

**Carson City
Agenda Report**

Date Submitted: Dec. 6, 2013

Agenda Date Requested: Dec. 19, 2013

Time Requested: Consent Agenda

To: Mayor and Board of Supervisors

From: Randal Munn, Chief Deputy District Attorney

Subject Title: For Possible Action: To approve pursuant to Section 3.070(3) of the City Charter an Amicus Curiae Brief Joint and Common Interest Agreement retroactive to November 20, 2013 and the appointment of Thomas Watson and Nira Feeley of the City Attorney's Office for the City of South Lake Tahoe, California to act as special deputies district attorney for the Carson City District Attorney's Office in filing an amicus brief and representing the amicus curiae interests of Carson City before the United States District Court, Eastern District of California, Sacramento Division in a suit brought by the Sierra Club and Friends of the West Shore against the defendant Tahoe Regional Planning Agency in case No. 2:13-CV-00267-JAM-EFB. *(Randal Munn)*

Staff Summary: The District Attorney's Office does not currently have any staff admitted to practice before the Sacramento Division federal district court, and time limitations for filing an amicus brief in support of the TRPA's motion for summary judgment required immediate action in drafting and filing the amicus brief under signature of the City Attorney's Office of South Lake Tahoe. The Agreement does not provide for any attorney's fees compensation and nominal costs will be shared by all amici (Carson City, Douglas County, Washoe County, Placer County, CA, El Dorado County, CA, and the City of South Lake Tahoe, CA). The Amicus Brief was drafted and filed by the South Lake Tahoe City Attorney on November 27, 2013 with draft input from all legal counsel from all amici jurisdictions.

Type of Action Requested:

☐ Resolution

☐ Ordinance- First Reading

☒ Formal Action/Motion

☐ Other (Specify)

Does This Action Require A Business Impact Statement: ☐ Yes ☒ No

Recommended Board Action: I move to approve pursuant to Section 3.070(3) of the City Charter an Amicus Curiae Brief Joint and Common Interest Agreement retroactive to November 20, 2013 and the appointment of Thomas Watson and Nira Feeley of the City Attorney's Office for the City of South Lake Tahoe, California to act as special deputies district attorney for the Carson City District Attorney's Office in filing an amicus brief and representing the amicus curiae interests of Carson City before the United States District Court, Eastern District of California, Sacramento Division in a suit brought by the Sierra Club and Friends of the West Shore against the defendant Tahoe Regional Planning Agency in case No. 2:13-CV-00267-JAM-EFB .

Explanation for Recommended Board Action: Because the Board had previously approved the TRPA Regional Plan Update (RPU), which is challenged by the Sierra Club in the lawsuit, the District Attorney's Office believed immediate action in support of Carson City's interests was required. Each amici party is located within the Lake Tahoe

Basin and is subject to the purview of the RPU, which was approved in December 2012 by the TRPA. The outcome of the litigation has direct ramifications on the amici parties, as each is charged with representing the public interest, general welfare, health, and safety in the physical development of the respective jurisdictions for the benefit of its citizens, residents and visitors. All amici parties risk losing explicit powers recognized by the Compact and incorporated into the December 2012 RPU and implemented in the TRPA Code of Ordinances.

Applicable Statute, Code, Policy, Rule or Regulation: Professional Legal Services contracts are exempt from competitive public bidding. NRS 332.115(1)(b).

CC Charter section 3.070(3): "The district attorney may, subject to the approval of the board, contract for the services of special deputy district attorneys."

Fiscal Impact: No fiscal impact. Nominal hard costs related to the mailing and reproduction of the amicus brief may be shared among six jurisdictions.

Explanation of Impact: N/A.

Funding Source: District Attorney's Office operations

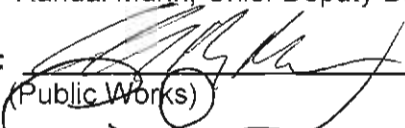
Alternatives: 1) Refer back to District Attorney's office
2) Do not approve Joint Agreement

Supporting Material:

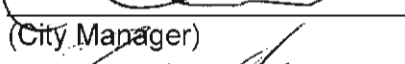
- 1) Joint And Common Interest Agreement
- 2) Amicus Brief (as filed)

Prepared By: Randal Munn, Chief Deputy District Attorney, Civil Division

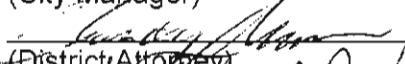
Reviewed By:


(Public Works)

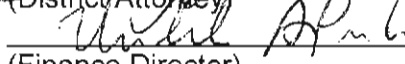
Date: 12-10-13


(City Manager)

Date: 12/10/13


(District Attorney)

Date: 12/10/13


(Finance Director)

Date: 12/10/13

Board Action Taken:

Motion: _____

1) _____	Aye/Nay
2) _____	_____

(Vote Recorded By)

**AMICUS CURIAE BRIEF
JOINT AND COMMON INTEREST AGREEMENT**

This Joint and Common Interest Agreement (the "Agreement") is entered into on November 20, 2013 by and between the following parties:

CITY OF SOUTH LAKE TAHOE, CALIFORNIA ("City of South Lake");
EL DORADO COUNTY, CALIFORNIA ("El Dorado")
PLACER COUNTY, CALIFORNIA ("Placer")
DOUGLAS COUNTY, NEVADA ("Douglas");
CARSON CITY, NEVADA, A CONSOLIDATED MUNICIPALITY ("Carson"); and
WASHOE COUNTY, NEVADA ("Washoe");

each a "Party," collectively "Parties," acting through their representatives and/or their undersigned counsel, NOW THEREFORE, AGREE AS FOLLOWS:

