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13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

15 SIERRA CLUB and FRIENDS OF THE WEST)
16 SHORE,)

17 Plaintiffs,)

18 v.)

19 TAHOE REGIONAL PLANNING AGENCY,)

20 Defendant.)

Civil Case No.: 2:13-CV-00267-JAM-EFB

) **BRIEF IN SUPPORT OF CROSS-MOTION**
) **FOR SUMMARY JUDGMENT BY TAHOE**
) **REGIONAL PLANNING AGENCY;**
) **OPPOSITION TO PLAINTIFFS' MOTION**
) **FOR SUMMARY JUDGMENT**

) Date: March 5, 2014
) Time: 9:30 AM
) Place: 14 Floor – Room 6 (JAM)
) Judge: John A. Mendez

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APA	Administrative Procedure Act (5 U.S.C. § 500 et seq.)
AR	Administrative Record
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 [AR5103]
CEQA	California Environmental Quality Act (Pub. Res. Code, § 21000 et seq.)
Code	TRPA Code of Ordinances
Compact	TRPA Compact
CWA	Federal Clean Water Act
EIP	Environmental Improvement Program
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
GHG	Greenhouse Gases
LTAB	Lake Tahoe Air Basin
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System
OB	Plaintiffs' Opening Brief
PLRM	Pollution Load Reduction Model
PLRPs	Pollutant/Stormwater Load Reduction Strategies
RTP	Regional Transportation Plan
RPU	Regional Plan Update
RPUC	Regional Plan Update Committee
SEZs	Stream Environment Zones
SLRPs	Stormwater Load Reduction Strategies

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SUF	Statement of Undisputed Fact
TERs	Threshold Evaluation Reports
TMDL	Total Maximum Daily Load
TRPA	Tahoe Regional Planning Agency
VMT	Vehicle Miles Traveled
1987 Plan	TRPA Regional Plan

1 **INTRODUCTION**

2 In December 2012, the Tahoe Regional Planning Agency (“TRPA”) Governing Board (“Board”) 3 certified the Final Environmental Impact Statement (“EIS”) for its Regional Plan Update (“RPU”) and 4 approved the RPU by a 12-1 vote. (AR27299-302.) This vote culminated ten years of planning, study, 5 and pervasive controversy to update the TRPA Regional Plan adopted in 1987 (“1987 Plan”). Through 6 this process, TRPA forged a consensus of unusual breadth and depth. The RPU did this against the 7 backdrop of dramatic changes in the social and economic makeup of the region, new and more stringent 8 federal and state regulatory standards, and better science about how to achieve the aims of the Compact.

9 The RPU is part of a comprehensive, integrated approach to accelerate attainment of all 10 thresholds, while also achieving other goals, such as greenhouse gas (“GHG”) emissions reduction 11 targets required by California Senate Bill 375. Other, key components include TRPA’s adoption of a 12 Regional Transportation Plan (“RTP”) and incorporation of Lake Tahoe’s Total Maximum Daily Load 13 (“TMDL”). Together, these plans are expected to provide a wide array of environmental benefits 14 including: (1) cutting the rate of growth by approximately half; (2) reducing GHG emissions by over 15 seven percent per capita; (3) reducing Vehicle Miles Travelled (“VMT”) and related traffic, noise and 16 associated air pollution; (4) reducing pollutant loading by including TMDL requirements in Area Plans, 17 accelerating compliance with “Best Management Practices” (“BMP”) requirements, and promoting 18 redevelopment that will meet strict water quality standards; (5) permanently restoring or protecting over 19 1,200 privately owned parcels in sensitive land or outlying areas; and (6) resulting in less coverage than 20 the 1987 Plan, particularly by removing coverage in sensitive lands. (SUF Nos. 3-9.)

21 Sierra Club and Friends of the West Shore (“Plaintiffs”) suggest that, in approving the RPU, 22 TRPA ignored their concerns. The record shows otherwise. At every turn, TRPA solicited and 23 incorporated input. Opportunities for review and comment were abundant. The process included 24 hundreds of meetings and hearings, and input from thousands of stakeholders, including local, state and 25 federal agencies. (SUF Nos. 10.) TRPA even delayed the RPU process for close to a year to accept 26 additional comments and analyze a wholly new alternative plan, all at Plaintiffs’ request. (SUF No. 11)

27 To address controversial issues surrounding the RPU, TRPA created a Regional Plan Update 28 Committee (“RPUC”) of the Governing Board, and the States created a Bi-State Consultation group, to

1 make recommendations to the full Board. The RPUC held 15 lengthy meetings at which business,
2 government and environmental stakeholders, including Plaintiffs, participated. (SUF No. 12.) The RPU
3 incorporated recommendations of the RPUC and Bi-State Consultation group, and included expanded
4 water quality protections. Ultimately, both States, every local government entity in the region, and
5 virtually all stakeholders (save Plaintiffs) endorsed the RPU. (SUF Nos. 13, 14, 96-100, and 151.)

6 After all this, Plaintiffs' litigation claims are startlingly myopic. Plaintiffs argue that TRPA did
7 not analyze the impacts of concentrating coverage in urban areas, and that TRPA could not rely on the
8 water quality benefits from "Best Management Practices" to find that the RPU would attain water
9 quality goals. These arguments largely ignore the EIS' analysis and disregard much of the evidence in
10 the record. Most strikingly, Plaintiffs never mention the TMDL or the RPU's adaptive management
11 programs, which the Board expressly found would ensure Water Quality Threshold Standards will be
12 met. Plaintiffs also claim that TRPA does not have enough monitoring data to show that the RPU
13 achieves and maintains compliance with air quality standards. Here, too, Plaintiffs mischaracterize the
14 record, and ignore TRPA's existing and expanded monitoring system. In the end, Plaintiffs' claims
15 amount to a disagreement over a handful of policies that TRPA will implement to meet Threshold
16 Standards. The record shows that TRPA's approval of the RPU and certification of the EIS are rational,
17 are neither arbitrary nor capricious, and are supported by substantial evidence.

18 **STATEMENT OF FACTS**

19 The beauty and history of Lake Tahoe, one of the largest and deepest lakes in the world, is well
20 documented in case law and set forth in TRPA's Statement of Undisputed Facts Nos. 15-49. *See*
21 *generally, Tahoe-Sierra Pres. Council, Inc. v. TRPA*, 535 U.S. 302 (2002); *Sierra Club v. TRPA*, 916
22 F.Supp.2d 1098 (E.D. Cal. 2013); *League to Save Lake Tahoe v. TRPA*, 739 F.Supp.2d 1260 (E.D. Cal.
23 2010); *Comm. for Reasonable Regulation of Lake Tahoe v. TRPA*, 311 F.Supp.2d 972 (D. Nev. 2004);
24 *Lake Tahoe Watercraft Recreation Ass'n v. TRPA*, 24 F.Supp.2d 1062 (E.D. Cal. 1998).

25 The case law and undisputed facts also set forth Lake Tahoe's regulatory progression, namely:
26 uncontrolled growth in the 1950's and 1960's that resulted in the Tahoe Regional Planning Compact and
27 formation of the TRPA in 1969; revisions to the Compact in 1980 to provide TRPA with authority to
28 regulate development to achieve and maintain Threshold Standards; and TRPA's adoption of Threshold

1 Standards in 1982, and the 1987 Plan to achieve and maintain them. Plaintiffs dwell on this background.
2 More relevant, however, is recent scientific and policy developments that produced a paradigmatic shift
3 in TRPA's approach to achieving and maintaining Threshold Standards. (*See e.g.*, SUF Nos.50-133.)

4 ***A. The Dilemma with Past Approaches to Legacy Development.***

5 Although Lake Tahoe became a recreational destination in the early 1900s, by the late 1960s,
6 economic momentum from the Winter Olympics and gaming in Nevada had spawned significant
7 development in the region that destroyed sensitive wetlands and endangered Lake Tahoe's famed clarity.
8 (SUF No. 17.) This development, particularly in Centers ("Centers" is a collective term for Community
9 Centers, Town Centers, Regional Centers, and the High Density Tourist District [AR5103]), covered the
10 native soil with impervious surface ("coverage") and directed stormwater runoff into Lake Tahoe. (*Id.*)
11 With that, Tahoe's clarity began to drop. (*Id.*) TRPA was created to lead a cooperative effort to stop this
12 uncontrolled growth and to preserve, restore, and enhance Tahoe's environment. (SUF No. 19-21.)

