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Alan Miller
PO Box 7526
South Lake Tahoe CA 96158
(530) 542-0243
Plaintiff, in propria persona

**ORIGINAL
FILED**

JUL 24 2023

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALAN MILLER,

Plaintiff,

v.

TAHOE REGIONAL PLANNING
AGENCY,

Defendant.

No. 2:22-CV-02113-KJM-AC

MOTION FOR SUMMARY JUDGMENT

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Administrative and Executive Materials

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Documents:

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1 Secondary Materials

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3 Industry Model Codes:

4 California Building Code 2019 (Vol 1 & 2)

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I. SUMMARY OF THE CASE

Tahoe Regional Planning Agency (TRPA) approved a Permit for a *faux*-pine macrotower, 112 feet high, in the City of South Lake Tahoe, California, in March 23, 2022. On August 5, 2022, TRPA responded to an application to revise the Project plans for the macrotower by issuing an exception to a prohibition in the TRPA regulations against excavation exceeding five feet in depth, to prevent interference with a below-ground water table. The exception approval allowed deepening the excavation from 7.5 feet to 13.5 feet, and doubling the amount of material removed from 25 to 50 cubic yards to accommodate the Applicant's design. TRPA approved the revised plans shortly after issuing the exception. I and others appealed the approval of the exception and the revised plans, including a stay request (denied) for the deepened excavation. What unfolded thereafter in the lead-up to the Appeal hearing was all sorts of illegal actions and machinations by TRPA culminating in an arbitrary and capricious denial of the Appeal before the TRPA Governing Board. This litigation followed with twelve separate claims for relief from August 5, 2022 to September 28, 2022, and one ongoing violation from October 3, 2022, seeking relief to set aside the revised Permit and dismantle the tower, and to impose civil liability on the TRPA to fund a court-appointed "special master" to prevent further abuses of discretion in TRPA regulatory actions through court oversight. This case is ripe for summary judgment as sought from this court based on the evidence and argument that follows, including information to supplement the administrative record as allowed in the court's discretion.

II. STANDARDS FOR JUDICIAL REVIEW

The reviewing entity is generally charged to determine on the basis of the AR whether the action taken was supported by the whole record, or was arbitrary and capricious, or not in accordance with law. If there are claims in the Plaintiff's lawsuit—*e.g.*, the agency process was corrupt or fraudulent, then materials outside of the AR can be introduced, and there may be an entitlement to limited discovery at the court's discretion, even when the case involves only reviewing an administrative decision. The court determined bad faith actions by TRPA may constitute grounds for supplementing the AR, for consideration and debate in motions and cross-motions. I'm grateful for the court allowing me leave to file

1 a separate motion to supplement the record in this case concurrently with this motion for summary
2 judgment per Magistrate Judge Claire’ minute Order dated June 11, 2023.

3 This Motion for Summary Judgment (MSJ) realleges and incorporates by reference all paragraphs
4 in the Motion to Supplement the Administrative Record (MSAR) I filed concurrently with this motion.
5 The information therein is intended to further elucidate why TRPA deserves the maximum civil liability
6 and other relief the court may impose for the claims in this MSJ.

7 The Status Report filing followed shortly after I received the certified administrative record (AR),
8 with limited time for review of its 3,429 pages. Upon review of the AR, I am not contesting what is
9 presented within it, in the sense that it contains information that comprises the public record. However, that
10 information does not tell the complete story. The MSAR is intended to provide information missing from
11 or hidden in the record to give the court a more complete history on which to judge the merits of the case
12 and TRPA’s actions in bad faith.

13 With regard to the claims in my case, I am following a general rule of law concerning judicial
14 review with regard to the AR, which is that the agency must justify its actions based on the public records
15 existing at the time the decision was made, not on “extra-record” evidence and findings produced after the
16 fact and inserted into the AR, as TRPA did in the Appeal hearing. To draw from case law, an analogy can
17 be drawn here with the court’s findings in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44
18 (1985) discussing,

19
20 “[T]he focal point for judicial review should be the AR already in existence, not some new record
21 made initially in the reviewing court” (*Camp v. Pitts*, 411 U.S. 138, 142 (1973)). The task of the
22 reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency
23 decision based on the record the agency presents to the reviewing court (*Citizens to Preserve*
Overton Park v. Volpe, 401 U.S. 402 (1971)).

24 Judicial review standards for TRPA are only a little different than the APA,¹ and first review was
25 by the TRPA Governing Board on the Interim Executive Director’s (IED) action approving a prohibition

26 ¹ Compact Art. VI(5) (“In any legal action ...the scope of the judicial inquiry shall extend only to the questions of
27 whether the act or decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the
28 agency has failed to proceed in a manner required by law”). The Compact supersedes the default APA where the two
conflict (*see, Edmond v. United States*, 520 U.S. 651, 657 (1997) (where a specific provision conflicts with a general
one, the specific governs)).

1 exception on August 5, 2022 and subsequent approval of revised plans. The Governing Board’s legal
2 charge: determine if the IED acted arbitrarily and capriciously or not in accordance with law.² By analogy,
3 this court should first review whether the IED’s action was supported on the basis of the AR already in
4 existence at the time of the Director’s decision, not on some new record created by the reviewing body.
5 The AR prior to August 5, 2022 must be used to determine whether the IED’s exception decision was
6 supported by the AR. If not, that constitutes grounds to set aside the IED’s exception approval and for
7 relief.

8 The court would then further review whether the claims in this case are supported by the AR
9 through the conclusion. If the Governing Board’s decision on the IED’s decision was arbitrary and
10 capricious, or not in accordance with law, that also constitutes grounds to set aside the approval and for
11 relief. (With respect, I am not instructing the court, but rather putting forward the information I am
12 proceeding under as a *pro se* litigant, and aiming to dispel potential confusion from processes TRPA
13 employed through conclusion.) Reference also my comments to TRPA on judicial review starting at the
14 bottom of AR1289-AR1290 and AR1293.

15 16 **III. GENERAL COMMENTS ON THE ADMINISTRATIVE RECORD**

17 With an overview to the AR in this case, my pre-Appeal writings are lengthy and substantial, on a
18 variety of telecom-related subjects (as in my hearing testimony). In my view, the Defendant’s public
19 record of primary, material interest for the prohibition exception granted consists of three sentences in the
20 August 5, 2022 exception letter (AR0269),

21 The Tahoe Regional Planning Agency (TRPA) staff has reviewed the Soils/Hydrologic Scoping
22 Report Application submitted in association with a monopine cell tower and equipment shelter.
23 The proposed excavation is **13.5 feet below ground surface**. It is not expected that groundwater
24 will be encountered in this location and the excavation is allowed pursuant to TRPA Code of
Ordinances §§ 33.3.6.A.2.a (accommodation of engineering requirements for above-ground
structures) and 33.3.6.A.2.d (public health and safety). (**emphasis** in original)

25
26 The record I made is replete with information on the failings of the “Soils/Hydrologic Scoping
27 Report Application.” The parenthetical shorthand references quoted above reflect the broad thinking of the

28 ² These concepts must underlie the Governing Board’s quasi-adjudicative function in appeals.

1 staff unrelated to the actual language in the Code. For subsection a., excavation per the Code is allowed
2 when “required” by law, not as a staff “accommodation” to the Applicant’s desires. For subsection d., the
3 letter states the excavation is “allowed” for public health and safety, when the Code requires that it must be
4 “necessary.” This approval letter was TRPA’s opportunity to discuss and explain their findings in light of
5 the whole record and there is nothing of substance. One of the sections is sufficient for an exception but
6 neither withstands legal scrutiny, as I’ll discuss under Claims 7 and 8.

7 The Notice of Appeal (NOA) was filed with the Affidavit for stay (AR0731-AR0755), followed
8 by lengthy emails concerning the illegal Appeal hearing schedule imposed and a letter of support on my
9 behalf concerning the applicable professional standards for soils/hydrologic investigations. This letter was
10 from an extraordinary professional associate, Lori Carpenter (AR1188-AR1205), who was directly and
11 significantly involved under contract in developing the methods TRPA is to follow concerning excavation
12 that may interfere with ground water. These important methods are now forgotten with staff turnovers and
13 a TRPA managerial change from engineers to lawyers in recent decades and now a public-relations
14 manager. The Statement of Appeal (SOA)(AR1287-AR1309) was filed early under duress and objection
15 on September 13, 2022, with its seven Exhibits, including my engineering analysis of impervious land
16 “coverage,” and I provided a comment letter (AR2863-AR2873) after the Staff Report for the Appeal was
17 published, before the hearing. In response, the five-page TRPA Staff Report and multiple Exhibits therein
18 (AR1584-AR1987) provided no record support for the staff approval.

19 The Staff Report for the Appeal in the AR is primarily a post-approval effort to insert new
20 information into the record while also attempting to limit the focus of the hearing and Board consideration
21 to the excavation exception alone (AR1586); the latter was improper with regard to issues raised in my
22 Affidavit about the scope of the incomplete application provided. Most arguments in my pre-Appeal
23 record are presented several times in the AR, so references herein serve to support the entire record I
24 provided.ⁱ

25 26 **IV. PROOF OF CLAIMS FOR RELIEF**

27 Claims herein are referenced to my First Amended Complaint (FAC), with all paragraphs in the
28 FAC hereby incorporated by reference. I hold with a strict interpretation of the statutes and regulations. In

1 general, an agency decision is arbitrary and capricious³: if the agency has relied on factors which Congress
2 has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an
3 explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it
4 could not be ascribed to a difference in view or the product of agency expertise.⁴ A court should invalidate
5 agency determinations that fail to “examine the relevant data and articulate a satisfactory explanation for
6 [the] action including a ‘rational connection between the facts found and the choice made.’”⁵ Courts must
7 “consider whether the decision was based on a consideration of the relevant factors and whether there has
8 been a clear error of judgment.”⁶ An agency decision that is the product of “illogical” or inconsistent
9 reasoning,⁷ that fails to consider an important factor relevant to its action, such as the policy effects of its
10 decision or vital aspects of the problem in the issue before it;⁸ or that fails to consider “less restrictive, yet
11 easily administered” regulatory alternatives,⁹ will similarly fail the arbitrary and capricious test. An agency
12 action that departs from a prior policy without acknowledging the change, or that creates an “unexplained
13 inconsistency” with prior policy is generally viewed as arbitrary and capricious.¹⁰ Pretextual
14 rationalizations for decisions are also arbitrary and capricious.¹¹ “The reasoned explanation requirement of
15 administrative law...is meant to ensure that agencies offer genuine justifications for important
16 decisions,”¹² therefore, pretexts are an example of bad faith or improper behavior which illegally subvert
17 due process. I move to have the court find the TRPA acted in an arbitrary and capricious manner for the
18 under-mentioned claims.

21 ³ *Id.* (The Compact adopts the APA’s arbitrary and capricious review).

22 ⁴ *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 42-44 (1983).

23 ⁵ *Id.*

24 ⁶ *Id.*

25 ⁷ *Am. Fed’n of Gov’t Emps., Local 2924 v. Fed. Labor Relations Auth.*, 470 F.3d 375, 380 (D.C. Cir. 2006).

26 ⁸ *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012).

27 ⁹ *Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995).

28 ¹⁰ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

¹¹ *Department of Commerce v. New York*, 139 S. Ct. 2551, 28-34, 47, 71 (2019) (holding action as arbitrary and capricious, based on a pretextual rationale; under a narrow exception to the general rule against judicial inquiry into the mental processes of administrative decisionmakers, such an inquiry may be warranted and may justify extra-record discovery, on a strong showing of bad faith or improper behavior; in order to permit meaningful judicial review, an agency must “disclose the basis” of its action; [t]he reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public).

¹² *Id.*

1 A. Claim 1—August 5, 2022 Exception Letter. Plaintiff realleges and incorporates by
2 reference all preceding paragraphs herein. The August 5, 2022 exception letter was issued, asserting
3 compliance with requirements in Code § 33.3.6.A.2, letters a. & d. That the letter was issued is
4 uncontested fact.

5 WHAT THE LAW REQUIRES: Code § 33.3.6.A.2. states:

- 6
7 2. TRPA may approve exceptions to the prohibition of groundwater interception or
interference if TRPA finds that:
8 a. Excavation is required by the International Building Code (IBC) or local
building code for minimum depth below natural ground for above ground structures;
9 ...
d. It is necessary for the public safety and health....

10 WHAT TRPA DID: The August 5, 2022 letter approved an exception to the above-cited
11 prohibition without substantial fact-finding therein that the deepened excavation would not interfere with
12 ground water. With regard to subsection a., there is no public record from TRPA that cites a requirement
13 of the IBC or local building code. In my Affidavit for the stay, I cited relevant provisions of the “IBC” (as
14 currently codified) that preclude prescriptions with regard to designs by competent designers, stating that
15 the chosen design was due to Verizon alone, not any code prescription, and that there was nothing in any
16 code to preclude another design that would eliminate potential interference with ground water (AR0738-
17 AR0740). I challenged TRPA to refute that part of the Affidavit for the record, and produce the operative
18 code they applied on August 5, 2022.

19 Verizon wrote a letter dated August 24, 2022, full of specious claims—but no IBC code citation
20 (AR0887-AR8892). With nothing to refute my assertions, the Staff Report notes (AR1589), “Staff does
21 not apply this provision as strictly as desired by Miller.” This is a clear admission that the Codes reference
22 to IBC requirements or local code requirements is and was illegally ignored by TRPA,¹³ leaving the
23 matter of lifting prohibitions to prevent ground water interference to the arbitrary and capricious¹⁴ whim of
24 the staff and Board, as here, with absolutely nothing in the AR to support the illegal decision.

25 TRPA also cited “d. It is necessary for the public safety and health” to lift the prohibition and
26 allow interference with ground water table. Again, there is nothing provided in the AR prior to August 5,
27

28 ¹³ *Infra* note 25.

¹⁴ *Supra* note 4.

2022 that documents how TRPA determined the deepened excavation is “necessary for public safety and health.” I refuted such necessity findings at length in my Affidavit, showing the tower design standard applied doesn’t support public safety in an emergency (AR0738-AR0743) and Exhibit “B” (AR0753-AR0755). My civil engineering assessment is that the tower was designed without consideration of snow and ice loads and therefore a potential danger to life and property from collapse due to its tremendous height (112 feet) and weight (in excess of 15,000 pounds) (AR0168), among other reasons. These potential dangers are NOT refuted in the AR. The 10,000 pounds of tower plastics were not installed prior to the epic winter of 2022-2023, with severe snow and ice loads that collapsed many long-standing structures at Lake Tahoe. Plastics began to be installed the week of July 16, 2023.

The exception letter is arbitrary and capricious as it merely cites applicable code sections, states the project meets the applicable code requirements, and grants the exception. The only finding made in the letter is that ground water was not expected be encountered based on a cursory investigation report by the Permittee’s contractor, the Geotechnical Report (AR00046) from 2019. That report was re-filed on August 2, 2022, as the Revised Geotechnical Report (RGR) with the first detailed engineering information on the specific tower design (structural calculations), and no changes to the soils/hydrology assessments and findings (AR0154-AR0227). The exception letter was issued August 5, 2022, and the plan revisions were approved and stamped on August 17, 2022 (AR0665-AR0678), with construction on the foundation well underway under the March 2022 Permit. I filed the NOA and stay request on August 22, 2022, refuting that the RGR was professionally appropriate, correct or adequate to determine that interference to a ground water table would not occur, as required, at length in the record (*e.g.*, AR0743-AR0747, and later at AR1295-AR1296, AR2865-AR2866, Ms. Carpenter’s letter (AR1188-AR1205) and Claim 8, below).

B. Claim 2—Late Response for Stay Request. Plaintiff realleges and incorporates by reference all preceding paragraphs herein. Claim 2 pertains to a late response to the stay request.