- A. The Parties wish to file a single amicus curiae brief in litigation in the United States District Court, Eastern District of California, Sacramento Division brought by the Sierra Club and Friends of the West Shore against the Tahoe Regional Planning Agency (TRPA), Defendant, Case No: 2:13-CV-00267-JAM-EFB, which challenges TRPA's adoption in December 2012 of a Final Environmental Impact Statement, Regional Plan Update, Code amendments to implement the RPU and adoption of Area Plans based on the RPU ("the Litigation"). It is the mutual intent of the Parties to file a single amicus brief in support of TRPA's Motion for Summary Judgment in the Litigation.
- B. Each Party, is located within the Lake Tahoe Basin and subject to the purview of TRPA's Regional Plan Update (RPU) which was approved in December 2012. Each of the Parties is a participating member of the governing body of the TRPA. The outcome of this litigation has direct ramifications on the Parties, as each is charged with representing the public interest, general welfare, health, and safety in the physical development of the respective jurisdiction for the benefit of its citizens, residents and visitors. The Parties have significant shared, common interests in this litigation because they collectively risk losing explicit powers recognized by the Compact and incorporated into the December 2012 RPU and implemented in the TRPA Code of Ordinances.
- C. The Parties believe it is in their respective interests to cooperate with each other in the drafting and filing of a single amicus brief on behalf of the local jurisdictions subject to TRPA regulations. Each Party will review the content of the Amicus Brief. If approved of and agreed to by the respective Parties' counsel, designated counsel shall sign as an Amici Party. The Parties wish to designate Thomas Watson and/or Nira Feeley of the City Attorney's Office for the City of South Lake, California, as counsel of record on behalf of the Parties, for service

purposes, including electronic service and filing of the Amicus Brief. Mr. Watson and Ms. Freely are properly licensed attorneys in good standing with the California Bar and with the United States District Court, Eastern District of California, thus with the approval of the Nevada Parties, may sign documents on behalf of the State of Nevada jurisdictions which require a licensed California attorney signature.

- D. The Parties agree there will be no compensation paid to each other stemming from this Agreement or researching, drafting, or any professional service associated with the Amicus Brief. Any court costs will be shared equally among the Parties.
- E. Additionally the Parties wish to cooperate in a way that ensures the preservation of any and all confidential and privileged information exchanged during the course of their joint efforts and without a waiver of the work-product doctrine, the attorney-client privilege or any other privilege or exemption protecting such information from discovery or disclosure related to the Litigation. In light of the foregoing and to aid and promote adequate representation and achieve efficiencies, the Parties desire at this time to memorialize their understandings and intentions with respect to their continuing joint amicus brief and to facilitate the exchange of information between the Parties and their respective counsel and consultants. The undersigned believe that the sharing of such information is protected by the joint defense and common interest doctrines recognized in The Restatement (Third) of the Law Governing Lawyers § 76 (1) (2000), and in cases such as *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996), cert. denied, 520 U.S. 1193, 137 L. Ed. 2d 695, 117 S. Ct. 1484 (1997); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987); *Continental Oil Company v. United States*, 330 F.2d 347 (9th Cir. 1964); *Collins v. State*, 113 Nev. 117, 946 P.2d 1055 (1997); *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998).
- F. Confidentiality of Communications. Each Party agrees to receive and hold in confidence the contents and embodiments of any and all oral or written communications exchanged between or among the Parties and their respective counsel relating to the Litigation ("Joint Amicus Communications"), whether or not such communications are otherwise privileged or protected. No Party or its counsel shall disclose any Joint Amicus Communication to any person or entity that is not either an employee, officer, consultant, expert, counsel or vendor of a Party or counsel for a Party directly involved with the Amicus without the written consent of the other Parties and their counsel, or without a court order or valid compulsory process compelling such disclosure or to use such Joint Amicus Communication for any purpose other than the Amicus Brief. Each of the Parties shall be responsible for and direct its participants to comply with the terms of this Agreement.

- G. **Limitation on Use and Disclosure of Shared Information.** In addition, each Party agrees: (1) to receive and hold in strict confidence any information (including, but not limited to, documents, legal analyses, interviews, legal memoranda and electronic data) related to the Amicus that is disclosed to it pursuant to this Agreement (collectively "Shared Information"); (2) to use the Shared Information solely for the purpose of drafting the Amicus Brief; and, (3) to take all steps reasonably necessary to protect the confidentiality of the Shared Information. A Party receiving Shared Information shall only disclose the Shared Information with the Party participants. The Parties agree that no Shared Information shall be used in any litigation between the Parties. However, information or materials that otherwise would not be subject to the attorney-client privilege or work product doctrine do not become subject to such privilege or doctrine merely because they have been incorporated or included in Shared Information.
- H. **Work Product Protection.** All documents and materials jointly created by, among or under the direction of counsel for the Parties related in any way to the Amicus Brief shall be deemed to be the work product of each counsel involved in its creation ("Joint Work Product.")
- I. **No Waiver of Privileges.** No Joint Amicus Communication or exchange of Shared Information or Joint Work Product between the Parties or and/or their counsel pursuant to this Agreement shall operate as a waiver of any privilege or protection (including the attorney-client privilege and the work product doctrine) that may apply to the communication or documentation so exchanged, or to the information, opinions and/or other material included therein.
- J. **Defense of Confidentiality.** If any person or entity requests or demands by subpoena or otherwise any Joint Amicus Communication, Shared Information or Joint Work Product from any Party, counsel for that Party will immediately notify counsel for the other Parties of such demand. The person who authors any Joint Amicus Communication, Shared Information or Joint Work Product shall be deemed to retain the possession, custody and control thereof. The Parties agree that each of them shall take all reasonable steps necessary or appropriate to permit the assertion of all applicable rights with respect to the confidentiality of information so demanded and shall cooperate fully with the other Parties in any judicial proceeding relating to requested disclosure.
- K. **No Agency or Partnership.** This Agreement shall not create any agency, partnership or similar relationship among the Parties.
- L. **Compliance with Statutes, Regulations, Court Orders and Contractual and Professional Obligations.** Nothing contained herein shall be construed nor applied so as to require any Party to violate any statute, regulation, court order or valid contractual or professional obligation.

