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

SIERRA CLUB and FRIENDS OF THE WEST)
SHORE,)
)
Plaintiffs,)
)
vs.)
)
TAHOE REGIONAL PLANNING AGENCY,)
)
Defendant.)

Civ. No. 2:13-CV-00267-JAM-EFB

**PLAINTIFFS' OPENING BRIEF IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

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AG	California Attorney General
AR	Administrative Record
Bailey	Land-Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide to Planning
BMP	Best Management Practices
CEQA	California Environmental Quality Act
CFA	Commercial Floor Area
Compact	Tahoe Regional Planning Compact
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
HRA	Hydrologically Related Area
IEC	Initial Environmental Checklist
LCD	Land Coverage District
NEPA	National Environmental Policy Act
ONRW	Outstanding National Resource Water
RPU	Tahoe Regional Plan Update
TAU	Tourist Accommodation Unit
TER	Threshold Evaluation Report
Threshold	Environmental threshold carrying capacity standard
TRPA	Tahoe Regional Planning Agency

INTRODUCTION

1
2 Lake Tahoe’s clear, blue waters result from a delicate ecological balance that minimizes
3 nutrients in the Lake. In 1968, California and Nevada forged the bi-state Tahoe Regional Planning
4 Compact to preserve this balance and protect the Lake’s “unique” environment. Compact art. I(a)(3).
5 The states found that “increasing urbanization” threatened the region’s environment, and, thus, its
6 “natural beauty and economic productivity.” Compact art. I(a)(1), (5). The Compact created the
7 Tahoe Regional Planning Agency (“TRPA”) to limit growth and ensure the Lake’s restoration.
8 Compact art. I(b). The original Compact did not succeed and was amended in 1980 to require that
9 environmental threshold carrying capacities (“thresholds”) be set to protect the region’s natural
10 values, including air quality, water quality, and soil conservation. Compact arts. II(i), V(b).

11 Over three decades later, little progress has been made to restore the Lake’s environment. In
12 2011, Lake Tahoe’s summer clarity declined to an all-time low; summer clarity has dropped an
13 average of a foot per year since 1969. The primary culprit is pavement and buildings covering the
14 Tahoe Basin’s soil and preventing infiltration of precipitation. Instead, stormwater and snowmelt
15 flow over hard surfaces, gathering pollutants. The runoff eventually flows into Lake Tahoe.

16 On December 12, 2012, TRPA adopted a Regional Plan Update (“RPU”). The RPU does not
17 reduce pavement or conserve soil. Instead, it allows more pavement and urban growth – an increase
18 of 66 acres, largely targeted for urban areas near the Lake. The RPU allows 3,200 new residential
19 units, 200,000 square feet of commercial floor area, and over 300 acres of new resort recreation area.
20 The RPU’s perverse logic is that allowing more pavement – the most significant threat to the Lake’s
21 waters – will restore the Lake. With the higher density development allowed in urban areas, property
22 owners will be encouraged to redevelop, and in doing so, will be required to install and implement
23 best management practices (“BMPs”). BMPs are intended to control stormwater, infiltrating runoff
24 into soil and groundwater, diverting it from pavement, and reducing runoff pollution into the Lake.

25 This approach presents two problems. First, the RPU allows a significant loss of soil, which
26 serves valuable ecological functions that BMPs do not replace. In studying the RPU’s environmental
27 impacts, TRPA failed to address how soil loss from concentrated coverage would affect local areas.
28 Second, TRPA’s studies fail to address how it will ensure that BMPs are properly maintained, which

1 is critical to their long-term ability to mitigate the runoff impacts of increased coverage, when TRPA
2 has had little success in achieving compliance with BMP requirements in the past.

3 Smog – resulting from increased traffic, motorized boating, and other combustion engines –
4 also plagues the Tahoe Basin. But TRPA has no adequate ozone monitoring plan to ensure that the
5 RPU achieves and maintains compliance with ozone standards. In light of TRPA’s failures to
6 properly address the RPU’s impacts on soil conservation, water quality, and air quality, plaintiffs
7 respectfully request that the Court set aside the environmental impact statement and threshold
8 findings for, and its approval of, the RPU.

9 **BACKGROUND**

10 **I. Lake Tahoe and Urban Development Within the Tahoe Basin**

11 In a grand setting high in the Sierra Nevada, Lake Tahoe is famed for its clear blue water.
12 AR107890. Lake Tahoe has an average depth of 1000 feet; its area is 191 square miles. AR107885.
13 This depth, the low ratio of watershed to lake area, and the watershed’s geology result in a very low
14 level of nutrients to support algal growth, producing the Lake’s clarity. AR126828, 169, 11920.
15 Recognizing its exceptional purity, EPA designated Lake Tahoe an Outstanding National Resource
16 Water (“ONRW”), the highest protection for a water body. AR11916. ONRW status “prohibits any
17 degradation of existing water quality standards with a limited exception for short-term or temporary
18 changes in quality.” *Nat’l Wildlife Fed’n v. Browner*, 127 F.3d 1126, 1127 (D.C.Cir.1997) (citing 48
19 Fed. Reg. 51,400, 51,403 (1983)).

20 But water quality monitoring in Lake Tahoe since the early 1960s has shown declining mid-
21 lake clarity due to increased algae growth and the addition of fine sediments, which scatter light and
22 reduce the depths it reaches. AR11920. Indeed, average summer clarity—measured by the maximum
23 depth at which a standard-sized white “Secchi” disk is visible from the surface—has steadily declined
24 from 94.1 feet in 1968 to 50.4 feet in 2011 (the lowest ever recorded) at a rate of nearly a foot per
25 year. AR107947. The largest cause of reduced clarity is fine sediment pollution, which mainly
26 originates in the Lake’s urban areas, although these cover only ten percent of the region. AR107924.
27 Paved surfaces prevent infiltration of precipitation into the soil, which instead runs off, carrying
28 sediments and other pollutants with it. AR126834. A network of roadways and pipes carries the

1 runoff to Lake Tahoe’s 63 tributaries or directly to the Lake. AR126828. Atmospheric deposition of
2 nitrogen, believed to be largely caused by vehicle exhaust, is also a large contributor to algae
3 growth. AR11925, 106048, 106060.

4 Due to development around Lake Tahoe, the “deep water clarity” standard for annual average
5 Secchi disk visibility of 97.4 feet is far from being achieved. AR152-53. In 2010, the second lowest
6 annual average Secchi depth of 64.4 feet was recorded. AR107327. While winter and annual average
7 clarity showed modest improvements in 2011, *see* AR107945-46, the Lake’s summer clarity
8 continued to decline. Indeed, summer clarity “has been dominated by a consistent long-term decline”
9 that has been “near-continuous over the last decade.” AR107947.¹

10 Further, runoff flowing into tributaries and the Lake’s nearshore directly impacts the waters
11 into which it discharges. Nutrient concentrations annually exceed tributary water quality standards,
12 AR163, 168, 171, and nearshore conditions are worsening: algae coating submerged rocks is more
13 frequently observed. AR20, 169. 424, 431. The latter is “of particular concern,” as the nearshore “is
14 highly visible and receives more recreational use than other areas of the Lake.” AR11934. *See also*
15 AR20 (noting nearshore’s “negative trends” in native aquatic species). Nutrient pollution from urban
16 areas likely contributes to this. AR424; AR107942 (nearshore site “with the most [attached algae] is
17 close to urban areas”).