WHAT THE LAW REQUIRES:

The Chairman of the Board shall review any request for a stay of a project or matter and the evidence submitted therewith, and any evidence of the hardship on the appellee, shall balance the equities and shall determine, within two working days of the request, whether or not a stay shall be issued. (ROP § 11.3)

1 WHAT TRPA DID: TRPA responded to the stay request three days after it was filed. The Appeal
2 and stay request was filed on August 22, 2022. On the third day TRPA responded, the first show of bad
3 faith by TRPA in this matter (see AR1182 email from General Counsel Marshall providing the Board
4 Chair’s decision). In “balancing the equities” the Board Chair responded illegally, in bad faith depriving
5 Appellants of our due process rights under the ROP, and putting us in extreme and unanticipated
6 hardship¹⁵ to prepare our Statement of Appeal (SOA) and our case for both the Legal Review Committee
7 hearing, and the Appeal hearing by September 28, 2022, as illegally scheduled by the Chair. The equities
8 were unbalanced to prejudicially favor Verizon and suit TRPA.¹⁶ The Board Chair’s stay response (AR
9 1186) included a prejudging of the outcome of the appeal, before the SOA was even filed, stating the
10 Appeal “has not demonstrated a substantial likelihood of success on the merits of his arguments that
11 TRPA staff erred in its approval of up to 6 additional feet of excavation.” See, my replies objecting at
12 AR1184-AR1186, with some confusion under the surprise circumstances.

13 C. Claim 3—Advancement of Appeal Hearing Date. Plaintiff realleges and incorporates by
14 reference all preceding paragraphs herein. Claim 3 involves TRPA’s illegal advancement of the Appeal
15 hearing date.

16 WHAT THE LAW REQUIRES: The Appeal hearing date must be scheduled in accordance with
17 the SOA filing, to the next regular Board meeting date the following month if filed on or before the 15th of
18 the month, or the next regular Board meeting date two months following if filed after the 15th of the
19 month (ROP §§ 11.2 & 11.4).¹⁷ Due process also prohibits *ad hoc* changing of rules in the middle of the
20 game—especially any tilting that’s offensive to the ordinary notions good faith and fair dealing.¹⁸

21 ¹⁵ “The core of due process is the right to notice and a meaningful opportunity to be heard.” *Lachance v. Erickson*,
22 522 U.S. 262, 266 (1998).

23 ¹⁶ *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972) (litigant “is entitled to a neutral and detached judge in the
24 first instance”); *Goldberg v. Kelly*, 397 U.S. 254, 241 (1970) (“impartial decision maker is essential” to due process);
25 *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4, 335, 344 (1976) (Due process right includes: an “impartial”
26 decisionmaker; a decision resting “solely on the legal rules and evidence adduced at the hearing”; a statement of
27 reasons for the decision and the evidence relied on. “[P]rocedural due process rules are shaped by the risk of error
28 inherent in the truthfinding process”).

29 ¹⁷ Agencies must abide by their own rules and regulations (*Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)). “It is
30 rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion
31 to ignore the required procedures of decisionmaking” (*Bennett v. Spear*, 520 U.S. 154, 172 (1997)). See also, *supra*
32 note 10 (an agency action that departs from a prior policy without acknowledging the change, or that creates an
33 “unexplained inconsistency” with prior policy is generally viewed as arbitrary and capricious).

34 ¹⁸ “[T]he substantive component of the Due Process Clause is violated” when action “can properly be characterized
35 as arbitrary, or conscience shocking, in a constitutional sense” (*County of Sacramento v. Lewis*, 523 U.S. 833, 846

1 WHAT TRPA DID: Advanced the Appeal hearing date based only on the August 22, 2022
2 Notice of Appeal (NOA) and stay request (to the scheduled regular Board meeting on September 22,
3 2022), and requested the SOA in seven days (rather than the 30) for Board consideration.

4 The Chair’s response cited ROP § 11.3, but this scheduling violated § 11.3, which states in
5 relevant part, “... pending a hearing on the appeal before the Board at its next regular meeting.” The
6 “next” regular Board meeting after the filing was on August 25, 2022. The earliest hearing date under
7 ROP §§ 11.2 & 11.4 was October 26 or November 16, depending on the SOA filing date. The scheduling
8 was not in accordance with law and pushed the hearing forward to assist Verizon to complete the
9 foundation construction before TRPA’s annual Oct 15 – May 1 requirements to cease usual construction
10 (before onset of winter conditions). At AR3405-AR3406, Mr. Marshall purportedly explains the rules to
11 accelerate the hearing to September 28, 2022, vaguely.

12 D. Claim 4—Requirements for a Complete Project Application. Plaintiff realleges and
13 incorporates by reference all preceding paragraphs herein. Claim 4 is concerned with requirements for a
14 complete application, as specified in ROP § 5.2.

15 WHAT THE LAW REQUIRES: A complete application in accordance ROP § 5.2 is required to
16 inform regulatory action to approve a Project or Project plan revision.

17 WHAT TRPA DID: TRPA approved the plan revision on August 5, 2022, though all specified
18 requirements for a “Complete Application” were not met (AR0237-AR0241). The Plan Revision was
19 approved despite many missing application elements. TRPA asserts these missing elements are covered
20 by general Permit conditions imposed on the Project (Defendant’s Answer to FAC March 28, 2023), *i.e.*,
21 for vegetation protection, site access, soil stockpiling, *etc.*, despite the absence of specific information and
22 provisions by the applicant to address potentially significant impacts, as required. Whether there is a
23 general Permit condition or not in the Permit is irrelevant to the application requirements. What is highly
24 relevant is that the application was incomplete.

25 E. Claim 5—Application Signer in Perjury. Plaintiff realleges and incorporates by reference
26 all preceding paragraphs herein. Claim 5 is that there is no application signature by the applicant in
27 accordance with ROP § 5.2.4. and that any such signature, if it exists, puts the signer in perjury.

28 (1998)).

1 WHAT THE LAW REQUIRES: ROP § 5.2 states:

2
3 An application shall be on a TRPA form prescribed by the Executive Director and shall be
4 executed by a person having sufficient legal interest to make application. . . A complete
5 application consists of the following:” [with eight listed requirements. § 5.2.4 requires the
6 applicant or agent shall provide:] “A dated signature, by or on behalf of the applicant,
7 attesting under penalty of perjury to the truth, completeness, and accuracy of the contents
8 of the application. . . .

9
10 WHAT TRPA DID: TRPA accepted and processed the application as if it was complete, without
11 notice that the application was incomplete and the Agent-signer committed perjury (AR0237-AR0241).
12 Allowing that e-signatures are routinely accepted in practice, if the e-signature in the AR is deemed valid,
13 the Agent’s application declaration must therefore be in perjury. The application form indicates no
14 application will be deemed complete without an IEC and other missing elements (per Claim 4). The
15 applicant can’t declare truthfully the application is “complete to the best of my knowledge” with the
16 missing elements, and TRPA shouldn’t have approved an incomplete application submitted with
17 statements in perjury.

18 F. Claim 6—Incomplete Application: Missing Initial Environmental Checklist. Plaintiff
19 realleges and incorporates by reference all preceding paragraphs herein. Claim 6 focuses on the
20 application’s missing Initial Environmental Checklist (IEC).

21 WHAT THE LAW REQUIRES: “Appropriate environmental documentation, in accordance with
22 Art. 6 of these Rules;” and, because the project is not exempt from appropriate environmental
23 documentation, the requirements of ROP § 6.4 apply:

24
25 The Executive Director shall devise and maintain an initial environmental checklist (IEC)
26 that shall be used, in conjunction with other available information, to determine whether
27 an environmental impact statement (EIS) shall be prepared for a project or other matter.
28 Based on the IEC, and other information known to TRPA, TRPA shall make one of the
findings, as appropriate, set forth in subsection 3.3.2 of the Code.

29
30 WHAT TRPA DID: There is nothing in the AR to indicate that any environmental review for the
31 plan revision application was accomplished by TRPA with regard to the IEC requirement is at the heart of
32 the permitting action, among the most critical elements, and thus my focus on it among the various
33 missing application elements. The Checkbox for the IEC was left blank on the application, indicating no

1 IEC was filed (AR0240). The IEC form supplied by the applicant is to be reviewed and verified by staff in
2 order to make a determination about potential adverse environmental effects. Nonetheless, staff
3 overlooked the IEC omission, and issued the exception letter and Permit revision with no environmental
4 review. The Staff Report totally misinformed the Board, first saying I claimed TRPA should prepare an
5 IEC, and then stating: “TRPA rules, however, only require supplemental environmental review for a
6 project revision if that revision involves new significant environmental effects not otherwise considered”
7 (AR1587). I pointed out in my Affidavit numerous potential adverse effects of the Project plan revisions
8 TRPA staff missed due to a failure to require and evaluate the IEC, besides ground water interference,
9 including for access routes to the dig site and from excess soil to manage on a tiny staging area (AR0735-
10 0736). These resulted in Permit violations, as discussed in my MSAR. The Staff Report misstated the
11 Code and rules, citing, “*See e.g.*, Rules of Procedure 6.15.1 (Grounds for Supplemental EISs).” This rule
12 doesn’t apply because no EIS or even an Environmental Assessment (EA) had been prepared by TRPA
13 for the Project approved in March 2022.

14 G. Claim 7—No Environmental Review Determination. Plaintiff realleges and incorporates
15 by reference all preceding paragraphs herein. Claim 7 concerns violation of ROP § 6.6 requirements for
16 staff to document the environmental review determination.

17 WHAT THE LAW REQUIRES:

18
19 If, based on the IEC or EA, and other available information, TRPA finds that a project or
20 matter will not have a significant effect on the environment, a statement of such finding
21 shall be placed in the project file maintained by TRPA and no further environmental
22 documentation shall be required.

23 WHAT TRPA DID: TRPA did no environmental review for the exception granted and the plan
24 revision. There is no valid IEC (including from 2019) or EA and no statement of finding in the file for the
25 exception based on the AR (There was no environmental review determination filed).

26 H. Claim 8—Incomplete Application: Missing Necessary Reports. Plaintiff realleges and
27 incorporates by reference all preceding paragraphs herein. Claim 8 concerns receipt of all necessary
28 reports to complete the application.

1 WHAT THE LAW REQUIRES: All reports required in ROP and checklist items in the online
2 application for a major plan revision must be provided.

3 WHAT TRPA DID: TRPA treated the plan revision application as a minor, insignificant plan
4 change, for which prior project reports would suffice, except for a required soils/ hydrological report. For
5 that, TRPA accepted a revised geotechnical report (RGR), unaltered from 2019 with respect to soils and
6 hydrology, as a valid basis for asserting the project would not interfere with or affect a ground water table.
7 The RGR was prepared by an unqualified professional without the field methods approved by TRPA in
8 advance, as required (ROP § 33.3.6.B.1).

9 The TRPA abused their discretion¹⁹ in justifying agency action from the RGR because this
10 evidence is inadmissible under the *Daubert* standard as applied to soils and hydrology associated with
11 wetland deliniation science. The factors that may be considered in determining whether the methodology
12 is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has
13 been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and
14 maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance
15 within a relevant scientific community (*Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579
16 (1993)).

17 The RGR fails the *Daubert* standard because: (1) they used a technique which through testing has
18 been shown to be inadequate to determine the ground water boundary; (2) peer-reviewed literature does
19 not validate their method in establishing a groundwater boundary; (3) the RGR, being riddled with errors,
20 has a high known error rate; (4) there are no standards for using the RGR's drilled soil-profile analysis
21 technique for determining seasonal ground water presence; and (5) the wetland science has been practiced
22 for decades by professional wetland scientists in the regulatory arena.

23 The court should review the agency's decision to admit "expert" testimony or reports under the
24 *Daubert* standard. The standard of review for this inquiry is consistent with the level of scrutiny against all
25 other agency actions—namely, the abuse of discretion standard.²⁰ Furthermore, it would be appropriate to
26 apply this standard even if the RGR were to somehow fall short of the definition of scientific testimony

27 ¹⁹ Reliance on inadmissible evidence is "a clear error of judgment" and results in a decision that is the product of
28 "illogical" or inconsistent reasoning, and fails to consider an important factor relevant to its action.

²⁰ See, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

1 because these factors may apply to non-scientific testimony, meaning “the testimony of engineers and
2 other experts who are not scientists.”²¹

3 To further illustrate egregiousness abuse of discretion, there are various valid scientific ways to
4 determine water tables occurring underground—*e.g.*, the U.S. Army Corps of Engineers’ (USACE)
5 published methodology and regulatory standards for wetland identification.²² The TRPA even deviated
6 from their own established internal procedures,²³ developed to be more protective of wetlands in the
7 Tahoe Basin—*i.e.*, “stream environment zones.” Their method only requires two criteria of the three-part
8 test (hydrology, vegetation and soils) for wetlands established in the USACE regulations for applying
9 protective standards and limitations—and may have passed muster with regard to the *Daubert* standard
10 when developed by Ms. Carpenter and others for TRPA regulatory purposes.

11 The staff reviewer—Julie Roll—lacks the qualifications to assess wetland science delineation
12 reports, and approved and forwarded an unqualified recommendation to the TRPA Governing Board.²⁴
13 The TRPA’s violation of procedural due process carried the substantive effect of depriving me of time to
14 develop and present this evidence and argument into the record of the Appeal. My Affidavit goes into
15 extensive detail concerning the deficiencies of the RGR to serve as a soils/hydrological report (AR0743-
16 AR0746), as does the Statement of Appeal at AR1245-AR1296, and my testimonies before the Legal
17 Committee (AR3399-AR3400) and the Governing Board (AR3414-AR3415) .

18 I. Claim 9—Prohibition of Excavation Interference with Ground Water Table. Plaintiff
19 realleges and incorporates by reference all preceding paragraphs herein. Claim 9 concerns prohibition of
20 excavation that may interfere with ground water. Code § 33.3.6.2. includes letters A & B as independent
21 requirements. Claim 9 concerns unmet requirements and criteria for an exception to prohibitions against
22 ground water interference associated with excavation greater than five feet, and approval on the basis of
23 Code § 33.3.6.A.2., letters a. & d.

24
25 ²¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

26 ²² Environmental Laboratory. (1987). “*Corps of Engineers Wetlands Delineation Manual*,” Technical Report Y-87-1,
U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

27 ²³ *Supra* note 10 (an agency action that departs from a prior policy without acknowledging the change, or that creates
an “unexplained inconsistency” with prior policy is generally viewed as arbitrary and capricious).

28 ²⁴ More generally, the TRPA often does not have the scientific subject matter expertise to mitigate and filter defective
or inchoate development applications from reaching the Governing Board for approval.

1 WHAT THE LAW REQUIRES: If excavation will interfere with or intercept a seasonal high
2 water table, the excavation is prohibited unless TRPA finds a proposed action meets at least one criterion
3 (of ten) listed for an exception to the prohibition(Code § 33.3.6.A.2).

4 WHAT TRPA DID: Issued the August 5, 2022 exception approval letter citing two subsections of
5 Code § 33.3.6.A.2, parts a. & d., as the bases for approval.

6 A Code citation does not constitute a “finding,” because it sheds no light on the considerations,
7 analyses and decisional processes that support an administrative action. What I didn’t find in the
8 documents available online prior to August 5, 2022 is the TRPA’s findings to support the exception for
9 deepened excavation. I challenged the lack of actual “findings” in the Affidavit filed (AR0734-AR0741),
10 in the SOA, and in testimony. I asked them to prove “Excavation is required by the International Building
11 Code (IBC) or local building code for minimum depth below natural ground. . . .” based on IBC
12 limitations I discussed at length in my Affidavit prohibiting such design constraints (AR0738-AR0734).
13 The SR states TRPA doesn’t “strictly” apply that part of the Code, instead granting deference to designers
14 and local building officials at its discretion (AR1589). This is a frank admission of illegality because
15 TRPA has no discretion to ignore the Code.²⁵ There were no “findings” with facts and analyses supporting
16 that the prohibited ground water interference was “necessary for public safety and health” prior to August
17 5, 2022 based on the AR.²⁶

18 J. Claim 10—Conflict of Interest Violations. Plaintiff realleges and incorporates by
19 reference all preceding paragraphs herein. Claim 10 concerns conflict of interest violations by TRPA in
20 employing staff or contract workers to bolster the deficient application by Verizon.

