

1 JOHN L. MARSHALL (SBN 145570)
TAHOE REGIONAL PLANNING AGENCY
2 P.O. Box 5310
Stateline, Nevada 89449
3 Telephone: (775) 589-5286
4 Facsimile: (775) 588-4527
Email: jmarshall@trpa.org

5 REMY MOOSE MANLEY, LLP
6 WHITMAN F. MANLEY (SBN 130972)
HOWARD F. WILKINS III (SBN 203083)
7 455 Capitol Mall, Suite 210
8 Sacramento, California 95814
Telephone: (916) 443-2745
9 Facsimile: (916) 443-9017
Email: wmanley@rmmenvirolaw.com
10 cwilkins@rmmenvirolaw.com

11 Attorneys for Defendant
12 TAHOE REGIONAL PLANNING AGENCY

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

) **REPLY BRIEF IN SUPPORT OF CROSS-**
) **MOTION FOR SUMMARY JUDGMENT**
) **BY TAHOE REGIONAL PLANNING**
) **AGENCY**

) Date: March 26, 2014

) Time: 9:30 AM

) Place: 14 Floor – Room 6 (JAM)

) Judge: John A. Mendez
)

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TABLE OF ABBREVIATIONS AND ACRONYMS

1	APA	Administrative Procedure Act (5 U.S.C. §§ 701-706 (2012))
2	AR	Administrative Record
3	Bailey	Bailey, R.G. 1974. Land-capability classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning. USDA Forest Service
4		
5	BMPs	Best Management Practices
6	Centers	Community Centers, Town Centers, Regional Centers, and the High Density Tourist District [AR5103]
7	CEQA	California Environmental Quality Act (Cal. Pub. Res. Code §§ 21000-21189.3 (West 2013))
8		
9	Code	TRPA Code of Ordinances
10	Compact	TRPA Compact
11	CWA	Federal Clean Water Act (33 U.S.C. §§ 1251-1387 (2012))
12	EIP	Environmental Improvement Program
13	EIR	Environmental Impact Report
14	EIS	Environmental Impact Statement
15	EPA	U.S. Environmental Protection Agency
16	GHG	Greenhouse Gases
17	LTAB	Lake Tahoe Air Basin
18	NEPA	National Environmental Policy Act (42 U.S.C. §§ 4321-4370h (2012))
19	NMFS	National Marine Fisheries Service
20	NPDES	National Pollutant Discharge Elimination System
21	POB	Plaintiffs' Opening Brief, ECF No. 25-1
22	PRB	Plaintiffs' Reply Brief, ECF No. 41
23	PRUF	Plaintiffs' Response to TRPA's Statement of Undisputed Facts, ECF No. 41-1
24	PLRM	Pollution Load Reduction Model
25	PLRPs	Pollutant/Stormwater Load Reduction Strategies
26	RTP	Regional Transportation Plan
27	RPU	Regional Plan Update
28	RPUC	Regional Plan Update Committee

TABLE OF ABBREVIATIONS AND ACRONYMS, cont'd

1		
2	SEZs	Stream Environment Zones
3	SLRPs	Stormwater Load Reduction Strategies
4	SUF	Statement of Undisputed Fact
5	TERs	Threshold Evaluation Reports
6	TMDL	Total Maximum Daily Load
7	TRPA	Tahoe Regional Planning Agency
8	TOB	TRPA's Opening Brief, ECF No. 36-1
9	VMT	Vehicle Miles Traveled
10	1987 Plan	TRPA Regional Plan
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1 **INTRODUCTION**

2 The TRPA Governing Board’s (Board’s) decision to approve the RPU culminated ten years of
3 planning, study, and debate. The Board chose to retain the regulatory framework established by the 1987
4 Plan, while making targeted amendments to accelerate the achievement and maintenance of Threshold
5 Standards in light of improved understanding of the science of Lake Tahoe’s water quality, a declining
6 economy, and decreasing public funding.

7 Plaintiffs disagree with the Board’s policy decisions on how to achieve Threshold Standards. But
8 Plaintiffs never point to any evidence of impacts from these RPU policies. Rather, Plaintiffs suggest that
9 TRPA was required to gather more data or undertake additional studies.

