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13
14 **UNITED STATES DISTRICT COURT**
15
16 **EASTERN DISTRICT OF CALIFORNIA**

17 LEAGUE TO SAVE LAKE TAHOE AND
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)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
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

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1 **I. INTRODUCTION**

2 The Tahoe Regional Planning Agency (“TRPA”) respectfully moves to amend this Court’s
3 judgment on two specific issues. First, TRPA seeks to amend the judgment to the extent it requires
4 TRPA to use a hypothetical baseline, as opposed to the existing physical conditions, for its
5 environmental analysis of the Shorezone Amendments (the “Amendments”). This Court’s September
6 16, 2010 order (“Order”) and the judgment entered that same date, misapplies the law to the extent the
7 Order requires TRPA to attempt to measure environmental impacts of its program against a theoretical
8 baseline that ignores the actual physical conditions. The buoys currently in Lake Tahoe, whether
9 permitted or not, represent the environmental baseline. Both CEQA and NEPA case law support
10 TRPA’s use of the existing physical conditions as the baseline. No law or policy supports the Order to
11 the extent it commands TRPA to apply a hypothetical baseline. Moreover, this Court’s Order includes
12 an alternative basis to uphold its judgment (footnote 13 on page 31 holding that TRPA failed to
13 explain its baseline choice adequately), which should be adopted as the sole basis for the Order on the
14 baseline issue.

15 Second, TRPA seeks to amend (or clarify) the Order and judgment so that it vacates only those
16 aspects of the Amendments that were actually challenged by the plaintiffs and for which this Court
17 found the environmental impact analysis deficient. In other words, TRPA seeks amendment or
18 clarification of the judgment so that the portions of the Amendments that were challenged by the
19 plaintiffs and found to be the product of inadequate environmental review may be severed, and those
20 portions not challenged by the plaintiffs may remain intact. This more limited vacation of the
21 Amendments is well supported by state and federal law, and is the norm in cases such as this where
22 the plaintiffs challenge only part of a larger regulatory program. Complete vacation of the
23 Amendments is not only unnecessary, but would severely disrupt TRPA’s ability to fulfill its
24 obligations to protect Lake Tahoe and the surrounding resources.

25 **II. SUMMARY OF RELEVANT FACTS**

26 **A. Procedural Background**

27 Briefing was completed on cross-motions for summary judgment in this matter on June 11,
28 2010. This Court heard oral argument on July 19, 2010 and took the matter under submission. This

1 court issued its Order on the cross-motions for summary judgment on September 16, 2009 and the
2 notice of entry of judgment was filed the same day. TRPA now timely brings this motion to alter or
3 amend the judgment pursuant to F.R.C.P. 59(e).

4 **B. Factual Background**

5 TRPA is organized and operates pursuant to its 1980 compact (the “Compact”). AR 29:18956-
6 977. The Compact requires TRPA to analyze the “significant environmental impacts of [a] proposed
7 project.” Compact Article VII, § (a)(2)(A), (AR 29:18972). TRPA began regulation of Lake Tahoe’s
8 shorezone in 1972. AR 8:03915. On October 22, 2008 TRPA adopted amendments to its shorezone
9 ordinances. AR 2:00734-764. The Amendments completely overhauled TRPA’s preexisting
10 regulatory framework for the shorezone of Lake Tahoe, which had not been comprehensively updated
11 since 1987. The Amendments included rules regarding the development of boating facilities on Lake
12 Tahoe, as well as regulations regarding other shorezone uses and activities unrelated to boating.

13 The environmental review for this action consisted in part of a 2004 Draft Shorezone EIS (AR
14 8:04934-9:05719); a 2005 Supplemental Draft Shorezone EIS (AR 5:03664-6:03837); a 2008 Draft
15 Addendum Shorezone EIS (AR 2:00972-3:01374) and a final Addendum (AR 2:00671-00971). Each
16 of these environmental documents relied on the existing physical conditions of the lake – or the status
17 quo – as the “baseline” for environmental analysis, and this baseline includes existing buoys in the
18 lake regardless of whether each existing buoy is fully permitted. AR 2:00746, 01032, 01046; 8:03923,
19 04968-04969, AR 5:03714. These buoys include those permitted by TRPA as well as buoys not
20 permitted by TRPA but that are leased or permitted by the Nevada Division of State Lands, the
21 California State Lands Commission, or the U.S. Army Corps of Engineers (which includes all buoys
22 proven to be placed in the lake before 1968); the buoys not permitted by TRPA also include buoys that
23 are not permitted by any agency. AR 8:04968-04969. The buoys not permitted by TRPA include an
24 estimated 2,000 buoys that were in Lake Tahoe before TRPA began regulating the shorezone in 1972.
25 AR:9:05795-05797 (299 buoys permitted in 1980, 753 buoys permitted by TRPA between 1972 and
26 1998; estimated 2,545 buoys in lake in 1988, 3,536 buoys in lake in 1998).

27 The Court ruled that TRPA acted arbitrarily and capriciously because of the “EIS’s use of the
28 number of existing buoys, rather than the number of existing buoys authorized by TRPA, as the

1 baseline” Order at 30. Notably, the Court also ruled in the alternative that TRPA had acted
2 arbitrarily and capriciously because of the EIS’s failure to adequately discuss why the EIS’s buoy
3 baseline was chosen. *Id.* at 31 n. 13.

