

**ORIGINAL
FILED**

OCT 20 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

**OPPOSITION TO CROSS-MOTION FOR
SUMMARY JUDGMENT**

AND

**REPLY TO OPPOSITION MOTION FOR
SUMMARY JUDGMENT**

1

2 **TABLE OF CONTENTS**

3

4 **I. INTRODUCTION TO THE TRPA RABBBIT HOLE**

5 **II. VIOLATIONS OF LAW**

6 **A. AGENCY REGULATIONS THAT VIOLATE STATUTE**

- 7 1. Agency Regulations Contrary to Compact Law Are Invalid
- 8 2. Regulations That Illegally Delegate Governing Board Authority To Executive
- 9 Director And Hearing Officers For Variance And Permit Approvals
- 10 3. How The Regulations Disenfranchise The Public And Violate Civil Rights To Due
- 11 Process And Equal Protection
- 12 4. Regulations Omit Reference To Variance and Approval Requirements Germane
- 13 To This Case

14 **B. AGENCY ACTIONS THAT VIOLATE STATUTE OR REGULATIONS**

- 15 1. Violations Of Mandatory Administrative Requirements Are A Prejudicial Abuse
- 16 Of Discretion, As Defined By The Compact
- 17 2. Prime Examples Of Violations In The AR And My Court Filings; A Non-
- 18 Exhaustive Listing
- 19 3. TRPA Has Not Taken “Final Action” on the Variance Application Or The
- 20 Variance Appeal
- 21 4. Public Notice Requirements Are Unmet
- 22 5. Certified Administrative Record Is Incomplete: No Audio Recording
- 23 6. TRPA Staff Approved A Variance To The Prohibition Protecting Ground Water
- 24 From Unnecessary Interference, Contrary To TRPA Assertions
- 25 7. TRPA Prejudicially Abused Its Discretion In Accepting And Relying On The Soil
- 26 Profile To Ensure Prevention Of Groundwater Interference
- 27 8. TRPA Prejudicially Abused Its Discretion By Approving Land Coverage In
- 28 Excess Of Limitations

- 1 9. TRPA’s General Stratagem For Prejudicial Abuse Of Discretion Under The Illegal
2 Rules It Devised; Evade Review and Repeat

3
4 C. CONSEQUENCES OF AGENCY VIOLATIONS

- 5 1. Demonstration of Injury and Standing Through Zone of Interest Violations
6 2. Demonstration Of Injury And Standing From Due Process Violations
7 3. Concepts Of Property And Liberty Related To Violations Of Due Process And
8 Equal Protection Rights

9
10 **III. JUDICIAL REVIEW STANDARDS IN THIS CASE**

- 11 A. OVERVIEW OF APPLICABLE LAW
12 B. APPLICABILITY OF STANDARDS
13 C. DEFERENCE TO TRPA IS OFTEN UNWARRANTED

14 **IV. CONCLUSION**

1 **TABLE OF AUTHORITIES**

2

3 **Statutes**

4 Federal Laws

5

6 Statutes

7 Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

8 Clean Water Act, 33 U.S.C. §§ 1251–1387

9 Endangered Species Act, 16 U.S.C. §§ 1531-1544.

10 Bald and Golden Eagle Protection Act, §§ 16 U.S.C. 668-668d

11 Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712

12 National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m

13 Tahoe Regional Planning Compact, PUBLIC LAW 96-551 – DEC. 19, 1980, 94

14 STAT. 3233

15

16 Rules of evidence and procedure

17 F. R. Evid. R. 201.

18 State Laws

19 California Constitution Art. I

20 Statutes

21 California Civil Code §§ 3509-3548

22 California Government Code § 65906

23 Rules of evidence and procedure

24 California Code of Civil Procedure §§ 1858, 1859, & 1866

1
2
3
4
5 **Cases**

6 Federal

- 7
- 8 • U.S. Supreme Court
 - 9 *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)
 - 10 *Alabama v. North Carolina*, 560 U.S. 330 (2010)
 - 11 *Auer v. Robbins*, 519 U.S. 452 (1997)
 - 12 *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994)
 - 13 *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984)
 - 14 *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986)
 - 15 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)
 - 16 *Collins v. Texas*, 223 U.S. 288 (1912)
 - 17 *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938)
 - 18 *Com. of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1851)
 - 19 *Crowell v. Benson*, 285 U.S. 22, 62 (1932)
 - 20 *Cuyler v. Adams*, 449 U. S. 433, 438 (1981)
 - 21 *De Martinez v. Lamagno*, 515 U.S. 417 (1995)
 - 22 *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 608 (2013)
 - 23 *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994)
 - 24 *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)
 - 25 *Evans v. United States*, 504 U.S. 255 (1992)
 - 26 *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 540 (2009)
 - 27 *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007)
 - 28 *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021)

1 *Hecht Co. v. Bowles*, 321 U.S. 321 (1944)
2 *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994)
3 *Hooper v. California*, 155 U.S. 648, 657 (1895)
4 *INS v. St. Cyr*, 533 U.S. 289, 299-300 n.12 (2001)
5 *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)
6 *Kleppe v. New Mexico*, 426 U.S. 529 (1976)
7 *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979)
8 *Low Wah Suey v. Backus*, 225 U.S. 460 (1912)
9 *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 n.23 (1989)
10 *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997)
11 *Miller v. French*, 530 U.S. 327, 336 (2000)
12 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 321 (1950)
13 *Murphy v. Hunt*, 455 U.S. 478 (1982)
14 *New York v. New Jersey*, 598 U.S. 218 (2023)
15 *Paul v. U.S.*, 371 U.S. 245 (1963)
16 *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982);
17 *Service v. Dulles*, 354 U.S. 363, 388 (1957)
18 *Stanley v. Illinois*, 405 U.S. 645 (1972)
19 *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 627 n.8, 628 (2013)
20 *Terrace v. Thompson*, 263 U.S. 197, 216-217 (1923)
21 *T-Mobile South, LLC v. City of Roswell, Ga.*, 574 U.S. 293 (2015)
22 *U.S. v. Larionoff*, 431 U.S. 864, 873 (1977)
23 *U.S. v. Morrison*, 529 U.S. 598 (2000)
24 *U.S. v. Nixon*, 418 U.S. 683, 695 (1974)
25 *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996)
26 *United States v. Palomar-Santiago*, 141 S.Ct. 1615 (2021)
27 *Virginia v. Maryland*, 540 U.S. 56, 66 (2003)
28 *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959)

1 *Weinstein v. Bradford*, 423 U.S. 147 (1975)

2 *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940)

3 *Wilkinson v. Austin*, 545 U.S. 209 (2005)

4
5 • Federal Courts of appeals

6 *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008)

7 *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1050 (9th Cir. 2014)

8 *Barnes v. Fed. Aviation Admin.*, 865 F.3d 1266, 1269 (9th Cir. 2017)

9 *BNSF Railway Company v. Clark County, Washington*, 11 F.4th 961 (9th Cir. 2021)

10 *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001)

11 *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015)

12 *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009)

13 *Center For Biological Diversity v. Lohn*, 511 F.3d 960 (9th Cir. 2007).

14 *Credit One Bank, N.A. v. Hestrin*, 60 F.4th 1220, 1231 (9th Cir. 2023)

15 *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155–56 & n.34 (9th Cir. 2010)

16 *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977)

17 *Ka Makani ‘O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002)

18 *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002)

19 *Monex Int’l, Ltd. v. Commodity Futures Trading Comm’n*, 83 F.3d 1130, 1133 (9th Cir. 1996)

20 *National Parks Conservation Ass’n v. E.P.A.*, 788 F.3d 1134 (9th Cir. 2015)

21 *Natural Resources Defense Council v. U.S. EPA*, 31 F.4th 1203, 1207 (9th Cir. 2022)

22 *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004)

23 *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005)

24 *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001)

25 *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017).

26 *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 539 (7th Cir. 2005)

27 *Sierra Club v. Tahoe Regional Planning Agency*, 840 F.3d 1106 (9th Cir. 2016)

28 *Suzy’s Zoo v. Comm’r*, 273 F.3d 875, 878 (9th Cir. 2001).

1 *Swords to Plowshares v. Kemp*, 423 F.Supp.2d 1031 (9th Cir. 2005)

2 *United States v. Able Time, Inc.*, 545 F.3d 824, 836 (9th Cir. 2008)

3 *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002)

4 *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984)

5 *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995)

6
7 • Federal District Court

8 *Central Sierra Environmental Resource Center v. Stanislaus*, 304 F.Supp.3d 916 (E.D. C.A.
9 2018).

10 *City of South Lake Tahoe v. Tahoe Regional Planning Agency*, 664 F.Supp. 1375 (E.D. CA.
11 1987)

12 *ForestKeeper v. Elliott*, 50 F.Supp.3d 1371 (E.D. C.A. 2014)

13 *Lake Tahoe Watercraft Recreation Ass'n v. TRPA*, 24 F.Supp.2d 1062, 1068 (ED. CA. 1998)

14 *McElmurray v. U.S. Dep't of Agric.*, 535 F. Supp. 2d 1318, 1325 (S.D. Ga. 2008)

15 *Stephans v. Tahoe Regional Planning Agency*, 697 F.Supp. 1149 (D. Nev. 1988)

16 *Western Watersheds Project v. Bureau of Land Management*, 971 F.Supp.2d 957 (E.D. C.A.
17 2013)

1 State Court

2 • Supreme Court of California

3 *Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 540 (1990)

4 *Sharon v. Sharon*, 75 Cal. 1 (1888)

5 *Today's Fresh Start, Inc. v. L.A. Cnty. Office of Educ.*, 57 Cal.4th 197, 212-213 (2013)

6 *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 517 (1974)

7
8 • California Courts of Appeal

9 *Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1183 (1996)

10 *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal.App.4th 997
11 (2007)

12
13 Other Authorities and References:

14 Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 480
15 (1988)

16 Plaintiff's Reply And Opposition To Defendant TRPA's Opposition To Plaintiff's Motion To
17 Supplement The Administrative Record p.6.