18 The impacts of runoff are mitigated through “best management practices” (“BMPs”) that
19 reduce runoff volume and remove pollutants. But BMPs do not infiltrate water or prevent runoff as
20 well as natural soil. AR143744 (“Natural watershed areas are very effective at removing nutrients
21 from incoming precipitation. Removal rates of up to 100 percent have been observed in natural
22 areas. Overland runoff is rare in natural areas.”) The Tahoe Environment Research Center notes that
23 a “comprehensive, regional urban stormwater monitoring plan” is needed to determine whether
24 stormwater treatment systems are having any effect on Lake water quality. AR107946. BMPs can
25 require costly installation, operations, and regular maintenance that must be applied to thousands of
26 parcels in the Tahoe Basin for as long as these parcels are covered, but TRPA has not broadly

27 _____
28 ¹ In addition, another clarity measure, “phytoplankton primary productivity,” which measures the
concentration of algae in the Lake, is in “rapid decline,” having increased at a rate of 8% over 44
years. AR146-47. In 2011, algae concentrations were over four times the threshold standard. *Id.*

1 enforced BMP requirements. AR55402, 137778; *see* pp. 18-20 below. Nearly two-thirds of existing
2 parcels have not been retrofitted. AR11950. In contrast, the infiltration “services” of natural soil are
3 free and require no regulatory oversight to ensure continued effectiveness. *Cf.* AR137718 (Placer
4 County estimating \$130 million costs for urban stormwater controls for 15 years); AR104079 (Basin
5 costs for water pollutant controls range from \$1.5-3.2 billion for 20 years).

6 **II. The Tahoe Regional Planning Compact**

7 In 1968, California and Nevada entered into the Tahoe Regional Planning Compact to protect
8 natural resources and control development in the Tahoe Basin. The Compact created TRPA to serve
9 as the land use and environmental resource planning agency for the Lake Tahoe region; Congress
10 approved it in 1969. Pub. L. No. 91-148 (1969). The 1969 Compact required TRPA to adopt a
11 regional plan and establish minimum region-wide standards for environmental protection. 1969
12 Compact, art. VI(a), (b). Unfortunately, the 1969 Compact failed to be the powerful environmental
13 protection measure intended. *See id.*, art. I(c) (“[I]t is imperative that there be established an
14 areawide planning agency with power to adopt and enforce a regional plan of resource conservation
15 and orderly development [and] to exercise effective environmental controls...”). As a result, Nevada
16 and California extensively amended the 1969 Compact, which Congress approved on December 19,
17 1980. Pub. L. No. 96-551 (1980). The Compact also was enacted by California and Nevada as state
18 laws. Cal. Gov. Code § 66801; Nev. Rev. Stat. 277.200.

19 These amendments included significant changes. First, the Compact requires TRPA to
20 develop environmental threshold carrying capacities, arts. II(i), V(b), and ensure that all planning
21 and development in the Lake Tahoe region is consistent with achieving and maintaining these. *See*
22 *id.*, art. I(b) (“[I]t is imperative that there be established a Tahoe Regional Planning Agency with the
23 powers conferred by this compact including the power to establish environmental threshold carrying
24 capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve
25 and maintain such capacities while providing opportunities for orderly growth and development
26 consistent with such capacities.”)

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

1 safety within the region.” Compact, art. II(i). Such standards must include standards for air quality,
2 water quality, and soil conservation. *Id.* In August 1982, by Resolution No. 82-11, TRPA adopted
3 thresholds. These thresholds were not only aimed at preventing further deterioration of the region,
4 but also at restoring the region to former conditions. Some thresholds impose “extensive substantive
5 requirements” on TRPA “to improve environmental quality, in some instances dramatically.”
6 *League to Save Lake Tahoe v. TRPA*, 739 F. Supp. 2d 1260, 1278, 1295 (E.D. Cal. 2010).

7 Within a year of the thresholds’ adoption, TRPA was required to amend the regional plan so
8 that “the plan and all its elements, as implemented through agency ordinances, rules and regulations,
9 achieves and maintains the [thresholds].” Compact, art. V(c). On April 26, 1984, TRPA adopted a
10 new Regional Plan, amended in September 1986 and February 1987. Until the RPU, the 1987 Plan
11 guided all land-use planning and development within the region. The Code of Ordinances (“Code”)
12 for implementation of the Regional Plan required by the Compact was adopted in May 1987.

13 To ensure that TRPA fulfills its mission to achieve and maintain the thresholds, when it
14 amends its Code or Regional Plan, it must make “threshold findings.” Code § 4.5 requires that,
15 whenever TRPA amends its Regional Plan, it must find that the Plan, “as amended, achieves and
16 maintains the thresholds.” *See* AR668 for TRPA’s Code of Ordinances. Code § 4.6 requires that, to
17 approve any change in the Code, TRPA must find that “the Regional Plan and all of its elements, as
18 implemented through the Code, Rules and other TRPA plans and programs, as amended, achieves
19 and maintains the thresholds.”

20 Article VII of the Compact requires TRPA to prepare and consider a detailed Environmental
21 Impact Statement (“EIS”) before approving or carrying out any project that may have a significant
22 effect on the environment. Art. VII(a)(2). The EIS must include the project’s significant
23 environmental impacts, any significant adverse environmental effects that cannot be avoided if the
24 project is implemented, alternatives to the project, and mitigation measures that “must be
25 implemented to assure meeting standards of the region.” Art. VII(a)(2)(A)-(D).

26 **III. The Tahoe Regional Plan Update**

27 Further details of the matters discussed above and the procedural history of the approval of
28 the RPU are described in section III of the Statement of Undisputed Facts, filed herewith.

STANDARD OF REVIEW

1
2 Summary judgment is appropriate when the record shows that “there is no genuine issue as to
3 any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
4 56(a). This is a record-review case, to be decided on the basis of the administrative record; there are
5 no material facts in dispute. The only issue is whether plaintiffs are entitled to judgment as a matter
6 of law, and, specifically, whether the RPU’s adoption is supported by the law and the record.

7 Under the Compact, the standard of review for legislative actions is “whether the act or
8 decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the
9 agency has failed to proceed in a manner required by law.” Art. VI(j)(5).; *see also* Code § 4.31 (all
10 findings “shall be supported by substantial evidence in the record of review”). Review under the
11 Compact largely parallels Administrative Procedure Act (“APA”) review of agency action. *See* 5
12 U.S.C. § 706(2)(A), (E); *League*, 739 F. Supp.2d at 1267 (applying APA standards to Compact
13 claims). An action is arbitrary or capricious for APA purposes where the agency “relied on factors
14 Congress did not intend it to consider, entirely failed to consider an important aspect of the problem,
15 or offered an explanation that runs counter to the evidence before the agency or is so implausible
16 that it could not be ascribed to a difference in view or the product of agency expertise.” *Lands*
17 *Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (citation, internal quotations omitted). Further,
18 the agency “must articulate a rational connection between the facts found and the conclusions
19 reached.” *League*, 739 F. Supp. 2d at 1267 (citation, internal quotations omitted). The Compact
20 requires an EIS to take “a ‘hard look’ at the potential impacts” of a proposed action. *League*, 739 F.
21 Supp. 2d at 1289, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

22 While the National Environmental Policy Act (“NEPA”) does not apply to TRPA, NEPA has
23 interpretive value, where the Compact’s and NEPA’s language are similar, and where their schemes
24 and purposes match. *See League*, 739 F.2d at 1274. The California Environmental Quality Act
25 (“CEQA”) also supplies persuasive authority. “Like CEQA and NEPA, the Compact serves to
26 inform the public and to protect the environment in a general sense.” *Id.* at 1276.

