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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SIERRA CLUB and FRIENDS OF THE WEST SHORE, NO. CIV. 2:12-0044 WBS CKD

Plaintiffs,

MEMORANDUM AND ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

v.

TAHOE REGIONAL PLANNING AGENCY,
COUNTY OF PLACER, and BOARD OF
SUPERVISORS OF THE COUNTY OF
PLACER,

Defendants.

HOMEWOOD VILLAGE RESORTS, LLC,
and JMA VENTURES, LLC,

Defendants and Real
Parties in Interest.

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Plaintiffs Sierra Club and Friends of the West Shore
("FOWS") brought this action against defendants the County of
Placer, the Board of Supervisors of the County of Placer
("County"), the Tahoe Regional Planning Agency ("TRPA"), Homewood

1 Village Resorts, LLC, and JMA Ventures, LLC (collectively,
2 "defendants"), alleging violations of the California
3 Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 21000-
4 21176 and the Tahoe Regional Planning Compact ("Compact"), Pub.
5 L. No. 96-551, 94 Stat. 3233 (1980); Cal. Gov't Code § 66801 et
6 seq.; Nev. Rev. Stat. § 277.200 et seq. Plaintiffs' allegations
7 pertain to TRPA and the County's approval of the Homewood Ski
8 Area Master Plan (the "Project"), which allows for the expansion
9 of the Homewood Mountain Resort in Homewood, California.
10 Presently before the court are plaintiffs' motion for summary
11 judgment and defendants' cross-motions for summary judgment
12 pursuant to Federal Rule of Civil Procedure 56.

13 I. Introduction and Facts

14 A. Compact and TRPA's Regulation

15 The Lake Tahoe Region ("Region") is located on the
16 California-Nevada border and comprises about 501 square miles,
17 including the waters of Lake Tahoe, which cover 191 square
18 miles.¹ (RP at i.) The primary focus of environmental
19 regulation in the Region is to protect the exceptional water
20 clarity of the lake. Id. Homewood is a town on the lake's west
21 shore and lies within Placer County, California.

22 In 1968, California and Nevada entered into the
23 Compact, which was approved by Congress in 1969. League to Save
24 Lake Tahoe v. Tahoe Reg'l Planning Agency, 739 F. Supp. 2d 1260,
25 1265 (E.D. Cal. 2010) ("League") (Karlton, J.), aff'd in part,
26 vacated in part, remanded, 469 F. App'x 621 (9th Cir. 2012). The

27
28 ¹ The Regional Plan, (Administrative Record ("AR") 13760-696), is cited as "RP at [internal page number]."

1 Compact guides all planning and development in the Region and was
2 amended in 1980 to direct TRPA, the agency it created, "to
3 establish environmental threshold carrying capacities" for the
4 Region. (Compl. Ex. A ("Compact") art. I(b) (Docket No. 1).) The
5 "environmental threshold carrying capacities" are environmental
6 standards "necessary to maintain a significant scenic,
7 recreational, educational, scientific or natural value of the
8 region or to maintain public health and safety within the region"
9 and "shall include but not be limited to standards for air
10 quality, water quality, soil conservation, vegetation
11 preservation and noise." (Id. art. II(i).) TRPA has adopted
12 thirty-six threshold standards, including standards for water
13 quality, air quality, noise, and scenic quality. (See
14 Administrative Record ("AR") 12879 (TRPA Resolution adopting
15 thresholds).)

16 The Compact also required TRPA "to adopt and enforce a
17 regional plan and implementing ordinances which will achieve and
18 maintain [the thresholds] while providing opportunities for
19 orderly growth and development consistent with such capacities."
20 (Compact art. I(b).) In 1987, TRPA adopted the Regional Plan,
21 which describes the needs and goals of the Region and provides
22 policies to guide action affecting the Region's resources. (RP
23 at iii.) The Regional Plan is implemented by the Code of
24 Ordinances and the Rules of Procedure promulgated by TRPA. See
25 Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l
26 Planning Agency, 311 F. Supp. 2d 972, 979-80 (D. Nev. 2004).

27 TRPA also has regulatory authority over specific
28 projects. For each project that may have a significant effect on

1 the environment, TRPA must adopt findings that the project will
2 not interfere with implementation of the Regional Plan or cause
3 the thresholds to be exceeded. (Compact art. V(g).) TRPA must
4 also prepare an environmental impact statement ("EIS") for the
5 project, similar to that required by CEQA, identifying the
6 project's significant environmental impacts, the impacts that
7 cannot be avoided if the project is implemented, alternatives to
8 the project, and mitigation measures that must be implemented to
9 assure meeting the standards of the region, among other things.
10 (Id. art. VII(a) (2) (A)-(D).)

11 Changes to TRPA's implementing documents require
12 particular findings. When TRPA amends the Regional Plan, it must
13 find "that the Regional Plan, as amended, achieves and maintains
14 the thresholds."² (Park Decl. Ex. 1 ("Code") § 6.4 (Docket No.
15 40).) Likewise, when it amends the Code, it must find that "the
16 Regional Plan, and all of its elements, as implemented through
17 the Code, Rules, and other TRPA plans and programs, as amended,
18 achieves and maintains the thresholds." Id. § 6.5.

19 B. Homewood Project

20 Homewood was developed in about 1900 as a vacation
21 resort. (AR 3105.) It is mainly a residential town, with only
22 906 residents in 2004. (Id. at 3005, 3119.) The Homewood
23 Mountain Resort ("Resort" or "HMR") opened in 1962 and is the
24 largest tourism feature in the town. (Id. at 3119, 12733.) It
25 has four main chairlifts and two distinct lodge areas, the South
26 Base and North Base. (Id. at 7351.) It is primarily a "day ski"

27
28 ² The court cites to the Code in effect at the time of
the Project approvals.

1 area because it has no overnight accommodations. (Id. at 40478.)

2 In 2006 and 2007, the owners of the resort, JMA
3 Ventures and Homewood Village Resorts LLC (collectively, "JMA"),
4 proposed the Project, a planned expansion of the Resort from
5 25,000 square feet to over one million square feet that would add
6 325 new residential and tourist accommodation units to the
7 surrounding Homewood community. (Id. at 2691-92, 3481.) The
8 Project is intended to update the Resort's ski facilities and
9 bring new development rights, including commercial floor area,
10 residential units, and tourist accommodation units, to the
11 Project area, which currently has no residential or tourist
12 accommodation units. (Id. at 3119.) The Resort is currently
13 operating at a loss, and the Project is also designed to generate
14 enough revenue to fund the environmental benefits the Project
15 will bring and ensure its continued economic viability. (Id. at
16 2749, 18968.)

17 In February 2008, TRPA's Governing Board accepted the
18 Project into the "Community Enhancement Program" ("CEP"), which
19 was created to provide incentives to developers to create "mixed-
20 use, transit-orientated development" in the Region. (Id. at
21 7351.) It grants projects development rights--bonus commercial
22 floor area allocations and bonus tourist accommodation units
23 ("TAUs")--from a pool reserved for projects that provide a
24 "substantial environmental benefit" or "mitigation in excess" of
25 legal requirements.³ See Code §§ 33.3.D(3)(C)(ii), 33.4.A(3).

26
27 ³ "Additional" TAUs are any TAUs created after 1987; they
28 require an allocation from TRPA. Code § 33.4.A. For projects
meeting certain criteria, "bonus" TAUs are awarded by TRPA when

1 For the Project to participate in this program, TRPA adopted a
2 resolution listing the minimum requirements it must meet. (AR
3 2680.) The benefits the Project will provide include water
4 quality improvements, retirement of sensitive lands, and an
5 overall reduction in land coverage. (Id. at 3920; see also AR
6 2977-79 (noting other Project benefits).)

7 To meet the environmental review requirements of both
8 CEQA and the Compact, the County and TRPA jointly issued the
9 draft environmental impact report-environmental impact statement
10 ("EIR-EIS") in January 2011. (Id. at 239.) The draft studied
11 the proposed Project and five alternatives, including a "reduced
12 project alternative," which proposed a fifteen percent reduction
13 in development for a total of 297 residential and tourist
14 accommodation units. (Id. at 268-70.) The proposed project
15 required several land-use planning amendments to the Regional
16 Plan, Code, and Plan Area Statements ("PASs").⁴ These amendments
17 are considered part of the proposed project and were analyzed
18 during the Project's environmental review. (See id. at 3926.)
19 They include amendments to the Regional Plan and to the Code to
20 remove the requirement that additional TAUs in a ski area be
21 allocated only under an adopted community plan, (id. at 36-61);
22 amendments to several PASs for the Resort to expand its urban
23 boundary, (id. at 358, 540-41); and additional Code amendments to
24 allow additional height and groundwater interception for below-

25 _____
26 at least one existing TAU is transferred for each TAU bonus unit
27 received. Id. § 35.3.

28 ⁴ Note that the Project entailed a new ski area master
plan, which is itself an amendment to the Regional Plan.

1 grade parking in the proposed project's areas, (id. at 360-61).⁵

2 In October 2011, TRPA and the County issued the final
3 EIR-EIS. (Id. at 2675-7333.) It modified the proposed project,
4 "Alternative 1A," to meet concerns raised during the comment
5 period. (Id. at 2756.) The same amendments remained necessary.
6 (Id. at 2788-89.) The EIR-EIS found that neither the reduced
7 alternative (Alternative 6), nor any smaller project, would
8 produce enough revenue to support the Project's proposed
9 environmental improvements and ensure the continued viability of
10 the ski operations. (Id. at 326.) Later in October, the County
11 approved the Project and the EIR-EIS. (Id. at 9236, 9245.)
12 Plaintiffs appealed both. (Id. at 8311.) The County denied the
13 appeal and certified the EIR-EIS. (Id. at 41-42.) On December
14 14, 2011, TRPA held a hearing on the Project. (TRPA
15 Administrative Record ("TAR") at 205-07.) It certified the EIR-
16 EIS, approved the amendments, and approved the Project. (Id. at
17 1017-21.)

18 II. Legal Standard

19 Although the parties bring cross-motions for summary
20 judgment, this is a record-review case and there are no material
21 facts in dispute.⁶ The ordinary standards for summary judgment
22

23 ⁵ The Regional Plan consists of the "Goals and Policies"
24 document and the Code. For ease, amendments to the "Goals and
25 Policies" are referred to as amendments to the Regional Plan and
amendments to the Code are referred to as such.

26 ⁶ Defendants request that the court take judicial notice
27 of the final 2011 Threshold Evaluation Report. (Def.'s Req. for
28 Judicial Notice Ex. A (Docket No. 58).) Plaintiffs object to
this request. (Pls.' Obj. to Req. for Judicial Notice (Docket
No. 63).) Defendants suggest that the court consider this
exhibit as indicating the truth or falsity of agency predictions.

1 are therefore not implicated. League, 739 F. Supp. 2d at 1267.
2 Instead, the court must determine whether either party is
3 entitled to judgment as a matter of law. Id.

4 A. CEQA

5 CEQA is "a comprehensive scheme designed to provide
6 long-term protection to the environment." Napa Citizens for
7 Honest Gov't v. Napa Cnty. Bd. of Supervisors, 91 Cal. App. 4th
8 342, 355 (2001). Its provisions are fleshed out by the
9 "Guidelines" set forth in the California Code of Regulations,
10 title 14, section 15000 et seq. ("Guidelines").⁷ CEQA is to be

11 _____
12 The court declines to adopt this rationale for considering this
13 exhibit. See League, 739 F. Supp. 2d at 1264 n.1. Defendants
14 also request that the court take judicial notice of ozone
15 monitoring reports from the U.S. Environmental Protection Agency.
16 (Defs.' Req. for Judicial Notice Ex. B (Docket No. 47-2).) The
17 court declines to consider this report for the same reason.
18 Relatedly, defendants request judicial notice of TRPA Resolution
19 2012-17 and Findings, which issued the final 2011 Threshold
20 Evaluation Report. (Defs.' Req. for Judicial Notice Ex. A
21 (Docket No. 66).) Because the court does not rely on the 2011
22 Threshold Evaluation Report, it need not decide whether to
23 consider this document, which is offered for the purpose of
24 urging the court to take judicial notice of the 2011 Threshold
25 Evaluation Report.

26 Defendants also request judicial notice of a state
27 court decision, California Clean Energy Committee v. County of
28 Placer, (Defs.' Req. for Judicial Notice Ex. 1 (Docket No. 59)),
and a TRPA staff report, September 2007 Staff Report to TRPA
Governing Board re: Amendment of Chapter 82, Water Quality
Mitigation and Amendment of Chapter 93, Traffic and Air Quality
Mitigation Program, to Raise the Mitigation Fees to Reflect
Increased Cost of Construction, (id. Ex. 2). Plaintiffs object
to both requests. (Pls.' Obj. to Req. for Judicial Notice.)
The court finds that judicial notice of the decision is proper
only for the fact of its existence. Cal. ex rel. RoNo, LLC v.
Altus Fin. S.A., 344 F.3d 920, 931 (9th Cir. 2003). The court
does not consider the TRPA report to reach its conclusions and
therefore need not determine whether it is properly subject to
judicial notice.

7 The California Supreme Court recently reaffirmed: "In
interpreting CEQA, we accord the Guidelines great weight except
where they are clearly unauthorized or erroneous." Vineyard Area

1 interpreted in a manner that gives the fullest possible
2 protection to the environment within the scope of the statutory
3 language. Citizens of Goleta Valley v. Bd. of Supervisors, 52
4 Cal. 3d 553, 563 (1990) ("Goleta I"). The environmental impact
5 report ("EIR") is described as the "heart of CEQA;" its purpose
6 is to inform the public and government officials of the
7 environmental consequences of decisions before they are made.
8 Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47
9 Cal. 3d 376, 392 (1988) ("Laurel Heights"). It requires project
10 proponents to "identify ways that environmental damage can be
11 avoided or significantly reduced" and assists to "[p]revent
12 significant, avoidable damage to the environment by requiring
13 changes in projects through the use of alternatives or mitigation
14 measures when the governmental agency finds the changes to be
15 feasible." Guidelines § 15002(a)(2)-(3).

16 Under CEQA, the court's review is generally limited to
17 ascertaining whether the public agency abused its discretion by
18 not proceeding as required by law or by making a determination
19 that is not supported by substantial evidence. Cal. Pub. Res.
20 Code §§ 21168, 21168.5; Californians for Alternatives to Toxics
21 v. Dep't of Food & Agric., 136 Cal. App. 4th 1, 12 (1st Dist.
22 2005) ("CATS"). Judicial review of these two kinds of error is
23 very different. Cal. Native Plant Soc. v. City of Santa Cruz,
24 177 Cal. App. 4th 957, 984 (6th Dist. 2009). Thus, "a reviewing
25 court must adjust its scrutiny to the nature of the alleged
26 defect, depending on whether the claim is predominantly one of
27 _____
28 Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,
40 Cal. 4th 412, 428 n.5 (2007).

1 improper procedure or a dispute over the facts.” Vineyard Area
2 Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,
3 40 Cal. 4th 412, 435 (2007) (“Vineyard Area Citizens”).

4 An agency fails to proceed in a manner required by law
5 when it fails to comply with the informational requirements of
6 CEQA. CATS, 136 Cal. App. 4th at 12. The court determines de
7 novo whether the agency used the correct procedures in taking the
8 challenged action. Cal. Native Plant Soc., 177 Cal. App. 4th at
9 984. “Substantial evidence” is “enough relevant information and
10 reasonable inferences from this information that a fair argument
11 can be made to support a conclusion, even though other
12 conclusions might also be reached.” Guidelines § 15384(a).
13 Under this standard, the court “accord[s] greater deference to
14 the agency’s substantive factual conclusions.” Vineyard Area
15 Citizens, 40 Cal. 4th at 435. It “`resolve[s] reasonable doubts
16 in favor of the administrative finding and decision.’” Laurel
17 Heights, 47 Cal. 3d at 393 (quoting Topanga Ass’n for a Scenic
18 Cmty. v. Cnty. of Los Angeles, 11 Cal. 3d 506, 514 (2d Dist.
19 1974)). It is not for the court to determine the correctness of
20 the EIR’s environmental conclusions, but rather only its
21 sufficiency as an informative document. Laurel Heights, 47 Cal.
22 3d at 392. Thus, the court cannot overturn an agency’s approval
23 of an EIR because an opposite conclusion would have been equally
24 or even more reasonable. CATS, 136 Cal. App. 4th at 645.

25 “An EIR will be found legally inadequate--and subject
26 to independent review for procedural error--where it omits
27 information that is both required by CEQA and necessary to
28 informed discussion.” Cal. Native Plant Soc., 177 Cal. App. 4th

1 at 986. In contrast, the usual dispute will "concern the amount
2 or type of information contained in the EIR, the scope of the
3 analysis, or the choice of methodology." Id. This is a factual
4 determination that receives substantial evidence review. San
5 Joaquin Raptor Rescue Ctr. v. Cnty. of Merced, 149 Cal. App. 4th
6 645, 654 (5th Dist. 2007).

7 CEQA's exhaustion requirement is characterized by
8 California courts as jurisdictional. Cal. Native Plant Soc. v.
9 City of Rancho Cordova, 172 Cal. App. 4th 603, 615 (3d Dist.
10 2009). Plaintiffs may not raise an issue in litigation unless it
11 was first presented to the agency. Cal. Pub. Res. Code §
12 21177(a). "[T]he objections must be sufficiently specific so
13 that the agency has the opportunity to evaluate and respond to
14 them." Tracy First v. City of Tracy, 177 Cal. App. 4th 912, 926
15 (3d Dist. 2009) (alteration in original) (internal quotation
16 marks and citation omitted). The burden is on plaintiffs to show
17 the issues they raise before the court were first raised before
18 the agency. Id.

19 B. Compact

20 Under the Compact, the applicable standard of review
21 for an agency's adjudicatory act or decision to approve or
22 disapprove a project is "prejudicial abuse of discretion," which
23 is established when "the agency has not proceeded in manner
24 required by law or if the act or decision of the agency was not
25 supported by substantial evidence in light of the whole record."
26 (Compact art. VI(j)(5).) In making this determination, the court
27 should "not exercise its independent judgment on evidence" but
28 rather "only determine whether the act or decision was supported

1 by substantial evidence." (Id.) The applicable standard of
2 review for a legislative act or decision of the agency extends
3 only to whether the act or decision was arbitrary, capricious, or
4 without substantial evidence or whether the agency failed to
5 proceed in a manner required by law. (Id.)

6 The Compact does not contain a statutory issue-
7 exhaustion requirement. It provides that "any aggrieved person
8 may file an action" that "alleg[es] noncompliance with the
9 provisions of this compact." (Id. art. VI(j)(3).) An
10 "'aggrieved person' means any person who has appeared . . .
11 before the agency at an appropriate administrative hearing to
12 register objection to the action which is being challenged . . .
13 ." (Id.) Cases finding a statutory issue-exhaustion requirement
14 rely on language that clearly demands objection to a particular
15 issue, rather than to the challenged action. See, e.g., Woelke &
16 Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665 (1982) (finding
17 an issue-exhaustion requirement where statutory language provided
18 that "'[n]o objection that has not been urged before the Board .
19 . . shall be considered by the court, unless the failure or
20 neglect to urge such objection shall be excused because of
21 extraordinary circumstances'" (quoting 29 U.S.C. § 160(e));
22 Wash. Ass'n for Television & Children v. FCC, 712 F.2d 677, 681
23 (D.C. Cir. 1983) (locating issue-exhaustion requirement in
24 statutory language providing that "'[t]he filing of a petition
25 for rehearing shall not be a condition precedent to judicial
26 review of [an FCC decision] except where the party seeking such
27 review . . . relies on questions of law or fact upon which the
28 Commission . . . has been afforded no opportunity to pass'"

1 (quoting 47 U.S.C. § 405 (second alteration in original)); see
2 also id. at 681 n.6 (collecting statutes).⁸ The Compact's
3 provision does not use words or phrases comparable to "issue" or
4 "grounds for objection," which would indicate that the statute
5 requires objection to a particular issue before the agency if
6 that issue is to be raised during litigation.

7 Instead, the Compact's provision regarding aggrieved
8 persons sets limitations on who may challenge TRPA's decisions
9 under the statute. See Dir., Office of Workers' Comp. Programs,
10 Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514
11 U.S. 122, 126 (1995) ("Newport News") ("The phrase 'person
12 adversely affected or aggrieved' is a term of art used in many
13 statutes to designate those who have standing to challenge or
14 appeal an agency decision, within the agency or before the
15 courts."). The judicial review provision of the Administrative
16 Procedure Act ("APA"), 5 U.S.C. § 702, entitles "[a] person . . .
17 adversely affected or aggrieved by agency action within the
18 meaning of a relevant statute" to judicial review. "In that
19 provision, the qualification 'within the meaning of a relevant
20 statute' is not an addition to what 'adversely affected or
21 aggrieved' alone conveys; but is rather an acknowledgment of the
22 fact that what constitutes adverse effect or aggrievement varies
23 from statute to statute." Newport News, 514 U.S. at 126. The

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25 ⁸ Defendants cite Unemployment Compensation Commission of
26 Alaska v. Aragon, 329 U.S. 143 (1946), as interpreting a statute
27 worded similarly to the Compact to require issue exhaustion.
28 However, the Supreme Court distinguished that case in Sims v.
Apfel, 530 U.S. 103 (2000), explaining that it "spoke favorably
of issue exhaustion in [Aragon], without relying on any statute
or regulation" Id. at 2085.

1 Compact appears to contemplate the model proposed by the APA; by
2 defining "aggrieved person," it delineates who has standing under
3 the statute.

4 Even where administrative issue exhaustion is not
5 statutorily required, a court may apply a "judicially imposed
6 issue-exhaustion requirement." Sims v. Apfel, 530 U.S. 103, 108
7 (2000).⁹ Whether a court should impose such a requirement
8 depends on the extent to which the particular administrative
9 proceeding is analogous to normal adversarial litigation. Id. at
10 109-10. However, even though there is no statutory issue
11 exhaustion requirement in the National Environmental Policy Act
12 ("NEPA") and it does not provide for any procedures akin to an
13 adversarial proceeding, the Supreme Court has imposed an issue-
14 exhaustion requirement for NEPA plaintiffs. Dep't of Transp. v.
15 Pub. Citizen, 541 U.S. 752, 764 (2004); see Lands Council v.
16 McNair, 629 F.3d 1070, 1076 (9th Cir. 2010) ("A party forfeits
17 arguments that are not raised during the administrative
18 process."); see also High Sierra Hikers Ass'n v. U.S. Forest
19 Serv., 436 F. Supp. 2d 1117, 1148 (E.D. Cal. 2006) (explaining
20 that Sims's test for applying a judicially imposed issue-
21 exhaustion requirement has been narrowed by Public Citizen). As
22 the Court explained, "[p]ersons challenging an agency's
23 compliance with NEPA must 'structure their participation so that

24
25 ⁹ Plaintiffs cite Montes v. Thornburgh, 919 F.2d 531 (9th
26 Cir. 1990), for a three-part test that a court may use to
27 determine if it should apply a prudential issue-exhaustion
28 requirement. However, the Montes test is for the exhaustion of
administrative remedies, rather than issue exhaustion. Id. at
537. Cf. Sims, 530 U.S. at 107 (explaining that the issue-
exhaustion requirement is not necessarily "an important
corollary" of any requirement of remedy exhaustion).