13 To meet these objectives, TRPA adopted the 1987 Plan. That plan focused primarily on strict
14 growth control and property acquisition to achieve Threshold Standards. (SUF Nos. 26-34.) The 1987
15 Plan also required TRPA to prepare Threshold Evaluation Reports (TERs) every five years to assess
16 progress towards attaining Threshold Standards, and to recommend amendments as needed. (*Id.*)

17 In 1991, TRPA issued the first TER. The report showed little movement toward improving
18 Tahoe's water quality. (SUF No. 37.) The TER concluded that regulation alone would not achieve and
19 maintain the Threshold Standards; TRPA also had to address aging public infrastructure (e.g., roads) and
20 legacy development. (*Id.*) In 1997, following a Presidential Summit, TRPA launched its Environmental
21 Improvement Program ("EIP"). Through the EIP, \$1.7 billion in both public and private monies has
22 been invested in stormwater management infrastructure, wetland restorations, and other beneficial
23 projects. The EIP remains a key program to achieve and maintain Threshold Standards. (SUF No. 45.)

24 The 2011 TER (the fifth since adoption of the 1987 Plan) found that TRPA had made significant
25 progress on improving environmental quality; the 2011 TER noted, among other things, that the decline
26 in Tahoe's clarity had flattened. (SUF No. 82.) The 2011 TER determined that 62 percent of measured
27 Threshold Standard indicators were in attainment, with many others trending towards improvement.
28 (SUF No. 79.) The TER also identified areas needing further attention to accelerate improvements,

1 including lake clarity, stream environment zones (“SEZs”), and scenic resources. (SUF Nos. 82, 86, 90.)

2 The science regarding how to improve water quality (and thus the best strategy for doing so) has
3 also evolved since 1987. The 1987 Plan was based on a 1970s-era study (“Bailey”) that classified land
4 “capability” depending on its physical characteristics (slope, soil, etc.), and identified coverage limits
5 within each classification. (SUF No. 30-34.) The 1987 Plan thus placed strict coverage limits on each
6 parcel in the Basin, depending on its Bailey classification, while allowing most “excess” coverage from
7 legacy development to remain in place, regardless of its classification. The theory was that coverage
8 limits, applied on a parcel-by-parcel basis throughout the region, would, taken as a whole, achieve water
9 quality threshold standards. (*Id.*) The 2011 TER noted the limits of this approach. (AR47.)

10 Although Plaintiffs suggest otherwise, TRPA has not abandoned regulating coverage. (SUF Nos.
11 9, 110-115.) Instead, TRPA’s challenge was to augment coverage regulations with policies focusing
12 squarely on what science has shown is the real issue: the amount of pollutants discharged to Lake Tahoe.
13 A central reason for this shift is the adoption of the Lake Tahoe TMDL.¹ (SUF Nos. 118-125, 148.) The
14 TMDL requires reductions in pollutant loads by sub-watershed (“catchments”) and source category. (*Id.*)
15 These reductions are scientifically linked to incremental gains in the water clarity threshold standard and
16 the scientific basis for improving Lake Tahoe’s clarity by an additional ten feet over the next twenty
17 years. (SUF No. 68.) The TMDL studies found that fine sediments, rather than suspended algae, were
18 the largest contributor to clarity loss (70%) and that the majority of fine sediments came from the
19 developed urban uplands. (*Id.*) California and Nevada developed the TMDL as required under the CWA
20 based on this information. (SUF No. 51.) The States placed primary responsibility for achieving load
21 reductions on the region’s local governments and each state’s respective water agencies. (SUF No. 61.)

22 Socio-economic conditions in the region have also changed dramatically since 1987. The
23

24
25 ¹ / A TMDL is a water quality restoration plan required by the Federal Clean Water Act (“CWA”) to
26 achieve water quality standards in impaired surface water bodies. A TMDL identifies the maximum
27 pollutant load a water body can assimilate while maintaining its water quality standards. The TMDL
28 then allocates that load to various dischargers, and requires each discharger to take steps to ensure that it
does not exceed its allocation. Lake Tahoe was only listed as a CWA 303(d) impaired water body in
1998 (California) and 2002 (Nevada). (AR106461-62.) In 2011, after ten years and millions of dollars of
study, the U.S. Environmental Protection Agency (“EPA”), California and Nevada approved the Lake
Tahoe TMDL, which is administered by the States’ respective water quality agencies. (SUF No. 51, 61.)

1 economic momentum from 1960 Olympics faded long ago. Gaming – once the dominant economic
2 engine – declined. (SUF Nos.73-74.) The region now endures high unemployment, a shortage of
3 affordable housing, elevated poverty levels, low housing occupancy rates, and public school closures.
4 (*Id.*) Much of the region’s infrastructure is dated. If further gains in environmental conditions are to be
5 realized, or the local economy is to revive, then public infrastructure must be upgraded. Yet, Federal and
6 State funding for such upgrades has plummeted. (SUF Nos. 58, 76, 118.)

7 These changes – improved understanding of the science of Lake Tahoe’s water quality, a
8 declining economy, and decreasing public funding – presented TRPA with a challenge: how to build on
9 the environmental gains of the 1987 Plan, while providing Tahoe communities with opportunities for
10 orderly growth and needed investment in environmental upgrades consistent with the Compact.

11 ***B. The RPU Maintains Strict Controls on Growth While Facilitating Necessary Changes.***

12 The RPU retains the regulatory framework from the 1987 Plan, while targeted amendments
13 ensure Threshold Standards are achieved and maintained in light of changed conditions in the region.
14 (SUF Nos. 106.) The RPU achieves Threshold Standards by incorporating contemporary planning
15 principles, current science, and the latest Federal, State, and local regulations, focusing on
16 redevelopment incentives to convert substandard legacy development into modern, environmentally
17 beneficial, visually attractive, walkable, bikeable communities. (SUF Nos. 107-08.) The RPU authorizes
18 limited new growth and strengthens existing protections. (SUF Nos. 108-111.) In particular, the RPU
19 incorporates the TMDL’s science-based regulatory approach and requirements to achieve Water Quality
20 Threshold Standards. (SUF Nos. 118-125.) The Board found the following RPU amendments will
21 reduce pollutant loads consistent with the TMDL and other regulatory requirements by:

- 22 • Expediting redevelopment of non-conforming properties to meet water quality standards;
- 23 • Reforming the land coverage program to accelerate land coverage reduction and land
24 coverage transfers from sensitive lands;
- 25 • Tightening land coverage limitations within 300 feet of Lake Tahoe;
- 26 • Awarding residential bonus units in Centers for removing and retiring excess land coverage;
- 27 • Designating two stream restoration plan areas in the Upper Truckee River watershed;
- 28 • Modifying Transportation Goals and Policies to promote walkable mixed-use Centers,
enhanced pedestrian and bicycle network, and transit enhancements to reduce dependency on
the automobile, which in turn reduces atmospheric deposition of nitrogen and road dust;
- Allowing easier to maintain area-wide water quality treatment facilities and funding
mechanisms in lieu of certain site specific BMPs;
- Providing incentives to accelerate the rate of BMP retrofits; and

1 • Phasing out the sale and use of chemical phosphorus fertilizer for lawns by 2017.
2 (SUF No. 122-125.) The RPU leverages each state’s enforcement programs to increase compliance. (*Id.*)
3 The RPU also includes a robust monitoring and adaptive management system to assess the effectiveness
4 of RPU programs and adjust policies and programs as needed. (SUF Nos. 128-132.) Under this system,
5 TRPA (1) limits new development based on VMT and traffic monitoring to ensure continued attainment
6 of transportation and air quality standards; (2) reviews Area Plans for conformance with adopted TMDL
7 load reduction requirements; (3) prepares annual reports on the EIP, BMP compliance, and other
8 programs; and (4) performs four-year updates to facilitate amendments based on the status of plan
9 implementation, progress towards attainment and maintenance of thresholds, and new information. (*Id.*)
10 The Board adopted extensive findings that the RPU will not adversely affect air or water quality and the
11 Regional Plan, as amended by the RPU, will achieve and maintain Thresholds Standards. (SUF No.133.)

12 STANDARD OF REVIEW

13 In record review cases like this, the general rules regarding summary judgment are modified
14 because there are no factual issues for the court to decide; the court determines “whether either party is
15 entitled to judgment as a matter of law.” *Sierra Club*, 916 F.Supp.2d at 1107.

16 Because the Board’s decision to adopt the RPU was a legislative act, the scope of the judicial
17 inquiry extends “only to the questions of whether the act or decision has been arbitrary, capricious or
18 lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required
19 by law.” Compact, art. VI(j)(5). This standard of review tracks the standard under the Administrative
20 Procedures Act (“APA”). *Sierra Club*, 916 F.Supp.2d at 1111; *League*, 739 F.Supp.2d at 1267. Thus,
21 Plaintiffs must show the Board’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise
22 not in accordance with law,” or that the Board committed procedural error. 5 U.S.C. § 706(2)(A), (D).

23 A decision is arbitrary and capricious if the agency “relied on factors which Congress has not
24 intended it to consider, entirely failed to consider an important aspect of the problem, offered an
25 explanation for its decision that runs counter to the evidence before the agency, or is so implausible that
26 it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs.*
27 *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
28 review is narrow and [the court] must not ‘substitute its judgment for that of the agency.’” *Sierra Club*,

1 916 F.Supp.2d at 1111, quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43.