ARGUMENT

I. TRPA’s Failure to Analyze the Impacts of Concentrating Coverage Is Arbitrary and Capricious.

The RPU authorizes 200,000 square feet of new commercial floor area (“CFA”) and 3,200 new residential units in the Tahoe Basin, targeting new development (which also includes unused developments rights under the 1987 Plan: 383,600 sq. ft. of CFA, 342 tourist accommodation units (“TAUs”), 960 residential units) in identified urban “centers” along the Lake. AR26957-59. It also purports to incentivize transfer of existing development rights into the centers, e.g., by awarding “bonus” residential units for transferring rights for impervious-surface development (“coverage”) from outlying sensitive areas into centers. AR11479, 11891. To encourage concentrated development in centers, the RPU allows local governments to raise height, density, and coverage limits in these areas, through the adoption of “area plans.” AR11598-601; Code §§ 13.5.3, 30.4. The RPU raises the maximum area of a parcel that may be “covered” from 50% to 70% on “high-capability” lands (lands deemed to better tolerate development), reducing the area of naturally functioning soil on such lands. AR11881, AR11897. The RPU also allows local agencies that adopt area plans to propose “a comprehensive coverage management system as an alternative to the parcel-level requirements,” potentially allowing 100% coverage of certain parcels and thus greater coverage concentration in larger areas, so long as overall coverage within the area plan boundary is limited to 70% and other conditions are met. Code § 13.5.3(B)(1). The areas where the increased coverage is targeted – including City of South Lake Tahoe, Tahoe City, Incline Village, and Kings Beach – are already heavily affected by coverage, their land areas covered up to 45 to 75%. AR155938-54.²

The concentration of new coverage closer to the Lake will result in significant loss of natural soil function on thousands of parcels – up to 40% of the remaining functional soil on parcels on high-capability lands already 50% covered could be lost, and even more on parcels with less than 50% coverage. But the EIS failed to examine the cumulative impacts to soil conservation resulting from increased development and concentrated coverage in centers, as well as on their associated natural watersheds and sub-watersheds. Instead, the EIS only analyzed the impacts of a net increase

² The RPU also exempts new paved, non-motorized public trails from parcel-level coverage limits. AR11895-96, 5186.

1 in coverage on a region-wide basis, an approach that improperly masks the significant local impacts
2 of the loss of natural soil function on communities along the Lake and on the Lake itself.

3 **A. TRPA’s Soil Threshold Requires Preservation of Environmental Balance.**

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

17 The threshold protects soil and ecological balance by requiring compliance with land
18 coverage limitations provided by “Land Capability Classification of the Lake Tahoe Basin,
19 California-Nevada: A Guide to Planning” (“Bailey,” after its author). AR11859. Bailey prescribes
20 the percent of area coverage allowed on nine soil types (“Bailey coefficient”), depending on their
21 sensitivity. AR11861-62. The “highest capability” lands may be covered up to 30%, while the lowest
22 capability lands—with steep slopes, higher susceptibility to erosion, lower infiltration ability, or wet
23 conditions—may only be covered up to 1%. *Id.*; AR11630. The acreage of coverage allowed in a
24 particular area for a specific land capability class is known as “base allowable land coverage.” Code
25 § 30.4.1. TRPA claims that the threshold is generally in attainment region-wide: The highest-
26 capability lands (classes 6 and 7)—dispersed over a more than 200,000-acre area—are purportedly in
27 compliance with the threshold region-wide, because, in the aggregate, they have less than 30%

1 coverage, while the threshold for one of the most sensitive soil types (class 1b) is not in compliance,
2 because, in the aggregate, coverage exceeds the 1% limit by over 650 acres.³ AR26687-88.

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

13 **B. The EIS Fails to Properly Study the Soil Conservation Impacts of Increased**
14 **Concentrated Coverage in Centers.**

15 An EIS must analyze “environmental consequences that foreseeably arise” from a proposed
16 action, such as adoption of the RPU. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th
17 Cir. 2002) (discussing NEPA). This is because “[t]he purpose of an EIS is to evaluate the
18 possibilities in light of current *and contemplated* plans and to produce an informed estimate of the
19 environmental consequences.” *Id.* (citing *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir.
20 1975)) (emphasis, alterations in original). Where an “environmental problem [is] *readily apparent* at
21 the time the [EIS] is prepared,” and a proposed plan “contain[s] enough specifics to permit
22 productive analysis” of the problem, the EIS must do that analysis. *Id.* at 1073 (emphasis added).
23 Environmental analysis is required “as soon as it can reasonably be done,” *id.* at 1072, at the
24 “earliest possible stage, even though more detailed environmental review may be necessary later.”

25 ³ TRPA has not consistently interpreted how compliance with Bailey limits should be evaluated. It
26 has previously evaluated compliance on a parcel-level basis and has claimed in litigation that it
27 should be evaluated on a watershed-basis. *See* note 5 below. *See also* AR3851-54, 4472-73, 4179-80
(public comments).

28 ⁴ TRPA has identified nine hydrologically related areas, each consisting of a collection of several
related watersheds. *See* AR11871, 11883 (map identifying HRA and watershed boundaries).

1 *Env'tl Prot. Info. Ctr. v. Cal. Dep't of Forestry* (“EPIC”), 44 Cal. 4th 459, 503 (2008) (internal
2 quotation marks, citation omitted) (interpreting CEQA). A cumulative impacts analysis, such as
3 analysis of the collective coverage impacts of future projects allowed by the RPU, “must be more
4 than perfunctory; it must provide a ‘useful analysis of the cumulative impacts of past, present, and
5 future projects.’” *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1076 (9th Cir. 2011)
6 (citing *Kern*, 284 F.3d at 1075). “To be useful to decision makers and the public, the cumulative
7 impact analysis must include ‘some quantified or detailed information; ... general statements about
8 possible effects and some risk do not constitute a hard look absent a justification regarding why
9 more definitive information could not be provided.’” *Id.* (citing *Ocean Advocates v. Army Corps of*
10 *Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005)). Here, the problems posed by increased concentrated
11 coverage in already heavily impacted areas was “readily apparent” but ignored, although studies
12 were “reasonably possible,” *Kern*, 284 F.3d at 1073, and the overall analysis of the RPU’s coverage
13 impacts was “perfunctory.” *Northern Plains*, 668 F.3d at 1075.

14 The EIS only performed a general analysis weighing the overall increase in coverage allowed
15 by the RPU against its purported overall benefits of reducing coverage on sensitive lands. It entirely
16 ignored the local impacts of increased coverage in areas where coverage is already concentrated. *See*
17 *generally* AR11876, 11897. The DEIS found that the RPU could cause a net increase in coverage of
18 66 acres region-wide (revised to 183 acres in the final EIS (“FEIS”)). AR11897, AR5095. To
19 conclude that this coverage would have less than significant impacts, the DEIS weighed the
20 generalized impact of an overall increase in coverage against the benefit of a 15-acre reduction in
21 coverage located in sensitive areas, “due to substantial changes to coverage policies providing
22 incentives to transfer coverage from sensitive lands.” AR11876, 11897-98. It also noted that the total
23 coverage allowed by the RPU would not exceed the total coverage allowed under Bailey, *i.e.*, the
24 total coverage allowed for each soil type, aggregating total coverage of each type across the entire
25 region, regardless of land capability. AR11897. Nowhere does the EIS mention the potential effects
26 of increased concentrated coverage at the local level. TRPA’s cursory analysis “fails to take a hard
27 look at an important aspect of the problem,” in light of extensive evidence that the location and
28 concentration of coverage matters: The greater the coverage in a watershed, the greater the loss of

1 natural soil and its ecological functions and the greater the potential for significant harm to that
2 watershed.