10 In the end, Plaintiffs’ arguments amount to second guessing TRPA on what evidence or strategy
11 to rely upon in determining how to meet Threshold Standards. Plaintiffs voiced these same objections
12 during the RPU planning process. TRPA and its consultants responded. The Board considered Plaintiffs’
13 views, but ultimately disagreed. The process worked as intended.

14 Plaintiffs now ask this Court to reverse the Board’s approval of RPU based on unsubstantiated
15 claims concerning soil conservation, water quality and air quality data. Yet, substantial—indeed,
16 abundant—evidence in the record supports the Board’s conclusion that the RPU’s overarching framework
17 and requirements will produce sustained environmental gains and will achieve and maintain Threshold
18 Standards. TRPA’s opening brief demonstrated that the Board’s approval of the RPU and certification of
19 the EIS were rational and met all the requirements of the Compact and applicable regulations.

20 **ARGUMENT**

21 **I. Substantial Evidence Supports the EIS’ Conclusion that Concentration of Coverage Resulting
22 from the RPU’s Incentives Would Result in Beneficial Impacts to Water Quality and Soils.**

23 TRPA’s RPU policies incentivizing the redevelopment of urban centers will result in improved
24 soils and water quality conditions. In fact, Plaintiffs concede the RPU will result in less coverage than
25 the 1987 Plan, significantly increase the removal of existing coverage in sensitive lands, and accelerate
26 mitigation programs addressing excess coverage. (PRUF No. 9.) Plaintiffs also concede the RPU
27 includes numerous incentives to accelerate the attainment of Soil Thresholds Standards. (PRUF No.
28 134.) Nonetheless, Plaintiffs’ reply opens with the argument that TRPA’s opening brief and the EIS
ignored potential localized impacts on “soil conservation.” This argument is improper, misleading, and

1 fails on the merits. TRPA’s opening brief focused on the EIS’s analysis of potential water quality
2 impacts from concentrating coverage in Centers because Plaintiffs made that argument in *their* opening
3 brief. (See POB at 8-11.) Plaintiffs’ new argument regarding soil conservation was not raised in their
4 opening brief and is an improper attempt to inject a new claim into a reply brief. See *EEOC v. Cal.*
5 *Psychiatric Transitions, Inc.*, 644 F. Supp. 2d 1249, 1281 (E.D. Cal. 2009) (“A moving party’s attempt
6 to introduce new facts or different legal arguments in reply papers is improper.”).

7 Plaintiffs’ argument fails for a second reason. Plaintiffs’ opening brief cites the EIS and other
8 documents for the proposition that soils perform important environmental functions. No one disputes
9 that proposition. Plaintiffs, however, never stated that the EIS’ discussion of soils conservation was
10 insufficient.¹ Plaintiffs therefore failed to exhaust administrative remedies with respect to this issue. See
11 *Sierra Club v. TRPA*, 916 F. Supp. 2d 1098, 1111, 1136 (E.D. Cal. 2013) (finding exhaustion
12 requirement applies under Compact; dismissing claims not first raised with TRPA).

13 The argument fails on the merits as well. Plaintiffs concede the RPU will result in less coverage
14 than the 1987 Plan and accelerate the removal of existing “legacy” coverage in sensitive lands, including
15 in sensitive stream environment zones (“SEZs”). (PRUF No. 139; see AR11897 [RPU’s changes to
16 coverage policies within Centers will result in an overall reduction in coverage].) Thus, the RPU’s
17 policy changes do not increase coverage in the Region, as Plaintiffs suggest, but modify regulations for
18 transferring coverage from one parcel to another. (PRUF No. 112.) The EIS analyzed the potential
19 impacts of these changes to the RPU’s transfer policies, which were designed to increase densities in
20 existing Centers in order to promote compact development patterns and substantial environmental gain.²
21 (See AR11670-82 [RPU provides incentives to focus development in “more compact, walkable, mixed-
22

23 ^{1/} Plaintiffs suggest their comments (and the California Attorney General (“AG”)) requested an analysis
24 of the localized impacts of concentrating coverage beyond water quality impacts. (See PRB at 1; POB at
25 11, citing AR4180-82 [comments on water quality impacts and aquatic systems], AR4483-85 [same],
26 4478-79 [same].) Plaintiffs’ comments do not mention soils conservation, vegetation growth, soil health,
27 or “environmental balance”; the focus is on the impact of coverage on water quality. The same is true
28 regarding comments from the California AG. (POB at 11, citing AR3854-55.) Notably, Plaintiffs
concede TRPA included additional analysis in the EIS and made significant modifications to the RPU,
to address these comments, and these modifications satisfied California. (PRUF Nos. 140-145, 151.)

