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INTRODUCTION

Plaintiffs Sierra Club and the League to Save Lake Tahoe (“plaintiffs”) request this Court to maintain the status quo in this case by issuing a preliminary injunction prohibiting the Tahoe Regional Planning Agency (“TRPA”) from approving permits for new piers, buoys, boat lifts, ramps, and slips (collectively “boat facilities”) to be constructed or placed within Lake Tahoe pending the resolution of the merits of plaintiffs’ claims. In October 2008, TRPA passed the Shorezone Ordinance Amendments (“Shorezone Amendments” or “Amendments”), which allow significantly increased development of boat facilities along Lake Tahoe’s shores. Pursuant to the Amendments, TRPA is now in the process of approving applications for five new piers, expects to issue permits for new piers and boat lifts as early as this summer, and may issue permits for new buoys, slips, and ramps at any time during the pendency of this lawsuit.

The construction or placement of new boat facilities in and around the Lake will cause irreparable harm to the Lake’s famed water clarity, air quality, and scenic and recreational resources and thus to plaintiffs’ interests in the use and enjoyment of those resources. Because plaintiffs have a strong likelihood of success on the merits in this case, because the balance of hardships tips sharply in favor of preserving the status quo pending this Court’s ruling on the merits, and because the public interest in the protection of Lake Tahoe will be served by preserving the status quo, the Court should issue a preliminary injunction enjoining the approval, construction, and placement of new boat facilities authorized by the Shorezone Amendments.

BACKGROUND

On October 22, 2008, TRPA’s Governing Board adopted the Shorezone Amendments. AR 1:1-3 (Ordinance 2008-10).¹ The Shorezone Amendments allow an additional 128 private piers, 10 public piers, over 3,000 new mooring buoys, 6 new boat ramps, and 235 boat slips to be constructed

¹ “AR” denotes citations to the administrative record. The number before the colon represents the record volume number, and the number after the colon represents the page number. Documents not within the record are filed as exhibits hereto or as attachments to Exhibit A, and are cited as “Ex. [letter]” or “Att. [no.],” respectively. All citations to the TRPA Code of Ordinances (including Shorezone Amendments) are to the Code section only and not to the record. Relevant excerpts of the Code are provided as Att. 1 to Exhibit A for the Court’s convenience.

1 or placed within Lake Tahoe's Shorezone, the area in which the land meets the lake.² Code §§
2 52.2.B, 52.4.B, 52.5. The projected impacts of this increased development include impaired public
3 access to the Shorezone, degraded scenic views along the shore, and a significant increase in
4 motorized boating, resulting in increased emissions of boat exhaust, including pollutants such as
5 carbon monoxide, nitrogen oxides, particulate matter, and various hydrocarbons. See AR 2:765-802
6 (EIS). In addition to degrading the Tahoe Region's air quality, many of these pollutants have caused
7 significant damage to Lake Tahoe's water quality and its famed clarity. See AR 7:4039-44 (draft
8 EIS). The Amendments took effect on December 21, 2008. AR 1:3.

9 The passage of the Amendments was preceded by significant and extensive criticism from
10 the public and state agencies regarding the inadequacy of the environmental study of the
11 Amendments, the ineffectiveness of mitigation measures to reduce significant impacts of new boat
12 facilities, and the inability of the Amendments to achieve and maintain the environmental standards
13 that govern the Tahoe Region³, in violation of the Tahoe Regional Planning Compact ("Compact"),
14 Pub. L. No. 95-551, 94 Stat. 3233 (1980), TRPA's foundational document. (The Compact is
15 attached as Ex. A to Pls.' Complaint (Doc. 1) and appears in the record at AR 29:18956-977.) Under
16 this bi-state agreement between California and Nevada and approved by Congress to ensure the
17 conservation of resources and to control development in the Lake Tahoe Basin, TRPA has two
18 "imperative" duties: (1) "to establish environmental threshold carrying capacities" for the Tahoe
19 Region and (2) "to adopt and enforce a regional plan and implementing ordinances which will
20 achieve and maintain such capacities while providing opportunities for orderly growth and
21 development consistent with such capacities." Compact art. I(b); V(b), (c). Environmental
22 threshold carrying capacities ("thresholds" or "threshold standards") are environmental standards
23 "necessary to maintain a significant scenic, recreational, educational, scientific or natural value of
24 the region or to maintain public health and safety within the region" and "shall include but not be

25 ² The Shorezone is the area including the nearshore, foreshore, and backshore of Lake Tahoe. This
26 includes, at a minimum, the area 350 feet lakeward from the shoreline (the nearshore), the zone of
27 lake level fluctuation (the foreshore), and the area of wave run-up or area of instability extending
28 from the high water level, plus 10 feet (the backshore). See Code, Chapter 2 (defining terms); AR
1:586 (defining backshore).

³ The Tahoe Region is the geographic area governed and protected by the Compact, as defined in
article II(a).

1 limited to standards for air quality, water quality, soil conservation, vegetation preservation and
2 noise.” Compact art. II(i). In accord with this mandate, TRPA has adopted 36 separate threshold
3 standards, including standards for water clarity and quality, air quality, recreational access, and
4 scenic quality. AR 11:7203-04.

5 Two Compact provisions require that the threshold standards be achieved and maintained as
6 a prerequisite to any amendment of the Regional Plan’s implementing regulations, the Code of
7 Ordinances. First, in approving any amendments to the Code of Ordinances, TRPA must make
8 findings that “the Regional Plan and all of its elements, as implemented through the Code, Rules and
9 other TRPA plans and programs, as amended, achieves and maintains the thresholds.” Code § 6.5.
10 *See also* Compact art. V(g) (requiring TRPA to prescribe specific written findings that it must make
11 prior to approving any project, which shall “insure that the project under review will not adversely
12 affect implementation of the regional plan and will not cause the adopted environmental threshold
13 carrying capacities of the region to be exceeded”). Second, before approving or carrying out any
14 project that may have a significant effect on the environment (such as the Shorezone Amendments),
15 TRPA must prepare and consider a detailed Environmental Impact Statement (“EIS”). Compact art.
16 VII(a)(2). The EIS must include, among other things, “[t]he significant environmental impacts of
17 the proposed project” and “[m]itigation measures which must be implemented to assure meeting
18 standards of the region.” *Id.* art. VII(a)(2)(A), (D). In addition, before approving a project, TRPA
19 must find that mitigation measures that avoid or reduce significant adverse environmental impacts to
20 a less significant level have been incorporated into the project or that such measures are infeasible.
21 *Id.* art. VII(d)(1), (2); Code § 5.8.D. (For further background on the Compact, *see* Doc. 1, Complaint
22 at ¶¶ 28-34.)

23 The EIS prepared by TRPA for the Shorezone Amendments acknowledged that increased
24 development authorized by the Amendments would have significant environmental impacts upon the
25 Region’s air and water quality, recreational access, and scenic resources, but numerous commenters
26 noted that the EIS and Amendments failed to describe with specificity and commit to adequate
27 mitigation for these impacts. For example, state and federal agencies commented on the lack of
28 specificity in various mitigation measures to ensure their effectiveness, and many members of the

1 public, including plaintiffs, complained that they were left in the dark as to exactly how a proposed
2 program to mitigate the impacts of more motorized boats on the Lake (called the “Blue Boating
3 Program”) would mitigate the air and water quality impacts of new boat facilities, because the EIS
4 lacked specific details as to key elements of this program. *See, e.g.*, AR 28:18004-05 (U.S. EPA);
5 AR 26:16658 (Lahontan Regional Water Quality Control Board (“Lahontan RWQCB”)); AR
6 26:16638 (California EPA); AR 25:16491 (Sierra Club); AR 25:16481-82 (League to Save Lake
7 Tahoe). For example, the EIS did not identify specific pollution control measures, engine tuning
8 requirements, bilge water and sewage management requirements, enforcement techniques that would
9 be used to reduce boating emissions, and the amount of funding available for these measures, but
10 simply asserted that the vaguely described program, when later formulated, would provide these.
11 *See, e.g.*, AR 2:827-31. The lack of specifics precluded meaningful analysis of the program’s
12 effectiveness in mitigating impacts to insignificant levels, and thus the public’s understanding of the
13 Shorezone Amendments’ actual impacts. In addition, the California State Lands Commission
14 (“State Lands”) repeatedly commented that a Lake Tahoe Public Access Fund, intended to mitigate
15 the recreational and scenic impacts of new piers through a \$100,000-per-pier mitigation fee, did not
16 require a sufficient fee, nor detail adequate standards as to how the fees collected would be used, to
17 ensure that equivalent recreational access would be provided to replace that lost to new pier
18 construction. AR 26:16559-60; AR 26:16653; AR 4:2230; AR 4:2250.