1 it . . . alerts the agency to the [parties'] position and
2 contentions,' in order to allow the agency to give the issue
3 meaningful consideration." Public Citizen, 541 U.S. at 764
4 (quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def.
5 Council, Inc., 435 U.S. 519, 543 (1978) (alterations in
6 original)).

7 The purpose of requiring issue exhaustion is to allow
8 "administrative agencies to utilize their expertise, correct any
9 mistakes, and avoid unnecessary judicial intervention in the
10 [administrative] process." Lands Council, 629 F.3d 1070 at 1076.
11 As explained, the Compact, like NEPA, does not have an issue-
12 exhaustion provision. However, as in the NEPA context, the
13 Compact requires the preparation of an EIS, which facilitates
14 public comments and responses by the agency. The EIR-EIS process
15 here provided plaintiffs with an opportunity to raise the issues
16 they considered relevant and allowed TRPA to give "meaningful
17 consideration" to those issues. There was an opportunity for
18 TRPA to use its expertise, correct its mistakes, and avoid otiose
19 judicial intervention. Because the Compact's EIS requirements
20 provide for public participation and agency response to the same
21 extent as does NEPA, and allow for the purposes of issue
22 exhaustion to be met, the court finds that an issue-exhaustion
23 requirement applies.¹⁰

24 III. Amendments to the Regional Plan and Code

25 A. Legal Standard

27 ¹⁰ The court does not decide if the issue-exhaustion
28 requirement applies in the absence of the environmental review
process.

1 Under Article VI(j)(5) of the Compact, the scope of
2 judicial review of legislative acts or decisions by TRPA extends
3 only to questions of whether the act or decision was "arbitrary,
4 capricious or lacking substantial evidentiary support or whether
5 the agency has failed to proceed in a manner required by law."
6 Both parties draw on cases interpreting the scope of the court's
7 review under the APA to explain the extent of the court's review
8 under the Compact. This is reasonable given the similar language
9 of the judicial review sections of the APA and the Compact. See
10 5 U.S.C. § 706(2)(A), (E); League, 739 F. Supp. 2d at 1267
11 (noting that the parties characterize the standard of review as
12 essentially the same as that used under the APA and citing APA
13 caselaw).¹¹

14 An agency's legislative action is considered arbitrary
15 and capricious when the agency relied "on factors which Congress
16 has not intended it to consider, entirely failed to consider an
17 important aspect of the problem, offered an explanation for its
18 decision that runs counter to the evidence before the agency, or
19 is so implausible that it could not be ascribed to a difference
20 in view or the product of agency expertise." Motor Vehicle Mfrs.
21 Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S.
22 29, 43 (1983). Under this standard, the court's scope of review
23 is narrow and it must not "substitute its judgment for that of
24 the agency." Id.

25
26 ¹¹ Judicial review under the APA requires a court to set
27 aside agency actions, findings, and conclusions found, among
28 other things, to be "arbitrary, capricious, an abuse of
discretion, or otherwise not in accordance with law" or
"unsupported by substantial evidence." 5 U.S.C. § 706(2)(A),
(E).

1 The parties dispute whether the prohibition against
2 agency "ad hocery" also applies only to agency adjudicative
3 actions or also to TRPA's legislative actions. In Ramaprakash v.
4 FAA, 346 F.3d 1121 (D.C. Cir. 2003), the court explained that
5 "the core concern underlying the prohibition of arbitrary or
6 capricious agency action is that agency 'ad hocery' is
7 impermissible." Id. at 1130 (internal quotation marks and
8 citation omitted). It held that the National Transportation
9 Safety Board ("NTSB") engaged in such ad hocery when it departed
10 from its precedent without any reasoned explanation in deciding
11 whether the Federal Aviation Administration could suspend
12 Ramaprakash's pilot certificate. Id. at 1125. Most
13 consequentially, the NTSB abandoned its decades-old requirement
14 of prosecutorial diligence in investigating possible violations
15 of the Federal Aviation Regulations. Id. at 1127-28. It also
16 indicated that whether the departures announced in Ramaprakash's
17 case would apply in the future would depend on the facts of
18 specific cases. Id. at 1130. The court expressed dismay at the
19 resulting uncertainty, concluding:

20 We have it on high authority that "the tendency of the
21 law must always be to narrow the field of uncertainty."
22 O.W. Holmes, The Common Law 127 (1881). The Board's
23 unexplained departures from precedent do the opposite.
24 "[W]here an agency departs from established precedent
25 without a reasoned explanation, its decision will be
26 vacated as arbitrary and capricious."

27 Id. at 1130 (second citation omitted).

28 Defendants attempt to cordon off "ad hocery" as a
specific restraint on agencies only in their adjudicative
actions, but the court does not give the phrase such talismanic
significance. The challenge in Ramaprakash to the policy change

1 evident in the NTSB's adjudicatory determination was brought
2 under § 706(2) (A) of the APA, which prohibits arbitrary and
3 capricious action. Id. at 1124. State Farm interpreted the same
4 provision and required a comparable explanation for an agency's
5 legislative act that marked a change in course: "a reasoned
6 analysis for the change." 463 U.S. at 42 (reviewing agency's
7 promulgation of an informal rule); see also Redding Rancheria v.
8 Salazar, --- F. Supp. 2d ----, 2012 WL 525484, at *12 (9th Cir.
9 Feb. 16, 2012) (explaining that an agency changing course in its
10 regulations must provide an explanation for the change).
11 Ramaprakash and State Farm reviewed different kinds of agency
12 actions, but the point from both decisions is the same: agencies
13 should provide reasonable explanations when they embark on policy
14 change. If there is any difference between an agency's failure
15 to explain change under Ramaprakash and State Farm, it would seem
16 to be only that an agency engaging in ad hocery commits a more
17 blatant violation of the prohibition against arbitrary and
18 capricious agency action such that the course its policy will
19 follow is wholly unpredictable.

20 The similarity between the standards is borne out by
21 subsequent caselaw. In American Federation of Labor v. Chertoff,
22 552 F. Supp. 2d 999 (N.D. Cal. 2007), the court considered
23 whether the Department of Homeland Security acted arbitrarily and
24 capriciously in promulgating a final rule that departed from its
25 historical position regarding the knowledge imputed to employers
26 who receive no-match letters from the Social Security
27 Administration ("SSA") indicating that an employee's name and
28 Social Security Number on a wage form do not match the SSA's own

1 records.¹² Id. at 1009. Although it did not use the phrase "ad
2 hocery," the court quoted Ramaprakash for the proposition that:

3 [A]gency action is arbitrary and capricious if it departs
4 from agency precedent without explanation. Agencies are
5 free to change course as their expertise and experience
6 may suggest or require, but when they do so they must
provide a reasoned analysis indicating that prior
policies and standards are being deliberately changed,
not casually ignored.

7 Id. at 1009 (quoting Ramaprakash, 346 F.3d at 1124-25). Even
8 though Chertoff considered an agency's legislative action, it
9 relied on Ramaprakash without qualification, affirming the
10 court's determination that there is no significant difference
11 between what State Farm requires and "ad hocery" prohibits.
12 Assuming, however, that some heightened standard under
13 Ramaprakash applies, for the reasons explained below, the court
14 finds that TRPA did not violate even this.

15 B. TRPA's Adoption of Amendments to Expand Access to TAUs

16 Prior to constructing new tourist accommodations, such
17 as hotels, the Regional Plan and Code require that developers
18 first receive an allocation of TAUs. (RP at II-5); Code §
19 33.4.A. Before the Project's approval, the Regional Plan
20 required that projects "be permitted additional [TAUs] as
21 specified within a community plan," (RP at II-5), and that "[n]o
22 bonus [TAUs] shall be allowed for projects outside adopted
23 community plans," (id. at VII-15; see also id. at II-5 ("Based on
24 demonstrated need, projects may be permitted additional [TAUs] as
25 specified within a community plan.")). Likewise, the Code

26
27 ¹² Although Chertoff analyzed the agency's action for
28 purposes of a preliminary injunction motion, the court cites the
case only for its statement of the law. See 552 F. Supp. 2d at
1009-10.

1 required that bonus TAUs be limited to "projects" and "parcels"
2 within adopted community plans. Code §§ 33.4.A.(3), 35.3.
3 Additionally, most of the Project is located in PAS 157, which
4 requires that "[a]ny new or additional commercial uses shall be
5 permitted only pursuant to an adopted [c]ommunity [p]lan." (AR
6 2962.)

7 PASs guide planning by setting the land-use
8 requirements for the different areas of the Region. (RP at I-5.)
9 Certain areas within the Region are designated by the Regional
10 Plan as eligible for community plans, which may be adopted to
11 supersede a PAS. (Id.) Adoption of a community plan is not
12 mandatory, (id. at II-6), but may commence "as a result of a
13 local government request, or by Agency initiative in recognition
14 of local interest," (id. at II-7); see also Code § 14.6.A(1).
15 Among other elements, community plans must include an "assessment
16 of needs, opportunities, limitations, and existing features" and
17 a "statement of goals and objectives for the area." (RP at II-
18 7.) "It is [TRPA's] goal that each proposed community plan . . .
19 will have addressed the needs and concerns of the community . . .
20 ." (Id. at II-8.) A "master plan" is another kind of detailed
21 plan that is intended "to augment [PASs] or community plans" and
22 "to provide more detailed planning to ensure that projects and
23 activities are consistent with the Goals and Policies [of the
24 Regional Plan], the [PASs] or community plans, and the Code."¹³

25
26
27 ¹³ Under the Plan, land use classifications include
28 conservation, recreation, residential, commercial and public
service, and tourist areas. (RP at II-3-4.) The chosen
classifications set the allowable land uses within the PAS.

1 Code § 16.0. It may also replace the PAS.¹⁴ (RP at I-5.)

2 Homewood was an area identified for community planning
3 and part of the Project area is designated as "a preliminary
4 community plan area," meaning it is eligible for a community
5 plan. (See AR 2964, 19063, 19072.) Homewood, however, does not
6 currently have a community plan, and at the time the Project was
7 proposed, some commentators requested a plan be adopted. (Id. at
8 1471, 1479, 1531 (commenting on Notice of Preparation of Draft
9 EIR-EIS); TAR 9962.) Instead of preparing a community plan for
10 the area, TRPA amended the Regional Plan and Code to allow
11 allocation of additional TAUs under either a community plan "or a
12 ski area master plan," as well as Plan Area 157 to allow new or
13 additional commercial uses pursuant to either type of plan
14 (collectively, the "Amendments").¹⁵ (See id. at 224, 623, 644-
15 45.)

16 Plaintiffs argue that the "new alternative" for
17 allocating TAUs and commercial floor area through the ski area
18 master plan process fails to satisfy the objectives of the
19 Compact and Regional Plan. (Pls.' Mem. in Supp. of Summ. J.
20 ("Pls.' Mem.") at 14:24 (Docket No. 40-1).) They view the
21

22 ¹⁴ The Code has an apparently contradictory requirement:
23 "Specific or master plans shall supplement, but shall not
24 replace, plan area statements and community plans" Code
§ 16.5.

25 ¹⁵ In their reply, plaintiffs depart from the argument
26 made in their opening brief that TRPA's decision not to create a
community plan "was arbitrary and unlawful." (Pls.' Mem. in
27 Supp. of Summ. J. ("Pls.' Mem.") at 14:3-7 (Docket No. 40-1).)
In their reply, they clarify that they object that "TRPA changed
28 the rules for obtaining additional development rights in ski
areas without any rational justification." (Pls.' Reply at 3:6-7
(Docket 55-1).)

1 Compact and Regional Plan as mandating regional planning to take
2 into account the Region's needs "as a whole" and requiring
3 consideration of community needs before approval of additional
4 development. They argue that because master plans are not
5 designed to be responsive to the Region's and community's needs,
6 TRPA's adoption of the Amendments marks a departure from TRPA's
7 prior practice. In other words, TRPA has departed from its
8 former policy in two ways: (1) the Region's and community's needs
9 are no longer considered in land-use planning, despite the
10 Compact and Regional Plan's clear intent that they be considered
11 and (2) those needs are no longer determined through the
12 community planning process. (Pls.' Reply 3:5-10 (Docket 55-1).)
13 Finally, plaintiffs argue that TRPA departed from that practice
14 without explaining why it changed its course; that is, "without
15 any rational justification." (Id. at 3:6-7.)

16 Initially, defendants dispute that TRPA changed course
17 or reversed its policy such that an explanation of the change is
18 required. A reversal would more clearly be before the court if
19 TRPA had approved amendments to prohibit allocation of TAUs
20 through community plans and instead distribute them only through
21 the ski area master plan process, or if it had previously found
22 that ski area master plans should not be used to allocate TAUs.
23 TRPA instead suggests that it merely expanded incentives that it
24 previously found to be environmentally beneficial. Cf. Redding
25 Rancheria, 2012 WL 525484, at *12 (analyzing agency's decision to
26 apply temporal limitation as a bright-line rule rather than on a
27 case-by-case basis as a change in course).

28 In setting out the required findings for the

1 Amendments, TRPA explained that the amendments to the Regional
2 Plan are consistent with the existing Regional Plan because they
3 "will facilitate implementation of the Regional Plan, in terms of
4 both threshold attainment and orderly growth and development, by
5 providing incentives for an economically, environmentally and
6 socially sustainable project that results in threshold-related
7 improvements" (TAR 678.) It stated further that:

8 The amendments do not increase the fixed number of bonus
9 units originally allocated in the Regional Plan.
10 Further, just as is required for projects in Community
11 Plans, projects in Ski Area Master Plans proposing to use
12 bonus units must demonstrate substantial environmental
13 benefits and provide a match of existing tourist
14 accommodation units through a transfer pursuant to Code
15 Chapter 34. As such, the proposed amendments expand
16 incentives already embodied in the Regional Plan to Ski
17 Area Master Plans to realize environmental gain.

18 (Id. at 678.) There is substantial evidence to support TRPA's
19 conclusion that the benefits it ascribes to the Amendments will
20 accrue. For example, TRPA explains that the Project will bring
21 "threshold-related improvements to water quality, SEZ, soil
22 conservation, recreation, air quality, transportation and scenic
23 quality." (Id. at 678.)

24 Even assuming the Amendments mark a change in course,
25 TRPA has provided an adequate explanation for any shift. TRPA
26 states that it expanded the means of allocating TAUs to provide
27 incentives for a project that brings various environmental
28 benefits and will facilitate implementation of the Regional Plan.
It also explained that by allowing TAUs to be allocated in an
additional way, projects that bring environmental benefits will
be further incentivized because they can now receive TAUs through
either a ski area master plan or a community plan. TRPA

1 therefore adequately acknowledged the "change" the Amendments
2 mark (expanding how TAUs can be allocated) and explained why it
3 was making that change.

4 For the same reasons, the court also rejects the
5 argument that TRPA's only rationale for the Amendments was to
6 "'enabl[e]' Project implementation" and that TRPA cannot justify
7 Regional Plan or Code amendments simply to accommodate a project.
8 (Pls.' Mem. at 16:1-2.) The court acknowledges plaintiffs'
9 concern that approval of specific projects should not drive
10 broader land-use planning. But TRPA did provide a reasonable
11 basis for adopting the Amendments and, assuming it must also give
12 an explanation as to why the Amendments will be beneficial going
13 forward, its explanation did so.¹⁶

14 Plaintiffs cite Western States Petroleum Ass'n v. EPA,
15 87 F.3d 280 (9th Cir. 1996), for the proposition that an agency
16 changing its course must supply a reasoned analysis for the
17 change. There, the EPA rejected Washington's proposed permitting
18 program for emissions because it would have exempted
19 insignificant emissions units ("IEUs") from monitoring,
20 reporting, and record-keeping requirements set by EPA
21 regulations. Id. at 283. The court held that the EPA abused its
22 discretion because these grounds for rejection were in direct

23
24 ¹⁶ Plaintiffs argue that defendants should have explained
25 why the change in course is justified going forward with respect
26 to all projects that require additional TAUs in a ski area, why
27 demonstrated need should no longer be determined through the
28 community plan process, and why ski area master plan areas should
be singled out among all master plan areas. This level of
justification is not required, however, by the Compact. See
Compact art. V(g) (describing standard of review as "arbitrary,
capricious or lacking substantial evidentiary support or whether
the agency has failed to proceed in a manner required by law").

1 contradiction to its prior precedent--on eight other occasions--
2 approving programs that omitted IEUs from those requirements.
3 Id. at 285. While the proposition is not mistaken, the
4 difference between the EPA's unexplained reversal stands in stark
5 contrast to the reasoned explanation provided by TRPA for its
6 shift in practice. See also Nw. Env'tl. Def. Ctr. v. Bonneville
7 Power Admin., 477 F.3d 668, 690 (9th Cir. 2007) (requiring
8 reasoned analysis for departure from longstanding practice)

9 It is also clear that TRPA has not made a wholesale
10 departure from any policy of community participation. Plaintiffs
11 argue that circumventing the community planning process
12 "foreordained a Project that met JMA's private objectives" to
13 construct enough residential and tourist accommodation units to
14 generate sufficient revenues to ensure the continued viability of
15 the ski operations.¹⁷ (Pls.' Reply at 10:15.) However,
16 defendants explain that JMA created an outreach program that TRPA
17 concluded provided the public with an adequate means to shape the
18 Project and determine the Project's needs. (See AR 3918-19; TAR
19 744.) While the level of community participation in preparing
20 the ski area master plan did not have the same depth as would
21 have been required for a community plan, it was not so scant as

22
23 ¹⁷ National Parks & Conservation Ass'n v. Bureau of Land
24 Management, 606 F.3d 1058 (9th Cir. 2010), is inapposite. In
25 that case, the Ninth Circuit rejected an agency's statement of
26 purpose required for the EIS process as too narrow under the
27 reasonableness standard because the majority of its objectives
28 were the project proponent's and not the agency's. Id. at 1970-
71. Likewise, Environmental Protection Information Center v.
U.S. Forest Service, 234 F. App'x 440 (9th Cir. 2007), rejected
the Forest Service's range of alternatives because it had defined
the objectives of the project in the EIS so narrowly that only
the proposed project would serve those objectives. Id. at 443-
44.

1 to be deemed nonexistent or to substantiate claims that TRPA
2 completely reversed its policy course.¹⁸

3 Finally, plaintiffs' arguments are misguided to the
4 extent that they imply that TRPA should not have amended the
5 Regional Plan and Code to allow the ski area master plans to be
6 used for some of the same purposes as community plans because the
7 latter are a better method of meeting those purposes. It is the
8 responsibility of TRPA to balance benefits and harms and make the
9 policy choice it believes to be best. Cf. Redding Rancheria,
10 2012 WL 525484, at *13 ("But of course the Tribe is not the one
11 who determines whether the Regulations were a necessary or
12 advisable means of implementing the ambiguous Restored Lands
13 Exception. Neither is this Court. . . . Congress entrusted that
14 determination to Interior."). TRPA provided a reasonable
15 explanation for the Amendments; this is all the Compact requires.
16 Accordingly, the court finds that TRPA's adoption of amendments
17 to the Regional Plan, Code, and PASSs to allow for allocation of
18 TAUs through the ski area master plan process did not violate the
19 Compact.

20
21 ¹⁸ Plaintiffs also argue that the ski area master plan
22 process precluded the assessment and development of alternatives
23 based on community needs. It is unclear what plaintiffs mean by
24 "alternatives," as they state on reply that they are not here
25 referring to the EIR-EIS's alternative analysis. (Pls.' Reply at
26 9:13-15.) Plaintiffs appear to argue that the community could
27 not participate in the formulation of the Project's objectives
28 during the ski area master plan process in the same way they
might with community planning. (See id. at 9:8-10:16.) This
argument has little force, however, because there is no
requirement that defendants use a community plan rather than a
ski area master plan and therefore no requirement that the
Project's objectives be shaped by the community rather than JMA.
To the extent this argument is a reformulation of plaintiffs'
contention that TRPA adopted the Amendments without a rational
basis, the court rejects it for the reasons stated above.

1 C. Code Amendments' Consistency with the Code

2 Plaintiffs also argue that the amendments to the Code
3 could not be approved because they are not consistent with the
4 Code. See Code § 6.3.A(1) (requiring TRPA to find that new Code
5 amendments are "consistent with, and will not adversely affect
6 the implementation of the Regional Plan, including . . . the
7 Code"). Plaintiffs locate a discrepancy in that although the new
8 Code amendments alter several Code provisions to allow allocation
9 of TAUs through ski area master plans, Code subsection
10 33.4.A(3) (d) still requires that the "[d]istribution of units
11 within the community plan shall be pursuant to the provisions of
12 the adopted community plan and . . . [a] demonstration of need
13 for additional units is shown pursuant to Chapter 14."¹⁹

14 Plaintiffs argue that Chapter 14 provides a detailed process to
15 determine and respond to community needs and that because the ski
16 area master plan does not even require a showing of "demonstrated
17 need" for additional TAUs, much less implicate the Chapter 14
18 process, that the amendments are inconsistent with the Code.

19 The court declines to consider this argument, however,
20 because plaintiffs failed to raise the issue during the
21 administrative process. It is waived.

22 D. Role of the Amendments in Land-Use Planning

23 Plaintiffs argue that the Compact and Regional Plan
24 "clearly indicate that general land-use planning, including the
25 Plan, Code and PASs, must come before site-specific project
26

27 ¹⁹ The Code amendments necessary to allocate TAUs are to
28 Chapters 33 (Allocation of Development) and 35 (Bonus Unit
Incentive Program). (AR 2791.)

1 approvals; planning and project approval must not happen
2 simultaneously." (Pls.' Mem. at 16:17-19.) The court finds that
3 plaintiffs adequately, if imperfectly, raised this argument.
4 (See, e.g., AR 6186 (comment from Sierra Club).)²⁰

5 In Friends of Southeast's Future v. Morrison, 153 F.3d
6 1059 (9th Cir. 1998), the Ninth Circuit held that under the
7 Forest Plan at issue, an area analysis must be conducted before a
8 project-specific EIS, rather than concurrently. Id. at 1069.
9 There, the plan stated that "[p]roject implementation will
10 normally consist of detailed site planning and project design
11 within the project locations identified through Area Analysis."
12 Id. at 1069 (internal quotation marks omitted) (emphasis in
13 original). It also provided that "NEPA procedures will be
14 followed and project-related environmental analysis will be
15 tiered to the appropriate Area Analysis documentation." Id.
16 (internal quotation marks omitted) (emphasis in original).