^{2/} These changes only apply to properties that are already developed. (AR11897.) Other RPU policies
reduce the amount of coverage that can be transferred onto undeveloped land. (AR5101.) The RPU
reduces potential coverage within 300 feet of Lake Tahoe by 1.8 acres from the 1987 Plan. (AR6483.)

1 use communities”].) The EIS explained the changes would shift coverage from sensitive lands to less
2 sensitive lands, resulting in beneficial impacts from decreased stormwater runoff. (AR11945.) The EIS’
3 analysis also considered impacts on natural nutrient cycling, vegetation, fish habitat, the protection of
4 “environmental balance,” and potential soil erosion; TRPA did not “ignore” these issues.

5 The EIS’ PLRM evaluated potential impacts on nutrient cycling from concentrating coverage in
6 Centers and found that the RPU’s coverage policies would increase the infiltration of nutrients and
7 improve nutrient cycling. (AR5103-04.) The EIS explained the RPU would also beneficially impact
8 nutrient loading by reducing fertilizer use and applying a new threshold to reduce attached algae in the
9 nearshore. (AR11930.) The EIS concluded the RPU, in conjunction with the TMDL, will “substantially
10 decrease” nutrient loading and improve natural nutrient cycling over existing conditions. (AR5188.)

11 The EIS described native vegetation growth noting: “Common plant and wildlife species are
12 relatively abundant locally and regionally and are not considered limited by the availability of habitat in
13 the Region.” (AR12050.) The EIS then determined in light of the RPU policies that development under
14 the RPU “is not expected to substantially affect breeding productivity or population viability of any
15 common species, or cause a change in species diversity locally or regionally.” (AR12050-55, 12034-39
16 [describing benefits to sensitive habitats from more concentrated development], 12057-59.)

17 The EIS also described the RPU policies that could have potential impacts to fish habitat (e.g.,
18 peak runoff volume, sediment and nutrient loading, impacts on tributaries) and concluded that existing
19 protections would ensure that impacts to fish and aquatic habitats would not be significant. (AR5330
20 [Response O16-71]; *see also* AR12045-50.) The EIS further determined that, “[w]ith transfer of
21 development from sensitive lands and lands distant from community centers, more open space would be
22 created in appropriate areas; restoration of sensitive habitats ... would result in increased permeability,
23 reduced urban runoff, and commensurate improvements in water quality, soil conditions, and habitat for
24 vegetation and wildlife.” (AR12038; *see also* 11876, 11905 [addressing potential soil impacts].)
25 Regarding potential erosion impacts, the EIS concluded that RPU policies ensured that redevelopment
26 would not increase sediment loading. (*See* TOB, p. 17 n. 13; AR11950-51, 11953.)

27 In sum, Plaintiffs’ argument regarding “soil conservation,” which first surfaces in their reply
28 brief, comes too late in their briefing, fails for want of exhaustion, and fails on the merits.

1 Next, Plaintiffs attempt to distinguish the cases cited by TRPA regarding the deference owed to
 2 TRPA's chosen methodology for evaluating potential impacts from concentrating coverage in Centers.
 3 (PRB at 2.) The attempt fails. The EIS added the PLRM modeling and analysis in response to comments
 4 from Plaintiffs and others expressing concern about potential localized impacts from concentrating
 5 coverage in Centers. The modeling showed that concentrating coverage in Centers will reduce nutrient
 6 and sediment loading, as well as stormwater runoff. (See PRUF Nos. 140-145, TOB at 8-13.) Plaintiffs'
 7 reply does not even acknowledge this analysis. Instead, Plaintiffs continue to argue additional analysis
 8 was necessary at a parcel- or subwatershed-scale.³ TRPA, however, was not required to expend limited
 9 resources for the "perfect study" envisioned by Plaintiffs. *Sierra Club v. U.S. EPA*, 167 F.3d 658, 662-
 10 63 (D.C. Cir. 1999). Courts defer to an agency's decision "to use available data [to evaluate impacts]
 11 unless there is no rational relationship between the means [the agency] uses to account for any
 12 imperfections in its data and the situation to which those means are applied." *Env'tl. Def. Ctr., Inc. v.*
 13 *U.S. EPA*, 344 F.3d 832, 872 (9th Cir. 2003). Here, the EIS disclosed potential impacts from
 14 concentrating coverage in Centers and explained why Plaintiffs' preferred additional analysis was
 15 neither feasible nor necessary. (PRUF No. 146.)⁴ That response sufficed.