3 The public presented extensive evidence on this subject in requesting analysis of coverage
4 impacts on a localized scale. *See, e.g.*, AR4180-82, AR4483-85, 4478-79. Plaintiffs noted studies
5 showing that impervious coverage greater than 10% in a watershed impacts aquatic systems. *See*
6 AR4181-82 (noting studies showing loss of biodiversity in streams). The California Attorney
7 General (“AG”) raised similar evidence: “As the amount of impervious cover and drainage density
8 increase in a development watershed, a number of results occur: (1) surface runoff increases; (2)
9 sources of sediment increase; (3) sediment yield increases; (4) nutrient yield increases; (5) peak flow
10 increases; (6) flow velocities increase; (7) stream energy and the ability to transport sediment
11 increase; (8) lag time decreases; and (9) flow time increases.” AR3854-55 (quoting 2005 Forest
12 Service study proposal: “watershed processes are measurably disrupted” by “over 10 percent
13 impervious coverage” AR139438). The AG’s letter also noted that in 2005 nine Tahoe Basin
14 watersheds exceeded 10% cover, and twelve additional watersheds exceeded 5% cover. AR3855
15 (quoting AR139439).

16 TRPA’s own past practices show that the location and concentration of coverage matter. For
17 example, TRPA’s regulations “recognize[] the potential harm that can be caused by concentrating
18 coverage in portions of the Tahoe Basin and thus limit[] transfers within the same hydrologically
19 related area to reduce the risk of concentrating coverage in over-covered parts of the Basin,”
20 AR38556. “The hydrologic boundaries are essentially a risk management mechanism to prevent any
21 given hydrologic or geographic subregion from absorbing a disproportionate amount of impacts
22 from transfers of land coverage.” AR141391.

23 TRPA’s 2006 Threshold Evaluation Report (“TER”) noted:

24 Although TRPA does not currently have an adopted threshold for a maximum
25 percentage of land coverage for each watershed in the Basin, *such an analysis is*
26 *worthwhile since scientific literature indicates that most stream quality indicators*
decline when watershed impervious cover exceeds 10 percent, with severe
degradation expected beyond 25 percent impervious cover.

27 AR93098 (emphasis added). The report noted that “four out of the 64 watersheds and seven out of
28 the nine aggregate intervening areas have equal to or greater than 10 percent hard coverage. Four of

1 these watersheds/ intervening areas have greater than 15 percent coverage, three of these watersheds/
2 intervening areas have greater than 20 percent coverage and two watersheds/ intervening areas
3 exceed 25 percent hard coverage.” *Id.*⁵

4 In 2007, TRPA proposed (although it did not adopt) a threshold requiring: “Land Coverage
5 and Disturbance-Land coverage by land capability class *on a watershed basis* not exceeding the
6 allowable percentage of impervious cover as specified” in Bailey. The justification was:

7 Drainage patterns play a significant role in mitigating the effects of impervious cover
8 – lands *adjacent to or downslope of impervious cover* may provide opportunities for
9 attenuating or eliminating the effects of increased runoff and erosion and transport of
10 pollutants, *while other pervious areas in the watershed may not*. Thus, there is a need
11 for soil conservation and storm water planning *on a smaller scale* to effectively
12 mitigate the effects of impervious cover in a watershed as a whole.

13 *Id.* (emphases added).

14 TRPA’s response to comments did not dispute this evidence but suggested that a localized
15 analysis should be done later; it claims a “parcel-scale or subwatershed-scale” analysis is “neither
16 feasible nor necessary to assess programmatic effects.” AR5090. This is unresponsive to requests for
17 watershed-level analysis, referring only to parcel- or subwatershed-scale analyses. Moreover,
18 TRPA’s claim that analysis of localized coverage effects is infeasible lacks merit. The Ninth Circuit
19 has held: “NEPA requires that an EIS engage in reasonable forecasting. Because speculation is...
20 implicit in NEPA, [] we must reject any attempt by agencies to shirk their responsibilities under
21 NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.”
22 *Northern Plains*, 668 F.3d at 1078, citing *Selkirk Conserv. Alliance v. Forsgren*, 336 F.3d 994, 962
23 (9th Cir. 2003) (alterations in original).

24 Here, reasonable forecasting was entirely feasible. TRPA knew where existing coverage was,
25 and the soil types for all areas. To study the increase in amount of coverage region-wide, TRPA
26 developed a “preliminary digital map that displayed impervious land surfaces... and [undeveloped

27 ⁵ Until recently, TRPA evaluated coverage compliance based on whether Bailey limits were met at
28 watershed and smaller scales but abandoned this without explanation in its 2011 TER. *Compare*
AR93096-98 (2006 TER evaluating “attainment on a land capability class basis...on the basis of the
Hydrologic Transfer Areas, on the basis of the watersheds and intervening areas, and on the basis of
subwatersheds”); *State of Cal. ex rel Van de Kamp v. TRPA*, 766 F.2d 1308, 1315 (9th Cir. 1985)
(noting TRPA’s position that “the threshold is to be applied on a ‘watershed association’ basis”) *with*
AR190 (2011 TER evaluating compliance with Bailey only on a regional scale).

1 lands]” and overlaid this with “two different land capability maps” showing where each soil type is,
2 “to determine preliminary estimates of impervious surface by land capability district at a Regional
3 scale.” AR3307. Impervious surface mapping could tell “hard” coverage (roofs or pavement) from
4 “soft” (e.g., compacted surfaces preventing infiltration) and identify buildings, roads, parking lots,
5 and driveways. *Id.* TRPA knew the potential development level in centers under the RPU, having set
6 its upper limits, and the development’s potential distribution. In TRPA’s region-wide analysis of
7 coverage impacts, “estimates of coverage from development... assume that all authorized
8 development would be built for each alternative and that the distribution of that development would
9 reflect distribution assumptions used in the TRPA Transportation Demand Model...” AR5092. *See*
10 *also generally* AR11154-73 (explaining distribution assumptions for model). The region-wide
11 analysis also estimated the average coverage associated with new units. AR11875, 12977-78.

12 Yet TRPA attempts to cast any inquiry into the local impacts of additional concentrated
13 coverage as “crystal ball inquiry.” For example, the FEIS states: “Estimated coverage reductions
14 from transfers have been applied proportionately to individual [land coverage classes] in TRPA’s
15 Region-wide analysis. It would be infeasible to attach such reductions to more specific locations
16 because the demand for transferred coverage within each HRA cannot be estimated with any
17 accuracy and the location of coverage available for transfer varies substantially within HRAs.”
18 AR5090. But “accuracy” is not required. *See Northern Plains*, 668 F.3d at 1079 (noting that agency
19 could have studied cumulative impacts of railroad project with methane extraction projects, given
20 that “EIS has described in some detail the likely scope of [methane] development in the future,”
21 including “” numbers of wells, compressors, roads, and pipelines, and likely locations of these
22 (emphasis added)). TRPA’s region-wide coverage analysis used “reasonable assumptions” and “best
23 available data” to make “estimates” of coverage increases. AR5091-92; *see also* AR5103 (water
24 quality analysis assuming all parcels within centers would “maximize their allowable coverage”);
25 AR1155 (transportation model noting distribution of development rights assigned “randomly” or “in
26 proportion,” “based roughly on the number of...parcels eligible for [those units]”); AR11158
27 (“Since it is impossible to know exactly how many and which parcels would utilize the residential
28 transfer incentives, it was necessary to make a series of reasonable assumptions based on the best

1 available information...”); AR11163-64 (description of transportation model). Here, coverage is
2 likely to come from outside centers, given transfer incentives. AR5306, 11598-99.

