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

SIERRA CLUB and FRIENDS OF THE WEST SHORE, Plaintiffs, vs. TAHOE REGIONAL PLANNING AGENCY, Defendant.	Civ. No. 2:13-CV-00267-JAM-EFB **PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS** Date: March 5, 2014 Time: 9:30 a.m. Place: Courtroom 6 Judge: Hon. John A. Mendez

Pursuant to Local Rule 260(a), plaintiffs Sierra Club and Friends of the West Shore hereby submit the following undisputed material facts in support of their motion for summary judgment, filed on October 25, 2013. Documents included in the Administrative Record are cited as "AR [volume]:[page number]." All citations to the Tahoe Regional Planning Compact ("Compact") are to the Compact only and not to the record; all citations to the Tahoe Regional Planning Agency ("TRPA") Code of Ordinances ("Code") are to the Code section only and not to the record. ECF No. 1-1 is a copy of the Compact.

I. Lake Tahoe and Its Environmental Decline

1. Lake Tahoe, situated in a spectacular setting near the crest of the Sierra Nevada at an elevation of approximately 6,225 feet above sea level, is one of the most well-known and revered fresh water bodies in the United States. ECF No. 19, ¶ 25. With a maximum depth of

approximately 1,636 feet, Lake Tahoe is the eleventh deepest lake in the world and the second deepest in the United States. *Id.* The Lake Tahoe Basin is a region of mountains and steep slopes, containing nutrient-poor soils, soils prone to erosion, and volcanic rock and soils. *Id.* Lake Tahoe's famed clarity is due to the Basin's very low levels of nutrients that support the growth of algae. *Id.*

A. Water Quality

2. Pursuant to the Clean Water Act, Lake Tahoe has been designated an "Outstanding National Resource Water" ("ONRW"). AR11916.

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

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

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

6. In addition, another clarity measure, "phytoplankton primary productivity," which measures the concentration of algae in the Lake, is in "rapid decline," having increased at a rate of 8% over 44 years. AR146-47. In 2011, algae concentrations were over four times the threshold standard. *Id.*

7. As a result of development around Lake Tahoe, the "deep water clarity" standard for

annual mean Secchi disk visibility is far from being achieved. AR152-53. In 2010, the second lowest annual average Secchi depth of 64.4 feet was recorded. AR107327. While winter and annual average clarity showed modest improvements in 2011, *see* AR107945-46, the Lake's summer clarity continued to decline. In 2008 and 2011, annual average clarity measurements were the lowest ever recorded (50.4 feet and 51.4 feet respectively); indeed, summer clarity "has been dominated by a consistent long-term decline" that has been "near-continuous over the last decade." AR107947.

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

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

B. Soils Protection

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

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

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

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

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

[1] TRPA has identified nine hydrologically related areas, each consisting of a collection of several related watersheds. *See* AR11871, 11869 (map identifying HRA boundaries).

coverage and two watersheds/ intervening areas exceed 25 percent hard coverage." *Id.* TRPA staff has stated that "there are 22 subwatersheds with 10% coverage [out of] 183 subwatersheds." AR16576.

C. Air Quality

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

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

17. TRPA's draft 2011 TER stated that the Region is not in compliance with California's 8-hour ozone standard. AR14696. TRPA's independent scientific peer review panel confirmed the

Report's conclusion that the 8-hour ozone standard is not being attained, with a reviewer noting that monitoring data confirmed TRPA's findings that California ozone levels are "'somewhat worse than target' with a trend that reflects 'little or no change.'" AR100817.

II. The Tahoe Regional Planning Compact

18. In 1968, the states of California and Nevada entered into an interstate agreement designed to preserve natural resources and control development in the Lake Tahoe Basin. AR116080. The agreement, known as the Tahoe Regional Planning Compact, created TRPA to serve as the land use and environmental resource planning agency for the Lake Tahoe Region and became effective with the consent of Congress in December 1969. Pub. L. No. 91-148 (1969) (AR116080).

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

20. These amendments included significant changes. The 1980 Compact (hereafter "Compact") recognized that "[i]ncreasing urbanization is threatening the ecological values of the region and threatening the public opportunities for use of the public lands." Art. I(a)(5). To preserve these values, it empowered TRPA "to establish environmental threshold carrying capacities," or "thresholds," and "to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such [thresholds] while providing opportunities for orderly growth and development consistent with such [thresholds]." Art. I(b).

