

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEAGUE TO SAVE LAKE TAHOE
and SIERRA CLUB,

Plaintiffs,

v.

TAHOE REGIONAL PLANNING
AGENCY,

Defendant.

NO. CIV. S-08-2828 LKK/GGH

O R D E R

Defendant has filed a Rule 59(e) motion to alter or amend the judgment of this court issued on September 16, 2010 (ECF No. 118). In that judgment, the court vacated Tahoe Regional Planning Agency Ordinance number 2008 - 10, adopted October 22, 2008, the Shorezone Amendments adopted at that time, the certification of the Environmental Impact Statement, and all findings based thereon. The court remanded the matter to defendant Tahoe Regional Planning Agency for further proceedings consistent with the order. The defendant timely filed a Rule 59(e) motion. For the reasons stated herein, the defendant's motion is DENIED.

1 **I. Background**

2 In 1968, California and Nevada entered into the Tahoe Regional
3 Planning Compact, approved by Congress the following year. The
4 Compact was amended in 1980 "to increase the level of environmental
5 protection for the [Lake Tahoe] Basin as a whole." Tahoe-Sierra
6 Pre. Concil, Inv v. TRPA, 322 F. 3d 1064, 1071 (9th Cir. 2003). The
7 Compact, as amended, directed the Tahoe Regional Planning Agency
8 ("TRPA") to develop "thresholds," or environmental standards
9 "necessary to maintain a significant scenic, recreational,
10 educational, scientific or natural value of the region or to
11 maintain public health and safety within the region." Compact art.
12 II(I). The TRPA regulates the region by promulgating rules and
13 plans, including a Regional Plan adopted in 1987 and implemented
14 by the TRPA's Code of Ordinances and Rules of Procedure. The TRPA
15 also regulates on a project-specific basis. Before approving
16 specific projects, the TRPA must prepare an environmental impact
17 statement ("EIS"). Compact art. VII(a)(2). A project cannot be
18 approved unless either "changes or alterations" have reduced the
19 "significant adverse environmental effects to a less than
20 significant level" or the agency determines that mitigation is
21 "infeasible." Compact art. VII(d)(1) and (2).

22 In 2008, the TRPA adopted the Shorezone Amendments, which
23 included provisions regarding piers, buoys, and other boating
24 facilities. Before adopting the amendments, the TRPA prepared an
25 EIS, which concluded that the amendments included mitigation
26 measures that would mitigate negative environmental impacts to a

1 "less than significant" level. Relying on the EIS, the TRPA
2 concluded that the Amendments satisfied the obligation to maintain
3 and achieve thresholds. Plaintiffs in this case challenged the
4 Amendments, arguing that TRPA's conclusions were arbitrary and
5 capricious, and relatedly, that the TRPA's actions violated the
6 Clean Water Act.

7 This court agreed that TRPA's conclusions that the Amendments
8 satisfied TRPA's obligation to maintain and achieve thresholds, and
9 that the Amendments' adverse impacts were mitigated to a "less than
10 significant" level were arbitrary and capricious. The court also
11 agreed that TRPA's conclusion that the Amendments comport with the
12 Clean Water Act was arbitrary and capricious. Order at 10, ECF No.
13 118. In so doing, the court held that the EIS had improperly
14 included existing unpermitted buoys as part of the 'baseline'
15 environmental conditions to which the environmental impact of the
16 Amendments were compared. The court vacated TRPA Ordinance number
17 2008 - 10, adopted October 22, 1008, the Shorezone Amendments
18 adopted at that time, the certification of the EIS, and all
19 findings based thereon.

20 Defendants now move to alter or amend the judgment, and
21 plaintiffs oppose.

22 **II. Standard**

23 A district court has wide discretion when considering a Rule
24 59(e) motion to amend a judgment. Turner v. Burlington Northern
25 Santa Fe R. Co., 338 F.3d 1058, 1063 (9th Cir. 2003).
26 Reconsideration under Rule 59(e) is appropriate if "the district

1 court (1) is presented with newly considered evidence, (2)
2 committed clear error or the initial decision was manifestly
3 unjust, or (3) if there is an intervening change in controlling
4 law." School Dist. No. 1J, Multnomah County, Ord v. AcandS, Inc.,
5 5 F.3d 1255, 1263 (9th Cir. 1993).

6 **III. Analysis**

7 Defendant requests alteration of the judgment on two bases.
8 First, defendant objects to the court's conclusion that it was
9 improper to include existing but unpermitted buoys as part of the
10 baseline environmental conditions in the EIS. Second, defendant
11 argues that the court should not have vacated the Amendments in
12 their entirety. Defendants have not presented any new evidence, and
13 do not argue that there is any intervening change in controlling
14 law. The court assumes, therefore, that defendants are arguing that
15 alteration or amendment is warranted because the court committed
16 clear error, or that judgment was manifestly unjust.