I. INTRODUCTION TO THE TRPA RABBIT HOLE

Plaintiff adopts by reference all prior pleadings, motions, and exhibits (Fed. R. Civ. P. 10(c)). Pursuant to Fed. R. Civ. P.7(a)(4), Local Rule 261(d), Judge Claire’s Standing Orders, the June 8, 2023 Order, and the August 30, 2023 Stipulation and Order to Extend Summary Judgment Deadlines, Plaintiff Alan Miller submits this Reply and Opposition (REPO) motion against Defendant Tahoe Regional Planning Agency’s (TRPA) Combined Opposition to Plaintiff’s Motion for Summary Judgment and Cross-Motion for Summary Judgment (OSJ or ECF 35). See the Tahoe Regional Planning Compact (Compact) Art. I(a), esp. (1) – (7), and (10). See esp. Art.(c) from which this litigation stems based on the administrative record (AR, ECF 22, 23).

Briefly characterizing ECF 35, sophistry throwing dust in the eyes of the court, the Defendant proposes a model for judicial review which would grant it wide deference and discretion while eviscerating any court review discretion. Herein I will prove beyond dispute that TRPA has enacted illegal regulations that subvert the Compact and is running roughshod and lawlessly over the public in abandonment of its charter through TRPA *following* illegal rules it has enacted, as well as *deviating* from them in bad faith. These violations have resulted in personal injury to the liberties and legitimate interests of me and others through deprivations of rights, and injury to the environment of the Lake Tahoe region which I hold sacred. This case will take a strange turn based on additional research and findings that support summary judgment in my favor.¹ The court has the opportunity and duty to strike down the illegal regulations and restore Lake Tahoe and the region by restoring the rule of law. The future of Lake Tahoe and protection of its precious values, beyond measure, is literally in your hands.

II. VIOLATIONS OF LAW

A. AGENCY REGULATIONS THAT VIOLATE STATUTE

1. Agency Regulations Contrary to Compact Law Are Invalid

It is a settled matter of law that an agency can’t adopt and implement regulations that subvert its organic statute and the will of the enactor(s).² In view of its longstanding, ongoing implementation of illegal regulations the court should grant no deference to TRPA in this case, nor bow to its discretion. I implore the court to strike down the invalid regulations, invalidate the approval of the tower and provide remedy through special master oversight of TRPA.

¹ With my unexpected discovery of the regulations in violation of the Compact, my prior Motion for Summary Judgment (MSJ) and Motion to Supplement the Administrative Record (MSAR) must be reinterpreted somewhat by the court, granting me deference concerning such things as the serial judicial review model I discussed at MSJ p.2,7-p.3,14. The fact that TRPA doesn’t follow such a process under the illegal regulations bolsters discussions herein of concepts of violations of basic civil rights through faulty regulations.

² *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 608 (2013) (Regulations, in order to be valid, must be consistent with the statute under which they are promulgated; Case becomes “moot” only when it is impossible for a court to grant any effectual relief whatever to the prevailing party); *U.S. v. Larionoff*, 431 U.S. 864, 873 (1977) (In order to be valid, regulations must be consistent with the statute under which they are promulgated); *Credit One Bank, N.A. v. Hestrin*, 60 F.4th 1220, 1231 (9th Cir. 2023) (Agency regulation can’t trump Supreme Court or Congress).

1 Illegal delegation is a clear abuse of discretion that disenfranchises the public in this way: While the Compact sets the
2 expectation that approving a “variance” or “project permit” requires a recorded vote from the Board members (BM)s, which
3 must occur at a noticed public meeting with a published agenda, the regulations dispense with all of that for adopting *most*
4 variances and project approvals, with TRPA processing upwards of 1,000 permits annually in recent years, tens of thousands of
5 approvals over the decades. Under the regulations TRPA adopted for itself, all required public participation is precluded unless a
6 costly appeal is filed and a hearing is granted. It is under these illegal rules that TRPA claims no public noticing of the variance
7 approval was required for the variance approval (AR1587), disenfranchising the appellants and the public in general.

8 2. Regulations That Illegally Delegate Governing Board Authority To Executive Director And Hearing Officers For 9 Variance And Permit Approvals

10 At the Appeal I said I I don’t agree with the voting procedure is in accord with the Compact.”³ Art.III(g) provides voting
11 procedures that are at issue in this case. For approving “variances” from the Code, Art.III(g)(1) is specified, while Art.III(g)(2)
12 provides voting procedures for project approvals. A “vote” may only occur on an application for a variance or project by placing
13 the matter on an agenda for a public meeting of the Governing Board (GB) with a public notice as required, and opportunity to
14 comment on the variance or project application and otherwise participate in the public meeting concerning the matter, with the
15 “vote” following that.

16 Decades ago, TRPA adopted its Code of Ordinances (COO) and Rules of Procedure (ROP) (jointly, agency-adopted
17 regulations, or simply regulations herein) with provisions contrary to the Compact for issuing approvals of variances and
18 projects. These illegal regulations assign the Executive Director (ED) and the Hearings Officer (HO) the discretionary authority
19 to issue variances and project approvals in the absence of a “vote” by the BMs at a GB meeting. Any such exercise of authority
20 is contrary to Compact delegation clauses⁴ and illegal and therefore a prejudicial abuse of discretion.

21 In enacting and implementing the regulations TRPA deprived the people of all their fundamental civil rights appurtenant
22 to a BM “vote” in the absence of an Appeal hearing, which I complained of bitterly in my Notice of Appeal’s (NOA) affidavit
23 (AR0748). While the adoption of these regulations was likely done for agency efficiency⁵ undreamt of by the enactors, the result
24 is a regulatory scheme contrary to Compact law that deprives the public, myself included, of its fundamental civil rights to
25 address the BMs at a duly noticed public meeting, and eliminates prescribed BM vote recording concerning approvals of

26 ³ See AR3414. TRPA audio recording at 2 hours, 51 minutes, *available at* <https://www.trpa.gov/2022/09/?cat=9>.

27 ⁴ Art.X., (b) and SEC 4.

28 ⁵ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (the Constitution recognizes higher values than speed and efficiency; the Bill of Rights in general, and the due process clause in particular, were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency and efficacy...).

1 proposed variances and project permits, in the absence of an appeal filing and payment of a non-trivial fee (currently over
2 \$1,200) for all illegally delegated approvals not exempt from regulation. The TRPA regulations are riddled with inconsistencies
3 with the Compact in all categories of projects not exempt from permit requirements, as well as for variances from the ordinances
4 in the COO.

5 The following regulations contain illegal delegations that are contrary to the Compact’s “vote” requirements and are
6 therefore invalid.⁶ From the COO: 2.2.2., A.2 - C.2, E.2., F.2 & G. The absence of D.2. for “Public Service” facilities is highly
7 significant because the COO provides no support for the decisions from: (1) the HO Appeal hearing for the Project held in
8 October 2021; and (2) the March 2022 Governing Board (GB) Appeal hearing that followed it. The court should give these
9 decisions no deference and vacate them, together with these regulations. Also, COO 2.2.3. From the ROP: 13.9.; 5.16. (except
10 as applies to “exempt” activity); 5.17. (applicable to ED); 5.20.; 6.21.; 9.19.5. – 9.19.7.; 10.6.2.; (appeals) 11, 11.1., 11.2.; 11.5.,
11 11.6.; 12.7.2.; & 14⁷. All of these regulations inconsistent with the Compact were enacted with a prejudicial abuse of discretion
12 as defined by the Compact.

13 By its use of dual “final action” language in the regulations contrary to the intent of Congress and the states, in the absence
14 of an appeal on a variance or project approval by the ED or HO, the approval currently stands in fact and legally (improperly) as
15 a “final action” for all purposes under the regulations—but not under the Compact requirements for any project or variance.
16 TRPA chose to call its delegated approvals “final action” in the regulations because that is precisely what they are (functionally)
17 after the 21-day appeal period has passed. Then, TRPA invokes limitations that bar further appeals or litigation as untimely on
18 the delegated “final action,” thereby depriving applicants, the general public and appellants of their due process rights for redress.
19 Therefore, the delegated approval functions to constitute “final action” under the operation of law for the vast majority of
20 variances and permits.⁸

21 3. How The Regulations Disenfranchise The Public And Violate Civil Rights To Due Process And Equal Protection

22 With no cost to attend and participate in a public meeting and adjudication of a variance request or project approval,
23 TRPA charges a fee currently in excess of \$1,200 to appeal a decision of the ED or HO and request a hearing before the GB, a
24 sizeable sum meant to chill public input and exercise of due process liberties, rights and privileges. No fee paid, no appeal. If an

25 ⁶ These are the regulations I am aware of that are inconsistent with the Compact. To quote them would far exceed my brief page limit. Nearly all bear
26 directly on, or flow from, this Project or case. The following are included, as follows, for completeness. COO 2.5. & 2.6. are suspect concerning
27 interagency agreements and illegal delegations *sans* review (see ROP 13.9.2.); and all of COO 53 is suspect, esp. 53.6.4. & 53.6.5; ROP 5.14 (applicable
28 to ED).

⁷ I pointed out regulatory inconsistencies TRPA did not address in MSJ 16; 9.