21. A threshold is "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and

safety within the region." Compact, art. II(i). Such standards must include, but not be limited to, "standards for air quality, water quality, soil conservation, vegetation preservation and noise." *Id*.

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

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

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

25. Article VII of the Compact requires TRPA to prepare and consider a detailed Environmental Impact Statement ("EIS") before approving or carrying out any project that has a significant effect on the environment. Art. VII(a)(2). The EIS must include, among other things, "[t]he significant environmental impacts of the proposed project," "[a]ny significant adverse environmental effects which cannot be avoided should the project be implemented," "[a]lternatives

to the proposed project," and "[m]itigation measures which must be implemented to assure meeting standards of the region." Art. VII(a)(2)(A)-(D). Article VII also requires that, before approving a project, TRPA must find that changes or alterations have been required or incorporated into the project which avoid or reduce significant adverse environmental effects to a less than significant level, or that specific economic, social, or technical considerations make infeasible the mitigation measures or project alternatives discussed in the EIS. Art. VII(d)(1), (2). Under the Compact, the approval of the Regional Plan Update was a project for which an EIS was needed. Art. II(h).

III. The Tahoe Regional Plan, Regional Plan Update, and Procedural Background

26. TRPA has an ongoing duty to ensure that the Regional Plan achieves the environmental thresholds; its Advisory Planning Commission and Governing Board "shall continuously review and maintain the regional plan." Art. V(c).

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

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

29. Beginning in 2010, TRPA undertook a "Regional Plan Update," or "Plan Update," to revise the 1987 Plan, something that it had unsuccessfully attempted to do for several years before 2010. ECF No. 19 ¶¶ 42-43. This update was motivated in part by TRPA's determination that the 1987 Plan would only guide the region for 20 years. *Id*. ¶ 42. [*See* 1987 Regional Plan Goals & Policies (AR28041) at VII-10, 18]. An update was necessary to address thresholds that were still out

of attainment, and a strengthening of the plan to achieve all of the thresholds was long overdue. AR26-28; AR011471.

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

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

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

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

34. Plaintiffs were actively involved throughout the legislative process for TRPA's

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

IV. Violations of the Compact by the RPU

A. Failure to Analyze Significant Soils Impacts

35. The RPU authorizes the addition of 200,000 square feet of commercial floor area ("CFA") and 3,200 new residential units in the Tahoe Basin, targeting new development (which also includes unused developments rights under the 1987 Plan: 383,600 sq. ft. of CFA, 342 tourist accommodation units ("TAUs"), 960 residential units) in identified urban "centers" along the Lake. AR26957, 26959. It also incentivizes transfer of existing development rights into the centers – including CFA, TAUs, and residential units by, for example, awarding "bonus" residential units for the transfer of coverage from outlying, sensitive areas into centers. AR11479, 11891. To encourage concentrated development in centers, the RPU allows local governments to raise limits on height, density, and impervious surfaces ("coverage") in these areas. AR11598-601; Code §§ 13.5.3, 30.4. The RPU raises the maximum area of a parcel that may be "covered" from 50% to 70% on "high-capability" lands (lands that can better tolerate development), reducing the area of naturally functioning soil on such lands. AR11881, AR11897. The RPU also allows local agencies that adopt area plans to propose "a comprehensive coverage management as an alternative to the parcel-level requirements," potentially allowing 100% coverage of certain parcels and thus greater coverage concentration in larger areas. Code § 13.5.3(B)(1). The areas for which the increased coverage is targeted – including City of South Lake Tahoe, Tahoe City, Incline Village, and Kings Beach – are already heavily affected by coverage, their land areas covered up to 45 to 75%. AR155938-54.

36. As demonstrated by the following facts in the record, the RPU EIS failed to examine

the cumulative soil conservation impacts of increased development and concentrated coverage in centers allowed by the RPU, as well as the impacts of this development and coverage at the localized level of watersheds and/or sub-watersheds. The EIS only performed a general analysis weighing the overall increase in coverage allowed by the RPU against its purported overall benefits of reducing coverage on sensitive lands, entirely ignoring the local and cumulative impacts of increased coverage in areas where coverage is already concentrated. AR11876, 11897. The DEIS found that the RPU could cause a net increase in coverage of 66 acres region-wide (revised upward to 183 acres in the final EIS ("FEIS"). AR11897, 5095. To conclude that the impacts of this coverage would be less than significant, the DEIS weighed the generalized impact of an overall increase in coverage (including in centers) against the benefit of a 15-acre reduction in coverage located in sensitive stream environment zones, "due to substantial changes to coverage policies providing incentives to transfer coverage from sensitive lands." AR11876, 11897-98.