17 Neither the Compact, Plan, or Code compel action in a
18 way that parallels the strong temporal requirements in the Forest
19 Plan. The Compact provides that "[n]o project may be approved
20 until it is found to comply with the regional plan"
21 (Compact art. VI(b).) Likewise, the Regional Plan explains that
22 the required planning documents, as well as the Compact, "provide
23 the basic framework for judging the merits of individual
24 projects." (RP at I-4.) Master plans are intended "to provide
25

26 ²⁰ The Sierra Club commented that "[t]he TRPA process that
27 permits this overwhelming change that envelopes the PAS, the CP
28 and uses the CEP to do more than was ever previously envisioned
is not a process that turns the Regional Plan on its head, it is
a calculated decision by the TRPA to do just that, without
declaring that the action amends the Regional Plan." AR 6816.

1 more detailed planning to ensure that projects and activities are
2 consistent with the Goals and Policies, the [PASs] or community
3 plans, and the Code.” Code § 16.0. These requirements put
4 limitations on the context in which a project is developed, but
5 they do not preclude consideration of their amendment at the same
6 time a project is being developed.

7 Nor is the ski area master plan dependent on the
8 broader planning documents in the same sense as the project
9 analysis was dependent on the area analysis in the Forest Plan.
10 The ski area master plan process is guided by those documents,
11 but they do not require any specific analysis particular to a
12 project before additional analysis for that project may commence.
13 Additionally, the Compact, Plan, and PASs were in place during
14 the Project’s development and drove the ski area master plan
15 process, even though TRPA concluded that some alterations were
16 appropriate to allow the Project to go forward. Cf. Goleta I, 52
17 Cal. 3d at 573 (“[I]t may not be appropriate . . . to disregard
18 an otherwise reasonable alternative which requires some form of
19 implementing legislation Moreover, in some
20 circumstances, an EIR may consider alternatives requiring a
21 site-specific amendment of the general plan. However, an EIR is
22 not ordinarily an occasion for the reconsideration or overhaul of
23 fundamental land-use policy.”). Even though some elements of the
24 Project conflicted with those provisions, that does not mean they
25 did not serve the role plaintiffs deem they should have.

26 E. Retroactive Waiver of Noncompliance with Community
27 Planning Requirement

28 Plaintiffs argue that TRPA attempted to retroactively

1 excuse TRPA's failure to complete a community plan. They contend
2 that because the requirements in place at the time the Project
3 was developed required TRPA to use the community planning process
4 to allocate additional TAUs and commercial space, TRPA had to use
5 the community planning process. Instead of creating a community
6 plan, plaintiffs argue that defendants proceeded as though the
7 community planning requirement did not exist and then waived it
8 at the same hearing at which the Project was approved, contrary
9 to law. Defendants, however, have asserted that plaintiffs
10 failed to exhaust this claim. Plaintiffs provide no response and
11 the court therefore assumes that they concede the point.

12 IV. Adequacy of the EIR-EIS's Alternatives Analysis and TRPA's
13 and the County's Related Findings

14 The Project's objectives are five-fold. (AR 2748.)
15 They are to: (1) construct onsite residential and tourist
16 accommodation units to increase midweek skier visits at the
17 resort; (2) optimize the quality of the winter ski experience and
18 improve the year-round use of the site; (3) maintain consistency
19 with the scale and character of Homewood, California; (4) enhance
20 the lifestyle and property values of West Shore residents; and
21 (5) generate sufficient revenues to support the Project's
22 proposed environmental and fire safety improvements, as well as
23 the economic viability of the ski operations. (Id. at 2738-39.)

24 The Draft EIR-EIS considered six alternatives designed
25 to meet some or all of these objectives. (See id. at 268-70.)
26 The Final EIR-EIS added a seventh alternative, which is a revised
27 version of the Project, created based on public input on the
28 draft. (Id. at 2691-92.) Alternative 1 is the proposed project

1 and it proposed to redevelop the North Base area, adding new
2 mixed-use buildings and new residential units; build a lodge at
3 the Mid-Mountain Base area and other amenities like a detached
4 gondola terminal, a new learn-to-ski lift, and an outdoor
5 swimming facility; and convert the South Base area to residential
6 uses. (Id. at 2691.) The proposed project required the
7 amendments related to TAU transfers considered in part III.A,
8 supra, as well as amendments to the Code's provisions on height
9 and grading standards and to three PASs. (Id.) Alternative 1A
10 is the revised proposed project. (Id. at 2691-92.) This
11 alternative replaced two of the three large multi-family
12 residential condo buildings at the South Base area with twenty-
13 four smaller chalet buildings, reducing the total number of
14 multi-family residential units from 99 in Alternative 1 to 95 in
15 Alternative 1A. (Id. at 2692.)

16 Alternative 2 is no project and Alternative 3 is
17 similar to the proposed project, but required no Code amendment
18 to building height. (Id.) Alternative 4 proposed to close the
19 ski resort and put in estate residential lots and one commercial
20 lot; it required an amendment to a PAS. (Id.) Alternative 5
21 reduced the size of the Project area, but still required
22 amendments to the Code (regarding height) and the PASs, although
23 it did not require an amendment to change PAS boundaries and
24 thereby expand the urban boundary of the project. (Id. at 2692-
25 2693.) Alternative 6 is the reduced-size alternative, which
26 proposed to reduce the number of total tourist accommodation and
27 residential units by approximately fifteen percent (from 336 to
28 284 tourist accommodation and residential units). (Id. at 2693,

1 2750-51.)

2 A. Adequacy of the EIR-EIS's Alternatives Analysis Under
3 CEQA

4 CEQA recognizes that "it is the policy of the state
5 that public agencies should not approve projects as proposed if
6 there are feasible alternatives or feasible mitigation measures
7 available which would substantially lessen the significant
8 environmental effects of such projects." Cal. Pub. Res. Code §
9 21002. To implement this policy, CEQA requires the consideration
10 and analysis of project alternatives that would reduce adverse
11 environmental impacts. Mount Shasta Bioregional Ecology Ctr. v.
12 Cnty. of Siskiyou, 210 Cal. App. 4th 184, 197 (3d Dist. 2012); In
13 re Bay-Delta Programmatic Env'tl. Impact Report Coordinated
14 Proceedings, 43 Cal. 4th 1143, 1163 (2008) ("In re Bay-Delta").
15 The court reviews the EIR-EIS's selection of alternatives and its
16 analysis of those alternatives to determine if they comply with
17 CEQA's procedural mandates and then decides whether substantial
18 evidence supports the decisions made. Cal. Native Plant Soc.,
19 177 Cal. App. 4th at 988.

20 1. No-Amendment Alternative

21 Plaintiffs first contend that the EIR-EIS failed to
22 consider a reasonable range of alternatives because it did not
23 consider any alternative that required no amendments to the
24 Regional Plan, Code, or PASs.²¹ Requests for analysis of such an

26 ²¹ Plaintiffs clarify in their reply that they are not
27 arguing that the alternatives in the EIR-EIS improperly focused
28 on meeting JMA's objectives and that therefore the range of
alternatives analyzed in the EIR-EIS was improperly narrow.
(Pls.' Reply at 27:8-10.) The court therefore does not address
defendants' arguments as they apply to this point. (See Defs.'

1 alternative were made during the scoping process. (See AR 2752-
2 55.) Plaintiffs argue that the EIR-EIS did not provide a
3 reasonable basis for omitting a no-amendment alternative because
4 it only explained that “[t]here is no legal requirement that an
5 alternative be considered” that requires no amendments. (Id. at
6 3923.) Second, they argue that defendants have adopted a
7 litigation position that the EIR-EIS properly rejected a no-
8 amendment alternative because it would not allow for overnight
9 lodging, contrary to the Project’s objectives, which is not
10 supported by the record.

11 “Generally, an agency’s selections of alternatives will
12 be upheld as long as there is a reasonable basis for the choice
13 it has made.” City of Maywood v. L.A. Unified Sch. Dist., 208
14 Cal. App. 4th 362, 416 (2d Dist. 2012). Clearly, the EIR-EIS’s
15 explanation that it is not legally required to consider a certain
16 alternative would be inadequate standing alone because no
17 particular alternative is legally required; the rule of reason
18 controls the selection of alternatives. See Citizens of Goleta
19 Valley v. Bd. of Supervisors, 197 Cal. App. 3d 1167, 1177 (2d
20 Dist. 1988) (“Goleta II”). However, the EIR-EIS also explains
21 that “[a]n alternative that eliminates overnight lodging would be
22 inconsistent with HMR’s objective to transform Homewood into an
23 overnight destination.” (AR 3923.) Although plaintiffs protest
24 that this explanation is not explicitly linked to a no-amendment
25 alternative, defendants assert that it applies because the no-
26 amendment alternative is an alternative that does not provide

27 _____
28 Mem. in Supp. of Summ. J. (“Defs.’ Mem.”) at 29-32 (Docket No.
47-1).)

1 overnight lodging. The connection between the no-amendment
2 alternative and overnight lodging explanation could have been
3 clearer, but this explanation would have sufficed, if it were
4 certain that a no-amendment alternative could not provide
5 overnight lodging. Cf. City of Maywood, 208 Cal. App. 4th at
6 416-18 (finding explanation that proposed reduced-sized
7 alternative would not comply with regulations regarding student
8 density for high schools to be a reasonable basis for not
9 including the alternative in the EIR).

10 At oral argument, the parties continued to dispute
11 whether the no-amendment alternative could provide overnight
12 lodging. The record shows that without any amendments to the
13 PASs, the Project's residential and tourist accommodation units
14 would be placed largely in PAS 157. (See AR 2790.) Although the
15 allowable uses in PAS 157 include bed and breakfast tourist
16 accommodations and hotel, motel, and other transient tourist
17 accommodation units, (id. at 2962-63), developing those uses
18 would require the transfer of TAUs into PAS 157, (id. at 2988-
19 89). However, because PAS 157 is not designated as a "receiving
20 area," such tourist lodging could not be built without an
21 amendment to PAS 157 to make it eligible to receive TAUs from
22 other areas. (Id.) Plaintiffs focus on PAS 159, which is such a
23 receiving area. (Id. at 19051.) But only a very slim portion of
24 the Project area is within PAS 159.

25 Defendants do not contest, however, that single-family
26 residential units could be built in PAS 157 without amendment.
27 The Project's objective pertaining to overnight accommodations is
28 to "construct[] . . . onsite residential and tourist

1 accommodation units." (Id. at 2738.) A no-amendment alternative
2 would arguably meet this objective by providing residential
3 units. More importantly, even if the no-amendment alternative
4 did not meet all of the Project's objectives, that alone is an
5 insufficient reason to reject it. See In re Bay-Delta, 43 Cal.
6 4th at 1165 (explaining that "an EIR should not exclude an
7 alternative from detailed consideration merely because it 'would
8 impede to some degree the attainment of the project objectives'"
9 unless it is otherwise infeasible or the lead agency has
10 determined that it cannot meet the project's underlying
11 fundamental purpose (quoting Guidelines § 1516.6(b)));
12 Watsonville Pilots Ass'n v. City of Watsonville, 183 Cal. App.
13 4th 1059, 1088 (6th Dist. 2010) (rejecting claim that reduced
14 development alternative did not require analysis in EIR simply
15 because it could not satisfy every objective for the city's new
16 general plan).²² Thus, defendants have failed to articulate a
17 reasonable basis for not evaluating a no-amendment alternative.

18 Although the EIR-EIS did not provide an explanation for
19 its exclusion of a no-amendment alternative, CEQA requires only
20 that an EIR analyze "those alternatives necessary to permit a
21 reasoned choice." Goleta II, 197 Cal. App. 3d at 1177-78. There
22

23 ²² In their briefs, defendants construe the analysis in
24 the EIR-EIS that a no-amendment project would not meet one of the
25 project's objectives as a finding that such an alternative would
26 not meet the fundamental purpose of the project. (Defs.' Mem.
27 36:7-9.) An alternative that does not meet a project's
28 fundamental purpose need not be considered. In re Bay-Delta, 43
Cal. 4th at 1165. If it were the case that the no-amendment
alternative fails to meet the Project's fundamental purpose by
providing only residential accommodations and that the EIR-EIS
rejected it for that reason, the court's conclusion that the EIR-
EIS did not need to consider a no-amendment alternative would
only be strengthened.

1 is "no categorical legal imperative as to the scope of
2 alternatives to be analyzed in an EIR. Each case must be
3 evaluated on its facts, which in turn must be reviewed in light
4 of the statutory purpose." Goleta I, 52 Cal. 3d at 566; see also
5 Mira Mar Mobile Cmty. v. City of Oceanside, 119 Cal. App. 4th
6 477, 487 (4th Dist. 2004) ("Mira Mar") ("The discussion of
7 alternatives is subject to a rule of reason . . .").

8 The alternatives analysis must at least "describe a
9 range of reasonable alternatives to the project . . . which would
10 feasibly attain most of the basic objectives of the project but
11 would avoid or substantially lessen any of the significant
12 effects of the project" Guidelines § 15126.6(a); see
13 also Goleta I, 52 Cal. 3d at 566 (requiring range of alternatives
14 that offer substantial environmental advantages and are
15 feasible). "Absolute perfection" is not required of the agency's
16 selection of alternatives; rather, the "key issue is whether the
17 alternatives discussion encourages informed decision-making and
18 public participation." Cal. Oak Found. v. Regents of Univ. of
19 Cal., 188 Cal. App. 4th 227, 276 (2010). The party disputing the
20 adequacy of the agency's chosen alternatives must demonstrate
21 that "the agency failed to satisfy its burden of identifying and
22 analyzing one or more potentially feasible alternatives. . . .
23 [It] may not simply claim the agency failed to present an
24 adequate range of alternatives and then sit back and force the
25 agency to prove it wrong." Mount Shasta Bioregional Ecology
26 Ctr., 210 Cal. App. 4th at 199.

27 The EIR-EIS analyzed seven alternatives. No
28 alternative, except for Alternative 2 (no project) was a no-

1 amendment alternative. Alternative 4 required only one
2 modification to a PAS, but it is also closed the ski resort.
3 Plaintiffs contend that a no-amendment alternative would have
4 allowed for consideration of a project that could avoid
5 significant impacts by preserving the environmental protections
6 the Regional Plan, Code, and PASs provide and also meet most of
7 the developer's objectives. Defendants argue that the EIR-EIS
8 considered a reasonable range of alternatives, that a no-
9 amendment alternative would merely fall within the range of those
10 already analyzed in the EIR-EIS, and that the EIR-EIS did not
11 need to analyze another alternative that did not meet the
12 Project's primary purpose.²³

13 To show that the range of alternatives examined in the
14 EIR-EIS was unreasonable, plaintiffs analyze each selected
15 alternative and conclude that only Alternative 6 is a potentially
16 viable alternative to the Project. (See Pls.' Reply at 15-17.)
17 Plaintiffs note that the alternatives identified by defendants as
18 focusing on what the Project would look like without amending the
19 Code, Alternatives 3 and 5, actually require extensive amendments
20 (thereby still allowing significant land-use changes) and did not
21 offer any environmental advantages over the Project. (Id.)
22 Plaintiffs scrutinize Alternatives 2 and 4, which required,
23 respectively, no amendments or one amendment to a PAS, as failing
24 to meet the Project's objectives. (Id. at 17.)

25 "[A]lternatives need not satisfy all project

26 _____
27 ²³ Because the court rejects defendants' contention that a
28 no-amendment alternative could not meet the objective of
providing overnight residential and tourist accommodation units,
it finds the argument misdirected here as well.

1 objectives, they must merely meet 'most' of them." Mira Mar, 119
2 Cal. App. 4th at 489 (2004). Plaintiffs are correct that
3 Alternative 4's proposal to build estate homes did not meet most
4 of the Project's objectives and therefore does not contribute to
5 a reasonable range of alternatives. However, Alternative 2, the
6 no-project alternative, does contribute to such a range. Cf.
7 Mount Shasta Bioregional Ecology Ctr., 210 Cal. App. 4th at 199
8 (EIR-EIS that analyzed only no project alternative and proposed
9 project considered reasonable range of alternatives). And
10 although alternatives that have the same or worse environmental
11 impacts as the proposed project do not further CEQA's purposes,
12 they may be helpful in identifying which features of the proposed
13 project are more or less environmentally friendly. Cf. id. at
14 490 (explaining that alternatives that have comparable or worse
15 impacts to the proposed project do not further CEQA's purposes
16 and declining to condone their inclusion in the EIR). Despite
17 the flaws with Alternatives 3 and 5, the EIR-EIS still analyzed
18 two alternatives that reduced the environmental impacts of the
19 project: the no-project alternative and a reduced-size
20 alternative.

21 The range of alternatives considered by the EIR-EIS is
22 reasonable. The EIR-EIS compared and contrasted six alternatives
23 (besides the proposed project). With this range, the public and
24 decision makers could compare the environmental impacts of
25 closing the Resort, reducing the size of the proposed project,
26 and adjusting the proposed project in different ways with the
27 proposed project's environmental impacts. This array of
28 alternatives "represent[s] enough of a variation to allow

1 informed decision making." Id. at 412 (internal quotation marks
2 omitted). And "if an EIR discusses a reasonable range of
3 alternatives, it is not rendered deficient merely because it
4 excludes other potential alternatives." Id.

5 This range is not legally deficient because it also did
6 not address a no-amendment alternative. Whether the EIR-EIS
7 might have considered a no-amendment alternative depends on
8 whether that alternative "would have been 'capable of avoiding or
9 substantially lessening any significant effects of the
10 project,' even if it 'would impede to some degree the attainment
11 of the project objectives.'" Watsonville Pilots Ass'n, 183 Cal.
12 App. 4th at 1087 (quoting Guidelines § 15126.6(b)). Plaintiffs
13 argue that the no-amendment alternative would have "preserved
14 existing land-use rules" and thereby "avoided impacts by
15 preserving the environmental protections inherent in those
16 rules." (Pls.' Reply at 14:18-19.) The court agrees with
17 plaintiffs that defendants cannot dispute that removing the
18 physical restrictions imposed by those rules would create effects
19 on the physical environment. Indeed, defendants noted that if
20 they had not built the Code amendments into the Project, a
21 significant effect would have resulted. (AR 3926); see also
22 Citizens Ass'n for Sensible Dev. of Bishop Area v. Cnty. of Inyo,
23 172 Cal. App. 3d 151, 175 (4th Dist. 1985) ("It is true that a
24 project would normally be considered to have a significant effect
25 on the environment if it conflicts with the adopted environmental
26 plans and goals of the community where it is located.").

27 Under CEQA, however, a court cannot require an agency
28 to consider an alternative merely because plaintiffs can show

1 that it is environmentally superior in certain aspects. Instead,
2 the alternative must avoid or substantially limit a significant
3 and unavoidable effect of the project. After mitigation, the
4 Project's impacts are reduced to a less than significant level
5 with four exceptions. These include impacts on traffic at two
6 already congested locales and significant climate change impacts.
7 (See AR 2705, 2708, 2726; see also id. at 8961-62 (third-party
8 appeal to EIR-EIS certification).) Thus, plaintiffs' argument
9 that a no-amendment alternative should be considered because it
10 preserves existing land-use rules fails because the Project has
11 no significant and unavoidable effects related to land-use
12 regulations.

13 A no-amendment alternative would necessarily be smaller
14 than the Proposed project because only residential units could be
15 built. But because any reduced-size project would still create
16 additional traffic and generate greenhouse emissions, TRPA
17 explained that the Project's unavoidable impacts are likely to
18 remain substantial and unavoidable with any smaller
19 alternative.²⁴ (See id. at 8961 ("Any alternative that would
20 result in an incremental increase in traffic at Fanny Bridge
21 would also result in significant and unavoidable impacts . . .
22 ."), 8962 ("Any alternative that attains the basic objective of
23 the Project, however, would also result in significant and

24
25 ²⁴ The court may consider the whole record in determining
26 whether the range of alternatives is reasonable. See Cal. Native
27 Plant Soc., 177 Cal. App. 4th at 987 (holding that where
28 complaint regarding alternatives analysis was that it was "merely
perfunctory," court could review the whole record to assess the
sufficiency of the range of alternatives in the EIR).

1 unavoidable impacts with respect to cumulative climate
2 change.”).) Substantial evidence supports the conclusion that
3 the no-amendment alternative would not avoid or substantially
4 reduce the Project’s unavoidable impacts. The court thus finds
5 that the EIR-EIS’s alternatives analysis is not inadequate
6 because it did not consider a no-amendment alternative.

7 2. Additional Reduced-Size Alternative

8 As explained above, the range of alternatives
9 considered in the EIR-EIS was reasonable. “When an EIR discusses
10 a reasonable range of alternatives sufficient to foster informed
11 decisionmaking, it is not required to discuss additional
12 alternatives substantially similar to those discussed.” Cherry
13 Valley Pass Acres & Neighbors v. City of Beaumont, 190 Cal. App.
14 4th 316, 355 (4th Dist. 2010). An EIR’s selection of
15 alternatives should not become vulnerable when decision makers
16 and the public can intelligently consider an alternative not
17 discussed in the EIR by studying the alternatives that are. See
18 Vill. Laguna of Laguna Beach, Inc. v. Bd. of Supervisors, 134
19 Cal. App. 3d 1022, 1028 (4th Dist. 1982) (declining to hold that
20 the agency should have considered another alternative between
21 10,000 and 20,000 units when the EIR evaluated plans for the
22 development of 0, 7,500, 10,000, 20,000, and 25,000 dwelling
23 units); cf. Watsonville Pilots Ass’n, 183 Cal. App. 4th at 1090
24 (requiring consideration of reduced alternative when the only
25 comparable alternative was the no-project alternative, which did
26 not serve the purpose that a reduced-development alternative
27 should have served).

28 The EIR-EIS already considered one reduced-size

1 alternative, Alternative 6. The environmental advantages of an
2 even smaller alternative could be understood from the EIR-EIS's
3 analysis of that alternative as impacts, such as the amount of
4 emissions the alternative would produce, would be proportionally
5 reduced. But plaintiffs also contend that the record indicates
6 that the impacts of another reduced-size alternative could have
7 been substantially less. As the court noted in its discussion of
8 the no-amendment alternative, TRPA explained that any reduced
9 variation of the Project would have the same unavoidable effects
10 as the Project, although on an incrementally smaller scale. See
11 Mira Mar, 119 Cal. App. 4th at 491 (declining to require city to
12 consider additional alternative for planned 96-unit condominium
13 development when it would encounter the same environmental
14 problems as those already analyzed). Plaintiffs have proffered
15 no countervailing evidence that a reduced project, such their
16 suggestion of one with a one-third reduction in units, would
17 substantially reduce the Project's traffic and climate change
18 impacts. Cf. Mount Shasta Bioregional Ecology Ctr., 210 Cal.
19 App. 4th at 199 ("[P]laintiffs make no attempt to show how such
20 alternative . . . would have reduced overall environmental
21 impacts of the Project."); Tracy First, 177 Cal. App. 4th at 929
22 (noting that for project with significant air quality and traffic
23 impacts, where there was no evidence in the record that fewer
24 customers would patronize a smaller store, whether the smaller
25 alternative would have less significant effects, and to what
26 degree, was only speculation).

