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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

SIERRA CLUB and FRIENDS OF THE WEST)
SHORE,)
)
Plaintiffs,)
)
vs.)
)
TAHOE REGIONAL PLANNING AGENCY,)
)
Defendant.)

Civ. No. 2:13-CV-00267-JAM-EFB

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO
TAHOE REGIONAL PLANNING
AGENCY'S CROSS-MOTION FOR
SUMMARY JUDGEMENT**

Date: March 5, 2014
Time: 9:30 a.m.
Place: 14th Floor – Room 6
Judge: John A. Mendez

TABLE OF ABBREVIATIONS AND SHORT FORMS

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AG	California Attorney General
AR	Administrative Record
Bailey	Land-Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide to Planning
BMP	Best Management Practices
CEQA	California Environmental Quality Act
CFA	Commercial Floor Area
Compact	Tahoe Regional Planning Compact
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
HRA	Hydrologically Related Area
IEC	Initial Environmental Checklist
LCD	Land Coverage District
NEPA	National Environmental Policy Act
ONRW	Outstanding National Resource Water
RPU	Tahoe Regional Plan Update
TAU	Tourist Accommodation Unit
TER	Threshold Evaluation Report
Threshold	Environmental threshold carrying capacity standard
TRPA	Tahoe Regional Planning Agency

1 **INTRODUCTION**

2 Lake Tahoe’s famed clear waters and spectacular alpine setting are a natural treasure for local
3 residents and for visitors from across the U.S. and the world. Unfortunately, TRPA is gambling with
4 the Lake’s extraordinary resources. The RPU allows increased concentrated development close to
5 Lake Tahoe’s shores without having studied its impacts on not just water quality, but also *soil*
6 *conservation*, unaddressed in TRPA’s Opposition. No plan to ensure adequate maintenance of BMPs
7 – necessary to control runoff *and for effective TMDL implementation* – is in place. Neither is any
8 effective ozone monitoring plan. The failure to address these issues before new development occurs
9 renders the EIS inadequate and shows that TRPA’s findings that the RPU achieves and maintains the
10 environmental threshold standards lack a basis in evidence and are arbitrary and capricious.

11 **ARGUMENT**

12 **I. The EIS Failed to Study the Impacts of Increased Coverage on Soil Conservation.**

13 TRPA’s Opposition fails to address plaintiffs’ claim that the EIS failed to study the impacts of
14 increased concentrated coverage on *soil conservation*, instead exclusively focusing on plaintiffs’
15 water quality claim. The issues are related but distinct. Coverage severely reduces infiltration and
16 alters natural hydrologic function of surface and stream flows into the Lake, impacting water quality.
17 AR134. Soil disturbance also interferes with natural nutrient cycling, native vegetation growth, fish
18 habitat, the health of the soil, and the protection of “environmental balance” and causes soil erosion.
19 Dkt. 36-3, No. 10; POB at 8; AR116224-29, 197. Even if the RPU’s water quality measures could
20 compensate for all soil infiltration and treatment function lost under the RPU, this would not prevent
21 impacts to soil’s many other functions. TRPA’s failure to grasp this difference echoes the EIS’s
22 failure to study the natural values of soil that will be lost to more pavement and buildings near the
23 Lake and the ecological consequences, despite irrefutable evidence that the location and amount of
24 coverage matter. POB at 10-11, 14 (“The greater the coverage in a watershed, the greater the loss of
25 natural soil and its ecological functions and the greater the potential for significant harm to that
26 watershed.”). *See League to Save Lake Tahoe v. TRPA*, 739 F. Supp. 1260, 1289 (E.D. Cal. 2010)
27 (where potential impacts are “important aspect of problem” TRPA required to “at least state a
28 decision as to whether or not these impacts were significant”).