16 In sum, substantial evidence supports the EIS' conclusions and TRPA's findings that the RPU's
 17 incentives for concentrating coverage in Centers in exchange for removing coverage from sensitive
 18 lands, will result in insignificant (if not beneficial) impacts to soil conservation and water quality, as
 19 well as assist TRPA in achieving and maintaining Soil Conservation and Water Quality Threshold
 20 Standards. Plaintiffs cite no evidence to the contrary and thus have not met their burden of proof.

21 _____
 22 ³ / Plaintiffs argue TRPA's analysis of potential impacts from concentrating coverage in Centers is not
 23 entitled to deference because it is not a methodology. TRPA, however, used the PLRM modeling for this
 24 exact propose, i.e., to confirm that localized impacts would not occur. (See TOB at 8-13.) To the extent
 25 Plaintiffs challenge the scope of TRPA's analysis, the "identification of the geographic area" within
 26 which a project's impacts on environmental resources may occur also "is a task assigned to the special
 27 competency of the appropriate agencies." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113,
 28 1127 (9th Cir. 2012); see *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (same); *City of Long Beach v.*
L.A. Unified Sch. Dist., 176 Cal. App. 4th 889, 907-08 (2009) (same under CEQA).

⁴ / Plaintiffs attempt to distinguish case law holding project-level review is not required in programmatic
 documents like the EIS by arguing area plans will not analyze adverse localized water quality impacts.
 (See PRB at 2, PRUF No. 147.) Plaintiffs are wrong. TRPA must find that area plans "[d]emonstrate that
 all development activity within [Centers] will provide for or not interfere with Threshold gain, including
 but not limited to measurable improvements in water quality." (AR 798 (emphasis added) [Code §
 13.6.5(C)(6)]; see also AR797-99 [Code §§ 13.6.4 et seq.], 5090, 5096; see also PRUF No. 117.)

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

3 **A. Substantial Evidence Supports TRPA’s Determination that RPU Policies and the TMDL Will**
4 **Result in Increased BMP Implementation and Maintenance.**

5 Plaintiffs’ water quality arguments assiduously avoid addressing the RPU and TMDL policies
6 that will lead to investments in water quality protection and restoration, including mandates and
7 incentives for BMP installation and maintenance, and thus improved conditions, in “legacy”
8 development that currently lack any BMPs. (See TOB at 5, 13-17.) Plaintiffs do not contest that the RPU
9 will increased installation of BMPs. (PRUF No. 184.)⁵ Instead, Plaintiffs suggest the benefits from
10 increased installation of BMPs will not improve water quality because TRPA does not regularly inspect
11 every parcel in the Basin “with a police presence” to ensure BMPs are maintained. (See PRB at 3-4.)
12 Plaintiffs also suggest that TRPA assumed every parcel in the Basin would comply with BMP
13 requirements. (*Id.*) These suggestions are false.

14 Plaintiffs persist in failing to distinguish between TRPA’s BMP Retrofit Program for existing
15 legacy development, and BMPs required for new development or redevelopment. (*Compare* RPB at 3-9
16 with TOB at 13-17.) All new development and redevelopment allowed under the RPU, including
17 development in Centers, must install and maintain BMPs as a condition of project approval. (PRUF No.
18 163.) Moreover, “Special Conditions” in all permits for all new projects require a BMP inspection and
19 maintenance plan. (AR126934 [BMP Handbook]; 547-48 [RPU WQ-3.11]; 6289 [Code §60.4.2].) In
20 fact, contrary to Plaintiffs’ suggestions, TRPA adopted a policy requiring all new development to
21 maintain a log of BMP inspection and maintenance activities based on its recognition that maintenance
22 had been neglected in the past, and that greater efforts were needed:

23 All BMPs require inspection and maintenance, whether installed on small single family
24 residences, large commercial sites or jurisdiction scale. ***When a project is permitted, a***
25 ***BMP inspection and maintenance plan will be required under the Special Conditions***
26 ***of the permit [¶] While maintenance has long been recognized as a critical***
27 ***component to long term BMP performance, it is frequently neglected. Land owners***
28 ***and managers shall maintain a log of inspection and maintenance activities related***
to the BMPs that have been installed throughout a project site or property.