19 Further enlarging these information gaps was the improper baseline used for the number of
20 buoys in the EIS. The Shorezone Amendments allow a total of 6,316 buoys to be placed in the Lake.
21 Code § 52.4.B. This number was derived by starting from the total number of buoys existing on the
22 Lake in 2002 as the baseline, or 4,454 buoys, and determining that 1,862 new buoys should be
23 allowed in addition to the baseline, presumably based on the EIS’s study of 1,862 additional buoys.
24 AR 2:746; *see generally* AR 2:766-802. However, the EIS acknowledged that some unknown
25 portion of the baseline consisted of unauthorized buoys, AR 2:746, and more recently, TRPA has
26 estimated that over 1200 buoys already existing on the Lake have never been issued a permit by
27 TRPA or a state or federal agency, Att. 5 at 235 (4,477 – 3,231 = 1,246). While TRPA plans to
28 remove these unauthorized buoys, *id.* at 236, 237, the Shorezone Amendments effectively

1 “grandfather” in the *number* of unauthorized buoys (as new, legal buoys will take the place of those
2 removed) without the EIS ever having studied the impacts of this number of buoys, since the EIS
3 considered them to be part of the baseline. Thus, the impacts of the actual number of buoys
4 authorized by the Amendments (over 1,200 plus 1,862, or approximately 3100) have never been
5 studied, in violation of the Compact’s mandate to study the project’s “significant environmental
6 effects.” See AR 5:3106 (Lahontan RWQCB recommending EIS study effects of unpermitted
7 buoys).

8 Despite these deficiencies in the public process and the Amendments, TRPA’s Board made
9 findings that the Amendments’ significant effects, including impacts on water quality, air quality,
10 recreational access, and scenic resources, were mitigated to less than significant levels and certified
11 the EIS. AR 1:1, 19-20. It also made findings that the “Regional Plan and all of its elements, as
12 implemented through the Code, Rules and other TRPA plans and programs, as amended [by the
13 Shorezone Amendments], achieves and maintains the thresholds.” AR 1:1-2, 22. However, given
14 the inadequate and undefined mitigation measures relied upon and the failure to look at the full
15 impacts of the Amendments, these findings are arbitrary and capricious and not supported by
16 substantial evidence.⁴

17 Moreover, given that the Region is currently not in attainment with many of the thresholds,
18 and that the Amendments will only undermine their attainment, the findings that the Code, as
19 amended by the Shorezone Amendments, achieves and maintains the thresholds cannot credibly be
20 made. Since 1991, TRPA has conducted four comprehensive evaluations of whether each threshold
21 is being achieved and/or maintained, which it is required to do every five years. AR 11:7204-05;
22 Code § 32.8.A. The most recent threshold evaluation in 2006 reveals that 27 of 36 threshold
23 indicators are not in attainment status, including six of seven indicators for water quality (including
24 clarity), which have never been in attainment status; six of eight air quality standards; and all four
25 threshold standards for maintenance of scenic quality, which have never been in attainment status.

26 ⁴ The Board also made findings that the project “will not cause the thresholds to be exceeded,”
27 exceeds the strictest air and water quality standards applicable, “is consistent with and will not
28 adversely affect implementation of the Regional Plan,” and that the amendments “are consistent with
the Compact.” AR 1:21-22. For the same reasons, these findings are also unsupported by the
record.

1 AR 11:7207. It also indicates that the recreational access standard of “additional access,” is in
2 “jeopardy” of non-attainment. AR 12:7662.

3 Given these unsupported findings, on November 21, 2008, plaintiffs brought this action
4 against TRPA for unlawful approval of the Shorezone Amendments. Nevertheless, TRPA has
5 proceeded to implement aspects of the Shorezone Amendments that will only further undermine
6 threshold attainment and cause irreparable harm to the Lake and the Region. Specifically, pursuant
7 to the Amendments, TRPA has started the approval process for five new piers that are expected to be
8 issued permits this summer or fall. Att. 6 at 278.⁵ Upon approval, construction may begin shortly.
9 See Code § 54.11.E (only known seasonal restriction on construction applies to fish spawning
10 habitat, which applies May 1 – October 1; at least one of the piers is not in fish spawning habitat,
11 Att. 13 at 5. While it is unclear from the pier applications whether the other proposed piers are in
12 such areas, in any event their construction may begin as early as October 2.). In addition, TRPA
13 could begin identification and removal of illegal buoys this summer, Att. 5 at 233, 236, 237, and, as
14 unauthorized buoys are removed, may permit new buoys on a one-for-one basis, provided the total
15 number of moorings on the Lake does not exceed the 2004 “baseline” level of 4,454 moorings,
16 Code § 52.4.F(2)(c).⁶ Further, TRPA may accept applications for new boat lifts, ramps, and slips at
17 any time, allowing their placement within the Lake during the pendency of this lawsuit. *Compare*
18 Code §§ 52.5 and 54.5.A(2)(g) (no phasing for these structures) *with* § 52.4.F (phasing buoy
19 permitting). Finally, where indications as to TRPA’s timing for permitting such structures have been
20

21 ⁵ On May 15, 2009, TRPA selected 5 preliminary pier applications for further processing. See
22 *generally* Att. 10. All of the piers are multiple-use piers, *id.*, and within scenic non-attainment areas,
23 Att. 11 at 2, Att. 12 at 2, Att. 13 at 2 (pier subject to non-attainment mitigation ratio), Att. 14 at 1,
24 Att. 15 at 2. Three of the piers are proposed to be the maximum length of 300 feet, and range in
25 width from 6 to 10 feet. Att. 11 at 5-6, Att. 12 at 2, Att. 13 at 1. The other two are approximately
26 160 feet long and six feet wide. Att. 14 at 2, 6; Att. 15 at 2. All of the piers are at least 10 feet wide
27 at the pierhead. Att. 11 at 6, Att. 12 at 2, Att. 13 at 1, Att. 14 at 6, Att. 15 at 2. Three of the piers
28 will contain two boat lifts each, which can add up to 348 sq. ft. of “visible mass” to the size of each
pier. Att. 11 at 7 (6000 lb and 12,000 lb); Att. 13 at 1 (same); Att. 14 at 2 (two 12,000 lb boat lifts);
see Code 54.5.A(2)(f). For at least two of the pier applications, each parcel for that application
already has a boat facility. Att. 11 at 1, 4 (8 moorings among four parcels); Att. 14 at 1, 6 (2 buoys
for each of 3 parcels). For another pier application involving 3 parcels, the pier will result in
relocation of 4 existing buoys lakeward of the pier. Att. 12 at 1, 2. The pier and the relocated 4
buoys will be shared among the three parcel owners. *Id.* at 2.

⁶ Plaintiffs have received inconsistent indications from TRPA as to when illegal buoy removal and
permitting of new buoys will occur. See Ex. A ¶¶ 3-5, Att. 2 at 2, Att. 4 at 2.

1 ambiguous or inconsistent, plaintiffs have sought clarification from TRPA and its counsel directly,
2 and a stipulation that no new structures will be permitted prior to the determination of the merits of
3 this case, but to no avail. Ex. A ¶¶ 3-5 & Atts. 2-4. Plaintiffs now seek preliminary relief enjoining
4 the approval, construction, or placement of any new boat facilities until the merits of this lawsuit are
5 resolved.

6 **ARGUMENT**

7 There are four factors that a district court must consider when deciding whether to grant a
8 preliminary injunction. “A plaintiff seeking a preliminary injunction must establish that he is [1]
9 likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of
10 preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the
11 public interest.” *Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)
12 (quoting *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008)). In *Winter*, the Supreme
13 Court raised the bar for establishing irreparable harm from a showing of mere possibility, which had
14 previously applied in the Ninth Circuit, to a showing of likelihood of irreparable harm.⁷

15 However, *Winter* did not disturb the Ninth Circuit’s alternative formulation of the test for
16 preliminary injunctive relief, the “sliding scale” approach, which requires that “serious questions
17 [going to the merits] are raised and the balance of hardships tips sharply in [the plaintiff’s] favor.”
18 *See Greater Yellowstone Coal. v. Timchak*, 2009 WL 971474, at *1 (9th Cir. 2009) (observing
19 viability of alternative formulation); *Save Strawberry Canyon I v. Dept. of Energy*, ---F. Supp.2d---,
20 2009 WL 723836, at *2 (N.D. Cal. 2009) (applying alternative formulation post-*Winter*); *Save*
21 *Strawberry Canyon II v. Dept. of Energy*, 2009 WL 109888, at *3 (N.D. Cal. 2009) (reconsidering
22 and upholding standard applied in *Strawberry I*). Thus, *Winter* “d[oes] not foreclose injunctive relief
23 where irreparable injury is imminent and manifest but where the plaintiff can only raise ‘serious
24 questions’ going to the merits but not a probability of success on the merits.” *Save Strawberry*
25 *Canyon II*, 2009 WL 109888, at *2.⁸

26
27 ⁷ *Winter* left intact the Ninth Circuit’s other three prongs for granting a preliminary injunction, and
the Ninth Circuit’s pre-*Winter* case law is still largely applicable here.