4 **III. STANDARD OF REVIEW**

5 A motion to alter or amend pursuant to F.R.C.P. 59(e) is the proper vehicle to request relief
6 from a summary judgment order. *Stephenson v. Calpine Conifers II, Ltd.*, 652 F. 2d 808, 811 (9th Cir.
7 1981), overruled on other grounds, *In Re Wash. Public Power System Securities Litigation*, 823 F.2d
8 1349, 1351 (9th Cir. 1987). A manifest error of law or injustice justifies the granting of such a
9 motion. *Turner v. Burlington Northern Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003);
10 *Flynn v. Dick Corp.* 565 F.Supp.2d 141, 145 (D.D.C. 2008) (a court’s misapplication of law or
11 regulation is grounds for relief). The motion “enables a court to correct its own errors to avoid
12 unnecessary appellate procedures.” *Moro v. Shell Oil Co.*, 91 F. 3d 872, 876 (7th Cir. 1996).

13 **IV. ARGUMENT**

14 TRPA is prepared to accept a judgment remanding its Amendments for further environmental
15 review, and it is prepared to accept the specific holding set forth in footnote 13 that it must better
16 explain its decision regarding use of the baseline. TRPA cannot, however, accept a ruling that
17 requires it to speculate about impacts based on a hypothetical baseline that artificially assumes that
18 there are only permitted buoys in the lake and that existing unpermitted buoys have not existed and do
19 not currently exist. TRPA must be allowed to retain its discretion in addressing the Court’s concerns
20 on remand – be it through a revised baseline, project description, impact analyses, alternatives, or a
21 combination thereof. In any event, the Court should not have vacated the Amendments in their
22 entirety, and instead should have limited its vacation of the Amendments to those portions that
23 authorize the permitting of boating facilities.

24 **A. Use of Existing Physical Conditions as the Baseline is Proper Under CEQA.**

25 No published CEQA case has held that the use of existing environmental conditions as the
26 baseline for an environmental analysis is improper. To the contrary, the existing condition is the
27 preferred baseline and only in limited circumstances is an agency allowed to stray from it. The
28 California Supreme Court has recently spoken directly to this issue and provided a survey of CEQA

1 case law regarding baseline. In *Communities for a Better Environment v. South Coast Air Quality*
2 *Management District* (“CBE”), the California Supreme Court concluded that a project should be
3 compared to “actual environmental conditions existing at the time of CEQA analysis” even if actual
4 development or activity “already exceeded that allowed under the existing regulations.” 48 Cal. 4th
5 310, 321 (2010). An agency must compare the environmental effects of its project with the “real
6 conditions on the ground . . . rather than the level of development or activity that *could* or *should* have
7 been present according to a plan or regulation.” *Id.* (internal quotations and citations omitted)
8 (original emphasis). Any CEQA document “must focus on impacts to the existing environment, not
9 hypothetical situations.” *Id.* at 322. The California Supreme Court identified only two situations
10 where an agency could deviate from this default baseline: (1) in the context of limited supplemental
11 environmental review under CEQA section 21166; and (2) the continued operation of an existing
12 facility without significant expansion of use. *Id.* at 326. In both situations an agency is taking a
13 narrower look at impacts than if existing conditions were used.

14 *CBE* involved the environmental review under CEQA of a refinery upgrade project. Part of
15 that project included substantially increasing the cogeneration plant and four boilers that provided
16 steam for operations. *Id.* at 317. The cogeneration plant and boilers were subject to prior permits that
17 stated a maximum allowable rate of heat production. *Id.* The agency treated any additional emission
18 “stemming from increased plant operations within previously permitted levels as part of the baseline
19 measurement for environmental review, rather than as part of the proposed [project].” *Id.* The state
20 court of appeal reversed the trial court’s upholding of the project’s environmental document because it
21 determined the “the proper baseline measurement should rest on realized physical conditions on the
22 ground instead of merely hypothetical conditions.” *Id.* at 318-319. The California Supreme Court
23 affirmed. The court reasoned that “operation of the boilers simultaneously at their collective
24 maximum was not the norm.” *Id.* at 322. Thus, “[b]y comparing the proposed project with what
25 *could* happen, rather than to what was actually happening, the [agency] set the baseline not according
26 to established levels of a particular use, but by merely hypothetical conditions allowable under the
27 permits.” *Id.* (internal quotations omitted).