2 Plaintiffs' arguments boil down to a request that the Court second-guess TRPA's policy
 3 decisions. As this Court observed, however, "TRPA's chosen methodology may not result in perfection,
 4 but it is not the court's role to mandate so much." *Sierra Club*, 916 F.Supp.2d at 1135. Thus, even where
 5 "conflicting views" exist, the Court must "defer to the informed discretion of the agency." *Envtl. Prot.*
 6 *Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1017 (9th Cir. 2006); see *The Lands Council v. McNair*,
 7 537 F.3d 981, 1000 (9th Cir. 2008) (agency has discretion to rely on staff expertise); *Wright v. Inman*,
 8 923 F.Supp. 1295, 1301 (D. Nev. 1996) (plaintiff's "speculative lack of confidence in [] monitoring
 9 plans" is insufficient reason to invalidate EIS or set aside decision). Deference is particularly appropriate
 10 where the issue involves technical expertise. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377
 11 (1989); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003). The issue is the
 12 same under CEQA -- not whether additional data could be obtained, but whether substantial evidence
 13 supports the agency's conclusions. *Ass'n of Irrigated Residents v. County of Madera*, 107 Cal.App.4th
 14 1383, 1397 (2003). Plaintiffs have the burden of proof. *Short Haul Survival Comm. v. United States*, 572
 15 F.2d 240, 244 (9th Cir. 1978); *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995); see *Defend the*
 16 *Bay v. City of Irvine*, 119 Cal.App.4th 1261, 1265-66 (2004) (to meet burden of proof, plaintiff must
 17 summarize all relevant evidence); *California Native Plant Soc'y v. City of Rancho Cordova*, 172
 18 Cal.App.4th 603, 626 (2009) (plaintiff cannot merely cite evidence favoring its position).

19 ARGUMENT

20 **I. TRPA Rationally Concluded the RPU Will Not Significantly Affect Water Quality and the 21 Regional Plan Will Achieve and Maintain Water Quality Threshold Standards.**

22 The Board independently found that (1) pursuant to Compact article VII, the RPU, including the
 23 incentives to foster redevelopment in Centers, will not adversely affect water quality, and (2) pursuant to
 24 Compact article IV, the Regional Plan, as amended by the RPU, will achieve and maintain Water
 25 Quality Thresholds Standards. (AR26673-83.) The Board made these findings based on deeply
 26 conservative assumptions. In particular, the TMDL "allocated" far more coverage than the RPU actually
 27 authorized -- meaning that the Board could have approved significantly more coverage without
 28 jeopardizing the Plan's approach to achieve and maintain Threshold Standards. (SUF No. 154.)

1 Plaintiffs' claims are much narrower.² They argue that the RPU EIS did not analyze the impacts
 2 of concentrating coverage in Centers (OB at 7-15), and that TRPA could not rely upon the water quality
 3 benefits from installing BMPs (OB at 15-22). Plaintiffs' arguments suffer from two pervasive,
 4 fundamental flaws. First, they never acknowledge policies in the RPU that will lead to investments, and
 5 thus improved conditions, in "legacy" development. Second, and even more remarkably, Plaintiffs never
 6 even mention the TMDL.³ Beyond that, Plaintiffs' arguments amount to nothing more than second
 7 guessing TRPA on what evidence or strategy to rely upon in determining how to meet Water Quality
 8 Threshold Standards.

9 ***A. TRPA Expressly Analyzed Impacts From Concentrating Coverage in Centers and Found the***
 10 ***Effect to be Beneficial.***

11 In order to claim the EIS obscured localized impacts of concentrated coverage in particular
 12 watersheds and Centers (OB at 7-15) Plaintiffs overlook most of the EIS' comprehensive coverage
 13 analysis. The EIS analyzed this impact regionally. The EIS stated that the RPU provides incentives to
 14 transfer coverage, existing development, and development rights from sensitive lands into Centers.
 15 (AR11944-48, 11953-54.) While this transfer will result in increased coverage on non-sensitive lands
 16 within Centers, it will also result in corresponding decrease in coverage (with associated beneficial
 17 effects of increased natural filtration on restored sensitive lands) elsewhere in the region. (AR11953.)
 18 The EIS concluded that this shift of coverage from "low capability" to "high capability" lands (that is,
 19 from areas that are more sensitive to those that are less so) was a "beneficial impact" because, as is
 20 relevant to the TMDL, it would decrease the "load" of pollutants discharged in stormwater runoff.
 21 (AR11945.) Substantial evidence supports this conclusion. (AR128193 [2012 Tahoe Basin Impervious

22 ² / Plaintiffs make two types of claims that have distinctly different foci: the RPU and the Regional Plan.
 23 For claims under Compact Article VII, the Court reviews the RPU amendments to the Regional Plan and
 24 whether the EIS adequately disclosed the environmental impacts associated with these amendments.
 25 (OB at 7-21.) For claims under Compact Article IV (to achieve and maintain the adopted Thresholds),
 26 the Court's focus is on the Board's findings that the implementation of the entire Regional Plan, together
 27 with the RPU amendments, will allow TRPA to achieve and maintain, in this case, the relevant air and
 28 water quality threshold standards. (OB at 21-25.) In either case, the Court's review is limited.

³ / Plaintiffs' failure to acknowledge the TMDL is startling. The EIS makes clear the TMDL plays a
 pivotal role in ensuring that encouraging density in Centers will not have a significant impact on soil or
 water quality. (*See, e.g.*, AR 11906, 11918-19, 11924-27, 11919, 11942-43, 11953, 5097-5104.)
 Plaintiffs fail to summarize this most relevant evidence supporting the EIS' analysis, or explain why it is
 lacking. That is reason enough to reject this argument. *Defend the Bay*, 119 Cal.App.4th at 1265-66.

1 Surface Coverage Study: “Concentrating development and limiting the development footprint has the
2 potential to reduce per capita and basin-wide environmental impact.”]; *see also* SUF Nos. 111, 138-43.)

3 Plaintiffs object, citing to their comments requesting a different analysis predicting location-
4 specific coverage. (OB at 11, citing AR4180-82, 4483-85, 4478-79.) As the EIS explained, however,
5 parcel-by-parcel analysis was neither feasible nor necessary; such analysis will instead occur in the
6 context of specific Area Plans and development proposals. (AR5089-96 [parcel-level analysis infeasible
7 because of the many assumptions that it would require]; *see also* AR 11550 [EIS “does not address
8 impacts at the level of proposed land use development or public works projects...”].) “Such
9 environmental analyses would occur after the RPU process concludes and in response to proposals for
10 implementing programs or specific development or public works projects.” (AR11550.) In fact,
11 coverage limits in Centers can be increased only if TRPA approves an Area Plan. That is particularly
12 noteworthy because TRPA can approve an Area Plan only after local-scale analysis has been performed,
13 and the analysis shows the plan reduces pollutant loading from the area. (AR5090.)

14 TRPA went further, and analyzed the water quality impacts from concentrated coverage in
15 Centers. Using the TMDL’s Pollution Load Reduction Model (“PLRM”), TRPA analyzed estimated
16 impacts from “pollutant loading that could occur within ... [C]enters” under RPU policies. (AR5103.)
17 The PLRM used “parcel-level data” on “land use types, impervious coverage, and BMP implementation
18 to generate estimates of fine sediment, nitrogen, and phosphorus loading and stormwater runoff.” (*Id.*)
19 The analysis was conservative; the model assumed land uses within Centers “would maximize their
20 allowable coverage.”⁴ (*Id.*) The results showed that, “even if policies that incentivize concentrated
21 development achieved the maximum allowable coverage in all Centers, the result would be a decrease in
22 pollutant loading from Centers as a result of implementing required water quality regulations.”
23 (AR5103-04.) The EIS summarized the results of the modeling. (*Id.*; *see* AR6479-89 [appendix].) As the
24 EIS explained, the PRLM confirmed the EIS’ analysis was likely conservative, and noted that actual
25

26 ⁴ / The PLRM analysis of coverage impacts is doubly conservative. At the same time it looked at the
27 maximum potential for increased development at the “receiving site,” it’s omission of the benefits of
28 transferring development from more “sensitive sending” sites vastly understated the beneficial effect of
likely future decreases in coverage from other elements of the RPU, particularly the excess coverage
mitigation program and continued coverage reductions resulting from the EIP. (AR5103.)

1 localized changes in pollutant loading from concentrated coverage is likely to be beneficial (rather than
2 merely “less than significant”). (AR5104.)