17 **A. The court's conclusion regarding the baseline was not** 18 **clearly erroneous nor manifestly unjust.**

19 The court acknowledges that whether or not to include existing
20 but unpermitted buoys in the baseline for the EIS is a difficult
21 question. However, the court's September 16, 2010 order thoroughly
22 analyzed the issue, and defendants have not presented any new
23 arguments against the court's conclusion in that order. The cases
24 cited by the defendant on this point were discussed in the order,
25 and were distinguished. Defendants argue that Communities for a
26 Better Environment v. South Coast Air Quality Management District,

1 48 Cal. 4th 310 (2010) supports the proposition that the EIS for
2 the Shorezone Amendments should use existing conditions, and not
3 hypothetical ones as the baseline. As discussed in the prior order,
4 Communities for a Better Environment was a state case decided under
5 the California Environmental Quality Act ("CEQA"). That case
6 involved an oil refinery that was permitted to operate all four of
7 its boilers at maximum capacity, although no boiler actually
8 operated at maximum capacity unless one of the other was shut down
9 for maintenance. Id. at 322. The Court overturned an EIS that used
10 the authorized limit, rather than the actual practice as the
11 environmental baseline, holding that the use of "hypothetical
12 allowable conditions as a baseline results in illusory
13 comparisons." Id. The case at bar is distinguished from
14 Communitites for a Better Environment. First, as noted, that case
15 was decided under CEQA, while the instant case arises under the
16 Compact. Second, the Compact's environmental protection goals go
17 further than those of CEQA. As noted in the September 16, 2010
18 order, the Compact commands "TRPA to improve environmental quality,
19 in some instances dramatically, by commanding setting and attaining
20 environmental thresholds." Here, unlike in Communities for a Better
21 Environment, use of the existing rather than the authorized,
22 environmental conditions as a baseline would result in less
23 environmental protection, not more. This case is the converse of
24 Communities for a Better Environment. Given the Compact's
25 remedial goals, the court continues to conclude that the EIS's
26 use of existing unpermitted buoys in the baseline was improper, and

1 that the conclusions based on that EIS were arbitrary and
2 capricious.¹

3 The defendant cites another state court CEQA case, Fat v.
4 County of Sacramento, 97 Cal.App.4th (2002), also thoroughly
5 addressed in this court's September 6, 2010 order. The court
6 continues to conclude that Fat does not carry weight here, and
7 further that the Fat opinion did not contain any holding as to
8 whether 'sub silento' agency approval of existing unauthorized
9 activity is in fact an agency action. Order at 27, ECF No. 118.
10 Defendants have not raised any new arguments with respect to Fat.

11 **B. Vacation of the Amendments in their entirety was not**
12 **clearly erroneous nor manifestly unjust.**

13 Defendant argues in its motion for reconsideration that the
14 court should not have vacated the Amendments in their entirety, and
15 defendant requests that the court amend its order to vacate "only
16 the portions of the Amendments that authorize the permitting of
17 boating facilities and allow the other portions of the Amendments
18 to remain in place." Def.'s. Mot. at 12, ECF No. 122. Defendant
19 claims that plaintiffs only challenged the portions of the
20 Amendments dealing with permitting of boating facilities and that
21 the court's remedy should have severed those challenged Amendments.
22 Plaintiffs in turn argue that the defendants never requested such
23

24 ¹ The court notes that even if the court were to determine
25 that it was proper to include the unpermitted buoys in the
26 baseline, the adopted Amendments, which allow for one-to-one
replacement of the unpermitted buoys, would not meet TRPA's
obligation to achieve and maintain the thresholds.

1 severance prior to the instant motion, and further that vacation
2 of the Amendments as a whole was proper, given that passage of the
3 Amendments relied on the EIS that the court held to be invalid.

4 The court agrees with the plaintiffs. The court's order
5 vacated certification of the EIS, leaving no valid EIS on which the
6 Amendments could be approved. The proper remedy in this case,
7 therefore, was to set aside all of TRPA's actions that were based
8 on the EIS which the court has found to be inadequate.

9 **IV. Conclusion**

10 For the foregoing reasons, defendants Rule 59(e) motion, ECF
11 No. 121 is DENIED.

12 IT IS SO ORDERED.

13 DATED: November 23, 2010.

14

15

16



17

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

18

19

20

21

22

23

24

25

26