⁸ The Compact does not allow that the ED or HO can approve a variance or project just because it’s not appealed. ALL such approval authority over
variances and projects was vested with the GB through voting at its public meetings, with TRPA charged to follow the law Congress established.

1 appeal is filed, TRPA can then proceed with justifications post-hoc to the staff approval and disenfranchise its detractors at a
2 subsequent appeal hearing, as in this case. The first essential of environmental review is notice and public involvement.⁹ By
3 dispensing with public notice,¹⁰ TRPA thwarts the public's opportunities to participate in decision-making processes¹¹ prior to
4 the staff's so-called "final action" when the opportunity to freely address the GB orally or in writing pre-approval is a liberty the
5 public must freely enjoy under the Compact and is deprived of by the regulations.

6 4. Regulations Omit Reference To Variance and Approval Requirements Germane To This Case

7 Art.III(g)(1) refers to "variances from the ordinances" whereas relevant TRPA regulations refer to "exceptions" and
8 "exemptions" throughout the COO and ROP, not "variances." TRPA has no means to approve a "variance" under its
9 regulations, yet does so routinely with these functionally equivalent words for TRPA (and court) purposes. The "exception"
10 approval given August 5, 2022 for the deeper excavation under COO 33.3.6. must therefore constitute a "variance" approval for
11 the Project variance to impact groundwater resources (henceforth "Variance").

12 B. AGENCY ACTIONS THAT VIOLATE STATUTE OR REGULATIONS

13 1. Violations of Mandatory Administrative Requirements are A Prejudicial Abuse of Discretion As Defined by the
14 Compact¹²

15 This entire Variance approval, Plan Revision approval, and Appeal proceeding was an illegal sham, a miscarriage of
16 justice carried out under color of law, and the approval issued by the GB in a manner contrary to law through the Appeal denial
17 must also be overturned as a matter of law and a prejudicial abuse of discretion.

18 2. Prime Examples Of Violations In The AR And My Court Filings; A Non-Exhaustive Listing

19 The actions in the header above could fill a volume in this action alone. There is little need to repeat the findings of my
20

21 ⁹ *ForestKeeper v. Elliott*, 50 F.Supp.3d 1371, 1377 (E.D. C.A. 2014) (Council on Environmental Quality (CEQ) regulations mandating public
22 involvement in preparing environmental assessment (EA) and diligent efforts to involve the public in preparing and implementing NEPA procedures are
substantive rules whose violation may invalidate an agency action).

23 ¹⁰ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 321 (1950) ("Publication may theoretically be available for all the world to see, but it is
24 too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked
away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let
fiction deny the fair play that can be secured only by a pretty close adhesion to fact.'").

25 ¹¹ It becomes the task of the public to track down unnoticed applications and staff approvals, through TRPA's complex online application tracking
26 systems; catch us if you can, and it will cost you. It does not publish lists of applications received and approved by staff in a readily-accessible online
format, preferring to do its work for the public in the dark. One must have specific Project information to look up a project or variance application.
Chilling.

27 ¹² *U.S. v. Nixon*, 418 U.S. 683, 695 (1974) (so long as regulation was extant, it had force of law, Executive Branch was bound by it, and United States as
28 sovereign composed of three branches was bound to respect and enforce it); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (objecting to
administrative body's "failure to exercise its own discretion, contrary to existing valid regulations"); *Service v. Dulles*, 354 U.S. 363, 388 (1957)
("Secretary...could not, so long as the Regulations remained unchanged, proceed without regard to them"); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40
(1959) ("Secretary...was bound by the regulations which he himself had promulgated").

MSJ and MSAR. For the sake of brevity, these are examples about which more can be written.

Complete application requirements are unmet (see ROP 5.2.1–5.2.8 concerning requirements for a complete application). The regulations are nondiscretionary as to what must be provided for a complete application. Only the *contents* of the elements may be reviewed with discretion to determine if the requirements are met. This goes for all application elements, including many TRPA did not obtain prior to “final action” by the staff (see AR2979 & AR3399-AR3400 for discussion).

Environmental review requirements are unmet (see MSJ 10:14-11:13). TRPA cites inapplicable regulations (OSJ 17:7-9; see AR2970 & MSJ 10:6-13). There was no environmental document or review of any kind in the AR and therefore nothing to “supplement”, as I discussed. The Compact’s purpose is to ensure that TRPA takes a “hard look” at environmental consequences of its proposed actions before deciding to proceed on a project,¹³ and probable environmental consequences of a project when brought to its attention by the public, and did not. Environmental law mandates public involvement and diligent efforts to involve the public in preparing implementing environmental review procedures.¹⁴ For meaningful consideration during the environmental review process, an issue need be raised using precise legal formulations, as long as enough clarity is provided that a decision maker understands the issue.¹⁵ TRPA may not defer consideration of these consequences to a later date, and the Compact requires consideration of potential impact before action takes place.¹⁶ TRPA has no programmatic environmental impact statement (EIS) or other document to satisfy its obligations under the Compact for this site-specific Project.¹⁷ TRPA cannot ignore cumulative impacts¹⁸ from multiple revisions of the same project, or multiple similar projects, and may not piecemeal a project into multiple actions, as here, to duck just below the threshold of more stringent environmental review.¹⁹ These concepts refute TRPA’s contentions on Claims 1 (OSJ I.C.1.) and 9 (OSJ 18:18), and Claims 4, 6 & 7 at OSJ 16:8, 16:22, 17:3-5 & 17:23, respectively. There is a cause of action facially created under the Compact’s judicial review provision where any aggrieved person may stand to sue with its zone of interests whenever TRPA violates its rules or does not proceed in a manner

¹³ *ForestKeeper v. La Price*, 270 F.Supp.3d 1182, 1211 (E.D. C.A., 2017) (NEPA’s purpose is to ensure that agencies take a “hard look” at the environmental consequences of their proposed actions before deciding to proceed).

¹⁴ *Id.* See also, *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (Interpretation of NEPA by Council on Environmental Quality is entitled to substantial deference); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 355-356 (1989) (Forest Service could rely on Council on Environmental Quality regulation).

¹⁵ *Protect Our Communities Foundation v. LaCounte*, 939 F.3d 1029, 1037 (9th Cir. 2019).

¹⁶ *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998).

¹⁷ *Supra* note 15.

¹⁸ 40 C.F.R. §§ 1501.3(b), 1501.9(e)(1), & 1508.25(a)(2) (“Cumulative impacts” are those impacts “that result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency...or person undertakes such other actions”).

¹⁹ *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002) (“connected,” “cumulative” and “similar” agency actions must be considered together in single review document to prevent agency from dividing project into multiple actions, each of which individually has insignificant environmental impact, but which collectively have substantial impact); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990) (NEPA requires that where several actions have cumulative or synergistic environmental effect, that consequence must be considered together in environmental review).

1 required by law.

2 When new information later shows that the remaining action will affect the quality of the human environment in a
3 significant manner or to a significant extent not already considered, TRPA must supplement its environmental review to
4 document the agency's "hard look" at new information.²⁰ TRPA didn't consider the information prior to the staff approval,
5 evaluating its impact, and supporting its decision not to supplement with a statement of explanation or additional data. TRPA is
6 barred from now supplementing environmental review to analyze information the agency knew at the time it failed to conduct
7 the original environmental review.²¹ New information may alter results of its original environmental analysis, and TRPA must
8 continue to take hard look²² at environmental effects of its planned action, especially when it's sufficient to show that remaining
9 action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.²³
10 The AR demonstrates that TRPA systematically failed to act under this duty as required by law, which is a prejudicial abuse of
11 discretion *per se*.

12 TRPA failed to take a hard look at Project impacts on endangered and threatened wildlife in violation of environmental
13 review procedures, which invalidates agency action. On multiple occasions throughout the approval process, the public raised
14 numerous issues with enough clarity that TRPA understood the issues raised. The information provided included peer-reviewed
15 scientific literature on specific impacts of the Project to human health, flora and wildlife.²⁴ It also included information about
16 wildlife sightings in the Project vicinity.

17 TRPA ignored multiple reports that the federally endangered Sierra Nevada Yellow-Legged Frog²⁵ may be living in the
18 nearby stream environment zones and could be affected by the Project (AR2900-AR2964 & AR2788-AR2853).²⁶ TRPA failed
19 to respond to a photographic report of this species sighted less than 500 feet from the Project (AR2954-AR2956 & AR2843-
20

21 ²⁰ *Supra* note 13.

22 ²¹ *Id.*

23 ²² *Cf., Conservation Congress v. Finley*, 774 F.3d 611, 621 (2014) (Courts employ a rule of reason to decide whether an environmental review contains a
reasonably thorough discussion of the significant aspects of probable environmental consequences, as required by NEPA; this standard is considered
essentially the same as the standard of abuse of discretion, and the court's analysis under it consists of insuring that the agency took a hard look at the
environmental impacts).

24 ²³ *Supra* note 15.

25 ²⁴ New information may combine with prior information provided by public to trigger probable harm to wildlife and fauna. Prior information is *available*
at https://tahoeregionalplanning-my.sharepoint.com/:f/g/personal/gbalkwell_trpa_org/Eq84iynlGG5MkXinedlYKAIBBqwijVBTJCJC3hghCs5uxQ?e=X8HsS7. "Judicial notice is
appropriate for records and reports of administrative bodies" (*United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th
Cir. 2008)).