3 Moreover, TRPA had the ability to examine the potential impacts of increased coverage to
4 particular watersheds and the “nature” of those impacts, even if the precise “extent” was unknown.
5 *See Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 532 (8th Cir. 2003) (noting
6 project’s air impacts could not be ignored—only “*extent* of the effect [was] speculative,” but “*nature*
7 of the effect” “far from speculative” (emphases in original)); *Kern*, 284 F.3d at 1073 (invalidating
8 EIS that failed to consider project’s risk of spreading tree fungus, when “environmental problem was
9 readily apparent” when EIS prepared). TRPA was “not operating in a vacuum.” *Northern Plains*,
10 668 F.3d at 1079. It knew the location of existing coverage, potential for new development, average
11 amount of coverage for each type of unit, and locations in which new development would likely be
12 located—in fact, had been *targeted*—and had assumed a distribution of that development in its traffic
13 models. *See EPIC*, 44 Cal. 4th at 503 (rejecting agency’s claim that “the lack of specific details
14 about [projected logging projects] made it infeasible to do individual watershed planning analysis,”
15 given that analysis “was not tied to any particular [timber harvest plan] and was not contingent on
16 [project proponent] formulating the siting and other details of its logging activity more precisely”).

17 The FEIS claims that studying localized coverage impacts is unnecessary, because those
18 impacts will be studied at the area plan or project-level stage:

19 [B]efore any physical alteration of the environment could occur, subsequent local-
20 scale evaluations of coverage would be prepared. For example, as part of the Area
21 Plan process, smaller-scale planning efforts would require additional environmental
22 analysis, including evaluation of coverage at a more localized scale before many of
23 the provisions relating to Area Plans in the Final Draft Plan would apply (e.g.,
24 comprehensive coverage management, increases to maximum allowable coverage).

25 AR5090. However, because the RPU EIS does not even acknowledge the potential for significant
26 impacts at a local level, nothing in the EIS triggers local jurisdictions (or TRPA) to study the local
27 impacts of increased coverage. Indeed, local jurisdictions adopting area plans have not studied such
28 impacts, relying on the RPU EIS’s conclusion that increased coverage limits have no significant
impact. For example, although Douglas County’s South Shore Area Plan will increase maximum
allowable coverage to the maximum for centers (70%), TRPA only prepared an “Initial

1 Environmental Checklist” (“IEC”) with no analysis of local coverage impacts. Instead, it cites the
 2 RPU EIS’s conclusion that impacts of maximum coverage under the RPU will not be significant:

3 The [Area Plan] would include the land coverage limitations of the adopted Regional
 4 Plan (Chapter 30 of the TRPA Code). These include allowing up to 70 percent
 5 coverage on developed parcels within Town Centers.... The potential effects of these
 6 changes were analyzed in the RPU EIS...and were found to be less than significant.

7 RJN, Park Decl., Ex. A at 7. *See also id.*, Ex. B at 8-9 (noting gap between area plan’s and RPU
 8 EIS’s cumulative analyses); AR5472 (FEIS noting “[f]uture... analysis *may or may not* involve the
 9 analysis [of coverage limits] at the community-level scale....”(emphasis added)). TRPA “may not
 10 avoid an obligation to analyze in [the] EIS environmental consequences that foreseeably arise from
 11 [the RPU] merely by saying that the consequences are unclear or will be analyzed later when [a
 12 study] is prepared for a site-specific [plan] pursuant to the [RPU].” *Kern*, 284 F.3d at 1066. By
 13 deferring this analysis, “the substantial informational and analytical gap in the analysis of watershed
 14 impacts...may also call into question” the total development allowed by the RPU, as well as TRPA’s
 15 overall strategy of incentivizing development transfers into centers. *EPIC*, 44 Cal.4th at 504.

16 In sum, TRPA’s failure to examine the impacts of increased, concentrated coverage within
 17 localized areas where development is intended to be concentrated lacks any evidentiary basis and is
 18 arbitrary and capricious, in violation of the Compact. *See Pac. Coast Fed’n of Fishermen’s Ass’ns v.*
 19 *Nat’l Marine Fisheries Serv.*, 265 F.3d 1028 (9th Cir. 2001) (holding agency’s “disregard of projects
 20 with a relatively small area of impact but that carried a high risk of degradation when multiplied by
 21 many projects and continued over a long time period” arbitrary and capricious).

22 **II. The EIS’s Analysis of the Water Quality Impacts of Increased Coverage Improperly
 23 Assumes That “BMPs” for Stormwater Treatment Will Mitigate These Impacts.**

24 TRPA’s solution to the loss of soil—specifically, its infiltration and pollution removal
 25 functions—is to require “best management practices” (“BMPs”) to mitigate the impacts of increased
 26 stormwater runoff and pollutant loading caused by increased coverage. In fact, TRPA is relaxing
 27 parcel-level coverage restrictions to *incentivize compliance* with BMP retrofit requirements, which
 28 property owners have long ignored and TRPA has rarely enforced. AR11894. In essence,
 requirements that have proven ineffective for existing development are to serve as “mitigation” for
 the RPU’s increased coverage. Most troublingly, TRPA has only partly addressed the BMP

1 implementation problem. Some compliance with BMP retrofit requirements may occur, but TRPA
 2 has no adequate, long-term plan to achieve broad compliance with BMP maintenance requirements
 3 essential to BMPs' efficacy. Given its poor record with BMP compliance, there is no basis to
 4 conclude that it will achieve permanent compliance with maintenance requirements for existing and
 5 significant new development.⁶

6 **A. The EIS Fails to Ensure Compliance with BMP Maintenance Requirements.**

7 Under the Compact, an EIS must set forth “[m]itigation measures which must be
 8 implemented to *assure meeting standards of the region.*” Art. VII(a)(2)(D) (emphasis added). The
 9 Compact thus “requires, at a minimum, a ‘reasonably complete’ discussion of mitigation measures,
 10 including ‘analytical data’ regarding whether the available measures would achieve the required
 11 result.” *League*, 739 F. Supp. 2d at 1281, quoting *Methow Valley*, 490 U.S. at 352. In the NEPA
 12 context, “[courts] consider whether [mitigation measures] constitute an adequate buffer against the
 13 negative impacts that may result from the authorized activity.” *Nat’l Parks & Conserv. Ass’n*, 241
 14 F.3d 722, 734 (9th Cir. 2001). “In practice, mitigation measures have been found to be sufficiently
 15 supported when based on studies conducted by the agency... or when they are likely to be
 16 adequately policed.” *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 17 (2nd Cir. 1997). “Such
 17 policing may occur prospectively by administrative enforcement through the imposition of a
 18 mandatory permit condition... or it may be recognized as a baseline incident, enforced by a literal
 19 police presence.” *Friends of Back Bay v. Army Corps of Eng’rs*, 681 F.3d 581, 589 (4th Cir. 2012).
 20 Here, the EIS mentions vague measures to ensure compliance with maintenance requirements with
 21 no discussion of their efficacy, with no “mandatory” condition for TRPA to pursue such efforts nor
 22 any assurance that existing maintenance requirements will be “enforced by a... police presence.” *Id.*

23
 24
 25 ⁶ In addition, for the same reasons discussed above, the EIS’s analysis of the water quality impacts
 26 of concentrated coverage in centers is inadequate, having failed to discuss the potential localized
 27 impacts of denser coverage, including impacts on nearshore and stream conditions; neither is it
 28 reasonable to assume BMPs will mitigate these impacts, without any adequate program to ensure
 proper BMP maintenance. *See* AR11944, 11953-60 (DEIS lacking any discussion of nearshore,
 tributary, or watershed impacts from increased coverage); AR4186-87, 4479-80 (public comment
 noting failure to study stream and nearshore impacts); AR3317 (FEIS assuming BMPs will mitigate
 nearshore and stream impacts).