21 WHAT THE LAW REQUIRES: In ROP § 8.4: “Employees shall not accept . . . present
22 compensation or arrange for future compensation for services already performed or to be performed, that
23 give rise to an actual conflict of interest or that create an appearance of a conflict of interest.”
24

25 ²⁵ “If the regulation’s text is unambiguous, [the court] give[s] no deference to the agency’s interpretation: ‘[t]he
26 regulation then just means what it means’” (*Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)). *See also*, *Attias v.*
Crandall, 968 F.3d 931, 937 (9th Cir. 2020); *Larson v. Saul*, 967 F.3d 914, 922 (9th Cir. 2020), cert. denied sub
27 nom. *Larson v. Kijakazi*, No. 20-854, 2022 WL 199379 (U.S. Jan. 24, 2022)).

28 ²⁶ That’s the end of the story in my view. For TRPA it was the lead-in to... turning the Appeal hearing basis on its
head, illegally, to produce and insert the needed and missing findings of fact into the AR long after the defective staff
approval.

1 WHAT TRPA DID: In the absence of a soils/hydrological report by a qualified professional for
2 the exception, subordinate employees paid by TRPA investigated the site of the excavation as I described
3 long after the August 5, 2022 approval, prepared reports supporting the employer's prior determination,
4 and used these inadmissible reports in the Appeal hearings. See additional extra-record information in the
5 MSAR supporting this violation at pp. 13-14. No subordinate employee should ever be placed in such a
6 position by the employer as a matter of law and ethics.

7 K. Claim 11—Impervious Land Coverage in Excess of Limitations. Plaintiff realleges and
8 incorporates by reference all preceding paragraphs herein. Claim 11 alleges the final plan revisions
9 stamped by TRPA allowed impervious land coverage in excess of what the Board granted prior approval
10 for due to plan-checking errors.

11 WHAT THE LAW REQUIRES: Land coverage planned, approved or built shall not be in excess
12 of allowable land coverage based on a verified coverage analysis by TRPA.

13 WHAT TRPA DID: Staff, approved revised construction plans that allowed building impervious
14 surfaces in excess of coverage limitations approved by the Governing Board. The revised plans with the
15 excess coverage were subsequently approved by the Governing Board in denying the Appeal.

16 Meeting coverage requirements for any TRPA project is of critical importance to the public, as I
17 briefed in my SOA (AR1305-AR1306) and FAC at pp. 21-22. In my SOA I developed coverage
18 computations for the revised plans, showing the work for others to follow.²⁷ I measured lengths with a
19 ruled tape of printed "screenshots" taken from scaled plans online, as the revised plans (public documents)
20 provided to me electronically could not be printed! I had to convert scales and compute the true coverage
21 values. (TRPA employs non-engineers to check and approve engineering plans, reports and computations,
22 improper under the rules of the California Board for Professional Engineers and Geologists).

23 The AR shows that the plans were approved in haste to get the revised Permit out on the Verizon
24 Project by staff engaged on another pressing assignment (AR0330 & AR0329). TRPA staff was unable to
25 understand the engineering analysis I presented for the record and make a reasoned determination, and
26 wrote falsely to the Board that the underground concrete foundation was not considered coverage

27 ²⁷ Exhibit 6 to my SOA is found in the AR at AR1356-AR1360 and marked-up as Attachment I to the SR (AR1975-
28 AR1979).

1 (AR1977). I pointed out TRPA’s own verification of allowed coverage indicating the foundation is
2 coverage (AR0649 & AR1975—see, “CELL TOWER FOOTING in coverage data table”). The Board
3 overlooked all this and denied the Appeal.

4 TRPA couldn’t have computed the coverage correctly because its own coverage allocation for the
5 foundation was misunderstood by staff. In the table of verified approved coverage for the Project no
6 coverage remained unused on the site, thus no room for error. That’s okay until the errors were exposed,
7 and the coverage exceeded strict limitations. Based on the AR, TRPA provided no valid refutation of my
8 coverage analysis showing coverage in excess of allowable amounts, which is illegal to approve.

9 L. Claim 12—Illegal Appeal Hearing Voting Procedure. Plaintiff realleges and incorporates
10 by reference all preceding paragraphs herein. Claim 12 alleges the voting procedure employed by the
11 Governing Board for the Appeal hearing was incorrect and not in accordance with Compact law.

12 WHAT THE LAW REQUIRES: The Appeal hearing to grant a variance, an exception, to the
13 Code of Ordinances (Code) must be conducted under Compact Art. III(g)(1) which states, in relevant part:
14 “. . . for granting variances from the ordinances, rules and regulations, the vote of at least four of the
15 members of each State agreeing with the vote of at least four members of the other State shall be required
16 to take action. . .”

17 WHAT TRPA DID: Over Appellant objections, TRPA applied Compact Art. III(g)(2) for the
18 vote. The voting procedure used is beyond dispute; see the Staff Report for the Appeal hearing (AR1584)
19 which clearly specifies the second voting procedure, five of nine. This procedure was reasserted as correct
20 by Mr. Marshall in testimony over my objections without reference to the Compact Articles, again
21 misinforming the Board and shedding no true light on the point of order I raised in testimony. The simple
22 reason the voting procedure used is incorrect is because the Appeal was filed in opposition to the August
23 5, 2022 granting of a variance (aka exemption, or exception herein) to a Code prohibition for a plan
24 revision to the Permit approved on appeal by the Governing Board on March 23, 2022.

25 The Compact is clear and specific. There is a conflict between the Compact language in Art.
26 III(g)(1) and ROP § 2.4.4, as follows in relevant parts. See, Art. III(g)(1) quoted above. The ROP § 2.4.4
27 states: “B. Four Votes from Each State...[to] 4. Act upon an Executive Director Code interpretation...”
28 then throws a confusing and illegal overlay on the statute with ROP § 2.4.4., “C. Extraordinary Project

1 Vote (5/9)...[to] 5. Approve or modify a project,” indicating five California-member votes of nine total
2 votes are needed. The arbitrary staff insertion of “or modify” into subsection C.5., makes it inconsistent
3 with the voting prescribed by Congressional statute (possibly since the early ROP adoption decades ago)
4 and was used at the Appeal hearing to illegally bolster the record. Clearly the improper TRPA rule
5 enactment fails under hierarchy-of-law considerations; the statute preempts. TRPA’s improper use of
6 Compact Art. III(g)(2) demonstrates a clearly unlawful approach to implementing the vote, which must be
7 set aside as must the addition of the words “or modify” to ROP § 2.4.4.C.5. be set aside.

8 9 IV. PRAYER FOR RELIEF

10 The theory of law applied here is a plain reading and interpretation of the statute and applying the
11 lessons learned in high school civics class. Namely, that we live in Republic under a binding Constitution
12 for the United States, established following a revolution to limit government authority and intrusions on
13 the freedoms and liberties of the people under natural law and as established in the Bill of Rights. The
14 founding fathers knew governments left unchecked by the public in the Republic could become tyrannical,
15 and thus it is the right and duty of every citizen therein to exercise their legal rights for redress of
16 grievance. This is particularly true of misconduct by public officials, which the federal law supports,
17 including civil liability.

18 Compact Art. VI(l) states:

19
20 Any person who violates any provision of this compact or of any ordinance or regulation
21 of the agency or of any condition of approval imposed by the agency is subject to a civil
22 penalty not to exceed \$5,000. Any such person is subject to an additional civil penalty not
23 to exceed \$5,000 per day, for each day on which such a violation persists. In imposing the
24 penalties authorized by this subdivision, the court shall consider the nature of the violation
25 and shall impose a greater penalty if it was willful or resulted from gross negligence than
26 if it resulted from inadvertence or simple negligence.

27 Examining the elements, that TRPA is a juridical “person”²⁸ is accepted *juris* prudence. TRPA
28 violated the provisions under claims. “[O]r of any condition of approval imposed by the agency” has a

27 ²⁸ A “person” subject to liability can be a local governing body (*see, Waggy v. Spokane County*, 594 F.3d 707, 713
28 (9th Cir. 2010)). TRPA is also an “agency” within the meaning of the Administrative Procedures Act (APA) (5 U.S.
Code § 551(a), and TRPA alleges to be held to portions of the APA in TRPA Rules of Procedure § 15.3.1. The
Compact supersedes the APA where the two conflict (*see, Edmond v. United States*, 520 U.S. 651, 657 (1997) (where

1 dual interpretation and may be thought of here as the Code imposed by the agency on itself as a condition
2 of approval, *e.g.*, a required finding in order to approve a project. TRPA violated the latter as set forth in
3 the claims, so is subject to the cited penalties, including for each day on which the excess coverage
4 violation persists. Considering the nature of the violations, which were both willful and negligent, the court
5 “shall impose a greater penalty” The egregious nature of the violations includes knowing and willful
6 violations of law, due process rights, civil rights to free speech (blocking comments from publication),
7 prejudicial actions, and arbitrary and capricious actions in violation of law. For one example, the staff
8 wrote and testified the foundation was not coverage (AR1977). The TRPA coverage table in the plans
9 indicates it is (AR0649); the latter is correct, but the Board negligently approved the incorrect
10 interpretation. While the violation of coverage allowances by staff before the hearing may have resulted
11 from inadvertence or simple negligence, when the deficiencies and contradictions were exposed at hearing
12 and the Board simply moved past them believing the staff in light of the evidence presented, that was a
13 willful or grossly negligent violation. The record is replete with willful and grossly negligent violations, as
14 discussed herein (and in my Motion to Supplement the AR).

15 The federal Clean Water Act (CWA, 33 U.S. Code § 1365) has provisions for citizen lawsuits and
16 sets ample precedent for the interpretation of Compact civil liability that follows. The CWA was adopted
17 by Congress in 1970, shortly following the adoption of the Compact in 1969, so these ideas were in play at
18 that time in Congress, that citizens should be able to sue for redress of violations by the agency. The CWA
19 sets forth similar provisions as the Compact:

20
21 Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any
22 citizen may commence a civil action on his own behalf—

23 (1) against any person (including (i) the United States, and (ii) any other governmental
24 instrumentality or agency to the extent permitted by the eleventh amendment to the
25 Constitution) who is alleged to be in violation of (A) an effluent standard or limitation
26 under this chapter or (B) an order issued by the Administrator or a State with respect to
27 such a standard or limitation, or

28 (2) against the Administrator where there is alleged a failure of the Administrator to
perform any act or duty under this chapter which is not discretionary with the
Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or
the citizenship of the parties, to enforce such an effluent standard or limitation, or such an
order, or to order the Administrator to perform such act or duty, as the case may be, and to
apply any appropriate civil penalties under section 1319(d) of this title. . . .

a specific provision conflicts with a general one, the specific governs)).

1 (e) Statutory or common law rights not restricted
2 Nothing in this section shall restrict any right which any person (or class of persons) may
3 have under any statute or common law to seek enforcement of any effluent standard or
4 limitation or to seek any other relief (including relief against the Administrator or a State
5 agency).

6 With adoption of the CWA Congress got more specific about the matter of empowering citizens
7 than in the Compact. However, the liability framework in the Compact is similar, a precursor that was
8 improved on in the CWA. Public officials are expressly the litigation target together with "any person." In
9 the same way, we have federal (interstate) waters at Lake Tahoe, and a bi-state Compact, but a more
10 limited authority than under the nationwide CWA provisions (which also apply at Lake Tahoe). Congress
11 clearly intended that the federal waters would be protected in this way. There is nothing in the plain
12 language of the Compact law to shield TRPA from civil liability.

13 In my FAC's Statement for Relief (cite pp) I set forth a proposal for the Court to consider
14 appointing a "special master" funded by the civil liability imposed to oversee TRPA approval actions. The
15 Defendant has objected to that proposal (Answer to FAC, March 29, 2023), stating the court has no
16 authority. TRPA doesn't want to be held accountable to the court under their own laws and rules. If the
17 TRPA did not plan to continue its abuses, there would be no issue with having oversight by a special
18 master. In the alternative, if the special master is not granted or possible, the liability must be paid to me.

19 Relief is requested for the 153 standing violations tallied in the FAC, with civil liability increasing
20 by \$5,000 daily for each day the tower, with its excess coverage, persists in violation. For purposes here,
21 the tower foundation construction is deemed complete as of October 3, 2022, based on photo evidence I
22 possess and the daily violation tally begins October 3, 2022.

23 For all the foregoing reasons, I seek summary judgment in my favor, with relief granted by
24 imposing the maximum penalties on TRPA for bad faith, and dismantling the tower on the bases I've
25 justified. I also seek relief from cost to prepare the AR (unknown) and the \$400 court filing fee. For this
26 relief, I pray.

27 ⁱ TRPA has issued nearly 1,000 permits annually in recent years. The fraudulent AR exemplifies how Lake Tahoe
28 region's environmental qualities are being undermined one permit at a time, with everyone from Congress down
failing to understand, some \$660 billion of public money reportedly spent on ecologic restoration and counting, and
the jury still out as to whether the restoration of Lake Tahoe will happen under TRPA and all involved.



19 July 24, 2023

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Alan Miller
PO Box 7526
South Lake Tahoe CA 96158
(530) 542-0243
Plaintiff, in propria persona

**ORIGINAL
FILED**

JUL 24 2023

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Alan Miller,

Plaintiff,

v.

Tahoe Regional Planning Agency,

Defendant.

No. 2:22-CV-02113-KJM-AC

**MOTION TO SUPPLEMENT
THE ADMINISTRATIVE RECORD**

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TABLE OF AUTHORITIES

Federal Statutes:

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Federal Regulations:

TRPA Code of Ordinances (generally)

TRPA Rules of Procedure, §§ 2.16.6 & 15.3.1

Federal Caselaw:

Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005)

State Statutes:

Ralph M. Brown Act. California Government Code §§ 54954.3, 54957.5, & 5495

California Public Records Act. Cal. Government Code §§ 7922.570 & 7922.575

Nevada Revised Statutes—Meetings of State and Local Agencies, NRS § 241.020

Nevada Revised Statutes—Public Records, NRS §§ 239.005 & 239.052

State Caselaw:

City of San Jose v. Superior Court, 2 Cal.5th 608 (2017)

North County Parents Organization v. Dept. of Education, 23 Cal. App. 4th 144 (1994)

¹ The Freedom of Information Act is part of the Administrative Procedure Act code (5 U.S.C. § 552).

INTRODUCTION

TRPA HAS DEVOLVED INTO A CORRUPT, TRYANNICAL AGENCY.

Following my filing of a May 2023 Status Report and a court scheduling conference with the parties in early June, the court granted me leave to file this Motion to Supplement the Administrative Record filed with the court and certified by the Tahoe Regional Planning Agency (TRPA) on May 11, 2023 on the basis of claims in my May 2023 Status Report. This motion realleges and incorporates by reference all paragraphs in the Motion for Summary Judgment I filed concurrently with this motion, and all paragraphs that follow below. The information herein is intended to compliment and elucidate the claims for relief in the Motion for Summary Judgment fully incorporated herein by reference.

Lands Council v. Powell, 395 F.3d 1019, 1029 (9th Cir. 2005) provides:

In limited circumstances, district courts are permitted to admit extra-record evidence: (1) if admission is necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith.” *Southwest Ctr.*, 100 F.3d at 1450 (internal citation and quotation marks omitted). These limited exceptions operate to identify and plug holes in the AR. Though widely accepted, these exceptions are narrowly construed and applied. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (holding that a reviewing court may require supplementation of the administrative record if it is incomplete); *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir.1996) (holding that a “court is supposed to make its decision on the basis of the administrative record,” but that “[t]here are exceptions”) (citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir.1988), amended by, 867 F.2d 1244 (1989)).

In reference to my May 2023 Status Report, I seek to supplement the AR for (1) – (4), above, for which the court has granted leave. After review of the AR, I’m not motioning for discovery. The TRPA clearly acted in bad faith—including rushing the hearing, giving illegal leave to prepare Appeal materials, chilling of witness testimony and other suppression of evidence. While I should be entitled to amend the AR due to the TRPA’s bad faith actions, which carried the substantive effect of depriving me and others a fair opportunity to present arguments and evidence at an unbiased tribunal,² the agency itself may not use this as an opportunity to make *post-hoc* rationalizations for agency action. “It is well-established that an

² *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972) (litigant “is entitled to a neutral and detached judge in the first instance”); *Goldberg v. Kelly*, 397 U.S. 254, 241 (1970) (“impartial decision maker is essential” to due process).