27 "CEQA does not require an EIR to consider 'each and
28 every conceivable variation of the alternatives stated.'" Mira

1 Mar, 119 Cal. App. 4th at 491 (quoting Residents Ad Hoc Stadium
2 Com. v. Bd. of Trustees, 89 Cal. App. 3d 274, 287 (1979)).

3 Consideration of one reduced-size alternative, in conjunction
4 with the Project's other alternatives, "represent[ed] enough of a
5 variation to allow informed decisionmaking." Mann, 233 Cal. App.
6 at 1151. Although the court recognizes that a smaller
7 alternative was possibly not considered on the grounds of
8 economic infeasibility, which it has found unsubstantiated,
9 plaintiffs identify no cases, and the court finds none, that
10 demand an additional reduced-size alternative to be considered
11 when the range of alternatives is otherwise reasonable.

12 Accordingly, the court finds that the EIR-EIS is not inadequate
13 for declining to study an additional reduced-size alternative.

14 B. Economic Infeasibility

15 1. TRPA's and the County's Findings of Financial
16 Infeasibility under CEQA

17 Before an agency "may approve a project with a
18 significant environmental impact, it is required to make findings
19 identifying . . . the [s]pecific . . . considerations that make
20 infeasible the environmentally superior alternatives"

21 Flanders Found. v. City of Carmel-by-the-Sea, 202 Cal. App. 4th
22 603, 620-21 (6th Dist. 2012) (alterations in original) (internal
23 quotation marks omitted). The Guidelines define "feasible" as
24 "capable of being accomplished in a successful manner within a
25 reasonable period of time, taking into account economic,
26 environmental, social, and technological factors." Cal. Pub.
27 Res. Code § 21061.1; see also Guidelines § 15126.6(f)(1) (stating
28 that the "economic viability" of an alternative is a relevant

1 consideration when evaluating the feasibility of an alternative).
2 As to a project's economic feasibility, "[t]he fact that an
3 alternative may be more expensive or less profitable is not
4 sufficient to show that the alternative is financially
5 infeasible. What is required is evidence that the additional
6 costs or lost profitability are sufficiently severe as to render
7 it impractical to proceed with the project.'" Pres. Action
8 Council v. City of San Jose, 141 Cal. App. 4th 1336, 1352 (2006)
9 (quoting Goleta II, 197 Cal. App. 3d at 1181).

10 The agency's feasibility findings must be "based on
11 substantial evidence set forth anywhere 'in the record.'" Goleta
12 I, 52 Cal. 3d 553 at 569 (quoting Cal. Pub. Res. Code § 21081.5);
13 see also Guidelines § 15131(c).²⁵ Substantial evidence is not
14 "[a]rgument, speculation, unsubstantiated opinion or narrative,
15 evidence which is clearly erroneous or inaccurate" Id. §
16 15384. Although the agency may rely on expert opinion, it must
17 be supported by facts. Id.; see Bakersfield Citizens for Local
18 Control v. City of Bakersfield, 124 Cal. App. 4th 1184, 1198 (5th
19 Dist. 2004). The agency cannot simply rely on evidence proffered
20 by the project's proponent regarding infeasibility; instead, the
21 agency "must independently participate, review, analyze and
22

23 ²⁵ The Guidelines provide:

24 [E]conomic, social, and particularly housing factors shall
25 be considered by public agencies together with
26 technological and environmental factors in deciding
27 whether changes in a project are feasible to reduce or
28 avoid the significant effects on the environment
identified in the EIR. If information on these factors is
not contained in the EIR, the information must be added to
the record in some other manner

Guidelines § 15131(c).

1 discuss the alternatives in good faith.'" Save Round Valley
2 Alliance v. Cnty. of Inyo, 157 Cal. App. 4th 1437, 1460 (4th
3 Dist. 2007) (quoting Kings Cnty. Farm Bureau v. City of Hanford,
4 221 Cal. App. 3d 692, 708 (5th Dist. 1990)) (emphasis in
5 original).

6 Although a reviewing court should not decide whether
7 studies are irrefutable or could have been better, it cannot
8 "uncritically rely on every study or analysis presented by a
9 project proponent in support of its position. A clearly
10 inadequate or unsupported study is entitled to no judicial
11 deference.'" Berkeley Keep Jets Over the Bay Comm. v. Bd. of
12 Port Comm'rs, 91 Cal. App. 4th 1344, 1355 (2001) ("Berkeley")
13 (quoting Laurel Heights, 47 Cal.3d at 409). However,
14 "[t]echnical perfection is not required; [the court] looks not
15 for an exhaustive analysis but for adequacy, completeness, and a
16 good-faith effort at full disclosure." Eureka Citizens for
17 Responsible Gov't v. City of Eureka, 147 Cal. App. 4th 357,
18 371-72 (1st Dist. 2007). Here, TRPA and the County did not just
19 rely on the financial documentation submitted by JMA to reach the
20 determination that Alternative 6 or any other reduced alternative
21 is financially infeasible.²⁶ They also considered economic
22 analyses prepared by an independent third-party expert, BAE Urban
23 Economics. BAE prepared an initial memorandum and, later, a
24 follow-up memorandum after FOWS submitted a letter commenting on
25

26
27 ²⁶ JMA submitted a "Homewood Sustainability Analysis,"
28 which stated that a twenty percent reduction in unit count would
not be sufficient to justify investment in the Project. (AR
40112-13.)

1 the initial analysis.²⁷ (AR 18968.)

2 BAE's initial memorandum considered the prospect of the
3 ski operations achieving profitability over the long term with
4 Alternative 6 (the "reduced project"), having 284 units (the
5 proposed project has 336 units). (Id. at 40477.) It explained
6 that the resort is currently operating at a loss and needs to
7 invest about \$10 million in capital improvements to two of its
8 main ski lifts in the near future. (Id. at 40478.) BAE states
9 that Homewood's mid-week skier average is significantly lower
10 than the industry average. (Id.) This is because the resort has
11 no overnight accommodations, it is primarily considered a "day
12 ski" area. (Id.) BAE states that Homewood's owners have
13 designed the Project to increase revenues, and thus better cover
14 the costs of operating the resort, by increasing the number of
15 mid-week, non-holiday skiers. (Id. at 40479.) While the
16 proposed project would potentially bring \$823,284 per year in
17 increased skier revenue, this profit is projected to decrease by
18 \$127,609 per year if the reduced project is implemented.²⁸ (Id.
19 at 40483.) BAE later adjusted its estimate of the proposed
20

21 ²⁷ The court declines to speculate as to the implications
22 of the timing of TRPA and the County's receipt of Homewood's
23 economic sustainability analysis and the BAE reports. There is
24 "nothing in CEQA requiring an EIR to analyze issues of economic
25 feasibility or requiring an agency to receive public input on the
26 question of economic feasibility." Sierra Club v. Cnty. of Napa,
121 Cal. App. 4th 1490, 1506 (1st Dist. 2004) The court's review
is limited to whether there is substantial evidence in the record
to support TRPA and the County's economic feasibility findings.

27 ²⁸ It calculated the estimated revenue increase based on
28 the assumption that the accommodation units would average a
fifty-five percent occupancy rate of 2.25 skiers and that
Homewood would cap attendance on eight peak days. (Id. at
40481.)

1 project's skier revenues to be approximately \$670,000. (See id.
2 at 18971.)

3 The "analysis does not estimate the potential revenue
4 gains from other related operations, such as ski rental, ski
5 lessons, and resort dining facilities" because, "to the extent
6 that these operations also represent an opportunity for the ski
7 resort to increase its profitability, the reduction in potential
8 skier days associated with the reduced project alternative would
9 have a commensurate reduction in the potential revenue support
10 that these operations could provide" (Id. at 40481.) It
11 thus finds that "[a]ny reduction in resort lodging units from the
12 [Project] will reduce the potential skier revenues and impair the
13 resort's ability to achieve ongoing operational viability." (Id.
14 at 40485.)

15 The analysis further explains, however, that even for
16 the proposed project, increased skier visits alone will not be
17 sufficient to generate a gross operating profit and justify the
18 additional required major capital investments. (Id.) Thus, "it
19 will be necessary for the ski resort to generate additional
20 profits from other aspects of the project . . . including ski
21 rental, lessons, and food service operations." (Id.) Each
22 "income stream[] will be necessary to support resort viability
23 and the reduced project alternative would only erode this
24 ability." (Id.) Moreover, any version of the project will
25 likely need to invest profits from the associated real estate
26 development into supporting the ski resort's immediate capital
27 investment needs. (Id.) BAE reports that the increase in skier
28 revenues under the proposed project would attract \$5.5 million in

1 new capital investments and \$4.6 million under the reduced
2 project. (Id. at 40483.)

3 The second memorandum from BAE explains that "lift
4 ticket sales represent 52 percent of total operating revenue" for
5 resorts of Homewood's size. (Id. at 18968-69.) It rejects the
6 suggestion "that a mechanism might be created whereby the
7 adjacent real estate would provide an ongoing operating subsidy
8 to the ski resort." (Id. at 18969.) Revenues from the real
9 estate development are intended "to provide [a] cross-
10 subsidization of the resort's one-time capital needs" and "once
11 the real estate development is complete, there will not be a
12 mechanism or source for ongoing subsidies from real estate
13 development." (Id.) Moreover, such a mechanism is "not likely,
14 because the project has not yet identified the full costs of
15 required mitigations and/or exactions that could be imposed by
16 regulating agencies." (Id.) BAE opines that it will likely be a
17 challenge to meet the resort's capital needs with revenues from
18 the real estate, let alone provide an ongoing subsidy for the ski
19 resort. (Id.)

20 As to the potential for other departments at the Resort
21 to generate additional revenue, BAE's second memoranda elaborates
22 that although they create additional revenue, they also generate
23 additional offsetting costs. (Id. at 18970.) Ultimately, BAE
24 opined that:

25 [T]he proposed project's bed base, less reductions in
26 ticket revenues from capping peak day attendance, plus
27 any minor increases in profits from other departments are
28 designed to achieve profitability that will enable the
resort to be sustainable over time. The reduced project
alternative or (other smaller alternatives) would
undermine this and would not likely generate sufficient

1 additional operating revenues to address the operating
2 losses.

3 (Id. at 18971.)

4 The BAE memoranda fail to provide substantial evidence
5 that Alternative 6 is economically infeasible. At best, BAE's
6 analyses show that a reduced-size alternative would be less
7 profitable. Fatal to BAE's flawed conclusion of infeasibility is
8 its failure to consider the Resort's other revenue streams
9 besides lift tickets, to what extent the real estate component of
10 the project could support the reduced project's economic
11 feasibility, and whether the capital investment a reduced project
12 could attract is sufficient.

13 First, the memoranda fail to provide a factual basis
14 for the conclusion that the reduction in profits from ticket
15 sales in the reduced project is so severe as to render "it
16 impractical to proceed with the project." Pres. Action Council,
17 141 Cal. App. 4th at 1352. Although revenues from various other
18 departments are cited as critical to the financial viability of
19 the proposed project and comprise forty-eight percent of the
20 resort's revenues, they are not given the same importance in the
21 memoranda's review of Alternative 6. Indeed, BAE's analyses show
22 that even the proposed project cannot make up the deficit at
23 which it is currently operating on profits from additional lift
24 tickets alone. BAE estimates the revenues from the proposed
25 project's increased sale of lift tickets to be \$670,000 per year;
26 thus, the proposed project's other operations must produce at
27 least \$330,000 in profits just to prevent the Resort from losing
28 money each year. BAE appears to assume that with the proposed

1 project, the Resort's other operations can make up the deficit
2 from increased lift ticket sales to ensure long-term
3 profitability of the resort, but does not show that the reduced
4 project cannot also do so.

5 The only explanation given for the different treatment
6 of these revenues streams in BAE's analyses of the feasibility of
7 the proposed project and the reduced project is that the latter's
8 reduced ticket sales will result in less revenue from those other
9 departments because fewer skiers will use the Resort's services
10 and those departments carry offsetting costs.²⁹ But this
11 distinction only shows lower profitability; it does not rise,
12 without more, to a showing of infeasibility. BAE makes no
13 attempt to estimate the potential revenue the Resort's other
14 operations could provide under Alternative 6 or the proposed
15 project and thus fails to provide evidence in this regard for its
16 conclusion that Alternative 6 is economically infeasible while
17 the proposed project is feasible.

18 Next, BAE asserts that revenue from sales of
19 residential/lodging units is "necessary to support resort
20 viability," but also that "the reduced project alternative would
21 only erode this ability." (Id. at 40485.) If real estate income
22 is necessary to the long-term economic feasibility of the
23 proposed project because it helps to meet immediate capital
24 needs, it is also necessary to the reduced alternative's
25 feasibility, even if the income from it is proportionally less.

26
27 ²⁹ Indeed, BAE's further explanation that marginal revenue
28 increases in the other departments will also bring marginal
increases in costs, undermines the profitability of both the
proposed project and the reduced alternative.

1 But BAE's analyses do not take the next step and show that the
2 reduced project's reduction in profit is too much. Indeed, BAE's
3 conclusion from this portion of its analysis begs the question:
4 Is the lesser income from the reduced project's real estate sales
5 insufficient to support the Resort's long-term feasibility?

6 The memoranda also fail to consider whether the real
7 estate component could provide an ongoing subsidy for the resort,
8 explaining that it is intended only to provide a one-time subsidy
9 for the resort's capital costs and that mitigation costs are
10 unknown. (Id. at 18969.) Despite JMA's intention that the real
11 estate component only provide a one-time surge of capital, BAE
12 explains that a mechanism to create an operating subsidy from
13 that component "might be created," but this is not likely because
14 of the unknown mitigation costs. However, the record shows that
15 mitigation costs are fixed at \$20-25 million, even if the units
16 are reduced. (Id. at 9376.) Because BAE did not estimate the
17 possible revenue from any such subsidy, another potential source
18 of support for the economic feasibility of the reduced project
19 went unconsidered.

20 Finally, BAE concluded that a smaller alternative's
21 reduced profitability would decrease its ability to attract
22 investment capital, which in turn would increase Homewood's
23 difficulty in financing the necessary capital improvements. Even
24 the proposed project, however, will not attract enough capital
25 financing to completely fund the improvements. (Id. at 40478,
26 40483.) Furthermore, although BAE acknowledges that the
27 developer can invest profits from the project's real estate
28 development into supporting the ski resort's immediate capital

1 investment needs, it does not indicate whether the sales from the
2 reduced project's real estate component could make up the
3 difference between the investment it would attract and the
4 Resort's capital needs. Again, even though the reduced
5 alternative will bring in less capital, BAE provides no facts to
6 show that the lesser amount is not enough.

7 These flaws are exacerbated by the lack of relevant
8 financial data. Except for listing what appears to be the
9 average revenue for departments, excluding lift ticket sales, at
10 ski resorts similar to Homewood in size, (id. at 18970), BAE
11 never estimates the projected revenues for such departments at
12 Homewood for either the proposed project or its reduced
13 variation. Nor does it provide any data on the potential income
14 from the real estate component of the project. In Center for
15 Biological Diversity v. County of San Bernardino, 185 Cal. App.
16 4th 866 (2010), the EIR relied exclusively on a memorandum from
17 an environmental consulting firm to establish the financial
18 infeasibility of an enclosed composting facility as an
19 alternative to an open-air facility. Id. at 876. The memorandum
20 based its estimate of costs for the proposed private composting
21 facility only on the costs associated with the development of one
22 public enclosed facility, even though there were other entities
23 operating within the state, as well as nationally, which
24 suggested that enclosed facilities might be economically
25 feasible. Id. at 884.

26 The court in that case noted various omissions in the
27 report, including its assumptions that the costs of that one
28 facility were reasonable and illustrative of the general costs of

1 composting facilities, as well its failure to explain why the
2 costs of the public project more than doubled from the initial
3 estimate or why the project took longer to develop than
4 anticipated. Id. Overall, the court found that the memorandum
5 lacked "meaningful comparative data pertaining to a range of
6 economic issues." Id. It court held that substantial evidence
7 did not support the final EIR's position that an enclosed
8 facility was infeasible. Id. at 885.¹⁵

9 This court does not question BAE's expertise or dispute
10 the accuracy of the information it did rely on, but notes, like

11
12 ¹⁵ Defendants cite several cases for the proposition that
13 courts have upheld agencies' findings on the economic
14 infeasibility of alternatives. See, e.g., Flanders Found., 202
15 Cal. App. 4th at 619-623; Cherry Valley Pass Acres & Neighbors,
16 190 Cal. App. 4th at 353-55; San Franciscans Upholding the
17 Downtown Plan v. City & Cnty. of S.F., 102 Cal. App. 4th 656,
18 693-95 (1st Dist. 2002); City of Fremont v. S.F. Bay Area Rapid
19 Transit Dist., 34 Cal. App. 4th 1780, 1787-89 (1st Dist. 1995).
20 The court does not dispute this proposition. More importantly,
21 in none of these cases did the evidence of financial feasibility
22 suffer from the same conclusory analysis or lack of key economic
23 data as in the present case. In Flanders Foundation, plaintiffs
24 critiqued an expert's report finding an alternative to restore
25 and lease a City-owned property to be infeasible on the grounds
26 that it: "d[id] not look at comparable park/mansion properties,
27 City maintenance expenses, City budget and funding capabilities,
28 nor the financial feasibility of any of the myriad potential
quasi-public uses suggested by the Flanders Foundation and
others." 202 Cal. App. 4th at 621. However, there was an
explanation for each of these omissions. The report's author
looked for, but could not find, any comparable properties; the
City would have to restore the property to lease it at a cost
exceeding \$1 million and therefore it could have reasonably
concluded that spending any amount of maintenance expenses on the
property was inappropriate; the City's budget and funding
capabilities were not relevant because the feasibility
determination depends on whether a reasonably prudent property
owner would proceed with the alternative (such a person would not
when there was significant benefit to restoring and selling the
property); and there was no a viable lease market for any "quasi-
public" use. Id. at 621-22. In contrast, there is no
explanation for the omissions in BAE's memoranda identified
above, especially because BAE itself has stressed the importance
to the proposed project of revenue streams besides lift tickets.

1 the court in Center for Biological Diversity, that significant
2 gaps in BAE's memoranda information render meaningful comparison
3 between the proposed project and the reduced alternative
4 impossible. As explained above, while the information provided
5 by JMA and BAE includes the projected profits from increased lift
6 ticket sales, the BAE memoranda are bereft of projections of the
7 profits that the Resort's other departments will contribute under
8 either version of the project, although they do estimate the
9 potential capital investment each would attract. Without such
10 comparative data, the economic feasibility of the reduced
11 alternative is unknown beyond the obvious conclusion that it
12 would be less profitable. See Uphold Our Heritage v. Town of
13 Woodside, 147 Cal. App. 4th 587, 599 (2007) (finding conclusion
14 that alternatives were financially infeasible was not supported
15 by substantial evidence when EIR included cost of the proposed
16 alternatives, which would restore the home, but not the cost of
17 the proposed project, which would build a new home); Goleta II,
18 197 Cal. App. 3d at 1172-74 (invalidating the county's finding of
19 economic infeasibility because the record contained no financial
20 data, such as "estimated costs, projected income, or expenses"
21 for reduced-size alternative). Accordingly, the County's finding
22 that Alternative 6 is economically infeasible is not supported by
23 substantial evidence.

24 2. Adequacy of the EIR-EIS's Alternative 6 Analysis
25 Under CEQA

26 Plaintiffs also contend that the EIR-EIS failed to
27 adequately explain why the reduced-size alternative (Alternative
28 6) and any other smaller-scale alternative were rejected as

1 economically infeasible, thereby precluding meaningful public
2 participation. (Pls.' Reply at 17:18-19.) Plaintiffs explain
3 that they are not claiming that CEQA requires a feasibility
4 analysis to be included in the EIR-EIS. (Id.); see San
5 Franciscans Upholding the Downtown Plan v. City & Cnty. of S.F.,
6 102 Cal. App. 4th 656, 690-91 (1st Dist. 2002) (CEQA does "not
7 require the EIR itself to provide any evidence of the feasibility
8 of . . . alternatives, much less an economic or cost analysis of
9 the various project alternatives and mitigating measures
10 identified by the EIR."). Indeed, CEQA requires only that
11 "alternatives and the reasons they were rejected . . . be
12 discussed in the EIR in sufficient detail to enable meaningful
13 participation and criticism by the public."¹⁶ Laurel Heights, 47
14 Cal. 3d at 404. The court here limits its discussion to the EIR-
15 EIS's analysis of Alternative 6, given that it has found that the
16 EIR-EIS did not need to consider an additional reduced-size
17 alternative.

18 The EIR-EIS stated that the ski resort needs to
19 increase mid-week ticket sales by an average of 400 in order to
20 generate sustainable revenues and at minimum cover operating
21 costs. (AR 2751.) It explained that although the resort
22 generates sufficient weekend and holiday skier visits, it needs a
23

24 ¹⁶ Plaintiffs also rely on the Guidelines, which require
25 that the EIR "briefly explain the reasons" underlying an
26 infeasibility determination. See Guidelines § 15126.6(c). This
27 provision, however, applies only to alternatives that were
28 rejected as infeasible during the scoping process. Id. ("The EIR
should also identify any alternatives that were considered by the
lead agency but were rejected as infeasible during the scoping
process and briefly explain the reasons underlying the lead
agency's determination.").

1 minimum of 316 onsite tourist accommodation and residential units
2 to generate the additional 400 ticket sales per day. (Id.
3 (explaining the assumptions behind this calculation).) It then
4 concluded that Alternative 6, with 282 planned units, or any
5 smaller alternative, would therefore be financially infeasible.
6 (Id.)

7 Here, the EIR-EIS's failure to discuss whether
8 Alternative 6's additional revenue streams would enable the ski
9 resort to be financially viable in the future did not allow for
10 "participation and criticism by the public." Laurel Heights, 47
11 Cal. 3d at 404. The EIR-EIS misleads the public by suggesting
12 that ticket sales revenue is the only relevant factor in
13 assessing the financial viability of Homewood, when in fact the
14 BAE memoranda clearly show that other revenue streams are
15 critical to the resort's financial viability. To be clear, the
16 court is not requiring duplication of the financial analysis in
17 the administrative record in the EIR-EIS. But to adequately
18 explain the reasons it has rejected Alternative 6, the EIR-EIS
19 must at least explain that Alternative 6's additional revenue
20 streams and sources of capital--including the probable capital
21 investments it could attract and profits from the real estate
22 development--are insufficient to ensure its financial viability.
23 Accordingly, the EIR-EIS's analysis of Alternative 6 is
24 inadequate under CEQA.

