Nos. 14-15998, 14-16513

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB and FRIENDS OF THE WEST SHORE,
Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Hon. John A. Mendez, Case No. 2:13-cv-00267-JAM-EFB

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GLOSSARY

1987 Plan	Lake Tahoe Regional Plan approved in 1987
AOB	Plaintiffs' Opening Brief
APA	Administrative Procedure Act (5 U.S.C. § 500 *et seq.*)
AR	Administrative Record
Area Plan	Local governments in the Region may prepare Area Plans pursuant to Code §13.
Bailey	Bailey, R.G. 1974. Land-capability classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning. USDA Forest Service
BMPs	Best Management Practices
Centers	Community Centers, Town Centers, Regional Centers, and the High Density Tourist District
CEQA	California Environmental Quality Act (Pub. Res. Code § 21000 *et seq.*)
Centers	A collective term for identified Town Centers, the Regional Center, and the High Density Tourist District. (Code § 11.6.3. AR5103.)
Code	TRPA Code of Ordinances

Compact	Tahoe Regional Planning Compact
Coverage	Impervious Surface (as defined in Code § 30.)
CWA	Federal Clean Water Act
EIP	Environmental Improvement Program
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EPA	United States Environmental Protection Agency
FRCP	Federal Rule of Civil Procedure
GHG	Greenhouse gases
Legacy Development	Pre-Compact Development
LTAB	Lake Tahoe Air Basin
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System
Plaintiffs	Appellants Sierra Club and Friends of the West Shore
PLRM	Pollution Load Reduction Model
PLRPs	Pollutant/Stormwater Load Reduction Strategies
Region	Lake Tahoe Region
RPU	Regional Plan Update
RPUC	Regional Plan Update Committee
RSER	RPU Supplemental Excerpts of Record
RTP	Regional Transportation Plan
Rule(s)	TRPA Rule of Procedure(s)

Rule 10.6.2	TRPA Rule of Procedure 10.6.2
SEZs	Stream Environment Zones
SLRPs	Stormwater Load Reduction Strategies
TAUs	Tourist Accommodation Units
TER	Threshold Evaluation Report
TMDL	Lake Tahoe Total Maximum Daily Load
TRPA	Tahoe Regional Planning Agency
Threshold Standards	Environmental Threshold Carrying Capacities
VMT	

INTRODUCTION

Plaintiffs make only one point that Defendant Tahoe Regional Planning Agency ("TRPA") accepts: they disagree with TRPA's policy choices. Plaintiffs would like to challenge the policies of the RPU but they cannot. The only question before this Court is whether TRPA properly exercised its discretion to amend its 1987 Regional Plan ("1987 Plan"), and whether the record supports TRPA's review of its policy choices. When put in this proper context, Plaintiffs' claims utterly fail.

Congress created TRPA to stop uncontrolled development causing significant environmental damage to Lake Tahoe and to restore the Lake's famed clear, blue water. To achieve these goals, TRPA adopted the 1987 Plan with some of the strictest development regulations in the nation. While the 1987 Plan achieved many of TRPA's objectives, the last two decades presented TRPA with new challenges: how to accelerate the restoration of the Lake, despite ongoing harm caused by obsolete, existing development and declining public funding – realities consistently unaddressed by Plaintiffs.

TRPA's planning response, the 2012 Regional Plan Update ("RPU"), strengthens existing growth controls, slashes development rates, further restricts development near the Lake, incentivizes environmentally beneficial redevelopment and incorporates the science-based regulatory requirements of the Lake Tahoe

Total Maximum Daly Load ("TMDL") approved by California, Nevada and the Environmental Protection Agency ("EPA").

TRPA grounded the RPU in sound science, modeling and technical review, as presented in its programmatic environmental impact statement ("EIS"). This comprehensive study concluded that the RPU would not adversely affect the environment. No impacts are left unanalyzed as Plaintiffs claim. In particular, the detailed EIS analysis shows that the RPU's changes to policies restricting the amount of impermeable "coverage" allowed on parcels would accelerate the attainment of TRPA's objectives by encouraging relocation of substandard development from environmentally sensitive areas to existing, already urbanized "Centers." The RPU strengthens, not threatens, the implementation of TRPA's comprehensive water quality improvement strategies, including Best Management Practices ("BMP") delivery and maintenance.

Plaintiffs object. They argue that TRPA, having studied and debated the RPU for more than a decade and achieved an unprecedented policy consensus, should have performed still **more** studies. However, as the district court held, abundant – indeed, overwhelming – information, studies, and modeling support the RPU policies. This Court should therefore affirm the district court's ruling.

JURISDICTION

TRPA agrees with the statutory basis for federal question and appellate jurisdiction stated in Plaintiffs' brief.

ISSUES PRESENTED

1. Do Plaintiffs have standing to challenge the RPU's coverage policies, where those policies themselves do not allow increased coverage and cannot without two further regulatory decisions, specifically TRPA's future approval of an "Area Plan" and a subsequent development permit, both of which must demonstrate no adverse environmental impacts? Are Plaintiffs' claims ripe for the same reasons?

2. Is the programmatic EIS adequate for evaluating the impact of the RPU's policies regarding the transfer of coverage to Centers, where the record includes studies, data and modeling showing these policies will improve water quality and where two further approvals and environmental reviews will require no unmitigated adverse environmental impacts before redevelopment can occur?

3. Can TRPA reasonably rely, in analyzing the potential impacts of the RPU's coverage transfer and environmental redevelopment policies, on its comprehensive water quality requirements that mandate all new development install and maintain BMPs?

4. Is Plaintiffs' challenge to the reasonableness of TRPA's record preparation costs properly before this Court? If so, did the district court abuse its discretion in finding that TRPA's costs were reasonable?

ADDENDUM

Pertinent sections of the Lake Tahoe Regional Planning Compact ("Compact"), TRPA Code of Ordinances ("Code"), TRPA Rules of Procedure ("Rules"), and U.S. District for the Eastern District of California Local Rules of Court ("Local Rules") are provided in a separate addendum.

STATEMENT OF CASE

The primary threats to Lake Tahoe's water quality – as identified by the peer-reviewed TMDL studies and TRPA's Threshold Evaluation Reports ("TERs") – are: (1) aging development in existing urban centers that lack adequate BMPs to reduce stormwater runoff containing fine sediments and nutrients; and (2) legacy development on sensitive lands, primarily wetlands or stream environment zones (SEZs), that significantly diminish natural infiltration of these same fine sediments and nutrients. *See*, *e.g.*, RSER69, 163-164, 600. In December 2012, following a decade of study and debate, TRPA adopted the RPU that includes multiple policies responding to these threats.

Plaintiffs attack a subset of these policies. The challenged policies allow local jurisdictions to propose Area Plans that shift density and coverage. Plaintiffs

portray these policies as allowing unchecked urbanization, and argue TRPA did not study the localized impacts of such urbanization.

This portrayal is an overly simplistic– indeed, misleading– caricature of the RPU. The RPU limits and conditions incentives that authorize the transfer of density and coverage to redevelopment projects in Centers. In particular, the RPU:

- Limits expanded coverage transfer incentives to "high-capability" land within *already* highly urbanized Centers. Code §§ 30.4.2.B.1 and 30.4.3.A.2; *see also* RSER146, 167.
- Offsets all such transferred coverage by the removal and restoration of at least as much coverage within the same Hydrologically Related Area ("HRA"). *Id.*, Code § 30.4.3.E and 30.4.3.G.1.
- *Reduces* coverage near the shore of Lake Tahoe. *Id.*
- Requires redevelopment projects install engineered, upgraded infrastructure that adheres to TRPA's detailed Code requirements to control and treat stormwater runoff. Code §§60.4.3 and 60.4.9; *see also* RSER310, 313.
- Promotes local government compliance with TMDL requirements, which imposes specific, enforceable limits on discharging sediment and other pollutants to Lake Tahoe. *See, e.g.*, RSER147, 163-166.

On cross-motions for summary judgment, the district court specifically rejected Plaintiffs' facile characterizations of the RPU and dismissed Plaintiffs' claims. The district court found Plaintiffs disregarded the abundant record evidence supporting TRPA's careful programmatic examination of these coverage incentives within the EIS. ER19, 27-32.

On appeal, Plaintiffs persist in urging more study is needed to support RPU policies allowing transfer of coverage to Centers. Plaintiffs barely acknowledge the scientific consensus reflected in the TMDL regarding how to restore the Lake's water quality. Plaintiffs also disregard policies committing TRPA to monitor its progress, and adjust its programs as necessary to attain and maintain environmental standards.

One fact is particularly revealing. TRPA adopted the RPU following more than a decade of study, hundreds of meetings, input from thousands of organizations and individuals, a peer-reviewed assessment of the status of TRPA's progress, a comprehensive programmatic EIS, a Bi-State consultation process and years of intense debate. Despite this record, when pressed at trial regarding what they would do differently, Plaintiffs had only one answer: perform more studies. RSER55-59.

As the district court held, TRPA's approval of the RPU and its certification of the EIS are rational, based on enlightened planning principles and supported by substantial record evidence. ER27-35.

STATEMENT OF FACTS

I. To preserve, restore, and enhance the Tahoe Region, TRPA adopted the 1987 Regional Plan's comprehensive growth control regulations.

Lake Tahoe is an icon, one of the largest and deepest alpine lakes in the world, whose beauty is legendary and history complicated. *See generally*, *Tahoe-Sierra Pres. Council, Inc. v. TRPA*, 535 U.S. 302 (2002); *Tahoe-Sierra Pres. Council, Inc. v. TRPA*, 322 F.3d 1064 (9th Cir. 2003); *People of State of Cal. ex rel. Van De Kamp v. TRPA*, 766 F.2d 1308 (9th Cir. 1985); *Sierra Club v. TRPA*, 916 F.Supp.2d 1098 (E.D. Cal. 2013). Seven times considered for National Park designation, Lake Tahoe never became parkland because of its long history of private use, logging, mining, grazing, casino gaming, and recreation-resort development. RSER700-723.

First developed for tourism and private camps as far back as the 1800s, a development boom in the mid-1900s, driven by gaming and the 1960 Winter Olympics, burst upon the Tahoe landscape creating concentrated high-rise towers on the South Shore and small, urbanized centers around the Lake. RSER64, 234-237, 693-698. Developments like the Tahoe Keys subdivision destroyed sensitive wetlands critical for filtering sediment and nutrients and endangered Lake Tahoe's

famed water clarity. *Id.* The Region's long history of human activity has left a legacy of adverse effects on the Lake's water quality and surrounding alpine environment that are still being addressed today. *Id.*; RSER71.

