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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SIERRA CLUB and FRIENDS OF
THE WEST SHORE,

Plaintiffs,

v.

TAHOE REGIONAL PLANNING
AGENCY,

Defendant.

No. 2:13-cv-00267 JAM EFB

**ORDER DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Plaintiffs Sierra Club and Friends of the West Shore's (collectively "Plaintiffs") Motion for Summary Judgment (Doc. #25) and Defendant Tahoe Regional Planning Agency's ("TRPA") ("Defendant") Cross Motion for Summary Judgment and Opposition (Doc. #36). Plaintiffs opposed Defendant's cross motion (Doc. #41) and Defendant replied (Doc. #45). Oral argument on these motions was held before the Court on March 26, 2014.

I. UNDISPUTED FACTUAL AND PROCEDURAL BACKGROUND

In 1968, California and Nevada entered into the Tahoe

1 Regional Planning Compact (the "Compact") to protect the Lake
2 Tahoe Area Basin ("LTAB"). Defendant's Response to Plaintiffs'
3 Statement of Undisputed Facts ("DRUDF") (Doc. #36-3) ¶ 18. The
4 Compact created the Tahoe Regional Planning Agency ("TRPA" or
5 "Defendant") to serve as the land use and environmental resource
6 planning agency for the region. DRUDF ¶ 18. In 1980, Nevada and
7 California extensively amended the 1969 Compact. DRUDF ¶ 19.
8 The amended Compact requires TRPA to develop environmental
9 threshold carrying capacities, and to ensure that all planning
10 and development in the LTAB region is consistent with achieving
11 and maintaining these thresholds. DRUDF ¶ 20. A "threshold" is
12 "an environmental standard necessary to maintain a significant
13 scenic, recreational, educational, scientific, or natural value
14 of the region or to maintain public health and safety within the
15 region." Compact, Art. II(i). In 1987, TRPA enacted the
16 Regional Plan, which has guided all land-use planning and
17 development within the LTAB region. Plaintiffs' Response to
18 Defendant's Statement of Undisputed Facts ("PRUDF") (Doc. #41-1)
19 ¶ 26. The TRPA Code of Ordinances ("Code"), which implemented
20 the 1987 Regional Plan, was adopted in May 1987.

21 Under the Code, TRPA may not amend the Regional Plan unless
22 it finds that the Plan, "as amended, achieves and maintains the
23 thresholds." Code § 4.5, at AR668. Article VII of the Compact
24 requires TRPA to prepare and consider a detailed Environmental
25 Impact Statement ("EIS") before approving or carrying out any
26 project that may have significant effect on the environment.
27 Compact, Art. VII(a)(2). The EIS must include the project's
28 significant environmental impacts, any significant adverse

1 environmental effects that cannot be avoided if the project is
2 implemented, alternatives to the project, and mitigation measures
3 that "must be implemented to assure meeting standards of the
4 region." Compact, Art. VII(a)(2).

5 On December 12, 2012, TRPA certified the Final EIS for the
6 Regional Plan Update ("RPU") and approved the RPU. PRUDF ¶ 1.
7 Key components of the RPU include TRPA's adoption of a Regional
8 Transportation Plan and the incorporation of Lake Tahoe's Total
9 Maximum Daily Load ("TMDL"). PRUDF ¶ 2. The TMDL is "a water
10 quality restoration plan" that "quantifies the source and amount
11 of fine sediment and nutrient loading from various land-uses and
12 outlines an implementation plan to achieve . . . existing water
13 quality standards." PRUDF ¶ 52. Plaintiffs and Defendant
14 characterize the RPU differently. Plaintiffs contend that the
15 RPU's "central strategy . . . is to loosen development
16 restrictions and incentivize redevelopment in urban core areas,
17 while removing existing development in sensitive outlying areas,
18 on the theory that this would enable more environmentally
19 sensible development and land-use overall." Plaintiffs'
20 Statement of Undisputed Facts ("PSUF") (Doc. #25-2) ¶ 33.
21 Defendant contends that the RPU "achieves Threshold Standards by
22 incorporating contemporary planning principles, current science,
23 and . . . focusing on redevelopment incentives to convert
24 substandard legacy development into modern, environmentally
25 beneficial, visually attractive, walkable, bikeable communities."
26 Def.'s Cross-Mot. at 5. Defendant emphasizes "TMDL's science-
27 based regulatory approach," rather than the 1987 Plan's focus on
28 limiting "impervious surface coverage." Id.