- M. Applicable Law. This Agreement shall be construed in accordance with the laws of the States of California and Nevada.
- N. Signatures – Counterparts. This Agreement and any amendment hereto, may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. This Agreement will not be effective until the execution and delivery between each of the Parties of at least one set of counterparts. The Parties authorize each other to detach and combine original signature pages and consolidate them into a single identical original. Any of such completely executed counterparts will be sufficient proof of this Agreement.
- O. Integration Provisions. This Agreement contains the entire agreement of the Parties with respect to the subject matter hereof and supersedes any prior agreement or understandings in that regard.
- P. Execution and Amendment. This Agreement may be amended only by way of a written document executed by all Parties. This Agreement and any amendments hereto may be executed in counterparts. By signing this Agreement, the undersigned attorneys acknowledge that they have conferred with their respective clients, and the clients agree to be bound by the terms of this Agreement. This Agreement and all its terms are effective as of the Effective Date.

IN WITNESS WHEREOF, the Parties and their respective attorneys have executed this agreement as of the date first written above.

AGREED:

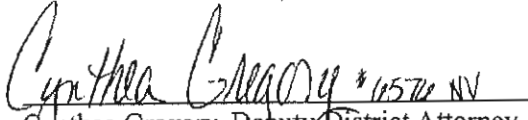
CITY OF SOUTH LAKE, CALIFORNIA



Thomas Watson, City Attorney
City of South Lake Tahoe

AGREED:

DOUGLAS COUNTY, NEVADA


Cynthia Gregory, Deputy District Attorney
Douglas County District Attorney's Office

AGREED:

Pursuant to the Carson City, Nevada Charter section 3.070(3), Thomas Watson and Nira Feeley of the City Attorney's Office for the City of South Lake Tahoe, CA, are designated amicus brief special deputy district attorneys for the Carson City District Attorneys Office.

CARSON CITY, a consolidated municipality


Neil A. Rombardo, Carson City District Attorney
By: Randal R. Munn, Chief Deputy District Attorney

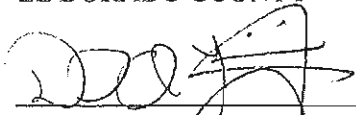
AGREED:

WASHOE COUNTY

Greg Salter, Deputy District Attorney
Washoe County District Attorney's Office

AGREED:

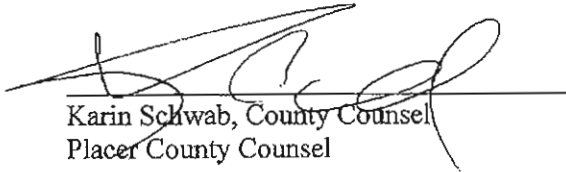
EL DORADO COUNTY

A handwritten signature in black ink, appearing to read "David Livingston", written over a horizontal line.

David Livingston, Senior Deputy County Counsel
El Dorado County, Office of the County Counsel

AGREED:

PLACER COUNTY



Karin Schwab, County Counsel
Placer County Counsel

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9 *Attorneys for Amici parties,*
10 *The City of South Lake Tahoe, California;*
11 *El Dorado County, California; Placer County,*
12 *California; Douglas County, Nevada;*
13 *Washoe County, Nevada; and*
14 *Carson City and County, Nevada*

11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA
13 SACRAMENTO DIVISION

14 SIERRA CLUB and FRIENDS OF THE WEST
15 SHORE,

16 Plaintiffs,

17 vs.

18 TAHOE REGIONAL PLANNING AGENCY,

19 Defendant.

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

APPLICATION BY THE CITY OF
SOUTH LAKE TAHOE,
CALIFORNIA; EL DORADO
COUNTY, CALIFORNIA; PLACER
COUNTY, CALIFORNIA; DOUGLAS
COUNTY, NEVADA; WASHOE
COUNTY, NEVADA; AND CARSON
CITY, NEVADA, A CONSOLIDATED
MUNICIPALITY FOR LEAVE TO
FILE AN AMICUS BRIEF IN
SUPPORT OF DEFENDANT, TAHOE
REGIONAL PLANNING AGENCY;
PROPOSED AMICUS BRIEF

**I. APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF
DEFENDANT TAHOE REGIONAL PLANNING AGENCY**

The City of South Lake Tahoe, California; El Dorado County, California; Placer County, California; Douglas County, Nevada; Washoe County, Nevada; and Carson City and County, Nevada (hereinafter “the local jurisdictions”) respectfully request leave to file an amicus brief in support of Defendant Tahoe Regional Planning Agency (TRPA). As explained below, the entities requesting leave to file this brief are the six local jurisdictions subject to the Tahoe Regional Planning Compact (“Compact”). Each local jurisdiction or a portion of the local jurisdiction is located within the Lake Tahoe Basin and subject to the purview of TRPA’s Regional Plan Update (RPU) which was approved in December 2012. Each of the local jurisdictions is a participating member of the governing body of the TRPA¹.