In the late 1960s, California, Nevada and the United States agreed to stop uncontrolled development when Tahoe's small communities threatened to become large metropolitan cities. They adopted the 1969 Compact creating TRPA and strengthened it in 1980 to restore Lake Tahoe. RSER64-65, 235, 699.

In 1982, TRPA adopted Environmental Threshold Carrying Capacities (or "Threshold Standards"), and in 1987 adopted a plan that, over time, would achieve and maintain those standards while "providing opportunities for orderly growth and development." Compact, arts. V(b), (c) and I(b); *see* RSER65, 112-118, 427-432. The 1987 Plan did not stop all growth; rather, it constrained, directed and limited growth to avoid harm and restore the environment over time. *Id.*

The 1987 Plan's growth control policies – all of which the RPU retains – capped development capacity, prohibited new subdivisions, metered the rate at which TRPA approves development, and prohibited development in designated areas. RSER115, 241-244, 436. Development was further constrained by coverage limits based on land capability classes for different soil types and

prohibitions of new development on sensitive lands.[1] *Id.* The 1987 Plan also required TERs every five years to assess progress towards attaining Threshold Standards and recommend Regional Plan amendments, as needed. *Id.*

II. Two decades of improved scientific understanding and socioeconomic changes revealed that adjustments to the 1987 Plan were needed to address the continuing harmful effects of legacy development.

The Region's environmental and economic status has changed significantly since the adoption of the 1987 Plan. The 1960s economic momentum has faded. RSER520. Today, the historic gaming economy is in permanent decline. The Region faces above average unemployment rates, affordable housing shortages, high poverty levels, and school closings. RSER215, 376-377, 213-219, 433. Tahoe's permanent resident population has dropped since 2000. Most tourism service workers commute from outside the Region. RSER213-214. As the economy wanes, so has investment in the built environment. Public funding for environmental restoration projects is also declining. RSER434-435, 740.

The majority of Tahoe's development was constructed before environmental standards were in place. RSER210, 235-237. TRPA's TERs and other studies showed much of this "legacy development" is a major factor preventing attainment of water quality standards. RSER116. Ironically, regulations that control growth

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[1] The 1987 Plan's land coverage regulations incorporated Robert Bailey's 1974 land capability classification system ("Bailey system"). RSER80, 241-242.

also discourage investments in upgrading infrastructure, such as stormwater controls, at legacy sites. RSER235-236.

For example, the 1987 Plan assigned impermeable coverage limits based on the "Bailey" system. Bailey established nine land capability classes reflecting the development capacity each land class could support regionally without soil or water quality degradation. Bailey further determined the development capacity of each class at a **regional** scale. RSER80, 241-242, 277-278. TRPA then assigned coverage limits on classes of **parcels** based on Bailey; TRPA used this indicator as a proxy for parcel-specific stormwater loading. RSER277-278, 295, 688-692. Bailey parcel-scale coverage limits constrain development based on classification, regardless of the magnitude of the risk an individual parcel poses to water quality. RSER157, 833. [2]

Starting in 1991, periodic TERs identified the need to aggressively address aging public infrastructure (e.g., roads) and legacy development. RSER65, 116, 830. In 1992, TRPA adopted a BMP retrofit program; this program called upon the owner of each of the 43,000 private parcels in the Region to install infiltration systems to treat stormwater. ER637-640, 642. But a parcel-by-parcel retrofit program was cumbersome and inefficient. On some parcels, technical constraints,

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[2] In recognition of the inexact nature of the Bailey system, TRPA has always recognized exceptions to Bailey's parcel-scale coverage limits. RSER157.

such as high groundwater, made parcel-scale BMPs infeasible. *Id.* Moreover, TRPA lacked funding to educate landowners and oversee the design and enforcement of BMPs on 43,000 parcels. RSER220-21.

In 1999, TRPA added focus to large-scale public infrastructure investments through its Environmental Improvement Program ("EIP"). RSER65, 116, 736-739. Over the 15 years since its adoption, the EIP secured and invested $600 million in stormwater treatment infrastructure mostly along roadways, but also in BMP retrofit projects. RSER734. [3] The EIP, a program funded by both the public and private sectors, has been successful. Water quality declines have stabilized and the EIP remains a key component of the RPU.

In 2011, following ten years of intensive scientific studies and modeling, California, Nevada, and the EPA approved the TMDL. [4] RSER163, 607. This enabled state and federal agencies to identify the sources and amount of pollution discharged to the Lake, and to develop a plan to achieve Water Quality Threshold Standards. RSER735, *see also* RSER607-609, 639-640, 724. The TMDL requires steady, documented reductions in pollutant loading to the Lake. It is implemented

[3] The EIP's $1.7 billion overall restoration investment in Tahoe's environment turned the trend toward attainment on many of TRPA's threshold categories. RSER733, 736-739.

[4] A TMDL is a water quality restoration plan required by the Clean Water Act ("CWA") Section 303(d) (33 U.S.C. § 1313(d)) to achieve water quality standards. RSER774, 742.

through permits and Memoranda of Agreement ("MOAs") requiring local governments and agencies to adopt and implement load reduction plans. RSER123, 274-275, 749, 756-773.

TRPA does not duplicate the States' lead regulatory role under the TMDL, but instead creates incentives for achieving and surpassing TMDL targets through the RPU's land-use policies. RSER124-125, 147, 608, 743-748. The TMDL load reduction targets provide local jurisdictions with flexible prescriptions for implementing BMPs in order to maximize available resources. In particular, jurisdictions prioritize areas that can benefit most from BMPs. *Compare* RSER164, 540 *with* RSER779 (study establishing minimal gains for BMP retrofit enforcement). Both the States (under the TMDL) and TRPA (under the RPU) require ongoing monitoring and maintenance of BMPs. ER643, RSER819. Unlike 30 years ago, the combined regulatory approach now scientifically links pollutant reduction plans to improvements in water quality. RSER607-609, 639, 724, 735.

The 2011 TER – found to be "technically sound" and "a credible basis to support ongoing TRPA policy-making" by an independent scientific peer review panel – reported significant progress on improving the Region's environmental quality. RSER65-67, 546-551, 683-684. Two-thirds of the threshold indicators are

either in attainment or trending toward attainment.[5] The 2011 TER identified Lake clarity and nearshore conditions as among the areas of most concern.[6] RSER65-66, 70, 72-77, 104-105. Regarding soil conservation, seven of nine indicators are in attainment; regionally, only sensitive wetlands and steep slopes (Bailey classes 1b and 2) are over-covered as a result of legacy development. RSER66, 78-98.

In its programmatic RPU EIS, TRPA evaluated five different land-use planning approaches, development potential regulatory incentives, and assesses each alternative's potential impacts. RSER228-233. TRPA also vetted the Draft RPU at 15 full-day public meetings to review the plan line-by-line; 89 percent of topics were endorsed unanimously. RSER154, 239-240, 519, 832. For the most difficult and intractable issues, a Bi-State multi-stakeholder consultation group, formed by the States, forged solutions and made recommendations to TRPA.

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[5] Threshold areas including scenic, wildlife, vegetation, recreation, fisheries and noise were generally in attainment but had specific areas needing improvement or included standards that TRPA has little practical ability to control. *See* RSER66-67, 99-103.

[6] Scientists identified nitrogen deposition and tributary runoff as among the factors affecting nearshore water quality. They recommended additional monitoring to assess whether supplemental management actions are necessary. RSER68, 111, 831. Scientists also concluded that actions taken to reduce nutrient runoff and implement the TMDL would benefit nearshore conditions because all water flows through the nearshore before reaching mid-lake. RSER105.

RSER437-469, 517-518, 641. TRPA's Governing Board reviewed and endorsed the Bi-State recommendations. *Id.* Ultimately, both States, every local government entity in the Region, and virtually all stakeholders (save Plaintiffs) endorsed the final RPU. RSER62, 641-682. The Governing Board certified the final EIS and approved the RPU by a 12-1 vote. RSER552-563.

III. The RPU maintains strict regulatory controls on growth while making targeted changes to address legacy development effects needed to accelerate attainment of Threshold Standards.

The RPU's updated policies address the most critical planning and environmental issues facing the Region, while leaving intact TRPA's strict growth control system, rigorous development standards, and inter-agency partnerships (e.g., EIP) for investment in restoration and monitoring. RSER245-259, 138. The Governing Board found the RPU's policies will accelerate threshold attainment by reducing existing sources of pollution and encouraging redevelopment of legacy building. RSER600; *see also* RSER236-237, 261-273.

The RPU authorizes little new growth, and strengthens existing water quality restoration and protection strategies. RSER525-531. The RPU further reduces the rate of urban development and creates no new development rights or tourist

accommodation units ("TAUs").[7] *Id.*, Code § 50.4.1, RSER212 (red-line of prior allocations), 173.

The RPU provides incentives to improve water quality and reduce sprawl, Vehicle Miles Travelled ("VMT"), air pollution, and new coverage. RSER276, 263-264. These incentives target the nine existing urban Centers. RSER169. These Centers are densely developed, highly covered urban areas that are major sources of pollutant loading. RSER297, 470, 834-849. Although Plaintiffs imply otherwise, the Centers do not contain significant vegetation or wildlife resources. *Id.*, RSER351-355, 361.

The RPU allows local jurisdictions to provide incentives to encourage redevelopment of these Centers.[8] For example, under the RPU, local jurisdictions may revise maximum transfer coverage limits (from 50 up to 70 percent) within these urban Centers, but only for already developed non-sensitive land that is more

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[7] The RPU reduces the rate of residential allocations from 294 per year to 130 per year. RSER212. The possibility of additional commercial floor area only exists if existing supplies are used. RSER528. The RPU also created resort recreation areas to reduce vehicle trips by placing visitors near recreation facilities, and act as a sink for transfer of existing development (the only kind possible for use in these areas). RSER139, 174-183, 532-533.