1 Likewise, in *Fat v. County of Sacramento*, 97 Cal. App. 4th 1270 (2002), the state court of
2 appeal held that the actual environment was the proper baseline under CEQA regardless of whether
3 existing environmental conditions were the result of unpermitted activity. In *Fat*, an airport expanded
4 unlawfully from a dirt strip, one hangar, and four to five planes in 1971 to a 2,000 foot paved runway,
5 a second 19,000 foot gravel runway, twenty-two hangars, a flight school, and an estimated 30,000
6 annual aircraft operations in 1992. 97 Cal. App. 4th 1270, 1273-1274 (2002). In 1997, a pilots’
7 organization applied for a conditional use permit for the airport. *Id.* at 1274. The purpose of the
8 permit was to legalize the existing use at the airport and did not involve any planned expansion of the
9 airport except for converting certain parking areas to hangars. *Id.*

10 The lead agency concluded that the project did not require preparation of an EIR because it
11 would not result in any additional impacts “beyond those already existing” from on-going, but
12 unpermitted, operations. *Id.* In an administrative appeal of this decision, the petitioners put forward
13 apparently uncontroverted evidence that the unpermitted uses at the airport resulted in significant
14 environmental impacts, including species impacts and noise. *Id.* at 1275. Petitioners successfully
15 argued in the trial court that “the only baseline capable of assuring no impacts escape evaluation (not
16 to mention mitigation) is 1970.” *Id.*

17 The court of appeal reversed. The court of appeal held that the “norm” is for an agency to use
18 the actual environment as its baseline, regardless of whether the environment is the result of
19 unpermitted activity, and that petitioners had failed to demonstrate that the agency had abused its
20 discretion by not deviating from this norm. *Id.* 1278, 1280-1281.

21 This Court dismisses the *Fat* opinion because it relies on CEQA Guideline 15125. Order at
22 26. *Fat* cannot so easily be discounted. The holding is directly on point, and the Court’s citation to
23 the CEQA Guidelines does not limit the holding. CEQA Guideline 15125(a) merely recites the law of
24 CEQA – that the environmental setting will normally be the existing physical condition. Guideline
25 15125 does not alter the result that would be achieved under application of the statute. Cal. Pub. Res.
26 Code § 21068 (agency must look at the “substantial *change* in the environment”) (emphasis added);
27 *See also CBE*, 48 Cal. 4th at 319 n. 4 (Guidelines aid in interpretation of CEQA). The guidelines are
28

1 merely further support, together with the statute and the entire body of CEQA case law, favoring the
2 use of the actual environment as the baseline. *Fat*, 97 Cal. App. 4th at 1281.

3 In sum, this Court's Order that TRPA must only consider buoys that have obtained TRPA
4 permits in the EIS's environmental baseline rather than the actual number of buoys that currently
5 physically exist on Lake Tahoe is contrary to CEQA, the CEQA Guidelines, and CEQA case law.¹

6 1. NEPA, like CEQA, Requires Evaluation of a Proposed Project Against Existing
7 Conditions.

8 Like CEQA, NEPA is concerned with impacts to the actual environment. "It is the
9 environment as it is found contemporaneously with an agency's decision to embark upon an action
10 which may change it, not the condition in which it may have been left before, which is the benchmark
11 from which the alteration of the status quo is to be measured in assessing the significance of such
12 action for NEPA purposes." *Overseas Shipholding Group, Inc., v. Skinner*, 767 F.Supp. 287, 299
13 (D.D.C. 1991) (*quoting National Resources Defense Council v. Vaughn*, 566 F.Supp. 1472, 1476
14 (D.D.C. 1983)). In *Skinner*, the U.S. Department of Transportation proposed giving permanent
15 approval of the use of certain waterways by certain tankers that had already been using the waterways
16 under a temporary waiver program. 767 F.Supp. 287, 289-290 (D.D.C. 1991). The agency's
17 environmental review for the project consisted of an environmental assessment that concluded the
18 project would not result in significant environmental impacts in part because it would simply make
19 permanent the shipping patterns that were already in existence at the time of the environmental
20 assessment. *Id.* at 299. Plaintiffs argued that the agency violated NEPA because the project was
21 "unfairly 'bootstrapping' [the project] on the temporary waiver system." *Id.* at 298. Plaintiffs
22 believed the project's review "should have compared the effects of the proposed 1987 Rule with the
23 state-of-the-world prior to the time that the agency began to issue temporary waivers" because if such
24

25 _____
26 ¹ This ruling also runs contrary to the mandate of the Compact that TRPA must analyze the
27 "significant environmental impacts of [a] proposed project." Compact Article VII, § (a)(2)(A). No
28 text in the Compact suggests that the Compact intended TRPA to analyze a hypothetical environment
rather than existing environmental conditions as is the clearly preferred baseline under CEQA, even if
a part of the actual environment is a result of unpermitted activity.

1 a baseline was used the agency would have found that the project would have resulted in significant
2 impacts. *Id.* The court disagreed.

3 The *Skinner* court held that the “agency correctly refused to extrapolate based upon a situation
4 which no longer exists, and correctly evaluated the status quo at the time of the rulemaking with the
5 state-of-the-world as it would exist if the 1987 Rule were adopted.” *Id.* Other NEPA cases are in
6 accord. *See, e.g., Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)
7 (“the acquisition of a negative easement which by its terms prohibits any change in the status quo does
8 not amount to major Federal action significantly affecting the quality of the human environment.”)
9 (citation and internal quotation marks omitted); *Upper Snake River v. Hodel*, 921 F.2d 232, 235 (9th
10 Cir. 1990) (EIS was not required where it would have discussed the environmental effects of
11 continuing to use a dam in the manner in which it was already being used); *Sierra Club v. Hassell*, 636
12 F.2d 1095, 1099 (5th Cir. 1981) (re-building a 24-year-old bridge destroyed by a hurricane would
13 maintain the environmental status quo and did not require an EIS under agency regulations); *City &*
14 *County of San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) (Navy leasing of
15 temporarily inactive shipbuilding facility did not need to analyze impacts from baseline that assumed
16 no shipbuilding operations; Navy only needed to analyze impacts unique to the new tenant as
17 compared to prior use); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir.
18 1979) (no EIS required when government leased pre-existing parking facility to management firm
19 because there was no change in the status quo).

