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19 UNITED STATES DISTRICT COURT
20 EASTERN DISTRICT OF CALIFORNIA
21 SACRAMENTO DIVISION

22 SIERRA CLUB and FRIENDS OF THE WEST)
23 SHORE,)

24 Plaintiffs,)

25 v.)

26 TAHOE REGIONAL PLANNING AGENCY,)

27 Defendant.)

28 Civil Case No.: 2:13-CV-00267-JAM-EFB
**TAHOE REGIONAL PLANNING
AGENCY’S RESPONSE TO PLAINTIFFS’
STATEMENT OF UNDISPUTED FACTS**

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

1 Respondent TAHOE REGIONAL PLANNING AGENCY (“TRPA”) hereby responds to
2 Plaintiffs’ Statement of Undisputed Facts (Doc. No. 25-2).¹

3 **GENERAL OBJECTION:** TRPA objects to Plaintiffs’ entire Statement of Undisputed Facts
4 on the basis that it does not comply with the requirements of Local Rule 260 which requires motions
5 for summary judgment to be accompanied by a “Statement of Undisputed Facts” that “shall enumerate
6 discretely each of the specific material facts relied upon in support of the motion and cite the particular
7 portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document
8 relied upon to establish that fact.” In clear non-compliance with this rule, Plaintiffs’ narrative
9 “Statement of Undisputed Facts” is argumentative, conclusory, and includes statements of law. Indeed,
10 rather than focusing the Court’s attention on the discrete, decisive facts that are needed to support
11 summary judgment, Plaintiffs have improperly utilized their Statement of Undisputed Facts as a
12 supplemental memorandum of law. Moreover, the statements are often not supported by accurate
13 citations to the record or are blatant mischaracterizations of the evidence in the administrative record.
14 Accordingly, much of Plaintiffs’ Statement of Undisputed Facts should be disregarded.

15 TRPA hereby disputes all statements in Plaintiffs’ Statement of Undisputed Facts that are
16 argumentative, conclusory or statements of law or reflect Plaintiffs’ opinion or characterization of the
17 administrative record, rather than undisputed facts. TRPA also generally disputes all alleged factual
18 statements unless expressly noted otherwise in this Response to Plaintiffs’ Statement of Undisputed
19 Facts.

20 **STATEMENT NO. 1:**

21 Lake Tahoe, situated in a spectacular setting near the crest of the Sierra Nevada at an elevation
22 of approximately 6,225 feet above sea level, is one of the most well-known and revered fresh water
23 bodies in the United States. ECF No. 19, ¶ 25. With a maximum depth of approximately 1,636 feet,
24 Lake Tahoe is the eleventh deepest lake in the world and the second deepest in the United States. *Id.*
25 The Lake Tahoe Basin is a region of mountains and steep slopes, containing nutrient-poor soils, soils

26 _____
27 ¹ / Because this is a record-review case, there are no material facts in dispute. The ordinary standards
28 for summary judgment are therefore not implicated. Instead, the Court must determine whether either
party is entitled to judgment as a matter of law based on the evidence in the administrative record.
Sierra Club v. TRPA, 916 F.Supp.2d 1098, 1107 (E.D. Cal. 2013).

1 prone to erosion, and volcanic rock and soils. *Id.* Lake Tahoe’s famed clarity is due to the Basin’s very
2 low levels of nutrients that support the growth of algae. *Id.*

3 **RESPONSE TO STATEMENT NO. 1:**

4 TRPA does not dispute that Lake Tahoe is located near the crest of the Sierra Nevada at an
5 elevation of approximately 6,225 feet above sea level or that, with a maximum depth of approximately
6 1,636 feet, it is the eleventh deepest lake in the world and the second deepest in the United States.
7 TRPA also does not dispute that the Lake Tahoe Basin is a region of mountains and steep slopes,
8 containing nutrient-poor soils, soils prone to erosion, and volcanic rock and soils. TRPA, however,
9 disputes Plaintiffs’ statement to the extent it implies that Lake Tahoe’s clarity is due solely to the
10 Basin’s very low levels of nutrients that support the growth of algae. Low levels of nutrients that
11 support the growth of algae is one of several factors that contribute to Lake Tahoe’s clarity.
12 (AR11920.)

13 **STATEMENT NO. 2:**

14 Pursuant to the Clean Water Act, Lake Tahoe has been designated an “Outstanding National
15 Resource Water” (“ONRW”). AR11916.

16 **RESPONSE TO STATEMENT NO. 2:**

17 TRPA does not dispute Statement No. 2.

18 **STATEMENT NO. 3:**

19 Continuous, long-term monitoring and evaluation of water quality in Lake Tahoe since the early
20 1960s, however, has shown declining mid-lake clarity attributable to an increase in algae production
21 and the addition of fine sediments (primarily particle sizes 16 microns or less in diameter), which
22 reduce the transmission of light to the Lake’s bottom and scatter light. AR11920. Indeed, average
23 summer clarity—measured by the maximum depth at which a white disk, called the Secchi disk, is
24 visible from the Lake’s surface—steadily declined from 94.1 feet in 1968 to 50.4 feet in 2011, the lowest
25 measurement ever recorded, at a rate of nearly one foot per year. AR107947.

26 **RESPONSE TO STATEMENT NO. 3:**

27 TRPA does not dispute the first sentence in Statement No. 3. TRPA disputes the second
28 sentence in Statement No. 3. While the average summer clarity has continuously declined, the exact

1 depth in 1968 is not reflected in the record and the depth in 2011 was 51.4 feet, not 50.4 feet.
2 (AR107947.) Also, the depth in 2011 was not the lowest measurement ever recorded. (*Id.*)

3 **STATEMENT NO. 4:**

4 The largest contributor to reduced mid-lake clarity is fine sediment pollution, which primarily
5 originates from the Lake's developed, urban areas, even though these cover only about ten percent of
6 the region. AR107924. Paved surfaces prevent infiltration of stormwater or snowmelt into the soil,
7 which instead runs off pavement, gathering fine sediments and other pollutants along the way, and
8 eventually flows into the Lake. AR126834.

9 **RESPONSE TO STATEMENT NO 4:**

10 TRPA does not dispute the first sentence in Statement No. 4. TRPA, however, disputes the
11 second sentence to the extent it implies that *all* stormwater and snowmelt not infiltrated into the soil
12 gathers fine sediments and other pollutants and eventually flows into the Lake. Plaintiffs' citation to
13 the record reference does not support this implication.

14 **STATEMENT NO. 5:**

15 Clarity loss in Lake Tahoe is also caused by accelerated input of nutrients, *i.e.*, nitrogen and
16 phosphorus, due to increased urbanization. AR11920. Atmospheric deposition of nitrogen, believed to
17 be largely caused by motor vehicle exhaust, is one of the largest contributors to algae growth.
18 AR11925, 106048, 106060.

19 **RESPONSE TO STATEMENT NO. 5:**

20 TRPA does not dispute that clarity loss in Lake Tahoe is also caused by accelerated input of
21 nutrients, *i.e.*, nitrogen and phosphorus, but disputes the assertion that the accelerated input of nutrients
22 into the lake is due solely to increased urbanization. The accelerated input of nutrients into the lake is
23 caused by numerous factors including increased urbanization. (AR147.) TRPA disputes the second
24 sentence in statement No. 5 because it is not supported by the record citations and represents Plaintiffs'
25 characterization of the record rather than an undisputed statement of fact.

26 **STATEMENT NO. 6:**

27 In addition, another clarity measure, "phytoplankton primary productivity," which measures the
28 concentration of algae in the Lake, is in "rapid decline," having increased at a rate of 8% over 44 years.

1 AR146-47. In 2011, algae concentrations were over four times the threshold standard. *Id.*

2 **RESPONSE TO STATEMENT NO. 6:**

3 TRPA does not dispute Statement No. 6.

4 **STATEMENT NO. 7:**

5 As a result of development around Lake Tahoe, the “deep water clarity” standard for annual
6 mean Secchi disk visibility is far from being achieved. AR152-53. In 2010, the second lowest annual
7 average Secchi depth of 64.4 feet was recorded. AR107327. While winter and annual average clarity
8 showed modest improvements in 2011, *see* AR107945-46, the Lake’s summer clarity continued to
9 decline. In 2008 and 2011, annual average clarity measurements were the lowest ever recorded (50.4
10 feet and 51.4 feet respectively); indeed, summer clarity “has been dominated by a consistent long-term
11 decline” that has been “near-continuous over the last decade.” AR107947.

12 **RESPONSE TO STATEMENT NO. 7:**

13 TRPA disputes the first sentence in Statement No. 7 because the characterization of the
14 evidence in the record represents Plaintiffs’ opinion rather than a statement of undisputed fact.
15 Moreover, numerous additional factors affect lake clarity in addition to development including
16 anthropogenic and natural disturbance in the undeveloped portions of the watershed, and local and
17 regional climate (especially wind and precipitation). (AR150.) TRPA does not dispute the remaining
18 sentences in Statement No. 7.