(AR126934-35 [emphasis added].) Plaintiffs suggest TRPA cannot rely on these requirements because
TRPA’s BMP Handbook is mere “guidance,” and Code Chapter 60 does not reference this requirement.

⁵/ Increased BMP implementation alone will improve current conditions, as many BMPs do not require
regular maintenance. (See AR127031 [“retaining walls can be effective for long periods of time while
requiring minimal maintenance”]; AR127024, 126991 [same for terracing and water spreading BMPs].)

1 (POB at 5, fn. 7.) Plaintiffs are wrong. TRPA’s BMP Handbook is part of the RPU. (AR547-48 [RPU
2 WQ-3.11].) Code Chapter 60.4.2 expressly requires the application of the BMP Handbook’s guidance,
3 or its equivalent, to all public and privately owned lands in the Basin. (AR6289 [Code §60.4.2].)

4 There is no dispute that TRPA’s water quality and BMP programs have increased the installation
5 of BMPs, and that the RPU creates additional incentives for private landowner BMPs. (PRUF No. 169,
6 184.) The EIS explained how these programs, among others, will accelerate both the installation and
7 maintenance of BMPs. (See TOB at 13-18.) Plaintiffs disagree with this conclusion, but cite no evidence
8 to support their sweeping claim that the RPU policies will be wholly ineffective. Thus, Plaintiffs have
9 not met their burden of showing that TRPA relied on improper evidence in its Water Quality Threshold
10 findings. (AR5188-90, 11894.) Indeed, numerous NEPA and CEQA cases uphold agencies’ reliance
11 upon BMPs even where they require long term maintenance by private entities. (See TOB at 18.) The
12 same outcome is warranted here.

13 ***B. TRPA Reasonably Relied on Implementation of the Lake Tahoe TMDL in Determining the
14 RPU Will Achieve and Maintain Water Quality Threshold Standards.***

15 Plaintiffs concede, as they must, that the Tahoe TMDL identifies major pollution sources for
16 Lake Tahoe—fine sediment, phosphorus, and nitrogen—and establishes a 65-year plan to attain the
17 TRPA’s Water Quality Threshold Standard for Lake clarity. (PRUF No. 54.) Plaintiffs also acknowledge
18 the Lake Tahoe TMDL identifies the amount of each pollutant entering the lake from these sources, the
19 reductions needed, the reduction opportunities that are available, and the implementation plan to achieve
20 these reductions. (*Id.*) Nevertheless, Plaintiffs dismiss TRPA’s reliance on the TMDL as a “red herring”
21 suggesting there is no basis to conclude the TMDL implementation plans will work.⁶ They are wrong.

22 Ignoring an overwhelming scientific and technical consensus, Plaintiffs’ dismissal of the
23 TMDL’s load reduction credits as a “sham” based on modeled estimates and an “annual records
24 inventory” of BMPs is unexplained. (PRB at 6.) First, Plaintiffs’ selective quotation to the Lake Clarity

25 ⁶/ Because Plaintiffs did not challenge EPA’s approval of the TMDL, it is presumed valid. *See Ctr. for*
26 *Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009). The Court should reject
27 Plaintiffs’ attempt to mount a collateral attack on the merits of the TMDL. *See Sierra Club v. TRPA*, 916
28 F. Supp. 2d at 1141 (rejecting Plaintiffs’ collateral attack on TRPA’s Air Quality Mitigation Program).
EPA’s approval of the TMDL was subject to challenge as a final agency action. *See Anacostia*
Riverkeeper, Inc. v. Jackson, 798 F. Supp. 2d 210, 244 (D.D.C. 2011) (invalidating EPA’s approval of
state’s TMDL because substantial evidence did not show it achieved applicable water quality standards).