[8] "Concentrating development and limiting the development footprint has the potential to reduce per capita and basin-wide environmental impact." RSER829. Evidence from existing projects demonstrates that environmental conditions improve significantly after redevelopment, even when increased development allowances (e.g., density, height, coverage) are permitted. RSER68, 171, 350, 471-473.

than 300 feet from the Lake. Code §§ 30.4.2.B.1 and 30.4.3.A.2. This new limit matches the limit applicable to undeveloped parcels. It thus removes a counter-productive policy in the 1987 Plan, which favored development of raw land over redevelopment in Centers. RSER167, 534. The RPU also includes transfer ratios that promote a net reduction in coverage and the removal of coverage in sensitive land. Code § 30.4.3.A.2; RSER474-516, 534-537. [9]

If local jurisdictions wish to adopt these incentives in Centers, they must first adopt Area Plans. RSER156, 521; *see also* Code §§ 30.4.3.A.2 and 13. Thereafter TRPA must independently consider the locally-approved Area Plan but only after it performs environmental review, provides opportunities for public comment and finds that the Area Plan will help "achieve and maintain" thresholds and provide other benefits. Code § 13.6.5.C.6; *see also* § 13.9, RSER231. TRPA's Code requires constant and rigorous monitoring of Area Plan implementation, including annual reporting and re-certification of the Area Plans every four years. Code § 13.8; RSER246. This system assures local plans meet and are implemented according to TRPA's regional standards. *Id.*, RSER521-531.

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[9] The RPU will significantly accelerate the removal of coverage in sensitive lands (23 – 35 acres projected from transfers alone), improve excess coverage mitigation programs, and result in less new coverage than all other RPU alternatives except the no-action alternative. RSER283, 298-299. The RPU will also permanently restore or protect over 1,200 private parcels in sensitive land or outlying areas without relying on limited public funding. RSER417-420.

The RPU integrates the TMDL's new science and a regulatory approach to achieve water quality. RSER164-166. The RPU incorporates direct measures to reduce pollutant loading instead of relying *solely* on indirect approaches like regulating coverage. *Id.*, RSER600. TRPA's BMP Handbook, updated with and made part of the RPU, incorporates new information from the TMDL and other studies, and provides guidance for the effective implementation and maintenance of BMPs for new and existing development. *See, e.g.*, RSER781 *et seq.*, 602-604.

The RPU also includes a robust monitoring and adaptive management system to assess the RPU's effectiveness at multiple scales, and to adjust policies and programs as needed to attain and maintain thresholds. Code § 16. [10] Peer reviewed TERs are now required every four years. RSER197, 524. For any Threshold Standard not in attainment, the TER must recommend compliance measures to ensure attainment and maintenance of the standard. Code §16.

The RPU includes additional adaptive management safeguards that: (1) limit new development based on VMT and traffic monitoring to ensure continued attainment of transportation and air quality standards (Code § 50.4.3, RSER184); (2) require review of Area Plans for conformance with adopted TMDL load reduction requirements (Code § 13.8.5); and (3) require annual reports on the EIP,

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[10] TRPA administers the multi-Agency, multi-sector monitoring program for threshold standards at an annual cost of approximately $3 million. RSER110.

BMP compliance, and other programs (Code §§ 16.9.2 and 50.5.2.E; RSER211, 741).

The Governing Board approved the RPU finding "the [1987] Regional Plan, as amended, and as implemented by the Code of Ordinances, as amended, achieves and maintains the adopted thresholds." RSER564-638, 686-687.

IV. District court proceedings.

Following a hearing on the cross-motions for summary judgment, the district court granted TRPA's cross-motion for summary judgment and entered final judgment. ER19.

The district court ruled that the EIS adequately studied impacts on water quality and soil conservation and that the substantial evidence supported TRPA's findings that the RPU achieved and maintained TRPA's environmental thresholds. ER27-32. The court held that TRPA's methodology for studying coverage impacts and its choice of modeling was entitled to deference and correctly found that no changes to coverage limits could be approved under the RPU until subsequent approvals and environmental studies were completed. ER30.

The court rejected Plaintiffs' argument that TRPA improperly relied on BMPs and the TMDL to support its findings that water quality thresholds would be attained under the RPU. ER27-35. The district court also rejected Plaintiffs' challenge to TRPA's findings relating to air quality impacts. ER35-39.

TRPA filed a timely bill of costs as the prevailing party. ER816. Plaintiffs did not object. ER 812. Plaintiffs then filed a motion claiming the taxed amount should be offset by the administrative record fees Plaintiffs paid to TRPA pursuant to an earlier district court order. ER816. The court denied Plaintiffs' motion and ruled that the costs were reasonable and did not exceed the scope of Federal Rules of Civil Procedure ("FRCP") Rule 54, and 28 U.S.C. § 1920. ER13.

SUMMARY OF ARGUMENT

Decreasing public funding and a declining economy framed the challenge facing TRPA: how to generate needed investment for environmental upgrades based on better science and opportunities for orderly growth consistent with the Compact to continue and accelerate the environmental gains of the 1987 Plan. After considering the EIS' programmatic analyses, the recommendations in the peer-reviewed 2011 TER and TMDL studies, extensive public input, and the voluminous administrative record in this matter, TRPA's Governing Board determined that the RPU addressed all these issues and would accelerate the attainment of Threshold Standards and create modern, visually attractive, compact, walkable, bikeable communities. RSER683-687.

Plaintiffs do not contest the vast majority of this analysis. Rather, Plaintiffs disagree with one of the Board's policy decisions – namely, the RPU's coverage policies that allow local jurisdictions to adopt Area Plans that may marginally

increase coverage for some redevelopment projects in existing urban Centers. Plaintiffs argue TRPA was required to gather more data or undertake additional studies before approving these policies. Their arguments, however, are based solely on the hypothetical effects of hypothetical future plans and projects, all of which must obtain two additional approvals and undergo further environmental review before they transition from hypothesis to reality.

Importantly, Plaintiffs never point to any evidence of impacts from the RPU policies they challenge. Rather they contend TRPA's future review of the plans and projects will be inadequate. In advancing this argument, Plaintiffs ignore the extensive analysis in the EIS and the record demonstrating the RPU's coverage policies will result in *beneficial* impacts to soil conservation and water quality. Plaintiffs also fail to acknowledge the RPU's extensive regulatory system that ensures environmental standards are attained and maintained.

Plaintiffs similarly ignore the beneficial impacts of the RPU's coverage policies in suggesting that TRPA's reliance on BMPs to mitigate potential water quality impacts from concentrating coverage in Centers was unreasonable. Under the RPU, BMP installation and maintenance is mandatory regardless of a project's potential impacts—they are not mitigation measures. Code §§ 60.4.3 and 60.4.9; RSER310, 313. Moreover, the RPU strengthens BMP requirements—including monitoring and enforcement—and in conjunction with TMDL requirements

supports the conclusion that the RPU will not create any adverse water quality impacts. RSER538-544. As a result, Plaintiffs fall far short of meeting their burden of demonstrating the Governing Board's certification of the EIS and approval of the RPU was arbitrary and capricious.

Plaintiffs also contend the district court abused its discretion in awarding TRPA its costs for preparing the record in these proceedings. They have waived this argument and fail to show error.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Because the Board's decision to adopt the RPU was a legislative act, the scope of the judicial inquiry extends "only to the questions of whether the act or decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required by law." Compact, art. VI(j)(5). This standard of review tracks the standard under the Administrative Procedures Act ("APA"). *Sierra Club*, 916 F. Supp. 2d at 1111.

A decision is arbitrary and capricious only if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). "[T]he court's scope of review is narrow and [the court] must not 'substitute its judgment for that of the agency.'" *Sierra Club*, 916 F. Supp. 2d at 1111, *quoting Motor Vehicle Mfrs.*, 463 U.S. at 43.

Review of an agency's action is "extremely limited," and a challenged EIS should be upheld if the Court finds it "fostered informed decision-making and public participation." *National Parks v Cons. Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 680 (9th Cir. 2000); *Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.*, 57 Cal.4th 439, 446 (2013) (same standard under CEQA). Even where "conflicting views" exist, the Court must "defer to the informed discretion of the agency." *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1017 (9th Cir. 2006); *Wright v. Inman*, 923 F. Supp. 1295, 1301 (D. Nev. 1996) (plaintiff's "speculative lack of confidence in [] monitoring plans" is insufficient reason to invalidate an EIS). Deference is particularly appropriate where the issue involves technical expertise. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989).

The agency's factual conclusions must be upheld if they are supported by "substantial evidence," a standard more deferential than the "clearly erroneous" standard for review of trial court findings. *See Dickinson v. Zurko*, 527 U.S. 150,

162, 164 (1999); *California Native Plant Soc. v. City of Rancho Cordova*, 172 Cal.App.4th 603, 626 (2009) (in CEQA case, "burden was on [Plaintiffs] to *affirmatively show* there was no substantial evidence in the record to support [the agency's] findings, and [Plaintiffs] could not carry that burden by simply pointing to portions of the administrative record that favored its position." (Original emphasis)). The agency is also entitled to a presumption of regularity, including a presumption that the agency follows its own regulations and properly discharges its duties. *See Del Norte County v. United States*, 732 F.2d 1462, 1468 (9th Cir. 1984).

TRPA does not dispute Plaintiffs' proffered standard of review for the district's court decision to award TRPA its reasonable costs.

ARGUMENT

I. Plaintiffs lack standing to challenge the impacts from concentration of development; until an actual increase in coverage is approved, Plaintiffs' claims are also unripe.

On appeal, Plaintiffs limit their challenge to whether adoption of the RPU was arbitrary and capricious based on the EIS' analysis of potential soil conservation and water quality impacts from the RPU's coverage policies authorizing jurisdictions to propose plans that allow future concentrated development in Centers (the "RPU coverage policies"). *See* AOB at 25-37

(impacts to soil conservation from concentrated coverage), 37-50 (impacts to water quality from concentrated coverage).

Plaintiffs, however, cannot demonstrate an actual injury arising from the RPU coverage policies because TRPA, in adopting the RPU, did not approve "increases" in coverage. The RPU coverage policies only provide incentives **if** a local jurisdiction proposes, and TRPA approves, an Area Plan. While Plaintiffs objected to the creation of Area Plans below, the district court correctly held they lacked standing to challenge potential future approvals under Area Plans. ER51-55. Plaintiffs have not challenged this aspect of the district court ruling. Yet, the district court's ruling on this issue also disposes of their coverage claims.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III" of the U.S. Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, Plaintiffs "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks and citations omitted); *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

Plaintiffs have not and cannot allege any injury as a result of TRPA's adoption of the RPU coverage policies. [11] Maximum coverage limits (RSER260) on already-developed, non-sensitive land in Centers can be increased only if it is more than 300 feet from the Lake and TRPA approves an Area Plan. Code §§ 30.4.2.B.1 and 30.4.3.A.2; *see also* RSER146, 167. Area Plans are optional planning tools for local governments. Code § 13.4.1. Local governments may decide not to propose Area Plans. If they do, the plans may or may not propose to increase maximum coverage in Centers. If proposed, any request to concentrate coverage may or may not reach the limits set by the RPU.