28 ⁸ Plaintiffs have standing to bring this action and to seek the preliminary relief they request, because:
(1) their members have standing to sue in their own right; (2) the interests at stake are germane to

1 **I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.**

2 Plaintiffs are likely to prevail on their claims that: (1) permitting new boat facilities will
3 have significant air and water quality impacts, which will not be adequately mitigated, and thus the
4 Amendments do not achieve or maintain the thresholds for these impacts; (2) permitting new piers
5 will have significant recreational and scenic impacts, which will not be adequately mitigated, and
6 thus the Shorezone Amendments do not achieve or maintain the recreational and scenic quality
7 thresholds; and (3) the EIS uses an improper baseline for the number of authorized buoys and thus
8 does not reveal the true extent of the Amendments' impacts.⁹ In all of these respects, the Shorezone
9 Amendments do not achieve or maintain the thresholds for various resources and thus were
10 unlawfully approved in violation of the Compact and its implementing Code of Ordinances.

11 **A. The Failure to Mitigate Air and Water Quality Impacts Precludes a Finding that the**
12 **Air and Water Quality Thresholds Will Be Achieved.**

13 **1. The undefined Blue Boating Program is not an adequate basis for**
14 **concluding that air and water quality impacts will be mitigated.**

15 The EIS improperly found that air and water quality impacts would be mitigated to a level of
16 insignificance. Article VII of the Compact requires TRPA to prepare and consider a "detailed" EIS
17 before approving or carrying out any project that may have a significant effect on the environment.
18 Art. VII(a)(2). The EIS must study "[t]he significant environmental impacts of the proposed
19 project." Art. VII(a)(2)(A). In addition, the EIS must set forth "[m]itigation measures which must
20 be implemented to *assure meeting standards of the region*." Art. VII(a)(2)(D) (emphasis added).
21 Further, before approving a project for which an EIS was prepared, the agency must make the

22 each organization's purpose; and (3) neither the claim asserted nor the relief requested requires their
23 members to participate directly in the lawsuit. *See Ecological Rights Found. v. Pacific Lumber Co.*,
24 230 F.3d 1141, 1147 (9th Cir. 2000); Exs. B-E (Pl. members' decls). Regarding element (1), a
25 member has standing in his own right if he has "[i] suffered an 'injury in fact' . . . [ii] the injury is
26 fairly traceable to the challenged action of the defendant; and . . . [iii] it is likely . . . that the injury
27 will be redressed by a favorable decision." *Id.* at 1147 (quoting *Friends of the Earth, Inc. v. Laidlaw*
28 *Env'tl. Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). In environmental cases, the injury-in-fact
requirement "is satisfied if an individual adequately shows that she has an aesthetic or recreational
interest in a particular place . . . and that interest is impaired by a defendant's conduct." *Id.*

Plaintiffs meet these requirements. *See* Exs. B-E.

⁹ Under the Compact, the applicable standard of review for these claims is "whether the act or
decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the
agency has failed to proceed in a manner required by law." Art. VI(j)(5).

1 following findings for each significant effect: “(1) Changes or alterations have been required in or
2 incorporated into such project which avoid or reduce the significant adverse environmental effects *to*
3 *a less significant level*; or (2) Specific considerations, such as economic, social or technical, make
4 infeasible the mitigation measures or project alternatives discussed in the [EIS] on the project.” Art.
5 VII(d)(1)-(2); Code § 5.8.D. (emphasis added). The EIS acknowledges significant air and water
6 quality impacts that will result from full implementation of the Shorezone Amendments, but
7 substantial evidence does not support findings that mitigation measures adopted will avoid or reduce
8 these effects “to a less significant level” or that they will “assure meeting standards of the region.”

9 The EIS admits that the Amendments, by allowing new boat facilities on the Lake, will result
10 in increased levels of air and water pollution, which could result in significant air and water quality
11 impacts. New boat facilities, which will increase boat storage on and access to the Lake, will induce
12 increased motorized boating, for an increase of 2,849.4 boat trips per year, resulting in 294,895 boat
13 trips per year at full implementation, 62,686 boat trips more than the current baseline. AR 2:773,
14 774, 775. Total boat launches per year would increase from 54,809 launches to 70,796 launches per
15 year at full implementation, 15,987 boat launches more than the baseline. AR 2:773. At full
16 buildout, the induced boat traffic would produce estimated additional boat emissions of:

- 17 • 177 tons of hydrocarbons (“HC”) and 92 pounds of polycyclic aromatic hydrocarbons
18 (“PAHs”) per year from increased operation of motorized watercraft and fueling
19 activities. AR 2:774, 775.
- 20 • 318 tons of nitrogen oxides (“NOx”) per year from increased operation of motorized
21 watercraft and trips to public facilities from automobiles. AR 2:774, 777.
- 22 • 7.8 tons of particulate matter (“PM”) per year from increased launches of watercraft
23 (direct water emissions only, not including atmospheric deposition). AR 2:774, 778.
- 24 • 4 tons of particulate matter from increased operation of motorcraft (atmospheric
25 deposition). AR 2:789.
- 26 • 400 tons of carbon monoxide (“CO”) per year from increased operations of motorized
27 watercraft. AR 2:790.

1 The EIS admits that “discharges of sediments, greases, and petroleum products from
2 increased boat launching would contribute to overall nutrient loading, which increases algal
3 productivity and creates turbidity in the littoral zone in violation of clarity thresholds.” AR 2:778.
4 The EIS also acknowledges that some portion of the NO_x emissions from boat exhaust deposit into
5 Lake Tahoe and that these emissions “could violate” TRPA’s thresholds and EPA’s Outstanding
6 National Resource Water (“ONRW”) antidegradation policy, as well as contribute to overall nutrient
7 loading and increase algal productivity, reducing water clarity. AR 2:777. Further, increased
8 discharge of petroleum products from operation of motorized watercraft and fueling activities “could
9 violate the TRPA water quality nondegradation standard, state drinking water quality standards for
10 maximum contaminant levels, and EPA’s ONRW antidegradation policy.” AR 2:775.

11 Moreover, the Final EIS concluded that these increased boat emissions would contribute to
12 degradation of the Region’s air quality. Because NO_x and HCs are precursors to ozone, the
13 increases in these emissions could lead to elevated ozone levels. AR 2:788, 790. Because TRPA’s
14 ozone threshold standards are exceeded every year, increases in NO_x and HCs would create a
15 significant impact. AR 2:788. In addition, because the CO standard has been exceeded in recent
16 years, increases in CO would also create a significant environmental impact. AR 2:790. Similarly,
17 although the EIS fails to acknowledge it, because California’s particulate matter 10 microns or less
18 (“PM₁₀”) standard has been exceeded in recent years, AR 11:7267, the increased PM₁₀ levels from
19 boat emissions would also create a significant impact, in addition to any increased emissions of
20 airborne particles that would result from increased land vehicle trips to public boat facilities (which
21 the EIS failed to quantify).