1 TRPA's cases are distinguishable. The EIRs at issue identified potentially significant impacts,
2 although deferring detailed site-specific studies. *See Sierra Club v. TRPA*, 916 F.Supp.2d 1098, 1154
3 (E.D. Cal. 2013) (EIR found "expanded snowmaking system's noise effects would be significant
4 and...identif[ied] a mitigation measure" to reduce effect to less than significant level); *In re*
5 *Programmatic Delta EIR Coordinated Proceedings*, 43 Cal.4th 1143, 1171 (2008) (EIR "evaluate[d]
6 in general terms the *potential* environmental effects of supplying water from potential sources"
7 (emphasis added)). This allowed decision makers to "intelligently consider the consequences of [the
8 proposed action] before approving it." *Id.* at 1173. Here, the EIS provided no opportunity to weigh, at
9 a minimum, the potential consequences of concentrated development on soil conservation – not even
10 "in general terms" – regardless of whether their exact extent could be predicted. *Id.* at 1171.

11 Despite TRPA's arguments, concentrated development is an essential part of the RPU,
12 integral to its strategy to attain air and water quality thresholds. TRPA maintains that higher coverage
13 limits are needed to "facilitate" redevelopment of polluting properties and "incentivize" BMP
14 compliance. AR26246. More intense development in centers will allegedly reduce car use, advancing
15 air quality standards. TRPA Opp. at 21, 24-25; AR26250, 26257. But the public and decision makers
16 had no opportunity to weigh tradeoffs between cumulative impacts of *local* soil loss and furtherance
17 of *regional* water and air quality goals. Once the RPU set regional policies, area plans *implementing*
18 *it* would not need to revisit them. *See Laurel Heights v. UC Regents*, 47 Cal.3d 376, 395 (1988) ("the
19 later the environmental review process begins, the more bureaucratic and financial momentum there
20 is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that
21 could be dealt with more easily at an early stage"). Because concentrated development is a key RPU
22 strategy, "[t]o defer any analysis whatsoever of the impacts of [such development] until after the
23 adoption of the [RPU]... would appear to be putting the cart before the horse." *See Stanislaus*
24 *Natural Heritage Project v. Cnty. of Stanislaus*, 48 Cal.App.4th 182, 200; *cf. Sierra Club*, 916 F.
25 Supp. at 1153 (upholding deferral of study of snowmaking impacts, because snowmaking not
26 "essential" to ski resort project, unlike water supply for housing development in *Stanislaus*).

27 Finally, TRPA does not dispute that it knew the location of existing coverage, the potential
28 maximum development and its distribution, and the average coverage for each developed unit. Dkt.

1 36-3, # 40. The EIS failed to explain why “reasonable forecasting” of local coverage increases was
 2 not possible given this information, not even at the *watershed* level.¹ Instead, it arbitrarily concluded
 3 that parcel- and subwatershed-scale coverage increases could not be predicted “with any accuracy,”
 4 when accuracy is not required and many other EIS analyses relied on modeled estimates. *See* POB at
 5 12-13. It also ignored whether reasonable forecasting at the watershed level was possible. TRPA is
 6 not owed deference for arbitrary action, which is not a scientific “methodology.” *Cf.* Opp. at 10-11.