In turn, TRPA may only consider approving an Area Plan after local-scale analysis has been performed, which demonstrates that direct, indirect and cumulative impacts from adoption of the plan will not result in significant adverse environmental impacts. Code §§ 3, 4, and 13.6-13.7. As the EIS explained, "as part of the Area Plan process, smaller-scale planning efforts would require additional environmental analysis, including evaluation of coverage at a more localized scale before many of the provisions relating to Area Plans in the Final

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[11] Although TRPA did not raise standing or ripeness below for these claims, it may do so now as (1) this court may affirm the district court's summary judgment on any ground supported by the record (*Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008)) and (2) standing and ripeness are jurisdictional prerequisites that can be raised for the first time on appeal (*DBSI/TRI IV Ltd. Partnership v. U.S.*, 465 F.3d 1031, 1038 (9th Cir. 2006)).

Draft Plan would apply (e.g., comprehensive coverage management, increases to maximum allowable coverage)." RSER156. For example, an Area Plan's environmental analysis must also show the plan **reduces** pollutant loading from the area if it proposes area-wide water quality treatments. Code § 13.5.3.B.3. Thus, the RPU simply allows future consideration of increasing coverage in Centers if further environmental review demonstrates the Area Plan will not result in significant adverse environmental impacts. RSER156-162.

Clapper and *Summers* are on point. In *Clapper*, the Supreme Court held the speculative application of Section 1881(a) of the Foreign Intelligence Surveillance Act of 1978 did not create standing because the act merely authorized surveillance, but not did result in any direct injury to plaintiffs. *Clapper*, 133 S. Ct. at 1149 ("Moreover, because §1881a at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents fear, respondents' allegations are necessarily conjectural." (Original emphasis)). Likewise in *Summers*, environmental groups could not establish standing to challenge U.S. Forest Service policies because no concrete application of those policies was before the court. *Summers*, 555 U.S. at 496.

Here, Plaintiffs' alleged injury is neither concrete nor actual because the RPU policies authorizing concentrated coverage are merely hypothetical and will occur, if at all, after future actions, all of which must undergo environmental

review. Moreover, if Plaintiffs or any aggrieved person so desires, they can challenge the approval of an Area Plan that authorizes concentrated coverage (or a future project approved pursuant to an Area Plan), if they believe it is inconsistent with Compact requirements. Code § 13.6.5 (Among other requirements, before approving Area Plan TRPA "shall make the general findings applicable to all amendments to the Regional Plan and Code."); Compact, art. VI(j)(3); *see also* ER53-55. They can also challenge TRPA's environmental review for the Area Plan (or project) if they believe it does not adequately disclose or fully mitigate environmental impacts. *Id.*; *see also* Code § 13.9, ER30. Thus, Plaintiffs' generalized distrust of TRPA's future environmental review (AOB at 33-34) provides no concrete, cognizable injury. Plaintiffs therefore lack standing.

Plaintiffs' claims regarding the alleged inadequacy of TRPA's future environmental review are also unripe. "Ripeness is peculiarly a question of timing." *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580 (1985). "For a suit to be ripe within the meaning of Article III, it must present concrete legal issues, presented in actual cases, not abstractions." *Colwell v. Dep't of Health & Human Services*, 558 F.3d 1112, 1123 (9th Cir. 2009). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296,

300 (1998) (internal quotations and citation omitted); *Sacks v. Office of Foreign Assets Control,* 466 F.3d 764, 773 (9th Cir. 2006).

In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), the Supreme Court held unripe challenges to the adoption of a forest plan that set production targets and harvesting methods but did not itself authorize cutting trees. *Id.* at 734-37. In this case the RPU authorizes local governments to provide coverage incentives to promote redevelopment through its voluntary Area Plan process, but the RPU does not itself approve any Area Plans or additional coverage.

Nor do the RPU coverage policies constrain TRPA's future review of Area Plans or projects. *See California v. Block*, 690 F.2d 753, 762-63 (9th Cir. 1982) (holding agency must evaluate impacts of choices that constrain further review). In fact, the RPU prohibits the approval of Area Plans or projects unless it is shown that they are consistent with the Compact and will effectively prevent or mitigate all environmental impacts. Code § 13.6.5. Plaintiffs' claims therefore are unripe.

II. Substantial evidence supports the EIS' conclusion that the RPU's coverage policies would not result in significant adverse impacts.

In its programmatic EIS, TRPA analyzed and disclosed the potentially significant adverse impacts of the RPU's coverage policies. The EIS provided a detailed explanation of how much new coverage could potentially be created and where such coverage might be located, both in and outside of Centers. RSER280,

309, 420-426. The EIS disclosed the RPU policies allowing up to 70 percent coverage on high-capability, developed parcels in Centers—the policies Plaintiffs challenge here—could increase coverage by approximately 64 acres region-wide.[12] RSER283, 301, 426. However, as the EIS made clear, this increase does not reflect a net expansion in coverage because "new" coverage authorized under these policies must be directly offset by reductions in existing coverage transferred from sensitive lands, or at higher ratios for transfers from high-capability lands. *Id.*; *see* Code §§ 30.4.3.A.2 and 30.4.3.G.1. The EIS explained that if 64 acres of new coverage was approved in Centers, approximately 79 to 92 acres of coverage elsewhere would have to be permanently retired and restored, resulting in a net reduction of 16 to 29 acres of coverage either in or near the Centers. *Id.*; *see* Code § 30.6.3. The EIS also explained that potential increases in coverage, both within and outside Centers, would not exceed Bailey limits at a regional level. RSER280. Accordingly, the EIS concluded impacts from the RPU's coverage policies on soil conservation would not be significant. *Id.*

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[12] Plaintiffs erroneously argue the EIS revised the potential region-wide increase in coverage from 66 acres to 183 acres. AOB at 20, 27. The only change in the EIS relating to coverage estimates corrected a mapping error that *overestimated* coverage from bike trails. RSER191-193. The 183-acre figure includes 64 acres of potential coverage from redevelopment in Centers and two acres from outside Centers disclosed in the Draft EIS, plus estimated coverage from the bike trails (52 acres) and other coverage exemptions (65 acres). RSER193. The EIS disclosed and evaluated all these potential increases. RSER280-309.

Plaintiffs do not dispute these facts. AOB at 20; RSER20-22 (¶¶26, 42); 24-26 (Nos. 9, 113). Nonetheless, Plaintiffs argue the EIS failed to disclose the potential cumulative impacts of the RPU's coverage policies on soil loss, increased runoff, and declining water quality in local watersheds and the Lake's nearshore area. AOB at 2, 25-34. As explained below, Plaintiffs are wrong.

A. The EIS specifically analyzed potential impacts of the RPU policies that could allow concentrated coverage in Centers and found the effects on water quality and soils to be beneficial.

Under existing TRPA regulations – unaltered by the RPU – all transferred coverage must come from the same HRA. [13] Code § 30.4.3.E; *see* RSER279. As Plaintiffs concede, this requirement ensures coverage will not become concentrated within a particular HRA. AOB at 29, citing ER258, 293. Thus, coverage in Centers may or may not increase under Area Plans, but coverage in an HRA cannot be increased and likely will be *reduced*.

As Plaintiffs admitted below, the RPU's policy changes do not increase coverage in the Region, but modify regulations for transferring coverage from one parcel to another. RSER24 (No. 9); see Code § 30.4.3.A.2, RSER534-537. The EIS disclosed that the RPU provides incentives to transfer coverage, existing

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[13] Plaintiffs cite comments from the California Attorney General that were critical of a proposal to remove this limitation. *Id.* at 28-29. Plaintiffs, however, fail to acknowledge that the RPU retained the 1987 Plan's prohibition of coverage transfers between HRAs. RSER145, 155, 194.

development, and development rights from sensitive lands into non-sensitive Centers. RSER328-332, 337-338. The EIS explained that, while these incentives could increase coverage on non-sensitive lands within Centers, at least as much coverage must be retired and restored within the same HRA. RSER155-162. The EIS concluded this policy would shift coverage from "low-capability" to "high-capability" lands (from more environmentally sensitive areas to those that are less so) resulting in beneficial impacts to soils and water quality. RSER329. Substantial evidence supports this conclusion. *See*, *e.g.*, RSER829, 169-170, 263-264, 328-332, 337-339.

TRPA provided detailed responses to comments raising concerns about potential impacts from concentrated coverage. As TRPA explained, the EIS evaluated coverage from a programmatic policy perspective, with a level of detail and degree of specificity appropriate to analysis of a Regional Plan. RSER155-162, 238. TRPA further explained that a parcel-by-parcel analysis (or sub-watershed analysis) was neither feasible (RSER156 [locations of future project proposals and corresponding coverage removal too speculative]) nor necessary (RSER 155-156 [*before* any physical alteration of the environment could occur, local-scale evaluations required]) in light of the regional scope of the RPU, and the site-specific analysis that would follow.

TRPA went further. It modeled the potential water quality impacts from concentrated coverage in Centers. Using the Pollution Load Reduction Model ("PLRM") developed for the TMDL, TRPA analyzed estimated impacts from "pollutant loading that could occur within … [C]enters" under all RPU policies. RSER169. The PLRM results showed that, "even if policies that incentivize concentrated development achieved the maximum allowable coverage in all Centers, the result would be a decrease in pollutant loading from Centers as a result of implementing required water quality regulations." RSER169-170, 199-209. As the EIS explained, the PLRM confirmed the EIS' analysis was conservative and that actual localized changes in pollutant loading will be beneficial. RSER170. [14]

The EIS also examined the potential localized impacts on tributary or nearshore conditions. RSER169. TRPA calculated the surface area necessary to construct infiltration BMPs in Centers and concluded the parcels targeted for concentrated development could accommodate the required BMPs. *Id.*

The EIS also considered impacts on natural nutrient cycling, the protection of "environmental balance," and potential soil erosion. TRPA determined that

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[14] The PLRM analysis was particularly conservative because it maximized development at the "receiving site," but omitted the benefits of removing development from more environmentally "sensitive sending" sites, although restoring and retiring coverage at the sending sites *must* occur before any increased coverage in Centers is allowed. The PLRM also omitted the beneficial elements of other RPU programs (e.g., excess coverage mitigation program, EIP). RSER169.

potential impacts on nutrient cycling from concentrating coverage in Centers would increase infiltration of nutrients and improve nutrient cycling. RSER169-170, 273. The EIS further concluded the RPU, in conjunction with the TMDL, will "substantially decrease" nutrient loading and improve natural nutrient cycling over existing conditions. RSER186, 397. TRPA also explained the RPU would beneficially impact nutrient loading by reducing fertilizer use and applying a new threshold to reduce attached algae in the nearshore. RSER314, 318-319.