27 ²⁵ 50 CFR § 17.11(h) ("The 'List of Endangered and Threatened Wildlife' is provided in the table in this paragraph. . . Common name[:]
Frog, Sierra Nevada yellow-legged | Scientific name[:]
Rana sierra | Where listed[:]
Wherever found | Status[:]
E[ndangered] | Listing citations and applicable rules[:]
79 FR 24255, 4/29/2014; 50 CFR § 17.95(d). CH").

28 ²⁶ I mentioned my own concern about the impact of the project, on *inter alia*, "frogs" (*E.g.*, AR0743, AR1320, AR 1604, & AR2748).

1 AR2845).²⁷ This is outrageous in light that the Tahoe region contains critical habitat for the Sierra Nevada Yellow-Legged
2 Frog²⁸ yet, for over a decade, TRPA has refused to even acknowledge this fact by including the species in its Environmental
3 Threshold Carrying Capacities²⁹ for wildlife as mandated by the Compact. Because Congress consciously decided to give
4 endangered species priority over the “primary missions” of agencies under federal law,³⁰ TRPA did not have the discretion to
5 ignore this information³¹ or proceed with the Project without appropriate environmental review³²—which may have required
6 soliciting a biological opinion.³³ This abuse alone is grounds for the court to invalidate the Project approval.³⁴ Nor can it be said
7 that a “reasonable mind might accept” this particular evidentiary record as “adequate to support a conclusion”—that the project
8 risked no significant effect on the environment—as required under the “substantial evidence” standard of review.³⁵ That would
9 be incorrect.

10 Stay response requirements are unmet. In responding to the stay request, and passing on the opportunity to schedule a
11 public hearing at the next meeting (MSJ 8:11-12), all the Chair must do is wait for the arrival of the SOA to schedule the Appeal
12 hearing (ROP 11). There is no discretion. It was this failure to follow the law and premature illegal scheduling of the hearing that
13 showed bad faith, violated due process and caused prejudicial hardships in preparing and defending the Appeal on short notice,
14 not so much the illegal day-late response as TRPA misrepresents (OSJ 14:1-2).

15 3. TRPA Has Not Taken “Final Action” on the Variance Application Or The Variance Appeal

16 TRPA points out my SOA did not object to the voting procedure used and asserts I “therefore didn’t preserve the issue”
17 (CSJ 19:22 – 20:7). I disagree that the “error was harmless” (*id.*). I didn’t know what procedure would be used as the Staff
18 Report hadn’t been published. To refute TRPA’s assertion, I refer you to my testimony on p. 2, above, and AR3414.

19 TRPA held an Appeal Hearing on a “Plan Revision” approval in response to an Appeal filing against a variance approval.
20

21 ²⁷ See also, AR2748.

22 ²⁸ 50 CFR § 17.95(d); 81 FR 59045 59119, 59076, 59096, 59099 (08/26/2016) (“Designation of Critical Habitat for the Sierra Nevada Yellow-Legged
23 Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad; Final Rule”) (Subunits 2D & 2E).

24 ²⁹ Available at <https://www.trpa.gov/regional-plan/#thresholds>.

25 ³⁰ *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir.
26 2008).

27 ³¹ *Supra* note 13; see also, *Credit One Bank, N.A. v. Hestrin*, 60 F.4th 1220, 1231 (9th Cir. 2023) (An agency’s regulation cannot trump the Supreme Court
28 or Congress); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

29 ³² *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (“It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not
30 confer discretion to ignore the required procedures of decisionmaking”).

31 ³³ *United States Fish and Wildlife Service v. Sierra Club, Inc.*, 141 S.Ct. 777, 783-784 (2021). *Cf.*, 16 U.S.C. § 1536; 40 U.S.C. § 4332; 40 CFR §§
32 402.12, 402.13, 402.14, 402.16, 1502.24, & 1508.1.

33 ³⁴ *Natural Resources Defense Council v. U.S. E.P.A.*, 38 F.4th 34 (9th Cir. 2022) (When petitioners allege procedural violation, redressability prong of
34 standing is satisfied by showing that agency decision could be influenced by procedures at issue).

35 ³⁵ *Dickinson v. Zurko*, 527 U.S. 150, 162, 164 (1999) (a reviewing court reviews an agency’s reasoning to determine whether it is “arbitrary” or
36 “capricious,” or, if bound up with a record-based factual conclusion, to determine whether it is supported by “substantial evidence”)

See 25:8-11, where TRPA clarifies: “Moreover, the Plan Revision was not a ‘variance.’ The Compact limits a ‘variance’ to a ‘variance from the ordinances or rules and regulations. . . .’ Art. III(g)(1). . . .” This shows TRPA erroneously acted on an appeal to a Plan Revision when the fact is we appealed a variance. (AR0731-AR0755) TRPA’s introduction (OSJ 7:2) also misrepresents the facts. The Appeal was filed on the August 5, 2022 Interim Executive Director’s (IED) approval (AR0269) of a Variance to code prohibiting potential interference with a ground water table *in association with* an application for a proposed Plan Revision (COO 33.3.6). The Variance approval allowed the August 17, 2022, approval of the applicant’s “Plan Revision.”³⁶

Another interpretation the court must consider follows from TRPA conflating the Variance and Plan Revision approvals as one. The BMs were only required to vote on our Appeal application under Art.(g)(1) for the Variance. Each EID approval was separately issued as stated (CSJ 5:14 (Variance) and CSJ 5:24-25 (Plan Revision)). I was charged only one fee by TRPA when I filed my NOA concerning the Variance approval. Thus, TRPA charged me a filing fee under the ROP for my NOA on the Variance and gave me a product with multiple defects in breach of contract,³⁷ an Appeal hearing for a Plan Revision (voted accordingly). Since the BMs voted only once under Art.(g)(2), which is inapplicable to approval of a variance in any event, the presumed hearing and denial of the Variance Appeal must be set aside as a matter of law and a prejudicial abuse of discretion as a vote on the Plan Revision.³⁸

4. Public Notice Requirements Are Unmet

No public notice was issued for Appeal hearing in compliance with ROP 12. TRPA published an agenda on its website a week prior to the Appeal hearing, but the ROP does not reference online publication of the meeting agenda as a valid means to meet applicable noticing requirements for meetings and agency actions. The AR provides no evidence whatsoever that TRPA provided any valid public notice for the Appeal hearing³⁹ as required by law, including to the co-appellants and other nearby property owners.⁴⁰ There’s also no AR evidence of public notice for a Variance approval hearing.

5. Certified Administrative Record Is Incomplete: No Audio Recording

ROP 5.21 states: “TRPA shall maintain. . .the official tape recordings of any relevant Hearings Officer, Advisory Planning Commission, or Board meetings.” This improperly omits the Legal Committee meetings (*see* ROP 10.6.1.D.) which

³⁶ TRPA confusingly conflated the two as one throughout the proceedings (as here), with the latter issued without my awareness only five days prior to my NOA filing. I was reviewing the revised plans and information from the Project applicant online in preparing my NOA, filed August 22, 2022 for the variance approval that enabled the Plan Revision approval and the attendant unexamined adverse environmental effects I commented on in my NOA and SOA. I didn’t cite the Plan Revision approval date in my NOA because I didn’t know of it.

³⁷ *Infra* note 93.

³⁸ The August 5, 2023, Variance approval was timely appealed, and no “final action” has been taken on it. Despite these facts, TRPA’s errors have enabled construction and operation of the macrotower at 1360 Ski Run Boulevard.

³⁹ These facts hold for the Project appeals before the HO in March 2022 and the GB in March 2023.

⁴⁰ I concede that no noticing of the August 5, 2022, Variance approval was required under the illegal rules of the ROP.

1 indicates the judicial AR “may” contain “relevant” hearing audio recordings, in conflict with the mandatory “shall” of ROP 5.21
2 concerning this public record. TRPA possesses existing online audio recordings (digital format) of the Appeal and Legal Review
3 Committee hearings of September 28, 2022 which are not in the certified AR under bad-faith TRPA discretionary abuses, which
4 may entitle us to “adverse inference” over contents of hearing transcript.⁴¹ These egregious omissions further support my MSJ
5 and MSAR.⁴² Because there is no audio recording or transcript of the Legal Review Committee and GB Appeal hearings in the
6 certified AR, TRPA is unable to substantiate any of its GB decision-making process leading to its denial. The court should not
7 any give any deference to TRPA.

8 6. TRPA Staff Approved A Variance To The Prohibition Protecting Ground Water From Unnecessary Interference,
9 Contrary To TRPA Assertions

10 TRPA begins III.C. with a claim that it did not approve a Variance⁴³ under COO 33.3.6.A.2. based on TRPA’s sole
11 finding: “[i]t is not expected that groundwater will be encountered in this location...” The Defendant’s proposition here that no
12 variance was given is a litigation position change warranting no deference,⁴⁴ and contrary to the fact that TRPA issued the
13 Variance (see my discussion of the applicable regulations at AR 1646-1647). Summarizing that, COO 33.3.6.A.1. & B. set forth
14 the prohibition and the soils-hydrology report requirement if there is a “reasonable possibility” for groundwater table interference
15 (AR1605, AR1632 & AR2977). TRPA required a soils-hydrology report to cover that reasonable possibility, accepted a “soil
16 profile” report in lieu of that and found only, “[i]t is not expected that groundwater will be encountered.” “Not expected” is
17 different than no “reasonable possibility,” which the Code requires protection against. Then TRPA did a very illogical thing:
18 TRPA issued a Variance, “excavation is allowed,” citing two criteria (neither valid) to allow groundwater interference, with no
19 supporting findings. TRPA’s contention that it didn’t approve a Variance is specious and without merit.