1 agency's action must be upheld, if at all, on the basis articulated by the agency itself" (*Nat. Res. Def.*
2 *Council v. U.S. Envtl. Prot. Agency*, No. 20-72794 at p. 9 (9th Cir. 2022)).³ "Courts do not "accept
3 appellate counsel's *post-hoc* rationalizations for agency action" (*Id.*⁴). "If the agency did not meet its
4 burden, [courts] 'should not attempt...to make up for such deficiencies' and 'may not supply a reasoned
5 basis for the agency's action that the agency itself has not given'" (*Id.*⁵). *See also, Kisor v. Wilkie*, 139 S.
6 Ct. 2400, 2417 (2019) (noting a court should decline to defer to a *post-hoc* rationalization advanced to
7 defend past agency action against attack); *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d
8 581, 603 (9th Cir. 2014). "[W]hen 'assessing the reasonableness of [an agency's action], [courts] look only
9 to what the agency said at the time of the [action]—not to its lawyers' *post-hoc* rationalizations""
10 (*Environmental Health Trust v. Federal Communications Commission*, 9 F.4th 893, 910 (D.C. Cir.
11 2021)⁶).

12

13 I. JUDICIAL NOTICE CONCERNING NONEXISTENT AND DEFECTIVE OATHS

14 OF OFFICE FOR ALL TRPA CIVIL OFFICERS

15 I want to correct the record. In my Affidavit and during my testimony at the Appeal hearing I
16 made an assertion that the TRPA members swore to an of oath office to serve as TRPA Board members. I
17 later tested the truth of that assertion by obtaining information from TRPA through the federal Freedom of
18 Information Act (FOIA) (5 U.S.C. § 552) in a letter dated May 20, 2023, requesting public records from
19 TRPA concerning oaths of office for their civil officials (EXHIBIT 1). The response letter from TRPA
20 (EXHIBIT 2) states, "TRPA does not require members of the Governing Board to take oaths." Thus, there
21 is assurance that the Board members are in violation of the law requiring oaths for federal officials, and no
22 assurances that they will uphold the laws, are not traitors or are not working for foreign agents, as they
23 may be, wittingly or not.

24 Under the circumstances, all official acts may therefore be null and void. That is not a case I'm

25 ³ quoting *Nat. Res. Def. Council v. U.S. EPA (NRDC 2013)*, 735 F.3d 873, 877 (9th Cir. 2013) (quoting *Motor*
26 *Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)).

27 ⁴ quoting *Nat. Res. Def. Council v. U.S. EPA (NRDC 2017)*, 857 F.3d 1030, 1040 (9th Cir. 2017) (quoting
Hernandez-Cruz v. Holder, 651 F.3d 1094, 1109 (9th Cir. 2011)).

28 ⁵ quoting *Ctr. for Biological Diversity v. Haaland*, 998 F.3d 1061, 1067 (9th Cir. 2021) (quoting *State Farm*, 463
U.S. at 43)).

⁶ quoting *Good Fortune Shipping SA v. Commissioner*, 897 F.3d 256, 263 (D.C. Cir. 2018).

1 making to this court, but would constitute a separate cause of action. Nonetheless, the fact that TRPA
2 officials serving in federal positions do not take oaths (all copies of oaths provided were legally defective)
3 is germane to the AR and all matters affecting me with regard to the TRPA in this case. The officials are
4 not bound by oath to uphold the laws as expected, which may go a long way to explaining the lawlessness
5 rampant at TRPA. As defined in Black's Law Dictionary (7th Ed. (2000)), "The person making the oath
6 implicitly invites punishment if the statement is untrue or the promise is broken. The legal effect of an oath
7 is to subject the person to penalties for perjury if the testimony is false." Thus, the need for oath avoidance
8 by scofflaws.

9 10 **II. INFORMATION TO SUPPLEMENT**

11 **THE ADMINISTRATIVE RECORD CERTIFIED BY TRPA**

12 I spoke pointedly at the Legal and Appeal hearing to address expressed TRPA and Verizon views
13 that I was elevating "process over substance" at AR3399, and AR3414, saying failures of procedure do not
14 justify the ends here. TRPA predetermined the outcome of the Appeal in advance, and used all means at
15 its disposal to achieve the desired end, tower construction in 2022, despite the need to resort to numerous
16 illegal actions to accomplish that. The AR is as important for what it doesn't contain that should be there,
17 as for what it does contain that shouldn't be there. TRPA's complex of applicable federal, state and local
18 legal requirements, and their horrendous self-developed anti-public codes and rules, are exploited
19 maximally to confuse and deprive the public of due process, using bully tactics and obscure legal
20 assertions to disenfranchise the public as the example here will show. TRPA was established as a Compact
21 agreement between Nevada and California under state laws, with the Tahoe Regional Planning Compact
22 ((PUBLIC LAW 96-551) ratified by Congress to provide a federal overlay (the U.S. government owns
23 roughly 70 percent of the lands surrounding Lake Tahoe, with the U.S. Forest Service as land manager).
24 The Governing Board is comprised of local, state, and federal public officials, and at-large members.
25 Thus, TRPA operates under a complex set of laws from the two states, including laws for local
26 governments, as well as the Compact. It's a potentially confusing legal set-up, one I posit is beyond the
27 grasp of most of the general public to fully understand. Owing to my 25 years of work as a State of
28 California engineer (water quality/waste regulation) I have a long association with TRPA, and perhaps a

1 greater understanding of it than most owing to my regulatory background. What follows herein
2 concerning TRPA practices is not unique to this particular cell tower project. It is merely one example
3 among many, and exposes some of the patterns of general practices routinely employed to disenfranchise
4 the public when the citizens don't agree with TRPA regulatory actions. TRPA's actual writings in the AR
5 germane to my Appeal are scant. I respectfully implore the judges to avail themselves of the full
6 Administrative Record (AR), particularly my writings from long familiarity with TRPA, and the AR
7 index, as well as this information to supplement the AR, to gain a greater understanding of the TRPA.

8 In my May 2022 Status Report I explained the legal basis for the court to allow me to augment the
9 AR and consider "extra-record" evidence, be it material or circumstantial. Among the criteria for allowing
10 discovery and introduction of information outside of the AR certified by the administrative agency is
11 where the agency exhibits actions or inactions in bad faith. I have included herein references to
12 information outside of the AR to demonstrate to the court the patterns of bad faith in common practice by
13 TRPA based on my experiences, too numerous to address fully in this case, and which should nonetheless
14 be considered. I begin by citing the laws that are applicable to TRPA in my understanding, attempting to
15 point the way through the maze, and then explore how TRPA interacts with the public it no longer serves
16 as I see it.

17 18 A. Requirements for Public Meetings, Notices, Scheduling and Public Comments

19
20 Public comments must be timely published, without censorship or omission of comments
21 impugning the agency, as cited and discussed below, following on Compact Art. III(d), in relevant part:

22
23 The governing body of the agency shall meet at least monthly. All meetings shall be open
24 to the public to the extent required by the law of the State of California or the State of
Nevada, **whichever imposes the greater requirement**, applicable to local governments⁷
at the time such meeting is held...

25
26 TRPA Code of Ordinances – Rules of Procedure § 2.6:

27
28 ⁷ The Bagley-Keene Act (Gov. Code §§ 11120-111321) has not historically been applied to TRPA meetings despite
the governing board members consisting of less than a *quorum* of officials from a California State legislative body.

1 All meetings of the Board shall be open to the public to the extent required by the law of
2 the State of Nevada or the State of California, whichever imposes the greater requirement
3 applicable to local governments at the time such meeting is held. All actions of the Board
shall be in open session.

4 The applicable statutes for California (CA) are CA Gov. Code § 54957.5(b)(1):

5
6 If a writing is a public record related to an agenda item for an open session of a regular
meeting of the legislative body of a local agency and is distributed to all, or a majority of
7 all, of the members of a legislative body of a local agency by a person in connection with
a matter subject to discussion or consideration at an open meeting of the body less than 72
8 hours before that meeting, the writing shall be made available for public inspection
pursuant to paragraph (2) at the time the writing is distributed to all, or a majority of all, of
9 the members of the body.

10
11 CA Gov. Code § 54954.3(c):

12
13 The legislative body of a local agency shall not prohibit public criticism of the policies,
procedures, programs, or services of the agency, or of the acts or omissions of the
14 legislative body. Nothing in this subdivision shall confer any privilege or protection for
expression beyond that otherwise provided by law.

15
16 CA Gov Code § 54959:

17
18 Each member of a legislative body who attends a meeting of that legislative body where
action is taken in violation of any provision of this chapter, and where the member intends
19 to deprive the public of information to which the member knows or has reason to know
the public is entitled under this chapter, is guilty of a misdemeanor.

20
21 The applicable Nevada Revised Statutes (NRS) is NRS § 241.020 3.(d)(3):

22 ...written notice of all meetings...must include...[a]n agenda consisting of:
23 (3) Periods devoted to comments by the general public, if any, and discussion of those
comments. Comments by the general public must be taken:
24 (I) At the beginning of the meeting before any items on which action may be taken are
heard by the public body and again before the adjournment of the meeting; or
25 (II) After each item on the agenda on which action may be taken is discussed by the
public body, but before the public body takes action on the item....The provisions of this
26 subparagraph do not prohibit a public body from taking comments by the general public
in addition to what is required pursuant to sub-subparagraph (I) or (II). Regardless of
27 whether a public body takes comments from the general public pursuant to sub-
subparagraph (I) or (II), the public body must allow the general public to comment on any
28 matter that is not specifically included on the agenda as an action item at some time before
adjournment of the meeting. No action may be taken upon a matter raised during a period

devoted to comments by the general public until the matter itself has been specifically included on an agenda as an item upon which action may be taken pursuant to subparagraph (2).....
(7) Any restrictions on comments by the general public.

Any such restrictions must be reasonable and may restrict the time, place and manner of the comments, but may not restrict comments based upon viewpoint.

Moreover, the TRPA's own procedure rules require materials for Governing Board consideration—including public comments—to be posted online whenever teleconferencing may be utilized, as it was during my Appeal hearing.

TRPA Code of Ordinances – Rules of Procedure § 2.16.6:

Agency materials that are to be considered at the meeting shall be made available online contemporaneously with presentation to the Governing Board members.

All TRPA records held in its custody are agency materials. Public comments submitted for consideration to the Governing Board are a type of public record belonging to the agency and therefore must be made available online. The comments that are present in the AR of my case after September 24, 2022 (pre-hearing) were not published online prior to the certification of the AR in May 2023, when they were fraudulently added to the historic online meeting documents without reference to the date when added. See Board Clerk Ambler's September 23, 2022 timely email forward of information from Verizon, and two very short public emails (AR2034 –AR2112), but NOT the public comments in AR2113-AR3330. The latter 1,218 pages of public comments were not given to the Board, or posted online as required contemporaneously. (Nor were these comments ever mentioned in the meeting minutes approved by the Governing Board the following meeting.) This was TRPA's use of electronic subterfuge to deprive the public of information, undermine solidarity among Project detractors, and chill public participation.

Under the penumbra of CA open meeting law as it directly pertains to associated records, the publication requirements hold true even for public comments submitted to a quorum of the meeting body via their private email accounts (*see, City of San Jose v. Superior Court*, 2 Cal.5th 608 (2017))

1 (communications about official agency business may be subject to disclosure by the agency even if the
2 employees used personal e-mail or text message accounts; an agency has constructive possession of
3 records if it has the right to control the records, either directly or through another person)). TRPA even
4 acknowledges “that use of personal electronic devices for official business subjects records on those
5 devices to public record and retention laws” (see Marshall email EXHIBIT 3). The TRPA does not
6 publicly provide agency email addresses for the Governing Board, and instead deliberately posts email
7 addresses external to TRPA for the public to contact its board members in their official capacity and can
8 only retrieve those public records by “good faith” voluntary compliance by board members (*id*). Because
9 there is apparent “bad faith,” it is likely that many of these qualifying records may never be seen by the
10 public. The certified AR contains none of these records (*e.g.*, I’ve received by blind copy) which TRPA
11 claims can be provided in response to FOIA requests for which the TRPA charges exorbitant
12 “professional review” fees which are contrary to law. Reference my reply from Counselor Marshall in
13 response to a recent FOIA request I made, indicating bogus fees may be charged at rates up to \$113 per
14 hour, at the sole discretion of the Executive Director (EXHIBIT 4), which is improper, arbitrary, and
15 capricious. The Compact Art. III(i), requires that,

16 [e]very plan, ordinance and other record of the agency which is of such nature as to
17 constitute a public record under the law of either the State of California or the State of
18 Nevada shall be open to inspection and copying during regular office hours.

19 The statute clearly requires that the public be readily provided with information in the public
20 record, in the age prior to the internet. This is consistent with adopting the open meeting and public record
21 laws of CA and Nevada. However, TRPA adopted a rule of procedure that is inconsistent with the
22 requirements of CA and Nevada public records acts. It instead purports to invoke the federal FOIA of
23 1966 (5 U.S.C. § 552), but does not comply with most of the Act including requirements to publish in the
24 Federal Register in accordance with the rest of the Administrative Procedure Act (APA) (5 U.S.C. §§
25 551–559). Pursuant to the TRPA Code of Ordinances – Rules of Procedure § 15.3.1, “In responding to
26 public records requests, TRPA shall adhere to the policies outlined in the Federal Freedom of Information
27 Act (FOIA) (5 U.S.C. § 552), including exemptions and judicial interpretations.” TRPA simply cherry-
28

1 picks portions of the federal FOIA for the purpose of allowing it to charge for “document search and
2 duplication” in violation of the state public records law directly specified in the Compact. FOIA
3 subdivision (III) for non-commercial public records requests limits fees to reasonable standard charges for
4 document search and duplication. However, TRPA charges professional review fees which are even
5 inconsistent with FOIA. TRPA adopted FOIA as a pre-textual ruse to violate and ignore state laws it is
6 bound by under the Compact. TRPA must comply fully with FOIA within the framework of the APA,
7 abandon its use in favor of the CA and Nevada requirements, or fully harmonize all applicable laws, and
8 the court should so order in its discretion.

9 Under CA and Nevada law, there is generally no cost to obtain public records maintained in an
10 electronic format. CA Public Records Act (CPRA) requires agencies to “make the information available in
11 any electronic format in which it holds the information” (CA Gov. Code § 7922.570(b)(1)). Moreover,
12 “[t]he cost of duplication of an electronic record . . . shall be limited to the direct cost of producing a copy
13 of a record in an electronic format” (CA Gov. Code § 7922.575(a)). The “direct cost” generally does not
14 include search and retrieval time (*North County Parents Organization v. Department of Education*, 23
15 Cal. App. 4th 144, 146 (1994)). Nevada likewise restricts fees to the direct cost of duplication (NRS §§
16 239.005 & 239.052). Neither state allows local agencies to charge for time and labor.

17 The meeting for the Appeal hearing was hybrid-online with Board members present at TRPA.
18 The agenda was published with Public Interest Comments scheduled to be heard only at the meetings end
19 in violation of NRS § 241.020 3.(d)(3)(I). TRPA changed the scheduled time illegally in 2020, to the
20 meeting end, as online agenda records show. This illegal change was deliberately made to discourage
21 public participation in response to the many public comments TRPA was receiving at that time adverse to
22 cell towers it didn’t want to hear.

23 Public comments are solicited with the agenda, through the conclusion of each item. Public
24 comments, oral and emailed, were allowed during the Appeal; but Mr. Marshall wrongly advised the
25 Board to limit considerations to narrowly-interpreted issues described by TRPA, with input chilled and
26 ignored despite the broader interpretations I provided.

1 No public comments were posted online with the agenda publication or thereafter online through
2 the conclusion of the meeting. They were not published at the time a quorum received them, as under CA
3 public meeting law, nor were they published contemporaneously with the meeting itself.