RPU policies also ensure that concentrated development would not increase sediment loading or erosion. RSER334-335, 337. As the EIS explained, RPU policies will result in coverage transfers from sensitive to high-capability lands and, therefore, reduce soil erosion. RSER 295, 394-399 (policies would not increase cumulative soil erosion).

More fundamentally, the RPU does not rely solely on coverage limits to protect water quality and soils. The RPU also incorporates TMDL load reduction projects, parcel-scale BMP implementation, and associated maintenance requirements. RSER337-339, 167-170. In particular, the TMDL requires local jurisdictions to prepare and implement load reduction plans that achieve specific pollutant loading reductions. RSER168. Local agencies must then reduce pollutant loads within each sub-watershed, and then maintain those reductions. RSER749-755. As the EIS stated, the TMDL will "prevent [] local jurisdictions

from permitting projects that would result in the type of local-scale water quality impacts" upon which Plaintiffs focus. RSER168.

Plaintiffs argue the EIS' soils analysis did not address their concern that the RPU coverage policies will concentrate coverage near the Lake. AOB at 25, 27-28. Again, Plaintiffs are wrong. The RPU actually *lowers* maximum allowable coverage within 300 feet of Lake Tahoe. RSER146, 155, 194. The EIS concluded the RPU will *reduce* potential coverage near the Lake. RSER203.

In addition to reducing potential coverage near the Lake, the RPU's new water quality threshold standard addresses reducing attached algae in the nearshore. RSER314, 318-319, 329, 604-606. The EIS further noted that TMDL load reduction plans are expected to benefit nearshore water quality. *Id.,* RSER169-170. The EIS concluded the RPU policies would therefore likely have beneficial nearshore water quality impacts. *Id.*

In the EIS, TRPA analyzed potential impacts on vegetation, wildlife, and fish habitat. RSER195, 356-375. The EIS explained the "transfer of development from sensitive lands and lands distant from … centers … would result in … improvements in water quality, soil conditions, and habitat for vegetation and wildlife." RSER360. As a result, the EIS concluded the RPU would not contribute to a cumulative impact on sensitive habitats, but rather enhance aquatic habitats in the Region. RSER401-402, 404.

In sum, the EIS' analyses provided substantial evidence that any potential localized and nearshore cumulative impacts from the RPU's coverage policies to soil conservation would be insignificant. Plaintiffs' argument that the EIS' analysis somehow lacked sufficient study is not grounded in any requirements of the Compact, NEPA or CEQA. [15] As this Court recently explained: "An agency … has discretion in deciding how to organize and present information in an EIS." *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1002 (9th Cir. 2013) citing *League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir.2008) (Agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate."); *City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal.App.4th 889, 909 (2009) (Under CEQA, "[i]f the lead agency determines that a project's incremental effect is not cumulatively considerable, the EIR need only briefly describe the basis for its findings."). The record demonstrates that the EIS

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[15] *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184, 1220 (2004), cited by Plaintiffs, is not on point. AOB at 26. There, the Court held the EIR was inadequate because it failed to correlate (and thus disclose) the potential health consequences of the projects' significant and unavoidable *increases* in air pollutants to a nonattainment basin. Here, the net impact of the RPU, in conjunction with implementation of the TMDL, results in a *substantial decrease* in pollutant loading. RSER186. Unlike *Bakersfield*, the EIS did not fail to disclose information the public needed to evaluate the RPU. Thus, Plaintiffs' attempt to equate additional coverage with additional discharges fails. *Id.*

more than met these requirements. *See Sierra Club*, 916 F. Supp. 2d at 1143 (TRPA's Code requires findings be supported by substantial evidence; it does not dictate what must be in the EIS).

B. Plaintiffs' analysis is neither feasible nor necessary; the district court accorded the proper deference to TRPA's methodology.

Plaintiffs claim the EIS fails to address "conservation *at the local scale*." AOB at 35 (emphasis in original). As the district court held, Plaintiffs' argument is inconsistent with the CEQA and NEPA cases acknowledging the methodology and scope of EIS' cumulative impacts analysis is matter of agency discretion. ER28. Their argument also fails on the merits.

In suggesting the district court improperly deferred to TRPA's use of the PLRM to evaluate potential impacts to soils, Plaintiffs argue, incongruously, that the "TMDL has nothing to do with soil conservation." [16] AOB at 35. Here, TRPA used the PLRM to model the potential impacts of concentrating development in Centers; TRPA did not rely on the TMDL (or modeling performed for the TMDL). As the EIS explained, the PLRM uses data on land-use types, impervious coverage, and BMP implementation, among many inputs to estimate "fine sediment,

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[16] Plaintiffs mistakenly cite interchangeably the TMDL and the PLRM analyses in the EIS. AOB at 34-36. They are not the same. The PLRM was developed as a tool for the TMDL to assess load reduction plans. Because the PLRM includes soil conservation components, the EIS used it to evaluate the effects of concentrated coverage in Centers. RSER169.

nitrogen, and phosphorus loading and stormwater runoff." RSER169; *see also* RSER775-777. Based on the PLRM results, the EIS concluded that the RPU's coverage policies would result in beneficial impacts on fine sediment, nitrogen, and phosphorus loading and stormwater runoff region-wide. *Id.* Importantly, the PLRM analyzed the very same impacts for which TRPA adopted the Bailey soil conservation Threshold Standard. *See*, *supra*, at 10.

Plaintiffs claim the EIS must have missed some localized impacts (AOB at 26), but never specify impacts the EIS failed to analyze. They make only vague references to "environmental balance" and "soil conservation." Elsewhere, they refer to "vegetation" (AOB at 36), which the EIS analyzed. *See*, *supra*, at 34. Plaintiffs also cite the important role soils play in "erosion prevention, infiltration, and nutrient cycling" (AOB at 36), but all these roles relate to water quality, and all were analyzed in depth in the EIS. *See*, *supra*, at 32-34.

Plaintiffs suggest TRPA should have deemed significant any coverage increase in watersheds with over ten percent existing coverage. AOB at 28-30. [17] Plaintiffs' suggested ten-percent-mark is an inferior substitute to the Bailey system

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[17] Plaintiffs argue that TRPA abandoned reviewing coverage at the parcel scale without explanation. AOB at 13, fn. 5. False. As the EIS explained, "Robert Bailey (R. Bailey, pers. comm.) indicated that his system as mapped and presented in his 1974 paper was never intended to be measured at the parcel scale due to uncertainties related to site/parcel-specific characteristics and soil types, and the broad mapping methodologies used to delineate land capability districts." RSER833.

because it ignores completely the relative sensitivity of lands, the hallmark of Bailey. RSER775-77. On the other hand, the PLRM accounts for (1) the location of the coverage (e.g., hydrologic connectivity, slope, soils distribution, etc.); (2) the nature of the land-use creating the coverage in view of data showing that different land-uses generate different pollutant loads (e. g. commercial vs. residential); and (3) the beneficial effects of required BMPs. *Id.* Thus, the PLRM addresses the same impacts for which Bailey was created, but more rigorously and with additional information and refinements based on 25 years of further scientific study. *Id.* [18] The district court appropriately accorded deference to TRPA's "methodology," finding that "TRPA's decision to use the [] [PLRM] model rather than [Plaintiffs'] model was an exercise of its scientific expertise." ER28.

Plaintiffs argue TRPA should have used its transportation model to calculate potential coverage within each of the 64 watersheds in the Region. AOB at 32. Because Plaintiffs never proposed using such a model during TRPA's lengthy

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[18] Throughout their brief, Plaintiffs acknowledge TRPA adopted the Bailey System to address the main cause of degradation to Lake Tahoe: pollutant-laden stormwater runoff. *See* AOB at 7, 8, 11, 12, 14, 15, 28, 38, 39, 40, 41. The PLRM measures directly what the Bailey coverage standard attempts to do only indirectly. *See*, *supra*, 10, 37-38.

environmental review, they cannot assert it now. [19] *Sierra Club*, 916 F. Supp. 2d at 1111 (requirement to exhaust administrative remedies applies under Compact); *Marathon Oil Co. v. United States*, 807 F.2d 759, 767 (9th Cir. 1986).

In any event, Plaintiffs' proposed analysis was both unnecessary and infeasible. As the EIS explained, to perform such analysis, TRPA would be required "to speculate where specific future projects would be proposed and where coverage would be removed." RSER156. Moreover, Plaintiffs' ten-percent-marker (AOB at 28) is not an end in itself; rather, it may be used to predict when watersheds might face degraded water quality, fisheries or other impacts—all of which TRPA measured directly in the EIS. *See*, *supra*, at 32-34. Thus, Plaintiffs' proposed standard focuses on impacts the EIS already analyzed using superior methodology. [20] "A project opponent or reviewing court can always imagine some

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[19] Although Plaintiffs suggest otherwise (AOB at 32), throughout the administrative process they argued the EIS was required to evaluate coverage on a "parcel by parcel basis." *See*, *e.g.*, RSER126.