1 The EIS notes that the RPU would increase maximum allowable coverage limits from 50 to
2 70% of developed parcels in centers; new development allocations for the centers could allow 64
3 acres of additional coverage compared to existing conditions. AR11953. The DEIS simply concludes
4 that the additional coverage “would be required to meet existing BMP standards to control potential
5 increases in stormwater runoff and pollutant loading from the additional coverage, including
6 maintenance requirements, and therefore this impact would be less than significant.” AR11953-54.
7 BMPs are management controls that TRPA requires developed sites to incorporate into drainage
8 systems “to prevent and minimize stormwater impacts,” and “to help preserve and restore the natural
9 hydrologic cycle.” AR126841. These can include: (1) “pollutant source controls” to minimize the
10 mobilization of pollutants in runoff; (2) “hydrologic source controls,” which promote infiltration of
11 stormwater, “reduc[ing] the volume and rate of stormwater runoff” to reduce pollutant loading; and
12 (3) practices that “treat stormwater through detention, settling, filtration, and nutrient cycling.”
13 AR126908-09, 126911. TRPA Code § 60.4.2 provides that BMPs shall be applied to all lands. Code
14 § 60.4.6 sets “standard BMP requirements,” including infiltration facilities to discharge runoff to
15 groundwater and effluent limits for pollutants in discharges. Infiltration facilities must be designed to
16 “accommodate the volume from a 20-year, one-hour storm”—generally meaning one inch of runoff
17 from impervious surfaces on a parcel—and must use “the methodology set forth in the BMP
18 Handbook.”⁷ Code § 60.4.6(A)(1), AR6486. The only requirement for maintenance is that “BMPs
19 shall be maintained to ensure their continued effectiveness.” Code § 60.4.9. Further analysis of water
20 quality impacts in the FEIS concluded that the RPU would result in reduced pollutant loading
21 compared to existing conditions, due to increased BMP installation. AR5103-04. This analysis relied
22 on the assumption that “BMPs are correctly designed, installed, and *maintained* to retain and
23 infiltrate the 20-year 1-hour design storm.” AR6486 (emphasis added).

24 Public comments questioned the EIS’s reliance on BMPs to mitigate increased stormwater
25 runoff, “given that the track record for maintaining BMPs at Lake Tahoe is poor.” AR3863 (Cal.

26
27 ⁷ Public comments submitted evidence concerning the inadequacy of existing BMP standards to
28 capture and infiltrate the runoff from additional coverage, but TRPA failed to address these concerns
and the risk for potential stormwater “spillover” or “bypass” of BMP infiltration systems. *Compare*
AR137044 [Att.5 at 4], 127938, 127958, 4481-82, AR4383 (comments) *with* AR3584-85, 3632-33.

1 AG); AR26477; AR24313; *see also* AR4401 (noting need for “increased regulatory authority (and
2 stable funding) for inspections and enforcement of...BMP maintenance and operation requirements
3 for... new projects”); AR37044 [Att. 5 at 4]. Proper maintenance is “critical to the continued
4 effectiveness of a treatment BMP,” AR127161, and, in many cases, “frequent” maintenance is
5 needed to ensure effectiveness. *See* AR126958 (infiltration basin); AR126988 (bioretention);
6 AR127174 (bioswales); AR127201 (media filter). Without regular maintenance, certain BMPs will
7 fail. For example, “[f]ailure to frequently remove sediment and other pollutants from a BMP that
8 relies on settling or contact with vegetation will result in the re-suspension and possible release of
9 these collected pollutants.” AR127161. *See also* AR91711, 91746 (“inconsistent maintenance” of
10 mechanical treatment BMPs can result in “elevated” levels of dissolved nutrients); AR126967
11 (“Routine maintenance is necessary... [for] infiltration trenches, because once clogged, restoration
12 typically requires rebuilding the system.”).

13 TRPA’s BMP Handbook admits that maintenance, while long “recognized as a critical
14 component to long term BMP performance,...is frequently neglected.” AR126934. Placer County’s
15 study of potential strategies to reduce runoff (including increased BMP implementation) notes:
16 “[b]ecause private property BMPs are predominantly constructed and maintained by individual
17 parcel owners, improper construction and unreliable maintenance are potential performance issues.”
18 AR137757. In one Incline Village sample area in 2010, for properties with BMP certificates, 27 of
19 56 were not properly functioning or maintained, based on visual inspection. AR126457, AR126462-
20 63. This compliance rate likely results from TRPA’s sole reliance on voluntary compliance. *See*
21 RPU WQ-3.11, AR547 (“In *all aspects* of the BMP retrofit program, TRPA shall emphasize
22 *voluntary compliance* with the ordinance provisions, the provision of technical assistance through
23 the Resource Conservation Districts, and public information campaigns to inform the public about
24 basic BMP requirements and benefits.” (emphases added)). *See also* AR5205-06; AR11950. Placer
25 County has noted the ineffectiveness of voluntary compliance and TRPA’s enforcement programs:

26 While current TRPA regulatory code requires the implementation of BMPs on all
27 private parcels, compliance has not been broadly enforced. To date, the policy has
28 resulted in a low level of voluntary response by the private sector, and Tahoe Basin
jurisdictions responsible for stormwater management currently have minimal
resources and political support to enforce private property BMP implementation or

1 maintenance. Furthermore, the current regulatory code for appropriate maintenance
2 practices is overly general. For example, TRPA's current Code of Ordinances
3 requires that BMPs shall be maintained to ensure their continued effectiveness.
4 ([§ 60.4.9]) ...Tahoe Basin jurisdictions will need improved support from local
5 agency policy makers and regulatory agencies such as TRPA to achieve private BMP
6 implementation in priority areas, and to ensure private BMPs are maintained.

7 AR137778.

8 In response to comments raising the issue of proper maintenance and the need for stronger
9 enforcement requirements, TRPA did not acknowledge a potentially significant impact from
10 improper or irregular maintenance but claimed that “[b]ased on the current maintenance
11 requirements and practices, education efforts, and enforcement requirements... it is valid to assume
12 that implementation of BMPs would be effective.” AR5188-89. No evidence is provided. Other than
13 restating existing maintenance requirements, TRPA simply noted its efforts to perform BMP
14 inspections, send “reminder letters,” and create online videos. AR5189. No further specifics about
15 how these programs operate and no analysis of their efficacy are given, nor is there monitoring
16 proposed to ensure effectiveness or correct course if these efforts fail. *See Nat’l Audubon Soc’y*, 132
17 F.3d at 17 (rejecting measure to place berm to deter illegal all-terrain vehicle traffic, because agency
18 “conducted no study of its likely effects, proposed no monitoring to determine how effective the
19 proposed mitigation would be, and did not consider alternatives in the event” of failure); *Nat’l
20 Parks*, 241 F.3d at 734 (finding agency “did not conduct a study of the anticipated effects of the
21 mitigation measures nor did it provide criteria for an ongoing examination of them or for taking any
22 needed corrective action”). Further, there is no commitment to continue existing efforts. The final
23 EIS notes these efforts are supported by “grant funding,” AR5189, but it is unclear whether TRPA
24 has any commitment to maintain them for the long term or whether these are permanent programs
25 with “stable funding” that would ensure continual BMP maintenance. AR4401. *See League*, 739 F.
26 Supp. 2d at 1283 (invalidating EIS for plan to allow more boat facilities, where there was no
27 discussion of whether buoy fees would supply sufficient funding to enforce boat speed limits).