3 More fundamentally, the RPU does not rely solely on coverage limits to protect water quality.
4 The RPU also incorporates TMDL load reduction projects, parcel-scale BMP implementation, and
5 associated maintenance requirements. (AR11953-55, 5101-04.) In particular, “[t]he Lake Tahoe TMDL
6 requires local jurisdictions to complete load reduction plans that identify catchments (i.e.,
7 sub-watersheds) and their respective pollutant loading to Lake Tahoe and achieve specific reductions in
8 pollutant loading from each catchment.” (AR 5102.) Local agencies must then reduce and maintain
9 pollutant loads within each sub-watershed. (AR106507; *see* AR106506 [Lake Clarity Crediting program
10 adopted as part of TMDL “provides a system of tools and methods to consistently estimate, track and
11 report pollutant load reductions at a catchment, or subwatershed, scale.”], 106534-37 [TMDL requires
12 tributary stream and in-lake monitoring to measure cumulative effects], 107419.) As the EIS stated, the
13 TMDL will “prevent [] local jurisdictions from permitting projects that would result in the type of
14 local-scale water quality impacts” upon which Plaintiffs focus. (AR5102.)⁵

15 Remarkably, Plaintiffs never cite this analysis, or even acknowledge these other components of
16 the RPU. Instead, Plaintiffs argue for a different analysis assessing the amount of coverage (as opposed
17 to its impacts) at a local scale; even there, Plaintiffs focus only on coverage in Centers, rather than
18 throughout the region. (OB at 10-15.) But the EIS explained why additional modeling was neither
19 necessary nor feasible. (AR5089-96, 5101-04.) TRPA’s decisions regarding how to perform this sort of
20 modeling are entitled to substantial deference. The court’s task is “not [] to decide whether an [EIS] is
21 based on the best scientific methodology available.” *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d
22 1073, 1088 (9th Cir. 2013). Indeed, given the technical nature of the issue, and TRPA’s longstanding
23 expertise with respect to such matters, TRPA is entitled to “the highest level of deference” with respect
24

25 ⁵ / Plaintiffs also ignore revisions to the proposed RPU amendments that TRPA made to provide
26 additional environmental protections and reduce potential environmental impacts, including restrictions
27 on transferring coverage and reducing allowable coverage within 300 feet of Lake Tahoe high
28 watermark for parcels and under comprehensive coverage management plans. (AR5089, 5306; *see also*
AR5057-72.) These revisions, recommended by a bi-State working group, addressed the concerns of the
States of California and Nevada and (*See* California Nevada Amicus brief, ECF No. 30-1 at p. 4),
collectively, served to ensure that local water quality impacts will not occur. (SUF No. 151.)

1 to review of its “scientific judgments” about what methodologies to use to perform its analysis. *Native*
 2 *Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012). Plaintiffs acknowledge neither
 3 TRPA’s chosen methodology,⁶ nor the deference to which TRPA is entitled.⁷

4 TRPA’s approach was particularly appropriate, given the regional scope of the RPU. The degree
 5 of detail that is required in an EIS “depends upon the nature and scope of the proposed action.”
 6 *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). At the program level, an EIS “must provide
 7 sufficient detail to foster informed decision-making,” but “site-specific impacts need not be fully
 8 evaluated” until the decision to undertake a site-specific project has been made. *Friends of Yosemite*
 9 *Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003) (internal quotations omitted); *see also Sierra Club*,
 10 916 F.Supp.2d at 1156-57 (upholding deferral of site specific analysis of impacts to noise thresholds
 11 under Compact in light of program-level analysis); *In re Bay-Delta Programmatic Env’tl. Impact Report*,
 12 43 Cal.4th 1143, 1169-70 (2008) (in CEQA case, California Supreme Court upholds program-level
 13 analysis of plan to restore Sacramento/San Joaquin Delta; EIR did not need to include detailed analysis
 14 of specific water projects that implementation of plan would require; rather, the agency could perform
 15 such analysis at the time it considered specific water projects under the plan). Here, too, site-specific
 16 analysis will be performed as Area Plans or specific projects are proposed. *See Opposition to Plaintiffs’*
 17 *Request for Judicial Notice* (addressing extra-record arguments regarding Area Plans).

18
 19 ⁶ / Plaintiffs primarily rely on pre-TMDL documents that characterize coverage, an indirect measure of
 20 water quality impacts, within watersheds. (OB at 8-9.) The advent of the TMDL and direct water quality
 modeling renders such analysis unnecessary and is perhaps why Plaintiffs ignore the TMDL entirely.

21 ⁷ / Under the applicable standard of review, Plaintiffs’ demand for further analysis is legally immaterial.
 22 Under both CEQA and NEPA, an EIR or EIS “need not include all information available on a subject all
 23 that is required is sufficient information and analysis to enable the public to discern the analytical route
 24 the agency traveled from evidence to action.” *North Coast Rivers Alliance v. Marin Mun. Water Dist.*
 25 *Bd. of Directors*, 216 Cal.App.4th 614, 639-40 (2013) (internal quotes and citations omitted); *see also*
 26 *Sierra Club*, 916 F.Supp.2d at 1154 (“The degree of specificity required in an EIR will correspond to the
 27 degree of specificity involved in the underlying activity which is described in the EIR.”). “A project
 28 opponent or reviewing court can always imagine some 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). The cases cited by Plaintiffs do not compel a different
 result – they do not involve the methodology used to evaluate impacts. *See, e.g., Mid States Coal. for*
Progress v. Surface Transp. Bd., 345 F.3d 520, 550 (8th Cir. 2003) (project level review failed to
 evaluate air impacts from reasonably foreseeable increase in coal consumption); *Pac. Coast Fed’n of*
Fishermen’s Ass’ns, Inc. v. Nat’l Marine Fisheries Serv., 265 F.3d 1028 (9th Cir. 2001) (record lacked
 evidence demonstrating NMFS considered cumulative effects in Endangered Species Act case).

1 Plaintiffs cite *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1066 (9th Cir. 2002) for
2 the proposition that, if an “environmental problem [is] readily apparent at the time the [EIS] is
3 prepared,’ and a proposed plan ‘contain[s] enough specifics to permit productive analysis’ of the
4 problem, the EIS must do that analysis.” (OB at 9 (emphasis added).) *Kern* is distinguishable. That case
5 focused on an EIS’ evaluation of the effects of a resource management plan on the spread of fungus to
6 cedar trees. The Ninth Circuit held the EIS’ two-sentence mention of the fungus problem, and a
7 reference to another document, was insufficient under NEPA. *Id.* at 1072-74 (plan-level documents may
8 be more general but cannot label “any and all discussion of future environmental effects as ‘crystal ball
9 inquiry.’”).

10 This case is nothing like *Kern*. The RPU EIS contained abundant information and analysis on the
11 potential impacts of concentrating coverage in Centers. The EIS also explained why further, project-
12 specific analysis was infeasible and unnecessary at the program level, and would be performed when
13 specific area plans or projects were proposed. (SUF No. 146; see also SUF 117, 130.)

14 Plaintiffs’ reliance on *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067
15 (9th Cir. 2011) (“*NPRC*”) is equally misplaced. In *NPRC*, the Court held the EIS for a railroad line was
16 inadequate because its cumulative impacts analysis was limited to a five-year time frame, and the
17 agency did not explain why it failed to consider other reasonable foreseeable projects that could overlap
18 with construction of the railroad line. *Id.* at 1077-79. In this case, however, there is no dispute whether
19 the EIS included reasonably foreseeable plans, programs and projects in its analysis. (OB at 13; see
20 AR11589-603 [RPU description], 11670-82 [description of expected development under RPU], 5059-
21 72, 12161-62 [EIS assumes full build-out]; SUF No. 136.) Plaintiffs cite *NPRC* to support their claim
22 that the EIS’ analysis of the impacts from potential future projects was insufficiently fine-grained. But
23 *NPRC* involved a specific development proposal – a railroad line – rather than a region-wide plan, such
24 as the RPU. Indeed, even the *NPRC* Court recognized that a court must not “act as a panel of scientists
25 that instructs the [agency] ..., chooses among scientific studies ..., and orders the agency to explain every
26 possible scientific uncertainty.” *Id.* at 1075. That is, however, precisely what Plaintiffs demand here.