[20] The primary study Plaintiffs cite on the ten-percent watershed coverage expressly states its analysis cannot be applied to California. ER337. The study further acknowledges it "has not yet been validated for non-stream conditions (e.g., lakes, reservoirs, aquifers and estuaries) and does not currently predict the impact of watershed treatment." *Id*. In fact, the study does not even account for the most basic buffers around streams, let alone TRPA's more stringent environmental regulations, the TMDL or the billion plus dollar investment in TRPA's EIP. Moreover, Plaintiffs erroneously argue the study can be used to predict watershed-wide impacts due to small coverage additions in Centers located at the bottom of watersheds. The study provides no basis for such a conclusion.

additional study or analysis that might provide helpful information. It is not for them to design the EIR." *Laurel Heights Improvement Assn. v. Regents of Univ. of California*, 47 Cal.3d 376, 415 (1988); *see Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1150 (9th Cir. 2010) (failure to order additional studies does not equate to a failure to evaluate environmental impacts).[21]

According to Plaintiffs, TRPA's position is that soil conservation and urbanization do not matter, so long as stormwater runoff is managed. AOB at 36-37. Plaintiffs are again wrong. As explained above, RPU policies will reduce coverage in HRAs (as well as region-wide and perhaps even in Centers), particularly on sensitive land where coverage does the most harm. Moreover, as Plaintiffs admitted below, the RPU's coverage policies apply only to properties that are already highly developed. RSER25-26 (No. 113), 301. Centers represent the areas around Lake Tahoe with the highest concentration of *existing* coverage. RSER297, 470. Plaintiffs also ignore recent studies showing redevelopment on high-capability lands, paired with the installation of BMPs, improves the environmental conditions of properties without BMPs. RSER186, 311-345. Thus,

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[21] Given the technical nature of the issue, and TRPA's longstanding expertise with respect to such matters, TRPA is entitled to "the highest level of deference" with respect to review of its "scientific judgments" about what methodologies to use to perform its analysis. *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012). Indeed, the Court's task is "not [] to decide whether an [EIS] is based on the best scientific methodology available." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1088 (9th Cir. 2013).

even without according deference to TRPA's methodology, the record contains no evidence supporting Plaintiffs' claim that TRPA had to use a "percentage covered" standard, applied to each watershed, to ensure no "localized" impacts would occur.

In sum, the EIS did not obscure localized "cumulative" impacts of concentrated coverage in Centers and was not required to undertake additional studies. AOB at 25-37. Plaintiffs' demand for further analysis is legally unsupportable. An EIS need not include all information on a subject; "all that is required is sufficient information and analysis to enable the public to discern the analytical route the agency traveled from evidence to action." *North Coast Rivers Alliance v. Marin Mun. Water Dist. Bd. of Directors*, 216 Cal.App.4th 614, 639-40 (2013). "The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity…." *Sierra Club*, 916 F.Supp.2d at 1154. TRPA adequately studied its redevelopment incentives.

C. None of the RPU policies authorizing increased coverage in Centers can be implemented without additional approvals and environmental review demonstrating no adverse environmental impacts will occur.

Plaintiffs argue that TRPA improperly deferred studying potential localized soil conservation impacts because "later plans implementing the [RPU coverage policies] would not need to revisit them." AOB at 31. Plaintiffs are wrong. Two further levels of planning, approvals, and environmental review are required before the coverage policies can be implemented.

Before TRPA can approve an Area Plan that authorizes an increase of coverage in Centers, additional environmental review must confirm the plan will not result in adverse environmental impacts. *See*, *supra*, at 25-27, 30. Area Plans must also include "an integrated community strategy for coverage reduction and enhanced stormwater management…." Code § 13.6.5.C.5. The plan must further demonstrate that all development in Centers will provide for "measurable improvements in water quality." Code § 13.6.5.C.6. Finally, among other requirements, Area Plans must develop standards to protect and direct development away from sensitive lands, and to ensure that any redevelopment of disturbed sensitive lands in Centers "…reduces coverage and enhances natural systems within the Stream Environment Zone…" Code § 13.6.5.A.7. TRPA cannot approve an Area Plan unless these findings are made. Code § 13.6.4. And concentrated coverage cannot occur until TRPA approves an Area Plan.

Plaintiffs argue Area Plan review constitutes impermissible deferral. AOB at 30-34. To the contrary, CEQA and NEPA case law confirm TRPA's approach is appropriate given the regional scope of the RPU. The degree of detail required in an EIS "depends upon the nature and scope of the proposed action." *Block*, 690 F.2d at 761. At the program level, an EIS "must provide sufficient detail to foster informed decision-making," but "site-specific impacts need not be fully evaluated" until the decision to undertake a site-specific project has been made. *Friends of*

Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003) (internal quotations omitted); *see also Sierra Club*, 916 F. Supp. 2d at 1156-57 (upholding deferral of site specific analysis of impacts under Compact in light of program-level analysis); *In re Bay-Delta Programmatic Envtl. Impact Report*, 43 Cal.4th 1143, 1169-70 (2008) (same in CEQA case). Here, too, site-specific analysis will be performed as Area Plans or specific projects are proposed.

Plaintiffs' reliance on *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1066 (9th Cir. 2002) (AOB at 26) is misplaced. In *Kern*, this Court held a two-sentence mention of the fungus problem in an EIS' evaluation of a resource management plan's effects, and a simple reference to another document, was insufficient under NEPA. *Id.* at 1072-74. Here, in contrast, the EIS contained abundant information and analysis on concentrating coverage in Centers, and explained why project-specific analysis was both infeasible and unnecessary. RSER155-162.

Similarly, in *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011) ("*NPRC*") the Court held inadequate the EIS for a railroad line because its cumulative impacts analysis was limited to a five-year time frame, and failed to consider other reasonable foreseeably projects. *Id.* at 1077-79. Here, the EIS included reasonably foreseeable plans, programs and projects in its analysis. AOB at 27-29; *see* RSER378-413, 245-273, 139-152.

Plaintiffs also cite *NPRC* for their claim that the EIS' analysis of the impacts from potential future projects was insufficiently fine-grained. But *NPRC* involved a specific development proposal – a railroad line – rather than a general region-wide plan, like the RPU. As the *NPRC* Court recognized, a court must not "act as a panel of scientists that instructs the [agency] ..., chooses among scientific studies ..., and orders the agency to explain every possible scientific uncertainty." *Id.* at 1075. That is, however, precisely what Plaintiffs wrongly demand here.

In short, contrary to Plaintiffs' argument (AOB at 27), the EIS provided the Governing Board, the States, and the public more than adequate information to weigh the benefits of the RPU coverage policies. Substantial evidence supports the TRPA's findings that the RPU's coverage policies will result in insignificant (if not beneficial) impacts to soil conservation and water quality, as well as assist TRPA in achieving and maintaining Soil Conservation and Water Quality Threshold Standards. Plaintiffs cite no evidence to the contrary. Their arguments second-guessing TRPA's strategy for achieving and maintaining Threshold Standards amount to nothing of legal import.

III. The EIS properly relies on BMPs as part of TRPA's comprehensive water quality protection program.

Plaintiffs argue TRPA improperly relied on BMPs to mitigate adverse water quality impacts from the RPU's coverage policies. AOB at 2, 37. Plaintiffs' premise is false. Any future redevelopment projects that propose to add coverage

in Centers must demonstrate a net reduction of both coverage and water quality impacts.

Under TRPA's Code, BMPs are "management controls" for the protection and restoration of water quality standards. RSER310, 313. Unlike mitigation measures, *BMPs must be installed regardless of any potential water quality impacts*. Code § 60.4.3. Indeed, TRPA's objective is not redevelopment per se, but the acceleration of water quality *improvement* through redevelopments' installation of BMPs and other green-building techniques. When TRPA modeled the impacts of the coverage policies, the PLRM demonstrated that the RPU would result in *beneficial* impacts and accelerate the attainment of Water Quality Threshold Standards. RSER170. Therefore, any potential future BMP decrease in efficiency would not result in adverse environmental impacts when compared to existing conditions (i.e., legacy development without BMPs), but rather would only incrementally reduce the beneficial impacts identified in the PLRM modeling. For this reason, Plaintiffs' attack on BMPs is immaterial. TRPA simply did not, and need not, rely on BMPs to mitigate any impacts from the RPU coverage policies challenged here. Compact art. VII(d)(1) *see also* Code § 3.6; *Santa Clarita Org. for Planning the Env't v. City of Santa Clarita*, 197 Cal.App.4th 1042, 1056 (2011) (mitigation not required for less than significant impacts).

Even if Plaintiffs' BMP claims were relevant to the EIS' conclusions, those claims fail. Plaintiffs assert that the EIS simply assumed without analysis that BMPs would be maintained. AOB at 37-50. As the district court concluded, however, ample record evidence shows the installation of BMPs can dramatically reduce pollutant loads; indeed, once installed, many BMPs – such as retaining walls, terracing, and water spreading BMPs – remain effective even without regular maintenance. ER34; *see also* RSER821-823. Moreover, the EIS examined the extent to which BMPs would assist TRPA's long-term efforts to achieve Water Quality Threshold Standards and result in load reductions required by the TMDL.

A. *All new development and redevelopment is required to install and maintain BMPs; the RPU also mandates long-term monitoring to ensure BMPs remain effective.*

All new development or redevelopment, including all concentrated development in Centers, must install and maintain BMPs as a condition of project approval. Code §§ 60.4.3 and 60.4.9; *see also* RSER167, 185, 189, 330. Security deposits are required to ensure BMPs and water quality improvements are installed. Code § 5.9.2. TRPA inspects these properties to ensure installed water quality improvements are working as designed. Code § 5.9.4.A. Moreover, as highlighted by the district court, BMP maintenance is mandatory. ER34, Code § 60.4.9.

Plaintiffs attack TRPA's history regarding installation, maintenance and monitoring of BMPs. Ironically, that history was why, in adopting the RPU, TRPA strengthened its BMP requirements. As the district court noted, "TRPA expressly acknowledged past failures in maintenance, and incorporated that experience into updated BMP guidelines." ER35. The district court was right. For example, permits for all projects must include "Special Conditions" requiring a BMP inspection and maintenance plan. RSER819; Code §§ 60.4.2-60.4.3. All projects are required to maintain a log of BMP inspection and maintenance. *Id.*, 725-732. In addition, TRPA's BMP Handbook program for inspection, maintenance, and monitoring expressly recognizes that "BMPs must remain functional and effective through regular inspections, maintenance, and monitoring for property owners and land managers to comply with the TRPA Code of Ordinances and for local jurisdictions to meet the TMDL pollutant load reduction targets." RSER824. These inspections assess conditions to determine if BMPs need maintenance action to keep them functioning and effective. RSER781 *et seq.*, 825. The BMP Handbook is part of the RPU and therefore was appropriately considered in the EIS to evaluate potential water quality impacts. *Id.*, RSER121-122, 414-416; *see* Code § 60.4.2.