1 On February 11, 2013, Plaintiffs filed their Complaint (Doc.
2 #1) in this Court. The Complaint includes the following causes
3 of action: (1) "Delegation of TRPA's project approval and review
4 duties in violation of the Compact;" (2) "Failure of Regional
5 Plan to establish and ensure compliance with minimum regional
6 standards;" (3) "Failure to properly make threshold findings
7 pursuant to the Compact and Code sections 4.5 and 4.6;" and (4)
8 "Failure to adequately analyze significant impacts in violation
9 of the Compact." In a June 14, 2013 Order (Doc. #18), the Court
10 dismissed Plaintiffs' state law claims with prejudice and
11 dismissed Plaintiffs' first cause of action without prejudice, on
12 ripeness grounds.

13 14 II. LEGAL STANDARDS

15 A. Standard of Review

16 Under the Compact, the standard of review for legislative
17 actions is "whether the act or decision has been arbitrary,
18 capricious, or lacking substantial evidentiary support or whether
19 the agency has failed to proceed in a manner required by law."
20 Compact, Art. VI(j)(5). Review under the Compact largely mirrors
21 review of agency action under the Administrative Procedure Act
22 ("APA"). League to Save Lake Tahoe v. Tahoe Reg'l Planning
23 Agency, 739 F. Supp. 2d 1260, 1267 (E.D. Cal. 2010) aff'd in
24 part, vacated in part, remanded, 469 F. App'x 621 (9th Cir.
25 2012).

26 Under the APA, an agency decision will be set aside only if
27 it is "arbitrary, capricious, an abuse of discretion, or
28 otherwise not in accordance with law." 5 U.S.C. § 706(s)(A).

1 "Review under the arbitrary and capricious standard is narrow,
2 and the reviewing court may not substitute its judgment for that
3 of the agency." Earth Island Inst. v. U.S. Forest Serv., 442
4 F.3d 1147, 1156 (9th Cir. 2006). Rather, the Court "will reverse
5 a decision as arbitrary and capricious only if the agency relied
6 on factors Congress did not intend it to consider, has entirely
7 failed to consider an important aspect of the problem, or offered
8 an explanation 'that runs counter to the evidence before the
9 agency or is so implausible that it could not be ascribed to a
10 difference in view or the product of agency expertise.'" Id.

11 The National Environmental Policy Act ("NEPA") does not
12 directly apply to TRPA. See Glenbrook Homeowners Ass'n v. Tahoe
13 Reg'l Planning Agency, 425 F.3d 611, 615 (9th Cir. 2005)
14 (explaining that NEPA regulations do not apply to the Compact).
15 However, cases interpreting NEPA may "inform interpretation of
16 the Compact . . . where those cases rest on language analogous to
17 that used in the Compact." League to Save Lake Tahoe, 739
18 F.Supp.2d at 1274. Similarly, cases interpreting the California
19 Environmental Quality Act ("CEQA") may provide persuasive
20 authority. See League to Save Lake Tahoe, 739 F.Supp.2d at 1276
21 (noting that "like CEQA and NEPA, the Compact serves to inform
22 the public and to protect the environment in a general sense").

23 B. Disposition at the Summary Judgment Stage

24 Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP")
25 provides that "a court shall grant summary judgment if the movant
26 shows there is no genuine issue of material fact and that the
27 movant is entitled to judgment as a matter of law." A factual
28 issue is "genuine" when the evidence is such that a reasonable

1 jury could return a verdict for the non-moving party. Villiarmo
2 v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002).

3 In this case, each party submitted its own statement of
4 undisputed facts as well as a response to the opposing party's
5 statement of undisputed facts. However, both parties agree that
6 disposition at the summary judgment stage is appropriate, given
7 that this is an administrative record case. The parties disagree
8 on which legal conclusions should be drawn from the
9 administrative record, but do not dispute the administrative
10 record itself. Therefore, disposition at the summary judgment
11 stage is appropriate.