27 In sum, Plaintiffs’ argument regarding the localized impacts of increased coverage in Centers is
28 based on four demonstrably false premises. First, the argument incorrectly assumes the sole effect of the

1 RPU will be to increase coverage in Centers. In fact, the RPU will also result in less pollutants flowing
 2 from within Centers to the Lake, and less coverage on other, more sensitive lands capable of natural
 3 infiltration. Second, the argument fails to acknowledge TMDL and other water quality programs, and
 4 their central role in reducing impacts throughout the basin, *including* within Centers. Third, the
 5 argument ignores the modeling performed by TRPA to confirm that adverse water quality impacts from
 6 concentrating coverage in Centers will not occur. Fourth, the argument ignores the programmatic nature
 7 of the analysis, which provides that localized impacts will be further analyzed as specific projects are
 8 proposed. In short, Plaintiffs’ argument segregates a single component of the RPU – increased coverage
 9 in Centers – from the integrated whole. The Court should reject an attempt to “parse but one component
 10 from the integrated mitigation program.” *Envtl. Council of Sacramento v. City of Sacramento*, 142
 11 Cal.App.4th 1018, 1039 (2006) (rejecting attack on habitat mitigation plan because plaintiffs “ignor[ed]
 12 the broader context, the broader findings, and the broader evidence relied on by the agencies”).⁸

13 ***B. TRPA Properly Relied on the Panoply of Stormwater Regulations, Including The Tahoe***
 14 ***TMDL, in its Water Quality Threshold Findings.***

15 BMPs are one part of the Regional Plan’s comprehensive water quality protection and restoration
 16 regulatory program,⁹ which includes the EIP’s water quality programs that facilitate implementation of
 17 BMPs. Plaintiffs claim that one component of this program – private parcel-scale BMPs – are unreliable
 18 and slow to implement. (OB at 15-20.) Based on this claim, Plaintiffs ask the Court to find that TRPA,
 19 the States of California and Nevada, and multiple local agencies cannot be trusted to meet their legal

20 ⁸ / The Court should also reject Plaintiffs’ unsupported suggestion that the EIS’ analysis of impacts on
 21 nearshore and stream conditions is inadequate for these same reasons – i.e. PLRM modeling results and
 22 TMDL requirements. (See OB at 16, fn. 6.) Notably TRPA adopted an additional water quality threshold
 23 to address nearshore conditions as part of the RPU, and adopted specific policies, such as the phase out
 of phosphorous fertilizer, specifically to address nearshore conditions. (SUF No. 152.) As elsewhere,
 Plaintiffs fail to acknowledge the TMDL Report, which concludes that actions taken to improve mid-
 lake clarity under the TMDL will also benefit nearshore conditions. (See SUF No. 149.)

24 ⁹ / Chapter 60 of the Code sets forth requirements for implementation of the Regional Plan’s Water
 25 Quality Goals and Policies. (AR1073-89.) These requirements include, among other things, the
 26 installation of temporary and permanent BMPs for the protection or restoration of water quality and
 attainment of minimum discharge standards. (*Id.*) The Code requires installing BMPs as described in
 TRPA’s BMP Handbook (AR126808-7540), or equivalent practices approved by TRPA, on all public
 and privately owned lands within the Basin. (AR1085 [Code § 60.4.2].) The RPU amendments do not
 27 alter these requirements, except to require installing and maintaining water quality BMPs consistent with
 the “defensible space” requirements of fire agencies. (AR1089, 14489-92; *see also* 5205-06.) The EIS
 28 addressed this change and concluded it would not result in any significant impacts. (AR11936.)

1 obligations under the Compact and TMDL. In making this argument, Plaintiffs both rewrite history and
 2 ignore the extent to which the RPU, augmented by the TMDL and regional stormwater regulations,
 3 enhances and strengthens the 1987 Plan's approach to water quality protection and restoration.
 4 Plaintiffs' argument also fails to acknowledge key differences between TRPA's BMP retrofit program
 5 and TRPA's requirements for permitting new or redevelopment under the RPU.¹⁰

6 Abundant evidence supports TRPA's conclusion that TRPA's BMP requirements and programs
 7 have improved, and will continue to improve, water quality. (SUF Nos. 157-186.) Studies in the record
 8 demonstrate there is a significant difference between properties that have installed BMPs compared to
 9 those that have not. Data shows, for example, that commercial properties without BMPs discharge
 10 pollutant loads that are five times higher than those from similar properties with structural BMPs — that
 11 is, structural BMPs reduce pollutant loads by 80 percent. (AR128167-68.) TMDL studies also conclude
 12 additional BMP implementation will improve water quality. (SUF No. 168.) Plaintiffs' argument that
 13 these benefits are illusory is based on an apples and oranges comparison. Unlike TRPA's BMP retrofit
 14 program for existing properties, new or redevelopment allowed under the RPU, including any
 15 concentrated coverage in Centers, must install and maintain BMPs as a condition of project approval and
 16 post security deposits. (SUF No. 163.) TRPA also inspects these properties to ensure BMPs are properly
 17 implemented. (*Id.*)

18 Plaintiffs also mischaracterize TRPA's BMP retrofit program.¹¹ TRPA recently initiated an
 19 accelerated BMP implementation program that has significantly increased the rate of BMP compliance
 20 for existing development. As of December 2011, over one-third (14,714 of 43,470) of the parcels in the
 21

22 ¹⁰ / Private stormwater BMPs are implemented in two ways: (1) applicants must install BMPs as a
 23 condition of approval for any permit from TRPA, and (2) TRPA requires all individual parcels owners
 24 to retrofit their property with BMPs. (AR5205; see AR1085-89 [Code §§ 60.4.3-60.4.9].)

25 ¹¹ / Plaintiffs mischaracterize information in the record regarding the installation and maintenance of
 26 BMPs under the 1987 Plan. (*See* Response to Plaintiffs' SUF Nos. 49-50.) For example, Plaintiffs state
 27 that "only" 30% of targeted properties have achieved BMP compliance. (OB at 20.) While this statement
 28 was accurate at the time the report was prepared (December 2011), Plaintiffs fail to acknowledge that
 thousands of compliance notices have been sent and an additional 40% to 60% of the targeted property
 owners are "actively working towards compliance" through TRPA's BMP program. (AR55409.)
 Similarly, Plaintiffs cite to the BMP Handbook to support the claim that maintenance is frequently
 "neglected." (OB at 18.) The BMP Handbook requires, however, that landowners "maintain a log of
 inspection and maintenance activities related to the BMPs that have been installed throughout a project
 site or property." (AR 126934.)

1 Tahoe region have received a BMP Certificate. TRPA issued roughly half of these certificates in the last
2 four years. (AR9085.) Notably, TRPA uses grant funding to focus compliance efforts on the most
3 beneficial areas, which has resulted in significantly higher compliance rates. (AR5189; SUF Nos. 170-
4 71.) The record also reflects TRPA’s commitment to improve BMP compliance. The RPU commits
5 TRPA to continue to implement its BMP compliance programs for both existing and new development.
6 (SUF No. 175.) As a result, TRPA expects that over time all 43,470 parcels in the Basin will receive
7 BMP certificates. (*See generally* AR1073-89.)

8 BMP maintenance is mandatory. (AR1089 [Code § 60.4.9 (“BMPs shall be maintained to ensure
9 their continued effectiveness.”)], 127376 (“Owners of developed properties must ensure BMPs remain
10 functional and effective to retain their BMP Certificate and comply with the TRPA Code of
11 Ordinances.”].) TRPA also audits local agencies to make sure that required BMP inspections occur.
12 (AR801-02 [Code, §§ 13.8.2; 13.8.3].) Under the RPU, TRPA will incorporate inspection and
13 maintenance logs for commercial and large residential properties. (AR126934 [“When a project is
14 permitted, a BMP inspection and maintenance plan will be required under the Special Conditions of the
15 permit.”]; *see* AR35204-11 [TRPA Contractors’ Manual for performing maintenance].)

16 It is nonsensical to argue, as Plaintiffs do, that TRPA should have assumed, in evaluating the
17 RPU’s water quality impacts, that none of these requirements will be implemented. Indeed, CEQA case
18 law holds that an agency’s analysis can (and should) assume that the agency will adhere to adopted
19 mitigation measures and regulatory requirements. *Laurel Heights*, 47 Cal.3d at 412 (court should take
20 into account agency commitment to implement mitigation); *Gentry v. City of Murrieta*, 36 Cal.App.4th
21 1359, 1394 (1995) (lead agency may rely on enforcement of existing ordinances as evidence that
22 impacts will not occur); *Towards Responsibility in Planning v. City Council*, 200 Cal.App.3d 671, 680
23 (1988) (“City is not obliged to speculate about effects which might result from violations of its own
24 ordinances.”); *cf. Cadiz Land Co., Inc. v. Rail Cycle*, 83 Cal.App.4th 74, 108-09 (2000) (EIR could
25 assume that adopted regulations would lead to reduced air pollution); *Wright*, 923 F.Supp. at 1301 (EIS
26 upheld despite plaintiff’s “speculative lack of confidence in [] monitoring plans”).

27 Moreover, the RPU creates additional incentives for public-private partnerships to accelerate
28 private property owners installing BMPs. The RPU allows and encourages area-wide water quality

1 treatment programs that, when combined with parcel-scale BMPs, make construction, maintenance, and
2 reporting more efficient. (AR 5189-90.) As the EIS explained, area-wide treatment solutions, together
3 with parcel-scale BMPs, have been implemented successfully under current TRPA policy. (AR11960.)
4 The RPU expands the authority to install area-wide treatment facilities only if it is shown to “meet or
5 exceed existing water quality requirements.” (*Id.*) For larger projects in Centers, area-wide treatment
6 facilities are expected to be more cost effective because they allow for greater flexibility in siting and
7 designing treatment systems. (AR5188-90.) The policy is expected to lead to more efficient maintenance
8 practices, as compared to maintaining BMPs on many smaller, scattered individual parcels. (*Id.*) In fact,
9 although Plaintiffs suggest otherwise, a 2012 study concludes that, while stormwater treatment,
10 coverage removal, and private property BMP implementation are complementary, “[s]tormwater
11 treatment technology is less expensive and replaces the need for coverage restrictions.” (AR128154.)