19 **STATEMENT NO. 8:**

20 Runoff flowing into tributaries and the Lake’s nearshore directly impacts the waters into which
21 it discharges. Nutrient concentrations annually exceed tributary water quality standards, AR171, and
22 nearshore conditions are worsening: algae coating submerged rocks is more frequently observed.
23 AR20, 169. 424, 431. The latter is “of particular concern,” as the nearshore “is highly visible and
24 receives more recreational use than other areas of the Lake.” AR11934. *See also* AR20 (noting
25 nearshore’s “negative trends” in native aquatic species). Nutrient pollution from urban areas likely
26 contributes to this. AR424; AR107942 (nearshore site “with the most [attached algae] is close to urban
27 areas”).

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1 **RESPONSE TO STATEMENT NO. 8:**

2 TRPA generally does not dispute Statement No. 8 other than the assertion that nutrient pollution
3 from urban areas “likely contributes” to the worsening of near shore conditions. This portion of the
4 statement is speculative and not supported by Plaintiffs’ record citations.

5 **STATEMENT NO. 9:**

6 The impacts of runoff are mitigated through “best management practices” (“BMPs”) that reduce
7 runoff volume and remove pollutants. But BMPs do not infiltrate water or prevent runoff as well as
8 natural soil. AR143744 (“Natural watershed areas are very effective at removing nutrients from
9 incoming precipitation. Removal rates of up to 100 percent have been observed in natural areas.
10 Overland runoff is rare in natural areas.”) The Tahoe Environment Research Center notes that a
11 “comprehensive, regional urban stormwater monitoring plan” is needed to determine whether
12 stormwater treatment systems are having any effect on Lake water quality. AR107946. BMPs can
13 require costly installation, operations, and regular maintenance that must be applied to thousands of
14 parcels in the Tahoe Basin for as long as these parcels are covered, but TRPA has not broadly enforced
15 BMP requirements. AR55402, 137778. Nearly two-thirds of existing parcels have not been retrofitted.
16 AR11950. In contrast, the infiltration “services” of natural soil are free and require no regulatory
17 oversight to ensure continued effectiveness. *Cf.* AR137718 (Placer County estimating \$130 million
18 costs for urban stormwater controls for 15 years); AR104079 (Basin costs for water pollutant controls
19 range from \$1.5-3.2 billion for 20 years).

20 **RESPONSE TO STATEMENT NO. 9:**

21 TRPA does not dispute that runoff from development is treated through application of “best
22 management practices” (“BMPs”) that reduce runoff volume and remove pollutants. TRPA also does
23 not dispute that “[n]atural watershed areas are very effective at removing nutrients from incoming
24 precipitation. Removal rates of up to 100 percent have been observed in natural areas. Overland runoff
25 is rare in natural areas.” (AR89249.) TRPA does, however, dispute the assertion that BMPs do not
26 prevent runoff as well as natural soil. Certain BMPs manage waste and hazardous material and are
27 effective at preventing oil, fertilizers, and other hazardous wastes from entering public storm drains,
28 native soil, surface water, and groundwater. (AR126841.) BMPs can also limit or control the amount

1 of stormwater runoff generated from a developed site by enhancing on-site infiltration and storage.
2 (AR126945.)

3 Regarding the fourth sentence in Statement No. 9, Plaintiffs overstate and mischaracterize the
4 statement in the Tahoe Environment Research Center State of the Lake Report. The Tahoe
5 Environment Research Center noted that a “comprehensive, regional urban stormwater monitoring plan
6 is needed to determine if recent capital investments in stormwater projects have indeed reduced the load
7 of fine particles from urban stormwater.” (AR107946.) TRPA disputes the fifth sentence in Statement
8 No. 9 because the characterization of the evidence in the record represents Plaintiffs’ opinion rather
9 than a statement of undisputed fact. TRPA also disputes the sixth sentence in Statement No. 9 because
10 the record cites do not support the statement. The record citation does not provide the amount of
11 parcels have been retrofitted. (AR11950.)

12 TRPA disputes the seventh sentence in Statement No. 9 because it provides Plaintiffs’ opinion
13 rather than a statement of fact supported by a citation to the record.

14 **STATEMENT NO. 10:**

15 The soil conservation threshold protects “the many functions of non-degraded soils[,] such as
16 infiltration, erosion prevention, vegetation growth, and nutrient cycling.” AR4169. Its intent is to
17 preserve “environmental balance” region-wide. AR11956 (DEIS noting coverage limits —necessary in
18 the Region to protect water quality and preserve environmental balance at the individual parcel scale,
19 *citing* AR27444; AR27424 (coverage limits “primarily for the purposes of erosion control and
20 maintaining ecological balances”). Soil in the Tahoe Basin “is an integral part of the structure and
21 function of the natural ecosystem.” AR116224 (1982 EIS for establishing thresholds). It is “essential
22 for supporting vegetation by providing a medium to anchor roots, store nutrients, and store water for
23 growth.” *Id.* Vegetation, in turn, “is a part of a total system that is responsible for removing nutrients,
24 particularly nitrogen, from precipitation which is stored in the soil. The nutrient removal process or
25 nutrient uptake is extremely important in the nutrient balance in the entire aquatic system.” AR116226.
26 Further, “[t]he physical, chemical, and microbiological composition of soils have substantial effect on
27 the quality of water moving over or through the soil system.” AR116224.

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1 **RESPONSE TO STATEMENT NO. 10:**

2 TRPA disputes the first sentence in Statement No. 10. The quoted language is from Plaintiffs’
3 comment letter on the RPU Draft EIS and represents Plaintiffs’ opinion, rather than a statement of
4 undisputed fact. TRPA does not dispute the remaining sentences in Statement No. 10.

5 **STATEMENT NO. 11:**

6 The threshold protects soil and ecological balance by requiring compliance with land coverage
7 limitations provided by “Land Capability Classification of the Lake Tahoe Basin, California-Nevada: A
8 Guide to Planning” (“Bailey,” after its author). AR11859. Bailey prescribes the percent of area
9 coverage allowed on nine soil types (“Bailey coefficient”), depending on their sensitivity. AR11861-62.
10 The “highest capability” lands may be covered up to 30%, while the lowest capability lands—with steep
11 slopes, higher susceptibility to erosion, lower infiltration ability, or wet conditions—may only be
12 covered up to 1%. *Id.*; AR11630. The acreage of coverage allowed in a particular area for a specific
13 land capability class is known as “base allowable land coverage.” Code § 30.4.1. TRPA claims that the
14 threshold is generally in attainment region-wide: The highest-capability lands (classes 6 and 7)—
15 dispersed over a more than 200,000-acre area—are purportedly in compliance with the threshold region-
16 wide, because, in the aggregate, they have less than 30% coverage, while the threshold for one of the
17 most sensitive soil types (class 1b) is not in compliance, because, in the aggregate, coverage exceeds
18 the 1% limit by over 650 acres. AR26687-88.

19 **RESPONSE TO STATEMENT NO. 11:**

20 TRPA does not dispute the first three sentences in Statement No. 11 explaining the “Land
21 Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide to Planning” and the
22 “Bailey coefficient.” TPRA does not dispute the fourth sentence of Statement No. 11, which references
23 the Tahoe Regional Planning Agency Code of Ordinances (“Code”) provisions insofar as it is
24 consistent with the provisions cited, which speak for themselves and are the best evidence of their
25 contents. TRPA disputes the statement insofar as it is inconsistent with the Code provisions cited.
26 TRPA further disputes the statement to the extent it purports to characterize legal conclusions as
27 statements of fact. TRPA disputes the fifth sentence in Statement No. 11 because it is argumentative
28 and provides Plaintiffs’ opinion rather than a statement of fact supported by record citations.

1 **STATEMENT NO. 12:**

2 TRPA generally implements Bailey on a project basis by applying Bailey coefficients at the
3 parcel-scale, but its regulations include exceptions to the coefficients. *See* AR3305; *see generally* Code
4 §§ 30.4.1(A), (B), (C). Depending on a parcel’s intended use, coverage in excess of the total base
5 allowable amount may be allowed up to “maximum land coverage” limits specified under Code §
6 30.4.2. This includes the new RPU coverage limits for centers. *See* Code § 30.4.2(B). Any land
7 coverage in excess of base allowable coverage must be “transferred” from a “sending site,” usually on a
8 one-to-one basis. *See* Code § 30.4.3(A). —For all land coverage transfers, the receiving parcel and the
9 sending parcel shall be in the same hydrologically related area [‘HRA’].” Code § 30.4.2(E). The
10 coverage transferred from the sending site must be “permanently retired,” and the sending site must be
11 restored “to a natural or near natural state.” *See* Code § 30.4.3(G)(1)(a).

12 **RESPONSE TO STATEMENT NO. 12:**

13 TRPA does not dispute that it generally implements Bailey on a project basis by applying
14 Bailey coefficients at the parcel-scale. TPRA does not dispute the remainder of Statement No. 12,
15 which references TRPA Code provisions insofar as they are consistent with the provisions cited, which
16 speak for themselves and are the best evidence of their contents. TRPA disputes the statement insofar
17 as it is inconsistent with the Code provisions cited. TRPA further disputes the statement to the extent it
18 purports to characterize legal conclusions as statements of fact.