7 **II. TRPA’s EIS and Threshold Findings Regarding Water Quality Are Invalid.**

8 **A. TRPA Arbitrarily Assumed That All BMPs Will Be Properly Maintained.**

9 The EIS failed to take a “hard look” at ensuring routine and regular maintenance of BMPs,
 10 despite that maintenance is crucial to effective BMP functioning but is “frequently neglected.” *See* POB
 11 at 18; *League*, 739 F. Supp. at 1283, 1289. TRPA argues that, under CEQA, it justifiably assumed that
 12 mitigation measures and regulatory requirements would always be complied with for tens of thousands of
 13 parcels, despite contrary evidence. Except for *Laurel Heights*, none of TRPA’s cases involved evidence
 14 of past history of noncompliance with mitigation or regulatory requirements. *Laurel Heights* found such
 15 evidence relevant under CEQA: “Because an EIR cannot be meaningfully considered in a vacuum devoid
 16 of reality, a project proponent’s prior environmental record is properly a subject of close consideration in
 17 determining the sufficiency of the proponent’s promises in an EIR.” *Laurel Heights*, 47 Cal.3d at 420.
 18 Here, the issue is not so much a project proponent’s credit-worthiness on its commitments, despite past
 19 failures, but TRPA’s reliance on unfounded assumptions that existing BMP programs will be complied
 20 with, despite contrary evidence. NEPA recognizes that an EIS must “reflect true conditions, as informed
 21 by any past experience with mitigation results.” 76 Fed. Reg. 3843, 3845, “Final Guidance for Fed.
 22 Dep’ts and Agencies on the Appropriate Use of Mitigation and Monitoring [etc.]” (Jan. 14, 2011). Thus,
 23 an EIS should “consider past experience and address the potential for environmental consequences as a
 24 result of mitigation failure.” *Id.* at 3851. This will “ensure that unsupported assumptions about mitigation
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26
 27 ¹ In contrast, *Friends of Yosemite Valley v. Norton* did not contemplate specific levels and patterns of
 28 zoning lands into different categories of use and outlining when non-conforming structures should be removed. 348 F.3d 789, 801 (9th Cir. 2003).

1 outcomes are not included.” *Id.* at 3845.² Both *Friends of Back Bay* and *Oro Fino* (NEPA and CEQA
 2 cases, respectively) are on point. *See* POB at 20-21. The agencies could not automatically assume that
 3 existing regulations would mitigate impacts when evidence showed they had not been enforced.³

4 The EIS does not discuss past and existing noncompliance with BMP maintenance requirements
 5 and the significant impacts of this with respect to existing and new development, much less address the
 6 reasons for this failure, or how this issue could be effectively resolved. *Compare* AR5188-89 (EIS) *with*
 7 AR137757 (Placer County noting BMP compliance problem).⁴ Without such analysis, the EIS could not
 8 (and does not) adequately address whether its listing of current and planned efforts to promote BMP
 9 maintenance will work. Its vague list is not of actual, funded commitments that would ensure long-term
 10 compliance with maintenance requirements.⁵ That compliance with such requirements will now be made
 11 a condition of new project approvals is inconsequential (and only addresses a portion of all properties).
 12 BMP implementation has long been a condition of project approval, and maintenance requirements have
 13 long been mandatory, *see* AR8616, 117828, but those requirements have not been enforced. AR103890.
 14 The EIS does not explain how permit requirements will make a difference given no planned increase in
 15 enforcement and TRPA’s poor record with voluntary compliance. *See* AR137778 (Placer County noting
 16 lack of enforcement); *see also* AR55406 (noting TRPA will “remind” property owners with BMP
 17 certificates “more than five years old” of maintenance requirements and “follow up” with “subset” of

18 ² It is irrelevant whether BMPs are “mitigation” or existing “management controls.” *Cf.* Opp. at 17
 19 n.13. Either way, the EIS relies on the “unwarranted assumption” that BMPs and BMP programs will
 20 reduce impacts to insignificance, AR5190, 11953-54, “lay[ing] the groundwork for an arbitrary and
 21 capricious decision.” *See Friends of Back Bay v. Army Corps of Eng’rs*, 681 F.3d 581, 587-88 (4th
 22 Cir. 2012). *See also* AR11949 (EIS) (“All developed properties... are required to mitigate impacts of
 23 development by installing and maintaining permanent BMPs....”)

24 ³ *Forest Guardians v. U.S. Forest Serv.* is distinguishable: There, the agency could rationally assume
 25 that monitoring would prevent overgrazing, because no evidence showed that monitoring failures
 26 were a “but-for cause” of past overgrazing. 329 F.3d 1089, 1099. Here, it is quite clear that failure to
 27 assure BMP maintenance causes water quality impacts. Dkt. 36-3, No. 46.