25 3. EIR-EIS's Alternatives Analysis and TRPA's
26 Infeasibility Finding under the Compact

27 The Compact requires consideration of alternatives to
28 the proposed project. (Compact art. VII(a)(2)(C), (a)(3).) It

1 also requires that TRPA make findings of infeasibility for a
2 project's alternatives when the project has significant and
3 unavoidable impacts. (Id. VII(d)(2).) Additionally, TRPA must
4 "take account of and . . . seek to harmonize the needs of the
5 region as a whole" in formulating and maintaining the Regional
6 Plan. (Id. art. V(c).) Plaintiffs argue that the EIR-EIS failed
7 to provide any meaningful analysis of the financial feasibility
8 of Alternative 6, or any other alternative, and that this
9 violated the Compact's mandate to consider the needs of the
10 region as a whole. The court rejects plaintiffs' contention that
11 TRPA's duty in this regard required it to include more detailed
12 financial information in the EIR-EIS than required by CEQA.
13 Instead, for the same reasons that the EIR-EIS's explanation for
14 rejecting Alternative 6 was inadequate under CEQA, it is also
15 inadequate under the Compact's requirement to consider
16 alternatives to a project. Likewise, TRPA's finding that
17 Alternative 6 is economically infeasible is not supported by
18 substantial evidence.

19 In addition to analysis of alternatives to a project,
20 the Compact requires an EIS to "[s]tudy, develop and describe
21 appropriate alternatives to recommended courses of action for any
22 project which involves unresolved conflicts concerning
23 alternative uses of available resources." (Id. art. VII(a)(3).)
24 Contrary to plaintiffs' assertions, the court finds this
25 provision to have little bearing on the level of analysis that
26 must be present in an EIS beyond an alternative's description.
27 Instead, this provision appears to speak to the range of
28 alternatives that must be considered under specific circumstances.

1 V. Verification of Existing Land Coverage

2 Plaintiffs argue that the EIR-EIS failed to adequately
3 describe the amount of existing "land coverage" in the Project
4 area. They view this flaw as contaminating various other
5 elements of and conclusions in the EIR-EIS, including its ability
6 to ensure that there is enough land coverage available to restore
7 to allow for new hard coverage and to mitigate excess coverage
8 and its analysis of water quality impacts, as well as the
9 adequacy of TRPA's findings that the Project complied with the
10 coverage removal and restoration requirements prerequisite to
11 approval of additional height under the CEP and Code section
12 22.4.G.

13 A. EIR-EIS's Description of Existing Soft Coverage

14 The Code governs new developments' need for the
15 creation of new coverage of land. Among other things, it sets
16 limits on the maximum percentage of a parcel of land that may be
17 covered ("allowable base coverage"), Code §§ 20.3.A., 20.3.B, and
18 the manner and conditions under which coverage may be either
19 "transferred" between parcels, id. §§ 20.3.B, 20.3.C., or
20 "relocated" within a project area, id. § 20.5.C. The Code uses a
21 direct offset method; to put it simply, for each square foot of
22 coverage created in one place, a square foot of coverage must be
23 removed from another. (See RP at II-12.) The Code also has a
24 land banking program, in which land coverage that has been
25 removed from a parcel "may be credited to the parcel account, if
26 such coverage or units is verified by TRPA as legally existing on
27 or after October 15, 1986." Code § 38.2.C. "Existing" is
28 defined in the Code as "[l]egally present or approved on the

1 effective date of the Regional Plan or subsequently legally
2 constructed, commenced or approved pursuant to necessary
3 permits." Id.

4 Land coverage to be used on the site for restoration
5 purposes and the resultant land coverage that will result from
6 the Project comes from verified existing land coverage retained
7 in its current location or relocated from within the Project area
8 in accordance with Code section 20.5.C. (See AR 3966).

9 Relocation is permitted for existing land coverage on the same
10 parcel or project area. Id. § 20.4.C. For the relocation of
11 coverage, there must be restoration "to cause the area to
12 function in a natural state with provisions for permanent
13 protection from further disturbance." Id. § 20.4.C; see id. §
14 20.5.C(2).

15 The Code defines "land coverage" as:

16 1) A man-made structure, improvement or covering, either
17 created before February 10, 1972 or created after
18 February 10, 1972 pursuant to either TRPA Ordinance No.
19 4, as amended, or other TRPA approval that prevents
normal precipitation from directly reaching the surface
of the land underlying the structure, improvement or
covering . . . ; and

20 2) lands so used before February 10, 1972, for such uses
21 as for the parking of cars and heavy and repeated
22 pedestrian traffic that the soil is compacted so as to
prevent substantial infiltration.

23 Id. § 2.2. The two types of coverage are referred to as "hard
24 coverage" and "soft coverage," respectively. Id. Examples of
25 hard coverage include roofs, decks, surfaces covered with asphalt
26 or concrete, roads, and parking lots. Id. Hard coverage does
27 not include structures, improvements, or coverings "that permit[]
28 at least 75 percent of normal precipitation directly to reach the

1 ground and permit[] growth of vegetation” Id.

2 Plaintiffs argue that for land to qualify as “soft
3 coverage” two requirements must be met: (1) it must have been in
4 use before February 10, 1972, for such uses as parking cars or
5 heavy pedestrian traffic, and (2) the soil must be compacted so
6 as to prevent substantial infiltration. In their view, the
7 latter requirement means that the land presently prevents
8 substantial infiltration. In other words, the coverage must be
9 permanent. Plaintiffs base this interpretation on the
10 definition’s use of the present tense (“the soil is compacted”)
11 and how soft coverage is categorized in the Code and Regional
12 Plan as a “permanent land disturbance.” See Code § 20.4 (“No
13 additional land coverage or other permanent land disturbance
14 shall be permitted in [certain areas].”); (RP at IV-15, IV-25
15 (“No new land coverage or other permanent disturbance shall be
16 permitted in [certain areas].”)). In contradistinction to soft
17 coverage, under the Code a “land disturbance” is a broader
18 category of land, which may include permanent disturbances, but
19 also more ephemeral or only temporary disturbances. See Code §
20 2.2 (defining “land disturbance” as “[d]isruption of land that
21 includes alteration of soil, vegetation, surface hydrology, or
22 subsurface hydrology on a temporary or permanent basis”); see
23 also id. § 20.4.C (noting that land that has been disturbed and
24 or consists of hard or soft coverage may be eligible for credit
25 for restoration).

26 Defendants initially appeared to approach the issue
27 from a different angle. They suggested in their briefs that
28 present infiltration rates are not relevant to whether soft

1 coverage legally "exists" on a parcel. (Defs.' Reply at 28:8-9
2 (Docket No. 58).) Instead, the verification process requires
3 that TRPA determine whether land coverage existed at the time the
4 Regional Plan was adopted. See Code § 38.2.C ("Land coverage and
5 units of use may be credited to the parcel account, if such
6 coverage or units is verified by TRPA as legally existing on or
7 after October 15, 1986."); id. § 2.2 (defining "existing" as
8 "[l]egally present or approved on the effective date of the
9 Regional Plan or subsequently legally constructed, commenced or
10 approved pursuant to necessary permits").¹⁷ This approach is
11 necessarily predicated on an interpretation of soft coverage that
12 reads the second prong of the definition ("the soil is
13 compacted") as a requirement only at the time of creation. In
14 other words, soft coverage "exists" if at some point up to 1972,
15 soil became compacted in such a manner as to prevent substantial
16 infiltration, regardless of whether that soil is still compacted
17 today. In defining soft coverage this way, defendants appeared
18 to adopt a view of the Regional Plan's land coverage scheme that
19 envisioned that the status quo in 1972 (or by 1986, after which
20 the Plan was finally adopted) would be the baseline from which
21 decisions about development would be made. Allowable land
22 coverage would never exceed what existed at that time.

23 At oral argument, however, counsel for TRPA stated that
24 present infiltration rates are relevant to determining whether
25 soft coverage exists. The court therefore concludes that for
26 land to be soft coverage, it: (1) must have been in use before
27

28 ¹⁷ The Regional Plan was adopted in 1987.

1 February 10, 1972, for such uses as parking cars or heavy
2 pedestrian traffic, and (2) the soil must be presently compacted
3 so as to prevent substantial infiltration. See Bassiri v. Xerox
4 Corp., 463 F.3d 927, 930 (9th Cir. 2006) (“[W]here an agency
5 interprets its own regulation, even if through an informal
6 process, its interpretation of an ambiguous regulation is
7 controlling under Auer unless ‘plainly erroneous or inconsistent
8 with the regulation.’” (quoting Auer v. Robbins, 519 U.S. 452,
9 461 (1997))).

10 Plaintiffs dispute the propriety of how TRPA verifies
11 soft coverage, arguing that it uses no actual measurements or any
12 other objective criteria to verify that soil prevents substantial
13 infiltration before it is restored. They rely on the Code’s
14 definition of “hard coverage” to inform what would constitute
15 “substantial infiltration” and argue that some of the roads TRPA
16 verified as soft coverage did not prevent substantial
17 infiltration because before restoration they allowed for rates of
18 infiltration of fifty-six and seventy-five percent. (Pls.’ Mem.
19 at 33:26.) Moreover, many of the verified roads supported
20 vegetation, likewise indicating that they are not coverage. (Id.
21 at 34:2-3.) Plaintiffs also state that infiltration rates on
22 certain roads did not appreciably increase following restoration.
23 (Id. at 34:11-15.) They note TRPA’s reliance on aerial photos
24 and maps showing that unpaved roads existed in 1972 ignores the
25 definitional requirement that the land currently prevent
26 substantial infiltration to be soft coverage. They conclude
27 accordingly that substantial evidence does not support that much
28 of the verified soft coverage is existing coverage and could be

1 validly banked.

2 Defendants respond that the Code does not define
3 "substantial infiltration" and that the court should defer to its
4 chosen methodology for determining whether land presently
5 prevents substantial infiltration, rather than requiring the
6 quantitative system preferred by plaintiffs. TRPA has already
7 verified 1,781,447 square feet of coverage on the Homewood
8 Property, (AR 3452), of which 1,473,060 square feet is soft
9 coverage, (id. at 3485). The majority of the soft coverage
10 verified consists of dirt roads. Id. TRPA argues that its
11 determination that dirt roadways are generally sufficiently
12 compact to be "soft coverage" is based on substantial evidence
13 and should not be disturbed.

14 The court will uphold TRPA's determinations of soft
15 coverage if they are rational and supported by substantial
16 evidence. Compact VI(j)(5); Cal. Pub. Res. Code § 21168.5. The
17 court's "duty is not to pass on the validity of the conclusions
18 expressed in the EIR, but only on the sufficiency of the report
19 as an informative document." Eureka Citizens for Responsible
20 Gov't, 147 Cal. App. 4th at 372; cf. Native Ecosystems Council v.
21 Weldon, 697 F.3d 1043, 1051 (9th Cir. 2012) ("A court generally
22 must be at its most deferential when reviewing scientific
23 judgments and technical analyses within the agency's expertise
24 under NEPA." (internal quotation marks and citation omitted)).

25 To determine soft coverage on the Homewood property,
26 TRPA compared existing dirt roads to a 1969 U.S. Forest Service
27 aerial photograph, made field measurements, and visited the sites
28 of particular road segments. (See AR 3966-68 (explaining the

1 verification and banking process).) TRPA adopted dirt roads as a
2 proxy for soft coverage because "years of TRPA's staff
3 experience, with the concurrence of other expert agencies, has
4 taught that the compaction of these bare dirt surface[s] leads to
5 substantial sediment runoff as a result of failing to infiltrate
6 and thereby eroding the road surface." (Defs.' Mem. in Supp. of
7 Summ. J. ("Defs.' Mem.") at 51:8-12 (Docket No. 47-1).) And
8 because dirt roads are generally permanent in nature due to the
9 compaction and erosion associated with such features, they also
10 indicate that substantial infiltration is not presently
11 occurring. (See Defs.' Reply at 28:13 n.14.) Thus, this
12 methodology allowed TRPA to ensure that verified land was both in
13 use by 1972 as a road and is presently compacted so as to prevent
14 substantial infiltration.

15 As additional evidence to support this methodology,
16 defendants cite to various sources in the record explaining that
17 disturbed and compacted land, including dirt roads, should be
18 restored because they result in soil loss and surface runoff that
19 affects the water quality of Lake Tahoe. (See id. at 51:8-25;
20 see, e.g., AR 3520; TAR 4413, 10051-53). Defendants note that
21 other expert agencies agree with TRPA that disturbed areas,
22 including roads, should be restored. (Id. at 5951, 5954.)
23 TRPA's consultant, Integrated Environmental Restoration Services,
24 which assisted HMR with restoration projects, verified that
25 unpaved roads at Homewood "are generally characterized by highly
26 compacted soil conditions, low to no surface cover, and elevated
27 runoff and sediment rates." (AR 3526.) This evidence is also
28 relied on by TRPA to support its conclusion that dirt roads are

1 generally permanent.¹⁸ (See Defs.' Reply at 28:13 n.14.)

2 The court finds that substantial evidence supports
3 TRPA's use of dirt roads as a proxy for "soft coverage."¹⁹
4 TRPA's interpretation of the Code requires TRPA to choose a
5 method to verify that coverage existed in 1972 and presently
6 prevents substantial infiltration. Presented with this difficult
7 task, TRPA reasonably adopted the assumption, based on
8 substantial evidence, that a dirt road in existence by 1972
9 continues to prevent substantial infiltration. Plaintiffs may
10 prefer a methodology that takes a more quantitative approach to
11 determining "substantial infiltration" but TRPA's method is
12 reasonably adapted to determine whether land meets the two prongs
13 of the soft coverage definition. Cf. The Lands Council, 537 F.3d
14 at 1000 ("When specialists express conflicting views, an agency
15 must have discretion to rely on the reasonable opinions of its
16

17 ¹⁸ Defendants explain that, "[b]ecause TRPA did not create
18 a full inventory of land coverage when the Regional Plan was
19 adopted, it must use an alternative method to determine if
20 coverage existed at that time." (Defs.' Reply at 26:12-13; see
21 also AR 4019 ("Infiltration measurements taken prior to
22 restoration work do not represent infiltration measurements taken
23 during land coverage verifications and clearly do not represent
24 infiltration rates present on February 10, 1972 or at the time of
25 the Regional Plan Adoption in 1987.")) This argument is only
26 applicable if soft coverage need not presently prevent
27 substantial infiltration. TRPA rejected this interpretation of
28 soft coverage, however, at oral argument. Thus, it does not
help TRPA to show that its methodology to determine soft coverage
is supported by substantial evidence.

24 ¹⁹ Relatedly, plaintiffs argue that the EIR-EIS improperly
25 deferred responses to their comments that specific road segments
26 were not properly identified as coverage. (See Pls.' Mem. at
27 34:1 n.18.) Because TRPA's method of determining soft coverage
28 is supported by substantial evidence, the court does not find
that TRPA's decision to respond to inquiries about particular
road segments until the banking application and approval process
precluded the public from being adequately informed about the
accuracy of TRPA's coverage determinations. (See AR 4019.)

1 own qualified experts even if, as an original matter, a court
2 might find contrary views more persuasive.’” (quoting Marsh v.
3 Or. Natural Res. Council, 490 U.S. 360, 378 (1989)). TRPA’s
4 chosen methodology may not result in perfection, but it is not
5 the court’s role to mandate so much. Accordingly, the court
6 finds that the EIR-EIS’s determination of the amount of existing
7 soft coverage in the Project area is supported by substantial
8 evidence.

9 B. Use of TRPA’s Soft Coverage Determinations in the EIR-
10 EIS

11 Plaintiffs contend that TRPA’s method of determining
12 soft coverage resulted in an unreliable verification of total
13 soft coverage and banked coverage. As a result, the EIR-EIS does
14 not adequately support the conclusion that sufficient restoration
15 credits exist to offset the Project’s extensive new coverage.
16 And to the extent that the Project’s new coverage is not offset
17 by the restoration of actual existing land coverage, the Project
18 will have unexamined and unmitigated significant impacts on soil
19 and water resources in violation of CEQA and the Compact.

20 As to the Project’s soil impacts, Plaintiffs argue that
21 “the unreliable soft coverage numbers” undermine the EIR-EIS’s
22 conclusion that the Project’s existing excess coverage can be
23 mitigated to a less than significant level, as required by TRPA’s
24 Excess Land Coverage Mitigation Program.²⁰ (Pls.’ Reply at
25

26 ²⁰ Defendants argue that plaintiffs did not raise any
27 arguments regarding the EIR-EIS’s conclusions on soil impacts
28 during the administrative process. (Defs.’ Mem. at 50 n.10.)
Regardless, the court rejects the argument as without merit
above.

1 30:10-19.) Because TRPA's soft coverage determinations are
2 supported by substantial evidence, this argument must be
3 rejected. Accordingly, the EIR-EIS accurately disclosed the
4 Project's impacts on soil. Likewise, substantial evidence
5 supports the EIR-EIS's conclusion that the Project's significant
6 soil impacts will be mitigated to a less than significant level.

7 As to the Project's water quality analysis, even if
8 defendants are incorrect and the amount of verified coverage
9 impacts the water quality analysis because that analysis relies
10 on a computer model with a "dirt road" input, TRPA's soft
11 coverage determinations are supported by substantial evidence,
12 and plaintiffs' argument must be rejected. Accordingly, the
13 EIR-EIS accurately disclosed the Project's impacts on water
14 quality. For the same reason, the EIR-EIS's finding that soft-
15 coverage restoration efforts will improve infiltration is
16 supported by substantial evidence.

17 C. Validity of TRPA's CEP and Additional Height Findings

18 In addition to offsetting its creation of new coverage,
19 the Project needs to restore existing land coverage to mitigate
20 excess existing coverage over the allowable base land coverage
21 limits, as required by the Excess Land Coverage Mitigation
22 Program. (AR 3486.) To mitigate this existing coverage, it will
23 permanently retire 174,373 square feet of coverage. (Id. at
24 3496.) It also needs to restore "substantial coverage" for its
25 participation in the CEP and to permanently retire at least ten
26 percent of the Project area's coverage to obtain additional
27 height pursuant to Code section 22.4.G(1)(b). (Id. at 7299; TAR
28 639.) The latter provision requires retirement of 176,134 square

1 feet. (AR 3496.)

2 Plaintiffs argue that TRPA's unsupported soft coverage
3 determinations undermine the EIR-EIS's conclusion that there is
4 sufficient coverage available within the Project area to restore
5 and bank to meet the requirements of the CEP and Code section
6 22.4.G(1)(b). Relatedly, plaintiffs argue that TRPA cannot rely
7 on the same retired square feet of coverage to fulfill the CEP
8 requirements and to mitigate the existing excess coverage at the
9 site and obtain additional height. Similarly, they argue that
10 the Project cannot rely on the same retired square feet to both
11 mitigate the existing excess coverage at the site and meet the
12 requirements of Code section 22.4.G(1)(b).

13 The first argument must be rejected because the court
14 has already found that TRPA's determination of soft coverage is
15 supported by substantial evidence. As to the second argument, to
16 participate in CEP, projects must provide "substantial
17 environmental benefits or mitigation in excess of TRPA's project
18 mitigation requirements." Code § 33.3.D(3). For the Project,
19 CEP required "substantial land coverage reduction." (AR 7299.)

20 Although the Project will arguably not permanently
21 retire substantially more coverage than it is required to retire
22 to mitigate existing excess land coverage, it does permanently
23 retire enough coverage to produce "substantial land coverage
24 reduction." (See AR 7299 (explaining that Project will retire at
25 least thirteen percent of total existing land coverage). The
26 Project also provides numerous environmental benefits beyond
27 those which it is legally required to provide and so even if it
28 restored no coverage beyond that which is otherwise required, it

1 could still meet the requirements to participate in the CEP
2 program. See Code § 33.3; (TAR 766).²¹ The court therefore need
3 not decide whether the same coverage may be counted for the
4 purposes of obtaining additional height and mitigating excess
5 coverage, as well as meeting the CEP requirements.

6 Finally, Code section 22.4.G(1)(b) requires that
7 "[e]xisting verified land coverage otherwise permissible within
8 the Ski Area Master Plan pursuant to the Regional Plan shall be
9 reduced by a minimum of 10 percent and permanently retired . . .
10 ." Plaintiffs argue that coverage permanently retired under the
11 Excess Land Coverage Mitigation Program is not "otherwise
12 permissible" because it must be removed for the Project to
13 proceed. Thus, the coverage removed for that purpose cannot be
14 counted as the coverage retired for additional height.
15 Plaintiffs failed to exhaust this argument. Although the
16 amendment was not in effect until Project approval, it was part
17 of the Project and the Project was intended to meet any
18 requirements it might impose. Plaintiffs had an opportunity to
19 raise this issue during the environmental review process and
20 failed to do so. Moreover, exhaustion is apropos because there
21 is a dispute over the interpretation of an agency's regulation
22 and the agency should be given an initial opportunity to
23 interpret that regulation.

24 Accordingly, TRPA's findings that the Project is

25
26 ²¹ The record also shows that even without the ten percent
27 of existing coverage that must be permanently restored to obtain
28 extra height (and the slightly smaller amount to mitigate
existing coverage), that coverage is only part of the 500,000
square feet in total that the Project plans to restore. (AR
7299.)

1 consistent with CEP, the Excess Land Coverage Mitigation Program,
2 and Code section 22.4.G's requirements are supported by
3 substantial evidence.

4 VI. The EIR-EIS's Air Quality Analysis

5 A. Adequacy of Mitigation Measure for Air Quality Impacts

6 The EIR-EIS concluded that the Project will have
7 significant air quality impacts from increased VMT.²² (AR 3360.)

8 During the winter ski season, the existing VMT is higher than
9 the VMT estimated with the proposed project because "the

10 residential units and hotels rooms would result in

11 internalization between Project uses, reducing the external trips
12 generated as compared to existing conditions." (Id. at 3361.)

13 During the summer, however, the VMT will increase from 0 VMT to

14 an estimated 8,431 VMT. (Id.) The EIR-EIS also concluded that

15 the Project, considered jointly with other planned projects in

16 the region, will have significant cumulative long-term air

17 quality impacts from both increased VMT and emissions from area

18 and stationary sources. (Id. at 3386.)

19 To mitigate these air quality impacts to a less than
20 significant level, the Project proposes to make contributions to

21 the Traffic and Air Quality Mitigation Fund ("Mitigation

22 Program") under Chapter 93 of the Code. (Id. at 3378, 3386.)

23 TRPA adopted the Mitigation Program to generate sufficient
24

25 ²² The EIR-EIS also determined that although stationary
26 source emissions from the Project will not generate emissions in
27 excess of the significance threshold, there is a possibility that
28 the future use of wood-burning appliances would generate
substantial emissions. (AR 3377.) The EIR-EIS finds this to be
a significant impact and provides another mitigation measure to
reduce it to a less than significant level. (Id.)

1 revenue to address air quality impacts associated with VMT. (Id.
2 at 3378.) The fund is "used for activities that reduce VMT or
3 otherwise reduce air pollutant emissions from automobiles." (Id.
4 at 3960.) The EIR-EIS explains that "[b]y contributing to TRPA's
5 Mitigation Program, the Project effectively mitigates air quality
6 emissions through VMT reductions achieved through [the]
7 Mitigation Program, as VMT reductions typically result in
8 reductions of air pollutant emissions." (Id. at 3378.)