12 C. Judicial Notice

13 Plaintiffs request judicial notice of several documents
14 related to the Douglas County South Shore Area Plan, all of which
15 post-date the approval of the RPU. (Doc. #26, 40). As this case
16 concerns whether TRPA's decision to approve the RPU was supported
17 by the administrative record, the post-dated documents are not
18 relevant. League to Save Lake Tahoe v. Tahoe Reg'l Planning
19 Agency, 739 F. Supp. 2d 1260, 1264 n.1 (E.D. Cal. 2010) aff'd in
20 part, vacated in part, remanded, 469 F. App'x 621 (9th Cir. 2012)
21 (declining to take judicial notice of post-dated documents in an
22 administrative record case); see also, Rybachek v. U.S. Env'tl.
23 Prot. Agency, 904 F.2d 1276, 1296 (9th Cir.1990) (noting that it
24 is not "appropriate . . . to use post-decision information as a
25 new rationalization either for sustaining or attacking the
26 Agency's decision"). Accordingly, Plaintiffs' requests for
27 judicial notice of all post-dated documents relating to the
28 Douglas County South Shore Area Plan are denied.

1 Plaintiffs also request judicial notice of the California
2 Air Resources Board's ("CARB") 2011 "Amendments to the Area
3 Designations for State Ambient Air Quality Standards." (Doc.
4 #26). Plaintiffs note that this document demonstrates "CARB's
5 redesignation of the Tahoe Basin as 'nonattainment transitional'
6 for ozone pollution." Pls.' Reply to Def.'s Opp. to RJN at 3
7 (Doc. #42). The Ninth Circuit has held that, in an
8 administrative record case, review of extra-record materials is
9 only appropriate if "necessary to explain agency decisions." Sw.
10 Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d
11 1443, 1450 (9th Cir. 1996). As acknowledged by Plaintiffs, the
12 Draft EIS "specifically references" CARB's designation of the
13 region as "nonattainment transitional." AR11759. As the
14 information in the proffered document "can be extracted from the
15 record," judicial notice is not necessary. Sw. Ctr. for
16 Biological Diversity, 100 F.3d at 1450-51. Accordingly,
17 Plaintiffs' request for judicial notice of the CARB document is
18 denied.

19 The Nevada Department of Conservation and Natural Resources
20 (one of the amici) also requests that the Court take judicial
21 notice of a December 19th, 2013 Proclamation by the Nevada
22 Governor. (Doc. #47). As this document post-dates the approval
23 of the RPU, the request for judicial notice is denied for the
24 reasons discussed above. League to Save Lake Tahoe, 739
25 F.Supp.2d at 1264 n.1 (declining to take judicial notice of post-
26 dated documents in an administrative record case).

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1 III. OPINION

2 The parties raise four basic issues in their respective
3 motions for summary judgment, which focus on TMDL and
4 concentrated coverage, soil conservation, BMPs, and the ozone
5 threshold. Each is discussed in turn. The Court finds in favor
6 of Defendant on all four issues as explained below.

7 A. TMDL and Concentrated Coverage

8 Plaintiffs argue that TRPA's failure to analyze the impacts
9 of concentrating impervious coverage was arbitrary and
10 capricious. Pls.' Mot. at 7. Defendant argues that the RPU's
11 shift to the TMDL model was supported by substantial evidence and
12 is entitled to deference. Def.'s Cross-Mot. at 8.

13 The RPU emphasizes the TMDL model, and moves away from the
14 "Bailey" model, which was implemented by the 1987 Regional Plan.
15 PRUDF ¶ 2. The Bailey model, named after its author, focuses on
16 limiting impervious surface coverage (i.e., concrete, asphalt,
17 etc.) in the Lake Tahoe region. Pls.' Mot. at 8. The Bailey
18 approach imposes strict limits on the percentage of area coverage
19 allowed on nine different soil types, depending on their
20 "capability" rating. Id. In contrast, the TMDL model aims to
21 reduce the total flow of pollutants into Lake Tahoe, and rejects
22 the Bailey model's strict limits on impervious surface coverage.
23 PRUDF ¶ 52.