28 ⁴ In contrast, the EIS accounted for the problem of lack of maintenance of pervious pavement (a
 BMP, AR126947) that the RPU partially exempts from coverage restrictions: “[P]erformance of
 pervious pavements can decline if it is not properly sited or maintained. The analysis finds that the
 effectiveness could be diminished over the long term, and therefore the pervious coverage could
 become ineffective at allowing runoff to pass though the surface and could increase stormwater
 runoff, creating a potentially significant impact.” AR5186.

⁵ *Compare* AR5188-89 (EIS) *with* AR137757 (Placer County noting “institutional shift [needed]
 potentially involving a combination of incentives, funding, and enforcement that ensures
 implementation and maintenance of private parcel BMPs”); AR137743 (County noting need for
 “rigorous multi agency effort”). *See also* AR1958 (TRPA water quality plan noting BMP compliance
 program implemented “[t]o the degree funding is available”).

1 these annually).⁶ Finally, it is unclear whether permits will include *specific*, enforceable requirements.
 2 See AR137778 (Placer County noting problem of “overly general” maintenance requirement).⁷

3 **B. The TMDL Does Not Save the RPU, and, in Fact, Requires BMP Compliance.**

4 TRPA’s reliance on the TMDL is a red herring. It suggests that water quality conditions will
 5 improve with the TMDL, regardless of BMP compliance rates throughout the region. But the TMDL
 6 simply sets forth pollutant load reductions needed to restore clarity that will be implemented through
 7 “load reduction plans” by local governments, unformulated when the RPU was adopted. Thus, no basis
 8 for claiming these plans will work exists. See *Vineyard Area Citizens for Responsible Growth v. City of*
 9 *Rancho Cordova*, 40 Cal.4th 412, 440 (2007) (EIR may not tier off of future studies).

10 Increased BMP installation and maintenance are critical to TMDL success. The “Recommended
 11 Strategy” for TMDL implementation relies heavily on BMPs. AR103790-91. This strategy “provides the
 12 basis for the load reduction allocation schedule of fine sediment particles and nutrients to Lake Tahoe for
 13 the first fifteen year TMDL implementation phase.” AR106488, 103796. The TMDL notes: “continued
 14 application of *existing stormwater management practices* would be insufficient to meet needed...load
 15 reductions. *Enhanced operations and maintenance* coupled with more intensive application of treatment
 16 measures with a demonstrated ability to reduce fine sediment particle loads will be needed to achieve
 17 TMDL requirements.” AR106505 (emphases added).⁸ The TMDL’s Pollution Load Reduction Model
 18 (“PLRM”) – also used in the EIS’s water quality analysis – assumes that all BMPs will be properly
 19 maintained. See AR6486, 104204-05, 104186. But nothing indicates how the TMDL – which simply
 20 requires local governments to create “load reduction plans” – will promote maintenance to address
 21 existing and new pollution sources.⁹ AR137778-79 (Placer County noting lack of TRPA regulatory

22 _____
 23 ⁶ Security deposits do not ensure long-term maintenance, only installation, before the project’s final
 inspection. See Code § 5.9.4(C) (deposit released after final inspection). Cf. Opp. at 14.

24 ⁷ The BMP Handbook only provides guidance, despite TRPA’s suggestion that it *requires* that
 “[w]hen a project is permitted, a BMP inspection and maintenance plan will be required under the
 25 Special Conditions of the permit.” See Opp. at 15. Cf. AR126827 (noting Handbook’s “guidance”
 function). Code Chapter 60 does not reference this as a requirement. See AR8616-20.

26 ⁸ See also AR137775 (Placer County will rely on increased BMP implementation); AR55404 (TRPA
 noting TMDL “identifies BMPs as a key strategy to attain pollutant load reduction goals”); AR55406
 27 (TRPA stating “BMP maintenance is critical to sustain the reduction of nonpoint source pollution
 needed to reach [TMDL milestone]”); Opp. at 16 n.12 (BMPs “one of several key strategies”).