19 **STATEMENT NO. 13:**

20 Scientific studies show that impervious coverage greater than 10% in a watershed negatively
21 affects aquatic systems. AR4181-82 (noting studies showing loss of biodiversity in streams). “As the
22 amount of impervious cover and drainage density increase in a development watershed, a number of
23 results occur: (1) surface runoff increases; (2) sources of sediment increase; (3) sediment yield
24 increases; (4) nutrient yield increases; (5) peak flow increases; (6) flow velocities increase; (7) stream
25 energy and the ability to transport sediment increase; (8) lag time decreases; and (9) flow time
26 increases.” AR3854-55. “[W]atershed processes are measurably disrupted by the placement of over 10
27 percent impervious coverage in the watershed,” AR139438.

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1 **RESPONSE TO STATEMENT NO. 13:**

2 TRPA disputes the first sentence in Statement No. 13 because it cites only to allegations in
3 Plaintiffs' comment letter, which does not constitute facts. TRPA does not dispute the accuracy of the
4 quotations to the record cites in the remaining sentences in Statement No. 13, however, the documents
5 are the best record of their contents and speak for themselves. Statement No. 13 also mischaracterizes
6 the evidence in the record. The study quoted by Plaintiffs ("Impacts of Impervious Cover on Aquatic
7 Systems" (Center for Watershed Protection, 2003)) is based on assessments of coverage where no
8 BMPs or other stormwater treatments are in place (i.e. watershed treatments). (See AR34344 [The
9 impervious cover model (ICM) used for the report "does not currently predict the impact of
10 watershed treatment."]; 34343 ["The ICM is a deceptively simple model"]; 34363 ["One of the
11 major policy implications of the ICM is that *in the absence of watershed treatment*, it predicts negative
12 stream impacts at an extremely low intensity of watershed development." (Italics added)].) The study,
13 therefore, is not relevant to Tahoe where very strict stormwater regulations are in place and where \$1.7
14 Billion has been invested in restoration and water quality improvement.

15 **STATEMENT NO. 14:**

16 TRPA's 2006 Threshold Evaluation Report ("TER") stated: "Although TRPA does not
17 currently have an adopted threshold for a maximum percentage of land coverage for each watershed in
18 the Basin, such an analysis is worthwhile since scientific literature indicates that most stream quality
19 indicators decline when watershed impervious cover exceeds 10 percent, with severe degradation
20 expected beyond 25 percent impervious cover." AR93098. The TER further noted that "four out of the
21 64 watersheds and seven out of the nine aggregate intervening areas have equal to or greater than 10
22 percent hard coverage. Four of these watersheds/ intervening areas have greater than 15 percent
23 coverage, three of these watersheds/ intervening areas have greater than 20 percent coverage and two
24 watersheds/ intervening areas exceed 25 percent hard coverage." *Id.* TRPA staff has stated that "there
25 are 22 subwatersheds with 10% coverage [out of] 183 subwatersheds." AR16576.

26 **RESPONSE TO STATEMENT NO. 14:**

27 TRPA does not dispute the TER quotations in Statement No. 14; however, the TER is the best
28 record of its contents and speaks for itself.

1 **STATEMENT NO. 15:**

2 Public comments and the 2011 TER have identified the need for more and permanent ozone
3 monitoring stations in the Tahoe Basin. AR4265-68, 82, 95, 125135, 155382. Tahoe is renowned for its
4 outstanding outdoor recreation, but high ground-level concentrations of ozone – most likely to occur in
5 the summer – can cause respiratory illnesses, to which children and the elderly are most susceptible.
6 AR92. Several species of pine and aspen, which make up large portion of Tahoe’s forests, are
7 especially vulnerable to ozone damage. *Id.* Lake Tahoe has drawn many highly polluting sources of
8 ozone precursor emissions – oxides of nitrogen and hydrocarbons – that react in the presence of
9 sunlight to form ozone. *Id.* These include on- and off-road motor vehicles, residential fuel combustion,
10 motorized boats, and off-road heavy equipment. *Id.*

11 **RESPONSE TO STATEMENT NO. 15:**

12 TRPA does not dispute Statement No. 38, which references public comments and the 2011
13 TER, to the extent that it is consistent with those documents, which speak for themselves and are the
14 best evidence of their contents. TRPA disputes the statement to the extent that it is inconsistent with
15 the documents.

16 **STATEMENT NO. 16:**

17 Regarding ozone, TRPA’s “threshold standards [are] identical to the most stringent applicable
18 ambient air quality standards.” AR11777. The most stringent and health-protective ozone standard
19 governing the Basin, California’s 8-hour ozone standard requires that average ozone concentrations not
20 exceed 0.070 ppm over an 8-hour period. AR11763. The California Air Resources Board has
21 designated the Lake Tahoe Air Basin as “nonattainment-transitional” for its 8-hour ozone standard, and
22 progress towards achieving the standard is “somewhat worse than target.” AR11759. The redesignation
23 from “nonattainment” to “nonattainment-transitional” occurred in 2011 “by operation of law” under
24 California Health & Safety Code § 40925.5(a), which requires redesignation “if, during a single
25 calendar year, the state standard is not exceeded more than three times at any monitoring location
26 within the district.” *See* RJN, Park Decl., Ex. C. Exceedances violating the 8-hour ozone standard were
27 recorded in South Lake Tahoe, California from 2006-2009, after which no ozone monitoring occurred
28 in the California portion of the Tahoe Basin. AR96, AR11774.

1 **RESPONSE TO STATEMENT NO. 16:**

2 TRPA does not dispute the first three sentences in Statement No. 16. TRPA disputes the fourth
3 sentence in Statement No. 16 because it cites evidence outside of the administrative record which is
4 inadmissible. (*See* TRPA’s Opposition to Plaintiffs’ Request for Judicial Notice.) TRPA does not
5 dispute that exceedances of the 8-hour ozone standard were recorded in South Lake Tahoe, California
6 from 2006-2009, but TRPA disputes the statement that no ozone monitoring occurred in the California
7 portion of the Tahoe Basin after 2009. The record page cited by Plaintiffs states only that ozone data
8 was “not available” after 2009. (AR11774.) The record further demonstrates that monitoring occurred
9 in the California portion of the Tahoe Basin after 2009. (AR99, 147415, 155884.)

10 **STATEMENT NO. 17:**

11 TRPA’s draft 2011 TER stated that the Region is not in compliance with California’s 8-hour
12 ozone standard. AR14696. TRPA’s independent scientific peer review panel confirmed the Report’s
13 conclusion that the 8-hour ozone standard is not being attained, with a reviewer noting that monitoring
14 data confirmed TRPA’s findings that California ozone levels are “‘somewhat worse than target’ with a
15 trend that reflects ‘little or no change.’” AR100817.

16 **RESPONSE TO STATEMENT NO. 17:**

17 TRPA disputes Statement No. 17 because it mischaracterizes the record. The 2011 draft TER
18 speaks for itself and is the best evidence of its contents. The 2011 Draft TER stated that the status for
19 ozone was non-attainment. (AR14696.) This designation reflects the “[s]tatus determination that would
20 have been assigned to the “Threshold Indicator” according to previous Threshold Evaluation’s
21 attainment status determination approach. The peer review panel comments cited by Plaintiffs explain
22 that TRPA has characterized compliance with the 8-hour ozone standard as “somewhat worse than
23 target” with a trend that reflects “little or no change.” (AR817.) According to the report, the monitoring
24 data for the period 1984-2009 when compared to the regulatory standard of 0.070 ppm (State of
25 California) supports the TRPA findings. (*Id.*)

26 **STATEMENT NO. 18:**

27 In 1968, the states of California and Nevada entered into an interstate agreement designed to
28 preserve natural resources and control development in the Lake Tahoe Basin. AR116080. The

1 agreement, known as the Tahoe Regional Planning Compact, created TRPA to serve as the land use and
2 environmental resource planning agency for the Lake Tahoe Region and became effective with the
3 consent of Congress in December 1969. Pub. L. No. 91-148 (1969) (AR116080).

4 **RESPONSE TO STATEMENT NO. 18:**

5 TRPA does not dispute Statement No. 18.

6 **STATEMENT NO. 19:**

7 The 1969 Compact required TRPA to adopt a regional plan, establish minimum region-wide
8 environmental protection standards, and enforce those standards. 1969 Compact, art. VI(a), (b).
9 Unfortunately, the 1969 Compact failed to provide the powerful environmental protection mechanism
10 that the two states and Congress had envisioned. *See id.*, art. I(c) (“[I]t is imperative that there be
11 established an areawide planning agency with power to adopt and enforce a regional plan of resource
12 conservation and orderly development, to exercise effective environmental controls...”). In
13 consequence, Nevada and California extensively amended the 1969 Compact to strengthen it, and
14 Congress consented to the changes on December 19, 1980. Pub. L. No. 96-551 (1980). The Compact
15 also was enacted by California as state law. Cal. Gov. Code § 66801.