22 The EIS improperly concluded that these impacts would be reduced to less than significant
23 levels through the future adoption of a then (and still) unformulated and undefined Blue Boating
24 Program (“BBP”), the effectiveness of which was obviously not analyzed or quantified within the
25 EIS, given its inchoate nature. Thus, it is impossible to determine whether these water and air
26 quality impacts will be mitigated to a level of insignificance, and whether they will “assure meeting
27 standards of the Region,” based on a proposed mitigation program that has yet to be created and
28 adopted. Mitigation measures must “constitute an adequate buffer against the negative impacts that

1 may result from the authorized activity” and be “developed to a reasonable degree,” *Nat’l Parks &*
2 *Conservation Ass’n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (citation and quotation marks
3 omitted) – in this case, to the extent that the public would be “assured” that the measures would
4 achieve and maintain the thresholds. In contrast, “[a] perfunctory description, or mere listing of
5 mitigation measures, *without supporting analytical data*, is insufficient to support a finding of no
6 significant impact.” *Id.* (citations and quotation marks omitted; emphasis added); *see also Sierra*
7 *Club v. Bosworth*, 510 F.3d 1016, 1029 (9th Cir. 2007). “Broad generalizations and vague
8 references to mitigation measures” are inadequate. *Neighbors of Cuddy Mountain v. U.S. Forest*
9 *Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998).

10 The BBP is just such a listing of “broad generalizations and vague references to mitigation
11 measures,” and the EIS does not contain any analysis of their effectiveness in reducing the air and
12 water quality impacts of additional boat facilities in the Lake. *See* AR 2:765-802, 827-31. Neither
13 does it give “a reasoned explanation as to why an estimate [of their effectiveness] is not possible.”
14 *Neighbors*, 137 F.3d at 1381. For example, one component of the BBP is

15 [a] mitigation fee program which will utilize boat sticker funds to implement additional
16 pollution control measures. The program may include measures to reduce pollutants
17 from sources other than motorized watercraft, and shall be designed to reduce or offset
any increase in air and water emissions from motorized watercraft beyond the baseline
levels identified in the [EIS].

18 Code § 54.15.A(7). However, at the time the Shorezone Amendments were passed, the fees
19 themselves had yet to be established, let alone any specific pollution control measures, so it was
20 impossible for TRPA to find that feasible, effective measures had been adopted that would mitigate
21 otherwise significant air and water quality impacts to insignificance.¹⁰ Other general elements of the
22 BBP include strengthening regulations, such as engine tuning requirements “designed to minimize
23 engine emissions,” clean bilge water requirements, and sewage disposal requirements, but, again, the
24 actual requirements are not specified, and, thus, no “supporting analytical data” for their

25 ¹⁰ *See* AR 28:18006 (U.S. EPA: The EIS does not “quantify the effectiveness or adequacy of the
26 potential mitigation measures. Therefore, it is not possible to assess or determine whether they will
27 reduce or abate the pollutants. . . to ‘less than significant levels.’”); AR 28:18031 (Lahontan
28 RWQCB: “The success of many mitigation measures and monitoring programs appears to rely
solely on funding from the Boat Sticker Program, so it is important to include sufficient financial
detail to allow reviewers to determine if the Boat Sticker Program will generate sufficient revenue to
fund the programs.”)

effectiveness is available. See Code § 54.15.A(2), (4)-(5); AR 2:820-22, 830. Further, an “enforcement program” is required, but it is not even apparent if and how it will differ from TRPA’s current enforcement activities. See Code § 54.15.A(9); AR 2:830. Finally, the BBP intends to promote cleaner boating practices, through boater education and a program for self-certification of compliance with clean boating practices but provides no details. AR 2:828-29. Once again, the effectiveness of these vague intentions has not been, and could not rationally have been, addressed in the EIS.

This case bears a striking resemblance to *National Parks*, in which the Ninth Circuit struck down an Environmental Assessment (“EA”) that improperly concluded that mitigation measures would render insignificant the air pollution impacts from increased boat trips to Alaska’s Glacier Bay (thus avoiding full-blown review in an EIS), where the EA did not explain “how long any such reduction might take or how great a reduction might ultimately be accomplished.”¹¹ 241 F.3d at 735. The court concluded, “In short, there is no evidence that the mitigation measures would significantly combat the . . . effects of the increase in vessel traffic.” *Id.*; see also *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1085 (E.D. Cal. 2004) (rejecting “simply describ[ing] mitigation measures without further discussion regarding their efficacy”); *High Sierra Hikers Ass’n v. Weingardt*, 521 F. Supp. 2d 1065, 1087 (N.D. Cal. 2007) (holding that effectiveness of mitigation measures must be discussed). That is the case here.

Nor does the fact that TRPA plans to study and monitor the effect of its mitigation measures through an unformulated Adaptive Management Program (“AMP”) provide much comfort, as that program does not assure that any shortcomings in the BBP will be corrected. First, given that the BBP has yet to be formulated,¹² the AMP necessarily lacks specificity in what standards and

¹¹ NEPA case law regarding the sufficiency of mitigation measures described in a preliminary Environmental Assessment is persuasive authority in interpreting the degree of specificity and analysis required to support the adequacy of mitigation measures. This is so because under NEPA an agency may be excused from more detailed study of a project’s impacts in an EIS if “the mitigation measures [described in the EA] will render such impacts so minor as to not warrant an EIS.” *National Parks*, 241 F.3d at 734. Similarly, the Compact requires mitigation of significant impacts to less than significant levels for a TRPA EIS to pass muster. Art. VII (d)(2).

¹² The Shorezone Amendments deferred formulation and adoption of the BBP’s implementation plan until March 2009, Code § 54.15.B(1), and in March 2009, the Governing Board further deferred the formulation of many specifics of this plan until March 2010, see Att. 7 at 4-5 & Att. 8 at 136-37,

1 programs of the BBP it will evaluate, except that it will use water quality data provided by the
2 BBP’s monitoring program. See Code § 54.16.A. However, the BBP water quality monitoring plan
3 lacks specificity regarding the criteria the Lake must meet. As the Lahontan RWQCB noted, the
4 monitoring plan must identify “specific performance measures, criteria, or triggers.” AR 25:16374;
5 see also AR 26:16661 (AMP must include “measurable performance standards by which the success
6 of the mitigation measures can be determined.”) The Amendments also fail to commit to specifics
7 as to how, when, and where water quality monitoring will occur. (The BBP does not provide for any
8 air quality monitoring plan.)¹³

9 Second, the AMP does not identify what corrective actions will be taken when whatever
10 standards it monitors are violated, see AR 25:16374 (Lahontan RWQCB: “For each water quality
11 constituent, different criterion and the relevant responses or mitigation measures need to be
12 considered.”), nor assure that corrective action will be taken at all. The Ordinance only requires
13 TRPA to make *recommendations* to its Governing Board for corrective action if performance
14 standards are not met, which the Board is under no obligation to adopt. Code § 54.16.C; see
15 *Bosworth*, 510 F.3d at 1029 (potential mitigation measures that were not “require[d]” or
16 “prescribe[d]” to mitigate potential significant effects were inadequate). This clearly does not assure
17 that the Region’s standards will be met. In short, the EIS fails to “provide criteria for an ongoing
18 examination of [mitigation measures] or for taking any needed corrective action (except for the plan
19 to conduct ‘studies’).” *National Parks*, 241 F.3d at 734.

20 Ironically, TRPA’s monitoring proposal “shows that the information necessary to determine
21 the impact of any mitigation measures . . . may well be obtainable before any environmental injury
22 occurs.” *Id.* at 735. “[W]here significant environmental damage may occur to a treasured natural
23 resource, the studies must be conducted first, not afterwards.” *Id.* at 736. Given the lack of detail

24 140, 147-49.

25 ¹³ To the extent that the EIS seems to indicate that the AMP’s triggers or “thresholds for action” are
26 the legal standards that TRPA must already comply with, see AR 2:820-21, such standards are
27 improper, because they suggest that action will not be required until they are violated. See *Friends*
28 *of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1028, 1034 (9th Cir. 2008) (where the agency is
bound by a “nondegradation and enhancement policy,” “[a] standard must be chosen that does in fact
trigger management action before degradation occurs.”). Where the standards are already out of
attainment, they are meaningless and could allow further degradation to continue without any
corrective action. AR 25:16429 (Sierra Club 7/3/08).

1 and data about the mitigation measures and their effectiveness, plaintiffs are likely to prevail on their
2 claims that the water and air quality impacts from new boat facilities have not been mitigated to less
3 than significant levels by measures adopted prior to the approval of the Amendments and that
4 TRPA's finding to the contrary is invalid. See Compact art. VII(d)(2); Code § 5.8.D.