12 The BMP Handbook, updated with and made part of the RPU, incorporates new information
13 from the TMDL and other studies, and provides guidance for the effective implementation and
14 maintenance of BMPs for new and existing development. (*See, e.g.*, AR126832.) The BMP Handbook
15 now recognizes that parcels are heterogeneous in terms of stormwater management, and that the 1987
16 Plan’s uniform approach will not work on every parcel. (AR126808-127540.) For this reason, the RPU
17 prioritizes stormwater pollutant load reductions in areas with the greatest potential for reductions,
18 thereby accelerating improvements in water quality in a more cost-effective manner. (AR26253.)

19 Moreover, the TMDL mandates water quality improvements (to be accomplished by, *inter alia*,
20 installation of BMPs) and provide safeguards to ensure that projects will not result in localized water
21 quality impacts. (AR5101-02; *see also* 107428-29 [California NPDES Permit].) The TMDL includes
22 Pollutant/Stormwater Load Reduction Strategies (PLRPs and SLRPs) to accelerate BMP implementation
23 and permits additional measures, beyond erosion controls, to meet Water Quality Threshold Standards
24 (e.g., SEZ restoration, wood stove replacement, decommissioning forest roads). (SUF Nos. 58, 65.)¹²

25
26 ¹² / The TMDL identifies BMPs as one of several key strategies to attain pollutant load reduction goals
27 on a catchment scale. (AR9086.) BMP implementation results in the following annual reduction of
28 pollutant loads identified by the TMDL: over 232,000 tons of total suspended solids; over 4,900 tons of
nitrogen; and over 1,300 tons of phosphorus. (AR55403.) While the TMDL identifies BMPs as an
important method for achieving pollutant load reduction goals, additional measures are provided to
ensure required load reductions are met. (AR106505-06.)

1 Finally, by imposing a load reduction target on each local agency, the TMDL provides each agency with
2 the incentive to prioritize maintenance to meet its target. (AR126934-35.)

3 Based on these programs – e.g., compulsory and enforceable BMP maintenance; the totality of
4 the RPU’s water quality program and its enhancements (most notably new TMDL strategies to
5 accelerate BMP implementation) – TRPA could rationally conclude that no adverse water quality
6 impacts will occur under the RPU. Plaintiffs cite no evidence to suggest the RPU would decrease BMP
7 implementation. There is no such evidence. Thus, TRPA’s conclusion that the RPU will increase
8 installation and maintenance of BMPs, and thus improve current conditions, is not merely reasonable; it
9 is uncontested. (AR5188-90, 11894.)¹³

10 Plaintiffs reliance on *Friends of Back Bay v. Army Corps of Eng’rs*, 681 F.3d 581 (4th Cir. 2012)
11 is misplaced. There, an environmental assessment cited a “No Wake Zone” to avoid impacts to wildlife.
12 Nearly five years later, however, the zone remained unmarked. Thus, “even if people wanted to obey the
13 no wake zone,” there was no way for them to do so. *Id.* at 588. Here, by contrast, TRPA’s BMP
14 requirements are in place, and TRPA has extensive public outreach programs, including BMP
15 workshops and other tools to educate property owners about proper BMP installation and maintenance.
16 (AR 5189.) TRPA also audits local jurisdiction permitting performance to ensure all BMP inspections
17 occur. (AR801-02.) There is nothing secret about TRPA’s BMP program.

18 *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089 (9th Cir. 2003) is on point. In that case, the
19 plaintiffs claimed that the Forest Service’s monitoring plan for range management was arbitrary and
20 capricious because prior remedial efforts had not succeeded. *Id.* at 1099. The Ninth Circuit rejected this
21 claim, finding that the agency’s compliance history did not invalidate its ongoing efforts, particularly
22

23 ¹³ / Plaintiffs mischaracterize as “mitigation” the role of BMPs in achieving Water Quality Threshold
24 Standards. (OB at 16.) BMPs are existing “management controls” under the Code for the protection or
25 restoration of water quality for attainment of minimum discharge standards; they are not “mitigation
26 measures.” (AR11915, 11929.) BMPs, unlike mitigation measures, must be installed regardless of any
27 potential water quality impacts. (AR1085.) In addition to the erosion control and stormwater runoff
28 benefits from implementing required BMP, under the Code all new development is required to offset the
impact of additional coverage by (1) paying water quality mitigation fees, or (2) implementing an offsite
water quality control project. (*See* AR1080-82 [Code § 60.2].) Thus, the EIS concluded that providing
incentives to redevelop properties that lack BMPs will likely result in water quality benefits, but under
no circumstances would such redevelopment be permitted to increase sediment loading. (AR11950-51
[impacts completely offset], 11953 [RPU same as Alternatives 2].) (SUF No. 165.)

1 because continued monitoring appeared to be the only rational way to effectively predict future impacts.
2 *Id.* Here, too, TRPA could rationally conclude that a multi-jurisdictional program specifically designed
3 to manage, control, re-infiltrate, and treat stormwater, including mandatory installation, maintenance,
4 monitoring and compliance obligations, will yield water quality benefits.

5 Nor is there anything arbitrary in relying on BMPs, even if they require efforts by private entities
6 and need long-term maintenance. Agencies routinely rely on BMPs to address a project's potential
7 impacts to water quality, and numerous NEPA and CEQA cases uphold agencies' reliance upon BMPs
8 for this purpose. *Hapner v. Tidwell*, 621 F.3d 1239, 1246 (9th Cir. 2010) (citing use of BMPs to reduce
9 soil disturbance during logging operations); *The Ecology Center v. Castaneda*, 562 F.3d 986, 999 (9th
10 Cir. 2009) (reliance on BMPs to protect watershed upheld in light of evidence that BMPs had succeeded
11 in some watersheds, and absent evidence that degraded conditions were attributable to BMPs); *Envtl.*
12 *Prot. Info. Ctr.*, 451 F.3d at 1015-16 (references to detailed BMPs incorporated into proposed timber
13 sale supported the conclusion the Forest Service had taken the requisite "hard look" at project's impacts,
14 particularly in light of concurrent monitoring to determine effectiveness of BMPs); *Endangered*
15 *Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 795-96 (2005) (upholding agency's
16 reliance on mitigation measure requiring installation and maintenance of BMPs to address run-off).

17 As this Court has observed, "it does not matter whether the proposal at issue [here the RPU] will
18 make the scoring shot, or even whether it will be involved in the play. The key is the finding that, one
19 way or another, the thresholds will be achieved." *Sierra Club*, 916 F.Supp.2d at 1144-45 (citing *League*,
20 739 F.Supp.2d at 1269.) Here, the Governing Board found that the Regional Plan, as amended by the
21 RPU, includes multiple requirements that, along with TRPA's own programs (e.g., the EIP Program)
22 and existing regulations (e.g., the TMDL), will achieve and maintain TRPA's Water Quality Threshold
23 Standards. (SUF Nos. 133, 156; *see also* AR 5190 ("reasonable for TRPA (and the two States in the
24 TMDL) to rely upon the implementation and maintenance of BMPs to address water quality impacts.")).
25 Abundant evidence supports that finding. It should be upheld.

1 **II. Substantial Evidence Supports TRPA’s Findings That the Regional Plan, as Amended by the**
2 **RPU, Achieves and Maintains Air Quality Threshold Standards.**

3 TRPA’s 2011 TER analyzed in detail the Tahoe basin’s attainment of Air Quality Threshold
4 Standards. (AR74-131.) One such threshold is for ozone pollution; the 2011 TER concluded the region
5 is “at or somewhat better than the adopted Threshold Standards.” (AR92-102.) A team of expert
6 scientists peer reviewed, and endorsed, the 2011 TER. (AR8839-948, 25448-49.) The Board found the
7 RPU will achieve and maintain the ozone threshold. (AR26684-85.)

8 Plaintiffs argue the record does not support this finding. (OB at 22-25.) Plaintiffs’ argument,
9 however, is remarkably narrow. Their argument focuses solely on monitoring data for one “Indicator
10 Reporting Category” for ozone. There are, in fact, four such indicators, not just one. Plaintiffs ignore
11 three of them. They dismiss data showing that ozone levels are declining. They ignore analyses of the
12 reasons for those trends, and why the trends are expected to continue. They ignore the RPU itself, which
13 is expressly designed to get people to use alternative modes of transportation, and thus lead to continued
14 declines in vehicle emissions (the main source of ozone pollution). They ignore expert opinion by TRPA
15 staff, consultants, and independent peer reviewers on these issues. In short, they ignore ample data and
16 analysis showing that air quality in Tahoe is good, is improving, and is projected to get better.