16 **RESPONSE TO STATEMENT NO. 19:**

17 TPRA does not dispute Statement No. 19, which references the Compact, Public Law No. 96-
18 551, and Government Code, insofar as it is consistent with the provisions cited which speak for
19 themselves and are the best evidence of their contents. TRPA disputes the statement insofar as it is
20 inconsistent with the Compact, Public Law No. 96-551, and Government Code provisions cited. TRPA
21 further disputes the statement to the extent it purports to characterize legal conclusions as statements of
22 fact.

23 **STATEMENT NO. 20:**

24 These amendments included significant changes. The 1980 Compact (hereafter “Compact”)
25 recognized that “[i]ncreasing urbanization is threatening the ecological values of the region and
26 threatening the public opportunities for use of the public lands.” Art. I(a)(5). To preserve these values,
27 it empowered TRPA “to establish environmental threshold carrying capacities,” or “thresholds,” and
28 “to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain

1 such [thresholds] while providing opportunities for orderly growth and development consistent with
2 such [thresholds].” Art. I(b).

3 **RESPONSE TO STATEMENT NO. 20:**

4 TPRA does not dispute Statement No. 20, which quotes the Compact, insofar as it is consistent
5 with the provisions cited, which speak for themselves and are the best evidence of their contents.

6 TRPA disputes the statement insofar as it is inconsistent with the Compact provisions cited. TRPA
7 further disputes the statement to the extent it purports to characterize legal conclusions as statements of
8 fact.

9 **STATEMENT NO. 21:**

10 A threshold is “an environmental standard necessary to maintain a significant scenic,
11 recreational, educational, scientific or natural value of the region or to maintain public health and safety
12 within the region.” Compact, art. II(i). Such standards must include, but not be limited to, “standards
13 for air quality, water quality, soil conservation, vegetation preservation and noise.” *Id.*

14 **RESPONSE TO STATEMENT NO. 21:**

15 TPRA does not dispute Statement No. 21, which references the Compact, insofar as it is
16 consistent with the provisions cited, which speak for themselves and are the best evidence of their
17 contents. TRPA disputes the statement insofar as it is inconsistent with the Compact provisions cited.
18 TRPA further disputes the statement to the extent it purports to characterize legal conclusions as
19 statements of fact.

20 **STATEMENT NO. 22:**

21 TRPA was required to develop and adopt these thresholds, arts. II(i), V(b), and ensure that all
22 planning and development in the Lake Tahoe region is consistent with achieving and maintaining the
23 adopted threshold standards. *See id.*, art. I(b). On August 26, 1982, by Resolution No. 82-11, TRPA
24 adopted thresholds for the Region. Within one year of adopting the thresholds, TRPA was required to
25 adopt a regional plan that would achieve and maintain these thresholds. *Id.*, art. V(c). While that
26 schedule was not met, in April 1984, TRPA adopted the 1984 Regional Plan; after litigation ensued, it
27 was further amended in 1987. AR011631-32.

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1 **RESPONSE TO STATEMENT NO. 22:**

2 TPRA does not dispute Statement No. 22, which references the Compact, insofar as it is
3 consistent with the provisions cited, which speak for themselves and are the best evidence of their
4 contents. TRPA disputes the statement insofar as it is inconsistent with the Compact provisions cited.
5 TRPA further disputes the statement to the extent it purports to characterize legal conclusions as
6 statements of fact. TRPA does not dispute that it adopted the 1984 Regional Plan in April 1984 and that
7 it was amended in 1987.

8 **STATEMENT NO. 23:**

9 Until the adoption of the Regional Plan Update challenged in this action, the Regional Plan as
10 amended in 1987 (“1987 Plan”) provided the framework for all land-use planning and development
11 within the region and for ensuring that all development was consistent with achieving and maintaining
12 the thresholds. AR01154, 11631-32. The Code of Ordinances (“Code”) for implementation of the
13 Regional Plan, as required by the Compact, was adopted in May 1987. AR117725.

14 **RESPONSE TO STATEMENT NO. 23:**

15 TRPA disputes the first sentence in Statement No. 23. The 1987 Plan did not provide the
16 framework for all land-use planning and development within the region. Rather, land-use planning and
17 development in the region is guided by several agencies and planning documents. For example, the
18 1976 National Forest Management Act (“NFMA”) requires the U.S. Forest Service to develop Forest
19 Plans to provide direction and guide activities on national forest land. The Lake Tahoe Forest Plan
20 geographically covers National Forest System Lands managed by the U.S. Forest Service Lake Tahoe
21 Basin Management Unit. The Lake Tahoe Basin Management Unit is the largest land manager in the
22 region, managing 78 percent of all lands in the Lake Tahoe Basin. (AR1923.) Moreover, the record
23 citations do not support the statement. AR1154 describes scenic quality standards and does not
24 mention the 1987 Regional Plan or its influence on land-use planning and development within the
25 region. AR11631-11632 also does not support the statement. TRPA does not dispute the second
26 sentence in Statement No. 23.

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1 **STATEMENT NO. 24:**

2 To ensure that TRPA fulfills its core mission of achieving and maintaining the thresholds,
3 whenever TRPA amends its Regional Plan or Code, it must make certain “threshold findings.” Code §
4 4.5. Specifically, section 4.5 of the Code requires that, whenever TRPA amends its Regional Plan, it
5 must find that “the Regional Plan, as amended, achieves and maintains the thresholds.” Similarly,
6 section 4.6 of the Code requires that, in order for TRPA to approve any change in the Code, it must find
7 that “the Regional Plan and all of its elements, as implemented through the Code, Rules and other
8 TRPA plans and programs, as amended, achieves and maintains the thresholds.”

9 **RESPONSE TO STATEMENT NO. 24:**

10 TPRA does not dispute Statement No. 24, which references the Code insofar as it is consistent
11 with the Code provisions cited, which speak for themselves and are the best evidence of their contents.
12 TRPA disputes the statement insofar as it is inconsistent with the Code provisions cited. TRPA further
13 disputes the statement to the extent it purports to characterize legal conclusions as statements of fact.

14 **STATEMENT NO. 25:**

15 Article VII of the Compact requires TRPA to prepare and consider a detailed Environmental
16 Impact Statement (“EIS”) before approving or carrying out any project that has a significant effect on
17 the environment. Art. VII(a)(2). The EIS must include, among other things, “[t]he significant
18 environmental impacts of the proposed project,” “[a]ny significant adverse environmental effects which
19 cannot be avoided should the project be implemented,” “[a]lternatives to the proposed project,” and
20 “[m]itigation measures which must be implemented to assure meeting standards of the region.” Art.
21 VII(a)(2)(A)-(D). Article VII also requires that, before approving a project, TRPA must find that
22 changes or alterations have been required or incorporated into the project which avoid or reduce
23 significant adverse environmental effects to a less than significant level, or that specific economic,
24 social, or technical considerations make infeasible the mitigation measures or project alternatives
25 discussed in the EIS. Art. VII(d)(1), (2). Under the Compact, the approval of the Regional Plan Update
26 was a project for which an EIS was needed. Art. II(h).

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1 **RESPONSE TO STATEMENT NO. 25:**

2 TPRA does not dispute Statement No. 25, which references the Compact, insofar as it is
3 consistent with the Compact provisions cited, which speak for themselves and are the best evidence of
4 their contents. TRPA disputes the statement insofar as it is inconsistent with the Compact provisions
5 cited. TRPA further disputes the statement to the extent it purports to characterize legal conclusions as
6 statements of fact.

7 **STATEMENT NO. 26:**

8 TPRA has an ongoing duty to ensure that the Regional Plan achieves the environmental
9 thresholds; its Advisory Planning Commission and Governing Board “shall continuously review and
10 maintain the regional plan.” Art. V(c).

11 **RESPONSE TO STATEMENT NO. 26:**

12 TPRA does not dispute Statement No. 26, which references the Compact, insofar as it is
13 consistent with the provisions cited, which speak for themselves and are the best evidence of their
14 contents. TRPA disputes the statement insofar as it is inconsistent with the Compact provisions cited.
15 TRPA further disputes the statement to the extent it purports to characterize legal conclusions as
16 statements of fact.

17 **STATEMENT NO. 27:**

18 TPRA’s maintenance of the plan is informed by its progress towards attaining the thresholds,
19 which it documents through threshold evaluation reports conducted every five years. Code § 16.9.1.
20 The report is required to evaluate progress towards attaining the thresholds over the preceding five-year
21 period, including progress toward “target dates” for attainment; assess the effectiveness of compliance
22 measures aimed at achieving and maintaining the thresholds; and recommend implementation of
23 “supplemental compliance measures” for attaining those thresholds that have not been achieved. *Id.*

24 **RESPONSE TO STATEMENT NO. 27:**

25 TPRA does not dispute Statement No. 27, which references the Code insofar as it is consistent
26 with the provisions cited, which speak for themselves and are the best evidence of their contents.
27 TRPA disputes the statement insofar as it is inconsistent with the Code provisions cited. Specifically,
28 TRPA disputes that threshold evaluation reports are conducted every five years. Following the RPU,

1 the Regional Plan now requires that TRPA prepare threshold evaluation reports every four years to
2 evaluate the status and trend of threshold standard attainment and progress in implementing the
3 regional plan. (AR619.) TRPA further disputes Statement No. 27 to the extent it purports to
4 characterize legal conclusions as statements of fact.

