

1 NICOLE U. RINKE (STATE BAR NO. 257510)
nrinke@trpa.org
2 AUSTIN QUINN-DAVIDSON (STATE BAR NO. 252276)
aquinn-davidson@trpa.org
3 TAHOE REGIONAL PLANNING AGENCY
P.O. Box 5310
4 Stateline, NV 89448
Telephone: (775) 588-5286
5 Facsimile: (775) 588-4527

6 COX, CASTLE & NICHOLSON LLP
ANDREW SABEY (STATE BAR NO. 160416)
7 asabey@coxcastle.com
SCOTT B. BIRKEY (STATE BAR NO. 209981)
8 sbirkey@coxcastle.com
CHRISTIAN CEBRIAN (STATE BAR NO. 245797)
9 ccebrian@coxcastle.com
555 California Street, 10th Floor
10 San Francisco, CA 94104
Telephone: (415) 392-4200
11 Facsimile: (415) 392-4250

12 Attorneys for Defendant
TAHOE REGIONAL PLANNING AGENCY

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14 **UNITED STATES DISTRICT COURT**
15 **EASTERN DISTRICT OF CALIFORNIA**

16 LEAGUE TO SAVE LAKE TAHOE AND
17 SIERRA CLUB,
18
19 Plaintiffs,
20 vs.
21 TAHOE REGIONAL PLANNING AGENCY,
22 Defendant.

CASE NO. 2:08-cv-02828-LKK-GGH
(Consolidated with Case 2:08-cv-03081-FCD-
DAD)

**[PROPOSED] ORDER GRANTING
MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO FED. R.
CIV. P. 59(e)**

Date: November 22, 2010
Time: 10:00 a.m.
Courtroom: 4
Judge: Hon. Lawrence K. Karlton

[PROPOSED] ORDER

1
2 This matter came on regularly for hearing on November 22, 2010, before the Honorable Lawrence K.
3 Karlton, Senior Judge of the United States District Court, Eastern District of California, in Courtroom
4 4 on the motion by the Defendant to alter or amend the Court’s order and judgment filed September
5 16, 2010 (the “Order”). Upon consideration of the papers filed in support of and in opposition to the
6 motion to alter or amend the Court’s order and judgment, and argument of counsel, and good cause
7 appearing:

8 **IT IS ORDERED** that:

9 The motion to alter or amend judgment is **GRANTED** as follows:

- 10 • The Order currently reads “The court agrees.” Order Pg. 20, Ins. 22 –pg. 21, ln 1. This
11 language is revised to read: “The court agrees with Plaintiffs that the TRPA’s baseline is
12 inadequate, not because the baseline must necessarily exclude unpermitted buoys, but because
13 TRPA has failed to adequately explain why unpermitted buoys are properly included in the
14 baseline.”
- 15 • The Order currently reads “To the extent that these cases apply here, they support the
16 conclusion that approval of unauthorized buoys or their replacements is an aspect of the
17 agency action and that inclusion of existing unauthorized buoys in the baseline impermissibly
18 obscured this action’s effects.” Order Pg. 23, Ins. 6-10. This language is revised to read “To
19 the extent these cases apply here, they support the conclusion that approval of unauthorized
20 buoys or their replacements is an aspect of the agency action.”
- 21 • At Order Pg. 29, Ins. 7-11, the sentence “It appears to the court, however, that a baseline may
22 reflect damage that has already occurred as a result of illegal activity as well as the agency’s
23 present ability and responsibility to limit perpetuation of that harm through enforcement” is
24 deleted.
- 25 • Order Pg. 29, footnote 12 is deleted.
- 26 • The Order currently reads “Finally, the facts of the project here are in an important way
27 distinct from those in any of the cited cases. In each of the above cases, the issue was whether
28 the agency could let sleeping dogs lie. Here, TRPA proposes to act on its existing duty to

1 enforce permit requirements, to issue permits to only those existing buoys that can otherwise
2 be lawfully permitted, and to remove the remaining buoys only to permit other unrelated buoys
3 in their place.

4 For these reasons, the court concludes that the EIS's use of the number of existing buoys,
5 rather than the number of existing buoys authorized by TRPA, as the baseline, was contrary to
6 the Compact and therefore arbitrary and capricious.

7 Because TRPA calculated the effects of the action by reference to this baseline, this error
8 infects much of the entire EIS. For example, TRPA's conclusion that the effects on air and
9 water quality would be mitigated to the point of insignificance was based on an incorrect
10 calculation of the magnitude of those effects. Use of the inappropriate baseline therefore
11 invalidates the EIS's analysis of air quality, water quality, and noise. In order to guide TRPA
12 on remand, and in light of the possibility of appeal, the court addresses the merits of plaintiffs'
13 independent arguments challenging the EIS. In order to do so the court assumes, contrary to
14 the above conclusion, that the EIS used a permissible baseline." Order Pg. 30, Ins. 15 to 31, In.
15 12. This language is revised to read "TRPA has failed to explain in the EIS how the baseline
16 chosen adequately addresses the issues identified by the court above. In light of this and
17 TRPA's failure to identify any discussion in the EIS of why this baseline was chosen, the
18 baseline is arbitrary and capricious in light of TRPA's failure to consider an important aspect
19 of the problem and to articulate a rational connection between the facts found and conclusions
20 reached. McNair, 537 F.3d 987, Earth Island Inst., 442 F.3d at 1157."

- 21 • Order Pg. 31, footnote 13 is deleted.

22 The motion to alter or amend judgment is also **GRANTED** as follows:

23 The Order is amended so that only those portions of the Shorezone Amendments that authorize the
24 permitting of boating facilities are VACATED. The remainder of the Shorezone Amendments remain
25 in effect.

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IT IS SO ORDERED.

DATED: _____

HON. LAWRENCE K. KARLTON
UNITED STATES DISTRICT JUDGE