24 Plaintiffs first argue that TRPA's failure to conduct a
25 watershed-level analysis on the effect of geologically-
26 concentrated coverage was arbitrary and capricious. Pls.' Mot.
27 at 9. Plaintiffs contend that substantial evidence exists in the
28 administrative record that concentrating coverage in single

1 watershed areas is environmentally harmful, even if region-wide
2 total coverage does not increase. Pls.' Mot. at 11. Plaintiffs
3 argue that a watershed-level analysis of concentrated coverage
4 was feasible and that TRPA's decision to conduct only a region-
5 wide study was unreasonable. Pls.' Mot. at 12. Defendant
6 responds that watershed-level analyses were not feasible, and
7 that it created and studied a Center-level model in response to
8 Plaintiffs' concerns. Def.'s Cross-Mot. at 9. Defendant also
9 maintains that it is entitled to substantial deference in
10 choosing the methodology for its environmental studies. Def.'s
11 Cross-Mot. at 10.

12 The Court must be "at its most deferential" when reviewing
13 "scientific judgments and technical analyses within the agency's
14 expertise." Native Ecosystems Council v. Weldon, 697 F.3d 1043,
15 1051 (9th Cir. 2012). The Court is "not . . . to decide whether
16 an EIS is based on the best scientific methodology." Alaska
17 Survival v. Surface Transp. Bd., 705 F.3d 1073, 1088 (9th Cir.
18 2013). Accordingly, the Court must be "at its most deferential"
19 in reviewing TRPA's scientific methodology, including the scope
20 and scale of its studies. Native Ecosystems Council, 697 F.3d at
21 1051.

22 TRPA's decision to use the TMDL model rather than the Bailey
23 model was an exercise of its scientific expertise. Although
24 Plaintiffs may prefer the Bailey model of coverage-based
25 limitations, Defendant's choice of the TMDL model is supported by
26 substantial evidence in the administrative record and addresses
27 Plaintiffs' concerns over concentrated coverage. See AR128193
28 (Tahoe Basin Impervious Coverage Study's finding that

1 "concentrating development and limiting the development footprint
2 has the potential to reduce . . . environmental impact").
3 Moreover, the Final EIS included a lengthy explanation of why
4 watershed-level analyses were neither feasible nor necessary.
5 AR5089-96. TRPA conducted extensive scientific studies under the
6 TMDL model, and an agency is not required to address "every
7 possible scientific uncertainty." N. Plains Res. Council, Inc.
8 v. Surface Transp. Bd., 668 F.3d 1067, 1085 (9th Cir. 2011). In
9 response to public comments by Plaintiffs, the Final EIS included
10 a Pollutant Load Reduction Model ("PLRM") which "provided
11 estimates of existing and future pollutant loading from areas
12 designated as "Centers" in the RPU. PRUDF ¶ 142. Although not
13 on the exact scale requested by Plaintiffs, the PLRM simulation
14 represents an effort by TRPA to address Plaintiffs' concerns
15 about localized concentration of coverage. AR5103 (Final EIS).
16 For these reasons, the cases cited by Plaintiffs, in which
17 agencies conducted little or no environmental review, are not
18 applicable. Pls.' Mot. at 9, 13 (citing N. Plains Res. Council,
19 668 F.3d at 1079 and Kern v. U.S. Bureau of Land Mgmt., 284 F.3d
20 1062 (9th Cir. 2002)).

21 Furthermore, the region-wide scale of the TMDL model is
22 consistent with the regional scale of the RPU itself. "The
23 degree of specificity required in an [Environmental Impact
24 Report] will correspond to the degree of specificity involved in
25 the underlying activity which is described in the EIR." Sierra
26 Club v. Tahoe Reg'l Planning Agency, 916 F. Supp. 2d 1098, 1154
27 (E.D. Cal. 2013); see also, State of Cal. v. Block, 690 F.2d 753,
28 761 (9th Cir. 1982) (noting that the degree of detail required