4 With regard to the certified AR filed by TRPA and public comments, the Index to the AR shows
5 that TRPA did not deliver large numbers of public comments, many comprising numerous pages, to the
6 Board members, though submitted timely prior to the Appeal hearing (AR Index at AR3051- AR3330).
7 These 321 bates pages of comments directed to the Board, in some cases by direct emails to Board
8 members unable to be accessed by TRPA, were omitted from the information the Board presumptively
9 “considered” in its arbitrary and capricious decision-making. The AR shows the comments were not
10 delivered by the staff to the Board prior to the decision on the Appeal. They are nonetheless included in the
11 AR (as they should be), but with deception regarding publishing. No comments received per the certified
12 AR pertaining to the Appeal were published, as required by Compact open meeting law, on the online
13 Agenda link until on or about May 30, 2023 (following this litigation, seven months late), in an illegal and
14 conspiratorial effort to deprive the public of information and knowledge concerning its solidarity. Public
15 comments received less than 72 hours before a public meeting and provided to a majority of the Board
16 members must be published contemporaneously online for public review (TRPA Code of Ordinances –
17 Rules of Procedure § 2.16.6). TRPA routinely ignores these requirements, as in this case.

18 The Board chair noted during the Appeal hearing, at AR3424 (and audio not provided with AR),
19 that over 40 people were attending the Appeal hearing online, with additional persons in the room and
20 perhaps more on telephones. They would not be aware through the TRPA website that any public
21 comments had been submitted, as the record shows they were. That also extends to the Legal Review
22 Committee hearing held prior to the Board meeting, posted online under the same Agenda; no public
23 comments were available online prior to the hearing. The Board Chair also stated at AR3404 (and audio
24 not provided with AR), that Board members were continuing to receive and review public comments
25 during the Appeal hearing, *with assurances that all such comments were being read and considered*.
26 Some public comments are quite lengthy, often with numerous attachments and/or links to online info, and
27 the TRPA agenda announcement always states public comments “of any length” are invited, without a
28 posted cut-off date or time for public comments. It’s not reasonably possible for decision-makers, the

1 Board Chair, to devote attention to public testimony about matters of health and safety, environmental
2 protection concerns, and other issues of great importance to the community while reading emailed
3 comments in the tens and hundreds of pages or more on their phones or computers, right up to the moment
4 of decision. To even state that is intentionally misleading the public, which has no means to verify its
5 comments are even received and processed (TRPA's email system for comments has no auto-reply to
6 acknowledge receipt).

7 TRPA's agenda only solicits public comment by email, then excludes any attachments (*e.g.*, pdfs)
8 without notice, and only publishes the body of the email online, which is improper under applicable
9 electronic records law. When it does publish public comments online, the comments are not associated
10 with any particular agenda item, and are uploaded improperly as serial, mixed comments on any agenda
11 item, leaving the public to download and search in frustration through numerous irrelevant documents to
12 find comments relative to an item of interest.

13 14 B. More TRPA Subterfuge with Electronic Public Records

15
16 CA law has applicable electronic records requirements that TRPA doesn't follow as it must.
17 Moreover, I have learned from Defendant's council that TRPA does not maintain records of
18 telecommunications as part of its public records, despite the undisputed use of personal and/or other
19 agency or business phones and email addresses by staff and Board members. For all the public knows the
20 Board members and staff may be trading emails and texts with each other, or the Permittee, during the
21 hearing(s) which do not appear in the public record. Nor do such writings as texts and emails (which are
22 public records) from staff concerning permitting, inspections, policies, hearings or any other official
23 agency matters ever make it into the official certified ARs. By the evidence, the AR lacks any
24 agency or extra-agency written public records in the certified AR (*i.e.*, texts and e-mails received via
25 telecommunications). By the evidence, TRPA maintains that this policy of omitting same from certified
26 ARs is proper, though the public is disenfranchised illegally.

27 Keeping records adverse to TRPA and its professed interests out of the public eye when they wish
28 to is standard operating procedure for TRPA based on my experiences. I assert TRPA has intentionally set

1 itself up to carry out electronic records subterfuge and deception to the detriment of the public to
2 accomplish its aims, as in this case. The whole of judicial review is focused on the certified AR. We get a
3 glimpse here of how TRPA has gamed the system in its favor, with an incomplete AR among other things.
4 Any judicial deference to public agencies should not be extended to bad actors and those acting in bad
5 faith with regard to public records in the broadest sense. TRPA's public records administration is abysmal,
6 vague and shrouded with respect to TRPA legal requirements. It is unlawful with regard to applicable
7 public agency information statutes of CA and Nevada, and purposely so. Nonetheless, the certified AR
8 provides substantial evidence of the facts in this matter supporting my claims and on which I largely make
9 my case.

10 11 C. The Gaming of the Appeal

12
13 The manner in which Verizon was informed of the Appeal and stay request is not contained in the
14 AR compiled and certified by TRPA, but we can know such communication must have occurred;
15 otherwise, how could Verizon have prepared the letter of August 24, 2022? It could not, by a
16 preponderance of the evidence. That letter proposed a September 28 hearing date for the first time, the
17 second-next Board meeting to come, and which TRPA subsequently imposed on the Appellants, over
18 repeated objections as illegal and outside the rules. That is what the Board Chair also chose. How could
19 Verizon attorneys know TRPA would impose such an illegal hearing schedule, outside of the Rules?
20 Verizon was clearly informed by TRPA of the contents of the lengthy Notice of Appeal and Affidavit in
21 the stay request, by private meeting, by private internet email or telephone, or some combination of the
22 above, none of which appear in the AR.

23 Board members and staff are known to use private phones for both personal and official state
24 business, and these private phones (or other public phones provided civil officials in other public
25 capacities) may be a source of such communication records (ref. EXHIBIT 3). Are there writings (text
26 messages and email) kept out of the AR TRPA certified? I don't know, but I suspect there are. What I do
27 know from experience is TRPA has a pattern of subterfuge around public records. Did TRPA and Verizon
28 scheme illicitly, colluding behind the scenes and out of public scrutiny to illegally advance the Appeal

1 hearing date? Yes, I allege based on the circumstances, but only discovery could provide the ability to get
2 at the actual facts in the matter. I've little interest in deposing notorious liars to obtain the details.

3 No matter what led to the August 25 TRPA stay response, what TRPA proposed to do was illegal
4 under the requirements in the *Rules of Procedure*; the fact that it was done in knowing, bad faith and
5 alleged collusion with Verizon just makes it a more egregious violation of law to support the court
6 vacating the Appeal decision.

7 At the hearing Verizon fraudulently claimed it had met all its Permit conditions. I filed a complaint
8 with TRPA for Verizon's violation of a Permit condition by going outside of fenced boundaries for heavy
9 equipment access (AR1251-AR1253), basically blazing a new road across unpermitted sensitive lands to
10 get to the dig site. I later observed another Permit violation, before the Appeal hearing, when soil was piled
11 in the middle of the road, rather than contained onsite as required (AR0736). TRPA staff did not speak up
12 to correct the record, despite the complaint it responded to (based on the AR record) and let the lies pass.

13 With regard to the violations, TRPA sent an inspector but did not enforce several Permit
14 conditions-of-approval, merely sanctioning the Permit violations, and allowing Verizon to continue the
15 violations with so-called "Best Management Practices." The TRPA omitted from the online AR any
16 information in response to my notices of the violations occurring until after the AR was certified. Nor did
17 TRPA inform me whether or how the violations were resolved, just, a "thanks" for letting them know of
18 the violations, with no follow up (AR1251-AR1254). (The risk of upset was not evaluated; see my
19 complaint on the gas line rupture/emergency at AR3041-AR3049). The TRPA would have us believe
20 there are no other ARs associated with this Appeal than what they filed. I assert there are records of these
21 inspections and follow up that were associated with the Appeal which are not disclosed in the certified
22 AR.

23 My recall is I didn't notify and complain to TRPA about soils stockpiled in the street I later
24 observed and photographed, as mentioned above, in violation of the Permit conditions to maintain all soils
25 on the parking area/staging site; why bother? But surely TRPA documented its approval of this Permit
26 violation unless staff was completely unaware of the closing of Needle Peak Road to public access. In any
27 case, Verizon had a duty to notify TRPA of the Permit violation with piling soils/staging in the public way
28 and there is no such information in the AR. These missing/hidden records are associated with the Appeal

1 because *I predicted these violations in my Affidavit from pit access by heavy equipment and soil*
2 *stockpiling based on changes to the Project excavation depth (AR0736).*

3
4 D. The Misfeasance with the Revised Geotechnical Report

5
6 Prior to her approval of the exception based on the RGR Ms. Roll did question her superiors as to
7 whether to require a proper revised soils/hydrological report in her emails at AR0051-AR0055. The AR
8 shows no further action was taken on that. The AR is lacking any information about why the report was
9 NOT required, what direction was given in response to this inquiry from the “resident expert.” The silent
10 record only discloses that TRPA did NOT require a soils/hydro report by a qualified professional, favoring
11 the RGR for the approval, later bolstering the record with belated soils/hydro investigations and reports by
12 TRPA employees, as if the end could justify the means despite the numerous failures of process.

13 Unsurprisingly, TRPA staff testified in ignorance of its own requirements before the Board at the
14 Appeal hearing. Ms. Cornell spoke to the Board as a “non-expert” in the subject area to confirm the
15 deficient process employed was standard operating procedure for TRPA (audio only, not provided in AR).
16 This is what I asserted in my Appeal at various places in the record. Mr. Marshall, also a non-expert, spoke
17 during the Legal Review Committee hearing for Julie Roll, whom he presented as the resident staff expert,
18 saying she often applied discretion in determining whether a geotechnical borehole was sufficient for
19 investigational purposes when ground water may be affected (audio only, not provided in AR). That may
20 be, but the law says if one digs below five feet where ground water may be affected, a soils/hydrological
21 report is required, not a geotechnical borehole and soil profile. Therefore, the basis for the August 5, 2022
22 approval was improper and in violation of law.

23 Concerning employee conflicts of interest in Claim 10 of the MSJ, Verizon began planning this
24 Project in 2019, if not before that. The Project is the subject of an unresolved 2019 Petition by
25 Eisenstecken before the Federal Communications Commission, which Verizon has trespassed by building
26 the tower. Nonetheless, the Project wound through City Planning Commission approval and a contentious
27 appeal denied by the South Lake Tahoe City Council, a permit appeal denied by a TRPA Hearings
28 Officer, and an appeal denied before the TRPA Governing Board, the subject of the *Eisenstecken, et al.*,

1 litigation. To think that at the 11th hour in the Tahoe construction season, with construction underway with
2 all haste, a subordinate employee would be ordered in to correct an application deficiency by providing an
3 independent, unbiased scientific report that would contradict its employer's approval, serve to uphold the
4 Appeal and "pull the plug" on the 2022 Project construction for highly technical wetland/ hydrologic
5 reasons is most definitely a conflict of interest beyond mere appearances. The fact that these reports were
6 provided long after August 5, 2022 makes them moot with regard to the approval and the Appeal hearing.
7 That is why I objected and sought to keep the reports out of the Appeal record as too late and fruits of the
8 poisoned tree.

9 When the excavator hit hard rock at five feet, instead of 19 feet, Verizon proceeded to jack-
10 hammer the bedrock with a large excavator day after day for weeks on end in advance of the Appeal
11 hearing. This was a tremendous unexamined noise impact consequent to their approval owing to the RGR
12 deficiencies and completely overlooked by TRPA to the detriment of the neighborhood residents and
13 wildlife, despite TRPA noise ordinances and required IEC disclosure items for noise. None of this
14 community impact is in the AR, other than in ignored public testimony. The gamble of TRPA went their
15 way in this case, with the project hitting bedrock, not at 19 feet as in the geotechnical borehole, but at
16 something like five feet below ground surface. This also goes to show how deficient the geotechnical
17 report was, for the single borehole drilled and accepted by TRPA was not even in the specific location of
18 the foundation, but some distance away, in a parking lot, for convenience (AR0025). If the circumstances
19 onsite had turned out differently and ground water was present seasonally unbeknownst to TRPA, without
20 the appeal there would have been prohibited interference with ground water that was not prevented or
21 mitigated as required in the TRPA regulations. That is a significant issue for all other potential projects that
22 may interfere with ground water in TRPA's purview, and a significant basis for the Appeal.

23 24 E. Concerns with Tower Collapse from Unexamined Snow and Ice Loads

25
26 Rather than substantively address my professional civil engineering contentions that the tower is
27 likely to be unsafe and at risk of collapse because designed without regard to snow loading considerations,
28 TRPA sidestepped these comments in silence and applied its layperson's engineering prowess, with Board

1 members stating that they felt the deeper excavation was needed to prevent a tower collapse, again
2 inserting their comments late into the record on the basis of nothing in the AR prior to the approval. Mr.
3 Marshall, shifting the proof burden with no engineering background, states stupidly in the Staff Report,
4 “Nor does Miller provide evidence that there exists a structural engineering foundation that would result in
5 less excavation.” From an engineering standpoint, there are an unlimited number of designs that could
6 meet overturning stability criteria, per my Affidavit comments. As but one alternative recommended in the
7 2019 Geotechnical Report, drilled (or driven) friction pilings are frequently used for tower foundations,
8 requiring much less excavation (AR0015). Verizon simply chose a spread concrete mat foundation based
9 on its initial, erroneous geotechnical borehole investigation. The deeper excavation was not needed for
10 health and safety.

11 Based on the whole of the record, and much more could be written, TRPA findings that the
12 increased excavation proposed for the tower (not the tower itself) is necessary for health and safety are
13 nonexistent prior to August 5, 2022. The tower design has not been verified as adequate to withstand
14 overturning from anticipated and locally-codified snow loads (AR0167 & AR0204-AR0205) (including
15 by local City of South Lake Tahoe building officials who also approved the Project design, apparently
16 without considering snow load requirements). Though my areas of specific engineering expertise do not
17 include tower design, I contend based on my review as a CA-registered Civil Engineer (Cert. No. C57473;
18 expires December 31, 2023), the tower as designed has not been verified to be safe, presents a threat to
19 public health and safety and should be dismantled for these and other reasons, most particularly for the
20 illegal manner of approval and unknown potential risks with regard to safety.

21 22 F. My Settlement Proposal to TRPA, Now an “Open Letter” 23

24 In addition to seeking reform from abuses of discretion by TRPA, part of the reason I undertook
25 this lawsuit on my own was to create a public record concerning the TRPA in this matter, win or lose. The
26 public can use these writings as an aid to understand the tyrant TRPA becomes to opponents of its policies
27 and actions, and how it runs rough-shod over the general public in collusion with others, both in the public
28 and private spheres. Hopefully with this action, many of those practices will become a part of history. I

1 feel this may only occur through the court appointment of a special master, and I am no longer interested
2 in settlement with the TRPA, as I do not trust the tyrant. The writings are now a public record with the
3 California Regional Water Quality Control Board, Lahontan Region (Lahontan Water Board or simply
4 Water Board).

5 TRPA is an image manager, through its various means of communication, its website, the local
6 press, *etc.*, because it has a long history as “the most hated agency in the Lake Tahoe basin” it has
7 struggled to overcome, using subterfuge, misinformation and cheer-leading to cover its failings. I expect
8 TRPA will object to my inclusion here of my preliminary settlement proposal to TRPA. While I have
9 honored confidentiality requirements with regard to discussions with TRPA of my settlement offer
10 (EXHIBIT 5), I informed TRPA in forwarding the information that the settlement offer is my intellectual
11 property to use and share as I may. That is because the water quality issues discussed therein are too
12 important to rest on TRPA alone, and necessarily involve its “partner” and my former employer, the Water
13 Board. They are co-regulators on many projects.