5 **2. The Shorezone Amendments fail to achieve the air and water quality**
6 **thresholds.**

7 As earlier noted, whenever TRPA approves amendments to its Code of Ordinances, it must
8 make findings that the regional plan as implemented by the Code as amended "achieves and
9 maintains the thresholds." Code § 6.5. See "Background," above, at 3. Because the significant air
10 and water quality impacts of new boat facilities are not adequately mitigated, the Shorezone
11 Amendments do not achieve the air and water quality thresholds and would only undermine the
12 thresholds. In addition, because TRPA is currently out of attainment for 6 out of 7 water quality
13 standards, including Lake Tahoe's two clarity thresholds, as well as 6 out of 8 air quality standards,
14 the finding that the Plan, as amended by the Shorezone Amendments, achieves and maintains these
15 thresholds defies logic and is simply indefensible. AR 11:7207.

16 Clarity loss in Lake Tahoe is caused by "accelerated input" of nutrients, *i.e.*, nitrogen and
17 phosphorus, and fine particles or "fine sediment" (particles 20 microns and less in diameter) due to
18 urbanization. AR 11:7313. "Currently, the principal sources of sediment and nutrient loading to
19 Lake Tahoe are stream flow, shoreline erosion, storm water/surface runoff, groundwater discharges,
20 atmospheric deposition [including from vehicle and motorized watercraft emissions], and incidental
21 waste discharges." AR 7:4045. The disturbance caused by these inputs "results in imbalances in the
22 lake's nutrient budget, accelerating increases in algal productivity." AR 11:7313. In turn, the
23 presence of algae in the water column "reduces clarity by mainly absorbing light, and to a lesser
24 extent scattering light." *Id.* Moreover, at least 60% of clarity loss may result from the accumulation
25 of small size particulate matter (< 20 µm diameter mineral sediments) in Lake Tahoe waters, as fine
26 particles efficiently scatter light. AR 11:7313-14. See also TRPA Answer to Pls.' Complaint (Doc.
27 21) at ¶¶ 2, 27 (admitting extent and causes of clarity decline).

1 TRPA's "deep water clarity" standard of a winter mean Secchi disk transparency, *i.e.*, the
2 maximum depth at which a standard-sized white disk can be seen from the water's surface, is not
3 being attained. AR 11:7322. For 2006, the winter mean Secchi disk transparency was 23.43 meters,
4 compared to the threshold standard of 33.4 meters. *Id.* The water quality standard for annual mean
5 phytoplankton primary productivity ("PPr"), a measure of algal productivity that relates to the clarity
6 of Lake Tahoe, is a maximum of 52 gmC/m²/yr. AR 11:7323. This standard is not being attained,
7 and the level of algal productivity is increasing. *Id.* In 2006, annual mean PPr measured 205.5
8 gmC/m²/yr, nearly four times the threshold standard. *Id.* The Lake's long-term rate of clarity
9 decline is an average of more than one foot per year, AR 7:4045, and the declining trend continues,
10 AR 11:7208.

11 Six of eight air quality standards are not in attainment status, including:

- 12 • The requirement of maintenance of carbon monoxide concentrations in the air at or
13 below 6.0 parts per million ("ppm") averaged over eight hours is not being achieved.
14 AR 11:7265.
- 15 • The threshold standard that ozone concentrations in the air shall not meet or exceed a
16 1-hour standard of 0.08 ppm is not being achieved, and the Region has exceeded
17 TRPA's standard for ozone for every threshold report to date. AR 11:7266.
- 18 • The region is not in compliance with the California 24-hour air quality standard for
19 inhalable particulates (PM 10) that particulate matter concentrations shall not exceed
20 50µg/m³. AR 11:7267.

21 Obviously, reversing these trends will require reducing emissions and "nutrient loading"
22 (such as deposition of NO_x). *See* AR 11:7337 (2006 Threshold Eval. stating that "reduction of algal
23 nutrient (nitrogen and phosphorus) loading to Lake Tahoe [is] projected to result in the reduction of
24 algal productivity to reach the Secchi depth standard"); AR 11:7323 ("load reduction strategies"
25 would improve clarity). As discussed above, the Shorezone Amendments will do the opposite.
26 Because additional emissions, induced by new boat facilities, will result in further declines in water
27 clarity and degradation of the Region's atmosphere, and because the BBP is not sufficiently defined
28 or evaluated as a means of effectively mitigating these impacts, TRPA arbitrarily concluded that the

Shorezone Amendments achieve and maintain the air and water quality thresholds, with no rational basis in substantial evidence in the record.

B. Inadequate Mitigation of Recreational Access Impacts Cannot Support a Finding that the Recreational Access Thresholds Will Be Achieved and Maintained.

1. The Lake Tahoe Public Access Fund and other proposed measures do not sufficiently mitigate the Amendments’ recreational impacts.

The EIS improperly concluded that recreational access impacts of the Shorezone Amendments would be mitigated to a less than significant level. The EIS on the Amendments acknowledges the potential significant recreational access impacts of the addition of new piers. “The construction of additional private piers in the Shorezone could create barriers to legal, lateral, public recreational access to the Lake. Restricting public access would be inconsistent with the TRPA Recreation Threshold and the Recreation Element of the Goals and Policies.” AR 2:783. Boat facilities would impede lateral pedestrian passage, as well as create obstacles to nearshore navigation for swimmers, canoes, kayaks, and top-line fisherman. AR 2:783, 785. The EIS also acknowledges that “to mitigate the creation of a pier structure, an equivalent amount should be removed.” AR 2:783.

However, the Lake Tahoe Public Access Fund (“LTPAF”), which is designed to provide a mitigation fee alternative to removal, falls far short of assuring the creation of equivalent recreational access. Under the LTPAF program, TRPA will assess a \$100,000 fee for each new pier and a \$20 per additional square foot fee for expansion of an existing pier. AR 2:783; Code § 54.13.A. Fees would be increased annually, “if appropriate, based on the consumer price index [“CPI”] for the region.” *Id.* The fees will be used to acquire or improve public access to Lake Tahoe “with priority to non-motorized recreational access.” *Id.*

The \$100,000 fee and yearly adjustments based on the CPI are inadequate to counteract the addition of a new pier. The fee is supposedly “based on a real-world estimation of the costs of *providing equivalent replacement* for recreation and public access” – the costs of physical removal of one pier, plus acquiring an easement. AR 2:784; AR 5:3645 (emphasis added). No evidence in the record, however, supports the assumption that pier owners will retire piers for this amount,

1 instead of the real estate value that a pier adds to lakefront property.¹⁴ On the contrary, the
2 California State Lands Commission commented that “neither the amount of funding to be so
3 provided, nor the proposed mechanism for disbursing it, appears adequate to achieve the desired
4 mitigation.” AR 26:16653. State Lands noted the fee is based on “the market derived real estate
5 values adjusted on the CPI for the next 19 years,” but because real estate values in the Tahoe area
6 have increased at a faster rate than the CPI, “a cash shortfall is likely to occur.” *Id.* Thus, fee
7 increases should be based on “the relevant local and regional construction costs and land values that
8 have a direct relationship to public access acquisitions and improvements.” AR 26:16559-60.

9 Further, the Amendments provide no standards to govern the types, locations, and sizes of
10 public access acquisitions or improvements that would be funded to mitigate the access impacts of a
11 new private pier by purportedly providing equivalent access. *See* Code § 54.13.A; AR 25:16505.
12 For example, the EIS states that the performance standards for the LTPAF are that it should maintain
13 “adequate” lateral passage of pedestrians along the Shorezone but does not define what constitutes
14 adequate lateral passage. AR 2:822.

15 Relatedly, no standards govern how existing public access will be preserved in areas where
16 new piers are built. Rather, the Amendments create a consultation process with State Lands that
17 attempts to foist responsibility upon that agency to determine whether “legal public access” under
18 California law exists where a new pier is built, but TRPA lacks authority to require that State Lands
19 participate in this consultation process. *See* Code at § 54.4.B(1).¹⁵ (The Amendments provide *no*
20 process to protect existing public access in Nevada.) Further, if State Lands fails to respond, the
21 Amendments absolve TRPA of any responsibility to protect legal public access, in violation of its
22 threshold duties, and the pier project in question may proceed. *Id.* All of these failings of the
23

24 ¹⁴ *See* AR 33:21177 (Sierra Club, 7/3/08) (“Until TRPA investigates the willingness of lakefront
25 property owners to sell their piers, for what price, and in which locations, there is no way to
26 conclude that the LTPAF will mitigate as expected. Chances are most owners will not remove a pier
27 that adds ~\$1 million-dollars of value to their property for 1/10th [sic] that amount.”)

28 ¹⁵ Section 54.4.B(1) states: “Prior to the approval of any project in shorezone of the State of
California that may adversely affect legal public access, TRPA shall consult with California State
Lands Commission to obtain the Commission’s determination whether legal public access exists
under California law. If TRPA does not receive timely written comment from the Commission after
providing notice of the proposed project, TRPA may approve the project without comment from
State Lands.”