28 ⁹ For the same reasons, TRPA is wrong that BMP compliance does not matter given the conservative
 assumptions in the TMDL. See Dkt. 36-2, ¶ 154. The TMDL simply requires specific load reductions,

1 support to increase BMP compliance for TMDL). Thus, the TMDL’s projected load reductions from
 2 greater BMP implementation are unreliable. AR137757 (Placer County TMDL Technical Report noting
 3 “[i]f a significant number of private property BMPs installed are not maintained over the long term, the
 4 average load reduction for private property BMPs estimated by the PLRM may not be accurate”). With
 5 no assurance of long-term BMP maintenance, TMDL load reduction “credits” that local governments
 6 earn for BMP installation – based on modeled PLRM estimates (and confirmed only by an “annual
 7 records inventory” of BMPs, rather than actual, measured reductions) – are a sham. AR107691, 107719,
 8 107726. So are the RPU EIS’s projected pollution reductions, based on the same model. *See* Opp. at 9.

9 TRPA mischaracterizes the TMDL in other respects.¹⁰ First, there is no assurance that the TMDL
 10 will be implemented. TMDL compliance is not mandatory in Nevada. The Nevada Division of
 11 Environmental Protection (“NDEP”) and the California Regional Water Quality Control Board, Lahontan
 12 Region (“Water Board”) are responsible for ensuring load reductions are met, under EPA-delegated
 13 authority. AR11918-19, 5098. In California, the Water Board has issued a single NPDES permit to Placer
 14 County, the City of South Lake Tahoe, and El Dorado County, *see* AR107394-440, defining the local
 15 governments’ duties in implementing the TMDL for urban stormwater discharges, including the load
 16 reduction each is responsible for. AR107416-17. Under the permit, each local government must have a
 17 “load reduction plan” to meet reduction targets, *i.e.*, reductions from baseline year 2004 modeled levels.
 18 AR107416-17.

19 In contrast, in Nevada, NDEP will implement the TMDL for urban pollution sources “through
 20 Memoranda of Agreement (MOA) with urban stormwater jurisdictions including Douglas and Washoe
 21 Counties and the Nevada Department of Transportation.” AR136266-Att. 1, p. xi. “Jurisdiction-specific
 22 load allocations will be developed for Washoe County and the jurisdictions comprising Douglas

23 but implementation must rely on increased BMP compliance. The Water Board noted that TMDL
 24 load reductions for existing sources and mitigation for new development will be dealt with separately.
 25 It disavowed that “development projects can be ignored” under the TMDL since new projects will
 26 increase pollution. AR107084. But “[e]fforts to eliminate the increased loads from [such projects]
 27 will not be counted towards the annual load reduction requirements.” AR 107080.

28 ¹⁰ TRPA cites California’s TMDL report as the operative document for California and Nevada. While
 large portions of the documents are duplicative and rely on the same studies, the two states’ TMDL
 reports differ in key respects. *See* AR136266 (email with non-Bates-stamped, clickable attachment of
 “track changes” version of NDEP TMDL report showing differences from California report).
 Plaintiffs cite to California’s TMDL report, except when specifically referring to Nevada’s TMDL
 report, cited as: AR136266-Att. 1, [page no.].

1 County,” but compliance is not mandatory.¹¹ Indeed, Nevada’s TMDL report notes that implementation
 2 in *both* states could indefinitely be put off, given limited funding:

3 [R]ecent economic conditions and budget constraints indicate that funding may soon
 4 become a real limitation constraining the pace of implementation. For example, the
 5 proposed Lake Tahoe Restoration Act of 2011... would authorize \$415 million over 10
 6 years to improve Lake Tahoe water clarity [among other things]... but it has been
 7 stalled in the U.S. Congress since its introduction. Should funding constraints
 8 adversely impact the feasibility to meet load reduction goals within the timeframes
 9 specified..., the *Water Board and NDEP* may amend the implementation and load
 10 reduction schedules.