14 On July 12, 2023, a scientific article was published in the journal *Nature*.⁸ I learned of it that same
15 day, through the *Las Vegas Review Journal* reporting the finding that, of 38 large lakes and reservoirs
16 sampled globally by a researcher at Lake Tahoe, the co-author Dr. Chandra, PhD, Lake Tahoe was third-
17 highest among the measurements for contamination by microplastics, the miniscule breakdown products
18 from plastics in the environment. Since my settlement offer includes identifying the most likely sources of
19 the microplastics affecting Lake Tahoe, as well as the solution that could be implemented, I felt I could no
20 longer wait and forwarded this information to the Water Board as a petition for redress of grievance under
21 applicable water quality law. I hope to perhaps avoid the needless expenditure of public money for source
22 identification by the agencies and apply any such money to abatement. I spoke to the Governing Board
23 about the microplastic contamination issues in my Appeal testimony (AR3414-AR3415) saying, in
24 essence, TRPA has largely helped create the contamination problem, and is going to need to abruptly
25 change course to fix it. My words were ignored, and TRPA may forever be known under the moniker
26 “Tahoe Regional Plastics Agency.” I got shunted aside in favor of industrial-scale microplastics pollution

27
28 ⁸ Nava, V., Chandra, S., Aherne, J. et al. “Plastic debris in lakes and reservoirs.” **Nature** 619, 317–322 (2023).
Available at: <https://doi.org/10.1038/s41586-023-06168-4>

1 from telecom *faux*-pine macrotowers clad in degradable, toxic plastics TRPA is so enamored with that
2 they will break any law to promote them. I include the information here (*sans* Attachments) to provide a
3 more complete picture for the court, and the public, of how this has come about from my perspective, that
4 the court may support my efforts for needed reformation at TRPA in all respects. The restoration of Lake
5 Tahoe may require restoration of the rule of law at Lake Tahoe, with all pulling together, both private and
6 public.

8 III. CONCLUSION

9 Here is my truth: Unexpected by TRPA, we caught the staff going about their daily routine of
10 ignoring the laws unchallenged in their rush to cross their final Permit hurdle, and appealed. Given
11 TRPA's illegal approach to the hearing procedure, it is hardly speculation that there were ulterior motives
12 orchestrated through the General Council's bald legal assertions, the Board Chair's illegal stay response,
13 the unanimous Legal Committee recommendation to deny the Appeal under the bogus procedures, the
14 closed-session deliberations by the Board on active litigation (*i.e.*, *Eisenstecken, et al.*) before the Appeal
15 hearing, the premeditated (routine) suppression of adverse public comments from publication online and
16 in the actual record the Board considered in the Appeal as open meeting law requires, the illegal
17 scheduling of the Appeal hearing for the controversial item without a time certain and near the end of a
18 long meeting, the introduction of prejudicial and interest-conflicted staff technical reports and other new-
19 record material, and by staff and Board member statements and behaviors to augment the AR during the
20 Appeal hearing. Those motives were to prejudicially uphold the Agency staff determination as infallible,
21 dismiss any concerns in the Appeal, suppress any opposition, augment the deficient AR with regard to the
22 August 5, 2022 approval, and march in lockstep (but for one voting member) to its predetermined and
23 desired end, by whatever means necessary, to deny the Appeal and enable completion of Project
24 construction in 2022. The court should see the prejudicial truth of these assertions based on a
25 preponderance of the evidence in the AR.

27 A. Deprivation of Due Process Rights, Cumulative Effects

1 With the AR as supplemented here it should be clear the TRPA is a highly corrupt and
2 incompetent agency that set out to deliberately deprive me and the public of the right to an unbiased
3 tribunal, the right to see evidence and public comments, particularly in opposition to me, and the right to
4 have adjudication based on a public record that is visible, accurate and complete. With the Agenda notice
5 of the proposed action and the limited review grounds asserted for it, the general public was hoodwinked,
6 and deprived of the opportunity to present reasons why the proposed action should not be taken, and to be
7 honestly listened to. A decision must be based exclusively on the evidence presented and was not. The
8 tribunal's prepared written findings of fact and reasons for its decision fail miserably. The information and
9 findings herein add weight to my Motion for Summary Judgment. For all the foregoing reasons, I seek
10 summary judgment in my favor, with relief granted by imposing the maximum penalties on TRPA for bad
11 faith, and dismantling the tower on the bases I've justified. For this I pray.

12
13 *Alan Miller*
14 *July 24, 2023*
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EXHIBITS

EXHIBIT 1: FOIA Request Letter to TRPA for Oaths of Office

EXHIBIT 2: FOIA Response Letter from TRPA for Oaths of Office

EXHIBIT 3: FOIA Response re Private Board Member Electronic Records

EXHIBIT 4: FOIA Response Letter from TRPA – Fees for Public Records

EXHIBIT 5: Preliminary Thoughts on Settlement Matters in Miller v. TRPA

EXHIBIT 1

FOIA Request Letter to TRPA for Oaths of Office

May 20, 2023

John Marshall, General Counsel
Freedom of Information Act Officer
Tahoe Regional Planning Agency
PO Box 5310
Stateline NV 89449

Re: Freedom of Information Act Request for Oaths of Office

Dear Mr. Marshall:

Under the Freedom of Information Act (FOIA, 5 U.S.C. Section 552), I am requesting the following documents: Oaths of Office for any civil officer or appointee serving under the Tahoe Regional Planning Agency (TRPA), as specified below. I will accept the information in paper form or by way of valid facsimile electronically (i.e., in a .pdf file format on a computer flash drive or SD memory card).

5 U.S. Code § 3331 - Oath of office, states:

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath to support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Concordantly, 5 U.S. Code § 3332 - Officer affidavit; no consideration paid for appointment states:

An officer, within 30 days after the effective date of his appointment, shall file with the oath of office required by section 3331 of this title an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment.

In order for any Affidavit to be legally valid, including an Affidavit in support of a person's oath of office, it must be sworn to, which includes specific provisions requiring allegiance to the Nation and office they hold in support of the Nation which contains, inter alia, the following language from the form Appointment Affidavit, which states in relevant part:

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof . . .

In order to be effective as a sworn declaration, it must either be sworn before a notary public or sworn under penalty of perjury per 18 U.S. Code § 1746, which requires:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: I declare (or certify, verify, or

state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date), (Signature).”

Request For Waiver of All Fees

I am requesting a waiver of all fees under 5 U.S.C. Section 552(a)(4)(A)(iii). The information I seek is in the public interest because it will contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest.

I believe I meet the criteria for a fee waiver recognized by the U.S. Justice Department – in its policy guidance of April 1987 – and by the federal courts, See *Project on Military Procurement v. Department of the Navy*, 710 F. Supp. 362 363, 365 (D.C.D. 1989).

My request concerns the operations or activities of government because the TRPA adopts regulations and rules to implement the Tahoe Regional Planning Bi-State Compact enacted by Congress (P.L. 96-551, 94 Stat. 3233) and conducts regulatory land use planning and permit approval actions that may affect all property owners in the TRPA jurisdiction, and others persons to varying degrees. TRPA staff officers make recommendations to the Governing Board and its subordinate committees and working groups, which are subsequently adopted into law or regulation. These planning and regulatory activities are carried out under color of law.

This request for public records information is necessary to ascertain whether the TRPA officers and appointees are serving under valid oaths of office as required, or are operating under the illusion of governmental authority. This is no mere interest of mine in the subject matter, but relates specifically to TRPA’s permitting action of August 5, 2022 concerning approval of a plan revision for a cellular telecommunications macrotower (located at 1360 Ski Run Blvd, South Lake Tahoe, El Dorado County, California), and my subsequent appeal, which the Governing Board denied. In that appeal and in testimony before the Governing Board I questioned whether TRPA was operating under, and faithful to, required oaths of office. I requested that TRPA produce the oaths under which it is operating. TRPA provided no written or other response to these concerns and requests. Beyond that discrete matter, the oaths of office further pertain to all actions of the TRPA (presumably) binding on the public. No law or regulation is binding unless

adopted according to law, and that per force includes enactment under valid oaths of office for all officers serving the TRPA.

Also, the information sought has informative value, or potential for contribution to public understanding. Please note the decision in *Elizabeth Eudey v. Central Intelligence Agency*, 478 F. Supp. 1175 1176 (D.C.D. 1979) (even a single document has the potential for contributing to public understanding). I plan to disseminate this information to the public at large through my associates at Environmental Health Trust (a non-profit entity), Americans for Responsible Techonology (a non-profit entity), Tahoe for Safer Tech and other means of news communication such as newsletters to interested-persons server lists, letters to newspaper editors, and in online posts.

In your deliberations, please take note of the following cases: *Campbell v. U.S. Department of Justice*, 334 U.S. App. D.C. (1998)(administrative and seemingly repetitious information is not exempt from fee-waiver consideration); *Project on Military Procurement* (agencies cannot reject a fee waiver based on the assumption that the information sought is covered by a FOIA exemption; and *Landmark Legal Foundation v. Internal Revenue Service*, 1998 U.S. Dist. LEXIS 21722 (D.C.D. 1998)(the fact that the information will soon be turned over to a public body does not exempt the material from fee-waiver consideration).

I consider this a very simple matter for TRPA to produce the oaths of office currently on file for each civil officer and appointee. If no such records exist, or are incomplete for certain persons, TRPA must provide that information also. I look forward to your response within the 20 working days, as outlined by the statute.

Thank you in advance,

Alan Miller

PO Box 7526

South Lake Tahoe CA 96158

(530) 542-0243, Syngineer1@gmail.com

EXHIBIT 2

FOIA Response Letter from TRPA for Oaths of Office



**TAHOE
REGIONAL
PLANNING
AGENCY**

Mail

PO Box 5310
Stateline, NV 89449-5310

Location

128 Market Street
Stateline, NV 89449

Contact

Phone: 775-588-4547
Fax: 775-588-4527
www.trpa.gov

May 31, 2023

Alan Miller
PO Box 7526
South Lake Tahoe, CA 96158
syngineer1@gmail.com

SENT VIA E-MAIL

Re: Responsive Records to Request TRPA File No. ADMIN2023-0018

Dear Mr. Miller:

Enclosed here are the records responsive to your letter dated May 20, 2023 to the Tahoe Regional Planning Agency (TRPA) requesting "Oaths of Office for any civil officer or appointee serving under the Tahoe Regional Planning Agency (TRPA), and/or which formerly served after January 1, 2018."

TRPA does not require members of the Governing Board to take oaths, however, state or local representatives may be required to take Oaths of Office to serve in a governmental office. Sometimes Governing Board members provide those documents to TRPA. Any such records have been provided to you here in accordance with your request and Article 15 of TRPA's Rules of Procedure.

If you have any further questions or concerns, please feel free to contact me at khuston@trpa.gov or (775) 589-5206.

Sincerely,

Katherine Huston
Paralegal
Tahoe Regional Planning Agency

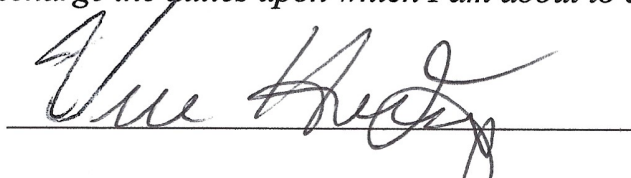
Enclosure

OATH

for the office of Member, Tahoe Regional Planning Agency

I, Vincent Edward Hoenigman, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

Signature



Term Expires with term expiring on 10/21/2025

State of California

County of San Francisco

*Subscribed and sworn to (or affirmed) before me on,
this 10th day of November, 2021*

*by Vincent Edward Hoenigman personally known to me or proved to me
on the basis of satisfactory evidence to be the person(s) who appeared
before me.*



(seal)

NOV 12 2021

Signature



RICHARD C. DARWIN

Judge, San Francisco Superior Court

State of Nevada

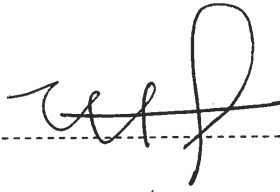
County of Washoe

I, MARK BRUCE, do solemnly swear (or affirm) that I will support, protect and defend the Constitution and Government of the United States, and the Constitution and Government of the State of Nevada, against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of any State notwithstanding, and that I will well and faithfully perform all the duties of the office of Member, Tahoe Regional Planning Agency
for the State of Nevada (NRS 277) (10/1/2013 - 9/30/2017)

on which I am about to enter; (if an oath) so help me God; (if an affirmation) under the pains and penalties of perjury.



Subscribed and sworn to before me this 11th day of September, A.D. 20 13.


Nicole Schomberg

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

OATH

For the office of: Tahoe Regional Planning Agency,

I, Belinda Faustinos, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of California, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

Signature

Belinda V. Faustinos

Term Expires: Pleasure

Subscribed and sworn before me,

This 10th *day of* October, 2016

SEE ATTACHED ACKNOWLEDGMENT

Signature

Title

*Return to Anthony Rendon, Speaker of the Assembly
State Capitol, Room 219
Sacramento, CA 95814
Attention: Appointments Unit/Lisa Dominguez*

ALL-PURPOSE ACKNOWLEDGMENT

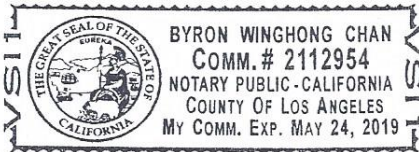
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this Certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of LOS ANGELES } SS.

On OCTOBER 10, 2016, before me, BYRON WINGHONG CHAN, Notary Public,
DATE

personally appeared BELINDA VALLES FAUSTINOS, who proved to me on the

basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

PLACE NOTARY SEAL IN ABOVE SPACE

NOTARY'S SIGNATURE

OPTIONAL INFORMATION

The information below is optional. However, it may prove valuable and could prevent fraudulent attachment of this form to an unauthorized document.

CAPACITY CLAIMED BY SIGNER (PRINCIPAL)

- ☐ INDIVIDUAL
☐ CORPORATE OFFICER _____ TITLE(S)
☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ GUARDIAN/CONSERVATOR
☐ SUBSCRIBING WITNESS
☐ OTHER: _____

DESCRIPTION OF ATTACHED DOCUMENT

OATH

TITLE OR TYPE OF DOCUMENT

1 + 1

NUMBER OF PAGES

OCTOBER 10, 2016

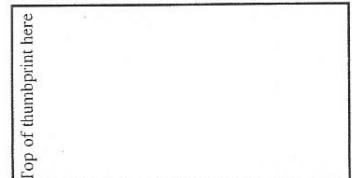
DATE OF DOCUMENT

SIGNER (PRINCIPAL) IS REPRESENTING:

NAME OF PERSON(S) OR ENTITY(IES)

RIGHT
THUMBPRINT
OF
SIGNER

OTHER



OATH

for the office of Member, Tahoe Regional Planning Agency

I, Ellison C. Shute Jr., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

Signature

Ellison C Shute Jr

State of California

County of *San Francisco*

Subscribed and sworn to (or affirmed) before me on,

this *30th* day of *March*, 20 *11*

by *Ellison C. Shute Jr*

personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.



(seal)

Signature

Jeanne Cain Freed

OATH

for the office of Member, Tahoe Regional Planning Agency

I, Casey K. Beyer, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

Signature *Casey K. Beyer*

Term Expires with term expiring on 8/25/2013 or at the Pleasure of the Governor

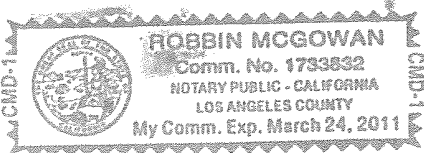
State of California

County of Los Angeles

Subscribed and sworn to (or affirmed) before me on,
this 4th *day of* September, 20 09

by Casey K. Beyer

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.



(seal)

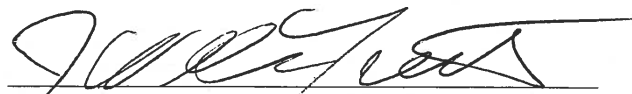
Signature *Robbin McGowan*

OATH

FOR THE OFFICE OF _____

Tahoe Regional Planning Agency

I, William Yeates, DO SOLEMNLY SWEAR
(OR AFFIRM) THAT I WILL SUPPORT AND DEFEND THE
CONSTITUTION OF THE UNITED STATES AND THE
CONSTITUTION OF THE STATE OF CALIFORNIA
AGAINST ALL ENEMIES, FOREIGN AND DOMESTIC;
THAT I WILL BEAR TRUE FAITH AND ALLEGIANCE TO
THE CONSTITUTION OF THE UNITED STATES AND THE
CONSTITUTION OF THE STATE OF CALIFORNIA; THAT I
TAKE THIS OBLIGATION FREELY, WITHOUT ANY MENTAL
RESERVATION OR PURPOSE OF EVASION; AND THAT I WILL
WELL AND FAITHFULLY DISCHARGE THE DUTIES UPON
WHICH I AM ABOUT TO ENTER.