20 The case this Court relies on, *Friends of Yosemite Valley v. Scarlett*, 439 F.Supp.2d 1074 (E.D.
21 Cal. 2006), is consistent with the above authority and does not support this Court’s conclusion that
22 TRPA used an incorrect baseline.² In *Scarlett*, the National Park Service adopted a 2000 FEIS and a
23 comprehensive management plan for the Merced River (the “River Plan”). 439 F.Supp.2d 1074, 1077
24

25 ² The Court also relies on the unpublished opinion in *Swan View Coalition v. Barbouletos*, 2008 WL
26 5681094 (D. Mont. 2008). The opinion is not well reasoned and inconsistent with the great weight of
27 published authority on the issue of baseline. Tellingly, the *Barbouletos* court cites no authority related
28 to baseline or the status quo in support of its conclusion that the environmental baseline should not be
existing conditions. *See Swan View Coalition v. Barbouletos*, 2008 WL 5681094, * 13-16 (D. Mont.
2008).

1 (E.D. Cal. 2006). The Ninth Circuit invalidated portions of the 2000 River Plan on various grounds.
2 *Id.* at 1077. After further litigation, the Fish and Wildlife Service prepared a supplemental EIS for the
3 River Plan which was again challenged by plaintiffs. *Id.* at 1103. Plaintiffs argued that the
4 supplemental EIS improperly included the invalidated 2000 River Plan as part of the regulatory
5 baseline for the project. *Id.* The court concluded that the Supplemental EIS could include in the
6 environmental baseline the portions of projects that tiered off the invalidated 2000 River Plan *that had*
7 *already been implemented*, but should not have included the unimplemented portions of the
8 invalidated 2000 River Plan in the regulatory baseline. *Id.* at 1104, 1105. Thus, the court held that the
9 unimplemented elements of the invalidated plan were not part of the baseline, but were part of the
10 project itself. *Id.*

11 The *Scarlett* decision follows the general principle found in both CEQA and NEPA that the
12 baseline for environmental analysis should consist of the existing physical environment. The 2000
13 River Plan did not exist (“the Ninth Circuit held the entire 2000 [River Plan] to be invalid,” *id.*), thus
14 it was improper to consider it as part of the status quo in the supplemental EIS. But projects that
15 relied on the invalidated River Plan had in fact been implemented and, therefore, did exist on the
16 ground. *Id.* at 1105 (“it would be contrary to NEPA to pretend that various projects which had already
17 been implemented . . . are not now part of the status quo”). Here, over 4,000 buoys physically exist on
18 Lake Tahoe. The buoys are real, and just like the already implemented projects that relied on the 2000
19 River Plan, they are properly considered part of the environmental baseline.

20 2. The Court’s Order Invades the Domain of an Administrative Agency.

21 The Court has gone beyond ordering that the baseline utilized in the EIS is inadequate; it has
22 also ordered what it believes the proper baseline must be in the EIS. Order at 30. This is contrary to
23 CEQA, NEPA, and general constitutional principles of the separation of powers.

24 Under CEQA, it is improper for a court to “direct any public agency to exercise its discretion
25 in any particular way.” Cal. Pub. Resources Code § 21168.9(c). Likewise under NEPA, a court may
26 not act as a “super-agency.” *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d
27 Cir. 1983). Rather, “[t]he only role for a court is to insure that the agency has taken a hard look at
28 environmental consequences; it cannot interject itself within the area of discretion of the executive as

1 to the choice of the action to be taken.” *Id.* (quoting *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), 410
2 n. 21). The “court’s task is merely to determine whether the EIS was compiled in objective good faith
3 and whether the resulting statement would permit a decisionmaker to fully consider and balance the
4 environmental factors.” *Id.* at 1030 (internal quotations omitted). The Court should only determine if
5 the EIS “cannot provide the basis for informed evaluation or a reasoned decision.” *Id.* It is left to the
6 agency to correct these deficiencies on remand. *Federal Power Commission v. Idaho Power Co.*, 344
7 U.S. 17, 20 (1952).

8 This constraint on a court’s power is not unique to CEQA and NEPA, but is a guiding
9 principle in administrative law. For example, the Ninth Circuit Court of Appeals has recently
10 explained the deference courts must provide to agencies when analyzing National Forest Management
11 Act (“NFMA”) claims brought against the U.S. Forest Service. In *The Lands Council v. McNair*, 537
12 F.3d 981 (9th Cir. 2008), the Ninth Circuit held that its “proper role is simply to ensure that the Forest
13 Service made no ‘clear error of judgment’ that would render its action ‘arbitrary and capricious.’” 537
14 F.3d 981, 993 (9th Cir. 2008). The court would otherwise defer to the agency on the evidence
15 necessary to support its decision; “[w]ere we to grant less deference to the agency, we would be
16 ignoring the APA’s arbitrary and capricious standard of review.” *Id.* at 992.