20 TRPA granted an exemption for any potential groundwater interference to illegally “accommodate” the client’s chosen
21 design. TRPA later marshaled one-sided evidence to support its contentions that the tower serves public safety and health while
22 ignoring all science and evidence to the contrary without acknowledgment, including threat of fire (AR3058) and collapse from
23

24 ⁴¹ See, e.g., *Butler v. Department of Homeland Security*, EEOC Appeal No. 07200900010 (5/27/10) (upholding an administrative judge’s drawing of
adverse inferences against the agency due to its failure to produce work assignment logs and its records retention policy).

25 ⁴² While the court may not consider them to support TRPA, it could sanction TRPA, make adverse inference from its failure to provide them, or demand a
certified, unabridged copy of recordings by separate order to supplement the incomplete AR it improperly certified as complete. Uncertified recordings
available at: <https://www.trpa.gov/2022/09/?cat=9>.

26 ⁴³ See generally, California Government Code § 65906 on application of variances to zoning regulations.

27 ⁴⁴ No deference warranted where agency is merely advancing litigation position, not an official interpretation of its regulation (*Kisor v. Wilkie*, 139 S. Ct.
2400, 2417 (2019) (“a court should decline to defer to a merely convenient litigating position”); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559
28 (9th Cir. 1995); see also, *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155–56 & n.34 (9th Cir. 2010); *United States v. Able Time, Inc.*, 545 F.3d 824,
836 (9th Cir. 2008); *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008)).

1 snow loads unconsidered (see AR2872 & AR3060). That does not accord with responsible action a reasonable mind might
2 accept in light of the whole record. TRPA's cherry-picking of the available safety and health data illegally distorted the facts to
3 disenfranchise the appellants in this case (example).

4 TRPA allowed the applicant to avoid the expense and trouble of producing a *bona fide* soils-hydro report, or any
5 vegetation protection report at all, nor did TRPA make any specific findings⁴⁵ for management of excess soils pursuant to COO
6 33.3.6.B.(1. - 3.) & 33.4.2.⁴⁶ With alleviating the hardship or burden of producing all of the reports required by law for
7 excavations deeper than five feet, the IED approved the Variance application in an abuse of discretion.

8 7. TRPA Prejudicially Abused Its Discretion In Accepting And Relying On The Soil Profile To Ensure Prevention 9 Of Groundwater Interference

10 Inferences can be drawn from the supplemental soil-hydrology reports. TRPA notes (OSJ 5:7-8) the Project permit's
11 Special Condition F, and that I didn't appeal the permit. That is inaccurate and irrelevant.⁴⁸ In II.B.4 (OSJ 6: 13) TRPA states:
12 "During the excavation, TRPA contracted with a Certified Professional Soil Scientist to observe the soil conditions and look for
13 signs of groundwater. AR1269-1271, 1362." This is a really a shameful admission that TRPA lacks the in-house expertise to
14 implement its own regulations for protecting groundwater tables from interference. TRPA had to hire an outside consultant to
15 make further field investigations for a qualified determination long after its staff's approval of the Variance. Groundwater
16 delineations require special scientific expertise or it wouldn't have hired the outside consultant, and TRPA lacked a staff
17 groundwater expert to testify at the Appeal hearing. It should therefore be granted no deference with regard to its groundwater
18 determination on the basis of agency expertise it lacks in light of the whole record.⁴⁹

19 If the "soil profile" TRPA relied on was in fact "substantial evidence" upon which to base a decision concerning potential
20

21 ⁴⁵ *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 517 (1974) (An administrative grant of a variance must be
22 accompanied by administrative findings. ... Party seeking variance must shoulder burden of demonstrating ... subject property satisfies requirements ...
23 neither administrative agency nor a reviewing court may assume without evidentiary basis that the character of neighboring property is different... A
24 change in nature of region is a proper subject for legislation, not piecemeal administrative adjudication by variance boards; Absent affirmative showing,
25 variance granted amounted to kind of "special privilege" explicitly prohibited by law; "whereas the adoption of zoning regulations is a legislative function,
26 the granting of variances is a quasi-judicial, administrative one. If the judiciary were to review grants of variances superficially, administrative boards could
27 subvert this intended decision-making structure... courts must meaningfully review grants of variances in order to protect the interests of those who hold
28 rights in property nearby the parcel for which a variance is sought. A zoning scheme, after all, is similar in some respects to a contract; each party foregoes
rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such
mutual restriction can enhance total community welfare").

25 ⁴⁶ "additional engineering, geologic... or other materials necessary to determine and evaluate project area conditions and the effect of the grading on
26 adjoining properties, public rights-of-way, and the public welfare."

26 ⁴⁸ I assisted in the appeal by Eisenstecken's appeal currently in litigation as a member of co-plaintiff Tahoe for Safer Tech. TRPA's motion to join these as
27 related cases was denied. In the NOA and affidavit I filed I didn't contest the permit as previously approved, so the relevance here escapes me.

27 ⁴⁹ This situation is, by specific analogy, like having the U.S. Army Corps of Engineers conduct the entire regulatory program related to discharges of
28 dredged or fill materials to waters of the U.S. under Clean Water Act section 404 without a single certified, qualified wetland (groundwater) delineator on
its staff. It's just absurd, as are TRPA's assertions about the soil profile constituting substantial evidence.

1 groundwater interference then all the TRPA consultant would have had to do is review the soil profile and make a determination
2 based on it. No qualified soil scientist would make such a claim. The consultant needed additional evidence not available before
3 the staff's Variance approval upon which to base a reasoned, scientific determination, and such evidence was primary, not
4 merely confirmatory of the soil profile prepared and approved by unqualified professionals. The staff's initial determination was
5 not supported by the soil profile method.⁵⁰

6 However, the defects happening at the staff level are pervasive and are capable of repetition, yet evading review.⁵¹
7 Consider: They don't follow their rules or make written determinations of fact and charge \$1,200 when challenged by an
8 appellant (me). Then they can hire outside experts and make post-hoc rationalizations to rectify defects, render prior defects
9 moot, and escape review, only to repeat the error for the next applicant. That's an abuse of discretion.

10 In refuting the inapplicability of *Daubert* (OSJ 18:9-15), to attempt to escape any review over its clearly erroneous finding
11 of fact, TRPA brazenly suggests that this court is without any power whatsoever to assess the agency's conclusory reliance on
12 junk science. However, it's well-settled that deference accorded an agency's scientific or technical expertise is not unlimited.⁵²
13 "'Junk science' has no more place in administrative proceedings than in judicial ones."⁵³ Contrary to TRPA's assertion, the spirit
14 of *Daubert* does apply to agencies acting under federal law.⁵⁴ This court may invoke the spirit of *Daubert* as a tool to assess
15 whether there was a prejudicial abuse of discretion in the use of the soil profile for determining hydrology.

16 8. TRPA Prejudicially Abused Its Discretion By Approving Land Coverage In Excess Of Limitations

17 TRPA asserts the court should give deference to its coverage determinations. However, the court must not credit arbitrary
18 and highly inaccurate calculations by TRPA and judicial deference is not warranted where the court is competent to decide the
19 issue.⁵⁵ TRPA's calculations were derived by computer magic with no work shown.⁵⁶ Calculations were unsubstantiated and

20 ⁵⁰ The fact the subsequent reports cured the defect is only afforded by illegal rules in the ROP to post-hoc substantiate that, in this case, ground water was
21 not affected.

22 ⁵¹ *Infra* note 61.

23 ⁵² *See, Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001); *Central Sierra Environmental Resource Center v. Stanislaus*, 304 F.Supp.3d 916, 928 (E.D.
24 C.A. 2018).

25 ⁵³ *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004) ("the spirit of *Daubert*...does apply to administrative proceedings... 'Junk science' has no more
26 place in administrative proceedings than in judicial ones").

27 ⁵⁴ *Id. See also, Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 539 (7th Cir. 2005) (invoking the "spirit" of *Daubert* to reason that nothing in experts'
28 curricula vitae indicated that they were unqualified); *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) (concluding expert should not have been
permitted to testify); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001) ("[a]n agency must act like an expert if it expects the judiciary to
treat it as one"); *McElmurray v. U.S. Dep't of Agric.*, 535 F. Supp. 2d 1318, 1325 (S.D. Ga. 2008) ("[w]hile *Daubert* does not apply to agency decisions in
any formal respect, the principles underlying that decision do apply" (citing *Pasha*, 433 F.3d at 535)).

⁵⁵ *National Parks Conservation Ass'n v. E.P.A.*, 788 F.3d 1134 (2015) (an agency must cogently explain why it has exercised its discretion in a given
manner); *Western Watersheds Project v. Bureau of Land Management*, 971 F.Supp.2d 957 (E.D. C.A. 2013) (Environmental review procedures require
agencies to ensure professional and scientific integrity, by setting forth the methodologies used and making explicit reference by footnote to the scientific
and other sources relied upon for conclusions); *Natural Resources Defense Council v. U.S. EPA*, 31 F.4th 1203, 1207 (9th Cir. 2022) (on review of agency
action, a court will not credit unsubstantiated or bare assumptions by an agency; A court does not credit arbitrary and highly inaccurate calculations by an

1 clearly erroneous; failure to make explicit methods used and numbers tabulated was a prejudicial abuse of discretion; the agency
2 must show its work.⁵⁷

3 TRPA's poor defense of its "cooked" coverage calculations during the Appeal hearing further erred through its entire
4 dismissal of my own expert coverage engineering analysis without support of any "specific, cogent reasons."⁵⁸ The court must
5 consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency's
6 decision.⁵⁹ The court is unable to do this because, with no audio recordings in the AR, the agency did not provide any reasons for
7 how it arrived at its conclusion aside from the SR and its erroneous information.