1 Shorezone Amendments demonstrate that plaintiffs are likely to succeed in showing that the
2 Amendments do not adequately mitigate the recreational access impacts of new piers, and, thus, the
3 finding that recreational access impacts will be mitigated to less than significant levels is invalid.

4 **2. The Shorezone Amendments do not achieve and maintain the**
5 **recreational thresholds.**

6 Because significant impacts of the Shorezone Amendments to public recreational access will
7 not be mitigated, the Amendments plainly fail to achieve and maintain the recreational threshold.
8 Thus, TRPA’s finding that that “the Regional Plan and all of its elements, as implemented through
9 the Code, Rules and other TRPA plans and programs, as amended, achieves and maintains the
10 thresholds” is unsupported by evidence in the record. *See* Code § 6.5.

11 The EIS states that the recreational threshold “requires TRPA to enhance access to the Lake
12 Tahoe Shorezone.” AR 2:783. This statement, however, obscures a central component of the
13 recreational threshold: creating “additional access” to the Shorezone, beyond merely preserving and
14 improving existing access. TRPA’s recreational threshold policy states: “It shall be the policy of the
15 TRPA Governing Body in development of the Regional Plan to preserve and enhance the high-
16 quality recreational experience including preservation of high-quality undeveloped shorezone and
17 other natural areas. In development of the Regional Plan, the staff and Governing Body *shall*
18 *consider provisions for additional access, where lawful and feasible, to the shorezone and high-*
19 *quality undeveloped areas for low density recreational uses.”* AR 12:7656 (2006 Threshold Eval.);
20 AR 29:19193 (Resolution 87-11 adopting thresholds) (emphasis added). One measure for
21 achievement of this standard is “the provision of additional access to the lake and other natural
22 features by the general public [sic].” AR 12:7656 (2006 Threshold Eval.). *See also* AR 12:7673
23 (“The importance of public *land acquisition* to recreation opportunities cannot be overemphasized,
24 *especially for the shorezone.*” (emphasis added)).

25 As of the 2006 Threshold Evaluation, the additional access standard was determined to be in
26 attainment. AR 12:7660, 7662. However, the Evaluation concluded: “Maintenance of existing
27 access levels is not adequate for the future based upon new housing starts and visitation trends. To
28 remain in attainment, preservation of access and opportunities is *essential* and must be accompanied

1 by the creation of new or expanded opportunities.” AR 12:7662 (emphasis added). The Evaluation
2 also found that “political, financial and social pressures,” threaten attainment, including “competing
3 interests” between public access and other uses. *Id.* Tellingly, two interim 2006 targets related to
4 additional access had not been met: (1) by 2006, TRPA had failed to amend the Regional Plan to
5 “ensure preservation of existing legal public rights-of-way and easements which provide public
6 access to public lands, including Lake Tahoe” in order to “insure that recreation gains do not simply
7 offset losses,” AR 12:7661, 7676, and (2) TRPA did not meet its target of increasing its inventory of
8 Lake Tahoe’s shoreline in public ownership from the present 44% to 50% by 2007. AR 12:7661.
9 Indeed, only slight progress was made in achieving this target – less than a 1% increase in public
10 ownership of the shoreline was achieved. *Id.* The interim target has been carried over to 2011, but
11 this target is once again “in jeopardy of not being achieved if issues like land acquisition for
12 recreational purposes are not equitably addressed.” AR 12:7662.

13 Given the risk of non-attainment of the additional access standard, it is incredible that TRPA
14 found that the Shorezone Amendments would achieve and maintain the thresholds. Contrary to
15 TRPA’s mandate not just to preserve but to create additional public access to the Shorezone, the
16 Shorezone Amendments will significantly *reduce* public access by allowing an additional 128
17 private piers. Moreover, because these losses will not be adequately mitigated by the LTPAF
18 program, any outside gains TRPA makes in public access towards its interim target would “simply
19 offset [these] losses,” instead of actually resulting in additional access. Indeed, the Shorezone
20 Amendments are more likely to result in a *net loss* of public access, given TRPA’s limited prospects
21 for acquiring new shoreline. *See* AR 12:7661 (“Shoreline land acquisition costs and opportunities
22 make acquisition of significant amounts of new public shoreline a challenge.”)

23 Therefore, plaintiffs are likely to prevail on their claim that substantial evidence does not
24 support the required finding that the Tahoe Regional Plan, as amended by the Shorezone
25 Amendments, will achieve and maintain the recreational thresholds.
26
27
28

1 **C. The Finding that the Amendments Achieve and Maintain the Scenic Thresholds Is**
2 **Improper, Because Their Scenic Impacts Are Not Adequately Mitigated.**

3 **1. The Amendments do not adequately mitigate the scenic impacts of new**
4 **piers.**

5 The EIS improperly found that scenic impacts of the Amendments would be mitigated to a
6 level of insignificance. The EIS admits that additional piers would degrade views from the Lake
7 looking toward the shore (views within a “shoreline travel unit”); views of the Lake from roadways
8 (within a “roadway travel unit”); views from recreational areas looking toward the Lake; and
9 specific views (“scenic quality resources”) within both non-attainment and visually sensitive scenic
10 units. AR 2:779-82. But the mitigations proposed do not adequately offset the scenic impacts that
11 additional piers would create within these areas. The Shorezone Amendments rely in part on the
12 LTPAF to mitigate the scenic impacts of new piers. For the reasons described above that the LTPAF
13 does not adequately ensure that the addition of a new pier will be offset by the creation of equivalent
14 public access, the LTPAF also fails to ensure that impacts on scenic resources will be adequately
15 mitigated. The fees are inadequate, and no standards guide how the funds from the fees should be
16 applied, to ensure that equivalent “visible mass” within the Shorezone is acquired and removed. For
17 example, nothing requires retirement of a pier in a visually sensitive area to offset the addition of a
18 pier in a visually sensitive area. In sum, there is no rational basis for TRPA’s conclusion that the
19 mitigation it has approved will reduce the Amendments’ scenic impacts to a level of insignificance.¹⁶

20 **2. The Shorezone Amendments fail to achieve and maintain the scenic**
21 **thresholds.**

22 Because the mitigation measures for scenic impacts do not adequately mitigate impacts of
23 new piers, the Shorezone Amendments do not achieve and maintain the scenic thresholds. Indeed,
24 all of the scenic thresholds – travel route ratings (for shoreline and roadway travel units), scenic
25 quality, the standard for Lake views from public recreation and bike trail areas, and the standard for

25 ¹⁶ The Shorezone Amendments also require a 1:1 mitigation of “additional visible mass” (in square
26 feet) for piers in attainment areas, and a 1:1.5 mitigation of additional visible mass within non-
27 attainment areas. Code § 54.6.D(1). (“Visible mass” is “the area of the structure visible at a
28 distance of 300 feet from the new pier and from a composite of views.” AR 2:740.) However, if
visible mass offsets within the Shorezone project area are not available or feasible, visible mass may
be reduced in the shoreland, the area landward of the Shorezone. Code § 54.6.D(2)(a). But
shorezone and shoreland scenic visible mass are not visually equivalent: Shoreland visible mass is
not as conspicuous in Lake views as piers, which protrude from the land into the Lake.

community design – are in non-attainment status. AR 12:7549, 7552-53, 7555. This is in significant part due to the presence of existing shorezone structures which negatively affect threshold ratings.¹⁷

However, despite the non-attainment of the scenic quality thresholds caused in part by boat facilities, the Shorezone Amendments authorize a significant increase in man-made features within the Shorezone, including piers, but fail to adequately mitigate their scenic impacts. Thus, the Shorezone Amendments would undermine, not attain, the scenic thresholds, and plaintiffs are likely to prevail on their claim that they fail to achieve and maintain the scenic thresholds.

D. The EIS Inaccurately Described the Baseline Number of Buoys and the Total Buoys Authorized by the Shorezone Amendments and Thus Failed to Study the Impacts of the Actual Number of Buoys Authorized.

The EIS failed to set the proper baseline regarding the number of existing buoys lawfully on the Lake when it included unauthorized buoys within that baseline. That is, by including unpermitted buoys in its count of existing buoys, and then making total existing buoys the measure of the base number of buoys that will be allowed on the Lake in the future, the Amendments significantly increased the number of buoys to be legally permitted on the Lake. It did so without having analyzed the impacts of adding to the base number of buoys allowed a large number of buoys currently on the Lake without legal authority (and which could be ordered removed). Thus, the actual impact of the Shorezone Amendments is much greater than the EIS reveals. This belies the Compact threshold findings that the Shorezone Amendments achieve and maintain the thresholds.