28 In addition, these programs continue to rely entirely on voluntary compliance and the hope
that it will be successful; no enforcement programs are mentioned. *See also* AR5205-06 (noting that
due to “limited enforcement resources” TRPA would “continue to emphasize voluntary compliance

1 with BMPs *for all property owners* in accordance with Policy WQ-3.11. Voluntary compliance is
2 facilitated through notifying property owners of requirements, providing technical assistance in BMP
3 implementation, and providing incentives only available to properties that comply with BMP retrofit
4 requirements.” (emphasis added)). But voluntary compliance has not achieved a significant rate of
5 compliance in at least one area of the Tahoe Basin, nor has it been successful Basin-wide for BMP
6 retrofit implementation. Under this program, all BMPs were to be installed by October 15, 2008,
7 Code § 60.4.4(A), but only 34% of the relevant properties have BMP compliance certificates.
8 AR11950. “Targeted” notice letters have resulted in “approximately 30 percent of targeted
9 properties achieving BMP compliance, typically within one to three years after receiving an official
10 notice from TRPA.” *Id.* This leaves over two-thirds of property owners out of compliance, three
11 years after receiving an official notice. *See also* AR137757 (“Current TRPA regulations define
12 private property BMPs as mandatory, but compliance has not been enforced.”); AR137743
13 (“Although TRPA ordinances have existed for private BMP implementation for over 20 years, the
14 implementation level remains on the order of 10% or lower in some areas of Placer County.”).

15 Nothing indicates that reliance on voluntary compliance for BMP maintenance would
16 achieve any more success than it has for retrofit requirements. Unlike one-time retrofit requirements,
17 maintenance inspections and activities may be needed numerous times a year and would apply to
18 tens of thousands of parcels for all time. *See e.g.*, AR126960, 126968 (example tables of “suggested
19 frequency” for various inspection and maintenance activities, e.g., “[m]onthly (April-Oct.),”
20 “[b]efore and during major storms,” “96 hours after major storms”). In short, “[t]he most that
21 [TRPA] could say was that it was ‘hopeful’ that [property owners] would comply with [BMP
22 maintenance requirements].” *See Friends of Back Bay*, 681 F.3d at 589 (finding that boat speed limit
23 that Army Corps had not enforced was not sufficient assurance that project’s boating impacts on
24 wildlife refuge would be mitigated to less than significant level).

25 Given the lack of evidence that BMP maintenance requirements will be complied with or
26 adequately enforced, the EIS should have “disclose[d] the history of neglected BMP maintenance
27 and disclose[d] the impacts of its alternatives assuming that past patterns of neglect continue into the
28 future.” AR3864 (AG comment). *See also Oro Fino Gold Mining Corp. v. Cnty. of El Dorado*, 225

1 Cal.App.3d 872, 881-82 (1990) (affirming County’s decision to require study of mining project’s
2 noise impacts, despite project proponent’s claim that it would comply with existing noise standards,
3 given evidence that standards were not “monitored and enforced vigorously”). *See also* 76 Fed. Reg.
4 3843, 3851, “Final Guidance for Fed. Dep’ts and Agencies on the Appropriate Use of Mitigation and
5 Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact”
6 (Jan. 14, 2011) (noting it appropriate under NEPA to “consider past experience and address the
7 potential for environmental consequences as a result of mitigation failure” to ensure that “similar
8 mitigation is not relied on in subsequent decisions, at least without more robust provisions for
9 adaptive management or analysis of mitigation alternatives that can be applied in the event of
10 mitigation failure”). TRPA’s finding that the impacts of increased coverage on water quality will be
11 less than significant is arbitrary and capricious and has no basis in the record.

12 **B. TRPA’s Water Quality Threshold Findings Are Inadequate.**

13 Because the EIS did not properly conclude that the RPU’s water quality impacts are less than
14 significant, TRPA also failed to make adequately based findings that the Regional Plan and Code, as
15 amended, “achieve and maintain” the water quality thresholds, as required by Code § 4.5. To ensure
16 that TRPA continues to meet the threshold standards, or corrects course when necessary, whenever
17 TRPA amends the Regional Plan, it must find “that the Regional Plan, as amended, achieves and
18 maintains the thresholds.” Code § 4.5. Similarly, when it amends the Code, it must find that “the
19 Regional Plan, and all of its elements, as implemented through the Code, Rules, and other TRPA
20 plans and programs, as amended, achieves and maintains the thresholds.” Code § 4.6.

21 To achieve the water quality thresholds for mid-lake clarity and tributary water quality,
22 sediment and nutrient pollution from runoff must be significantly reduced. AR 152, 163-63 (noting
23 non-attainment of these standards). But there is no assurance that BMPs will be properly maintained,
24 or, if not, that corrective measures will be taken. The increased coverage that the RPU permits will
25 thus likely result in more pollutants reaching tributaries and streams and ultimately Lake Tahoe,
26 causing further mid-lake clarity loss and decline in nearshore conditions. Thus, rather than bringing
27 Lake Tahoe into attainment of the mid-lake clarity and tributaries thresholds, the RPU will put
28 attainment further out of reach. In sum, TRPA’s findings that the RPU achieves and maintains the

1 water quality thresholds lack any evidentiary support and are arbitrary and capricious. *See* Code §§
2 4.5, 4.6.

3 **III. TRPA’s Findings That the RPU Achieves and Maintains the Ozone Threshold Are**
4 **Improper.**

5 TRPA’s update of the Regional Plan entirely failed to provide for sufficient air quality
6 monitoring in the Region, despite numerous public comments and the 2011 TER having identified
7 the need for more and permanent ozone monitoring stations. AR4265-68, 82, 95, 125135, 155382.
8 The RPU’s failure to ensure adequate monitoring, so that actual ozone conditions are known and can
9 be managed on the basis of adequate information, renders TRPA’s findings that the RPU achieves
10 and maintains the ozone threshold invalid. Effective control of ozone levels is critical in the Tahoe
11 Basin: Tahoe is beloved for its outstanding outdoor recreation, but high ground-level concentrations
12 of ozone – most likely to occur in the summer – can cause respiratory illnesses, to which children
13 and the elderly are most susceptible. AR92. Several species of pine and aspen, which make up large
14 portion of Tahoe’s forests, are especially vulnerable to ozone damage. *Id.* Unfortunately, Lake
15 Tahoe has drawn many highly polluting sources of ozone precursor emissions—oxides of nitrogen
16 and hydrocarbons—that react in the presence of sunlight to form ozone. *Id.* These include on- and off-
17 road motor vehicles, residential fuel combustion, motorized boats, and off-road equipment. *Id.* To
18 have any rational handle on the problem, TRPA must monitor ozone throughout the Basin.

19 TRPA based its findings that the RPU achieves the ozone thresholds on a false premise, that
20 the Region “is in attainment with the ozone Threshold Standards,” though monitoring data does not
21 support this. AR26799.⁸ In fact, California’s 8-hour ozone standard, which has applied since 2006 to
22 the Tahoe Basin’s California side, about two-thirds of the Basin and its air-shed, was violated every
23 year it was monitored.⁹ AR96, AR11774. The DEIS notes that the California Air Resources Board

24 ⁸ The ozone finding specifically states: “The Lake Tahoe Region is in attainment with the ozone
25 Threshold Standards and it is anticipated that implementation of the policies, strategies, programs
26 and measures listed above will further reduce the presence of ozone and ozone precursors in the
27 Region. It is therefore determined that policies, strategies, programs, and measures are in place to
28 achieve the Threshold Standards for ozone and to continue to maintain compliance.” AR26685.