17 Thus, as recognized in this Court’s Order in footnote 13, a court looks to see if the agency
18 “failed to consider an important aspect of the problem or offered an explanation for its decision that
19 runs counter to the evidence before the agency.” *Id.* at 993. “This approach respects our law that
20 requires [the courts] to defer to an agency’s determination in areas involving a ‘high level of technical
21 expertise.’” *Id.* Importantly, a court is “not free to impose on the agency [its] own notion of which
22 procedures are best” *Id.* Nor may a court impose procedural requirements not explicitly
23 enumerated in the relevant statutes. *Id.* A court can require an agency provide specific *information* to
24 substantiate its position, *id.* at 998, but requiring the agency to adopt specific methodologies is beyond
25 this Court’s power. *Federal Power Commission*, 344 U.S. 17 at 20; *Securities and Exchange*
26 *Commission v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Federal Power Comm’n v.*
27 *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333-334 (1976) (“a reviewing court may not,
28 after determining that additional evidence is requisite for adequate review, proceed by dictating to the

1 agency the methods, procedures, and time dimension of the needed inquiry”). Thus, prescribing the
 2 baseline TRPA must adopt impermissibly blurs the distinction between the role of a court and the role
 3 of an agency.

4 The Court has identified concerns that TRPA has failed to adequately inform the public
 5 regarding the impacts of its project in part because the project involves replacing or permitting already
 6 existing buoys that lack TRPA permits. The Court’s Order should be amended to preserve TRPA’s
 7 discretion as to how this inadequacy should be addressed – be it through the discussion of the baseline
 8 utilized, the project description, the impact analyses, the alternatives, or otherwise.

9 3. The Court’s Order Imposes an Inequitable Burden on TRPA to Speculate on the
 10 State of the Environment Absent Unpermitted Buoys.

11 The environmental baseline is a “snapshot of the physical conditions that exist at the time
 12 when environmental review of the proposed activity begins.” *Wal-Mart Stores, Inc. v. City of Turlock*,
 13 138 Cal. App. 4th 273, 289 (2006), disapproved on other grounds in *Hernandez v. City of Hanford*, 41
 14 Cal. 4th 279, 295-297 (2007). “The physical conditions that are reasonably foreseeable are the
 15 difference between the baseline snapshot and any one of the snapshots depicting future conditions.”
 16 *Id.* at 290. The Court now asks TRPA to “photoshop” its baseline snapshot to delete the thousands of
 17 buoys that are floating in the lake without all necessary permits. This is impracticable.

18 The Court has ruled that the baseline infects the analyses of air quality, water quality, and
 19 noise. Order at 31. The Court thus appears to ask TRPA to speculate as to what the water quality of
 20 Lake Tahoe would be in 2010 if TRPA had prevented illegal buoys from being installed over the last
 21 30 years and removed the thousands of unpermitted buoys that existed before TRPA even began
 22 regulating the lake in 1972. This is a potential Pandora’s box of speculation. *Skinner*, 767 F.Supp.
 23 287 at 298 (the “agency correctly refused to extrapolate based upon a situation which no longer
 24 exists”).

25 TRPA is unaware if current scientific methodology would make it feasible to determine with
 26 any precision what the current water quality (i.e., theoretical levels of HCs2, NOx, PAHs, PM5)
 27 would be in the lake today absent any unpermitted buoys over the last several decades. This is not a
 28 matter of simply subtracting the level of contamination and noise associated with unpermitted buoys;

1 TRPA will also need to predict that amount of other lawful actions that would have occurred absent
2 those buoys—would there have been the same level of onshore development and vehicle traffic over
3 the last generation? Would TRPA have approved its prohibition on two-stroke engines if there were
4 thousands fewer boats using the lake? The possible cascade of changes to the environment from what
5 currently exists absent unlawful and lawful activity is staggering.

6 In any event, the environmental baseline that would emerge from that exercise would be
7 speculative. The same analytical conundrum would present itself with air quality and noise impacts.
8 It is just such an outcome that CEQA and NEPA case law demands be avoided. *CBE*, 8 Cal. 4th 310
9 at 321 (an agency must compare the environmental effects of its project with the “real conditions on
10 the ground”); *Skinner*, 767 F.Supp. 287 at 298.

11 Further, the Court’s Order does not distinguish between buoys that are unpermitted in the lake
12 that preexisted TRPA regulation and unpermitted buoys installed after TRPA’s first shorezone
13 ordinance in 1972. Thus, the Court’s Order requires the baseline to exclude buoys that have
14 physically existed in the lake since before TRPA had any authority to prevent their installation. The
15 Court fails to recognize the enforcement difficulties that TRPA has been presented with since its
16 inception with reaching an equitable solution to all interested parties with structures that predate
17 TRPA regulation. The Court asks TRPA to author a fiction that there are no legal, monetary, or
18 political constraints to perfect enforcement of its regulations when drafting the baseline for the EIS.
19 The forced removal of generation-old buoys would be staunchly resisted by the owners and their
20 immediate removal should not be assumed to be part of the baseline.