9 As the EIR-EIS explains, TRPA tracks the Mitigation
10 Program's funds and disburses them at the request of the local
11 jurisdiction from which they are collected, or the Tahoe
12 Transportation District, if "the expenditure is consistent with
13 TRPA's Regional Transportation Plan or the 1992 Air Quality
14 Plan." (Id. at 3960.) The EIR-EIS states that strategies that
15 may be funded by the Mitigation Program to mitigate the Project's
16 air quality effects could include: "[e]xpansion of existing
17 transit facilities; [a]ddition of bicycle lanes; Transportation
18 Systems Management measures such as bicycle facilities,
19 pedestrian facilities, and use of alternative fuels in fleet
20 vehicles; and [p]rovision of connectivity between multi-use paths
21 for bicycles and pedestrians." (Id. at 3378.) Chapter 93
22 provides a fee schedule that sets varying fees per vehicle trip,
23 depending on the project. See Code § 93.3.D.

24 1. CEQA

25 Plaintiffs first challenge the EIR-EIS's study of
26 mitigation measures under CEQA. A brief restatement of the
27 appropriate standard of review is first in order. Under CEQA,
28 the court must determine whether TRPA and the County

1 prejudicially abused their discretion either by not proceeding in
2 the manner required by law or by making a decision not supported
3 by substantial evidence. Cal. Pub. Res. Code § 21168.5; Laurel
4 Heights, 47 Cal. 3d at 392. It "presume[s] the correctness of
5 the agency's decision and the petitioners thus bear the burden of
6 proving that the EIR is legally inadequate or that the record
7 does not contain substantial evidence to support the agency's
8 decision." Save our Peninsula Comm. v. Monterey Cnty. Bd. of
9 Supervisors, 87 Cal. App. 4th 99, 139 (6th Dist. 2001).
10 Plaintiffs here challenge the adequacy of the EIR-EIS's
11 discussion of Mitigation Measure AQ-2a for the Project's air
12 quality impacts, requiring the court to consider whether TRPA and
13 the County failed to proceed in a manner prescribed by CEQA.
14 Vineyard Area Citizens, 40 Cal. 4th at 435 (question of the
15 sufficiency of CEQA as an informational document is one of law).
16 They also challenge the County's findings that the Project's
17 significant air quality effects will be reduced to less than
18 significant, requiring the court to consider whether the County's
19 conclusion is supported by substantial evidence.

20 If the EIR is the heart of CEQA, then mitigation is its
21 teeth. Envntl. Council of Sacramento v. City of Sacramento, 142
22 Cal. App. 4th 1018, 1039 (3d Dist. 2006). CEQA requires that an
23 EIR set forth the ways in which a project's significant effects
24 on the environment can be mitigated by proposing mitigation
25 measures that will minimize those effects. Cal. Pub. Res. Code §
26 21100(b)(3); see also id. §§ 21002.1(a), 21061. The EIR should
27 identify mitigation measures that "could reasonably be expected
28 to reduce adverse impacts if required as conditions of approving

1 the project." Guidelines § 15126.4(a)(1)(A); Laurel Heights, 47
2 Cal. 3d 376 at 416-17. Mitigation measures must be feasible--
3 capable of being successfully accomplished in a reasonable amount
4 of time, considering economic, environmental, social, and
5 technological factors--and enforceable. Guidelines §
6 15126.4(a)(1)-(2); Cal. Pub. Res. Code § 21061.1. They must also
7 be "'roughly proportional' to the impacts of the project."
8 Guidelines § 15126.4(a)(4)(B).

9 Fee-based mitigation programs have been found to be
10 adequate mitigation measures under CEQA. See, e.g., City of
11 Marina v. Bd. of Trs. of the Cal. State Univ., 39 Cal. 4th 341,
12 364 (2006); Save our Peninsula Comm., 87 Cal. App. 4th at 141;
13 Napa Citizens for Honest Gov't v. Cnty. of Napa, 91 Cal. App. 4th
14 342, 363 (1st Dist. 2001) ("Fee-based infrastructure can be an
15 adequate mitigation measure under CEQA."). The CEQA Guidelines
16 specify that such programs are appropriate when the project funds
17 its "fair share" of a mitigation measure designed to alleviate a
18 cumulative impact. Guidelines § 15130(a)(3). Plaintiffs do not
19 dispute that the Project could rely on a fee-based mitigation
20 program to reduce its significant air quality impacts. They
21 argue instead that the EIR-EIS's mitigation analysis is
22 inadequate under CEQA because it fails to show how the Program
23 will offset air quality impacts. Relatedly, they argue that the
24 EIR-EIS improperly deferred the formulation of mitigation
25 measures.

26 If the EIR-EIS's analysis of the mitigation measure is
27 to be upheld, it must be upheld on the basis articulated in that
28 document. League, 739 F. Supp. 2d at 1271. Defendants argue

1 that even if the EIR-EIS's analysis is inadequate, they did not
2 need to find that the Project's air quality impacts would be
3 significant. (Defs.' Mem. at 62.) After the final EIR-EIS was
4 completed, defendants asked their consultants to produce
5 supplemental analyses of the Project's vehicle miles traveled
6 ("VMT"). (See TAR 6587-95 (ICF Memorandum), 6596-99 (Fehr and
7 Peers Memorandum).) VMT is defined as "[t]he total miles
8 traveled by a motorized vehicle, or a number of motorized
9 vehicles, within a specific area or during a specified period of
10 time." (RP at B-5.) The supplemental studies showed that based
11 on the Project's reduction of VMTs associated with the transfer
12 and retirement of TAUs and "Equivalent Residential Units," the
13 EIR-EIS significantly overstated the Project's air quality
14 impacts and that the Project would not result in an annual
15 increase in VMTs in the basin. (AR 9006; TAR 9132.)

16 Additional documentation in the record, however, "does
17 not make up for the lack of analysis in the EIR." Save our
18 Peninsula Comm., 87 Cal. App. 4th at 130. Agencies thwart the
19 informational purposes of CEQA when they attempt to alter the
20 conclusions in the EIR after its finalization. The adequacy of
21 the EIR-EIS will therefore be considered on the grounds provided
22 therein.

23 A fee-based mitigation program is sufficient under CEQA
24 if there is evidence that mitigation will actually occur. Save
25 our Peninsula Comm., 87 Cal. App. 4th at 140. It follows that
26 simply promising to contribute funds to a fee-based mitigation
27 program is not a sufficient mitigation measure if the program
28 will not actually provide mitigation. See id. at 140 ("Of course

1 a commitment to pay fees without any evidence that mitigation
2 will actually occur is inadequate.”). The EIR under review in
3 Communities for a Better Environment v. City of Richmond, 184
4 Cal. App. 4th 70 (1st. Dist. 2010) (“CBE”), did not set forth any
5 particular mitigation measure for the proposed project’s
6 greenhouse gas emissions, but instead required the project
7 proponent to hire an independent expert to create a mitigation
8 plan that considered measures suggested in the EIR, which would
9 be approved by the City after the environmental review process.
10 Id. at 92. The court faulted the EIR for failing to set any
11 standards for successful mitigation and not attempting any
12 calculations as to the reductions the “vaguely described future
13 mitigation measures” would produce. Id.

14 In contrast to the nascent plan for mitigation in CBE,
15 the Mitigation Program is an established program with well-
16 developed guidelines. While not all of the specific projects
17 funded by the Mitigation Program have undergone environmental
18 review, TRPA created the program specifically “to offset impacts
19 from indirect sources of air pollution,” Code § 93.0, and the
20 Mitigation Program itself underwent environmental review when it
21 was adopted as part of the Regional Plan, (AR 13820; Defs.’ Mem.
22 at 66:23 n.20). The EIR-EIS does not specify which particular
23 projects will be funded, it only lists a few possible projects
24 that the mitigation fee could support. It does, however, explain
25 that the Mitigation Program must expend its funds in compliance
26 with TRPA’s 1992 Air Quality Plan or Regional Transportation Plan
27 (“RTP”). (AR 3960.) The Air Quality Plan consists largely of
28 measures implemented by TRPA to attain and maintain air quality

1 standards in the Region, such as Code section 91.7's limitations
2 on idling. (See TAR 8961-8963 (explaining the elements of the Air
3 Quality Plan).) The RTP has the primary objective of attaining
4 and maintaining the Compact's thresholds by creating a program
5 "to research, plan, and coordinate potential mitigation
6 activities" (Id. at 8612; see id. at 8590-664 (Lake
7 Tahoe Regional Transportation Plan).)

8 While not in the body of the EIR-EIS, the RTP is
9 referenced therein and is in the record. It explains in
10 exhaustive detail the mobility-related projects that the
11 Mitigation Program provides funding for as part of an overall
12 effort to attain the thresholds. (See id.) Just two examples of
13 the thirty-six planned projects include the U.S. 50 Pedestrian
14 and Bicycle Improvements Project and specific measures to attract
15 and retain transit users for the publically operated transit
16 center. (Id. at 8627, 8633, 8642). The RTP also includes the
17 cost estimates, project objectives, and anticipated completion
18 dates for all the projects. (Id. at 8624.) In CBE, the court
19 recognized that because there was no set mitigation measure, more
20 detailed analysis was required for the EIR to adequately show
21 that mitigation would occur. Here, the Mitigation Program has
22 funded and will continue to fund carefully developed projects;
23 there is no doubt that mitigation will occur.

24 Nor is payment to the Mitigation Program improper
25 deferral. In CBE, the court found improper deferral in the EIR
26 where "there was no assurance that the plan for how the
27 [p]roject's greenhouse gas emissions would be mitigated to a net-
28 zero standard was both feasible and efficacious, and [it] created

1 no objective criteria for measuring success." 184 Cal. App. 4th
2 at 95. In contrast, the Project has committed to mitigation: it
3 will pay the appropriate fee under Chapter 93 to the Mitigation
4 Program, which is already in place and driven by the
5 comprehensive RTP. It is especially appropriate here for the
6 Project to contribute to the Mitigation Program because VMT-
7 related emissions are a regional pollutant and must be combated
8 on a regional basis. In contrast to the failure to develop a
9 plan for mitigation at the time of the EIR's production in CBE,
10 the EIR-EIS here has clearly not "plac[ed] the onus of mitigation
11 to [a] future plan and [left] the public 'in the dark about what
12 land management steps will be taken, or what specific criteria or
13 performance standard will be met.'" Id. at 93 (quoting San
14 Joaquin Raptor Rescue Ctr. v. Cnty. of Merced, 149 Cal. App. 4th
15 645, 670 (5th Dist. 2007)).

16 The EIR-EIS does not provide analytical data showing
17 that mitigation will occur, which was noted as a deficiency in
18 CBE. Mathematical precision is not needed in this case, however,
19 to inform the public and decision makers that mitigation will
20 occur. Unlike the unformed and incomplete measures at issue in
21 that case, "we must presume and expect that the [agency] will
22 comply with its own ordinances, and spend the fees it collects on
23 the appropriate improvements" Save our Peninsula Comm.,
24 87 Cal. App. 4th at 141. In lieu of such numbers, assurance that
25 the Project is contributing enough to mitigate its share of air
26 quality impacts in the region is provided by the fact that the
27 fee it must pay is determined by the amount of VMTs it will
28 contribute. See Code § 93.3.D.

1 The Mitigation Program's fee is set to ensure that
2 there is sufficient funding for its air quality mitigation
3 projects. Id. § 93.6 (requiring TRPA to make a biennial review
4 of the fee schedule in light of the costs of needed improvements
5 and the funds available to support those improvements); cf.
6 Guidelines § 15130(a)(3) ("A project's contribution is less than
7 cumulatively considerable if the project is required to implement
8 or fund its fair share of a mitigation measure or measures
9 designed to alleviate the cumulative impact."). Although
10 defendants should have provided in the EIR-EIS how the fee is
11 calculated, as well as the actual fee it must pay, this error is
12 not prejudicial.³⁶ See Cal. Pub. Res. Code § 21005.

13 Furthermore, it would make no sense to require what is
14 tantamount to de novo environmental review of an established fee-
15 based mitigation program each time such a program is used as a
16 mitigation measure. The Mitigation Program is part of an
17 important collective effort at addressing a problem that cannot
18 be ameliorated with piecemeal efforts. (A bus stop at Homewood
19 is useless in encouraging visitors and residents to use public
20 transportation if there are not bus stops throughout the Region.)
21 It helps to fund the RTP, which not only encompasses carefully
22

23 ³⁶ Plaintiffs argue on reply that because the mitigation
24 fee will be based on the peak summer increase in vehicle daily
25 trips minus the reduction in winter vehicle daily trips, instead
26 of the peak summer increase, payment to the Mitigation Fund will
27 not assure that the peak summer increase in VMT and resulting
28 cumulative ozone impacts are adequately mitigated. (Pls.' Reply
at 39:7-10.) Defendants counter that the argument has not been
exhausted, but the court finds it has no merit. Calculation of
fees is set by the Mitigation Program, not the Project.
Moreover, as explained above, the fee schedule is updated
biennially to ensure that the program has sufficient funds in
light of the costs of needed improvements. Code § 93.6.

1 developed long-term and on-going strategies to reduce dependence
2 on private automobile travel, but also has prioritized six
3 regionally significant projects that in many cases have had
4 preliminary planning, public review, and environmental
5 documentation. (TAR 8624.) Plaintiffs complain that the RTP
6 sets no specific targets or performance measures for emissions or
7 vehicle trip reductions. (Pls.' Reply at 38:8-11.) However, the
8 RTP is intended to help achieve the thresholds, which do provide
9 such standards. (See TAR 8612.)

10 A mitigation fund loses its effectiveness if each time
11 a project intends to contribute to it as a mitigation measure it
12 faces a collateral attack demanding that all the research and
13 planning behind it be reproduced. The Mitigation Program and the
14 RTP are briefly discussed in the EIR-EIS and the details of both
15 are in the record and publically available. (See AR 3960
16 (explaining that expenditure of funds from Mitigation Program
17 must be consistent with RTP).) For an established program
18 adopted specifically to address air quality in the Region, that
19 is adequate, even where analytical data is not provided in the
20 EIR-EIS itself.

21 Finally, in Save Our Peninsula, the EIR contained a
22 comprehensive traffic analysis that identified problem areas on
23 two roads and recommended mitigation in the form of fees paid to
24 a traffic impact fee program established by county ordinance and
25 designed to implement road improvements as needed. 87 Cal. App.
26 4th at 139. Planned improvements included "intersection
27 channelization and passing lanes," as well as twelve proposed
28 interim projects based on a county-adopted "Deficiency Plan."

1 Id. at 141. Petitioners argued "that the EIR failed as an
2 informational document because it failed to tie the fee
3 mitigation plan to the actual physical impacts of the project on
4 the environment . . . [and] claimed the EIR mitigation plan must
5 identify the nature of specific improvements and their timing and
6 how the improvements would mitigate the impact of the increased
7 traffic." Id. at 137-38.³⁷ The court rejected these arguments,
8 explaining: "All that is required by CEQA is that there be a
9 reasonable plan for mitigation." Id. at 141.³⁸

10 Plaintiffs attempt to distinguish Save Our Peninsula
11 and other cases approving fee-based mitigation programs on the
12 grounds that the contributed funds were to be applied to
13 specifically defined projects that were described in the EIR.³⁹

14
15 ³⁷ Plaintiffs attempt to distinguish this case on the
16 grounds that it was concerned with whether implementation would
17 occur in a timely matter. Although the court did address this
concern, it also clearly addressed the substantive adequacy of
the payment of fees as a mitigation measure.

18 ³⁸ For the development project in Endangered Habitats
19 League v. County of Orange, 131 Cal. App. 4th 777 (4th Dist.
20 2005), to reduce its impact on traffic on a specific road to a
21 less than significant level, it planned to contribute to two
22 existing fee programs to fund road improvements. Id. at 784.
23 The court disapproved of contribution to these programs as a
24 mitigation measure because there was neither evidence of the
25 specific improvements that would be funded by the programs nor
26 evidence that the mitigated project would achieve the required
27 service level. Id. at 785. However, any persuasive value of the
28 case is minimal given that the issue before the court was whether
the project complied with the City's general plan, not whether
the EIR's discussion of the mitigation measure was sufficient
under CEQA. Defendants' reliance on friends of Lagoon Valley v.
City of Vacaville, 154 Cal. App. 4th 807 (1st Dist. 2007), is
unpersuasive for the same reason. See id. at 817 (appellant
arguing that project was inconsistent with City's general and
policy plans).

29 ³⁹ Plaintiffs also cite Napa Citizens for Honest
Government for the proposition that mitigation funds must be
applied to specifically defined projects described in the EIR.

1 See, e.g., City of Marina, 39 Cal. 4th 341 at 363-64; Env'tl.
2 Council of Sacramento, 142 Cal. App. 4th at 1039; Save Our
3 Peninsula, 87 Cal. App. 4th at 140-41. As explained above,
4 however, the EIR-EIS incorporates by reference the RTP and its
5 detailed analysis of the specific projects that the Mitigation
6 Program will fund. Moreover, none of the courts in those cases
7 held that fee-based mitigation is inadequate unless the EIR
8 specifically identifies which projects the fees will fund.
9 Although more detail could have been provided in the body of the
10 EIR-EIS, it adequately, if imperfectly, informed the public that
11 mitigation would occur.

12 The EIR-EIS states that to mitigate the Project's air
13 quality impacts, JMA must pay the required fee based on its
14 predicted VMTs to the Mitigation Program, which has and will
15 continue to implement specified projects that are designed to
16 reduce VMT or otherwise reduce air pollutant emissions from
17 automobiles. This is a "reasonable plan for mitigation." Save
18 Our Peninsula, 87 Cal. App. 4th at 141. Accordingly, the court
19 finds that the EIR-EIS's discussion of air quality mitigation
20 measures was adequate under CEQA and that the County's findings
21 that the Project's air quality impacts will be reduced to a less
22 than significant level are supported by substantial evidence.

23 2. Compact

24 The Compact requires an EIS to include "[m]itigation
25 measures which must be implemented to assure meeting the

26 _____
27 In that case, however, the EIR rejected payment to a relevant
28 mitigation fund as an infeasible mitigation measure. 91 Cal.
App. 4th at 363.

1 standards of the region.” (Compact art. VII(a)(2)(D).) TRPA
2 must also make written findings that “[c]hanges or alterations
3 have been required in or incorporated into [the] project which
4 avoid or reduce the significant adverse environmental effects to
5 a less than significant level.” (Id. art. VII(d)(1).) In
6 League, TRPA proposed two programs, the “Blue Boating Program”
7 and a buoy fee program, to mitigate the air and water quality
8 impacts of increased motorized boating that would result from
9 TRPA’s approval of the construction of new boating facilities on
10 Lake Tahoe. 739 F. Supp. 2d at 1279-80. Addressing the
11 plaintiffs’ challenge that the EIS’s discussion of mitigation was
12 inadequate, the court observed that the EIS did not discuss the
13 potential efficacy of any of the Blue Boating Program’s elements
14 and gave scant, if any, analytical data thereon; failed to
15 discuss the types of projects that would be funded by the sticker
16 fees aspect of the Blue Boating Program; and did not reveal
17 whether there would be sufficient funding to pay for the needed
18 mitigation. Id. at 1283. It disapproved the buoy fee program
19 analysis for failing to discuss the aggregate amount by which it
20 would cause emissions to be reduced. Id.

21 The court relied on NEPA caselaw to explain what
22 constitutes a sufficient discussion of a mitigation measure under
23 the Compact. Id. at 1282. The court found this to be proper
24 because both the Compact and NEPA have comparable provisions
25 requiring a statement of the unavoidable environmental impacts of
26
27
28

1 a project.⁴⁰ Id. at 1281-82. It also relied on the Compact's
2 requirement that, when mitigation is feasible, TRPA must make
3 "'written findings' that 'changes or alterations' will 'avoid or
4 reduce' environmental harm to insignificance, and these findings
5 'must be supported by substantial evidence,'" id. at 1281
6 (quoting Compact art. VII(d)(1)), to hold that the EIS must
7 include "at a minimum, a 'reasonably complete' discussion of
8 mitigation measures including 'analytical data' regarding whether
9 the available measures would achieve the required result," id.

10 Two caveats must accompany the League court's
11 articulation of what constitutes an adequate discussion of
12 mitigation measures under the Compact. First, while NEPA caselaw
13 may provide persuasive authority for interpreting the Compact, it
14 is not controlling. Under NEPA, the duty to study possible
15 mitigation measures stems from the statute's requirement that the
16 unavoidable adverse effects of a project be studied. See
17 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-52
18 (1989) (holding that an EIS must consider the extent to which
19 adverse effects can be avoided by discussing possible mitigation
20 measures). Under the Compact, an EIS needs to include
21 "[m]itigation measures, which must be implemented to assure
22 meeting standards of the region." (Compact art. VII(a)(1)(D).)
23 Thus, while NEPA focuses on mitigation measures that ameliorate a
24 project's adverse impacts, the Compact focuses on measures that

25
26 ⁴⁰ NEPA requires a statement of "any adverse environmental
27 effects which cannot be avoided should the proposal be
28 implemented." 42 U.S.C. § 4332(2)(C)(ii). The Compact requires
the EIS to identify "[a]ny significant adverse environmental
effects which cannot be avoided should the project be
implemented." (Compact art. VII(a)(2)(B).)

1 achieve the Region's standards. The League court's wholesale
2 adoption of NEPA caselaw fails to acknowledge this difference in
3 what each law requires of a mitigation measure and the effect
4 those particular requirements may in turn have on how a measure
5 is analyzed in an EIS. Cf. Comm. for Reasonable Regulation of
6 Lake Tahoe v. Tahoe Reg'l Planning Agency, 365 F. Supp. 2d 1146,
7 1156 (D. Nev. 2005) ("NEPA is only persuasive authority for
8 interpreting Article VII of the Compact"); Comm. for
9 Reasonable Regulation of Lake Tahoe, 311 F. Supp. 2d at 992
10 ("[I]t is unclear whether the standards for preparing an EIS
11 under the NEPA apply to TRPA's interpretation of the Compact and
12 its Code.").

13 Second, League's reliance on TRPA's required findings
14 is misguided. Those findings are made by TRPA after the EIS is
15 completed, on the record as a whole. While they require
16 substantial evidence in the record that any mitigation measure
17 will reduce a significant impact to a less than significant
18 level, they do not dictate what must be in the EIS specifically.
19 Given the League court's unsteady reliance on NEPA caselaw and a
20 Compact provision regarding findings made on the record, the
21 court considers the case to have lesser persuasive value as to
22 what the Compact requires in an EIS's analysis of a mitigation
23 measure.