Under NEPA, the proper baseline (or “no action alternative”) for updating a land management plan is “‘no change’ from current management direction or level of management intensity.” Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981) (codified at 40 C.F.R. pts. 1500 *et seq.*). However, in preparing an

¹⁷ See AR 12:7606 (2006 Threshold Eval.) (noting that reduction in travel route rating resulted from “clutter and scale of boat storage” in shoreline unit “and the high density of structures at the south end of the unit.”); AR 12:7607 (noting that “[a]dditional clutter along the shoreline from added piers (or extensions) and clutter on piers, have contributed to the degradation” of travel route rating); AR 12:7608 (“The man-made features subcomponent has been reduced due to additional development along the shoreline of piers and pier extensions.”); AR 12:7609 (“The low man-made features rating reflects, in part, the number of boats and beach equipment clutter found along the beach throughout this unit.”); AR 12:7610 (“Piers with boatlifts are noticeable. These features combine with the past development practices to reduce the score for manmade features.”); AR 12:7615 (noting that “larger buoy field” creates problems with “intactness” of scenic view); AR 12:7610 (noting that piers and boatlifts cause “distractions”).

1 EIS for a management plan, an agency may not “predetermine” an acceptable level of use or activity
2 by including within the environmental baseline existing but unauthorized uses or activities that are to
3 be authorized by the project under consideration. *See Friends of Yosemite Valley v. Scarlett*, 439 F.
4 Supp. 2d 1074, 1104-1105 (E.D. Cal. 2006) (holding “no action” alternative improperly included
5 already-occurring activities that had been invalidated), *aff’d*, 520 F.3d 1024 (9th Cir. 2008). This is
6 because a baseline would be “meaningless if it assumes the existence of the very plan being
7 proposed.” *See Friends*, 439 F. Supp. 2d at 1105. *Cf. Center for Biological Diversity v. Bureau of*
8 *Land Mgmt.*, 422 F. Supp. 2d 1115, 1158 (baseline properly excluded management that “did not
9 proceed through a typical land use planning process”).

10 Here, the EIS improperly adopted a baseline of 4,454 buoys, although an estimated 1,246 of
11 these buoys have never obtained a permit from TRPA or any state or federal permitting authority.
12 Att. 5 at 235 (4,477 – 3,231 = 1,246). The EIS then measured the impacts of the Shorezone
13 Amendments from this baseline and concluded that an additional 1,862 buoys would be allowed (for
14 a total of 6,316 buoys). *See generally* AR 2:766-802. Now, as illegal buoys are removed (which
15 TRPA plans to begin this year, Att. 5 at 233, 236, 237; *see* n.6 above), new buoys could be allowed
16 to take the place of those removed, provided that the total number of buoys does not exceed 4,454.
17 *See* Code § 54.4.F(2)(C). Thus, the Shorezone Amendments actually authorize 3,108 new buoys –
18 the 1,246 existing but unauthorized buoys plus 1,862 more buoys – but the EIS fails to acknowledge
19 this and both predetermines approval of 40% of the total number of new buoys the Amendments will
20 allow and underestimates the Amendments’ impacts in doing so.

21 In *Friends*, the EIS prepared under NEPA included in the baseline “no action alternative”
22 levels of use for a recreational area that had been authorized under a management plan invalidated
23 by the Ninth Circuit. 439 F. Supp. 2d at 1104-1105. The district court found that where the entire
24 management plan had been invalidated, and thus certain elements of the plan authorizing those
25 levels of use had been invalidated (even though not specifically challenged in the prior litigation), “it
26 was thus improper for [the agency] to refer those elements as part of the status quo at the time the no
27 action alternative was presented to the public,” even though those levels of use were already part of
28 the status quo. *Id.* at 1105. The court reasoned, “A no action alternative in an EIS is meaningless if

1 it assumes the existence of the very plan being proposed,” *id.*, and the Ninth Circuit affirmed this
2 reasoning, *Friends*, 520 F.3d at 1037-38. Here, the baseline assumes the existence of the plan being
3 proposed – over 1200 new buoys will be legally permitted on the Lake, in addition to 1,862 new
4 buoys acknowledged in the EIS – and thus “predetermines” the addition of these new buoys.

5 Moreover, TRPA cannot rely upon its own past failures in enforcement to mask the effect of
6 its proposed action. For baseline purposes, “use of existing degraded [environmental] conditions
7 brought on by the [management agency’s] refusal to enforce its own rules is contrary to the law.”
8 *See Swan View Coal. v. Barbouletos*, 2008 WL 5682094, at *16 (D. Mont. 2008) (setting aside
9 biological opinion that improperly included illegal springtime snowmobile use within baseline,
10 caused by agency’s failure to enforce its own prohibition on such use). Otherwise, an agency could
11 mask the actual effect of its management decisions. *See id.* at *15 (“To analogize, if the posted
12 speed limit is sixty miles per hour, but the state has always allowed drivers to travel at seventy miles
13 per hour, the state cannot raise the speed limit to sixty-five miles per hour and claim that the law
14 now makes the roads more safe.”) Here, TRPA has had the long-standing authority and the duty to
15 enforce the prohibition against unpermitted buoys but has simply failed to do so.¹⁸ In the meantime,
16 the number of buoys on the Lake has steadily increased, by over 1000 buoys within a decade - from
17 3,398 in 1995 to 4,477 in 2006, Att. 5 at 235, a number of which are unauthorized. *See id.* at 234
18 (stating that “there has been a trend for an increasing number of buoys on Lake Tahoe. Some of
19 these buoys are permitted and some are not.”) It cannot be that by failing to enforce its own rules,
20 TRPA gets a pass from studying the effects of authorizing more than 1200 buoys and the cumulative
21 impacts of the total number of new buoys authorized by the Amendments.

22 Given that TRPA failed to set the proper baseline for buoys, plaintiffs are likely to prevail on
23 their claims that the impacts of the number of unauthorized buoys have not been properly studied in
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25 ¹⁸ *See* Att. 9, Code § 52.3.J, *repealed* Oct. 22, 2008 (“Mooring buoys . . . that have not received a
26 permit from TRPA, shall be removed or modified and have a permit issued by TRPA within two
27 years from the date of notice [of the requirement to obtain a TRPA permit.]”); Att. 9, Code §
28 54.6.A(5), *repealed* Oct. 22, 2008 (“Mooring buoys shall display a TRPA Buoy Identification Tag at
all times.”); Compact Art. VI(j) & (j)(3) (empowering agency to bring legal actions alleging a
violation of an ordinance or regulation of the agency); Art. VI(k)(empowering agency to monitor
compliance with ordinances, and bring enforcement actions to insure compliance); Art. VI(l)
(specifying fines for violations of agency’s ordinances).

1 the EIS and that substantial evidence does not support that their impacts will be adequately
2 mitigated.

3 **II. APPROVAL OF NEW PIERS AND BUOYS WILL IRREPARABLY HARM**
4 **PLAINTIFFS' USE AND ENJOYMENT OF LAKE TAHOE.**

5 **A. The Approval of New Piers Will Cause Plaintiffs Irreparable Harm.**

6 In the absence of preliminary relief, plaintiffs' and their members' interests in use and
7 enjoyment of Lake Tahoe are likely to be irreparably harmed. "Environmental injury, by its nature,
8 can seldom be adequately remedied by money damages and is often permanent or at least of long
9 duration, *i.e.* irreparable." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005)
10 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)) (internal alterations
11 omitted). "When the proposed project may significantly degrade some human environmental factor,
12 injunctive relief is appropriate." *National Parks*, 241 F.3d at 737 (citation, internal quotation marks
13 omitted). Here, the approval and construction of new piers within Lake Tahoe would cause
14 irreparable injury to plaintiffs' interests in several ways, including by causing further declines in
15 Lake Tahoe's clarity, degradation of the Region's air quality, impairment of scenic views of the
16 Lake's shoreline, and increased obstacles to recreational access within the Shorezone.