1 "in an EIS depends upon the nature and scope of the proposed
2 action"). As the RPU is a region-wide plan, TRPA's decision to
3 temporarily defer a site-level analysis was reasonable. Friends
4 of Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003)
5 (an EIS for a program-wide plan must provide "sufficient detail
6 to foster informed decision-making," but "site-specific impacts
7 need not be fully evaluated" until site-level projects are
8 proposed). Under the RPU, "smaller-scale planning efforts would
9 require additional environmental analysis, including evaluation
10 of coverage at a more localized scale." AR5090 (Final EIS).
11 Such local-level analyses would occur "in response to proposals
12 for implementing programs or specific development or public works
13 projects." AR11550 (Draft EIS).

14 Plaintiffs' reliance on TRPA's prior practices, which
15 acknowledged the potential harm of concentrating coverage, is
16 unpersuasive. Pls.' Mot. at 11. Plaintiffs note that TRPA's
17 1988 and 1989 Water Quality Management Plans "recognize[e] the
18 potential harm that can be caused by concentrating coverage" and
19 emphasize the importance of preventing "any given . . .
20 geographic subregion from absorbing a disproportionate amount of
21 . . . land coverage." Pls.' Mot. at 11 (citing AR2070 and
22 AR141391). However, as Defendant notes, these documents are 25
23 years old and were written prior to "the advent of the TMDL."
24 Def.'s Cross-Mot. at 11.

25 Plaintiffs' argument that "TMDL compliance is not mandatory
26 in Nevada" is misguided. Pls.' Reply at 6. The federal Clean
27 Water Act ("CWA") requires that Nevada "have a continuing
28 planning process" to meet its obligations under the TMDL model.

1 33 U.S.C. § 1313(e). If Nevada fails to meet its TMDL
2 obligations, the Environmental Protection Agency is authorized by
3 the CWA to establish, and enforce, its own TMDL standard in
4 Nevada. Food & Water Watch v. United States Env'tl. Prot. Agency,
5 2013 WL 6513826, at *2 (D.D.C. Dec. 13, 2013). Accordingly,
6 Nevada's reliance on non-binding Memoranda of Agreement to
7 implement the TMDL does not affect its statutory obligations
8 under the CWA, and does not call into question the RPU's reliance
9 on the TMDL.

10 B. Soil Conservation

11 A second argument put forth by Plaintiffs is that the EIS
12 "failed to examine the cumulative impacts to soil conservation
13 resulting from increased development and concentrated coverage in
14 centers." Pls.' Mot. at 7. Defendant's initial response to this
15 contention raises a procedural defense that Plaintiffs failed to
16 raise a "soil conservation argument" in their opening brief, and
17 are, therefore, prohibited from raising it for the first time in
18 their reply brief. Def.'s Reply at 2. However, in addition to
19 the claim quoted above, Plaintiffs' opening brief contains an
20 extensive discussion on TRPA's responsibility to meet the "soil
21 conservation threshold," which protects "soil and ecological
22 balance." Pls.' Mot. at 8. Similarly, Defendant argues that
23 Plaintiffs failed to exhaust their administrative remedies, as
24 the argument was never raised during the administrative process.
25 Def.'s Reply at 2. However, Plaintiffs submitted public comments
26 in response to the Draft EIS expressing concern that failure to
27 adhere to soil conservation thresholds could disrupt the
28 "ecological balance" of the LTAB region and result in "vegetative

1 disturbance" and "ecologic damage." AR4473 (Final EIS).

2 Accordingly, Plaintiffs are not procedurally barred from raising
3 this argument.

4 Nonetheless, Plaintiffs' contention that the EIS failed to
5 address soil conservation concerns is not supported by the
6 record. The Draft EIS concluded that the RPU would result in
7 improvements in "soil conditions" as well as "habitat for
8 vegetation and wildlife." AR12038. Similarly, the Draft EIS
9 concluded that the RPU would not have a significant effect on
10 native vegetation growth, noting that "common plant . . . species
11 are relatively abundant locally and regionally and are not
12 considered limited by the availability of habitat" in the LTAB
13 region. AR12050. Although TRPA's discussion of the RPU's soil-
14 related impact is not as thorough as that of water-quality
15 impact, this is consistent with the fact that the vast majority
16 of comments, throughout the administrative process, focused on
17 RPU's potential impact on water-quality. TRPA's conclusion that
18 the RPU would not have a significant effect on LTAB soil
19 conditions is supported by the record.