8 The Appeal decision on the excess coverage was not the outcome of a reasoned, logical thought process. I stand by MSJ
9 15:11-16:8. Summarizing: The AR shows the plans were approved in haste by a non-engineer. Electronic measurements were
10 used, computer-mouse "clicks" with no other staff verifying the plan checker didn't make errors and no AR of how the results
11 were obtained or checked. The planner couldn't understand my Exhibit 6 (AR1356) with my basic calculations shown, *e.g.*,
12 width multiplied by height and a scale conversion. She misunderstood a basic fact, writing the foundation was not coverage,
13 which was clearly erroneous. I'm a registered professional civil engineer with 25 years of plan-checking expertise. I showed all
14 the scales and views measured, all the math steps to my results.⁶⁰ TRPA didn't resolve the plan discrepancies showing excess
15 coverage. Though no Project plan with excess coverage is allowed by law, 11 of 12 BMs voted to deny the Appeal (see
16 AR2870-AR2871). Staff was prejudged as right to support a foregone conclusion without evidence: uphold the Project. The
17 illegal excess coverage decision was not a logical conclusion based on the facts such as a person of reasonable mind could
18 accept, let alone 11 of 12 minds, with no AR evidence to the contrary. The decision was a prejudicial abuse of discretion and
19 deserves no deference.

20 9. TRPA's General Stratagem for Prejudicial Abuse of Discretion Under the Illegal Rules It Devised; Repeat and
21 Evade Review

22
23 _____
agency); *Monex Int'l, Ltd. v. Commodity Futures Trading Comm'n*, 83 F.3d 1130, 1133 (9th Cir. 1996) (judicial deference not warranted where courts are
24 competent to decide the issue).

25 ⁵⁶ *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959) (the evidence used to prove the Government's case must be disclosed to the individual so that he has
an opportunity to show that it is untrue) (quoted by *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970)).

26 ⁵⁷ *Supra* notes 55 & 56.

27 ⁵⁸ See, *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (agency credibility determinations may be overruled when they are "not supported by
specific, cogent reasons").

28 ⁵⁹ *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017).

⁶⁰ *C.f.*, F. R. Evid. Rule 201(b) (the court may judicially notice mechanics of basic math which is not subject to reasonable dispute because it generally
known within the district court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be
questioned).

Coverage and soils-hydrology evaluation error are examples of errors that are capable of repetition, yet evading review.⁶¹ Here we see TRPA offering less than a scintilla of supporting evidence for coverage decisions in expectation of court deference. If someone lodges a costly appeal on a staff decision on a project coverage requirement, TRPA can attempt a post-decision remedy or bolster its case for the decision before the GB, right or wrong. If litigation follows, as here, TRPA stands on its judicial review requirements and, under its assertions, can often prevail in court—only to repeat the same behavior again and again.⁶² In the case of coverage for this Project, TRPA offered little if any evidence for its decision, being unnecessary under the deference it generally enjoys. The Variance approval for the Project worked similarly, but with TRPA using post-decisional studies to bolster its improper decision to rely on the soil profile. These are dirty tricks TRPA uses to cover and repeat errors and pre-textual ruses, violate civil rights, and evade review under the abuses it exploits.

C. CONSEQUENCES OF AGENCY VIOLATIONS

1. Demonstration of Injury and Standing Through Zone of Interest Violations

Residents living under TRPA jurisdiction have an expectation and interest that TRPA will fulfill its duties under the Compact, follow its own regulations, and administer the Regional and local area plans which mutually protect all residents from adverse changes to the character and scenic nature of the area,⁶³ and violation of this social contract inherently causes injury. Residents who live and or own real property under TRPA jurisdiction have property or liberty interests in the preservation of the Tahoe Region. I am such a resident and therefore am injured by violations arising under the TRPA Compact which by their very nature “degrade or degenerate” the quality of the environment which surrounds me. Any complained injury falling within the zone of interests sought to be protected by the Compact is enough to establish injury.⁶⁴ Interests conferring standing to sue may reflect aesthetic, conservational, recreational, or spiritual values as well as economic values, where Compact is concerned, trend is toward enlargement of class of people who may protest administrative action.⁶⁵

The bare fact that there are multiple routes to establish injury refutes TRPA mistaken premise that the only route is directly

⁶¹ *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007) (“Capable of repetition, yet evading review” mootness exception applies where: (1) challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is reasonable expectation that same complaining party will be subject to same action again); *see also*, *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Center For Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007).

⁶² Most appellants and litigants being unaware, as I am, that TRPA operates in chronic “bad faith.”

⁶³ *Supra* note 47 at 517 (a zoning scheme is similar to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, under rationale that mutual restriction enhances total community welfare).

⁶⁴ *Supra* note 32 (to demonstrate standing... plaintiff must establish that injury complained of falls within zone of interests sought to be protected by statutory provision whose violation forms legal basis for complaint, not by reference to overall purposes of statute in question).

⁶⁵ *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-154 (1970); *see also*, *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004) (A cognizable procedural injury exists, as would give rise to Article III standing, when a plaintiff alleges that a proper environmental review has not been prepared under NEPA when the plaintiff also alleges a “concrete” interest, such as an aesthetic or recreational interest, that is threatened by the proposed action).

(OSJ 16:8, OSJ 17:3-5 & OSJ 17:23).

I’ve unequivocally alleged that proper environmental review has not been done under the Compact. This Project injures the quality of the environment sought to be protected by, *inter alia*, the Compact, the Endangered Species Act, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Clean Water Act.⁶⁶ More specific and concretely, the Project causes judicially cognizable injury because: (1) it disfigures the views of the Heavenly mountains, surrounding forest, and Bijou Park Creek aspen grove which injures my aesthetic enjoyment of the Lakeview Heights Plan Area and impairs its enjoyment for future generations;⁶⁷ (2) peer-reviewed scientific literature submitted under the Project’s environmental review process, demonstrates the tower design injures local populations of endangered, threatened, or sensitive wildlife and I have a passionate “[d]esire to use or observe animal species, even for purely aesthetic purposes”;⁶⁸ (3) it discharges microplastic solid waste into the environment and into Bijou Park Creek and downstream waterways;⁶⁹ (4) exceedance of allowable coverage limits contributes to human-caused sediment which lowers the aesthetic clarity of Lake Tahoe; (5) environmental harm is a type of evil which violates my spiritual values through the desecration of the region’s sacred splendor—its value as a natural holy temple to worship god while witnessing his awesome powers—disconnects me from divinity⁷⁰; (6) whereas the economic vitality of the Lake Tahoe Region is innately dependant on its outstanding environmental quality and aesthetics, degradation causes me economic harm; and (7) I am a member of the Tahoe for Safer Tech, an unincorporated environmental association

⁶⁶ Compact’s judicial review provision is appropriate mechanism to review TRPA specific actions which proceed in violation of federal laws such as ESA, MBTA, & CWA (*cf.*, *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 733 (9th Cir. 2020) (when two claims are inextricably intertwined between two statutes, and those statutes contain conflicting jurisdictional provisions, courts follow the more specific statute; NEPA, ESA, and the Marine Mammal Protection Act all lack independent judicial review provisions; claims arising under all three are therefore reviewable under the APA); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (“The APA, by its terms, provides a right to judicial review of all ‘final agency action for which there is no other adequate remedy in a court’”). APA has analog provision in Compact which is controlling as a more specific federal law (*see*, *City of South Lake Tahoe v. Tahoe Regional Planning Agency*, 664 F.Supp. 1375, 1377 (E.D. CA. 1987)).

⁶⁷ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (where “development ‘would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.’ We do not question that this type of harm may amount to an ‘injury in fact’ sufficient to lay the basis for standing. . . .Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process”); *Conservation Congress v. United States Forest Service*, 409 F.Supp.3d 861 (E.D. C.A. 2019) (A plaintiff satisfies the “injury in fact” to possess Article III standing in an environmental case where an individual shows an aesthetic or recreational interest in a particular place, or animal, or plant species and that interest is impaired by a defendant’s conduct); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992) (“desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing”); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 872 (1990) (“‘recreational use and aesthetic enjoyment’ are among the sorts of interests that [NEPA is] designed to protect”).

⁶⁸ *Id.* (desire to use or observe animal species, even for purely aesthetic purposes, is a cognizable interest for standing purposes).

⁶⁹ *California Sportfishing Protection Alliance v. Chico Scrap Metal Inc.*, 124 F.Supp.3d 1007 (E.D. C.A. 2015) (A facility’s discharges are subject to the Clean Water Act (CWA) if bodies of water are conduits for the discharges to seep into a navigable waterway and the discharges significantly affect the physical, biological, and chemical integrity of the navigable waterways; that water containing pollutants discharged from facility flowed into ditch, then into seasonal intermittent stream which flowed miles before discharging in ravine that was tributary of navigable waterway miles from facility, was sufficient to support environmental claim, under CWA, that facility discharged pollutants into navigable waterway).

⁷⁰ *Supra* note 65 (interest conferring standing to sue may reflect spiritual values).