21 To avoid this inequity, TRPA believes the Court’s decision should be amended so that footnote
22 13 is the sole basis for finding the EIS’s baseline inadequate. TRPA should retain its discretion to
23 determine the baseline for its analysis and to provide the Court and the public an adequate explanation
24 of why such a baseline is appropriate.

25 **B. The Court Should Not Have Vacated the Amendments in Their Entirety.**

26 In its Order granting plaintiffs’ motion for summary judgment, the Court vacated the
27 Amendments in their entirety. These Amendments completely overhauled TRPA’s preexisting
28 regulatory framework for the shorezone of Lake Tahoe, and included substantial improvements to

1 various aspects of the regulatory framework that had not been comprehensively updated since 1987.
2 The Amendments contain rules regarding the development of boating facilities on Lake Tahoe, the
3 focus of plaintiffs’ and the Court’s consternation with the Amendments, as well as separate
4 regulations regarding other shorezone uses and activities in the Region. TRPA respectfully requests
5 that the Court limit its vacation of the Amendments to those portions that authorize the permitting of
6 boating facilities and allow the other portions of the Amendments to remain in effect. The vacation
7 should likewise necessarily extend to the Blue Boating and Adaptive Management Programs, which
8 were adopted as mitigation measures for the permitting of boating facilities *and* were to be funded, in
9 whole or in part, by the permitting of boating facilities.

10 A limited remedy of this sort is appropriate here because: (1) these other parts of the program
11 are not within the scope of plaintiffs’ arguments nor the basis for the Court’s conclusion; (2) these
12 other parts of the program are in many cases environmentally beneficial; (3) these aspects of the
13 program can be given independent life; and (4) vacation of these aspects of the program will severely
14 disrupt TRPA’s ability to manage the Lake Tahoe shorezone.

15 1. Limited vacation is an appropriate remedy.

16 The Compact, which governs TRPA’s actions, contains a judicial review provision that is
17 analogous to that contained in the federal Administrative Procedures Act (APA). TRPA Compact,
18 Art. VI(j)(5); 5 U.S.C. § 706. Thus, though not governed by the APA, TRPA and this Court can look
19 to the APA for guidance. Pursuant to the APA, a court may set aside “the whole *or a part* of an
20 agency rule” when reviewing agency rulemaking. *Catholic Social Service et al. v. Shalala*, 12 F.3d
21 1123 (D.C. Cir. 1994), 1128, quoting 5 U.S.C. § 551(13) (original emphasis). For example, in
22 *Catholic Social Service*, the D.C. Circuit Court of Appeals upheld the district court’s determination
23 that the infirm portion of a Medicare cost-limit rule promulgated by the Secretary of Health and
24 Human Services was severable, and thus while this portion of the rule was invalid, the remainder of
25 the rule was intact.

26 Likewise, pursuant to CEQA, if project activities are capable of being severed, a court’s order
27 “shall be limited to that portion of a determination, finding, or decision or the specific project or
28 project activities found to be in noncompliance.” Cal. Pub. Res. Code § 21168.9. Thus, in *Anderson*

1 *First Coalition v. City of Anderson*, the court upheld the severance of a gas station from the remainder
 2 of a larger project, since “the EIR’s analysis . . . was not inadequate regarding the *entire* project, but
 3 only regarding the gas station.” 30 Cal. App. 4th 1173, 1180 (2005) (original emphasis). The court
 4 stated that section 21168.9 “expressly authorize[s] the court to fashion a remedy that permits some
 5 part of the project to go forward while an agency seeks to remedy its CEQA violations.” *Id.* at 1181,
 6 quoting Remy et al., *Guide to the Cal. Environmental Quality Act* (10th ed. 1999), p. 647. Limited
 7 vacation of rules is also an appropriate remedy in the context of a challenge brought pursuant to the
 8 National Environmental Policy Act (NEPA). *See Sierra Club v. Van Antwerp*, 2010 WL 3292182
 9 (D.D.C. 2010) (holding that an Army Corps of Engineers’ permit should only be partially vacated so
 10 as to avoid environmental harm). Limited vacation through severance is therefore a well accepted and
 11 proper means of providing a remedy for portions of a program or plan that were not at issue in the
 12 underlying case.³

13 2. Vacation should be limited to those portions of the Amendments that permit
 14 boating facilities because plaintiffs challenged only those aspects of the
 15 Amendments.