11 AR136266-Att. 1, p. 12-14. It is unclear if sufficient public funds are available. *See also* Dkt. 36-2 ¶¶ 76,
 12 118 (TRPA noting limited funding for Lake restoration); AR137777-78 (Placer County unable to
 13 implement TMDL due to funding constraints). TRPA cannot rely on the TMDL to mitigate the RPU’s
 14 impacts, especially because it “did not require that [it] be implemented as a condition of the development
 15 allowed under the [RPU] and made no provision to ensure that [it] will actually be implemented or ‘fully
 16 enforceable.’” *See Fed’n of Hillside Canyons v. City of Los Angeles*, 83 Cal.App.4th 1252, 1261. The
 17 RPU does not include TMDL requirements but “plays a supportive role that facilitates implementation of
 18 the TMDL.” AR1947.¹²

19 Even if the TMDL were fully implemented, it would not address localized impacts to streams and
 20 nearshore areas, especially nearshore clarity decline and algae growth, which increased concentrated
 21 development and improper BMP maintenance could exacerbate. *See* POB 3, 16 n.6; AR106458, 107138
 22 (noting correlation between algae growth and development); AR102277 (mineral particles from urban
 23 areas reduce nearshore clarity). The TMDL only requires load reductions to improve mid-lake clarity, not
 24 nearshore or stream conditions. AR106457, 106459. Thus, it mainly targets fine sediments (the main
 25 cause of mid-lake clarity loss); nutrient pollution (the main cause of nearshore algae growth) is targeted
 26 to a lesser degree. AR106485, 106437, 106608. The TMDL’s touted flexibility for targeting “priority
 27 areas” could leave localized, cumulative water quality impacts from development in lower priority areas
 28

¹¹ *See* AR136266-Att. 1, p. 10-5 (Nev. TMDL replacing load reduction “requirements” with “goals”);
 AR11919 (EIS: “MOAs are a collaborative, legally nonbinding approach” to implementing TMDL);
 AR136268 (“[T]he *aspirational goal* of the [Nevada TMDL] is also to set forth a *recommended* plan
 and strategy to restore Lake Tahoe’s historic deep water transparency to 29.7 meters annual average
 Secchi depth at a feasible pace *consistent with available funding*.” (emphasis added)).

¹² Moreover, the TMDL is based on an untested model. AR106482-91, 26003-04. Nothing requires
 that it be shown *effective* in reducing pollution before new development is allowed. AR26495.

1 unaddressed. *See* AR107135; AR1905 (noting TMDL load reductions “supersede” project-level “effluent
 2 limits”). TRPA suggests that any increase in localized water pollution impacts will be avoided because
 3 the TMDL does not allow any increase in pollutants at the catchment or subwatershed level from 2004
 4 baseline levels. *Opp.* at 16; Dkt. 36-2, ¶ 60. But only the California NPDES permit requires this; TRPA
 5 points to no similar Nevada requirement. *Id.* Thus, Nevada can meet TMDL load reductions without
 6 ensuring new sources (post-2004) do not increase pollution overall.¹³

7 Nor can TRPA rely on speculation that local governments might adopt area-wide stormwater
 8 treatment systems, allowed by the RPU, to replace or supplement private BMP implementation. TRPA’s
 9 own water quality analysis does not assume any area-wide treatment. *See* AR5103. Such systems require
 10 large capital investments and sustained operations and maintenance funding. AR137743 (high capital
 11 costs); AR128192 (public entities bear costs, with higher cost per acre than private parcel BMPs);
 12 AR128191 (“ongoing maintenance...of stormwater treatment systems is costly, and has historically been
 13 neglected or inconsistent”). No evidence shows these systems are financially feasible or how they would
 14 be funded. *See W. Land Exchange Project v. U.S. Bureau of Land Mgmt.*, 315 F.Supp.2d 1068, 1092 (D.
 15 Nev. 2004) (NEPA review neither assured “that any of the mitigation measures that ‘could be employed’
 16 actually will be,” nor addressed their funding). The TMDL notes their uncertain cost and effectiveness.
 17 AR103791 (study results “are sensitive enough to the assumptions made that sediment removal rates or
 18 costs [of centralized treatment systems] could be adjusted up or down significantly”).¹⁴