1 which has members who own real property adjacent or near to the Project and are thus directly threatened by it.⁷¹ I've appended
2 Exhibit 6, my affidavit declaring concrete and particularized injury falling within the Compact's zone of interests.⁷²

3 2. Demonstration Of Injury And Standing From Due Process Violations

4 *A fortiori*, laws and regulations promulgated under the Compact themselves create interests protected by the Fourteenth
5 Amendment that refute TRPA at OSJ 14:16-24 and OSJ 15:14-15. A liberty interest protected by the Due Process Clause may
6 arise from an expectation or interest created by statutes or policies, or it may arise from the Constitution itself, by reason of
7 guarantees implicit in the word "liberty."⁷³ After all, the Due Process Clause of the Fourteenth Amendment was intended to
8 prevent government from abusing its power, or employing it as instrument of oppression.⁷⁴ Whenever TRPA promulgates
9 legislative rules⁷⁵ which carry the force of federal law, the public may presume that the law will be obeyed.⁷⁶ TRPA may not
10 violate its own regulations.⁷⁷ There is a liberty interest which is deprived whenever the TRPA violates its own ROP. TRPA
11 resorts to sophistry⁷⁸ to mislead this court that an agency may violate its legislative rules—without causing to a due process
12 violation—by citing federal caselaw⁷⁹ which actually pertains to internal interpretive guidelines which do not carry the force of
13 law.⁸⁰ It's simply untrue that TRPA may violate its unambiguous regulatory ROP without causing a due process violation.

14 Whether a TRPA pronouncement is interpretive or substantive is a legal question⁸¹ so court gives no agency deference.
15 TRPA's COO are substantive regulations. Notwithstanding, any so-called TRPA "standard practice" which is inconsistent with
16 or amends an existing legislative rule, cannot be interpretive, since it would impose new rights or obligations by changing an
17 existing law and such amendment must follow the applicable notice and public comment procedure requirements.⁸²

18 ⁷¹ *E.g.*, Tahoe For Safer Tech co-founder Benjamin Lebovitz, a co-appellant who personally testified at the Appeal Hearing, lives within a block of the
19 Project. He would be directly harmed via one or more of the aforementioned judicially cognizable mechanisms of injury. Environmental group's website
20 available at <https://www.tahoeforsafertech.org>.

21 ⁷² This supplements SOA and AR materials in accordance with the manner and degree of evidence required at successive stages of litigation.

22 ⁷³ *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

23 ⁷⁴ *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992).

24 ⁷⁵ A "legislative rule" is issued by an agency pursuant to statutory authority and has the force and effect of law; An "interpretive rule" simply advises the
25 public of the agency's construction of the statutes and rules which it administers and lacks the force and effect of law (*PDR Network, LLC v. Carlton &*
26 *Harris Chiropractic, Inc.*, 588 U.S. —, 139 S.Ct. 2051, 2055 (2019); *see also, Azar v. Allina Health Services*, 587 U.S. —, 139 S.Ct. 1804, 1811 (2019);
27 *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96-97 (2015); *Lane v. Salazar*, 911 F.3d 942, 949 (9th Cir. 2018); *Mora-Meraz v. Thomas*, 601 F.3d 933,
28 939-940 (9th Cir. 2010); *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008).

⁷⁶ California Civil Code § 3548 (a "Maxim of Jurisprudence" is presumption that "[t]he law has been obeyed"); *see e.g., People v. Golston*, 58 Cal.2d 535
(1962) (in absence of showing to contrary it will be presumed that constitutional due process provision was obeyed).

⁷⁷ *Supra* note 12.

⁷⁸ We are way beyond the point that sophisticated counsel should have known better. We are probably at the point of intentional and blatant disregard
for controlling authority and case law.

⁷⁹ *James v. U.S. Parole Com'n*, 159 F.3d 1200, 1206 (9th Cir. 1998) (holding that alleged failure to fully comply with internal guideline did not amount to
due process violation, as provision was internal interpretive provision that did not have force of law).

⁸⁰ Defendant TRPA Combined Opposition and Cross-Motion, p.14, l.16; p.15, l.4; p.17, l.3.

⁸¹ *Mora-Meraz v. Thomas*, 601 F.3d 933, 939-940 (9th Cir. 2010).

⁸² Agencies are generally required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the

3. Concepts Of Property And Liberty Related To Violations Of Due Process And Equal Protection Rights

The concepts of equal protection of the laws and due process both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, but a discrimination may nevertheless be so unjustifiable as to be violative of due process.⁸³ The term “liberty” within the Fifth Amendment to the Federal Constitution extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective.⁸⁴ There is a due process right to notice and meaningful opportunity to be heard by an unbiased tribunal.⁸⁶ The ED’s impediments to hearing access subvert due process. The ED acts as gatekeeper when she obstructs petition processes for appeal to the GB in the first instance, and biases any granted appeal hearing when she rushes scheduling in violation of ROP regulations, as here. The lack of public notice diminishes the likelihood that any aggrieved persons will appeal for redress, will testify at hearing, and further deprives them of opportunity for public participation in environmental review process, and their right to be heard.

III. JUDICIAL REVIEW STANDARDS IN THIS CASE

A. Overview of Applicable Law

TRPA is an agency created by Congress under the Compact Clause of the U.S. Constitution,⁸⁷ operates “under aegis of federal law,”⁸⁸ and is empowered to adopt regulations which carry the force of federal law.⁸⁹ TRPA Compact is substantially consistent with that creating an independent quasi-federal agency whereas it is an agent of Congress established to carry into effect the legislative policies embodied in the “Compact.”⁹⁰ Its organic act is a more than supple device for dealing with interests confined within region, but is also means of safeguarding national interest⁹¹—such as to protect Tahoe Region as “National

rule’s content (e.g., 5 U.S.C. § 553(b)-(c); Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (October 4, 1993) (providing for presidential review of agency rulemaking states that the public’s opportunity to comment, “in most cases should include a comment period of not less than 60 days”). See also, Charles H. Koch Jr., 1 ADMINISTRATIVE LAW AND PRACTICE 329-30 (2010 ed.).

⁸³ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁸⁴ *Id.*

⁸⁶ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (due process requires notice reasonably calculated to apprise interested parties of pendency of action and afford them an opportunity to present their objections and be heard at a meaningful time in a meaningful manner); *Goldberg v. Kelly*, 397 U.S. 254, 267, 271 (1970) (due process of law is opportunity to be heard during hearing at meaningful time and in meaningful manner by an impartial decision maker); *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959) (rights of confrontation and cross-examination apply in all types of cases where administrative and regulatory actions are under scrutiny); *Ward v. Village of Monroeville*, 409 U.S. 57, 62-63 (1972) (due process requires “a neutral and detached judge in the first instance”). See also, *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974); *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4 (1976).

⁸⁷ See, *U.S. v. Morrison*, 529 U.S. 598, 607 (2000) (enacted statutes must be based on powers in Constitution).

⁸⁸ *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977).

⁸⁹ See, *Lake Tahoe Watercraft Recreation Ass’n v. TRPA*, 24 F.Supp.2d 1062, 1068 (E.D. CA. 1998); *City of South Lake Tahoe v. Tahoe Regional Planning Agency*, 664 F.Supp. 1375, 1377 (E.D. CA. 1987); *Stephans v. Tahoe Regional Planning Agency*, 697 F.Supp. 1149, 1152 (D. Nev. 1988).

⁹⁰ *Cf., F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 540 (2009).

⁹¹ *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (compacts are means of safeguarding national interest); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951).

Treasure.”⁹² The TRPA Compact is construed as a contract under the principles of contract law.⁹³ State sovereign power governs all contracts subject to sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms;⁹⁴ a State does not easily cede its sovereignty.⁹⁵

Land management interstate compacts are the constitutional cousin of the federal enclave and there is substantial overlap; states simply opt into ceding regional jurisdiction under express terms invoked through the Compact Clause inversely to the manner in which they opt out of aggregate cession under the Federal Enclave Clause.⁹⁶ Thus, TRPA preempts traditional state powers only where that result is the clear and manifest purpose of Congress.⁹⁷ Applying the “unmistakability doctrine” to the TRPA Compact means that—unlike federal agencies or enclaves administered under U.S. Const. Article II Sec. II—ambiguous, “mistakable,” statutory terms are not entitled to traditional agency deference.⁹⁸ Nor is TRPA’s interpretation of the Compact’s judicial review provisions⁹⁹—of which itself is not charged with administering¹⁰⁰—entitled to agency deference. Notwithstanding, once the TRPA Compact received approval of Congress, it was transformed into a law of the United States, preempting any state law that conflicts with the Compact.¹⁰¹

California did not in “unmistakable terms” surrender residents’ expansive rights secured under its State Constitution. California’s due process protections are, at times, broader than those imposed by the Fourteenth Amendment.¹⁰² California

⁹² Compact Art. I.

⁹³ See, *New York v. New Jersey*, 598 U.S. 218, 143 S.Ct. 918, 924 (2023) (interstate compacts are construed as contracts under the principles of contract law).

⁹⁴ *U.S. v. Winstar Corp.*, 518 U.S. 839, 871-872 (1996) (under unmistakability doctrine, sovereign power governs all contracts subject to sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms); see also, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (in federal courts, except in matters governed by Federal Constitution or by acts of Congress, law to be applied in any case is law of the state).

⁹⁵ *Supra* note 93 at 925 (background notion that a State does not easily cede its sovereignty may inform the interpretation of TRPA compact).

⁹⁶ See, *Kleppe v. New Mexico*, 426 U.S. 529, 542-543 (1976); *Paul v. U.S.*, 371 U.S. 245, 268 (1963); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528 (1938); *Swords to Plowshares v. Kemp*, 423 F.Supp.2d 1031, 1034 (9th Cir. 2005) (all generally holding jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification).

⁹⁷ *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994) (Supreme Court will interpret statute to preempt traditional state powers only if that result is clear and manifest purpose of Congress); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 544 (1994) (it is generally presumed that Congress acts intentionally... particularly where [it replaces] standard legal terminology with neologism; before federal statute will be construed to displace traditional state regulation in manner which radically readjusts balance of state and national authority, such a federal statutory purpose must be clear and manifest).