1 Crediting Program Handbook fails to acknowledge the cited passage applies only to private property
2 BMPs, one small aspect⁷ of the TMDL's expected load reductions. (See AR107726 [describing required
3 inspections for treatment BMPs, roads, and other pollutant controls].) Second, to suggest the TMDL is
4 defective because it assumes BMPs will be properly maintained also misrepresents the record. (PRB at
5 5.) While the TMDL PLRM modeled load reduction *opportunities* from implementation of BMPs, the
6 TMDL requires that load reductions must be *verified*.⁸ As the Lake Clarity Crediting Program Handbook
7 expressly states, "no credit can be declared or awarded without evidence that expected conditions are
8 being maintained." (AR107727.) The Handbook also provides detailed guidance to local entities for
9 inspection plans, verification procedures, and adaptive management based on monitoring and research
10 efforts. (AR107726-31, 107871-72.) Finally, the TMDL Final Report includes a monitoring program
11 and adaptive management plan to ensure load reductions are met. (AR136266-Att. 1, p. 12-1 -13-
12 11[Nevada TMDL Report].) While the entire monitoring program was not fully implemented when the
13 report was prepared, the report noted that lake and tributary monitoring has been ongoing for years and
14 will continue to be used to evaluate "water quality trends" and "load reduction actions." (*Id.* at 13-9.)⁹

15 Next, Plaintiffs misconstrue the law in arguing there is no assurance the Nevada TMDL will be
16 implemented through Memoranda of Agreement ("MOA") with local governments - unlike California's
17 permitting requirements. This argument ignores the requirements of the Clean Water Act ("CWA")
18 requiring Nevada to "have a continuing planning process" to ensure that the State meets its obligations
19 under TMDL. CWA, 33 U.S.C. § 1313(e); see *Food and Water Watch v. U.S. EPA*, No. 12-1639(RC),
20 2013 WL 6513826, at *2-4 (D.D.C. Dec. 13, 2013) (describing TMDL requirements). Nevada's

21
22 ⁷/ The Crediting Program provides a structure to ensure load reduction methods and near-term
23 compliance issues are measurable and more likely to occur. (AR107692-93.) The program provides
24 flexible methods to meet load reductions; it assumes no additional private property BMPs. (AR107726.)

25 ⁸/ Plaintiffs erroneously attribute the assumptions used for the EIS PRLM to the TMDL PRLM. Unlike
26 the TMDL PLRM, the EIS PLRM assumed BMPs installed for new development in existing Centers as
27 a result of the RPU's coverage changes would be properly maintained. (AR6486.) As explained above,
28 unlike TRPA's Retrofit Program, such new development is required to install and maintain BMPs
(including documenting inspection and maintenance) as a condition of approval. (AR126934-35.) These
projects are also required to demonstrate they will not increase sediment loading. (See PRUF No. 165.)

⁹/ Plaintiffs admit California, Nevada, and the U.S. EPA approved the TMDL in 2011. (PRUF No. 51.)
Thus Plaintiffs' reliance on *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*,
40 Cal. 4th 412, 440 (2007) is difficult to fathom. The Court in *Vineyard* criticized an agency for relying
on future, amorphous water supplies to serve development. *Id.* Here, there is nothing amorphous about
the TMDL; EPA and the States have adopted it as binding.

1 implementation of the TMDL through agreements rather than permits does not alter the CWA's
2 requirement that Nevada meet its obligations under the TMDL. In fact, if either State falls short, the
3 EPA is authorized to take action under the CWA to establish its own TMDLs. *See id. at *2; Am. Farm*
4 *Bureau Fed'n v. U.S. EPA*, No. 1:11-CV-0067, 2013 WL 5177530, at *20 (M.D. Pa. Sept. 13, 2013)
5 (CWA requires EPA to “ensure that management plans are developed and implement[ed]”).

6 Plaintiffs' argument that the TMDL could be “indefinitely put off, given limited funding”
7 misrepresents the record. (PRB at 7.) The record shows Nevada stated that implementation and load
8 schedules could be amended in the future due to budget constraints. (AR136266-Att. 1, p. ES-3.)
9 Nevada's (as well as Placer County's) acknowledgement of budget constraints does not support
10 Plaintiffs' suggestion that the TMDL may not be implemented. While implementation timing and load
11 reduction schedules may be adjusted, the TMDL cannot be put off indefinitely for any reason under the
12 CWA. *See, e.g., Food and Water Watch*, 2013 WL 6513826, at *2-4 (noting EPA established TMDL
13 because states' TMDLs were not achieving water quality standards).