⁹ In the case of ozone, “the threshold standards [are] identical to the most stringent applicable
ambient air quality standards.” AR11777 (draft EIS). The most stringent and health-protective ozone
standard governing the Basin, California’s 8-hour ozone standard, requires that average ozone
concentrations not exceed 0.070 ppm over an 8-hour period. AR11763.

1 has designated the Lake Tahoe Air Basin as “nonattainment-transitional”¹⁰ and that progress towards
2 achieving the standard is “somewhat worse than target.” AR11759. TRPA’s draft 2011 TER
3 similarly states that the Region is *not* in compliance with the standard, *see* AR14696, and TRPA’s
4 independent scientific peer review panel confirmed the Report’s conclusion that the California 8-
5 hour ozone standard is not being attained. AR100817 (reviewer noting monitoring data confirms
6 TRPA’s findings that California ozone levels are “‘somewhat worse than target’ with a trend that
7 reflects ‘little or no change’”). *See also* AR3570 (final EIS noting same). However, the Final
8 Threshold Evaluation, with no explanation, notes that this standard “is currently in attainment.”
9 AR97.

10 The only possible explanation for the reversal is that no violations of the standard were
11 recorded in two of the last five years of the 2007-2011 reporting period. *See* AR96 (final TER noting
12 region “in attainment with the [California] standard” in 2010 and 2011). But this determination
13 appears to be improperly based on *Nevada* monitoring data from Incline Village, at the opposite end
14 of the Lake from where ozone data had been previously collected. AR96-97. Violations were
15 recorded in South Lake Tahoe, California from 2006-2009, AR96, AR11774, after which *no* ozone
16 monitoring occurred in the California portion of the Tahoe Basin. *See id.* (DEIS noting monitoring
17 data from only California monitoring station “not available after 2009”), AR4261 (public comment).

18 The lack of sufficient monitoring data to support TRPA’s claim illustrates a larger point: its
19 finding that the Regional Plan achieves and maintains the ozone thresholds is arbitrary, because it
20 lacks an adequate monitoring program to ensure that the ozone thresholds are attained. The RPU
21 requires TRPA to “evaluate progress toward attaining and maintaining the environmental thresholds
22 through the use of a detailed monitoring program.” AR619 (Goal ME-1). TRPA “shall maintain an
23 operational monitoring program,” which includes “*continuous scientific* monitoring of
24 environmental conditions related to the adopted threshold standards.” AR620 (Policy ME-3.1(A))

25 ¹⁰ In 2011, the California Air Resources Board redesignated the Tahoe Basin from “nonattainment”
26 to “nonattainment transitional.” *See* RJN, Park Decl., Ex. C. This occurred “by operation of law”
27 under California Health & Safety Code § 40925.5(a), which requires redesignation “if, during a
28 single calendar year, the state standard is not exceeded more than three times at any monitoring
location within the district.” *Id.* However, as noted below, the responsible agencies failed to conduct
any monitoring in California in this period.

1 (emphasis added). The monitoring program is “necessary” to “evaluate the thresholds, the
2 effectiveness of the regional plan, and the implementing ordinances and programs.” AR619, 620
3 (Goal ME-3). These have long been requirements of the Regional Plan, but TRPA has never fulfilled
4 its duty to install a scientifically validated monitoring network to effectively manage and control
5 ozone pollution in the Basin. *See* AR89086 (2001 TER noting discontinued monitoring sites and
6 recommending “[n]ew monitoring stations”); AR92970, 92951, 92968 (2006 TER noting need to
7 establish and maintain permanent sites).

8 TRPA’s monitoring “network” essentially consists of one ozone monitoring station in Incline
9 Village, Nevada, which does not ensure that the 8-hour standard on the California side of the Basin
10 is achieved. Nothing in the record justifies this bare minimum monitoring for an area of over 500
11 square miles, with variable meteorological conditions. AR4325. Indeed, past monitoring has shown
12 that ozone concentrations can vary significantly around the region. AR147415, 147101, 4343 (table
13 of ozone levels at different sites). The final TER itself notes that the current level of ozone (and
14 particulate) monitoring is “insufficient”:

15 Three factors affect the ability to comprehensively evaluate the status and trends of
16 air quality indicators in the Lake Tahoe Basin: 1) lack of spatial coverage of
17 monitoring sites, 2) lack of long-term operations of monitors at a given site, and 3)
18 the nature of existing indicators used to evaluate air quality in the Region. *In general,*
19 *the spacing and density of monitoring sites is insufficient to know the extent of how*
maximum and minimum pollutant concentrations are distributed throughout the
basin. This is particularly true for ozone and PM2.5 for which it is unknown if the
current network has tracked maximum (and minimum) pollutant concentrations in the
Region.

20 AR82 (emphasis added). *See also* AR82 (“Many [air quality] monitoring sites have been operated
21 only intermittently or have been shut down after a few years.... Locations of monitoring sites have
22 also been changed, making it more difficult to determine with a high degree of certainty whether a
23 trend was due to a real change in the atmosphere or more a result of the site change.”); AR97 (noting
24 “the duration of [ozone] monitoring at a particular monitoring site tends not to be continuously
25 collected,” which reduces “confidence” in the attainment determination and trend for this threshold).

26 TRPA further admits that, with respect to air quality, “there are additional monitoring needs
27 to fully satisfy the scope of monitoring and reporting called for in the Regional Plan.” AR155884-
28 85. But it goes on to suggest that there are not sufficient resources to meet those needs, and its only

1 “plan” appears to be to hope for more resources, but with no commitment to dedicate those resources
2 to monitoring: “As further resources are made available, additional stations and data *may* be made
3 *possible*.” *Id.* (emphasis added). *See also* AR4521 (comment: “Where is there identified a secure and
4 reliable source to fund the basic measurement of thresholds?”) In essence, TRPA’s “plan” is to put
5 off indefinitely establishing an effective monitoring program. This cannot “ensure adequate
6 monitoring of progress toward attaining and maintaining thresholds and standards.” *See* Code §
7 16.4.3 (adequate monitoring ensured by annually listing in status report “indicators for which TRPA
8 lacks reliable data sufficient to identify current status, and a program, *including an implementation*
9 *timetable*, to provide sufficient reliable data to allow TRPA to report, on a continuing basis, the
10 status of that indicator” (emphasis added)). Indefinite delay is intolerable, when other sources
11 suggest that ozone levels in Tahoe are rising. *See* AR4342, 147415 (Echo Summit data from just
12 outside the Basin); AR155805 (Desert Research Institute scientist quoted in 2012 that Tahoe “one of
13 the few areas in California where ozone is getting worse”).

14 In sum, the record lacks any evidentiary support that the RPU achieves and maintains the
15 ozone threshold, in light of: (1) TRPA’s non-attainment of California’s 8-hour ozone threshold, (2)
16 its admission that the current monitoring program is inadequate to monitor and detect maximum
17 ozone concentrations, (3) its failure to establish an adequate monitoring program for a decade or
18 more, and (4) the lack of any concrete plan to fund and establish an adequate monitoring program.
19 *See* Code §§ 4.5, 4.6.

20 CONCLUSION

21 For all of the foregoing reasons, Plaintiffs respectfully request this Court to (1) set aside the
22 EIS, the RPU, Code amendments adopted to implement the RPU, and any area plans adopted by any
23 governmental agency whose area plan approvals relied on the RPU’s approval; and (2) to issue an
24 injunction against TRPA and all governmental agencies from implementing the RPU, including
25 adopting area plans, or from implementing any area plan adopted by a governmental agency whose
26 area plan approval relied on the RPU’s provisions.

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Respectfully submitted,

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3 /s/ Wendy S. Park
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