19 Finally, TRPA’s reliance on adaptive management is unavailing. It cannot defer dealing with the
 20 problem of BMP compliance, or address it as it goes along, when the problem is already evident. *Cf.*
 21 *League*, 739 F. Supp. at 1284 (adaptive management cannot justify “postponing altogether the discussion
 22 of mitigation measures”). This approach, which amounts to *possibly* reacting to worsened conditions (in

23
 24 ¹³ Nor do coverage reductions through existing programs necessarily offset localized water quality
 25 impacts, as these can be carried out anywhere in the region, AR5065 (excess coverage mitigation),
 AR11698 (Environmental Improvement Program), or for coverage transfers, within the same
 hydrologically-related area (not smaller-scale watershed). AR 5065. *Cf.* *Opp.* at 9 n.4.

26 ¹⁴ Cost-effectiveness and functioning of these systems may actually depend on *effective private-*
 27 *parcel BMP implementation* that reduces the volume of runoff to be treated. *See* AR128192 (“On-site
 28 BMPs and infiltration...reduce[] both the volume of stormwater and the concentration of pollutants in
 runoff that must be treated.... Thus...[treatment] systems can be smaller and require less frequent
 maintenance to maintain functionality. Both factors reduce the costs of stormwater treatment.”);
 AR137719 (increased BMPs improve effectiveness of stormwater treatment systems); *Opp.* at 15-16.

1 an unspecified manner), instead of addressing potential impacts from improper BMP maintenance before
 2 impacts occur, is not proper mitigation. *See League*, 739 F. Supp. at 1284 & n.23; *cf. Opp.* at 6 (listing
 3 measures, none of which mandate specific corrective actions).

4 **III. No Evidence Shows That TRPA’s Monitoring Network Is Adequate.**

5 TRPA’s most recent TER and its response to comments on the RPU both acknowledge that
 6 TRPA’s monitoring network as of the RPU’s approval was inadequate to detect maximum ozone
 7 concentrations. *See* AR82 (“spacing and density of monitoring sites is insufficient”); *id.* (“it is
 8 unknown if the current network has tracked maximum...[ozone] concentrations”); AR155884 (noting
 9 Regional Plan’s “additional [air quality] monitoring needs”); AR95 (agency should “work towards
 10 maintaining monitoring sites for the long-term to reduce the discontinuity of data collection”).¹⁵

11 While the TER does not provide more specifics, this is likely because ozone levels in South Lake
 12 Tahoe, California – where the greatest emissions of ozone precursors are due to traffic levels – have
 13 not been monitored since 2009. *See* AR11774, 102756, 147765, 92237, 92273, 92282. But the RPU
 14 provides no concrete commitments to fill those gaps. *Id. See* POB at 24-25. Without such
 15 commitments, and even assuming *arguendo* that the Region has achieved ozone thresholds, there is
 16 no evidentiary basis for TRPA’s finding that the RPU can “achieve and *maintain*” those thresholds.