5 **STATEMENT NO. 28:**

6 TRPA prepared threshold evaluation reports for the five-year periods ending in 1991, 1996,
7 2001, 2006, and 2011, which have documented a steady decline in water quality, continuing violations
8 of air quality standards, and a lack of progress in attaining soil conservation thresholds, among other
9 threshold nonattainments. AR26-28; AR092892. The 1987 Plan has not fulfilled the Compact's
10 mandate to —achieve and maintain the thresholds. *Id.*

11 **RESPONSE TO STATEMENT NO. 28:**

12 TRPA disputes Statement No. 28 because it argumentative, contains Plaintiff's opinion,
13 mischaracterizes the record, and does not state facts based on record citations. TRPA admits that it
14 prepared threshold evaluation reports for the five-year periods ending in 1991, 1996, 2001, 2006, and
15 2011. The threshold evaluation reports speak for themselves and are the best evidence of their
16 contents. The 2011 TER documents the significant progress that TRPA has made in achieving and
17 water quality, air quality, and soil conservation thresholds among others. (AR7-480.)

18 **STATEMENT NO. 29:**

19 Beginning in 2010, TRPA undertook a "Regional Plan Update," or "Plan Update," to revise the
20 1987 Plan, something that it had unsuccessfully attempted to do for several years before 2010. ECF No.
21 19 ¶¶ 42-43. This update was motivated in part by TRPA's determination that the 1987 Plan would
22 only guide the region for 20 years. *Id.* ¶ 42. [See 1987 Regional Plan Goals & Policies (AR28041) at
23 VII-10, 18]. An update was necessary to address thresholds that were still out of attainment, and a
24 strengthening of the plan to achieve all of the thresholds was long overdue. AR26-28; AR011471.

25 **RESPONSE TO STATEMENT NO. 29:**

26 TRPA disputes Statement No. 29 because it represents Plaintiffs' characterization of the record
27 and opinion, rather than provide a statement of undisputed fact.

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1 **STATEMENT NO. 30:**

2 However, in June 2011, pressure from Nevada development interests led to passage of Nevada
3 Senate Bill 271 (“SB 271”), which required Nevada to withdraw from the Compact in 2015 if
4 California did not agree to certain changes in the Compact and TRPA did not adopt a new regional
5 plan. NV SB271 §§ 1, 25.4 (2011).

6 **RESPONSE TO STATEMENT NO. 30:**

7 TRPA disputes Statement No. 30 because it based on Plaintiffs’ opinion and purports to
8 characterize legal conclusions as statements of fact. Nevada Senate Bill 271 (“SB 271”) speaks for
9 itself and is the best evidence of its content.

10 **STATEMENT NO. 31:**

11 On April 25, 2012, TRPA released the draft amendments to the regional plan and Code
12 implementing these changes (collectively, “Draft Plan Update”). AR12235. It also released the draft
13 EIS studying the impacts of the proposed changes to the Plan and Code. AR11450. The draft EIS
14 studied five alternatives. AR011475. “Alternative 3” consisted of the preferred Draft Plan Update.
15 AR011478. All alternatives (other than “no project”) proposed additional development, rather than a
16 reduction in development from that authorized under the 1987 Plan. AR011477-80.

17 **RESPONSE TO STATEMENT NO. 31:**

18 TRPA does not dispute the first four sentences in Statement No. 31. TRPA disputes the fifth
19 sentence in statement No. 31. Alternative 2 proposed a reduction in development from that authorized
20 under the 1987 Plan. (AR011478 [“Alternative 2 would substantially reduce the rate of development as
21 compared to the 1987 Regional Plan.”].)

22 **STATEMENT NO. 32:**

23 On December 12, 2012, TRPA approved the final EIS and adopted a Regional Plan Update
24 (“RPU”). ECF No. 19, ¶ 4. The RPU revised and loosened the standards by which new projects are
25 reviewed and approved, while significantly increasing the potential for new development throughout
26 the region. AR11479, 3334, 11478.

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1 **RESPONSE TO STATEMENT NO. 32:**

2 TRPA does not dispute that it approved the final EIS and adopted a Regional Plan Update on
3 December 12, 2012. TRPA disputes the second sentence because it is argumentative and represents
4 Plaintiffs’ opinion, rather than a statement of undisputed fact. The RPU in fact reduced the rate of
5 development at Lake Tahoe by approximately 50 percent. (AR 992.)

6 **STATEMENT NO. 33:**

7 The RPU opens over 300 acres of undeveloped land to “resort recreation” development,
8 expanding Tahoe’s urban boundary; allows up to 3,200 new residential units and 200,000 square feet of
9 new commercial floor area; and allows increased concentration of coverage closer to the Lake in urban
10 core areas—up to 100% land coverage of parcels in designated “community centers” in certain
11 instances. AR011479, 3334. The RPU’s central strategy to restore Lake Tahoe is to loosen
12 development restrictions and incentivize redevelopment in urban core areas, while removing existing
13 development in sensitive outlying areas, on the theory that this would enable more environmentally
14 sensible development and land-use overall. AR11478. However, this strategy fails to account for the
15 drastic increase in new, concentrated development that the RPU allows above current levels and the
16 harmful impacts of that increased development. *Id.*; AR11897, AR5095.

17 **RESPONSE TO STATEMENT NO. 33:**

18 TRPA disputes the first sentence in Statement No. 33 as the citation do not support the
19 conclusions stated other than the RPU approves 3,200 additional residential units (down from over
20 6,000 in the prior plan), 200,000 square feet of commercial floor area, and that under a subsequently
21 adopted Comprehensive Coverage Management Plan, parcels aggregated together could cover a 100%
22 of a single parcel, but only if the net impact of the management plan reduces coverage on sensitive
23 lands and results in at least as much environmental protection as the parcel-by-parcel approach.
24 (AR26236-26237, 5185-5186.) TRPA disputes the second and third sentences of statement No. 33
25 because they are argumentative and represent Plaintiffs’ characterization of the record and opinion,
26 rather than a statement of undisputed fact.

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1 **STATEMENT NO. 34:**

2 Plaintiffs were actively involved throughout the legislative process for TRPA’s development of
3 the RPU and preparation of the EIS. ECF No. 19, ¶ 21. Plaintiffs participated in meetings and
4 submitted comments to TRPA. *Id.* The passage of the RPU was preceded by significant and extensive
5 criticism from plaintiffs, other members of the public, and state agencies regarding the inadequacy of
6 the environmental study of the RPU, the ineffectiveness of mitigation measures to reduce significant
7 impacts of the RPU to soils, water quality, air quality, and other environmental resources, and the
8 inability of the RPU to achieve and maintain the environmental standards that govern the Tahoe
9 Region, in violation of the Compact. *See, e.g.*, AR4153; AR3775-81 (list of commenters on draft EIS).

10 **RESPONSE TO STATEMENT NO. 34:**

11 TRPA does not dispute that Plaintiffs were involved in the legislative process for TRPA’s
12 development of the RPU and preparation of the EIS or that Plaintiffs and others participated in
13 meetings and submitted comments to TRPA. However, TRPA disputes Plaintiffs’ characterization of
14 the comments received by TRPA because it represents Plaintiffs’ opinion, rather than a statement of
15 undisputed fact.

16 **STATEMENT NO. 35:**

17 The RPU authorizes the addition of 200,000 square feet of commercial floor area (“CFA”) and
18 3,200 new residential units in the Tahoe Basin, targeting new development (which also includes unused
19 developments rights under the 1987 Plan: 383,600 sq. ft. of CFA, 342 tourist accommodation units
20 (“TAUs”), 960 residential units) in identified urban “centers” along the Lake. AR26957, 26959. It also
21 incentivizes transfer of existing development rights into the centers – including CFA, TAUs, and
22 residential units by, for example, awarding “bonus” residential units for the transfer of coverage from
23 outlying, sensitive areas into centers. AR11479, 11891. To encourage concentrated development in
24 centers, the RPU allows local governments to raise limits on height, density, and impervious surfaces
25 (“coverage”) in these areas. AR11598-601; Code §§ 13.5.3, 30.4. The RPU raises the maximum area of
26 a parcel that may be “covered” from 50% to 70% on high-capability lands (lands that can better tolerate
27 development), reducing the area of naturally functioning soil on such lands. AR11881, AR11897. The
28 RPU also allows local agencies that adopt area plans to propose “a comprehensive coverage

1 management as an alternative to the parcel-level requirements,” potentially allowing 100% coverage of
2 certain parcels and thus greater coverage concentration in larger areas. Code § 13.5.3(B)(1). The areas
3 for which the increased coverage is targeted – including City of South Lake Tahoe, Tahoe City, Incline
4 Village, and Kings Beach – are already heavily affected by coverage, their land areas covered up to 45
5 to 75%. AR155938-54.