24 League is also distinguishable from the present case on
25 the same grounds as CBE. The Blue Boating Program and buoy fees
26 were measures newly conceived for mitigating the anticipated
27 water and air quality effects from TRPA's approval of the
28 construction of new boating facilities on Lake Tahoe. League,

1 739 F. Supp. 2d at 1279. In the case of the Blue Boating
2 Program, the EIS admitted that the program was incompletely
3 developed. Id. For its sticker fee component, for example,
4 "TRPA ha[d] not identified any discussion in the record . . . of
5 particular potential mitigation efforts" that the collected funds
6 would be use for. Id. at 1279-80. Although the EIS included
7 some discussion of how the buoy fees would be spent, it did not
8 explain by how much the program would reduce aggregate emissions.
9 Id. at 1283. For these new and untested programs, the court
10 necessarily required detailed analysis--including analytical
11 data--as to how they would "suffice to offset the air and water
12 quality impacts of increased boating." Id. at 1284. As
13 explained above, however, the Mitigation Program is already part
14 of the Regional Plan and encompasses the RTP's significant
15 planning efforts. In this specific case, the details provided in
16 the EIR-EIS, and the information referenced therein, are
17 sufficient to show decision makers and the public that mitigation
18 will occur. Additionally, JMA's payment of the mitigation fee
19 addresses the Compact's requirement that mitigation measures
20 maintain the region's standards because the RTP is designed to
21 achieve and maintain the thresholds. (See TAR 8612.)

22 Accordingly, the court finds that the EIR-EIS's
23 discussion of air quality mitigation measures was adequate under
24 the Compact. TRPA's findings that the Project's air quality
25 impacts will be mitigated to an insignificant level and its
26 mitigation measure will assure meeting the standards of the
27 region are supported by substantial evidence.

28 B. Validity of TRPA's Air Quality Threshold Findings

1 Whenever TRPA amends the Regional Plan, it must find
2 "that the Regional Plan, as amended, achieves and maintains the
3 thresholds." Code § 6.4. Likewise, when it amends the Code, it
4 must find that "the Regional Plan, and all of its elements, as
5 implemented through the Code, Rules, and other TRPA plans and
6 programs, as amended, achieves and maintains the thresholds."
7 Code § 6.5. In League, TRPA had "concluded that this obligation
8 [under Code § 6.5] was satisfied because the project included
9 mitigation measures that would ensure that the [Code] Amendments
10 had no significant adverse effects." Id. at 1268. The court
11 explained, however, that for thresholds not in attainment, more
12 is required: "a showing that something--whether the Amendments or
13 something else--will provide the necessary improvement." League,
14 739 F. Supp. 2d at 1271. As the League court explained:

15 Where a threshold is not in attainment, a finding that
16 the problem is not getting worse does not satisfy this
17 provision. Nor is it sufficient to find that,
18 metaphorically, the ball is moving forward. By requiring
19 that the Regional Plan be implemented so as to
20 "achieve," rather than merely "approach," the
21 thresholds, the Compact and Ordinances require a finding
22 that TRPA will make it to the goal. TRPA is correct that
23 Code section 6.5 looks to the entire package of the
24 regional plan, ordinances, etc., rather than to effects
25 specifically attributable to the proposed amendment.
26 Thus, it does not matter whether the proposal at issue
27 will make the scoring shot, or even whether it will be
28 involved in the play. The key is the finding that, one
way or another, the thresholds will be achieved.

23 Id. at 1269. In other words, "[s]ection 6.5 does not require a
24 finding that thresholds have been achieved, it requires a finding
25 that the amended ordinances implement the plan in a way that
26 achieves them." Id. at 1270. The court agrees with plaintiffs
27 that this holding applies equally to Code § 6.4 and defendants do
28 not appear to dispute this.

1 TRPA concluded that the Regional Plan, as amended,
2 achieves and maintains the thresholds. (TAR 684.) It based its
3 findings on the analyses of numerous reports and documents,
4 including the EIR-EIS and the 2006 Threshold Evaluation Report
5 ("Report").⁴¹ (See id.) TRPA specifically identified the
6 Environmental Improvement Program ("EIP") as a critical component
7 of maintaining and achieving the thresholds, as it has funded
8 over 700 projects and programs designed to help meet the
9 thresholds.⁴² (Id. at 685.) TRPA next identified the compliance
10 measures in place, as well proposed supplemental measures, which
11 are described in the Report and are intended to promote
12 attainment. (Id. at 686.) Examples of the compliance measures
13 include shuttle programs, bikeways, and intercity bus services.
14 (Id. at 7096.) Also important to its finding is the CEP, which
15 encourages projects having substantial environmental benefits
16 that will further achievement of the thresholds. (Id. at 687.)
17 Finally, TRPA noted that the new Regional Plan amendments will
18 allow the Project to proceed, and the Project itself will help
19 attain multiple thresholds. (Id.)

20 With respect to the ozone threshold, TRPA found that as
21 of the Report, the threshold was not in attainment. (Id. at
22 688.) The Report indicates that the proposed target date for
23

24 ⁴¹ The Report is the result of TRPA's mandate to conduct a
25 comprehensive evaluation every five years of whether each
26 threshold is being achieved and/or maintained and to make
specific recommendations to address problem areas. (TAR 6616.)

27 ⁴² TRPA's findings explain that it joined with 50 public
28 and private organizations to help achieve the environmental
thresholds. (TAR 685.) Over \$1 billion has been invested in the
program. (Id.)

1 compliance is 2015. (Id. at 678.) It notes that ozone precursor
2 emissions from the Project will not affect TRPA's efforts to
3 attain the ozone threshold because the Project's operational-
4 related emissions of NOx and ROG will not exceed the significance
5 threshold for these pollutants. (Id. at 690.) With respect to
6 the VMT threshold, TRPA found that as of the 2006 Report, the
7 threshold was not in attainment, but that there has been a
8 positive trend towards attainment. (Id. at 693.) It explained
9 that the VMTs produced by the Project will be effectively
10 mitigated through funds paid to the Mitigation Program. (Id. at
11 694.) It also referenced two analyses completed after
12 publication of the final EIR-EIS demonstrating that the Project
13 will actually not result in a net increase in VMTs.⁴³ (Id. at
14 694-95; see also id. at 6587-95 ("ICF Memorandum"), 6596-99
15 ("Fehr and Peers Memorandum").) Because ozone is affected by VMT
16 levels, the impact from air pollutant emissions on ozone levels
17 are likewise overstated in the EIR-EIS. (Id. at 692.)

18 Plaintiffs argue that TRPA's findings lack evidentiary
19 support. First they argue that neither VMT nor the ozone
20 precursors emissions will be adequately mitigated. They next
21 object to TRPA's failure to address the effectiveness of the
22 compliance measures and programs and note that it is unclear
23

24 ⁴³ Plaintiffs challenge TRPA's reliance on these analyses
25 to change the conclusions made in the EIR-EIS about the Project's
26 impacts. (Pls.' Mem. at 41 n. 23.) They also contest the
27 study's conclusions. (Pls.' Reply at 34:14 n.26.) The Compact,
28 however, does not limit TRPA to relying on the EIR-EIS to support
its findings. TRPA expressly stated that its threshold findings
were based on the analyses in the record and the court will
therefore consider these analyses in determining whether there is
substantial evidence for TRPA's findings. See League, 739 F.
Supp. 2d at 1281.

1 whether the supplemental measures are adopted and enforceable.
2 Finally, they suggest that any progress in attainment does not
3 show that the Plan and Code will achieve and maintain the
4 thresholds, and that regardless of any progress, TRPA must show
5 that it has an "effective plan" in place to achieve each
6 threshold.

7 The court does not read League as broadly as plaintiffs.
8 League does not require TRPA to develop a specific plan and prove
9 that it will be effective in meeting the thresholds. Rather,
10 TRPA must conclude, based on substantial evidence, that it "has
11 adopted a course of action that will meet the targets." See id.
12 at 1271. Here, substantial evidence supports TRPA's conclusion
13 that the combination of the various recommendations in the
14 Report, the compliance measures, the EIP, the CEP, and the Plan
15 amendments is such a course. Even though TRPA has not quantified
16 the effects of each contributing element, it has explained how
17 each will assist with achieving and maintaining the thresholds.
18 TRPA has no doubt exceeded the showing, found inadequate in
19 League, that the Plan as amended will not make things worse.
20 League, 739 F. Supp. 2d at 1269. It has gone further and made
21 findings that the Plan and its related elements will make
22 progress to and eventually attain the thresholds.

23 Nor do plaintiffs' objections undermine this
24 conclusion. As the court found above, VMT and cumulative ozone
25 impacts will be adequately mitigated through the Mitigation
26 Program. Thus, the Project will not deter attainment of the air
27 quality thresholds. This is also confirmed by the supplemental
28 report acknowledging that the EIR-EIS overstated the Project's

1 VMT effects. Although the supplemental compliance measures and
2 programs appear not be mandatory, they are only part of the
3 numerous programs that TRPA has identified as helping it to
4 achieve and maintain the thresholds. Again, TRPA also relies on
5 the EIP, the CEP, and the Regional Plan amendments as part of its
6 course of action to ensure that the Regional Plan is implemented
7 in a way that achieves and maintains the thresholds.

8 Accordingly, the court finds that substantial evidence supports
9 TRPA's findings that the Regional Plan and all of its elements
10 will achieve and maintain the air quality thresholds.

11 VII. Noise Impacts

12 A. Adequacy of the EIR-EIS's Analysis of Construction
13 Noise Impacts

14 1. CEQA

15 Under CEQA, an EIR must identify the "significant
16 environmental effects" of a proposed project. Cal. Pub. Res.
17 Code § 21100(b)(1); Guidelines § 5126(a). A "significant effect"
18 is "a substantial, or potentially substantial, adverse change in
19 the environment." Cal. Pub. Res. Code § 21068. "[A] lead agency
20 has the discretion to determine whether to classify an impact
21 described in an EIR as 'significant,' depending on the nature of
22 the area affected." Mira Mar Mobile Cmty., 119 Cal. App. 4th at
23 493. That determination "calls for careful judgment on the part
24 of the public agency involved, based to the extent possible on
25 scientific and factual data." Guidelines § 15064(b).

26 To determine whether an impact is significant, an
27 agency may rely on a "threshold of significance." Guidelines §
28 15064.7(a). Such a threshold can be "an identifiable

1 quantitative, qualitative or performance level of a particular
2 environmental effect." Id. § 15064.7(a). Thresholds may be
3 drawn from existing environmental standards, such as other
4 statutes or regulations. Protect The Historic Amador Waterways
5 v. Amador Water Agency, 116 Cal. App. 4th 1099, 1107 (3d Dist.
6 2004). If the threshold is met, "the effect will normally be
7 determined to be significant." Guidelines § 15064.7(a).

8 However, "[c]ompliance with the law is not enough to
9 support a finding of no significant impact under the CEQA."
10 CATS, 136 Cal. App. 4th at 17. The EIR's discussion of impacts
11 must "provide[] sufficient information and analysis to allow the
12 public to discern the basis for the agency's impact findings.
13 Thus the EIR should set forth specific data, as needed to
14 meaningfully assess whether the proposed activities would result
15 in significant impacts." Id. at 13 (internal citations omitted).

16 Placer County's noise ordinance establishes a daytime
17 (7:00 AM to 10:00 PM) noise limit of 55 dBA, Leq, and a nighttime
18 (10:00 PM to 7:00 AM) noise limit of 45 dBA, Leq. (AR 3963.)
19 Construction noise, however, is exempt from the daytime limit
20 between the hours of 6 AM and 8 PM Monday to Friday and between 8
21 AM and 8 PM on the weekend. (Id.) TRPA likewise exempts noise
22 from construction activities between the hours of 8:00 AM and
23 6:30 PM. (Id.) The EIR-EIS adopted the County's and TRPA's
24 noise ordinances as thresholds to determine if the noise impacts
25 associated with the Project's construction will result in a
26 significant impact. (Id. at 3411-12.)

27 The EIR-EIS determined that the noise impacts from the
28 Project's daytime construction activities were not significant

1 "[b]ecause of Placer County and TRPA's construction noise
2 exemptions during daytime activities." (Id. at 3963.) However,
3 because nighttime construction activities could exceed the
4 County's noise ordinance, the EIR-EIS found a significant impact
5 and required mitigation measures to reduce construction noise to
6 a less than significant level. (Id.)

7 Plaintiffs argue that by using the construction
8 exemption as a threshold, TRPA and the County did not
9 meaningfully consider the noise impacts of the project because it
10 was a foregone conclusion that they would not result in a
11 significant impact. As a result, plaintiffs argue that
12 substantial evidence does not support the County's finding that
13 the Project's noise impacts are less than significant. This
14 contention, however, is difficult to square with the extensive
15 analysis conducted in the EIR-EIS related to the Project's level
16 of daytime noise. The EIR-EIS examined the noise impacts of the
17 Project's construction activity based on the "worst-case
18 scenario" in which the three loudest pieces of equipment would be
19 operating at the same time. Under that scenario, noise levels
20 would likely reach 93 dBA, Leq, at 50 feet. (Id. at 3411.) For
21 the closest residences, 100 feet from the Project, noise from the
22 construction activities for the Project could reach up to 85 dBA,
23 Leq, and if pile drivers are used noise could reach up to 93 dBA,
24 Leq, at those residences, without taking into account acoustical
25 shielding or terrain. (Id. at 3413.) The EIR-EIS indicated that
26 construction would occur seasonally between May 2011 and December
27 2020 and would occur at particular locations for only a fraction
28 of the time. (Id. at 3411.)

1 As part of its analysis, the EIR-EIS considered that
2 the impacts would be lessened by the noise reduction measures
3 imposed by the County's ordinance, as well as the mitigation
4 measure proposed because of the possibility that the construction
5 noise would exceed the County's nighttime restrictions. The
6 County's noise ordinance requires that all construction equipment
7 be fitted with factory-installed muffling devices and be
8 maintained in good working order. (See id. at 8972 (explaining
9 that for the Project's construction noise to be exempt from
10 daytime noise level requirements, HMR must comply the ordinance's
11 requirements); id. at 2820 (requiring regulatory compliance
12 measures, including shrouding or shielding of impact tools and
13 muffling or shielding intake and exhaust ports on construction
14 equipment).)

15 Mitigation Measure NOI-1C provides that JMA "shall
16 design and implement measures to reduce noise construction." (AR
17 3415.) JMA must prepare a noise control plan to identify
18 measures that can be employed to reduce construction noise.
19 (Id.) The plan must include "enclosing or shielding
20 noise-generating equipment and locating equipment as far as
21 practical from sensitive uses." (Id.) The plan must be
22 implemented in a way to ensure that construction noises will not
23 exceed 45 or 55 dBA, Leq, during sensitive hours on both weekdays
24 and weekends. (Id.) Finally, TRPA and the County must approve
25 the plan prior to issuance of a grading permit. (Id.)

26 Although there is no requirement in Mitigation Measure
27 NOI-1C that construction noise be reduced to any particular level
28 during the day, the measures and noise control plan it requires

1 are not limited to nighttime construction. By its plain terms,
2 JMA is required to "implement measures to reduce noise from
3 construction." (Id.) There is no limitation on this imperative
4 or any suggestion that it would apply only to nighttime
5 construction. While the plan must ensure that construction noise
6 does not exceed the thresholds at night, this standard does not
7 limit the general command of the mitigation measure to reduce
8 construction noise at all hours.

9 In Berkeley, the court reviewed challenges to an EIR
10 for an expansion of the Oakland airport. 91 Cal. App. 4th at
11 1350. To determine whether the project would have a significant
12 effect on noise, the EIR relied exclusively on a fixed standard
13 of 65 CNEL. Id. at 1373. CNEL, or "community noise equivalent
14 levels," measures background noise levels based on a weighted
15 average of all measured noise over a twenty-four-hour period.
16 Id. In commenting on the draft EIS, citizens complained and
17 several experts opined that its reliance on the CNEL metric
18 caused it to ignore "single-event" nighttime noise and to fail to
19 acknowledge citizens' sleep disturbances that such noise might
20 cause. Id. at 1375-76. The court explained that use of the CNEL
21 standard precluded "any meaningful analysis of existing ambient
22 noise levels, the number of additional nighttime flights that
23 will occur under the [project], the frequency of those flights,
24 to what degree single overflights will create noise levels over
25 and above the existing ambient noise level at a given location,
26 and the community reaction to aircraft noise, including sleep
27 disturbance." Id. at 1382. Given this oversight, the court held
28 that the potential noise impact of increased nighttime flights

1 required further study. Id.

2 It may fairly be said that TRPA and the County used a
3 static, bright-line rule, like the CNEL standard in Berkeley, as
4 the significance threshold for daytime construction noise (the
5 exemption). But, unlike in Berkeley, that reliance did not
6 preclude analysis of the potential impacts of the Project's
7 construction noise. The analysis in the EIR-EIS is thorough and
8 carefully details the level of noise that will result from the
9 project.⁴⁴ Nor did the use of the exemption as a threshold
10 preclude consideration of the particular setting in which the
11 noise will occur. The EIR-EIS accounts for the particular
12 setting of the Project, explaining the "noise sensitive land
13 uses" that could be affected. (Id. at 3397.) It describes the
14 effects noise increases have on humans, (id. at 3392-95), and
15 details the noise levels at all times of day, not just during
16 non-exempt hours, (id. at 3411.) It also explains the impact the
17 construction noise will have on residential homes. (See id. at
18 3412.) Given this analysis, the EIR-EIS "sets forth sufficient
19 information to foster informed public participation and enable
20 the decision makers to consider the environmental factors
21 necessary to make a reasoned decision." Berkeley, 91 Cal. App.
22 4th at 1356.

23 Plaintiffs reliance on CATS is unavailing for similar
24 reasons. In that case, the agency proposed a statewide pesticide

25
26 ⁴⁴ Each PAS sets "CNELs which shall not be exceeded by
27 any activity or combination of activities." Code § 23.3. The
28 court addresses plaintiffs' argument regarding the EIR-EIS's
failure to evaluate whether the Project's construction noise
would violate the noise threshold standards for the adjacent PASs
in subsection C, infra. (See Pls.' Mem. at 46:16-22.)

1 application program to control a pest threatening California's
2 grapevines. CATS, 136 Cal. App. 4th at 5. The court held that
3 in finding no significant impact based solely on the registration
4 of the pesticides to be used and the related regulatory program
5 in place, including safety regulations for employees handling
6 pesticides, the EIR failed to adequately analyze the possible
7 environmental effects of the specific uses of pesticides in the
8 program, especially as related to the particular chemicals to be
9 used, the amounts and frequency of their use, and specific
10 sensitive areas targeted for application. Id. at 15-16. The
11 court faulted the agency for "repeatedly deferr[ing] to the
12 [pesticide] regulatory scheme instead of analyzing environmental
13 consequences of pesticide use and therefore [falling] short of
14 its duty under CEQA to meaningfully consider the issues raised by
15 the proposed project." Id. at 16.

16 Unlike the agency's failure in CATS to conduct
17 independent analysis, TRPA and the County here did not rely on
18 the ordinance to exclude all examination of the Project's noise
19 effects; in fact, the EIR-EIS contains an extensive analysis, as
20 detailed above. Moreover, the ordinances TRPA and the County
21 adopted as a significance threshold would have contemplated
22 regulating exactly the kind of noise that this project would
23 produce: that from construction in a residential area. In
24 contrast, the breadth and scope of the pesticide application in
25 CATS involved the use of pesticides in a manner beyond that which
26 the existing pesticide regulations took into account. See id. at
27 17 (explaining that the state pesticide regulation program was
28 not "intended to[] address the environmental impacts of

1 administering a statewide pesticide application program backed by
2 the full force of the DFA and the county agricultural
3 commissioners”).

4 As a final matter, the court notes that this case is
5 unique among those cited by both parties in that the threshold
6 selected by TRPA and the County includes an exemption.

7 Plaintiffs argue that such a standard foreordains a finding of no
8 significant impact and therefore precludes consideration of the
9 Project’s noise impacts, even though it may allow for disclosure
10 of these impacts.

11 “In exercising its discretion [to determine if an
12 impact is significant], a lead agency must necessarily make a
13 policy decision in distinguishing between substantial and
14 insubstantial adverse environmental impacts based, in part, on
15 the setting.” Mira Mar, 119 Cal. App. 4th at 493 (citing
16 Guidelines § 15064(b)); see also Nat’l Parks & Conservation Ass’n
17 v. Cnty. of Riverside, 71 Cal. App. 4th 1341, 1359 (1999) (“[T]he
18 standards for assessing impacts of a project require careful
19 judgment on the part of the public agency involved, based to the
20 extent possible on scientific and factual data; these standards
21 allow for a finding of an insignificant degree of impact, not
22 necessarily a zero impact.”). In Mira Mar, the court deferred to
23 the City’s discretion to determine that, while blocking public
24 views would be a significant impact, the hindrance of private
25 views would not be considered as such. 119 Cal. App. 4th at 493.
26 These distinct significance thresholds for public and private
27 views resulted because the City had adopted the its land-use
28 policy, which embodied the distinctions. Id. at 494.

1 As with the City's land-use policy, the noise
2 ordinances embody a reasonable policy determination, here with
3 respect to regulating noise. See also Nat'l Parks & Conservation
4 Ass'n, 71 Cal. App. 4th at 1358 (upholding agency's choice to use
5 residential noise standards in parkland). The exemptions in both
6 ordinances are coupled with specific noise limits for evening
7 hours. This two-part approach to noise regulation appears to
8 reflect the conclusion that while it is crucial to have
9 quantitative limitations on noise occurring during nighttime
10 hours, construction noise occurring during daytime hours, even in
11 a residential locale, is intermittent and temporary and thus not
12 so disruptive as to give rise to a need for specific limits on
13 it.⁴⁵ As did the City in Mira Mar, TRPA and the County
14 appropriately exercised their discretion to use the noise
15 ordinances, and the policy choice they encompass, to determine
16 whether the Project's construction noise would result in a
17 significant effect. Further reason to believe that the noise
18 ordinances are an appropriate significance threshold stems from
19 the fact that daytime construction noise is only exempt if the
20 various requirements of the County's noise ordinance, such as the
21 use of muffling, are met.

22 Plaintiffs press that ultimately an exemption from
23 regulation is no standard at all and would allow for unlimited
24 construction noise. While a theoretical possibility, that is not
25

26 ⁴⁵ Construction noise would not occur in the entire
27 Project area for nine continuous years, as plaintiffs suggest.
28 (AR 3411.) Instead, construction at each base will only occur
for five years; new construction is expected to take two years.
(Id. at 4308, 5025.)

1 the case before the court. The EIR-EIS did not attempt to evade
2 consideration of the noise impacts from daytime construction, but
3 instead clearly detailed those impacts and the factors that will
4 limit them. Accordingly, the court finds that the EIR-EIS
5 properly fulfilled its obligation under CEQA to analyze the
6 environmental impacts of the Project's construction noise and
7 therefore substantial evidence supports the County's findings
8 that the Project's noise impacts are less than significant.

9 2. Compact

10 League again relied on NEPA caselaw to describe whether
11 an EIS's analysis of a potential impact is sufficient under the
12 Compact. It stated that "[t]he court must ask whether the EIS
13 took a 'hard look' at [a project's] potential impacts." League,
14 739 F. Supp. 2d at 1289 (quoting Robertson, 490 U.S. at 352).
15 Assuming the Compact requires such a "hard look," the court does
16 not consider this standard to require different or more analysis
17 than that required by CEQA. Thus, for the same reasons that the
18 EIR-EIS's analysis of the Project's construction noise impacts
19 was sufficient under CEQA, it is also sufficient under the
20 Compact. Likewise, TRPA's finding that the Project's
21 construction noise impacts are less than significant is supported
22 by substantial evidence.