Nor was there anything arbitrary about TRPA's approach. Agencies routinely rely on BMPs to address a project's potential impacts to water quality,

and numerous NEPA and CEQA cases uphold agencies' reliance upon BMPs for this purpose. *Hapner v. Tidwell*, 621 F.3d 1239, 1246 (9th Cir. 2010) (citing use of BMPs to reduce soil disturbance during logging operations); *Envtl. Prot. Info. Ctr.*, 451 F.3d at 1015-16 (references to detailed BMPs incorporated into proposed timber sale supported the conclusion agency had taken "hard look" at project's impacts); *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 795-96 (2005) (upholding agency's reliance on mitigation measure requiring installation and maintenance of BMPs to address run-off); *see also Alaska Survival*, 705 F.3d at 1089 (agency properly relied on BMPs imposed under the CWA as mitigation for wetlands impacts).

Friends of Back Bay v. Army Corps of Eng'rs, 681 F.3d 581 (4th Cir. 2012) is distinguishable. There, an environmental assessment cited a "No Wake Zone" to avoid impacts to wildlife. Nearly five years later, however, the zone remained unmarked. Thus, "even if people wanted to obey the no wake zone," there was no way for them to do so. *Id.* at 588. Here, by contrast, TRPA's BMP requirements are in place, and TRPA has extensive public outreach programs, including BMP workshops and other tools to educate property owners about BMP installation and maintenance. RSER186-187. TRPA also audits local agencies to ensure that required BMP inspections occur. Code § 13.8.2-13.8.5. There is nothing unknown

about TRPA's BMP program. If anything, the RPU contains policies redoubling TRPA's efforts to ensure BMPs are installed, maintained and monitored.

Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089 (9th Cir. 2003) is on point. In that case, the plaintiffs claimed the Forest Service's monitoring plan for range management was arbitrary and capricious because prior remedial efforts had not succeeded. *Id.* at 1099. This Court rejected the claim, finding that the agency's compliance history did not invalidate its ongoing efforts. *Id.*; *see also Mount Shasta Bioregional Ecology Center v. County of Siskiyou*, 210 Cal.App.4th 184, 208 (2012) (upholding mitigation to address noise impacts that depended in part on whether neighbors lodged complaints). Here, too, TRPA could rationally conclude that a multi-jurisdictional BMP program to manage, control, re-infiltrate, and treat stormwater, including mandatory installation, maintenance, monitoring and reporting obligations, will yield water quality benefits. ER33-35.

CEQA cases similarly hold that an agency's analysis can (and should) assume that the agency will adhere to adopted regulatory requirements and mitigation measures. *Laurel Heights,* 47 Cal.3d at 411 [22]; *Oakland Heritage*

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[22] Plaintiffs cite *Laurel Heights* for the proposition that TRPA's past compliance efforts are relevant. AOB at 39. In upholding the agency's commitment to mitigation despite past failures, the California Supreme Court stated that "consideration … must also be given to measures the proponent proposes to take in the future, not just to the measures it took or failed to take in the past." *Laurel Heights,* 47 Cal.3d at 411.

Alliance v. City of Oakland, 195 Cal.App.4th 884, 900 (2011) (building standards in seismic codes); *see also Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1394 (1995) (agency may rely on enforcement of existing ordinances as evidence that impacts will not occur); *Towards Responsibility in Planning v. City Council*, 200 Cal.App.3d 671, 680 (1988) (agency "is not obliged to speculate about effects which might result from violations of its own ordinances.").

Plaintiffs cite statistics on the number of private owners that have retrofitted their properties. AOB at 37, 40. The record shows TRPA's BMP retrofit program has, in fact, been imperfect. ER523. But Plaintiffs consistently confuse TRPA's BMP retrofit program, which applies to all 43,000 parcels throughout the Region, with the further requirement that all new development in Centers install BMPs. The district court recognized this distinction, stating: "Plaintiffs' emphasis on maintenance overlooks the distinction between BMP Retrofits and BMPs for new development." ER34; RSER169 (installation of BMPs factored into PLRM modeling because permitting process requires their installation and maintenance, backed up with bonding, monitoring and reporting); *see* Code §§ 5.9 and 60.4.

In fact, by providing incentives that encourage redevelopment, the RPU is designed to move properties from TRPA's retrofit program into TRPA's mandatory permitting program and, in the process, to accelerate the undeniable water quality benefits of BMP compliance. *See e.g.*, RSER301. Indeed, the record

evidence cited by Plaintiffs actually supports TRPA's policy choice. For example, Plaintiffs cite a 2010 study by TRPA of BMP retrofits in a residential subdivision in Crystal Bay, Nevada. AOB at 40. The study reported the number of individual homes with BMPs installed based on a visual assessment of maintenance efforts. RSER778. The study demonstrates that, in terms of reducing pollutant loads, BMP retrofits for single-family residences are less effective than redeveloping legacy multifamily and commercial parcels – precisely the sort of redevelopment that the RPU wants to encourage. RSER779. This was true even though the subdivision was adjacent to the Lake. RSER780. Thus, contrary to Plaintiffs' suggestion, TRPA's policy choice to encourage redevelopment, rather than initiate enforcement actions against all non-compliant parcel owners, was neither arbitrary nor capricious, but supported by evidence in the record. *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1069 (9th Cir. 2010).

Here, this Court's role is limited to ensuring that "the agency reasonably relied on data" in the record when making its projections. *Lands Council v. McNair*, 629 F.3d 1070, 1076-77 (9th Cir. 2010). As the district court determined, TRPA did. ER 32-35.

B. The RPU strengthens TRPA's policies to ensure BMPs are installed and maintained; those policies will complement pollutant load reduction plans required by the TMDL.

The RPU includes a variety of other policies –ignored by Plaintiffs – to increase BMP implementation and maintenance. For example, the RPU encourages area-wide water quality treatment programs that, when combined with parcel-scale BMPs, make construction, maintenance, and reporting more efficient. RSER186-188. Such area-wide treatment facilities are permissible only if shown to "meet or exceed existing water quality requirements." *Id.*; Code § 13.5.3.B.3. New development or redevelopment that increases sediment loading is prohibited. RSER334-337.

The RPU also commits TRPA to continue to implement its BMP compliance programs for both existing and new development. RSER344, 189-190, 198. The RPU policies will reduce pollutant loading by increasing funding for water quality programs and improvement projects. RSER320. Under TRPA's Code, all new development or redevelopment must offset the impact of additional coverage by (1) paying water quality mitigation fees, or (2) implementing an offsite water quality improvement project. Code § 60.2.3. As the district court held, substantial evidence demonstrates the RPU's comprehensive water quality protection program will enhance BMP implementation and maintenance. ER34-35.

Plaintiffs rely heavily on statements by TRPA and others that BMPs need to be maintained to maximize water quality benefits. AOB at 40-41. As the district court held, however, abundant record evidence shows that the RPU strengthens TRPA's BMP maintenance requirements and enforcement mechanisms. ER32-35; *see also* RSER827-828, ER638.

Plaintiffs err by citing *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) [sic] and *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001). In both cases, the agencies proposed unstudied mitigation to avoid preparation of an EIS. *Id.* As discussed above, BMPs are not mitigation under the RPU but mandatory conditions applicable to all projects, without regard to whether a project will result in adverse water quality impacts. In any event, in both of these cases the record contained no information regarding whether the proposed mitigation measures would be effective. *Id.* Here, by contrast, extensive studies show BMPs dramatically improve stormwater quality. As stated in the EIS, "[n]ew science associated with the TMDL [] revealed that high pollutant loads are generated from older developments without adequate BMPs and that environmentally-beneficial redevelopment and associated improvements in the quality of urban runoff could be facilitated with adoption of a new Regional Plan." RSER153; *see* RSER827-828.

Finally, the RPU will complement the TMDL's approach to attain Water Quality Threshold Standards. Consistent with the TMDL recommendations, the RPU identifies BMPs as one of several strategies to attain pollutant load reduction goals. RSER222, ER638. As the EIS explains, it was "reasonable for TRPA (and the two States in the TMDL) to rely upon the implementation and maintenance of BMPs to address water quality impacts." RSER188. As stated in TRPA's Findings, "The Lake Tahoe TMDL represents a centerpiece of the joint effort to achieve and maintain water quality standards applicable in the Region." RSER607. The Governing Board found that the Regional Plan, as amended by the RPU, includes multiple requirements that, along with TRPA's own programs and existing regulations (e.g., the TMDL), will achieve and maintain TRPA's Water Quality Threshold Standards. RSER607-617, 638. Plaintiffs disagree with this conclusion, but cite no evidence to support their narrow claim that BMP maintenance requirements will not be enforced on any future concentrated development approved in Centers. More importantly, Plaintiffs have not met their burden of showing that TRPA relied on improper evidence in its Water Quality Threshold findings. RSER186-188, 298. [23]

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[23] Plaintiffs' claim that the EIS erred by relying on the TMDL because it does not address localized impacts is misplaced. AOB at 46-47. EPA's approval of the TMDL was a final agency action. *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 244 (D.D.C. 2011). Plaintiffs did not challenge EPA's approval of

IV. The district court did not err in requiring Plaintiffs to pay for the administrative record.

In a preliminary ruling, the district court required Plaintiffs to pay for the preparation of the administrative record as required under Rule 10.6.2. ER46-49. Despite losing on all claims, Plaintiffs sought reimbursement of their costs in a post-judgment motion. The district court denied Plaintiffs' request ruling that the administrative record costs awarded to TRPA were appropriate under FRCP Rule 54 and 28 U.S.C. § 1920 ("§ 1920"). ER4-13, 10 ("As the total administrative record cost is reasonable, and Plaintiffs were not charged for costs outside the scope of FRCP 54 and § 1920, the award of costs to [TRPA] was proper."). Plaintiffs fail to show, as they must, that the district court abused its discretion in awarding costs to TRPA. In addition, Plaintiffs' arguments suffer numerous procedural defects.

A. Plaintiffs failed to timely object.

Failure to timely object to a cost bill waives a party's ability to challenge assessment of costs on appeal. *Walker v. California*, 200 F.3d 624 (9th Cir. 1999). Plaintiffs were required to file an objection to TRPA's cost bill within seven days if it opposed the taxation of costs in the amount TRPA requested. E.D. Cal. Local

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the TMDL, and it is presumed valid. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009). The Court should reject Plaintiffs' attempt to mount a collateral attack on the TMDL. *See Sierra Club*, 916 F. Supp. 2d at 1141 (rejecting collateral attack on TRPA's Air Quality Mitigation Program).