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

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

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

40. TRPA's response to comments did not dispute this evidence but suggested that a localized analysis should be done at a later time, claiming that a "parcel-scale or subwatershed-scale" analysis is "neither feasible nor necessary to assess programmatic effects." AR5090. But TRPA knew the location of existing coverage, including the soil types for all areas: To study the increase in amount of coverage region-wide, TRPA developed a "preliminary digital map that displayed impervious land surfaces… and [undeveloped lands]," which it overlaid with "each of [its] two different land capability maps" showing where each soil type exists, "to determine preliminary estimates of impervious surface by land capability district at a Regional scale." AR3307. 2012 revised impervious surface mapping could tell "hard" coverage (paved surfaces or roofs) from "soft" coverage (e.g., heavily compacted surfaces preventing infiltration, e.g., dirt roads) and identify buildings, roads, trails, parking lots, and driveways. *Id.* TRPA knew the potential level of development in centers under the RPU, having set upper limits on residential units, TAUs, and CFA, as well as the potential distribution of that development; in TRPA's region-wide analysis of coverage impacts, "estimates of coverage from development… assume that all authorized development would be built for each alternative and that the distribution of that development would reflect distribution assumptions used in the TRPA Transportation Demand Model…" AR5092. The region-wide analysis also estimated the average amount of coverage associated with each new unit. AR11875, 12977-78.

41. The FEIS claims that studying localized coverage impacts is unnecessary, because those impacts will be studied at the area plan or project-level stage. AR5090. However, local jurisdictions adopting area plans have not studied such impacts, relying on the RPU EIS's conclusion that increased coverage limits would not result in any significant impact. *See, e.g.,* RJN, Park Decl., Ex. A at 7 (local government environmental compliance documentation for area plan adopting RPU's increased coverage limits simply notes that "these changes were analyzed in the RPU EIS…and were found to be less than significant").

B. Failure to Analyze Significant Water Quality Impacts and Unsupported Water Quality Threshold Findings

42. The EIS's discussion of water quality impacts states that the RPU would increase

maximum allowable coverage limits on high capability lands from 50% to 70% of developed parcels in centers, and new development allocations for these centers could allow 64 acres of additional impervious coverage compared to existing conditions. AR11953. The DEIS concludes that the additional coverage "would be required to meet existing BMP standards to control potential increases in stormwater runoff and pollutant loading from the additional coverage, including maintenance requirements, and therefore this impact would be less than significant." AR11953-54.

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

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

45. Public comments questioned the EIS's reliance on BMPs to mitigate impacts of increased stormwater runoff "given that the track record for maintaining BMPs at Lake Tahoe is poor." AR3863; AR26477; AR24313; *see also* AR4401 (noting need for "increased regulatory

authority (and stable funding) for inspections and enforcement of…BMP maintenance and operation requirements for… new projects").

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

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

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

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

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

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

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

C. Unsupported Air Quality Threshold Findings

52. TRPA based its findings that the RPU achieves the ozone thresholds on the premise

that the Region "is in attainment with the ozone Threshold Standards." AR26799. TRPA's final 2011 TER, with no explanation, stated that the California 8-hour ozone standard "is currently in attainment." AR97. Prior to the final 2011 TER, TRPA's position, endorsed by an independent scientific review, was that the 8-hour ozone standard was not in attainment. *See* ¶ 16, above.

V. Standing

53. Plaintiffs have standing to bring this action. Plaintiffs' members' have suffered an injury in fact, which is fairly traceable to the challenged action of the defendant and will likely be redressed by a favorable decision; the interests at stake are germane to each plaintiff organization's purpose; and neither the claim asserted nor the relief requested requires their members to participate directly in the lawsuit. ECF No. 14-1, 14-2, 14-4, 14-5, (Pl. Members' Decls.).

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Respectfully submitted,

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