20 To the extent that Plaintiffs' soil conservation argument
21 depends on TRPA's failure to study the effects of concentrated
22 coverage on a watershed-level scale, this argument fails for the
23 reasons discussed above. Supra at II(D)(1)(b). TRPA is entitled
24 to substantial deference in selecting the methodology and scale
25 of its environmental studies. Native Ecosystems Council v.
26 Weldon, 697 F.3d 1043, 1051 (9th Cir. 2012).

27 C. BMPs

28 Plaintiffs contend that TRPA's conclusion that the RPU will

1 not significantly affect water quality is arbitrary and
2 capricious due to its reliance on BMPs. Pls.' Mot. at 15.
3 Plaintiffs note the historical lack of success in BMP
4 implementation and maintenance. Id. Defendant responds that the
5 RPU includes a number of provisions that will result in
6 widespread implementation of new BMPs and more effective
7 maintenance of existing BMPs. Def.'s Cross-Mot. at 13.

8 BMPs, or "best management practices," are defined as
9 "alternative structural and non-structural practices proven
10 effective in erosion control and management of surface runoff."
11 PRSUF ¶ 159. There are two categories of BMPs: (1) BMP Retrofits
12 and (2) BMPs for new development or redevelopment. PRSUF ¶ 163.
13 The BMP Retrofit Program is a "nonpoint source pollution control
14 program" which is codified in the TRPA Code of Ordinances and
15 requires all existing past development to retrofit the site with
16 water-quality BMPs. PRSUF ¶ 162. Under the RPU, any new
17 development must install and maintain BMPs as a condition of
18 project approval. PRSUF ¶ 163. The TMDL approach proposed by
19 the RPU identifies BMPs as one of several key strategies to
20 attain pollutant load reduction goals. PRSUF ¶173.

21 According to Plaintiffs, the RPU's reliance on BMPs is not
22 warranted given the "history of neglected BMP maintenance."
23 Pls.' Mot. at 20. However, Plaintiffs' emphasis on maintenance
24 overlooks the distinction between BMP Retrofits and BMPs for new
25 development. It is undisputed that, under the RPU, any new or
26 redevelopment must install and maintain BMPs as a condition of
27 project approval. PRSUF ¶ 163. Moreover, it is further
28 undisputed that the RPU will increase the installation of BMPs.

1 PRSUF ¶ 184. Ample evidence exists in the record that the mere
2 installation of BMPs at the onset of a development project could
3 dramatically reduce pollutant loads. AR128167-68 (data showing
4 significant difference in runoff and fine sediment particle
5 loading between building units with BMPs and those without BMPs).
6 Once installed, many BMPs - such as retaining walls, terracing,
7 and water spreading BMPs - can remain effective without regular
8 maintenance. AR127031, 127024, 126991.

9 Plaintiffs' reliance on the past failures of BMPs also
10 overlooks the RPU's inclusion of programs designed to incentivize
11 and improve the maintenance of BMPs. For example, under the TMDL
12 model, credits to an urban jurisdiction for implementing BMPs may
13 not be awarded "without evidence that expected conditions are
14 *being maintained*." AR107727 (2011-09 TMDL Lake Clarity Crediting
15 Program Handbook). Likewise, the RPU will "encourage the use of
16 area-wide [water] treatment facilities" which are expected to
17 result in "more efficient maintenance practices relative to
18 conducting maintenance activities on many smaller and widely
19 distributed individual parcels and sites." AR5189-90 (Final
20 EIS). Moreover, the RPU would "prioritize BMP Implementation in
21 areas that achieve the greatest load reduction," which would
22 accelerate improvements in water quality in a more cost-effective
23 manner. AR26253.