The outcome of this litigation has direct ramifications on the local jurisdictions, as each is charged with representing the public interest, general welfare, health, and safety in the physical development of the respective jurisdiction for the benefit of its citizens, residents and visitors.² The local jurisdictions have a significant interest in this litigation because they risk losing an explicit power recognized by the Compact and incorporated into the RPU³ and implemented in the TRPA Code of Ordinances: “Whenever possible without diminishing the effectiveness of the regional plan, the ordinances, rules regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective States, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the regional plan.”⁴

¹ TRPA Compact Art. III(a)(1)-(2) [AR081289-90]

² TRPA Compact Art. I(a)(8) [AR081287]; Cal. Gov. Code § 65800; Nevada Revised Statutes 278.020

³ TRPA Compact Art. VI(a) [AR081296].

⁴ TRPA Compact Art. VI(a) [AR081296].

If Plaintiffs' claims are accepted, it will undermine the purpose of the TRPA Compact, impede the local jurisdictions' obligations to implement measures needed to improve Lake clarity, and disallow local government's responsiveness to the unique circumstances of each local jurisdiction. Citizens within the local jurisdictions will not reap the benefits of the RPU, including redevelopment of blight, streamlined local planning, creation of livable and thriving communities, restoration of environmentally sensitive lands to open space, and increased clarity of Lake Tahoe's pristine blue waters. Like the Defendant in this case, the local jurisdictions recognize the RPU is the culmination of nine years of collaborative planning in which all of the local jurisdictions participated. The RPU provides extraordinary environmental and socioeconomic public benefits to the communities within and beyond the Lake Tahoe Basin.

The local jurisdictions agree with the legal arguments advanced by Defendant in its Cross-Motion for Summary Judgment.

II. INTEREST OF AMICI CURIAE

The local jurisdictions are those governmental entities located within the "region"⁵ as defined by the Compact and subject to the purview of the RPU. The local jurisdictions represent nearly 55,000⁶ year-round residents who inhabit the approximately 202,000⁷ land acres of the region. The local jurisdictions have contributed to and commented on the RPU throughout the past nine years. The local jurisdictions have a significant interest in community planning, development and the unique environmental and ecological values of Lake Tahoe, which are irreplaceable.⁸ Each jurisdiction sees both direct and indirect benefits from increased clarity of Lake Tahoe, and share obligations with Defendant to achieve and maintain clarity goals. The local jurisdictions have a direct interest in the Area Plans that the plaintiffs seek to set aside along with the RPU. The Court's decision in this case

⁵ TRPA Compact Art. (II)(a) Definitions [AR081288].

⁶ 2011 TEVAL at pgs A-1 to 2 [AR008811-12]

⁷ RPU DEIS, Section 2.2 at pg 2-1 [AR011557]

⁸ TRPA Compact Art. I(a)(3) [AR081287]

1 will have a direct impact on the local jurisdictions and their citizens. For these reasons, the local
2 jurisdictions request leave to participate in these proceedings as amici parties.
3

4 Dated: November 26, 2013

Respectfully submitted,

6 THOMAS WATSON
7 City Attorney

8 /s/ Nira Feeley
9 NIRA FEELEY
10 Assistant City Attorney
11 *City of South Lake Tahoe*
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AMICUS BRIEF

I. INTRODUCTION

The local jurisdictions are those three California and three Nevada local governing entities located in the Lake Tahoe Basin and subject to the TRPA Compact, the Tahoe Regional Planning Agency (TRPA) Regional Plan, implementing ordinances, rules and regulations. The local jurisdictions include the City of South Lake Tahoe, California; El Dorado County, California; Placer County, California; Douglas County, Nevada; Washoe County, Nevada; and Carson City, Nevada, a Consolidated Municipality. As stated in the Motion for Leave to file this Amicus Brief, the local jurisdictions have a direct interest in the outcome of this litigation, and incorporate by reference said Motion, including the stated interests of the Amicus Curiae.

II. ARGUMENT

A review of the whole record indicates that adoption of the RPU was not arbitrary and capricious or lacking substantial evidentiary support. Rather, adoption of the RPU is supported by the law and the record. The RPU and implementing ordinances are supported by the Environmental Impact Study (EIS), Threshold findings, stakeholder statements and the TRPA Compact.

The local jurisdictions support TRPA's position and request that this Court uphold the adoption of the RPU and implementing ordinances, deny all relief requested by the Sierra Club (SC) and Friends of the West Shore (FOWS) (collectively Plaintiffs) and grant TRPA's Cross-Motion for Summary Judgment.

The Compact created a regional agency, TRPA, with plenary land use planning and regulatory authority but not without also providing that local governments be allowed to establish "specific and local ordinances, rules, regulations and policies which conform to the regional plan."⁹ The local

⁹ TRPA Compact Art. VI(a) [AR081296]

1 jurisdictions take seriously their responsibility to meet the standards of the Regional Plan, and for
2 decades local jurisdictions have served as a critical link in implementing the Regional Plan's
3 environmental, land use, and transportation strategies designed to meet threshold goals.