17 **A. The Tahoe Basin Is in Attainment with Air Quality Thresholds, and Air Pollution Levels**
18 **Are Declining.**

19 Air quality in the Lake Tahoe Air Basin (LTAB) is good and getting better. (AR74-128; *see*
20 AR91832 [CARB report stating, as of 2006, air quality in LTAB had improved over previous 20 years].)

21 The “Air Quality Index” (AQI) developed by the U.S. EPA illustrates this trend. The AQI
22 synthesizes data for various pollutants to determine whether overall air quality on a given day is healthy.
23 (AR75.) From 2007 to 2011 (the most recent review period), the number of days rated “good” increased
24 from 319 to 361 days, and the number of days rated “moderate” correspondingly decreased from 46 to 4
25 days.¹⁴ None has been rated “Unhealthy” or “Hazardous” and, since 2008, none has been rated
26 “Unhealthy for Sensitive Groups.” (*Id.*)

27 ¹⁴ / EPA calculates the AQI for five pollutants: ground-level ozone, particulate matter, carbon monoxide,
28 sulfur dioxide, and nitrogen dioxide. The AQI uses pollutant-specific equations based on maximum
recorded daily concentrations to determine the level of health concern. (AR75.)

Ozone, or O₃, is one of the pollutants used to calculate the AQI. Ozone forms when precursor gases, such as NO_x, react in sunlight. (AR11772.) The main source of NO_x emissions is vehicle exhaust. (AR11773-74, 5239.) The Federal government, California and Nevada have all adopted ozone standards. (AR11762-63.) Under the Compact, TRPA must adopt a Regional Plan that will attain and maintain whichever of these standards is most stringent. Compact, art. V(d); *see League*, 739 F.Supp.2d at 1268-70. The TER reflects this commitment. (AR77-78.) So does the RPU EIS. (AR11757, 11777.)

TRPA relies on four data sets – “Threshold Indicators” – to determine whether air quality meets Threshold Standards and state/federal standards included in the ozone indicator reporting category: (1) the highest 1-hour average concentration, (2) the highest 8-hour average concentration, (3) the 3-year average of the fourth highest average concentration, and (4) oxides of nitrogen (NO_x) emissions in tons per day. TRPA looks at each of the four indicators to determine whether the LTAB is in attainment with individual ozone standards (threshold or state/federal standards), and at the indicators in the aggregate to characterize overall conditions. Data date back to at least the early 1980s. (AR92-102.) The data shows that the LTAB is in attainment with ozone standards, and that ozone is declining:

Applicable Threshold or State/Federal Standard	TER Analysis
1-hour average concentration: - TRPA: 0.080 ppm - California: 0.090 ppm - Nevada: 0.100 ppm	Highest recorded value in 2011: 0.077 ppm (less than the most stringent standard). Trend line shows gradual decline during 1982-2011. Conclusion: “in attainment.” (AR94-95.)
Highest 8-hour Average Concentration: - California: 0.070 ppm	Highest recorded value in 2011: 0.068 ppm. Trend line shows gradual decline. Conclusion: “in attainment.” (AR96-97.)
3-Year Average of the 4th Highest 8-hour Average: - Federal: 0.075 ppm	Average for 2009-2011: 0.061 ppm. Trend shows steady decline. Conclusion: “in attainment.” (AR98-99.)
NO _x Emissions: - TRPA: 9.4 tons/average summer day - California: annual average NO ₂ concentration not to exceed 0.030 ppm; highest one-hour concentration not to exceed 0.18ppm - Nevada/Federal: annual average NO ₂ concentration not to exceed 0.053 ppm, highest one-hour not to exceed 0.10 ppm	In 2010, NO _x emissions estimated substantially lower than the TRPA standard. Preliminary results from new TRPA monitoring station (August - November 2011) indicate that the highest average 1-hour NO ₂ concentration was 0.02 ppm. NO _x emissions declining, further declines expected. Conclusion: “in attainment.” (AR100-101.)

1 The record explains why ozone concentrations are declining. Ozone pollution is attributable
 2 largely to motor vehicle exhaust (ozone precursors). Vehicle emission standards have become
 3 increasingly stringent over time. As precursor emissions decline, ozone concentrations go down. This
 4 trend is expected to continue. (AR11772, 11788-89; *see* AR11800-01 [modeling indicates 78% decline
 5 in NO_x emissions].) The trend is not unique to the LTAB. Ozone pollution is trending downward
 6 throughout much of California. (AR70380-449.) In fact, by encouraging redevelopment in smaller,
 7 denser Centers, the RPU will accelerate this trend by encouraging people to get out of their cars and
 8 walk, bike, or use transit. (AR11670-82 [RPU provides incentives to focus development in “more
 9 compact, walkable, mixed-use communities, supported by greater density and increased height, which
 10 would facilitate maintenance of the existing ... [C]enters’ character, improve access to services, and
 11 reduce automobile dependency”]; AR26683-85 [RPU programs aimed at reducing ozone].) Plaintiffs
 12 ignore virtually all of this information.

13 ***B. Monitoring Data Supports the Finding that the LTAB Is Already In Attainment with the***
 14 ***Ozone Threshold.***

15 Plaintiffs’ claim that the RPU would not achieve and maintain the ozone threshold focuses solely
 16 on the 2011 TER’s conclusion regarding one of the Ozone Indicator Reporting Categories: the 8-hour
 17 average ozone concentration standard adopted by California in 2006. Their claim is misplaced.

18 First, Plaintiffs accuse TRPA of switching its story without explanation. (OB at 23.) Plaintiffs
 19 base this accusation on statements in the Draft 2011 TER and Draft EIS. TRPA released the Draft EIS in
 20 April 2012. (AR11450.) The Draft EIS included a table summarizing the attainment status for various
 21 pollutants and standards. (AR11759.) The table stated that the LTAB was “nonattainment- transitional”
 22 for the 8-hour standard,¹⁵ and that in 2011 the basin was “somewhat worse than target.” (*Id.*) The Draft
 23 TER, also released in April 2012 (AR14684), included a table stating the “ozone” standard was “non-
 24 attainment” in 2011. (AR14696.) The Final EIS reported the 8-hour ozone standard to be in attainment.
 25 (AR5238.) The explanation for the revised conclusion is straightforward. The record shows that

26 ¹⁵ / CARB applied the “non-attainment transitional” designation because the standard was exceeded no
 27 more than three days during a calendar year. (AR12172-74, 48590 [CARB data for 2008, 2009].) *See*
 28 Cal. Code Regs., title 17, § 70303.5(a). The 8-hour standard was exceeded five days in 2008, one day in
 2009, zero days in 2010, and zero days in 2011. (AR11774, 5238.) Had CARB determined there was
 insufficient data to evaluate compliance, it would have labeled the LTAB as “Unclassified.” (AR11759.)

1 additional monitoring data became available *after* TRPA published the Draft TER and Draft EIS. The
2 data shows a continuation of the long-term trend of declining O₃ concentrations, and attainment of
3 California's 8-hour standard. (AR5238.) TRPA updated the Final TER to reflect these data. (AR96-97.)
4 The new data showed the highest concentration was 0.067 ppm in 2010 and 0.068 ppm in 2011, both
5 below the California standard. The Final TER stated that confidence in this conclusion was "moderate,"
6 acknowledging that, although data were limited, it was consistent with the long-term downward trend.
7 (*Id.*)¹⁶ James Mahoney, PhD, the chair of the peer-review panel, testified the TER was technically
8 sound, and provided a solid basis to support TRPA's ongoing policy making. (AR25448-49.)

9 Second, Plaintiffs argue TRPA should have ignored the 2010/2011 data because TRPA obtained
10 it from a monitoring station located in Nevada. (OB at 23, citing AR4261.) Elsewhere, Plaintiffs assert
11 that conditions vary from one location to another, such that data from a Nevada station say nothing
12 about California air quality. (OB at 24, citing AR4325.) In fact, as TRPA explained, during years when
13 data were available from monitoring stations located in both states, "little variation" was seen; "[b]oth
14 stations showed similar concentrations and number of exceedance days during 2008-2010." (AR5352;
15 *see* AR3461.) The data support this explanation. (AR147415¹⁷; *see* AR90472, 102786-92.) Plaintiffs do
16 not explain why the Nevada data are a nullity simply because they were obtained on one side of a line on
17 a map, particularly where (as here) the evidence shows the data are representative of the entire basin.