24 Under the TRPA Code of Ordinances, BMP maintenance is
25 mandatory. AR1089 (Code § 60.4.9). Under the RPU, "a BMP
26 inspection and maintenance plan will be required" for any new
27 project that is granted a permit. AR126934 (BMP Handbook). TRPA
28 was entitled to conclude that its mandatory, incentivized BMP

1 ordinance would be largely followed. See Towards Responsibility
2 In Planning v. City Council, 200 Cal.App.3d 671, 680 (1988)
3 (noting that the creator of an EIR "is not obliged to speculate
4 about effects which might result from violations of its own
5 ordinances"). The Ninth Circuit has repeatedly upheld agencies'
6 use of BMPs to address potential environmental impacts. See
7 Hapner v. Tidwell, 621 F.3d 1239, 1246 (9th Cir. 2010) (citing
8 agency's use of BMPs to minimize soil disturbance during logging
9 operations); Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451
10 F.3d 1005, 1015 (9th Cir. 2006) (holding that the implementation
11 of "specific and detailed" BMPs supported the agency's finding
12 that the project's effect on wildlife and watershed would not be
13 significant). Plaintiffs' attempt to distinguish these cases, on
14 the grounds that they did not involve "evidence of past history
15 of noncompliance," is unsuccessful. Pls.' Reply at 3. As
16 discussed above, TRPA expressly acknowledged past failures in
17 maintenance, and incorporated that experience into updated BMP
18 guidelines.

19 D. Ozone Threshold

20 Plaintiffs' final contention in support of their motion
21 herein is that TRPA's conclusion that the RPU will attain and
22 maintain the ozone threshold, as required by the Compact, is
23 arbitrary, capricious and lacking substantial evidentiary
24 support. Pls.' Mot. at 21. Defendant responds that its
25 conclusion that the RPU will attain and maintain the ozone
26 threshold is supported by substantial evidence. Def.'s Cross-
27 Mot. at 19.

28 Ozone is a pollutant that forms when precursor gases react

1 in sunlight. PRSUF ¶ 190. The federal government, California,
2 and Nevada have all adopted ozone standards. PRSUF ¶ 190. Under
3 the Compact, TRPA is required to "provide for attaining and
4 maintaining" the most stringent of these standards. Compact,
5 Art. V(d). TRPA found that the Regional Plan, as amended by the
6 RPU, will achieve and maintain the ozone threshold. PRSUF ¶ 216.
7 In evaluating air quality in the LTAB region, TRPA relies on four
8 data sets called "Threshold Indicators." PRSUF ¶ 194. The Final
9 EIS concluded that each of these four Threshold Indicators was
10 "in attainment" with the most stringent applicable state or
11 federal standard. AR5238.

12 Plaintiffs object to TRPA's finding with regard to one of
13 these Threshold Indicators: the highest 8-hour average
14 concentration of ozone. Pls.' Mot. at 21. Plaintiffs note that
15 the Draft EIS designated the LTAB region as "nonattainment-
16 transitional" with regard to the "8-hour average," and concluded
17 that progress toward meeting the California standard is "somewhat
18 worse than target." AR11759 (Draft EIS). However, the
19 subsequent 2011 Threshold Evaluation Report ("TER") concluded
20 that the region was "currently in attainment" with the "8-hour
21 average" threshold. AR97. Plaintiffs contend that this reversal
22 came "with no explanation." Pls.' Mot. at 23.

23 In fact, the shift from "nonattainment-transitional" to
24 "currently in attainment" is explained by the incorporation of
25 additional data into the 2011 TER - data that was unavailable at
26 the time that TRPA published the Draft EIS. AR97. This new data
27 showed that, in 2010 and 2011, maximum 8-hour average ozone
28 concentration had been measured at a level below the California

1 limit. Id. Accordingly, the Board concluded, with "moderate"
2 confidence, that the LTAB region was in attainment with the "8-
3 hour average" ozone Threshold Indicator. AR5238 (Final EIS).