4 Even in 1980, Congress recognized the public interests and investments in the region are
5 substantial.¹⁰ These benefits to the public's interests and investments will primarily be realized by
6 allowing the local jurisdictions to develop and implement local Area Plans that can be tailored locally
7 for effective and efficient restoration of Lake Tahoe's water quality and clarity as required of them by
8 Lake Tahoe's Total Maximum Daily Load (TMDL). The RPU recognizes requirements of the U.S.
9 Environmental Protection Agency (USEPA) and the authorities of California and Nevada in
10 establishing the TMDL and regulating the local jurisdictions under delegated Clean Water Act
11 authority.¹¹ TRPA developed the Regional Plan Update (RPU) to work together with the TMDL
12 through the RPU's land use and transportation policies that make it more feasible for local jurisdictions
13 to comply with the TMDL requirements while also meeting other regional environmental threshold
14 standards.¹² The local jurisdictions collaborated with TRPA throughout the development of the 2012
15 RPU and as adopted will be able to tailor local plans and their implementation to the desired
16 community character of local residents as well as to the newly established regulatory requirements of
17 TMDL implementation. See *infra* II.A.

18 As this brief explains, the RPU provides land use and other measures essential to meet the local
19 jurisdictions' obligations to implement the TMDL and meet TMDL regulatory load reduction targets,
20 while concurrently allowing the local jurisdictions to transition to a planning and permitting system that
21 conforms TRPA, local, state, and federal requirements all aimed at restoring Lake Tahoe's
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28 ¹⁰ TRPA Compact Art. I(a)(2) [AR081287].

¹¹ TRPA RPU DEIS pgs 3.8-6 to 3.8-7 [AR011918-9]

¹² TPRA RPU FEIS pg 2-11 [AR005067]

environment, including air and water quality. The RPU facilitates the local jurisdictions' compliance with and attainment of required TMDL targets. In this respect, the RPU provides for a seamless and efficient implementation plan to achieve not only water quality but other environmental goals for the Tahoe Region as well.

A. LAKE TAHOE TMDL

Plaintiffs' brief inexplicably ignores the most recent requirements for water quality restoration of Lake Tahoe and the requirements for implementation by local governments. Under section 303(d) of the Clean Water Act, the USEPA requires states to identify impaired waters not meeting water quality standards and establish TMDL water quality restoration plans to address their impairments.¹³ Despite its ultraoligotrophic (very clean and very clear) status, Lake Tahoe is listed as a 303(d) impaired water body for certain pollutants.¹⁴ The amount of pollutant load the Lake can accept, while preserving its ultraoligotrophic status, is established by the regulatory standards recently adopted in the Lake Tahoe TMDL.

The Lake Tahoe TMDL was developed collaboratively by California and Nevada state agencies – the Lahontan Regional Water Quality Control Board (LRWQCB) and the Nevada Division of Environmental Protection (NDEP). The TMDL provides a framework for a comprehensive water quality restoration plan to reduce loads from pollutant sources of fine sediment particulates and to ultimately achieve Lake Tahoe transparency and clarity water quality objectives.¹⁵

Stormwater runoff from urbanized land uses is identified by the TMDL as the largest source of fine sediment parcels to Lake Tahoe.¹⁶ Stormwater runoff occurs when precipitation from rain and snowmelt flows over impervious surfaces collecting debris, chemicals, sediment, and other pollutants that impact water quality if left untreated.¹⁷

¹³ C.F.R. Tit. 40, § 22:130.6

¹⁴ U.S. EPA Impaired Waters and Total Maximum Daily Loads, 2012
<http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/index.cfm>

¹⁵ Lake Tahoe Total Maximum Daily Load (TMDL), Lahontan Regional Water Quality Control Board and Nevada Division of Environmental Protection, 2010: p. 1-1 [AR106440]

¹⁶ Lake Tahoe TMDL Report, Lahontan Regional Water Quality Control Board and Nevada Division of Environmental Protection (2010) Executive Summary, p. ES-1, (AR106437).

¹⁷ U.S. EPA Stormwater Program, 2012. http://cfpub.epa.gov/npdes/home.cfm?program_id=6.

1 The Lake Tahoe TMDL is identical for both California and Nevada with the exception of each
 2 state's implementation and enforcement mechanisms. LRWQCB implements and enforces the
 3 California Lake Tahoe TMDL through a National Pollutant Discharge Elimination System Municipal
 4 Storm Water discharge permit (NPDES Permit) issued to the California local jurisdictions, including
 5 the amici City of South Lake Tahoe, El Dorado County, and Placer County.¹⁸ NDEP implements the
 6 TMDL through Memoranda of Agreement (MOA) between NDEP and amici Washoe and Douglas
 7 counties.¹⁹ Both the NPDES Permit and MOA require local jurisdictions to achieve pollutant load
 8 reduction targets established by the Lake Tahoe TMDL.²⁰ The Permit and MOA provide detailed,
 9 quantitative tracking and assessment tools to hold local jurisdictions accountable for reducing specific
 10 pollutant loading targets to Lake Tahoe.²¹ These tracking and assessment tools allow for large-scale,
 11 area-wide water quality treatment mechanisms in lieu of parcel-level treatment through site-specific
 12 BMPs.²² That is, rather than requiring uniform water quality treatment on a parcel-by-parcel basis, the
 13 TMDL uses a larger geographic area, known as a "catchment" or sub-watershed unit, as the operative
 14 unit of compliance for pollutant load reduction from stormwater treatment.²³ Unlike the exclusively
 15 parcel-based compliance system of the 1990s, the newly adopted Lake Tahoe TMDL now allows local
 16 jurisdictions to implement large-scale storm water collection, conveyance, and treatment projects
 17 within Area Plans.²⁴ Area-wide stormwater plans must "be shown to achieve equal or greater
 18 effectiveness and efficiency at achieving water quality benefits than certain parcel-level BMPs."²⁵ The
 19 Lake Tahoe TMDL thus allows the local jurisdictions the flexibility to achieve required water quality
 20 by implementing more comprehensive, area-wide treatment efforts.