16 The Amendments establish a comprehensive regulatory program for all development and
 17 activities in the shorezone. Plaintiffs’ summary judgment motion, however, only challenged those
 18 aspects of the Amendments which they alleged failed to account for environmental impacts resulting
 19 from an increase in boating facilities, and thus increased boating, on Lake Tahoe. Plaintiffs state that
 20 their claims under the Compact “fall into three different categories, claims related to (1) all boat
 21 facilities, (2) only piers, and (3) only buoys.” Plaintiffs’ Motion for Summary Judgment at 9. In
 22 plaintiffs’ discussion of why TRPA failed to mitigate air and water quality impacts, plaintiffs base
 23 their arguments on “new boat facilities, which will increase boat storage on and access to the Lake”
 24 and an increase in “motorized boating.” *Id.* at 10. Likewise, in arguing that TRPA failed to make the

25 ³ Even outside the context of the APA, CEQA, and NEPA, courts favor limited injunctive relief. As
 26 explained by this Court on page 15 of its Order on plaintiffs’ motion for a preliminary injunction,
 27 injunctive relief should be narrowly tailored to the harm necessitating the relief. The vacation and
 28 remand ordered by this Court to remedy any alleged harm caused by the impacts from boating
 facilities should therefore be narrowly tailored to those portions of the Amendments that authorize the
 development of boating facilities. *See Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct.
 365 (2008); *Sierra Forest Legacy v. Rey*, 577 F.3d 1015 (9th Cir. 2009).

1 required findings to achieve and maintain thresholds, plaintiffs again base their argument on
2 “additional emissions, induced by new boat facilities.” *Id.* at 17. Throughout their briefs, plaintiffs
3 focus solely on the impacts from increased boating as the basis for their challenge to the Shorezone
4 Amendments. *See also, e.g., id.* at 17 (discussing how plaintiffs take issue with “noise levels from
5 increased motorized boating”); *id.* at 29 (arguing that the Amendments will not enable TRPA to fulfill
6 its responsibility to prevent long-term degradation of the waters of Lake Tahoe, based on “boat
7 emissions” and their impact on water quality); *id.* at 19-22 (focusing their challenge to TRPA’s
8 mitigation of recreation impacts to the impacts from new piers). Because plaintiffs consistently and
9 exclusively challenge those portions of the Amendments which relate to an increase in boating, only
10 those aspects of the Amendments which allow for the permitting of boating facilities should be
11 vacated.

12 Consistent with the scope of plaintiffs’ arguments, this Court itself based its vacation of the
13 Amendments on TRPA’s alleged failure to adequately account for impacts associated with increased
14 boating. For example, as the “predicate” for its determination that TRPA failed to meet its obligation
15 pursuant to Section 6.5 of the Code to achieve and maintain thresholds, the Court referred exclusively
16 to part III.B of its Order, which identified TRPA’s failure to mitigate impacts from boating facilities.
17 Order at 11. Similarly, in evaluating which thresholds were challenged by plaintiffs, the Court stated
18 that “many appear to have little connection to motorized boating or boating facilities” and “[b]ecause
19 plaintiffs rest their claims on thresholds argued to be affected by boating and boating facilities, the
20 court limits its analysis to those thresholds.” *Id.* at 16. Moreover, the Court’s conclusion with regards
21 to the environmental baseline relates exclusively to the number of buoys on the lake and not to other
22 aspects of the baseline used by TRPA. To the extent this court maintains its Order that TRPA’s
23 baseline determination was erroneous, such an infirmity need not, by definition, infect aspects of the
24 program unrelated to the authorization of additional buoys or boating facilities.

25 Because both the plaintiffs and the Court identified the infirmities of the Amendments as being
26 those aspects related to the permitting of piers, buoys, and other boating facilities, and their
27 corresponding potential increase in boating on Lake Tahoe, the Court should have limited its vacation
28 to those aspects of the Amendments that authorize the addition of or permitting of boating facilities.

1 *See, e.g., Catholic Social Service*, 12 F.3d at 1128 (stating that “to set aside an entire rule where only a
2 part is invalid” would exceed a court’s scope of review).

3 3. Vacation should be limited to those portions of the Amendments that permit
4 boating facilities because the remaining portions of the Amendments are in
5 many cases environmentally beneficial or benign.

6 By vacating the Amendments in their entirety, the Court not only eliminated provisions of the
7 Amendments that were beyond the scope of plaintiffs’ challenge and its own conclusions, but it also
8 eliminated provisions that would have a beneficial or benign environmental impact. These provisions
9 by way of example include the following:

- 10 • Regulations requiring a scenic assessment for most projects in the shorezone, including
11 those unrelated to boating, such as shorezone protective structures, dredging, and swim
12 platforms. TRPA Code of Ordinances Section 54.6, AR 1:00201-202; *see also* Impacts
13 6.8.1 and 6.8.2 for a discussion of environmental benefits associated with this section (AR
14 2:000779-781).
- 15 • The designation of Shorezone Preservation Areas, limiting new development in sensitive
16 areas of Lake Tahoe. TRPA Code of Ordinances, Section 50.4 (AR 1:00150-151); *see*
17 *also* Impacts 6.8.4 and 12.8.2 for a discussion of environmental benefits associated with
18 this section (AR 2:00782 and AR 2:00798).
- 19 • Improved standards for shoreline protective structures. TRPA Code of Ordinances,
20 Subparagraph 54.5.C(3), AR 1:00196-197; *see also* Impacts 11.8.3, 11.8.4, 11.8.5 for a
21 discussion of environmental benefits associated with this subparagraph (AR 2:00796-797).
- 22 • Improved standards for dredging. TRPA Code of Ordinances, Section 54.11, AR 1:00207-
23 208; *see also* Impact 5.81 for a discussion of environmental benefits associated with this
24 section (AR 2:00774-775).