17 The final TER, however, contradicts the draft, finding the ozone threshold was attained, when
 18 only one monitor in Incline Village, Nevada had reported ozone data for the last two years (2010-11).
 19 TRPA reversed the draft’s original conclusion that the 8-hour standard is not in attainment, but the
 20 peer reviewers never endorsed this change. *Cf. Opp.* at 23. In fact, the only peer review – of the *draft*
 21 TER – recommended “aggressive” emissions reductions. AR8861, 8904-05. Significantly, CARB
 22 maintains that the California side of the Region is “nonattainment-transitional” for the 8-hour ozone
 23 standard.¹⁶

24
 25 ¹⁵ The Air Quality Index (“AQI”) purportedly showing air quality improvements is also unreliable.
 26 The AQI’s count of “good” air days is “based on the *highest pollutant concentration* that is measured
 27 that day.” AR75 (emphasis added). But the TER noted deficiencies in ozone monitoring. AR82
 (monitoring “intermittent[]” and sites have changed). Also, the AQI’s conclusions were not peer
 reviewed, having only first appeared in the final TER. *See generally* AR9209, 8839-8948.

28 ¹⁶ The Region must meet the “strictest” standards in the areas where they are “*applicable,*” *see*
 Compact art. V(d), but Nevada data cannot show this for a California standard, especially when
 ozone levels vary both in location and time throughout the Region, AR90473-76, 148539 (maps

1 TRPA points to several new sites as proof that the network is adequate and vaguely refers to a
 2 study that “recommended a total of five monitoring sites.” *Cf.* Opp. at 23 n.18. But nothing in the
 3 record explains whether the new sites adequately address the “spacing and density” problem
 4 identified in the TER, details the study and its recommendations, nor states TRPA’s commitment to
 5 adopt them. (The study was not made public nor part of the record.) Given these information gaps,
 6 plaintiffs questioned the adequacy of the location and future plans for the Bliss State Park and TRPA
 7 Office sites (e.g., whether monitoring will be ongoing), but TRPA did not respond. *Compare*
 8 AR4337, 4343, 4450-51 (comments O16-131, -132, -198, -202) with AR5356-57, 5402, 155884
 9 (respective responses).¹⁷ Finally, TRPA’s long-term projections of reduced ozone levels do not save
 10 the threshold findings. The TER peer reviewers noted that “the effectiveness of existing programs in
 11 controlling ozone” is “uncertain,” and “the high inter-annual variability in ozone concentrations...
 12 suggests that programs currently in place may not be effective at improving conditions moving
 13 forward.” AR8905. Without knowing actual conditions and how to respond, TRPA has no rational
 14 basis upon which to conclude that the RPU is on the right track.¹⁸

15 **CONCLUSION**

16 For the foregoing reasons, and those in plaintiffs’ opening brief, plaintiffs respectfully request
 17 that the Court grant summary judgment in their favor; set aside the EIS, all approvals related to the
 18 RPU, and area plans approved pursuant to the RPU; and enjoin implementation of the RPU.
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23 showing varying 2-week average concentrations over time, including variations between Lake’s north
 24 and south shores), and the largest local emissions of ozone precursors occur in the City of South Lake
 25 Tahoe. Relatedly, no evidence shows that CARB relied on Incline Village data to designate the
 26 California part of the Basin “non-attainment transitional.” *Cf.* Opp. at 21 n.15.

25 ¹⁷ The Tahoe City, California site was not quality-control approved by CARB, and there was no
 26 indication of when it would officially come online. *See* AR147416. The Bliss State Park, California
 27 site appears to be for detecting background or baseline ozone levels, not peak levels, as it is located in
 28 a remote, unpopulated area. AR2561, 128337, 92011, 92026, 92162.

¹⁸ This is especially so because ozone formation can be influenced by other factors, such as weather,
 climate change, and transport of ozone precursors from outside the Basin, and the effectiveness of
 existing air quality programs is unknown. AR155795, 97 (TER noting “directed effectiveness
 monitoring” needed to understand effectiveness of programs to reduce ozone).

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Respectfully submitted,

2 /s/ Wendy S. Park

3 WENDY S. PARK

TRENT W. ORR

4 *Counsel for Plaintiffs Sierra Club*
5 *and Friends of the West Shore*

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