6 **RESPONSE TO STATEMENT NO. 35:**

7 TRPA does not dispute the first three sentences in Statement No. 35, but note the parenthical
8 may create some confusion, and refers the Court the quoted excerpts for a better explanation. TRPA
9 does not dispute the fourth sentence of Statement No. 35, insofar that the RPU raises the maximum
10 allowable coverage on non-sensitive developed lots within centers and outside of 300 feet of Lake
11 Tahoe. TRPA disputes the remaining contentions as unsupported by the citations. TRPA does not
12 dispute the fifth sentence of Statement No. 35, which references the Code, insofar as it is consistent
13 with the provisions cited, which speak for themselves and are the best evidence of their contents.
14 TRPA disputes the statement insofar as it is inconsistent with the Code provisions cited. TRPA further
15 disputes the statement to the extent it purports to characterize legal conclusions as statements of fact.
16 TRPA disputes the final sentence in statement No. 35 because it represents Plaintiffs’ characterization
17 of the record and opinion, rather than a statement of undisputed fact.

18 **STATEMENT NO. 36:**

19 As demonstrated by the following facts in the record, the RPU EIS failed to examine the
20 cumulative soil conservation impacts of increased development and concentrated coverage in centers
21 allowed by the RPU, as well as the impacts of this development and coverage at the localized level of
22 watersheds and/or sub-watersheds. The EIS only performed a general analysis weighing the overall
23 increase in coverage allowed by the RPU against its purported overall benefits of reducing coverage on
24 sensitive lands, entirely ignoring the local and cumulative impacts of increased coverage in areas where
25 coverage is already concentrated. AR11876, 11897. The DEIS found that the RPU could cause a net
26 increase in coverage of 66 acres region-wide (revised upward to 183 acres in the final EIS (“FEIS”).
27 AR11897, 5095. To conclude that the impacts of this coverage would be less than significant, the DEIS
28 weighed the generalized impact of an overall increase in coverage (including in centers) against the

1 benefit of a 15-acre reduction in coverage located in sensitive stream environment zones, “due to
2 substantial changes to coverage policies providing incentives to transfer coverage from sensitive
3 lands.” AR11876, 11897-98.

4 **RESPONSE TO STATEMENT NO. 36:**

5 Plaintiff disputes Statement No. 36 as it is argumentative, mischaracterizes record, and states
6 Plaintiffs’ opinion, rather than a statement of undisputed fact. The EIS analyzes the potential effects of
7 increased coverage at the local level. (AR11944-48, 11953-54, 12175-82; 5097-5100, 5101-04; *see*
8 *also* TRPA’s Opening Brief, pp. 8-13, filed concurrently with this Response for TRPA’s response to
9 this argument.) Moreover, the DEIS speaks for itself and is the best evidence of its content.

10 **STATEMENT NO. 37:**

11 The EIS also noted that the total coverage allowed by the RPU would not exceed the total
12 coverage allowed under Bailey, *i.e.*, the total coverage allowed for each soil type, aggregating total
13 coverage of each type across the entire region. AR11897. Nowhere in the EIS are the potential effects
14 of increased concentrated coverage at the local level ever mentioned.

15 **RESPONSE TO STATEMENT NO. 37:**

16 TRPA does not dispute the first sentence in Statement No. 37, which references the EIS, to the
17 extent that it is consistent with the EIS, which speaks for itself and are is best evidence of its contents.
18 TRPA disputes the statement to the extent that it is inconsistent with the EIS. TRPA disputes the
19 second sentence in Statement No. 37 because it is as it is argumentative, mischaracterizes record, and
20 states Plaintiffs’ opinion, rather than a statement of undisputed fact. The EIS not only mentions, but it
21 also expressly analyzes the potential effects of increased coverage at the local level. (AR11944-48,
22 11953-54, 12175-82; 5097-5100, 5101-04; *see also* TRPA’s Opening Brief, pp. 8-13, filed concurrently
23 with this Response for TRPA’s response to this argument.)

24 **STATEMENT NO. 38:**

25 The public presented extensive evidence of localized impacts of concentrated coverage in
26 requesting that the EIS provide an analysis of the RPU’s impacts in this regard. *See, e.g.*, AR4180-82,
27 AR3854-55. This evidence is summarized in paragraph 12, above.

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1 **RESPONSE TO STATEMENT NO. 38:**

2 TRPA does not dispute the first sentence in Statement No. 38, which references public
3 comments to the extent that it is consistent with the comments, which speak for themselves and are the
4 best evidence of their contents. TRPA disputes the statement to the extent that it is inconsistent with
5 the comments. TRPA also disputes Statement No. 38 because it represents Plaintiffs' opinion and
6 characterization of the record, rather than statement of undisputed fact.

7 **STATEMENT NO. 39:**

8 TRPA's 2006 TER noted: "Although TRPA does not currently have an adopted threshold for a
9 maximum percentage of land coverage for each watershed in the Basin, such an analysis is worthwhile
10 since scientific literature indicates that most stream quality indicators decline when watershed
11 impervious cover exceeds 10 percent, with severe degradation expected beyond 25 percent impervious
12 cover." AR93098. The 2006 TER further noted that "four out of the 64 watersheds and seven out of the
13 nine aggregate intervening areas have equal to or greater than 10 percent hard coverage. Four of these
14 watersheds/ intervening areas have greater than 15 percent coverage, three of these watersheds/
15 intervening areas have greater than 20 percent coverage and two watersheds/ intervening areas exceed
16 25 percent hard coverage." AR93098.

17 **RESPONSE TO STATEMENT NO. 39:**

18 TRPA does not dispute that the quoted language in Statement No. 39 is included in TRPA's
19 2006 TER; however, the TER is the best record of its contents and speak for itself.

20 **STATEMENT NO. 40:**

21 TRPA's response to comments did not dispute this evidence but suggested that a localized
22 analysis should be done at a later time, claiming that a "parcel-scale or subwatershed-scale" analysis is
23 "neither feasible nor necessary to assess programmatic effects." AR5090. But TRPA knew the location
24 of existing coverage, including the soil types for all areas: To study the increase in amount of coverage
25 region-wide, TRPA developed a "preliminary digital map that displayed impervious land surfaces...
26 and [undeveloped lands]," which it overlaid with "each of [its] two different land capability maps"
27 showing where each soil type exists, "to determine preliminary estimates of impervious surface by land
28 capability district at a Regional scale." AR3307. 2012 revised impervious surface mapping could tell

1 “hard” coverage (paved surfaces or roofs) from “soft” coverage (e.g., heavily compacted surfaces
2 preventing infiltration, e.g., dirt roads) and identify buildings, roads, trails, parking lots, and driveways.
3 *Id.* TRPA knew the potential level of development in centers under the RPU, having set upper limits on
4 residential units, TAUs, and CFA, as well as the potential distribution of that development; in TRPA’s
5 region-wide analysis of coverage impacts, “estimates of coverage from development... assume that all
6 authorized development would be built for each alternative and that the distribution of that
7 development would reflect distribution assumptions used in the TRPA Transportation Demand
8 Model...” AR5092. The region-wide analysis also estimated the average amount of coverage associated
9 with each new unit. AR11875, 12977-78.

10 **RESPONSE TO STATEMENT NO. 40:**

11 TRPA disputes the first sentence in Statement No. 40, insofar as it suggests that TPRA did not
12 analyze in the EIS the impacts of concentrating development in centers when in fact it did (see
13 Response to Statement 37, *supra*); insofar as the first sentence references the FEIS, the document
14 speaks for itself and is the best evidence of its contents. TRPA disputes the statement to the extent that
15 is it inconsistent with the FEIS. TRPA does not dispute the second and third sentences in Statement
16 No. 40, which reference the RTP/SCS FEIS (a document not at issue in this case), insofar as they are
17 consistent with the RTP/SCS FEIS, which speaks for itself and is the best evidence of its contents.
18 TRPA disputes the statement to the extent that is it inconsistent with the RTP/SCS FEIS. TRPA
19 disputes the fourth sentence in Statement No. 40, which references the FEIS, insofar as it is consistent
20 with the FEIS, which speaks for itself and is the best evidence of its contents. TRPA disputes the
21 statement to the extent that is it inconsistent with the FEIS. TRPA does not dispute the last sentence in
22 Statement No. 40, which references the DEIS, insofar as it is consistent with the DEIS, which speaks
23 for itself and is the best evidence of its contents. TRPA disputes the statement to the extent that is it
24 inconsistent with the DEIS.

25 **STATEMENT NO. 41:**

26 The FEIS claims that studying localized coverage impacts is unnecessary, because those
27 impacts will be studied at the area plan or project-level stage. AR5090. However, local jurisdictions
28 adopting area plans have not studied such impacts, relying on the RPU EIS’s conclusion that increased

1 coverage limits would not result in any significant impact. *See, e.g.*, RJN, Park Decl., Ex. A at 7 (local
2 government environmental compliance documentation for area plan adopting RPU’s increased
3 coverage limits simply notes that “these changes were analyzed in the RPU EIS...and were found to be
4 less than significant”).