25 These provisions either did not exist in the pre-existing rules or were improvements upon the
26 preexisting standards. The Court’s vacation of the Amendments as a whole results in the vacation of
27 these provisions which do not implicate plaintiffs’ concerns regarding boat-induced impacts to Lake
28 Tahoe and instead represent improvements in TRPA’s regulation of the shorezone.

1 A blanket vacation at the expense of environmentally beneficial rules is an undesirable
2 outcome that can and should be avoided. For example, in *Davis County Solid Waste Management and*
3 *Energy Recovery Special Service District v. United States Environmental Protection Agency*, 108 F.3d
4 1454 (D.C. Cir. 1997), the court revisited its vacation of emission standards promulgated by the
5 Environmental Protection Agency (EPA). In its initial opinion, the court held that the EPA violated
6 the Clean Air Act when it promulgated emission standards for different types of municipal waste
7 combustor units. *Id.* at 1455. The court vacated the standards that had been established for each type
8 of unit. Although the court found all of the standards to be invalid, the EPA asked the court to
9 reconsider its decision to vacate the standards “in their entirety” and to instead vacate only the
10 standards for those units with emission capacities below 250 tons/year. *Id.* The EPA argued that
11 vacation of the other standards would have a “serious environmental impact even if the EPA quickly
12 repromulgates the standards.” *Id.* at 1455-56. The Court agreed and found the standards for those
13 units with capacities below 250 tons/year to be severable, because these were the only standards
14 expected to be “meaningfully affected” on remand and because “vacating the large unit standards will
15 have a significant deleterious effect.” *Id.* at 1460. The court thus amended its initial opinion to vacate
16 only those standards for units with capacities below 250 tons/year. *Id.* Like the court in *Davis*, this
17 Court should not vacate the Amendments in their entirety because doing so would result in
18 “significant deleterious effects” to the lake.

19 4. Vacation should be limited to those portions of the Amendments that permit
20 boating facilities because the remainder of the Amendments can be given
21 independent life.

22 Courts routinely allow for limited vacation where unchallenged aspects of a program can be
23 given independent life. In *Catholic Social Service*, the court held that it would exceed the scope of
24 review to “set aside an entire rule where only a part is invalid, and where the remaining portion may
25 sensibly be given independent life.” *Catholic Social Service*, 12 F.3d at 1128. Accordingly, while the
26 court vacated the invalid portion of a cost-limit rule promulgated by the Secretary of Health and
27 Human Services, it left the remainder of the rule intact. *Id.*

28 Here, the unchallenged aspects of the Amendments may be given independent life since these
provisions and the provisions authorizing the allocation of boating facilities “operate entirely

1 independently of each other.” *Davis*, 108 F.3d at 1460. For example, the provisions authorizing the
 2 permitting of buoys and piers are unrelated to and separate from aspects of the Amendments which
 3 have no impact on increased boating, such as scenic protection requirements, standards for shoreline
 4 protective structures, or the designation of Shorezone Preservation Areas. Because those provisions of
 5 the Amendments unrelated to the authorization of boating facilities can be given independent life, the
 6 Court should sever those parts of the Amendments authorizing the permitting of piers and buoys and
 7 leave the remainder of the Amendments in effect.⁴

8 5. Vacation should be limited to those portions of the Amendments that permit
 9 boating facilities in order to avoid disruptive consequences.

10 “The decision whether to vacate depends on the ‘seriousness of the order’s deficiencies . . . and
 11 the disruptive consequences of an interim change that may itself be changed.’” *Allied-Signal Inc. v.*
 12 *U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150 (D.D.C. 1993). Vacating those aspects of the
 13 Amendments which were not challenged by the plaintiffs would cause disruptive consequences. For
 14 two years, residents, as well as a number of federal, state, and local entities, have relied upon the
 15 Amendments. These entities use the Amendments to implement environmental improvements.
 16 Given that the aspects of the program that were unchallenged in many cases will lead to
 17 environmentally beneficial impacts, these aspects do not contain serious “deficiencies” and the Court
 18 should avoid the disruptive consequences of complete vacation.

19
 20
 21
 22 _____
 23 ⁴ TRPA’s own Code of Ordinances specify that its rules, including the Amendments, are severable: “If
 24 any section, clause, provision or portion of the Code . . . is declared unconstitutional or invalid by a
 25 Court of competent jurisdiction, the remainder of the Code . . . shall not be affected. For this purpose,
 26 the provisions of the . . . Code . . . are declared severable.” TRPA Code of Ordinances, § 1.6. *See*
 27 *also* Section 8.00 of Ordinance 2008-10, which adopted the Amendments: “[t]he provisions of this
 28 ordinance and the amendments to the Code of Ordinances adopted thereby shall be liberally
 construed...if any section, clause, provision or portion thereof is declared unconstitutional or
 invalid...the remainder of this ordinance and the amendments to the Code of Ordinances shall not be
 affected thereby. For this purpose, the provisions of this ordinance and the amendments to the Code
 of Ordinances are hereby declared respectively severable.” AR 1: 00028.

1 **V. CONCLUSION**

2 For the foregoing reasons, TRPA respectfully requests this Court grant this motion to alter or
3 amend the judgment.

4 DATED: October 14, 2010

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