Rule 292(c). Plaintiffs filed no objection to TRPA's cost bill. Instead, Plaintiffs waited until after the Clerk taxed costs against Plaintiffs and only then filed a motion to review the Clerk's action, alleging the Clerk failed to offset the properly taxed costs against the amount Plaintiffs paid to TRPA for the administrative record under Rule 10.6.2. ECF No. 64 at 1, 2. Thus, due to Plaintiffs' failure to object, the Clerk did not have any information regarding Plaintiffs' claim of offset at the time it issued the order. Plaintiffs therefore waived their ability to challenge the Clerk's action.

B. The district court did not abuse its discretion in awarding administrative record costs to TRPA.

To prove the district court abused its discretion in awarding administrative record costs to TRPA, Plaintiffs must show that the court's decision was "based on an inaccurate view of the law or a clearly erroneous finding of fact." *Corder v. Gates*, 947 F.2d 374, 377 (9th Cir. 1991). This is a high bar. "An abuse of discretion occurs when 'no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found.'" *Stone v. City and County of San Francisco*, 968 F.2d 850, 861 n.19 (9th Cir. 1992), quoting *Duran v. Elrod*, 713 F.2d 292, 297 (7th Cir. 1983). Moreover, the burden falls squarely on Plaintiffs to demonstrate an abuse of discretion. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 944-45 (9th Cir. 2003). Here, the

record contains ample evidence to support the district court's exercise of discretion, and Plaintiffs have not met their burden.

1. *Plaintiffs were not charged for privilege review.*

Plaintiffs first argue they are entitled to reimbursement for TRPA's time on privilege review of the administrative record. AOB at 55-56. As the district court determined, Plaintiffs were not charged for TRPA's privilege review of the record. ER12.

When TRPA provided Plaintiffs with an estimate of costs for record preparation before trial, it explained "a privilege review of the assembled record is not included." ER69. Further, after presenting Plaintiffs with the final invoice, TRPA's General Counsel confirmed "[n]o attorney time was billed for privilege review." ER76. In locating and organizing documents for the record, staff appropriately had to look at the documents. ER62, 75-76; *Conservation Congress v. U.S. Forest Service*, 2010 WL 2557183 at *1; *see also* AOB at 60, fn. 32 (describing locating, compiling, and organizing record documents as "clerical" tasks). During that same examination, TRPA staff flagged potentially privileged documents. No additional time was charged for independent privilege review; TRPA staff time was merely "contemporaneous with other tasks" for which Plaintiffs were properly billed. ER76. Therefore, Plaintiffs did not incur privilege review costs.

2. *Costs for compiling the record are recoverable.*

Plaintiffs err by arguing costs for "staff time to gather documents, organize and create an index to the administrative record" are not recoverable under § 1920. AOB at 56, 57. Section 1920, subdivision (4) allows recovery of "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." As explained by the district court, the recoverable costs include "the cost of *compiling* and copying the administrative record." ER12, emphasis added; *League to Save Lake Tahoe v. TRPA*, 2012 WL 3206412, at *2 (D. Nev. Aug. 3, 2012) ("costs associated with the physical efforts undertaken to gather, organize, index, and prepare the complete record underlying proceedings in this litigation" are taxable under § 1920). Since all staff time charged to Plaintiffs was spent compiling the record, the district court properly concluded that Plaintiffs were not billed for any costs other than those recoverable under § 1920. ER12-13.

3. *Administrative record preparation costs were reasonable.*

Asserting the insufficiency of itemized tasks, Plaintiffs contend the district court lacked sufficient evidence to determine whether the costs were reasonable. AOB at 59. Plaintiffs' argument fails.

First, Plaintiffs did not exhaust administrative remedies. On October 7, 2013, TRPA invoiced Plaintiffs the full costs of preparing the administrative

record. ER11. Under TRPA Rules, "Final action by the Executive Director may be appealed to the [TRPA Governing] Board by filing a notice of appeal with TRPA [] no later than 21 days after final action." Rule 11.2. Plaintiffs did not appeal within the required 21-days; therefore, their challenge to the sufficiency of the invoice is barred. *Sierra Club*, 916 F. Supp. 2d at 1111, 1136 (E.D. Cal. 2013) (exhaustion applies under Compact).

Second, the district court found Plaintiffs' challenge untimely. The district court noted, "Plaintiffs declined to challenge the final invoice as insufficiently-detailed" at the time of payment, and it would be "decidedly unfair to allow Plaintiffs to induce Defendant to proceed in the lawsuit through full payment of the administrative record cost, and then later, to challenge the level of detail in the invoice as insufficient." ER8. Plaintiffs had ample time to present any objection to TRPA's invoicing to the district court. ER59-60, 62. Instead, Plaintiffs waited until after they lost on the merits to object. Plaintiffs therefore waived their ability to challenge costs. ER11.

Third, as noted by the district court, "for the considerable task of compiling and copying the 150,000-page record in this case, the total cost of $53,769.24 is not facially unreasonable." ER12. The cost of producing the record in this case ($0.36 per page) is well within the costs awarded and incurred for producing administrative records in similar cases. *See*, *e.g. California Oak Foundation v.*

Regents of the Univ. of Cal., 188 Cal.App.4th 227, 292-295 (2008) ($51,442.63 for 40,000-page record ($1.30 per page)); *Otay Ranch, L.P. v. County of San Diego,* 230 Cal.App.4th 60 (2014) ($37,528 for 18,000-page record ($2.08 per page)); *see also* ER147 ($14,072 for 11,682-page record ($1.20 per page)), ER148 ($50,000 for 30,000-page record ($1.67 per page)), *id*. ($28,137.74 for 11,024-page record ($2.55 per page)).

Lastly, Plaintiffs present no credible evidence that the number of hours spent compiling the massive administrative record, which covers over ten years of planning and study, and an extensive administrative process, was unreasonable. AOB at 60, fn. 23. Nor do Plaintiffs dispute the rates charged by TRPA for the work performed. *Id*. Plaintiffs simply desire more detail to parse the invoice but fail to demonstrate that the costs awarded to TRPA were unreasonable. Accordingly, the district court's ruling on costs should be upheld. [24]

C. Plaintiffs' challenge to TRPA Rule 10.6.2 should be rejected.

Plaintiffs argue the district court erred by requiring payment, pursuant to Rule 10.6.2, of administrative record costs in advance of the Court's decision on the merits. AOB at 51-52. This argument is moot. The court affirmed TRPA's

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[24] The district court also properly awarded $133.26 in shipping costs. *Zuill v. Shanahan*, 80 F.3d 1366 (9th Cir. 1996), as amended, (June 14, 1996); *In re Ricoh Co., Ltd. Patent Litig.*, 2010 WL 8961328, at *5 (N.D. Cal. Sept. 29, 2010); *Oyarzo v. Tuolumne Fire Dist.*, 2014 WL 1757217, at *8 (E.D. Cal. Apr. 30, 2014).

award of record costs under FRCP 54(d) and § 1920 after the court's decision on the merits. Plaintiffs' challenge to the advance recovery of record preparation expenses under Rule 10.6.2 therefore lacks any practical significance; TRPA prevailed and thus is entitled to costs under FRCP Rule 54(d).

Next, Rule 10.6.2 existed before this case, and could have been challenged within 60-days of its adoption. Plaintiffs did not timely challenge the validity of the rule. ECF No. 14 at 6. A facial challenge now is barred. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 956 (9th Cir. 2011) (limitations for facial challenge to ordinance runs from time of adoption); Compact, art. VI(j)(4); *see also Tahoe Sierra Preservation Council v. TRPA*, 34 F.3d 753, 755 (9th Cir. 1994).

An as-applied challenge is similarly time-barred because TRPA advised Plaintiffs of the Agency's determination that they were required to pay for the record preparation costs in this matter under Rule 10.6.2 on March 7, 2013 RSER1-14. Since Plaintiffs initiated no challenge to that determination within 60 days, an as-applied challenge is also time-barred. *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991).

Even if the Court reaches the merits, the Compact specifically authorizes such fee recovery: "The agency may fix and collect reasonable fees for **any** service rendered by it." Compact, art. VIII(b) (emphasis added). Plaintiffs claim that preparing the record is TRPA's "legal duty" that "cannot be considered

'services rendered,' under the term's plain meaning." AOB at 53. The district court rejected Plaintiffs' argument, finding Plaintiffs' definition of "services rendered" "does not prevent TRPA from adopting Rule 10.6.2 because [Article VIII(b)] is broad enough to encompass production of an administrative record for plaintiffs in litigation." ER47.

Absent litigation, there is no independent "legal duty" requiring TRPA to prepare the administrative record at its expense. Plaintiffs chose to file the lawsuit and therefore, preparing an administrative record was simply a consequence of their action, similar to a request for public records. Indeed, the "fee for service" rule for administrative records tracks TRPA's consistent treatment of persons seeking individual services. For example, "[w]henever the [TRPA] performs services for members of the public, other than applicants or other public agencies, by providing or mailing copies of documents, the Agency shall collect a reasonable charge for the purpose of recovering costs to the Agency." Rule 10.7.1. Private applicants must also pay the cost under specific schedules of the review of their project applications including all costs of environmental documentation. Rule 10.8.

There is nothing unusual about TRPA's approach. The States of California and Nevada and the federal government also provide for recovery of rendered services in a variety of contexts, including the preparation of administrative

records. *See*, *e.g.*, Cal. Code Civ. Proc. § 1094.5(a) ("Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner."); Cal. Pub. Resources Code § 21167.6(b)(1) (record preparation fee under CEQA); Cal. Gov't Code § 6250 *et seq*. (fees under California Public Records Act); Nev. Rev. Stat. §§ 239.052 *et seq*. (fees under Nevada Public Records Act); 5 U.S.C. § 552 (a)(4)(A)(i) (fees under Freedom of Information Act).

As the district court noted, TRPA's authority to adopt Rule 10.6.2 could have been clearer if Article VIII(b) was located in the litigation section, but its location in the Finances section of the Compact gives TRPA broad authority to adopt such rules. ER47. Accordingly, the district court's finding that Rule 10.6.2 is valid should be upheld.

CONCLUSION

The district court's judgment should be affirmed.

Dated: November 28, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

To the knowledge of TRPA, this case is not related to any other case before the Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: November 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 28, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, I certify that I served by Federal Express one paper copy of Appellee TRPA's Excerpts of Record on the persons listed below:

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