21 LRWQCB and NDEP require the local jurisdictions to prepare, submit, and implement pollutant

23 ¹⁸ Lake Tahoe TMDL Report, Lahontan Regional Water Quality Control Board and Nevada Division of Environmental
 24 Protection, (2010) §§ 16.4.3, p. 16-6 [AR106556], 16.5.2, p. 16-11 [AR106561].

24 ¹⁹ *Id.* at § 16.5.3, p. 16-12 [AR106562].

25 ²⁰ *Id.* at §§ 16.4.3, p. 16-6 [AR106556], 16.5.2, p. 16-11 [AR106562], 16.5.3, p. 16-12 [AR106562].

26 ²¹ *Id.*

27 ²² Code § 13.5.3.B.3 [AR000792]. TRPA's regulations adopted 20 years ago used tax assessors parcels as a proxy for a
 28 relevant stormwater treatment unit. Prior to adoption of the Lake Tahoe TMDL in 2010, stormwater treatment was
 measured on a parcel by parcel basis.

²³ Lake Tahoe Regional Plan Update Final EIS – Volume 1, Tahoe Regional Planning Agency, Master Response 4, (2012)
 p. 3-26 [AR005098].

²⁴ *Id.*

²⁵ Code § 13.5.3.B.3(a) [AR000792]

load reduction plans which describe how load reduction milestones will be met.²⁶ Load reduction plans provide LRWQCB and NDEP assurances that planned implementation actions and strategies will reduce fine sediment particle consistent with TMDL targets.²⁷ If local jurisdictions fail to meet required pollutant load reduction standards, they are subject to enforcement action by the LRWQCB and NDEP.

The Lake Tahoe TMDL also establishes a detailed water quality monitoring and adaptive management framework to assess TMDL implementation progress and respond to changing conditions.²⁸ The monitoring program includes a comprehensive urban storm water monitoring component to evaluate the effectiveness of storm water management practices and quantify progress at meeting required pollutant load reduction targets.²⁹ The program also includes tributary stream and in-lake monitoring to measure the cumulative effect of land-use and water quality management policies and practices.³⁰ LRWQC and NDEP have also committed to a formal adaptive management process known as the Lake Tahoe TMDL Management System.³¹ The Management System enables various stakeholders a clear process to interact with the LRWCB and NDEP to link available research and monitoring information with established RPU policy, determine if environmental improvement is occurring as expected, and make RPU policy adjustments if needed.

The local jurisdictions are invested in and committed to implementing the TMDL. They have recently submitted the Implementers Monitoring Plan (IMP) to the LRWQCB and NDEP.³² The local jurisdictions' IMP is the "first collaborative monitoring plan for implementation efforts related to the urban stormwater source category"³³ of the TMDL. The IMP will monitor TMDL implementation and

²⁶ Lake Tahoe TMDL Technical Report, Lahontan Regional Water Quality Control Board and Nevada Division of Environmental Protection (2010), § 11.3.1, (AR106505).

²⁷ *Id.*

²⁸ Lake Tahoe TMDL Report, Lahontan Regional Water Quality Control Board and Nevada Division of Environmental Protection (2010), § 13 [AR106527].

²⁹ *Id.*

³⁰ Lake Tahoe TMDL Report, Lahontan Regional Water Quality Control Board and Nevada Division of Environmental Protection (2010), § 13.4 [AR106534-7].

³¹ Lake Tahoe TMDL Report, Lahontan Regional Water Quality Control Board and Nevada Division of Environmental Protection (2010), § 12.1 [AR106514-9].

³² Implementers' Monitoring Program, Tahoe Resource Conservation District (2013) <http://tahoercd.org/wp-content/uploads/2013/08/Implementers-MP-130812.f>

³³ *Id.* at 1

1 supply data necessary for building a Regional Stormwater Monitoring Program. It identifies a total of
 2 nine monitoring sites—five catchment outfall sites and four BMP effectiveness projects—in five
 3 locations throughout the Tahoe Basin, each with distinctive characteristics.³⁴ The plan is partially
 4 funded with \$750,000 in Southern Nevada Public Lands Management Act funds issued by the U.S.
 5 Forest Service to the Tahoe Resource Conservation District.³⁵ This collaborative effort to implement a
 6 crucial requirement of the Lake Tahoe TMDL demonstrates the local jurisdictions' commitment to the
 7 TMDL and the overall water quality plan.

8 The Lake Tahoe TMDL and the associated NPDES Permit and MOA provide a robust,
 9 defensible, and enforceable program for achieving overall water quality improvement at Lake Tahoe.
 10 Local jurisdictions must meet required TMDL regulatory targets regardless of whether the RPU
 11 facilitates TMDL implementation or not.