4 Plaintiffs argue that the new data should not have been
5 incorporated into the 2011 TER because it was obtained from a
6 monitoring station located in Nevada, rather than California.
7 Pls.' Mot. at 23. Plaintiffs state that "past monitoring has
8 shown that ozone concentrations can vary significantly around the
9 region" and, in support of this proposition, cite a table of raw
10 data, showing ozone measurements at different locations. Pls.'
11 Mot. at 24 (citing AR147415). However, TRPA concluded that
12 "little variation" is seen between the California and Nevada
13 monitoring sites, and that "[b]oth stations showed similar
14 concentrations and number of exceedance days during 2008-2010."
15 AR3566 (Final EIS). The Court's expertise does not lie in
16 advanced statistical analysis, and, therefore, the Court defers
17 to TRPA's judgment that variability between sites is low enough
18 to use Nevada data in the 2011 TER and the Final EIS. Such
19 deference is particularly appropriate where the determination
20 "requires a high level of technical expertise." Marsh v. Oregon
21 Natural Res. Council, 490 U.S. 360, 377 (1989).

22 Plaintiffs argue that this data shortage is emblematic of a
23 wider deficiency in TRPA's monitoring program. Pls.' Mot. at 23.
24 Plaintiffs note that the 2011 TER acknowledges that "the spacing
25 and density of monitoring sites is insufficient." Id. (citing
26 AR82). Plaintiffs also cite a number of instances in which TRPA
27 acknowledges that the limitations on monitoring reduce the
28 "confidence" with which the agency can make its findings. Pls.'

1 Mot. at 23. However, complete certainty on the agency's part is
2 not required. N. Coast Rivers Alliance v. Marin Mun. Water Dist.
3 Bd. of Directors, 216 Cal.App.4th 614, 640 (2013) (noting, in a
4 CEQA case, that an agency need not analyze "all information
5 available on a subject;" the mere fact that more information
6 "might be helpful does not make it necessary" that the agency
7 consider it). Moreover, the 2011 TER merely acknowledges that
8 "spacing and density of monitoring sites is insufficient to know
9 the extent of how maximum and minimum pollutant concentrations
10 are distributed throughout the basin." AR82 (emphasis added).
11 These limitations were taken into account by the "moderate"
12 confidence level with regard to the attainment of California's 8-
13 hour ozone standard, as expressed in the 2011 TER. AR97. These
14 peer-reviewed findings constitute substantial evidence on which
15 TRPA could base its wider approval of the RPU. (Although
16 Plaintiffs note that, unlike the Draft EIS, the 2011 TER was not
17 peer-reviewed, the statistical methodology used in both reports
18 was peer-reviewed along with the Draft EIS.)

19 Moreover, TRPA was not required to make a finding that the
20 LTAB region is currently in attainment of all threshold
21 standards. Sierra Club v. Tahoe Reg'l Planning Agency, 916 F.
22 Supp. 2d 1098, 1145 (E.D. Cal. 2013). Rather, it was required to
23 find that the RPU implements a plan that will achieve and
24 maintain those thresholds. Id. at 1145. TRPA partially relied
25 on the region's current attainment of the thresholds in making
26 that finding. However, TRPA also relied on a number of other
27 factors. Def.'s Cross-Mot. at 24. First, it noted that air
28 quality in the LTAB region is consistently improving, due to

1 increasingly stringent vehicle emission standards. AR26683.
2 Second, the RPU implements a number of programs and policies
3 designed to "reduce dependency on the automobile by making more
4 effective use of existing transportation modes and of public
5 transit." Compact, Art. V(c)(2)(A). Among other things, the RPU
6 provides incentives for the creation of non-motorized trails, the
7 removal of non-compliant emission sources, and enhanced
8 pedestrian, bicycling, and public transit opportunities.
9 AR26684-85. As high ozone levels are largely tied to vehicle
10 emissions, these changes provide additional support for TRPA's
11 finding that the RPU will achieve and maintain air quality
12 thresholds. Substantial evidence supported TRPA's conclusion
13 that the Regional Plan, as amended by the RPU, will achieve and
14 maintain the ozone threshold.

15
16 IV. ORDER

17 For all the foregoing reasons, the Court DENIES Plaintiffs'
18 Motion for Summary Judgment and GRANTS Defendant's Cross-Motion
19 for Summary Judgment:

20 IT IS SO ORDERED.

21 Dated: April 4, 2014

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23 
24 JOHN A. MENDEZ,
25 UNITED STATES DISTRICT JUDGE
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