5 **RESPONSE TO STATEMENT NO. 41:**

6 TRPA does not dispute the first sentence in Statement No. 41, which references the FEIS, to the
7 extent that it is consistent with the FEIS, which speaks for itself and is the best evidence of its content.
8 TRPA disputes the statement to the extent that it is inconsistent with the EIS. TRPA disputes the first
9 sentence in Statement No. 41, insofar that it suggests that TPRA did not analyze in the EIS the impacts
10 of concentrating development in centers when in fact it did (see Response to Statement 37, *supra*).
11 TRPA disputes the second sentence because it is speculative and cites to evidence outside of the
12 administrative record that is inadmissible. (See TRPA’s Opposition to Plaintiffs’ Request for Judicial
13 Notice.)

14 **STATEMENT NO. 42:**

15 The EIS’s discussion of water quality impacts states that the RPU would increase maximum
16 allowable coverage limits on high capability lands from 50% to 70% of developed parcels in centers,
17 and new development allocations for these centers could allow 64 acres of additional impervious
18 coverage compared to existing conditions. AR11953. The DEIS concludes that the additional coverage
19 “would be required to meet existing BMP standards to control potential increases in stormwater runoff
20 and pollutant loading from the additional coverage, including maintenance requirements, and therefore
21 this impact would be less than significant.” AR11953-54.

22 **RESPONSE TO STATEMENT NO. 42:**

23 TRPA does not dispute Statement No. 42, which references the EIS, insofar as it is consistent
24 with the EIS, which speaks for itself and is the best evidence of its content. TRPA disputes the
25 statement to the extent that it is inconsistent with the EIS.

26 **STATEMENT NO. 43:**

27 Best management practices (“BMPs”) are management controls that TRPA requires developed
28 sites to incorporate into stormwater drainage systems “to prevent and minimize stormwater impacts,”

1 *i.e.*, runoff pollution, and “to help preserve and restore the natural hydrologic cycle.” AR126841. These
2 can include: (1) “pollutant source controls” to minimize the “mobilization” of pollutants captured by
3 runoff; (2) “hydrologic source controls,” which promote infiltration of stormwater into natural soil or
4 undeveloped areas, “reduc[ing] the volume and rate of stormwater runoff,” thus reducing pollutant
5 loading; and (3) “treatment” practices, which “treat stormwater through detention, settling, filtration,
6 and nutrient cycling.” AR126908-09, 126911. TRPA Code § 60.4.2 provides that BMPs shall be
7 applied to all lands. Code § 60.4.6 sets “standard BMP requirements,” including infiltration facilities to
8 discharge runoff to groundwater” and effluent limits for maximum pollution concentrations for
9 discharges. Infiltration facilities must be designed to “accommodate the volume from a 20-year, one-
10 hour storm” and must use “the methodology set forth in the BMP Handbook.” Code § 60.4.6(A)(1).
11 The only Code requirement for maintenance is that “BMPs shall be maintained to ensure their
12 continued effectiveness.” Code § 60.4.9.

13 **RESPONSE TO STATEMENT NO. 43:**

14 TRPA does not dispute the first sentence in Statement No. 43. TRPA does not dispute the
15 remainder of Statement No. 43, which references the Code insofar as it is consistent with the Code
16 provisions cited, which speak for themselves and are the best evidence of their contents. TRPA
17 disputes the statement insofar as it is inconsistent with the Code provisions cited. TRPA further
18 disputes the statement to the extent it purports to characterize legal conclusions as statements of fact.

19 **STATEMENT NO. 44:**

20 The FEIS’s analysis of the RPU’s water quality impacts concluded that the RPU would result in
21 reduced pollutant loading compared to existing conditions, due to increased BMP installation. AR5103-
22 04. This analysis relied on the assumption that “BMPs are correctly designed, installed, and maintained
23 to retain and infiltrate the 20-year 1-hour design storm (generally taken as 1 inch of runoff from
24 impervious surfaces on a parcel).” AR6486.

25 **RESPONSE TO STATEMENT NO. 44:**

26 TRPA does not dispute Statement No. 44, which references the FEIS, insofar as it is consistent
27 with the FEIS, which speaks for itself and is the best evidence of its content. TRPA disputes the
28 statement to the extent that it is inconsistent with the EIS.

1 **STATEMENT NO. 45:**

2 Public comments questioned the EIS’s reliance on BMPs to mitigate impacts of increased
3 stormwater runoff “given that the track record for maintaining BMPs at Lake Tahoe is poor.” AR3863;
4 AR26477; AR24313; *see also* AR4401 (noting need for “increased regulatory authority (and stable
5 funding) for inspections and enforcement of...BMP maintenance and operation requirements for... new
6 projects”).

7 **RESPONSE TO STATEMENT NO. 45:**

8 TRPA does not dispute Statement No. 45, which references public comments, to the extent that
9 it is consistent with the comments, which speak for themselves and are the best evidence of their
10 contents. TRPA disputes the statement to the extent that it is inconsistent with the comments.

11 **STATEMENT NO. 46:**

12 Proper, routine maintenance is “critical to the continued effectiveness of a treatment BMP,”
13 AR127161, and, in many cases, —frequent maintenance is needed to ensure effectiveness. *See*
14 AR126958 (infiltration basin); AR126988 (bioretention); AR127174 (bioswales); AR127201 (media
15 filter). Without regular and proper maintenance, certain BMPs will utterly fail; for example, “[f]ailure
16 to frequently remove sediment and other pollutants from a BMP that relies on settling or contact with
17 vegetation will result in the re-suspension and possible release of these collected pollutants.”
18 AR127161. *See also* AR91711, 91746 (“inconsistent maintenance” of mechanical treatment BMPs can
19 result in “elevated” levels of dissolved nutrients); AR126967 (“Routine maintenance is necessary to
20 prolong the effectiveness of infiltration trenches, because once clogged, restoration typically requires
21 rebuilding the system.”)

22 **RESPONSE TO STATEMENT NO. 46:**

23 TRPA does not dispute Statement No. 46, which references the 2012 BMP Handbook and the
24 Lake Tahoe BMP Monitoring Reporting Process Handbook, insofar as it is consistent with those
25 documents cited, which speak for themselves and are the best evidence of their contents. TRPA
26 disputes the statement insofar as it is inconsistent with the documents cited.

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1 **STATEMENT NO. 47:**

2 TRPA’s BMP Handbook states that maintenance, while long “recognized as a critical
3 component to long term BMP performance,...is frequently neglected.” AR126934. As Placer County’s
4 study of potential strategies to reduce runoff (including increased BMP implementation) notes,
5 “[b]ecause private property BMPs are predominantly constructed and maintained by individual parcel
6 owners, improper construction and unreliable maintenance are potential performance issues.”
7 AR137757. For example, in one Incline Village sample area in 2010, for those properties with BMP
8 certificates, nearly half (27 of 56) were not properly functioning or maintained, based on a visual
9 inspection. AR126457, AR126462-63.

10 **RESPONSE TO STATEMENT NO. 47:**

11 TRPA does not dispute the first sentence of Statement No. 47, which references the 2012 BMP
12 Handbook, insofar as it is consistent with the provisions cited, which speak for themselves and are the
13 best evidence of their contents. TRPA disputes the statement insofar as it is inconsistent with the 2012
14 BMP Handbook provisions cited. TRPA disputes the second sentence of Statement No. 47 as the
15 citations do not support the statement.

16 **STATEMENT NO. 48:**

17 TRPA relies exclusively on voluntary compliance for BMP retrofits and maintenance. *See*
18 AR547 (“In all aspects of the BMP retrofit program, TRPA shall emphasize voluntary compliance with
19 the ordinance provisions, the provision of technical assistance through the Resource Conservation
20 Districts, and public information campaigns to inform the public about basic BMP requirements and
21 benefits.”); AR5205-06; AR11950.

22 **RESPONSE TO STATEMENT NO. 48:**

23 TRPA disputes Statement No. 48 because the record cites do not support the statement. The
24 record states that voluntary compliance will be emphasized by TRPA. (AR548.)

25 **STATEMENT NO. 49:**

26 In response to comments raising the issue of proper BMP maintenance and the need for stronger
27 enforcement requirements, TRPA did not acknowledge a potentially significant impact from improper
28 or irregular maintenance, but claimed that “[b]ased on the current maintenance requirements and

1 practices, education efforts, and enforcement requirements... it is valid to assume that implementation
2 of BMPs would be effective.” AR5188-89. No supporting evidence was provided; other than restating
3 existing maintenance requirements, TRPA simply noted its efforts to perform BMP inspections, send
4 maintenance “reminder letters,” and create online videos. AR5189. No further specifics about these
5 programs and no analysis of their efficacy is offered, nor is there any proposed monitoring to ensure
6 effectiveness or correct course if these efforts fail. AR5188-89. The FEIS notes that these efforts are
7 supported by “grant funding,” AR5189, but there is no indication that TRPA has made any
8 commitment to maintain these programs for the long term or whether these are permanent programs
9 with “stable funding” that would ensure continual BMP maintenance. AR4401.