17 Here, as the EIS admits, additional piers placed in the Lake will result in increased motorized
18 boating emissions that contribute to clarity loss, likely resulting in further declines in clarity. *See*
19 AR 2:777-78; section I(A)(2) above at 10, 14; TRPA Answer (Doc. 21) at ¶ 26 (admitting that
20 Lake's conditions are "fragile" and that "accelerated algal growth can be induced by small
21 incremental additions of nutrients to the Lake"). Further, the damage done by these emissions would
22 be of permanent or long duration. The Lake has already lost over 30% of its clarity since 1968, AR
23 11:7313, and restoration of its former clarity levels has proven extremely difficult. *See* AR 11:7324,
24 (2006 Threshold Eval.) (attainment of the PPr standard "may not be possible"); AR 11:7323 (some
25 modeling suggests that attainment of Secchi depth standard would take at least twenty years using "a
26 combination of load reduction strategies"); AR 11:7349 (lake will not be in attainment with Secchi
27 depth threshold "for many years"); AR 11:7353 ("Attainment [of PPr] will be difficult due to the
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1 complexity of lake chemistry, and the slow response time of the lake.”). This is in part due to the
2 Lake’s natural features. As the EIS explains:

3 Lake Tahoe does not benefit from a large annual flushing action of precipitation and
4 runoff that benefits other bodies of water. Outflows from Lake Tahoe represent a
5 minimal loss of nutrients and sediments in the overall nutrient budget. The extremely
6 large ratio of Lake volume to outflow volume means that water, sediments, and
7 nutrients have an extremely long residence time in the Lake. A typical drop of water
is estimated to reside in Lake Tahoe for 700 years. With this remarkable residence
time, any flow or other contributions that enter Lake Tahoe stay there either in
solution, or in the Lake’s bottom sediments In many respects, Lake Tahoe
behaves like a sink, collecting sediments and nutrients with few means of removal.

8 AR 7:4040.

9 Moreover, because new piers would actually be added prior to the implementation of the
10 Blue Boating Program, these impacts would occur with no mitigation. *See California ex. rel. Van*
11 *De Kamp v. TRPA* (“*Van De Kamp I*”), 766 F.2d 1308, 1316 (9th Cir. 1985) (affirming that there
12 was irreparable harm where amended Tahoe Regional Plan “will only contribute to deterioration of
13 the environmental quality of the region”). Similarly, irreparable harm is likely to result from boating
14 emissions that contribute to further degradation of the Region’s air quality, including HCs,
15 particulate matter, CO and NOx. *See* section I(A)(1) at 9-10 above. *See California ex. rel. Van De*
16 *Kamp v. TRPA* (“*Van De Kamp II*”), 766 F.2d 1316, 1319 (9th Cir. 1985) (finding irreparable harm
17 where project would increase nitrogen deposits to Lake Tahoe and reduce air quality).

18 The addition of new piers will also result in irreparable harm to Lake Tahoe’s scenic
19 character and recreational access. For example, the five new piers recently selected for further
20 approvals this year are all multiple-use piers, which can have a maximum length of 300 feet—the
21 length of a football field—and a maximum “visible mass” of 280 square feet. Code 54.5.A(2)(c)(ii),
22 (f); *see generally* Att. 10. Further, for multiple-use piers, “an additional 348 square feet may be
23 authorized to permit the inclusion of two low-level boat lifts.” Code 54.5.A(2)(f).¹⁹ Thus, the scenic
24 “footprints” of these piers have significant negative visual impacts, as well as the adverse impacts to
25 pedestrian lateral access and nearshore navigation they would cause. *See* Ex. B, ¶¶ 11-12; Ex. C, ¶¶
26 5-8; Ex. E, ¶¶ 7, 8, 10-11 (Pls.’ member declarations). Given their permanency and the high cost of

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28 ¹⁹ Three of the piers selected for potential approval this year have a maximum length of 300 feet,
Att. 11 at 5, Att. 12 at 2, Att. 13 at 1, and three will contain two boat lifts, Att. 11 at 7 (6,000 lb and
12,000 lb boat lifts), Att. 13 at 1 (same), Att. 14 at 2 (two 12,000 lb boat lifts).

1 removal, new piers would cause irreparable damage to plaintiffs’ and their members’ interests in
2 enjoying the Lake’s scenic views and recreational access in the Shorezone areas where the piers are
3 located.

4 **B. The Approval of New Buoys and Other Boat Facilities Will Cause Irreparable Harm.**

5 For the same reasons that new piers would cause irreparable damage to Lake Tahoe’s clarity
6 and the Region’s air quality, as described above, so would new buoys, boat lifts, ramps, and slips. It
7 does not matter that new buoys would only be added up to the so-called baseline, as illegal buoys are
8 removed. Under “baseline” conditions, the thresholds are not in attainment, and illegal buoys are
9 partly responsible for the Lake’s clarity declines and the Region’s deteriorating air quality. Thus,
10 any addition of new buoys—within or over the baseline—would perpetuate the violation of the air
11 and water clarity thresholds and result in irreparable harm to the Lake’s clarity and air quality.

12 *California ex. rel. Van De Kamp v. TRPA* (“*Van de Kamp III*”), 766 F.2d 1319, 1323 (9th Cir.
13 1985) (“If the [challenged action] fails to ensure that the environmental thresholds are observed, the
14 environmental deterioration at which the Compact is directed will continue.”) Moreover, it matters
15 not that those buoys can eventually be removed. As long as the buoys are in place to facilitate
16 motorized boating, damage to the Lake will occur. Finally, permitting these boat facilities will also
17 irreparably harm the plaintiffs’ interests in the Lake’s scenic and recreational access values. More
18 boat facilities within the Shorezone will further impede nearshore recreational access to the
19 Shorezone, *see* Ex. B at ¶¶ 9-12, Ex. E at ¶ 8, AR 2:783, 785, while also degrading views of the
20 shoreline, *see* n.17 above (noting 2006 Threshold Evaluation’s observations that man-made
21 structures within Shorezone undermine scenic thresholds), Ex. B at ¶ 11, Ex. C at ¶ 5, Ex. E at ¶ 10.

22 **III. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN FAVOR OF PLAINTIFFS.**

23 When environmental injury is sufficiently likely, the balance of harms will usually favor the
24 issuance of an injunction to protect the environment. *Save Our Sonoran*, 408 F.3d at 1124. No
25 appreciable harm would occur to TRPA from the issuance of an injunction against approval of new
26 boat facilities during the pendency of this case. While TRPA might not receive some revenue from
27 new buoy registration fees intended to fund its buoy enforcement activities, it can continue to collect
28 fees for buoys already on the Lake that have been previously issued a permit. Overall, the

1 irreversible harm that will occur to the Lake by allowing new boat facilities to be put in place far
2 outweighs any minor inconvenience that TRPA might experience from a relatively short delay in its
3 ability to issue boat facility permits or otherwise authorize or carry out the construction or placement
4 of new boat facilities pursuant to the Amendments. Thus, the balance of hardships clearly supports
5 granting plaintiffs the injunction they seek.

6 **IV. THE PUBLIC INTEREST IN PRESERVING LAKE TAHOE FAVORS ISSUING A**
7 **PRELIMINARY INJUNCTION.**

8 “The preservation of our environment . . . is clearly in the public interest.” *See Earth Island*
9 *Inst. v. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006). The special public concern for Lake
10 Tahoe’s preservation is manifest in the bi-state compact between California and Nevada, approved
11 by Congress, to cooperatively manage the Lake to protect this recognized national treasure. *Van De*
12 *Kamp III*, 766 F.2d at 1324 (holding that public interest “strongly” supported enjoining shorezone
13 construction); Compact, art. I(a)(3) (“The region exhibits unique environmental and ecological
14 values which are irreplaceable.”) On the other hand, a modest delay in permitting, constructing, or
15 placing new private-use boat facilities within the Lake would cause no harm to the public at large.
16 The public interest therefore weighs heavily in favor of an injunction against the permitting of new
17 boat facilities until a decision is reached on the merits of whether the Shorezone Amendments,
18 which authorize these facilities, were lawfully enacted in proper compliance with the provisions of
19 the Compact intended to preserve and protect the environment of Lake Tahoe.

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1 **CONCLUSION**

2 For the foregoing reasons, plaintiffs respectfully request this Court to issue a preliminary
3 injunction against the permitting, construction, and/or placement of any new boat facilities within
4 Lake Tahoe pursuant to the Shorezone Amendments pending a resolution of the merits of this case.
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6 Respectfully submitted,
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8 DATED: July 1, 2009

/s/ Wendy S. Park

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Earthjustice

10 ***Counsel for Plaintiffs League to Save Lake Tahoe &***
11 ***Sierra Club***
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