12 **B. THE RPU FACILITATES LOCAL JURISDICTION IMPLEMENTATION** 13 **OF THE TMDL**

14 The RPU recognizes the authorities of California and Nevada in establishing and regulating
 15 under the TMDL and, where appropriate, incorporates the Lake Tahoe TMDL implementation plan as a
 16 means for achieving TRPA's water quality thresholds.³⁶ Plaintiffs misunderstood the role of BMPs in
 17 achieving water quality. BMPs are not the sole tool by which local jurisdictions, companies, and
 18 individuals are required to help attain lake clarity. Rather, the Lake Tahoe TMDL is the most recent
 19 scientific and regulatory advancement in the overall program for attainment of TRPA's water quality
 20 thresholds.³⁷ Consistent with the TMDL accounting and tracking program, the RPU enhances TRPA's
 21 original regulatory system and permits local jurisdictions to use area-wide water quality treatment
 22 mechanisms of more relevance in combination with certain site-specific BMPs.³⁸ That is, rather than
 23 requiring uniform application of site specific BMPs, the RPU and the TMDL both allow local
 24 jurisdictions to implement area-wide storm water collection, conveyance, and treatment projects within
 25 Area Plans thus facilitating a more streamlined and effective approach to water quality improvement

26 ³⁴ *Id.* at 7, 9

27 ³⁵ *Id.* at 5

28 ³⁶ TRPA RPU DEIS pgs 3.8-6 to 3.8-7 [AR011918-9], TPRA RPU FEIS pg 2-11 [AR005067]

³⁷ TRPA RPU Staff Summary (December 5, 2012) Exhibit E – Attachment E-2 pg 10 [AR026673]

³⁸ Code § 13.5.3.B.3 [AR000792].

1 within the Tahoe region.

2 Advances in water quality science for Lake Tahoe are the basis in the RPU to allow the local
3 jurisdictions, through their Area Plans, the flexibility to achieve required water quality improvements
4 either by relying on standards established by the RPU or by implementing more comprehensive, area-
5 wide treatment efforts.³⁹ Either way, the states of California and Nevada hold local jurisdictions
6 responsible and accountable for achieving TMDL pollutant load reduction targets. Furthermore,
7 because the RPU requires that Area Plans conform with the RPU before such plans can be approved
8 and implemented, TRPA ensures that all development within Area Plans either meets the TMDL or
9 meets the existing regulations and standards set forth by the original Regional Plan.⁴⁰

10 For many decades the Tahoe region and local jurisdictions were plagued with duplicative and
11 inconsistent regulatory standards from multiple regulators and overlapping jurisdictions. The local
12 jurisdictions support the RPU precisely because it eliminates duplicative compliance requirements and
13 facilitates a streamlined regulatory system. The RPU conforms the many differing requirements for
14 local jurisdictions thus allowing for more feasible and effective local compliance.⁴¹

15 The RPU in large part accomplishes this by creating consistency between the regional water
16 quality regulatory system and the regional land use planning system. To conform the land use planning
17 system to the water quality system--which shifted water quality treatment from a parcel based system to
18 an area-wide system--the RPU allows for and encourages an area-wide scale of land use planning over
19 the prior Regional Plan's focus on individual parcels and projects to achieve its objectives. Such area-
20 wide planning is implemented through Area Plans which are tailored plans for the relocation of
21 coverage to facilitate effective TMDL implementation.⁴² Area Plans promote environmentally
22 beneficial redevelopment, relocating coverage off sensitive land onto high capability land in already
23 developed centers, and create more walkable town centers, deterring dispersed development and
24 reducing reliance on vehicles that impact air and water quality.

27 ³⁹ TRPA Regional Plan, Chapter 2 (2012) pg 2-36 [AR000542]

28 ⁴⁰ TRPA RPU FEIS Volume 1 (2012) § 2.2.16, pg 2-11 [AR005067]

⁴¹ TRPA RPU FEIS Volume 1 (2012) Master Response 4, pg. 3-27 [AR005099]

⁴² TRRA RPU FEIS §2.2.1 (2012) pg. 2-2 [AR005058], TRPA RPU FEIS Volume 1 (2012) § 2.2.16, pg 2-11 [AR005067]

C. AREA PLANS

In order to better address issues of regional significance while allowing for planning and implementation tailored to local circumstances, the RPU borrows from other successful regional planning and regulatory models to create a new framework for local jurisdiction planning and implementation. It reinforces TRPA's general and regional responsibilities, while ensuring compliance with the Regional Plan, and its implementing Code of Ordinances, rules, regulations and policies as anticipated by the TRPA Compact over 30 years ago.⁴³

Area Plans, provided for in Chapter 13 of the TRPA Code of Ordinances, once reviewed and approved by the TRPA Governing Board for conformance with the Regional Plan, including all of the Compact's required findings that the Area Plan is consistent with and furthers the goals and policies of the Region Plan, are then incorporated into the Regional Plan for implementation by local governments.⁴⁴ If requested by local government, TRPA may then, via a Memorandum of Understanding (MOU), delegate to the local jurisdictions' review of development applications that TRPA may have historically reviewed, approved and/or denied.⁴⁵ Area Plans allow the local jurisdictions to implement RPU policies at a local geographic scale and at the same time effect water quality improvement on an area-wide or more regional scale.⁴⁶ TRPA approval of all Area Plans for conformance and the right of affected parties to appeal any TRPA approval are procedural safeguards assuring that the regional goals of the Compact will be satisfied.⁴⁷ TRPA approval will only be granted where the local jurisdiction demonstrates that an Area Plan will help attain and maintain regional environmental thresholds established by TRPA.⁴⁸

Area Plans allow local jurisdictions to specifically tailor the look and feel of local communities

⁴³ TRPA Compact Art. VI(a) [AR081296].