10 **RESPONSE TO STATEMENT NO. 49:**

11 TRPA does not dispute Statement No. 49, which references the FEIS to the extent that it is
12 consistent with the FEIS, which speak for itself and are is best evidence of its contents. TRPA disputes
13 the statement to the extent that it is inconsistent with the FEIS. This statement mischaracterizes the
14 record and fails to distinguish between the requirements and enforcement for new development (or
15 redevelopment) and retrofit requirements for existing properties. Unlike TRPA’s BMP retrofit program
16 for existing properties, new development allowed under the RPU, including any concentrated coverage
17 in Centers, must install and maintain temporary and permanent BMPs as a condition of project
18 approval. (AR1085-89 [Code, § 6.4], 5101, 5181, 5205, 11946.) THE RPU amended the Code to make
19 maintenance of BMPs a mandatory condition of approval. (AR5659.) These projects are also required
20 to provide security deposits. (AR737 [Code, § 5.9.2: “a security shall be posted in an amount equal to
21 110 percent of the cost of the approved BMPs and other erosion control and water quality
22 improvements required as a condition of approval”].) TRPA also inspects these properties to ensure
23 BMPs are properly implemented. (AR738 [Code, § 5.9.4].) The RPU also added an adaptive
24 management process to review all local jurisdiction Area Plans for conformance with adopted TMDL
25 load reduction plans (which provide a science-based strategy and timeline to achieve water quality
26 standards). (AR802-803 [Code, § 13.8.5;].) If Area Plans are not meeting TMDL targets, TRPA can
27 revoke permit delegation, and take other steps necessary to achieve targets. (AR802 [Code, §
28 13.8.4.C].) The TMDL includes additional monitoring requirements as explained in TRPA’s Brief in

1 Support of Cross-Motion for Summary Judgment filed concurrently with this document.

2 **STATEMENT NO. 50:**

3 No enforcement programs are mentioned, and TRPA has stated that, due to “limited
4 enforcement resources,” it would “continue to emphasize voluntary compliance with BMPs for all
5 property owners in accordance with Policy WQ-3.11. Voluntary compliance is facilitated through
6 notifying property owners of requirements, providing technical assistance in BMP implementation, and
7 providing incentives only available to properties that comply with BMP retrofit requirements.”
8 AR5205-06. But voluntary compliance has not worked; under TRPA’s BMP retrofit program, all BMPs
9 were to be installed by October 15, 2008, Code § 60.4.4(A), but only 34% of the relevant properties
10 have BMP compliance certificates. AR11950. “Targeted” notice letters have resulted in “approximately
11 30 percent of targeted properties achieving BMP compliance, typically within one to three years after
12 receiving an official notice from TRPA,” leaving over two-thirds of property owners out of compliance
13 three years after official notice. *Id.*

14 **RESPONSE TO STATEMENT NO. 50:**

15 TRPA disputes Statement No. 50 because it is argumentative and conclusory. Plaintiffs also
16 mischaracterize TRPA’s responses to comments. The response quoted in Statement No. 50 responded
17 to Plaintiffs’ comment requesting that TRPA clarify whether water quality programs described in
18 Appendix A of the Regional Plan Update Draft EIS are required or voluntary. (AR5206.) TRPA
19 responded that: “Goal WQ-3.11 refers to the BMPs, implementation of which would continue to be
20 required for all projects, as described in Goal WQ-3.12: ‘Projects Shall Be Required to Meet TRPA
21 BMP Requirements as a Condition of Approval for All Projects.’ As such, all projects that require an
22 approval from TRPA, and projects where TRPA approval is delegated to other jurisdictions, are
23 required to comply with BMP and other water quality requirements as a condition of approval. ¶ For
24 water quality retrofits of existing development that are not associated with a project application, BMP
25 installation is also required. However, compliance efforts would continue to be targeted in priority
26 areas due to the limited enforcement resources available to TRPA and the numerous competing needs
27 for those resources. TRPA would also continue to emphasize voluntary compliance with BMPs for all
28 property owners in accordance with Policy WQ-3.11. Voluntary compliance is facilitated through

1 notifying property owners of requirements, providing technical assistance in BMP implementation, and
2 providing incentives only available to properties that comply with BMP retrofit requirements.”
3 (AR5206-5207.)

4 TRPA further disputes the third sentence in Statement No. 50 because it is argumentative and
5 includes statements of law, rather than statement of fact. TRPA, however, does not dispute that at least
6 34% of parcels in the Lake Tahoe region have BMP compliance certificates. (AR11950.) TRPA also
7 does not dispute that targeted notice letters have resulted in “approximately 30 percent of targeted
8 properties achieving BMP compliance, typically within one to three years after receiving an official
9 notice from TRPA.” (AR11950.) The EIS notes that, “[a]s of December 2011, the TRPA Stormwater
10 Management Program has initiated accelerated implementation for nearly 350 commercial and large
11 multi-family properties and 1,000 single family properties within the Tahoe Region. Overall, this
12 enforcement program has been successful in increasing BMP compliance rates, with approximately 30
13 percent of targeted properties achieving BMP compliance, typically within one to three years after
14 receiving an official notice from TRPA. In addition, 40 percent of targeted single family properties and
15 63 percent of commercial and multi-family parcels are actively working with TRPA and Resource
16 Conservation Districts to achieve BMP compliance.” (*Id.*)

17 **STATEMENT NO. 51:**

18 Unlike one-time retrofit requirements, maintenance inspections and maintenance activities may
19 be needed numerous times a year and would apply to tens of thousands of parcels for all time. *See e.g.*,
20 AR126960, 126968 (example tables of “suggested frequency” for various inspection and maintenance
21 activities, e.g., “[m]onthly (April-Oct.),” “[b]efore and during major storms,” “96 hours after major
22 storms”).

23 **RESPONSE TO STATEMENT NO. 51:**

24 TRPA does not dispute Statement No. 51.

25 **STATEMENT NO. 52:**

26 TRPA based its findings that the RPU achieves the ozone thresholds on the premise that the
27 Region “is in attainment with the ozone Threshold Standards.” AR26799. TRPA’s final 2011 TER,
28 with no explanation, stated that the California 8-hour ozone standard “is currently in attainment.”

1 AR97. Prior to the final 2011 TER, TRPA’s position, endorsed by an independent scientific review,
2 was that the 8-hour ozone standard was not in attainment. *See* ¶ 16, above.

3 **RESPONSE TO STATEMENT NO. 52:**

4 TRPA does not dispute that it based its findings that the RPU achieves the ozone thresholds in
5 part on the determination that the Region “is in attainment with the ozone Threshold Standards.”
6 (AR26799.) To the extent the Statement suggests that TRPA’s findings were based solely on the
7 current attainment status of the ozone Threshold Standards, TRPA disputes this Statement. The
8 findings state: “The Lake Tahoe Region is in attainment with the ozone Threshold Standards and it is
9 anticipated that implementation of the policies, strategies, programs and measures listed above will
10 further reduce the presence of ozone and ozone precursors in the Region. It is therefore determined that
11 policies, strategies, programs, and measures are in place to achieve the Threshold Standards for ozone
12 and to continue to maintain compliance.” (AR26685.) TRPA does not dispute that the final 2011 TER,
13 stated that the California 8-hour ozone standard “is currently in attainment,” but disputes the argument
14 that TRPA did not explain the basis for its conclusion. The TER explains the ozone monitoring upon
15 which that determination was based. (*Id.*) The highest 2011 measurement of 0.068 ppm is 3% below
16 the standard of 0.070 ppm. (AR96-97.)

17 TRPA disputes the third sentence in Statement No. 52 because it mischaracterizes the evidence
18 in the record. The 8-hour ozone standard is currently in attainment. (AR96.) The draft EIS notes that
19 the California portion of the Lake Tahoe Air Basin is currently designated by the California Air
20 Resources Board as “nonattainment-transitional” for its 8-hour ozone standard, and progress towards
21 achieving the standard is designated “somewhat worse than target.” (AR11759.) TRPA also disputes
22 Statement No. 52 because it cites evidence outside of the administrative record which is inadmissible.
23 (See TRPA’s Opposition to Plaintiffs’ Request for Judicial Notice; *see also* response to Statement No.
24 16, above.)

25 **STATEMENT NO. 53:**

26 Plaintiffs have standing to bring this action. Plaintiffs’ members’ have suffered an injury in fact,
27 which is fairly traceable to the challenged action of the defendant and will likely be redressed by a
28 favorable decision; the interests at stake are germane to each plaintiff organization’s purpose; and

1 neither the claim asserted nor the relief requested requires their members to participate directly in the
2 lawsuit. ECF No. 14-1, 14-2, 14-4, 14-5, (Pl. Members' Decls.).

3 **RESPONSE TO STATEMENT NO. 53:**

4 TRPA disputes Statement No. 53 because it constitutes legal argument and conclusions, which
5 are inappropriate to include within the Statement of Undisputed Facts.

6
7 Dated: November 27, 2013

Respectfully submitted,

8 By: /s/ Howard F. Wilkins III

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