14 Plaintiffs' citation to *Federation of Hillside Canyons v. City of Los Angeles*, 83 Cal. App. 4th
15 1252, 1261 (2000), for the proposition that TRPA cannot rely on the TMDL also completely misses the
16 mark. In *Federation*, the agency's own record stated that the necessary traffic improvements would not
17 be built. *Id.* The record here is nothing like that. At most, Nevada has said the pace of implementation
18 could be affected by budget conditions. Moreover, if Nevada doesn't meet its requirements under the
19 TMDL – EPA can step in. That was not true in *Federation*. Furthermore, TRPA's incorporation of the
20 TMDL into its regulatory scheme is a common and reasonable mitigating measure in CEQA cases. *See,*
21 *e.g., Oakland Heritage Alliance v. City of Oakland*, 195 Cal. App. 4th 884, 910 (2011) (upholding future
22 building-specific review that required compliance with seismic building standards); *see also Sierra Club*
23 *v. TRPA*, 916 F. Supp. 2d at 1146 (TRPA reasonably relied on adopted Air Quality Mitigation Program
24 as well as non-mandatory programs in threshold findings).

25 Finally, Plaintiffs argument that even if the TMDL is fully implemented it will not address
26 localized impacts to streams and nearshore areas also misses the mark. As explained in TRPA's opening
27 brief, the PLRM demonstrates the RPU's coverage provisions will reduce pollutant loading resulting in
28 beneficial impacts to streams and nearshore areas. (TOB at 9 and 13 n. 8.) Plaintiffs cite no evidence–

1 other than their own opinion—that this analysis was inadequate. Moreover, as part of the RPU, TRPA
 2 adopted additional Water Quality Thresholds to address nearshore conditions, along with policies, such
 3 as the phase out of phosphorous fertilizer, to improve nearshore and tributary conditions.¹⁰ (*Id.*)¹¹

4 In sum, Plaintiffs cite no evidence to suggest the RPU would decrease BMP implementation or
 5 adversely impact water quality because there is no such evidence. TRPA’s conclusion that the RPU will
 6 increase installation and maintenance of BMPs and improve current water quality conditions is
 7 reasonable. (AR5188-90, 11894.) The Board found that the Regional Plan, as amended by the RPU,
 8 includes multiple requirements that, along with TRPA’s own programs (e.g., the EIP Program) and
 9 existing regulations (e.g., the TMDL), will achieve and maintain TRPA’s Water Quality Threshold
 10 Standards. (SUF Nos. 133, 156.) Because substantial evidence supports that finding, it should be upheld.

11 **III. Substantial Evidence Supports TRPA’s Findings that the Regional Plan, as Amended by the
 RPU, Achieves and Maintains Air Quality Standards.**

12 As TRPA’s opening brief explains, the Board was not required to find that ozone thresholds were
 13 in attainment prior to approving the RPU. Rather, the Board had to and did find that the Regional Plan,
 14 as amended by the RPU, put TRPA on a path that will achieve and maintain those thresholds. *See*
 15 Compact, arts. I(b), V(c); *Sierra Club v. TRPA*, 916 F. Supp. 2d at 1145 (finding 1987 Plan, as amended
 16 in 2011, achieved and maintained ozone thresholds despite the fact that all ozone thresholds had not
 17 been achieved); PRUF No. 48. Plaintiffs do not dispute the Board made these findings. (PRUF No. 216.)
 18 Nor do they dispute the Board concluded that RPU policies would “reduce dependency on the
 19 automobile by making more effective use of existing transportation modes and of public transit.” (*Id.*)¹²
 20 As Plaintiffs point out (RPB at 9) these changes are consistent with the TER peer review panel’s
 21 recommendation that the RPU pursue aggressive policies to reduce dependency on automobiles. (PRUF
 22

23 ¹⁰ / Notably, the TMDL Report states: “[TMDL] actions to improve the transparency may have positive
 24 effects on the nearshore conditions by indirectly reducing turbidity and attached algal mass.”(AR48646.)

25 ¹¹ / Despite Plaintiffs’ suggestions to the contrary, TRPA requires that area-wide BMPs incorporated
 into Area Plans comply with applicable TMDL requirements. (AR792 [Code § 13.5.3 (C)(3)(a), (b)].)