⁴⁴ Code §§ 13.1.3 [AR000788], 13.6 *et seq.* [AR000793]

⁴⁵ Code § 13.1.3 [AR000788]. Historically, TRPA has delegated substantial permitting authority for projects under the Compact to the local jurisdictions. Such delegation has included authority for residential development, public works project authority, and small commercial project reviews. The local jurisdictions' performance under delegated permit authority has always been checked through a system of periodic audits, demonstrating complete or substantial conformance to Regional Plan requirements (and at levels equal to TRPA's own self-audits). Code § 2.5. Any delegated project pursuant to an MOU may be appealed to the TRPA by an affected party. Code § 13.1.3 [AR000788].

⁴⁶ Large scale projects and permitting in sensitive areas such as Lake Tahoe's shorezone will remain subject to direct permitting by TRPA. Code § 13.7.3.A [AR000800].

⁴⁷ Code §§ 13.1.3 [AR000788], 13.6 *et seq.* [AR000793]

⁴⁸ *Id.*

1 within the more general regional development parameters set by the Regional Plan.⁴⁹ For Area Plans
 2 that govern designated town centers, the local jurisdictions can utilize a mix of incentives (e.g.,
 3 transfers of development rights and targeted development transfer ratios) and development allowances
 4 (e.g., additional height, density and coverage) to foster environmentally beneficial redevelopment of
 5 aging, deteriorating and polluting properties.⁵⁰ Area Plans also allow local jurisdictions the opportunity
 6 to consolidate and eliminate inconsistent regulations and remove duplicative permitting processes
 7 between the Regional Plan and local land use plans.⁵¹ Increasing environmental redevelopment and
 8 property investment incentives is a reasonable and feasible means to revitalize local jurisdictions' aging
 9 commercial centers and infrastructure that if unaddressed will continue to contribute pollutants to the
 10 Lake needing to be reduced or eliminated.⁵² Area Plans encourage and incentivize redevelopment of
 11 the built environment and enhancement of the transportation and circulation network, thus creating
 12 more walkable and bike-able communities.⁵³

13 Environmental benefits are realized by the local jurisdictions under Area Plan policy because
 14 the RPU supports the transfer and location of development within urban centers and the removal of
 15 development in environmentally sensitive areas.⁵⁴ Area Plan policies incentivize the removal of
 16 coverage from the most environmentally sensitive areas and encourage development of the highest
 17 capability, least environmentally sensitive and already developed areas.⁵⁵ These coverage policies help
 18 create more walkable town centers, deter dispersed development and reliance on vehicles, and
 19 redevelop blight within the local jurisdictions.

20 In sum, Area Plans together with delegation MOUs facilitate much needed redevelopment and
 21 re-investment in properties while simultaneously helping the Lake Tahoe Basin achieve environmental
 22

23 ⁴⁹ TRPA, Memorandum to TRPA/TMPO Governing Board & Advisory Planning Commission, October 24, 2012
 24 [AR026230]

25 ⁵⁰ TRPA, Memorandum to TRPA/TMPO Governing Board & Advisory Planning Commission, October 24, 2012
 26 [AR026238]

27 ⁵¹ TRPA, Memorandum to TRPA/TMPO Governing Board & Advisory Planning Commission, October 24, 2012
 28 [AR026230]

⁵² TRPA, Memorandum to TRPA/TMPO Governing Board & Advisory Planning Commission, October 24, 2012
 [AR026240]

⁵³ *Id.*

⁵⁴ Code § 30.4.3.A.2 [AR000880-1]

⁵⁵ *Id.* (explaining that when coverage is transferred from sensitive lands, coverage is retired from the sending parcel at a 1:1 ratio; and increasing ratios from non-sensitive lands. *See* Table, § 30.4.3.A.2.b [AR000881])

1 thresholds and standards. Area Plans and implementing MOUs are vital planning tools that allow for
2 much needed development and redevelopment within the local jurisdictions' communities.

3 III. CONCLUSION

4 The local jurisdictions have a significant interest in the outcome of this litigation. The RPU
5 provides each jurisdiction much needed tools in order to meet their TMDL obligations while
6 simultaneously revitalizing their communities.

7 The local jurisdictions have spent a great deal of time and resources contributing to, helping
8 draft, commenting upon and implementing the RPU. As this brief explains, the RPU's policies that
9 establish Area Plans encourage improved development of town centers while incentivizing removal of
10 development in environmentally sensitive areas. The RPU policies reinforce the Lake Tahoe TMDL
11 and therefore assist local jurisdictions in their obligation to meet water quality standards and thresholds.

12 The TMDL permits local jurisdictions to implement any variety of sediment reduction
13 techniques, including but not limited to parcel-level BMPs (which were required under the original
14 Regional Plan) and area-wide BMPs. The local jurisdictions are charged with the responsibility of
15 implementing the Lake Tahoe TMDL, and have already committed great resources in order to meet
16 state and TRPA water quality objectives and thresholds.

17 Plaintiffs have ignored the Lake Tahoe TMDL and have thus ignored the alignment of the RPU
18 regional systems for implementing both area-wide land use planning and area-wide stormwater
19 implementation. The local jurisdictions support the RPU because such alignment streamlines what was
20 once a cumbersome and duplicative regulatory framework.

21 For the reasons set forth herein, the local jurisdictions, as amici parties, respectfully request that
22 the Court uphold the Regional Plan and deny Plaintiffs' Motion for Summary Judgment.

23 Dated: November 26, 2013

Respectfully submitted,

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25 City Attorney

26
27 /s/ Nira Feeley
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