18 Third, Plaintiffs argue the existing Regional Plan includes monitoring requirements that TRPA is
19 not fully implementing. According to Plaintiffs, unless and until all these monitoring requirements are

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21 ¹⁶ / Plaintiffs cite a comment from one of the scientists that performed peer review of the Draft 2011
22 TER as further evidence that the LTAB was not in attainment with the 8-hour standard. (OB at 23, citing
23 AR100817.) This comment simply acknowledged that, based on data through 2009, the LTAB had not
24 attained the 8-hour standard. (AR8904.) The panel recommended stepping up air quality monitoring
25 efforts (AR8849), while elsewhere noting that there were limits to what feasibly could be gathered.
(AR8855.) The panel did not, however, conclude that existing data were insufficient to draw any
26 conclusions. (AR8857 [noting "high quality" of report].) The panel also recommended adopting more
27 aggressive policies to reduce dependency on automobiles, stating a "more aggressive posture is
28 appropriate for addressing ozone attainment moving forward." (AR8903.) Plaintiffs' attack on the RPU,
which focuses on precisely this goal, is therefore ironic.

¹⁷ / Plaintiffs cite this spreadsheet to suggest that ozone levels in Tahoe are worsening. (OB at 24.) The
Echo Summit station recorded 8-hour ozone levels higher than those at the South Lake Tahoe Airport
and Incline Village stations. This station, however, is not in the LTAB. Moreover, the Echo Summit data
shows that readings at this station in 2000 were virtually identical to those recorded in 2012 (with higher
levels in between), belying Plaintiffs' claim that ozone levels are rising. (AR147415.)

1 met, TRPA cannot make threshold findings. (OB at 24-25.) Plaintiffs support this argument by citing
2 statements in the 2011 TER, and in the 2001 and 2006 TERs, recommending increased monitoring.
3 (AR82, 97, 89086, 92951, 92968, 92970.) But TRPA recognized the need to “better align
4 monitoring/reporting programs with available funding.” Even so, “[m]onitoring, evaluation, and
5 reporting programs are tremendously expensive. Rarely can all desired programs be fully funded. . . . As
6 a consequence, priorities must be set and limited funds must be allocated across often competing
7 priorities.” (AR155877.) Nevertheless, TRPA based the attainment finding on “the best available
8 information,” while acknowledging the “specialized equipment” and high operating costs of such
9 monitoring. (AR155884; *see* AR92968, 92970.) The record shows, moreover, ongoing efforts by TRPA
10 and other agencies to expand the monitoring network. (AR155884 [monitoring stations installed at
11 Stateline, Nevada and Bliss State Park by 2012], 99 [new monitoring station established at Tahoe City,
12 California in summer 2011].)¹⁸ The record includes data from these new stations. These data, while
13 preliminary, show no ozone exceedances. (AR147415; *see* AR2190 [PCAPCD letter noting data].)

14 TRPA concluded there was sufficient data to have “moderate” confidence in the conclusion that,
15 for California’s 8-hour ozone standard, the basin was “at or somewhat better than target.” (AR96.) The
16 TER explained the reason for this level of confidence: “[E]ven though the data 1) were collected using
17 federal reference methods [], 2) were subject to quality assurance requirements, and 3) have been
18 collected continuously in the region since 1984, the spatial distribution and density of monitoring
19 stations is probably insufficient to know *with certainty* whether maximum pollutant concentrations have
20 been detected.” (AR97 (emphasis added).) A peer review panel endorsed the conclusion. (AR25448-49.)

21 Plaintiffs’ argument amounts to a claim that TRPA can reach a conclusion only if it can do so
22 “with certainty.” The argument thus reflects a disagreement about how much data is enough. That is
23

24 ¹⁸ / In a December 12, 2012, report to the Board, staff summarized the expansion of the monitoring
25 network: “TRPA and partner agencies are currently monitoring air quality at six different sites in the
26 Region. TRPA’s Air Quality Threshold Standards are generally in attainment and the existing array of
27 monitoring sites represents significantly more monitoring sites per capita than surrounding areas. TRPA
28 commissioned an independent review of the Region’s air quality monitoring network. The review
recommended a total of five monitoring sites, with some consolidation and reconfiguring of monitoring
equipment to more completely and efficiently monitor all relevant parameters. The Governing Board
was informed of this recommendation at the November Governing Board meeting, and will consider it
in future priority setting and resource allocation decisions.” (AR128337.)

1 insufficient reason to overturn TRPA’s finding. *Sierra Club*, 916 F.Supp.2d at 1135; *Envtl. Prot. Info.*
2 *Ctr.*, 451 F.3d at 1017; *North Coast Rivers Alliance*, 216 Cal.App.4th at 639-40. The Board was entitled
3 to rely on the expert opinions of its staff and consultants, confirmed by independent peer review, that the
4 TER’s ozone conclusions were technically sound and supported by the best available information.
5 Plaintiffs cite no verified expert opinion to the contrary. The Court should decline Plaintiffs’ invitation
6 to second guess that decision.

7 ***C. Detailed Analysis Supports the Board’s Finding that the RPU Will Attain and Maintain the***
8 ***Ozone Threshold.***

9 Plaintiffs’ argument fails for an even more fundamental reason. TRPA had ample support for its
10 conclusion that the RPU will “attain[] and maintain[]” the ozone threshold, as required by the Compact.
11 Compact, art. V(d). That support consisted not merely of the LTAB’s existing attainment status, but also
12 of expert analysis regarding air quality *in the future*. In adopting the Regional Plan, the Board was not
13 required to find that all thresholds had been achieved. Rather, the Board had to find that the Regional
14 Plan put TRPA on a path that will achieve and maintain those thresholds. (AR733-34.) *See* Compact,
15 arts. I(b), V(c); *League*, 739 F.Supp.2d at 1268-70; *Sierra Club*, 916 F.Supp.2d at 1146 (TRPA must
16 find, based on substantial evidence, that it “has adopted a course of action that will meet the targets.”).
17 Thus, the issue for the Board was only partly about what monitoring data said regarding existing air
18 quality. The issue was also about the path the Regional Plan set for the region.

19 The Board’s findings addressed this issue. The Board found that the Regional Plan, as amended
20 by the RPU, achieves and maintains thresholds, including the thresholds for ozone. (AR26664-704.)
21 Although Plaintiffs suggest otherwise (OB at 22), the Board did not base this finding solely on the
22 premise that the LTAB had attained the ozone threshold. Rather, the Board found that, based on
23 increasingly stringent tail-pipe emission standards and other air pollution control measures, air quality in
24 the LTAB had improved, and will continue to improve. (AR26683.) The Board further found that the
25 existing Regional Plan and Code, the EIP, and other TRPA programs will attain and maintain the
26 threshold. (AR26684.) The cited programs and policies included:

- 27 • Land Use policies providing incentives to promote mixed-use Centers as a means of
28 reducing VMT and associated emissions.
- Provisions exempting non-motorized trail land coverage and requiring the dedication of
easements for non-motorized trails.

- 1 • Policies providing incentives for removing non-compliant emission sources, and replacing them with sources that meet current standards.
- 2 • Policies requiring the development and implementation of best practices for construction-related emissions.
- 3 • Policies requiring the development of standards to reduce construction and operational GHG emissions, which will, in turn, also increase building efficiency and reduce other air pollutant emissions.
- 4 • Phased release of allocations tied to traffic monitoring to ensure that VMT will not exceed the threshold standard. (*See* AR26638.)
- 5 • Policies concerning the allocation of air quality mitigation fees.
- 6 • Policies requiring Area Plans to enhance pedestrian, bicycling, and transit opportunities.
- 7 • Water quality and transportation policies targeting NO_x emissions.

8
9 (AR26684-85.) These policies and programs advanced the objective of “reduc[ing] dependency on the
10 automobile by making more effective use of existing transportation modes and of public transit,” as
11 directed by the Compact. Compact, art. V(c)(2)(A).

12 The Draft EIS included the results of modeling to determine the RPU’s impact on ozone levels in
13 the LTAB. (AR11782-92, 12909-56.) The EIS estimated ozone-related emissions compared to existing
14 conditions (2010) and in the future (2035), and concluded that regional emissions will decrease.

15 (AR5069, 11785-92.) As the EIS explained, tailpipe standards will continue to become increasingly
16 stringent; the RPU will allow only limited development beyond what 1987 Plan authorized; any
17 additional emissions due to growth will be more than offset by stricter tailpipe standards; and TRPA’s
18 programs and policies will further reduce emissions by promoting forms of transit other than cars. (*Id.*)

19 Plaintiffs have the burden of proof to show why this evidence was insubstantial. *Short Haul*
20 *Survival Comm.*, 572 F.2d at 244. Plaintiffs make no attempt to meet this burden. The Court should
21 therefore reject their claims concerning air quality.

22 CONCLUSION

23 Defendant TRPA respectfully requests that the Court deny Plaintiffs’ Motion for Summary
24 Judgment and grant TRPA’s Cross-Motion as to all claims.

25
26 Dated: November 27, 2013

Respectfully submitted,

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