26 ¹² / Plaintiffs also acknowledge the RPU reduces vehicle miles traveled (“VMT”) and associated air
 27 pollution and will result in 10,000 fewer VMT than the no action alternative (no additional new
 development allocations) and includes adaptive management limiting new development based on VMT
 28 monitoring to ensure continued attainment of transportation and air quality standards. (PRUF Nos. 5 and
 130.) Plaintiffs further acknowledge the Board determined that all ozone thresholds were in attainment
 based on monitoring data and analysis included in the EIS and Final TER. (PRUF Nos. 203.)

1 No. 211.) Nevertheless, Plaintiffs continue to argue TRPA could not amend the 1987 Plan until its
2 ozone monitoring network is expanded to ensure maximum ozone concentrations can be detected more
3 thoroughly. Plaintiffs are wrong.

4 Plaintiffs fail to cite any legal authority supporting their argument that additional monitoring was
5 required before TRPA could amend the 1987 Plan. (*See* POB at 22-25; PRB at 9-10.) Instead, Plaintiffs
6 continue to argue that the Final TER’s change in attainment status for the 8-hour ozone indicator was
7 unexplained and that it is not entitled to deference because it relied in part on data from a monitoring
8 station on the Nevada side of the LTAB.¹³ (PRB at 23.) TRPA’s opening brief and the EIS explained the
9 reason for the change – i.e., new data. (*See* TOB at 21-24.) Moreover, the same peer-reviewed
10 methodology (i.e., using a percent to target approach) used in the draft TER was used in the final TER.¹⁴
11 (AR61, 155873-74, 155884-85.) Thus, Plaintiffs’ argument that additional data was required fails as
12 substantial evidence supported the Board’s conclusions regarding the attainment of ozone standards.¹⁵

13 In sum, Plaintiffs fail to meet their burden to show the Board’s findings were not based on
14 substantial evidence. The Board had ample support for its conclusion that the RPU will “attain[] and
15 maintain[]” the ozone threshold standards. (*See* TOB at 19-25.) Therefore, the Court should reject
16 Plaintiffs’ air quality claims.

17 CONCLUSION

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

20
21 ¹³/ Plaintiffs argue TRPA’s determination that monitoring stations located in California and Nevada
22 showed “little variation” in peak/maximum ozone levels was arbitrary and should have considered
23 average two-week concentrations. (*See* PRUF No. 209.) Plaintiffs’ suggestion that TRPA should have
24 evaluated average two-week concentration levels for ozone (not the applicable standard), however, does
25 not refute the expert opinion relied on by TRPA that available data was sufficient to evaluate peak ozone
26 levels (the applicable threshold). (*Id.* [“stations showed similar concentrations and number of exceedance
27 days during 2008-2010.”]) Even if Plaintiffs could point to data or an expert opinion conflicting with
28 TRPA’s conclusion (which Plaintiffs have not done), TRPA’s conclusion is entitled to deference. *See*
Sierra Club v. TRPA, 916 F. Supp. 2d at 1135; *N. Coast Rivers Alliance v. Marin Mun. Water Dist. Bd.*
of Dirs., 216 Cal. App. 4th 614, 639-40 (2013).

¹⁴ The methodology used to make the status determination in the both draft and final TERs was peer-
reviewed and found to be reasonable and an improvement when compared to previous threshold
evaluation approaches. (AR8839-48; 8949-9002.) The updated data met the EPA’s stringent quality
assurance requirements and the analysis of this data was conducted by air quality experts. (AR96-97.)

¹⁵/ *See* TOB at 23 [addressing TRPA’s commitment to expand its air quality monitoring network].

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Respectfully submitted,

By: /s/ Howard F. Wilkins III
JOHN L. MARSHALL, State Bar No. 145570
Tahoe Regional Planning Agency
P.O. Box 5310
Stateline, Nevada 89449
Telephone: (775) 588-4547
Facsimile: (775) 588-4527
Email: jmarshall@trpa.org

WHITMAN F. MANLEY, State Bar No. 130972
HOWARD F. WILKINS III, State Bar No. 203083
Remy Moose Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
Email: wmanley@rmmenvirolaw.com
cwilkins@rmmenvirolaw.com

Attorneys for Defendant
TAHOE REGIONAL PLANNING AGENCY