EXECUTIVE OFFICER GOLDSTENE: This is November 2010?

MR. SCHADE: November 2010. And we were going to meet a couple of months later to continue to work on that to-do list. That really seemed to correspond to the time when the City stopped communicating with us. We used to have these meetings with the City and their consultants where -- I mean what's the word that I use? Pummel each other?

You know, we would sit around the table for sometimes days. And we would argue these scientific issues. And we came to resolution many times. And that's sort of the way we were used to doing business with the City.

Something happened between November of 2010 and February of 2011 where the City rather than send their consultants to meet with us and pummel each other across the table, where the attorneys sort of took over. That really was kind of the beginning of a fundamental change in our working relationship.

EXECUTIVE OFFICER GOLDSTENE: Okay. Thank you.

Mr. Somach or Mr. Van Wagoner, I'm interested in what happened then about that time and why the City stopped meeting or refused to meet. I'm not sure how you want to frame it.

MR. VAN WAGONER: We were scheduled to meet. In that particular meeting, I was ill and I can probably get my doctor to whip out an excuse. I was being treated. It was that bad. That's why the meeting was canceled.

The other thing about the meeting -- we can find the agenda for it. It was specifically to talk about their modeling for that year and maybe some other issues if there was time. It was not going to be a meeting to talk about the expert panel recommendations.

EXECUTIVE OFFICER GOLDSTENE: Was there any attempt to have any follow-up meetings once you were better? I'm glad to see you're well. It does sound like there was a need to continue the discussion. I'm just wondering on either side why the discussions.

MR. SCHADE: We were unable to schedule anything with the City, despite repeated attempts.

EXECUTIVE OFFICER GOLDSTENE: All right. And then the other question I had -- I'm still trying to understand why the City when the first new SCRD was being issued did not ask the district for more time. This is in

response, Mr. Somach, to some of your closing arguments to put your evidence together to submit it as part of the record for the SCRD. And I don't -- you're claiming that you're questioning the fairness of the process and I'm trying to understand more the position on that.

MR. SOMACH: To the extent that -- I just want to at least indicate I wasn't on the scene anywhere near this time. It wasn't me telling people not to show up to meetings. I think that issue is an important one. I don't think it was lawyers in any event. I think it was a convenient excuse.

I think it was the City feeling as if it was time to address these very significant and serious issues and costing a lot of money and costing a lot of water. And they felt they were not being listened to. So they decided to proceed in a manner that sought to protect.

Here's what I know about the response to the draft SCRD. And it was that they work very hard to try to meet the time line with respect to the first draft that they believe that they would have another opportunity when the final or before a final version came out. But in fact, a final version came out and then all of the statute of limitations and other periods started to run.

I don't know why at that time or if at that time there was a formal motion made. But since that time,

we've been working very diligently in terms of collecting the evidence and materials and feel that we have not had the opportunity in order to put that in.

And I believe that we always thought that there would be an evidentiary hearing here, which, as it turned out, was an erroneous assumption. And so that is why the work kept being done, even though the order became final was we thought we would have an evidentiary hearing here and be able to then put all of this evidence on, have it evaluated by a third party distanced from the ranker that had been created out there and be able to come up with a response.

But let me just turn around and make certain, since I'm laboring under the fact that I was not there.

Okay. Yes. They confirmed my assumption, my assertion anyway.

EXECUTIVE OFFICER GOLDSTENE: Okay. All right. Thanks.

Are there any other comments, Mr. Hsiao?

MR. HSIAO: I could just respond briefly.

There was never a request made by the City for any extension of time for the proceedings before the district.

As for suggestion that the City misunderstood that there may be a future hearing, the City was on notice

of the proceedings that took place before the Air Resources Board in 1996 through 1998 where the Air Resources Board issued the identical orders that the hearing that would take place before the Air Resources Board would be limited to the administrative record presented to the district.

So they knew about the legal rulings. They knew what their obligations were. They performed no due diligence in order to extend the time period for their submittal. And they ended up with the record they ended up with.

I'll say one thing. Further in the 1996, 1998 proceedings, the City proceeded in the manner they proceeded here. They disregarded the Air Resources Board rules and attempted to submit declarations and other evidence outside the record.

The first time they did it, they were sanctioned and their briefs were rejected by the Air Resources Board. The second time they did it, the Air Resources Board allowed them to file their briefs with the extra evidence over our objections.

So there is a significant history behind the production and the application of the rules for this Section 42316 hearing.

EXECUTIVE OFFICER GOLDSTENE: Thank you.

MR. SOMACH: Could I respond just briefly to that? And that is two things, actually.

That situation is distinguishable from this because, in fact, there was an evidentiary hearing that took place before the district, which distinguishes that from this situation.

And secondly, that that process was subject itself to litigation, including the process and procedures employed by CARB. And as you know, that litigation was dismissed as part of the 1999 -- 1998 settlement. As I also indicated at the beginning, hindsight being as perfect as it is, it probably would have been better just to proceed with the litigation so we would have gotten a final judicial determination way back then whether the procedures being employed/deployed here are the appropriate ones under the circumstances.

EXECUTIVE OFFICER GOLDSTENE: Okay. It looks like your team wants you to take a look at something.

For the moment, I don't have anything else.

Does ARB have anything to add, at this point? Okay.

Anything to add?

MR. SOMACH: I have nothing. Well, I've got a million things, but I won't add.

EXECUTIVE OFFICER GOLDSTENE: Okay. Well, let me

just check one more time.

Is there anybody the audience that wants to make any comments? Any public comment? Okay.

Well, I think we're near the end.

A couple things that I want to say.

First, I want to thank everybody for being here today. I know it's been -- there's been a lot of build up to this day and a lot of work has been put in by everybody, and that's greatly appreciated.

I'm going to remind everybody that in terms of public comment, we're treating the State Lands Commission letter that was received on June 12th as a public comment. And I'm going to be issuing a procedural order next week ordering and directing the parties to submit a proposed Statement of Decision and Findings of Fact and Conclusions of Law, including citations to the record.

I think the court reporter will probably take a few weeks to get the transcript ready. And then I'm trying to think in terms of time.

Do either party have a sense of how much time I should give you after you get the transcript?

MR. HSIAO: I would say seven days.

MR. SOMACH: I think we need more time. I would like at least 14 days.

EXECUTIVE OFFICER GOLDSTENE: Okay. So once we

get the transcript, we'll key it to the arrival of the transcript for 14 days or so.

Is there anything else? Okay, with that, then I'm going to conclude the hearing. I thank you all again for being here. Thank you.

(Whereupon the Air Resources Board Executive Officer Hearing adjourned at 2:23 PM)

CERTIFICATE OF REPORTER

I, TIFFANY C. KRAFT, a Certified Shorthand Reporter of the State of California, and Registered Professional Reporter, do hereby certify:

That I am a disinterested person herein; that the foregoing hearing was reported in shorthand by me, Tiffany C. Kraft, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of June, 2012.

_____

TIFFANY C. KRAFT, CSR, RPR
Certified Shorthand Reporter
License No. 12277