William Yeates (sign here)
Pleasure Term

SUBSCRIBED AND SWORN TO BEFORE ME,

THIS 15th DAY OF APRIL

A.D. 2013



ROBERT D. ROTH
DEPUTY LEGISLATIVE COUNSEL

Senate Rules Committee

APR 15 2013 -

Appointments

EXHIBIT 3

FOIA Response *re* Private Board Member Electronic Records



June 20, 2023

Alan Miller
PO Box 7526
South Lake Tahoe CA 96158
syngineer1@gmail.com

SENT VIA E-MAIL

Re: Miller v. Tahoe Regional Planning Agency, Case No. 2:22-CV-02113-KJM-AC

Mr. Miller,

The Tahoe Regional Planning Agency (TRPA) is in receipt of your June 12, 2023, letter regarding a "Freedom of Information Request for Information on Public Records." In your letter you pose questions regarding TRPA policies on telephonic devices and smartphones and the handling of records produced by such electronic devices as well as how such records are included in the production of administrative records for litigation. You also ask for copies of public records relevant to these TRPA policies.

Public record laws provide an opportunity for the public to request copies of public records from public agencies notwithstanding the presence of litigation. These laws, however, do not provide an opportunity to conduct other discovery, such as interrogatories or depositions, particularly where such discovery is disfavored in record review cases such as your case against TRPA referenced above.

Nevertheless, TRPA will provide a general response to your questions and produce responsive public records. TRPA does not assign staff or Governing Board members mobile phones or mobile telephone numbers. TRPA does provide certain staff (but not Governing Board members) with a mobile phone allowance to offset the use of personal electronic devices when conducting official business. TRPA provides staff (but not Governing Board members) with computers that generally have Wi-Fi capability including VoIP capacity. TRPA advises staff and Governing Board members that use of personal electronic devices for official business subjects records on those devices to public record and retention laws. Attachment A is TRPA's Record Retention Policy. TRPA's personnel policy (Attachment B) provides guidance regarding support and use of personal electronic devices.

A distinction exists between a mobile device and public records. Records are generally created or linked to a mobile phone number (e.g. a telephone call or text) or an email account. Texts or calls are linked to the cellular number and TRPA does not "maintain" personal numbers. In contrast, TRPA does maintain email address using the "@trpa.gov" domain regardless of whether staff is using a TRPA-issued or personal device to create or receive emails. TRPA does not maintain personal email accounts.

TRPA Rules of Procedure Section 10.6 guides producing administrative record to facilitate judicial review of challenged agency action. Link: <https://www.trpa.gov/wp->

Alan Miller
June 20, 2023
2 of 2

[content/uploads/documents/Rules-of-Procedure.pdf](#); see also Section 5.21. Generally, when compiling a Section 10.6 administrative record, TRPA staff includes records of communication it possesses, including relevant Governing Board member communications regardless of their stored location. Since TRPA does not access personal electronic devices, the agency relies on the good faith response to requests for records. Regarding the record prepared for the Miller v. TRPA action, TRPA has requested all relevant communication be provided for inclusion in record. If additional relevant, non-privileged records are provided, TRPA will supplement the record with them.

Apart from the attachments and linked Rules of Procedure, TRPA possesses no other records responsive to your request.

If you have need to discuss the content of this letter, please contact me at jmarshall@trpa.gov or (775) 303-4882.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Marshall', is positioned above the printed name.

John Marshall
TRPA General Counsel

CC: Debbie Leonard, Leonard Law, PC

Attachments:

- A. TRPA Records Retention Policy
- B. TRPA Personnel Policy Manual

EXHIBIT 4

FOIA Response Letter from TRPA – Fees for Public Records



**TAHOE
REGIONAL
PLANNING
AGENCY**

Mail

PO Box 5310
Stateline, NV 89449-5310

Location

128 Market Street
Stateline, NV 89449

Contact

Phone: 775-588-4547
Fax: 775-588-4527
www.trpa.gov

June 21, 2023

Alan Miller
PO Box 7526
South Lake Tahoe CA 96158
syngineer1@gmail.com

SENT VIA E-MAIL

Re: Notice of Receipt of Request for Public Records Dated June 20, 2023

Dear Alan Miller:

Tahoe Regional Planning Agency (TRPA) received your letter dated June 20, 2023 requesting:

- Records related to the "Action Plan for TRPA Permitting Improvements"; and
- Any public records associated with the Innovation Initiative Update.

Please accept this letter as notice that TRPA is currently processing your request for public records. At this time, I am working with TRPA staff to retrieve the documents you have requested.

TRPA's guidelines for records requests can be found in Article 15 of the [TRPA Rules of Procedure](#). Under Article 15.3(b), the Agency has twenty-one (21) calendar days from the date of the Notice of Receipt of Records Request to prepare requested public records.

Also under Article 15, TRPA collects standard fees associated with the actual cost of production to the Agency incurred during the processing of each public records request (see enclosed Public Records Request Fee Schedule). Once the documents are ready for production, I will contact you to notify you of the cost of production. Please be advised that the records requested will not be released until these costs are paid in full.

If you have any further questions or concerns, please feel free to contact me at khuston@trpa.gov or (775) 589-5206.

Sincerely,

Katherine Huston
Paralegal
Tahoe Regional Planning Agency

Enclosure

TAHOE REGIONAL PLANNING AGENCY

128 Market Street
Stateline, Nevada
www.trpa.org

P.O.Box 5310
Stateline, Nevada 89449

Phone: (775) 588-4547
Fax (775) 588-4527
Email: trpa@trpa.org

Public Records Request **Fee Schedule / Cost Sheet**

Fee Schedule / Cost Sheet subject to annual review by the TRPA Executive Director

Staff Time: (Includes the cost of locating the files, inspecting the files for confidential materials, as well as the time associated with duplicating requested documents. Staff time will be charged at the specified rate, to be billed in increments of 15 minutes.)

Assistant	_____	@ \$45.00/hour	_____
Planner/Other	_____	@ \$60.00/hour*	_____
Paralegal	_____	@ \$60.00/hour	_____
Attorney	_____	@ \$70.00 or \$113.00/hour*	_____

*Fees may vary

Black and White 8 ½ "x 11" Copies	_____	@ 25¢/page	_____
Color 8 ½ "x 11" Copies	_____	@ \$1.00/page	_____
Black and White 24" x 36" Copies	_____	@ \$3.25/page	_____
Color 24" x 36" Copies	_____	@ \$10.00/page	_____
Compact disc of electronic records	_____	@ \$10.00/disc	_____

Cost of Postage	_____
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Total	_____
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Date	_____
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Receipt #	_____
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TRPA Staff	_____
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EXHIBIT 5

Preliminary Thoughts on Settlement Matters in *Miller v. TRPA*

Preliminary Thoughts on Settlement Matters in Miller v. TRPA

By Alan Miller, PE

Memorial Day 2023, In remembrance of those who have served honorably.

In approaching the matter of settlement I found it useful to examine how I want to feel, and I invite you, reader, to do the same. I also invite TRPA to consider why I am in litigation with it. I'm not being paid, and rather have paid for the opportunity for a Court hearing. What have I to gain? Nothing financially; that is not why I'm in it. My interests are for the good of all. I would like to feel that capable, thoughtful, people are taking utmost care to protect our Lake Tahoe environment, the waters, the plants, the rocks and the sky, the air that brings us life. I would like to feel that we are all here to share in the divinity that we are, and which surrounds us, on our evolutionary paths. I want to feel grateful, and do, for the experiences and opportunities TRPA has provided to interact with me, which has spurred so much growth in me, particularly in the areas of microplastics and water quality. I want to feel that I have true partners in protecting the Lake Tahoe environment, who consider and respect my views when offered and fairly present their own views in an honest scientific and social debate to arrive at greater understandings of our environment and how to manage our natural resources in relationship with it. I want to feel that we are hastening the path to restoration of the seriously damaged and compromised Lake Tahoe environment, rather than hastening its further decline through development and redevelopment that lacks adequate planning, analysis of cumulative effects, regulatory oversight and monitoring. I want to feel like I can move on to other things in my life, trusting the agencies to follow the laws, at a minimum, and fulfill their charges. I would prefer to move out of judgment and condemnation into understanding, change and forgiveness. With these thoughts I recite silently the prayer for serenity, and declare my desire for peace with all my brothers and sisters and soul relations, and co-travelers, for expansion into greater possibilities and revelations of truth. My view is that if TRPA defeats me in this lawsuit, it will be unknowingly defeating itself. May we war no more.

The Tower

Dismantlement and removal of the tower is likely a "non-starter" for negotiating purposes, so let's start there. There may be limited need for discussion on that point for I am content to let the Judge decide that matter; as the "fruit of the poisoned tree" dismantling the illegally approved and erected tower is the most immediate and practical remedy available to the Court in this case, likely before the Court gets to ruling on Eisenstecken. That said, Verizon could simply choose to abandon its permit and remove and reuse the tower at some other approved site. Little can be done to restore the land at the tower site, so that point is rather moot, though restoration in-kind could be provided elsewhere.

Tower removal is warranted in my view, for aesthetic issues it presents, the toxic waste and microplastics issues it presents if adorned with plastics (the subject of our petition, unresolved, to the Lahontan Water Board, and thence the State Water Board and Courts, as needed), and the tower collapse and increased fire risk potentials, EMF pollution aside. In the meantime, the aesthetic eyesore remains, in silent testament to misfeasance, unable to be operated (which is of NO practical, verified health and safety consequence) and subject to pending enforcement action by the FCC for being built

illegally. Regardless of what the FCC may or likely may not do to enforce its laws for Verizon's transgressions, that is the situation for now as I see it. There is no need for FCC to act against Verizon when the matter can more readily be righted by the Court, and/or because Verizon, TRPA and others are subject to potential adverse action by the Court in the Eisenstecken case (with the tower built under an expired City Permit, no less). Backing down at this point would be admitting a mistake on TRPA's part, to an imperfection in the Project evaluation and permitting processes (which can't be admitted, even if true), so I understand the lack of desire for tower removal and that opinions of TRPA staff may differ from mine. Nonetheless, TRPA should understand that I would settle for that.

Principal Points of Grievance

TRPA should understand my view of the environmental laws and regulations is neutral, though they were developed by the powers that be to enable and facilitate environmental degradation at the hands of the developers. They are just a tool, like any other, that can be used for good or for ill depending on how the laws are applied, misapplied, ignored, etc. The environmental movement was hijacked by the three-letter agencies in the 1970s, and now by the wealthy "philanthropists" hailing from the Fortune 500. If you think Richard Nixon was an environmentalist, you don't know Richard Nixon, who was a tool of the industrialists.

I don't mean to be arrogant or act like a know-it-all. I know what I know and I am just one man, but I had opportunities for training with world-class experts in a variety of subjects in my work on water quality. While I don't mean to be unkind or malign TRPA staff, who I believe are well-intentioned in the main, they are only as strong as their training and backgrounds, which I see as deficient to the task of protecting Lake Tahoe. I believe TRPA can no longer perceive clearly the culture it is embedded in. It exists in a public relations bubble it has helped to create in large part, detached from foreign views, touting science it doesn't fully understand. I therefore offer an informed outside view, without sugarcoating, that may not be perceivable by TRPA. In that light, I nonetheless hold TRPA maintains an undeserved arrogance, a can-do-no-wrong attitude, and a defensiveness of its shortcomings that is unwarranted. TRPA's approach to science and environmental effects evaluation, whenever carried out, is superficial, lacking rigor and depth. I assert this is from a lack of qualified leadership in the water quality department, and expertise that has been lost over the years by a quasi-scientific environmental management system run by attorneys navigating the socio-political system, and needs to turn the permit cranks just to survive.

I am a civil and environmental engineer, a scientist. I went to university alongside environmental planners and the curriculum for science is scarcely comparable, together with math and analytical skills. It is for these reasons that the TRPA staff, speaking generally, lacks expertise and their analyses lack rigor and depth with regard to the sciences of physics, chemistry, materials, electromagnetics, geology, hydrology, pollution fate and transport, physical and chemical water treatment processes, limnology and so much more (biology, ecology, zoology, etc.). Their analyses are uncritically reviewed by laypeople, pass legal muster primarily on administrative bluster and weight, though backed up by ignorance, and with processes set against anyone with the skills or patience to challenge this culture and

mode of operation. Compliance monitoring and reporting for permits and impacts is virtually nil at the Project level for most projects.

A historical sketch may be informative. David Zigler had a BS in mechanical engineering and MS in environmental engineering. He worked as Sr. Water Quality Planner for TRPA from 1981 – 1994, the last 5 years as Executive Director. He was followed by Exec Dir James Baetge, 1994-1999, a civil engineer and former executive with the State Water Resources Control Board with broad water quality and science credentials. They laid the regulatory groundwork. It appears John Marshall, an attorney who possessed a bachelor of arts (not science) degree before obtaining his law degree, served as interim Director for a period between 2000 and 2002, exact length unknown to me. Marshall was followed by Juan Palma, a forester formerly with LTBMU. He was succeeded by John Singlaub, from 2003-2005, a former land manager and landscape architect with the BLM. Then came Joanne Marchetta as ED, an attorney with a limited forestry background, soft-science, so 17 years of lawyer-management, double-teamed by Marshall all the while. No top scientists in-house, no engineering expertise, chemists, physicists, geologists, etc., such as I formerly supervised. (I don't mean to tout engineers unduly, I just question whether the differences in qualifications are really understood by TRPA.)

The Governing Board passed on a fine Caltrans civil engineer in promoting Julie Regan, with her BA in journalism, MS in communications, and background in sales and marketing. Such a hire would have been outside the culture. We know TRPA has taken a strong interest in effectively promoting its own public relations narratives in the media and elsewhere. A PhD science degree is reportedly in progress for Ms. Regan, I know what not in. While this may lead to improved understanding of science to guide the agency beyond what the attorneys decide, only time will tell. That's how I see it: TRPA staff is unable to understand and apply science, which is a sort of black box, with more than a gesture of understanding, including ability to critically evaluate research presented. They follow rote procedures and unevaluated, undisclosed assumptions, and directives from the legal department. TRPA's main charge is to protect water quality, and it lacks scientific expertise to do so, leading to such findings as absence of evidence is evidence of absence of potentially significant impacts, without a hard scientific look, i.e., with regard to tower PVC and microplastic wastes. These writings are just pretext for context.

Part of my efforts in opposing this tower are simply a means to shed light on the record in these matters, and to give the public a chance to catch up with the science of electromagnetics TRPA has ignored for its own purposes under its lawyer-directors to the detriment of Lake Tahoe environments. The Board members aren't scientists, in the main. They apparently don't read the materials and thus look to staff for science direction it is incapable of providing, or make choices for their own reasons. The way I see it, the issues in this matter center around the following things the Agency would need to take committed actions to change to make this lawsuit go away. Fortunately, many of these build on the current regulatory and planning efforts underway embodied in the Action Plan for TRPA Permitting Improvements (approved 2022-08-24). I support that Plan in some regards while eschewing other elements (particularly expanding the class of "exempt" activities without adequate scientific evaluations to support expediting such activities without oversight, and delegating project review activities to other agencies even *less* qualified than TRPA).

I propose for settlement discussions:

1. Changes to Code and Rules are needed to change processes I see as deficient that, particularly in the area of scheduling, discourage and prevent public participation, consideration of comment and response from the Agency, and reasoned decision-making. Routinely giving people a week to comment on a Board decision, and the Board even less time to read and consider the record before acting, is tyrannical when the only avenue for redress is costly appeals and federal litigation. TRPA sets a 21 day notice for certain items and that should be standard operating procedure to consider public comment and avoid setting the stage for arbitrary and capricious decisions in violation of law.
2. That there is an inability to follow Compact, Code or Rules faithfully and consistently due to a variety of causes that will likely require changes in culture, staffing, and needed and ongoing staff training over time (sans Marchetta). Clarifications per 1, above, may aid in this. Changes to rules and procedures so unclear as to be ambiguous are needed, i.e., “qualified professional,” when staff have no apparent or specific knowledge of what that means, or the necessary background or professional qualifications to judge the qualifications of others more qualified. I would point out training is something TRPA should be doing anyway, and I would need to discover the extent that ongoing formal training is conducted, for one, on the Compact, Codes and Rules, or whether everything is learned ad hoc, or as “on the job” training to consider this for settlement purposes. Does not every employee have on file a plan for training and career development, technical or otherwise?
3. Inadequate professional in-house expertise should be addressed. Very few staff with other than soft-science planning backgrounds are employed. TRPA has few if any professionally credentialed civil and environmental engineers, engineering geologists, hydrogeologists, ground water geologists, geomorphologists, soil scientists, chemical engineers, chemists or scientists with State certification or Master’s or PhD degrees in hard-science education. This will take time to change, and greater outside help is needed in the meantime.
4. Professional training in environmental impact assessment is needed. Given that TRPA follows its own impact assessment process, that is neither CEQA or NEPA, where does it obtain the needed training for in-depth analysis? Given the level of analyses I’ve seen on the Ski Run tower and other Projects I opine that they lack rigor and depth, that staff doesn’t know how to craft findings for the record, or doesn’t bother to do so, and that significant impacts are routinely missed and dismissed. Nonetheless, TRPA in its processes denies the public reasonable input per 1, above, and same follows from 2. and 3., above.
5. Professional training in plan checking and coverage analysis is needed.
6. Professional training in Stream Environment Zone assessment and characterization is needed.