23 B. Adequacy of the EIR-EIS's Analysis of the Proposed
24 Expanded Snowmaking System's Noise Impacts

25 1. CEQA

26 "The fundamental purpose of an EIR is 'to provide
27 public agencies and the public in general with detailed
28 information about the effect which a proposed project is likely

1 to have on the environment.'" Vineyard Area Citizens, 40 Cal.
2 4th at 428 (quoting Guidelines § 21061). As noted previously,
3 CEQA requires that an EIR adequately identify and analyze the
4 significant environmental effects of the proposed project. Cal.
5 Pub. Res. Code § 21100; Guidelines § 15126(a). This requirement
6 extends to any future expansion or other action if it is a
7 reasonably foreseeable consequence of the initial project and
8 will likely change the environmental effects of the initial
9 project. Laurel Heights, 47 Cal. 3d at 396.

10 "CEQA requires a lead agency to prepare an EIR for a
11 project 'at the earliest possible stage,' yet, at the same time,
12 it recognizes 'additional EIRs might be required for later phases
13 of the project.'" Cal. Oak Found., 188 Cal. App. 4th at 271
14 (quoting City of Carmel-By-The-Sea v. Bd. of Supervisors, 183
15 Cal. App. 3d 229, 250 (6th Dist. 1986)). CEQA therefore permits
16 a lead agency to use "tiering," which refers to the "coverage of
17 general matters and environmental effects in an [EIR] prepared
18 for a policy, plan, program or ordinance followed by narrower or
19 site-specific [EIRs] which . . . concentrate on the environmental
20 effects which (a) are capable of being mitigated, or (b) were not
21 analyzed as significant effects on the environment in the prior
22 [EIR]." Cal. Pub. Res. Code § 21068.5. In other words, it
23 allows "the environmental analysis for long-term, multipart
24 projects to be 'tiered,' so that the broad overall impacts
25 analyzed in an EIR at the first-tier programmatic level need not
26 be reassessed as each of the project's subsequent, narrower
27 phases is approved." Vineyard Area Citizens, 40 Cal. 4th at 429.

28 The EIR-EIS explains that JMA proposes to expand

1 Homewood's snowmaking system from the current 23.8 acres of ski
2 trails to a total of 102.3 acres, (AR 2773), and from ten snow
3 guns to fifty-five.⁴⁶ (Id. at 3426, 3673.) A plan for the
4 expanded system was submitted with the Project, although it did
5 not indicate where the snow guns would be located. (Id. at
6 35899-913.) TRPA and the County have approved the Ski Area
7 Master Plan, of which expanded snowmaking is a part. (See id. at
8 2773 ("The existing snowmaking system will be upgraded to ensure
9 adequate early and late season snowpack.")) They have not
10 approved, however, a specific snowmaking expansion plan and any
11 expansion cannot go forward without further approval from TRPA
12 and the County. (Id. at 8236 (conditional use permit approved by
13 the County); TAR 2197-2199 (permit granted by TRPA).)

14 The EIR-EIS explains that "[b]ecause the number and
15 type of guns as well as the location of each gun is currently
16 unknown, the noise levels from snowmaking cannot be quantified."⁴⁷
17 (AR 3426.) Instead, it describes the "worst-case scenario," in
18 which the snowmaking system would operate every night of the ski
19 season from midnight until 7:00 AM and for three continuous days
20 for two weeks at the beginning of the season. (Id.) It then
21 quantifies the noise created by three different guns used in
22 Homewood's current snowmaking system at three different

23
24 ⁴⁶ Counsel for JMA repeatedly asserted at oral argument
25 that Homewood currently uses twenty-one snowguns. The record
26 counsels otherwise: Homewood has "five guns operating at the
north side and [five] guns operating at the south side" (AR 3426 (emphasis added).)

27 ⁴⁷ Plaintiffs note that defendants did in fact know how
28 many snow guns are proposed to be included in the expanded
snowmaking system. (See AR 3673 ("The proposed snowmaking system
requires installation of . . . 55 snow guns."))

1 locations. (Id. at 3409-10 (identifying noise levels for the
2 currently used snowmaking equipment).) The EIR-EIS concludes
3 that because “[s]nowmaking currently exceeds noise standards at
4 the residential uses near the North and South Base areas” that
5 “new snowmaking activities that result in an increase in
6 snowmaking noise would result in a significant noise impact.”
7 (Id. at 3964.)

8 The mitigation measure adopted in the EIR-EIS to reduce
9 existing and proposed snowmaking noise levels to a less than
10 significant level requires JMA to reduce noise levels at Homewood
11 to meet adjacent PAS CNEL limits. (Id. at 3428.) JMA must
12 “prepare a noise control plan to design, construct/install, and
13 operate new snowmaking equipment so that the increase in noise
14 associated with snowmaking conditions . . . is reduced to meet
15 the appropriate PAS limit.” (Id.) The plan must be approved by
16 TRPA and Placer County prior to HMR using any new snowmaking
17 equipment. (Id. at 3878.) The EIR-EIS lists that measures in
18 the plan may include, but are not limited to, setbacks, temporary
19 barriers between the noise source and noise-sensitive land uses,
20 selection of quieter snowmaking equipment, prohibiting or
21 minimizing the operation of snowmaking activities during
22 nighttime hours, reducing the amount of snowmaking equipment
23 operating concurrently, and reducing the number of nozzles near
24 noise sensitive land uses. (Id. at 3428-29.) Acoustical studies
25 are required at the time specific designs are submitted to ensure
26 compliance with the CNEL limits. (See id. at 3964.) The EIR-EIS
27 finds that after mitigation, the snowmaking system’s noise would
28 meet the adjacent PAS CNEL limits. (Id. at 3429.)

1 The parties do not dispute that the potential
2 environmental effects of expanded snowmaking had to be analyzed
3 in the EIR-EIS because that expansion is a reasonable future
4 phase of the Project. Plaintiffs argue that the EIR-EIS failed
5 to adequately analyze the expanded snowmaking's noise effects by
6 improperly deferring their consideration, while defendants
7 contend that the level of analysis conducted was sufficient for a
8 program-level EIR. Defendants also rely on their claim that
9 further environmental review is required before the snowmaking
10 expansion is approved, which would address any insufficiencies in
11 the EIR-EIS's analysis of the expansion's noise effects.

12 Plaintiffs depend largely on Stanislaus National
13 Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182
14 (5th Dist. 1996), to argue that defendants' improperly deferred
15 analysis of the snowmaking expansion's noise effects. The EIR
16 under review in that case did not identify the significant
17 impacts of supplying water beyond the first five years for a
18 twenty-five year development project of an almost 30,000-acre
19 destination resort and residential community. Id. at 188, 195.
20 The EIR concluded that until sources for the water are
21 identified, the project's water requirements would be considered
22 a significant impact. Id. at 195. The proposed mitigation
23 measure for this significant impact was to forbid approval of
24 development requiring over 1,200 acre-feet per year of water
25 until adequate water supplies were made available and the
26 environmental impacts of the sources were studied and mitigated
27 per CEQA. Id. at 195. The EIR also required additional
28 environmental review of further water acquisition projects. Id.

1 at 195.

2 The EIR never identified, however, the specific
3 environmental impacts of procuring the water. The court found
4 the EIR's analysis insufficient under CEQA because the
5 "environmental consequences of supplying water to th[e] project
6 would appear to be one of the most fundamental and general
7 'general matters' to be addressed in a first-tier EIR." Id. at
8 199 (quoting Cal. Pub. Res. Code § 21068.5). In other words,
9 "[t]o defer any analysis whatsoever of the impacts of supplying
10 water to this project until after the adoption of the specific
11 plan calling for the project to be built would appear to be
12 putting the cart before the horse." Id. at 200.

13 The court agrees with plaintiffs that snow is to a ski
14 resort as water is to a resort and housing development; that is,
15 essential. But counsel for JMA repeatedly emphasized at oral
16 argument that it was prepared to proceed with the Project whether
17 or not the proposed snowmaking expansion is eventually approved
18 by TRPA and the County. While snow is undoubtedly necessary to
19 the Project's success, JMA asserts that even after the Project's
20 expansion of Homewood, the mountain will have sufficient snow
21 with what nature and its current snowmaking system provides to
22 operate. It characterized the expanded system as "insurance" to
23 ensure an adequate snowpack and well-maintained runs, rather than
24 a necessity.

25 Had JMA depended on an extended ski season for the
26 Project's economic feasibility, the expanded snowmaking system
27 might be viewed as essential to the Project. The financial
28 calculations prepared for the Project, however, do not rely on

1 extending the ski season to ensure the Project's economic
2 viability. Thus, while deferral was inappropriate in Stanislaus
3 because the project could not function without water, it is not
4 inappropriate here for that reason because the Project can go
5 forward without expanded snowmaking. JMA's assertions on this
6 point should alleviate plaintiffs' fear that approval of expanded
7 snowmaking is inevitable because the Project might be infeasible
8 without it.

9 Deferral was also not inappropriate here because TRPA
10 and the County should be found to have already approved the
11 expanded snowmaking system. CEQA permits agencies "to use
12 'tiering' to defer analysis of certain details of later phases of
13 long-term or complex projects until those phases are up for
14 approval." Cal. Oak Found., 188 Cal. App. 4th at 271 (internal
15 quotation marks and citation omitted). Contrary to plaintiffs'
16 suggestions, while the Project (the ski area master plan) has
17 been approved, the expanded snowmaking system has not received
18 final approval. It is not included in the permits approved by
19 TRPA and the County. (See TAR 2197-99; AR 8236.) The expansion
20 cannot be built until JMA presents to TRPA and the County a noise
21 control plan that will reduce the system's noise effects to
22 within the appropriate PAS limits. (Id. at 3878.)

23 Nor was deferral inappropriate because a full analysis
24 of the expanded snowmaking system's increased noise levels should
25 be found to have been feasible. "A basic tenet of CEQA is that
26 an environmental analysis 'should be prepared as early as
27 feasible in the planning process to enable environmental
28 considerations to influence project program and design and yet

1 late enough to provide meaningful information for environmental
2 assessment.'" Laurel Heights, 47 Cal. 3d 376 at 395; see
3 Guidelines § 15151 ("[T]he sufficiency of an EIR is to be
4 reviewed in the light of what is reasonably feasible."). "The
5 degree of specificity required in an EIR will correspond to the
6 degree of specificity involved in the underlying activity which
7 is described in the EIR." Id. § 15146. The EIR-EIS's program-
8 level analysis of the expanded snowmaking system's noise effects
9 meets these standards.

10 The preliminary designs for the snowmaking expansion
11 provide some important details, such as proposing locations for
12 features like pipeline and hydrants. (AR 35877.) As the EIR-EIS
13 explains, however, final plans for the snowmaking system have not
14 been engineered, and other important details such as the location
15 and type of snow guns, as well as noise control measures, have
16 not been finalized. (See id. at 35913.) Plaintiffs suggest that
17 the snow guns would presumably have to be placed relatively close
18 to the electrical outlets, which are to be located near the
19 hydrants, whose location has been designated. (See id. at 32520
20 (explaining that an electrical outlet will be next to each
21 hydrant to plug the snow guns into).)

22 As counsel for JMA explained at oral argument, however,
23 determining the precise location of the snow guns is important
24 because natural features have a significant impact on the noise
25 produced by the snow guns. The other undetermined factors, such
26 as the type of snow guns to be selected and noise control
27 measures, also have significant impacts on the expanded
28 snowmaking's noise levels. Given these uncertainties, the EIR-

1 EIS conducted the level of analysis that was feasible by
2 quantifying the noise of the current snowmaking system and
3 explaining when snowmaking would occur with the expanded system.
4 (See id. at 3409-10); cf. L.A. Unified Sch. Dist. v. City of Los
5 Angeles, 58 Cal. App. 4th 1019, 1028 (2d Dist. 1997) (noting that
6 an environmental impact issue should be considered when the
7 “agency preparing the plan has ‘sufficient reliable data to
8 permit preparation of a meaningful and accurate report on the
9 impact’ of the factor in question” (quoting Laurel Heights, 47
10 Cal.3d at 396)).

11 Instead of improper deferral, the EIR-EIS relies on
12 proper tiering. Tiering is described by California courts as
13 “used to defer analysis of environmental impacts and mitigation
14 measures to later phases when the impacts or mitigation measures
15 are not determined by the first-tier approval decision but are
16 specific to the later phases.” Vineyard Area Citizens for
17 Responsible Growth, Inc., 40 Cal. 4th at 431. “For example, to
18 evaluate or formulate mitigation for site specific effects such
19 as aesthetics or parking . . . may be impractical when an entire
20 large project is first approved; under some circumstances
21 analysis of such impacts might be deferred to a later tier EIR.”
22 Id. at 431 (internal quotation marks and citation omitted).
23 Here, defendants found that the proposed expanded snowmaking
24 system’s noise effects would be significant and preceded to
25 identify a mitigation measure that would reduce the effect to a
26 less than significant level. Given the uncertainties about the
27 expanded snowmaking system and the lack of final engineered
28 plans, the EIR-EIS is not inadequate for not going a step further

1 at the program-level of analysis to conduct a full study or make
2 estimates of the increased noise levels the system will produce.

3 Plaintiffs next contend that there is no guarantee that
4 additional environmental review of the snowmaking expansion's
5 noise impacts will actually occur. The County's conditional use
6 permit for the Project states that the snowmaking system will
7 "require subsequent environmental review prior to development."

8 (AR 8236.) Plaintiffs note, however, that while the EIR-EIS
9 clearly makes a commitment to further analyze the water impacts
10 of the expanded snowmaking system, which must be considered in
11 conjunction with the Project's water needs as a whole, it fails to
12 do so for its noise impacts. The EIR-EIS requires JMA to provide

13 "a detailed Water System Engineering Report . . . [that shall]
14 describe the necessary infrastructure required by the serving
15 water provider to meet the Proposed Project's domestic, fire
16 protection, and snow making water demands." (Id. at 3985.) It

17 must produce this plan "prior to approval of Improvement Plans
18 for any portion of the HMR MP Phase 1 development." (Id.)

19 Furthermore, the hydrology section of the EIR-EIS states that
20 "[s]nowmaking is proposed as a programmatic-level project
21 component and will require further environmental review prior to
22 project conditioning and/or approvals." (Id. at 3643.)

23 Although there is no comparable commitment to further
24 environmental analysis of the snowmaking system's noise effects
25 in the EIR-EIS, CEQA requires such review. Regarding subsequent
26 environmental review when an agency relies on tiering, the
27 Guidelines provide that "[i]f a later activity would have effects
28 that were not examined in the program EIR, a new initial study

1 would need to be prepared leading to either an EIR or a negative
2 declaration." Guidelines § 15168(c)(1). Because the Project
3 used a tiered EIR-EIS, it is subject to this provision and must
4 provide additional environmental review if any of the snowmaking
5 system's effects have not been adequately studied. Defendants
6 also emphasize that further environmental review will occur
7 because the mitigation measure for snowmaking's noise effects
8 requires TRPA and the County to approve JMA's noise control plan
9 before the snowmaking expansion can be constructed. (AR 3428.)

10 Plaintiffs last press that without quantifying the
11 snowmaking expansion's expected increase in noise levels, there
12 is no basis for the EIR-EIS's conclusion that the Project's
13 snowmaking noise impacts will be reduced to meet the PAS noise
14 limits. They argue that this is especially so because the
15 Homewood resort already violates those limits. (See id. at
16 3397.) In Laurel Heights, a neighborhood association challenged
17 the finding of mitigation for a building's noise impacts when the
18 major source of the noise--ventilation fans--had not been studied
19 or quantified. 47 Cal. 3d at 418. The EIR explained that:

20 The noise from these fans can be calculated once the
21 systems are designed and the fans selected. Specific
22 noise control treatments including fan silencers, barrier
23 walls, or baffled enclosures will then be evaluated if
24 predicted levels exceed the performance standards. The
equipment design will be reviewed by a qualified
acoustical engineer for compliance with the noise
performance standards.

25 Id. (internal quotation marks omitted). The Laurel Heights court
26 found this analysis of mitigation to be sufficient, despite the
27 EIR's failure to quantify the probable noise the fans would
28 produce and the not yet finalized mitigation plan intended to

1 ensure that the fans' noise would be reduced to a less than
2 significant level. See id.

3 The present case is very similar to Laurel Heights.
4 Although the snow guns for the expanded system have not yet been
5 selected and their noise levels at different locations around the
6 Resort once installed not yet quantified, JMA must present a
7 noise control plan that shows the expanded snowmaking system's
8 noise levels are in compliance with the PAS limits before the
9 County and TRPA can approve the system.⁴⁸ (AR 3428, 3878.)
10 Acoustical studies are also required at the time final designs
11 are submitted to ensure compliance. (Id. at 3964.) As did the
12 court in Laurel Heights, the court likewise determines here that
13 the EIR-EIS adequately shows that the mitigation measure will
14 reduce the expanded snowmaking's noise impacts to a less than
15 significant level. And although "a mitigation measure cannot be
16 used as a device to avoid disclosing project impacts," the EIR-
17 EIS made no such ploy. San Joaquin Raptor Rescue Ctr., 149 Cal.
18 App. 4th at 663-64. It identifies the expanded snowmaking
19 system's noise impacts as significant and, by relying on tiering,
20 commits to further environmental review of the expansion. The
21 fact that the mitigation measure for snowmaking's noise impacts

22
23 ⁴⁸ The mitigation measure is not defective because JMA
24 will work from a non-exclusive list of measures to devise a noise
25 control plan subject to TRPA's and the County's approval. "[F]or
26 [the] kinds of impacts for which mitigation is known to be
27 feasible, the EIR may give the lead agency a choice of which
28 measure to adopt, so long as the measures are coupled with
specific and mandatory performance standards to ensure that the
measures, as implemented, will be effective." CBE, 184 Cal. App.
4th at 94. The snowmaking expansion's noise levels must comply
with the PAS limitations. And, here, an even stronger medicine
exists than in the usual case: the mitigation measure must prove
to be effective or the expansion will not be approved.

1 is intended to reduce those impacts to a less than significant
2 does not diminish those other factors.

3 In sum, the EIR-EIS did not improperly defer analysis
4 of the snowmaking expansion's noise impacts. Its program-level
5 analysis provided "detail sufficient to enable those who did not
6 participate in its preparation to understand and to consider
7 meaningfully the issues raised by the proposed project.'" Dry
8 Creek Citizens Coal., 70 Cal. App. 4th at 26 (quoting Laurel
9 Heights, 47 Cal.3d at 405). Thus, the EIR-EIS's analysis of the
10 expanded snowmaking system neither violated CEQA, nor precluded
11 the County's finding that the mitigation measure will effectively
12 reduce the expanded snowmaking system's noise effects to a less
13 than significant level.

14 2. Compact

15 Again assuming that the Compact requires the EIR-EIS
16 to take a "hard look" at the Project's snowmaking noise impacts,
17 the EIR-EIS's analysis is sufficient under the Compact for the
18 same reasons the court finds it to be sufficient under CEQA.
19 Additionally, TRPA's finding that the Project's increased
20 snowmaking noise will be mitigated to a less than significant
21 level in reliance on the EIR-EIS's analysis did not violate the
22 Compact for the same reasons the Compact's comparable finding did
23 not violate CEQA.

24 C. Validity of TRPA's Noise Threshold Findings

25 Whenever TRPA amends the Regional Plan, it must find
26 "that the Regional Plan, as amended, achieves and maintains the
27 thresholds." Code § 6.4. Likewise, when it amends the Code, it
28 must find that that "the Regional Plan, and all of its elements,

1 as implemented through the Code, Rules, and other TRPA plans and
2 programs, as amended, achieves and maintains the thresholds.”
3 Code § 6.5. The Project area and surrounding areas are currently
4 not in attainment with the local PAS CNEL limits due to traffic
5 and snowmaking noise. (TAR 732.) Noise from traffic and
6 snowmaking is expected to increase under the Project. (Id.)
7 Despite this, TRPA found that the Project will assist TRPA in
8 attaining the noise thresholds. It explained that “Mitigation
9 Measure NOI-2 would reduce traffic noise relative to existing and
10 future no-project conditions, and Mitigation Measures NOI-3a and
11 NOI-3c would reduce snowmaking noise to PAS CNEL levels.” (Id.
12 at 732-33.)

13 There is substantial evidence in the record to support
14 TRPA’s finding that the amendments to the Plan and Code will
15 achieve and maintain the noise threshold. The court found that
16 TRPA adequately studied the noise impacts due to the Project’s
17 construction and the proposed snowmaking expansion, and that TRPA
18 properly concluded that the adjacent PAS standards will be met by
19 Homewood because the mitigation measure for expanded snowmaking
20 requires as much. Moreover, even if expanded snowmaking is not
21 approved, Mitigation Measure NOI-3c still applies. It provides
22 that “HMR must reduce noise levels to meet adjacent PAS CNEL
23 limits. The reduction of noise to PAS CNEL levels shall be
24 reevaluated annually to ensure that HMR is implementing all
25 possible snowmaking measures available to work towards the
26 attainment of the PAS CNEL noise standards” (AR 3878.)

27 Even if plaintiffs have not exhausted their argument
28 that the Project’s daytime construction noise would violate CNEL

1 standards, thereby precluding TRPA from finding that the
2 amendments required for the Project achieve and maintain the
3 noise thresholds, the court finds that it has no merit. Although
4 construction noise will temporarily result in violations of the
5 noise thresholds for the Project area, TRPA has found that the
6 Project, when completed, will assist with achieving the noise
7 thresholds because it will reduce noise relative to current
8 conditions. Thus, substantial evidence supports TRPA's
9 conclusion that the amendments to the Regional Plan and Code
10 achieve and maintain the noise thresholds.

11 VIII. Conclusion

12 With respect to the EIR-EIS's analysis of Alternative
13 6 and to TRPA's and the County's findings that Alternative 6 is
14 economically infeasible, plaintiffs' motion for summary judgment
15 is GRANTED as to all defendants, and defendants' cross-motions
16 for summary judgment are DENIED. In all other respects,
17 defendants' cross-motions for summary judgment are GRANTED and
18 plaintiffs' motion for summary judgment is DENIED. This does not
19 necessarily mean that the Project or some version of it may not
20 go forward at some point in time. However, before it does, TRPA
21 and the County must ensure that a legally adequate EIR-EIS has
22 been certified and the necessary findings under CEQA and Compact
23 have been made.

24 IT IS THEREFORE ORDERED that TRPA and the County shall
25 not begin any construction of the Project without the
26 preparation, circulation, and consideration under CEQA and the
27 Compact of a legally adequate EIR-EIS with regard to Alternative
28 6 and adoption of the appropriate findings required by CEQA and

1 the Compact.

2 The clerk shall administratively close this file, which
3 may be re-opened upon the application of any party upon a showing
4 of good cause.

5 DATED: January 4, 2013

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8 WILLIAM B. SHUBB
9 UNITED STATES DISTRICT JUDGE
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