My Interests and Further Thoughts on Settlement

I came to this Project out of a concern for the effects of the wireless communications rollout on the Lake Tahoe environment, which I consider sacred and alive and deserving of respect in all regards. The TRPA touts its 2012 Regional Plan update as a “Plan for the 21st Century” yet it does not include the word “wireless” or a single mention of the long-range plans of the wireless industry to blanket the region

(world) in its electrosmog, which TRPA invites at Lake Tahoe while siding with the industry and shutting out scientific and public input. Nor does it address what I will explain below. My interests morphed into water quality concerns when I became aware of the plastic and microplastic wastes from the towers, and TRPA's blithe dismissal of impacts from same with "a look-see" and opinions that amount to "absence of evidence is evidence of absence," while touting a ridiculous report prepared by Verizon consultants as a sound scientific basis for its conclusions on microplastics and implications for Lake Tahoe. My interests further morphed into groundwater protection concerns with my Appeal when I saw that TRPA staff doesn't understand or correctly interpret its own regulations for groundwater protection, approving crap reports from unqualified individuals, again, because they themselves are unqualified.

My interests are morphing again for a water quality issue that causes my heart pain, threatens many of the things WE have worked to achieve at Lake Tahoe, and brings up thoughts and feelings in me I would prefer not to experience. Now we come to perhaps one of the most egregious things TRPA has done over the last three decades to adversely affect water quality at Lake Tahoe, with implications for greatly expanded cumulative impacts in the future: The approval by TRPA, without adequate analysis, of development activities involved with placing numerous plastic structures in the Lake Tahoe shorezone environment in various forms (marinas, wharves, docks, piers, decks, boardwalks) and other appurtenant developments. These approvals have created conditions of contamination of Lake Tahoe with microplastics, toxic foreign materials that are highly persistent.

These plastic materials are sold under a variety of trade names for "fake wood" and wood-replacement products. The commercial products have changed over the years. The involved plastics are difficult to obtain information on (from a tight-lipped burgeoning plastics industry), beyond eco-marketing hype, but currently appear to be primarily virgin or recycled polyvinyl chloride (PVC), high and low density polyethylene (PE, HDPE, LDPE), and polystyrene (PS), but other plastics also, which are toxic, which contain toxins, and which are (or were) foreign to the Lake Tahoe environment for all history. They are currently breaking down into microplastics at accelerating rates due to age and weathering, as the attached preliminary photo report shows (Attachment 1), with the wastes being directly discharged to Lake Tahoe waters as both litter and microplastics. Aside from contaminating the waters, sediments are also being contaminated, with implications adverse for the environment AND for future dredging projects for recreation purposes, which will further mobilize contaminants during displacement or removal and affect sediment reuse potentials (i.e., for beach replenishment) and disposal costs.

A report from water sampling I conducted for Columbia University indicated the waters of the Tahoe Keys (homeowner's side) are "loaded" with PVC, which can only be as a result of deteriorating docks and shoreline structures. TRPA has approved these docks and after three years a TRPA permit expires and that's the end of its *sans* enforcement action for post-permit-period deterioration of the structures and materials. And what could be considered a permit violation? TRPA has no standards or specifications in its vast Code or permits for pier materials, save for colors, no "best management practices" of any kind for plastics of any kind. Deteriorating shorezone structures are left to the owners to manage.

In the Tahoe Keys, the plastics and microplastics may have implications for weed growth as well, given that "weedy" colonizer organisms often proliferate in disturbed, degraded and polluted environments to

the detriment of less pollution-tolerant native organisms. Such was the Tahoe Keys prior to chemical and UV light treatments. If it has not been suggested before, let me be the first to suggest the possibility of unknown adverse synergistic effects between plastics present in the waters and sediments of the Tahoe Keys and the chemical and ultraviolet light treatments that may affect expectations and desired outcomes for weed controls. These unknown effects may be responsible, with other factors, for the severely degraded water quality conditions following the treatments in 2022, the worst I have observed there since 1993, including during other low-water periods. During low-water periods pollutants are concentrated in the remaining water. (See my preliminary photo report. I note the Board was deprived of certain of such pictures in the recent (May) report on the TK treatments Project, nor did I see commentary on the noxious odors produced in combination with the algae odor emissions typical prior to treatments.)

It may be the waters of the Tahoe Keys that are the most impacted by plastics, due to the size of the development and its age, but it is by no means the only source of microplastics TRPA has approved, and will continue to approve in the shorezone unless something changes the long-standing program. There are numerous other marinas in various conditions, from nearly new to severely degraded, and many of the private homeowner docks and piers with plastics are already deteriorating. In-situ “useful life” expectancies are variable and unknown. I have no doubt based on my inspections that additional water testing would confirm the preliminary result that the waters of the Tahoe Keys, on both the homeowner and marina sides, are heavily contaminated with PVC from the hundreds upon hundreds of deteriorating plastic docks, and the problem will only grow unless immediate actions are taken. Other sources of plastics and microplastics are present also, and likely contaminating the water, but let us focus for now on the docks and piers.

I spoke briefly in my limited time of certain of these concerns in my testimony in the Appeal of September 2022, to a deaf and mute audience. Further, there appears to be a regional blindness to the issue. While non-profits scour the shorelines and lake bottom for litter and wrecked/discarded equipment (bless them), the Tahoe Research Group and Desert Research Institute employees sift through the shoreline garbage, the snowpack, and seine-dredge the waters for microplastics, and Dr. Lars Anderson poisons the waters of the Tahoe Keys, I have seen no discussion, no water testing amid the vast sampling, no mention anywhere of plastic structures in the shorezone environment and whether they may be obvious sources of the microplastics that have been found in Lake Tahoe, which are poorly characterized from a chemical standpoint. There is nothing in the Shorezone Plan. Apparently, none of the research scientists, from Dr. Charles Goldman on down, understand the microplastics issue at Lake Tahoe and its potential magnitude, or are keeping silent about it while they seemingly ignore the obvious and siphon funds from the public trough to study microplastics as they see fit. I am not a crackpot, nor do I want to be “right” about these things in the I-told-you-so sense; my intent is to help address a water quality problem, despite the means I’ve been driven to. I want to see the problems begin to be addressed with the seriousness I assert they deserve based on the evidence, however preliminary.

Time is of the Essence

So far as I know, I was the first to report the toxic algae blooms in the Tahoe Keys lagoons to the Lahontan Water Board. Before that I recruited and hired one of California's most expert water quality engineers to plan and oversee the herbicide treatments in the Tahoe Keys, when that was clearly fated to occur. Now that I have discerned the sources of microplastics, and the regulatory underpinnings, this issue is going to go forward to the Water Board and others, as needed. It's just a matter of time, and not far off. But time is of the essence: Many docks and shoreline structures were damaged or submerged (e.g., throughout the Tahoe Keys) by the heavy snows of winter '22-'23. Owners will (presumably) be coming in for TRPA and Water Board permits to repair these damaged structures (or they will be "qualified exempt" under TRPA rules, an error for dock replacements), or repairs may be under MOU at the Tahoe Keys (?), so TRPA will have an opportunity to interrupt the additional placement of plastics in the water environment.

Worse, owners will continue to ignore their deteriorating structures without agency intervention, or undertake repairs without seeking agency approval, witness the Tahoe Keys Marina. Repairs that involve cutting or sawing plastics over or near waters will release more plastics. Public education is needed. In addition, 12 new piers are reportedly to be approved by TRPA this year. This is an early opportunity for TRPA to step up and begin doing the right thing for Lake Tahoe and water quality, as this problem has not been disclosed by others previously to my awareness, and get some consideration for settlement in this lawsuit. Otherwise, we will press forward as adversaries on these matters, with TRPA and the others in a lame defensive position with regard to water quality policy and science.

I have not gone fully "public" on this as yet though I will also be petitioning the Lahontan Water Board in this matter, as there is co-culpability and a need for disrupting Water Board CWA section 401 state water quality certifications, co-permitting activity with TRPA. I will also explore with it an apparent dereliction of oversight of the dozen or so California marinas under the Water Board's Marina General Permit (which my staff and I penned), particularly the Tahoe Keys Marina, but others also. On the section 401 WQCs, in all my years at the Lahontan Water Board the directives I received from executives and managers of Lake Tahoe were to focus on the impacts from dredged and fill material discharges (i.e., bottom impacts from piers, posts, footings, appurtenant structures) and leave the details of the shorezone structure design (aesthetics, materials, colors, configurations, allowable coverage, etc., etc.) to TRPA. In areas of the Lahontan Region outside of TRPA's jurisdiction, I promoted use of natural materials in such settings whenever possible, knowing well that such structures often end up as wrecked or discarded materials under natural forces and neglect. It is my view that the directed approach by the Water Board and deference to TRPA on the WQCs is improper under CEQA, which must consider the "whole of the action" being approved for its consequent effects, including effects that may be cumulatively considerable. It is no different for TRPA under other rules.

The Water Board staff already sees the implications of plastics in the shorezone at Lake Tahoe, the ubiquitous presence of plastics in the water environment and, like TRPA, is ill-prepared to deal with it, to clean up the mess, if possible. Will the Water Board lead or hide from the issues? Only time will tell. Perhaps it has already raised the issue behind the scenes with TRPA, but that is speculation for what is

surely to come. That is my hope, that TRPA and the Water Board will at begin a joint and collaborative effort to walk back these impacts. Will DEQ step up for Nevada?

I recognize the magnitude of the issues for TRPA. I also see that there could be a parallel, a lesson with regard to ignoring the growing adverse cumulative effects of unseen electromagnetic energies. I have no idea how TRPA will respond to the information, whether it will trade water quality for recreational boating. Truth has a way of coming out in the end, especially in the information age. Mistakes can't always be avoided but they can be corrected and prevented in the future, which is how we grow. That is my hope. This could be like the two-stroke engine ban regulations, TRPA leading the nation. I see a fork in the river: TRPA will either alter the present path to water quality destruction by plastics under the new Executive Director, by all means feasible and reasonable, or deny the realities until the problem grows and management becomes costly and/or technically infeasible, and therefore politically infeasible. I therefore again offer TRPA the olive branch. If it will realize the error of approving man-made materials in the sensitive areas around and over waters, and take concrete steps to change the program, we may have a basis for settlement discussions.

The alternative as I see it is for TRPA to maintain a defense of its non-scientific, non-analytical ways and ignore and worsen the problem until Lake Tahoe and its waters are irreversibly polluted with microplastics as a result of missing reasonably foreseeable impacts and consequences, lack of planning, lack of regulation, and ignoring public concerns, as expressed here and in my prior testimony. There are microplastic wastes not amenable to control, dust in the air, tire dust, etc. Such is not the case at Lake Tahoe with the shorezone structures. Wood, rock and metal are viable alternatives. If you think the plastic docks don't break down and discharge wastes, see the pictures in my preliminary report, including many floating microplastics, which will destroy water clarity over time. Hydraulic residence time is an engineering concept: With Lake Tahoe's 600-year average hydraulic residence time for water, pollutants likewise will tend to accumulate rather than dissipate. Plastics include floaters and sinkers; the former will affect clarity. I now find plastic litter now every time I walk the beaches near the Tahoe Keys, where I frequent, including floating and washed-up miniature styrofoam "popcorn" plastics from deteriorating docks, broken ballasts, and the like. I know there is more plastic I can't see. The water quality shit-show that is the Tahoe Keys is only the worst problem area, and serves as a warning, for what befalls the Keys spreads to the Lake. Like this gross example of unintended, unevaluated impacts, increased impacts from other shoreline structures and marinas I've reviewed, including all those approved under TRPA "Marina Master Plans," will surely worsen with time.

I propose for settlement discussions:

- A. An immediate moratorium on the placement of new plastic materials in the shorezone, over Lake Tahoe waters, and in SEZs, taking a proactive approach to a "new" issue.
- B. A regulatory PLAN for phasing out and removing existing plastics from the environments in A., such that only natural materials are used for structures in these areas, materials that will not produce toxic and "forever" plastic wastes in the water environment.

- C. Abatement and removal (required or voluntary) of deteriorating plastic shoreline structures. Criteria as a basis for removal of deteriorating plastics (age, type, condition, other), and incentives for removal. (Water Board assistance may be needed or desirable.)
- D. Water testing for plastics, directing funds for same, specifically in potential PVC “hotspots,” which comprise many of the shoreline structures, so that monitoring may determine the current state of contamination, as well as improvements from abatement and removal, and threats from sediment disturbances.
- E. Regulations prohibiting the further use of plastics for structures in A., or that may otherwise affect water quality, including industry wastes from monopine towers and other bulk sources of degradable plastics, which should be banned.

My big-picture thoughts on plastics are attached in rhyme. “Think globally, act locally,” as the saying goes. I am not naive, but humans created the plastics problems and humans can undo them. Consider the alternatives. How will my speech end? “Julie Regan was informed of the implications of plastics in the shorezone at Lake Tahoe from the beginning of her stint as Executive Director, and under her watch the Governing Board chose to” I look forward to discussing these matters for settlement purposes at the pleasure of TRPA.

~~Attachments: Preliminary Photo Report on Deteriorating Plastic Structures at Lake Tahoe~~

~~Plastic is Forever! © Alan Miller~~

1 Alan Miller
2 PO Box 7526
3 South Lake Tahoe CA 96158
4 (530) 542-0243

5 *Plaintiff, in propria persona*

7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA

10 ALAN MILLER,

11 Plaintiff,

12 v.

13 TAHOE REGIONAL PLANNING
14 AGENCY,

15 Defendant.

No. 2:22-CV-02113-KJM-AC

**PLAINTIFF'S ALAN MILLER'S
ERRATA TO
MOTION FOR SUMMARY JUDGEMENT**

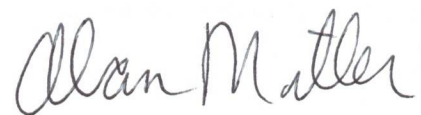
16
17 Plaintiff Alan Miller submits this Errata to my Motion for Summary Judgment filed with
18 the court on July 24, 2023, consisting of typographical errors, stray words, missing reference, *etc.*,
19 in order of appearance following additional proofreading.

- 20 1. Table of Contents, page 2, line 13: change "Incomple" to "Incomplete."
- 21 2. Page 4, line 24: delete superscript "i."
- 22 3. Page 9, line 2: change "September 22" to "September 28."
- 23 4. Page 10, line 14.5: change "Incomple" to "Incomplete."
- 24 5. Page 10, line 26: delete "is."
- 25 6. Page 11, line 24: "Their" should be lower-case "their."
- 26 7. Page 12, line 11: change "deliniation" to "delineation."
- 27 8. Page 13, line 3: change "egregiousness" to "egregious."
- 28 9. Page 15, line 22: add "which is" before "improper."

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- 10. Page 16, line 2: close quote after "FOOTING," and remove quotation mark after "data."
- 11. Page 18, line 5: add a period after "penalty."
- 12. Page 19, line 12: change "cite pp" to "p. 30."

DATED: July 26, 2023



Alan Miller

PO Box 7526
South Lake Tahoe CA 96158
(530) 542-0243
Plaintiff, in propria persona