⁹⁸ Compare *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010) (unless the text of an interstate compact directs otherwise, the Supreme Court does not review the actions of a compact commission on the deferential model of judicial review of administrative action by a federal agency) with, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452 (1997).

⁹⁹ Compact. Art. VI(j).

¹⁰⁰ See, *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (in construing statute setting up administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities, each acting in performance of prescribed statutory duty without regard to appropriate function of other in securing plainly indicated objects of statute); see also, *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997) (we do not defer to the Director’s interpretation here of the APA’s provision for allocating the burden of persuasion under the preponderance of the evidence standard, [because] [t]he APA is not a statute that the Director is charged with administering).

¹⁰¹ See, *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 627 n.8, 628 (2013) (citing *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (quoting *Cuyler v. Adams*, 449 U. S. 433, 438 (1981))); *Com. of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1851) (bi-state compact, by the sanction of Congress, has become a law of the Union).

¹⁰² *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1050 (9th Cir. 2014); *Today’s Fresh Start, Inc. v. L.A. Cnty. Office of Educ.*, 57 Cal.4th

procedural due process protections require reasonable notice and an opportunity to be heard before a lead agency makes an adjudicatory land use decision that constitutes a substantial or significant deprivation of other landowners' property rights.¹⁰³

The zoning authority of local governments derives not from statutes such as the Compact, but from the state Constitution.¹⁰⁷ A conditional use permit grants an owner permission to devote a parcel to a use that the applicable zoning ordinance allows not as a matter of right, but only upon issuance of the permit.¹⁰⁸ A variance is a permit to build a structure or engage in an activity that would not otherwise be allowed under the zoning ordinance; it cannot, however, be granted to allow a use unauthorized by the zoning ordinance.¹⁰⁹ To quote the California Supreme Court¹¹⁰:

“[T]he adoption of zoning regulations is a legislative function, the granting of variances is a quasi-judicial, administrative one. If the judiciary were to review grants of variances superficially, administrative boards could subvert this intended decision-making structure. . . courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare”
(*Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506 (1974)).

TRPA administrative action may not issue variances outrageously or systemically which carry the effect of changing or rezoning regional or local area plan.¹¹¹ The ED has effectively usurped a legislative function and subverted the intended decision-making structure, by approving excavation depths in exceedance of five feet which do not meet the criteria of TRPA regulations or long-term plans. Through the Governing Board’s planning laws, the local community had been assured community welfare which prevented the adverse development of gargantuan facilities¹¹² on neighboring properties which require significant foundations and whose foundations may leach unfairly leach lime and other chemicals into the surrounding water table.

B. Applicability of Standards

This case involves mixed questions of law and fact¹¹³ whereas the content within the AR is undisputed and ultimate

¹⁰³ 197, 212-213 (2013).

¹⁰⁷ *Id.*

¹⁰⁷ *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal.App.4th 997 (2007).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See, West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) (the highest court of state is the final arbiter of what is state “law”, and its pronouncement is to be accepted by federal courts as defining state law).

¹¹¹ *Supra* note 45; *Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 540 (1990) (general plan functions as “a ‘constitution,’ or perhaps more accurately a charter for future development”).

¹¹² This Macro-Cell Tower is 112 feet tall—approximately 12 stories—in a residential neighborhood with a two-story height limit.

¹¹³ *See, Google LLC v. Oracle Am., Inc.*, 593 U.S. —, 141 S. Ct. 1183, 1199 (2021) (a reviewing court should break a mixed question of law and fact into “its separate factual and legal parts, reviewing each according to the appropriate legal standard); *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (proposing an inquiry to determine whether *de novo* or clearly erroneous review is appropriate).

Compact and the rest of federal environmental law whereas National Environmental Policy Act ("NEPA") decisions which are authoritative¹²⁵ and are often evaluated under the arbitrary and capricious standard.¹²⁶ The "rational basis review" or "hard look review," typically applied under NEPA are just kinds of substantial evidence review. The administrative review clause of the Compact should be read under the strong presumption that Congress intended judicial review.¹²⁷

C. Deference To TRPA Is Often Unwarranted

Contrary to TRPA's assertions, court deference to purported agency expertise is not unlimited.¹²⁸ No deference is warranted to TRPA's interpretation of its unambiguous regulations, decisions which rest on misinterpretation of Court precedent, TRPA violation of statutes, or otherwise where TRPA had no authority to act. Nor is deference warranted where TRPA is merely advancing a litigation position that is not an official interpretation of its regulation, where it has radically inconsistent interpretations of law, or where courts have experience in the area and are fully competent to decide the issue.

IV. CONCLUSION

The Administrative Record has exposed but one instance of a severe and pervasive problem where democratic processes and environmental review under TRPA are closed and malfunctioning, controlled by special development interests. TRPA wants this court to make precedent that it is accountable to nobody, no matter the harms. Don't let it. I seek relief on behalf of myself and others and move for the court to uphold the MSJ and MSAR and its claims for relief and liability damages as also supported herein. I urge the court to order the tower be dismantled, put a moratorium on new towers sans an EIS and appoint a special master over TRPA if possible to ensure regulatory reform is legally proper and limits future abuses of discretion.



DATED:

October 20, 2023

Alan Miller, *Plaintiff, in propria persona*

P. O. Box 7526, South Lake Tahoe CA 96158

encompasses the agency's assessment of the evidence in the record and its application of that evidence in reaching a decision. In arbitrary and capricious review, the focus is on the agency's explanation or justification of its decision and whether that decision can be reasoned from the body of evidence).

¹²⁵ *Sierra Club v. Tahoe Regional Planning Agency*, 840 F.3d 1106, 1115 (2016). *See also*, Plaintiff's Reply And Opposition To Defendant TRPA's Opposition To Plaintiff's Motion To Supplement The Administrative Record p.6.

¹²⁶ *See, Barnes v. Fed. Aviation Admin.*, 865 F.3d 1266, 1269 (9th Cir. 2017); *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002) (clarifying when standard applies). *See also, ForestKeeper v. La Price*, 270 F.Supp.3d 1182 (2017) (with respect to judicial review of agency decisions made pursuant to NEPA, summary judgment is governed by the arbitrary and capricious standard instead of the typical summary judgment standard that determines whether there are disputed issues of material fact); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205-06 (9th Cir. 2004).

¹²⁷ *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986); *De Martinez v. Lamagno*, 515 U.S. 417, 419 (1995).

¹²⁸ *Supra* note 52.

EXHIBIT 6

Affidavit of Injury Falling within Compact's Zone of Interests

Affidavit

My name is Alan Miller and I have resided in the City of South Lake Tahoe since 1993. I came here because of my love for the natural environment, the near-pristine waters, the magnificent trees and forests, the mountains and their waterfalls and trees. I connect with nature through walks and hikes, bicycling, swimming in the natural waters, breathing the clean air and enjoying the night skies. My world is a world that is alive: not only the plants and animals, from whom I receive “messages” helpful to me in my daily life but the mineral kingdom, the sacred “four winds” and the nature spirits assisting the mother earth, the mother of us all. I know many people can’t understand the unseen, certainly not the desecraters and despoilers, how powerful it is, and how everything is connected to the sacred benevolence.

When I came to this basin there were no wireless facilities save for around the airport and a small number of community radio station antennas. Now the wireless towers are ubiquitous and increasing everywhere in the region, like an urban blight, and the 112-foot monopine macrotower Verizon Wireless installed at 1360 Ski Run in my city is just one egregious and disgusting example of how my environment is being degraded one tower at a time, with none escaping the poison.

There is a business I frequent on Ski Run Boulevard so I am frequently in the area and visiting friends in the neighborhood. The Bijou Park Creek is very unique, with its dense aspen groves, so colorful in the fall (and in the spring when the leaf-buds open). My late wife, poisoned by wireless, loved aspens for the way they sound in the wind. Me, too. I saw a bear there this summer and I’ve seen eagles over the Ski Run tower site, which stands adjacent. I question whether the aspens and all they support will be there for future generations, knowing towers are especially hard on aspen trees. It is depressing to consider they wouldn’t be.

The tower is on my route to and from the Heavenly Ski area, where I’ve spent many happy days over the years connecting with god and the nature I enjoy. I no longer patronize the ski area, so disgusted am I with its own wireless expansion for commercial profit on the public lands, with ski area employees in cahoots with the Tahoe Regional Planning Agency, which is a horrible thing for the environment, the plants, the animals, the people and the waters. I can’t connect spiritually with my god and nature in the same way there now; something intangible has been lost. Besides that, I quit going because every time I pass the Ski Run tower, with its in-your-face destruction of the mountain view, I am reminded of the unfettered wireless expansion at Lake Tahoe by the tower on my route, the toxic microplastic wastes being continually shed to the environment as I have witnessed at the Ski Run tower and other monopine macrotowers. and how my friend Monica and her family were driven to flee their beautiful home overlooking Lake Tahoe to preserve their health from continual microwave radiation after the tower was approved on the adjacent property by the feckless TRPA. I am concerned how the Ski Run tower and the tower across the street from where he lives will affect the health of my friend David, who suffers grave illness exacerbated by microwave poisoning. I am concerned that all this wireless expansion will keep . . . expanding until, with no planning or environmental review whatsoever, the environment at Lake Tahoe right to my front door has been further radically altered by powerful unseen forces that are malevolent.

The fact is the Ski Run tower could not have been built if TRPA and others had followed the laws. I feel like I live in a banana republic under TRPA and I DO NOT CONSENT. The environment I love is being destroyed by wireless microwaves with impunity by the very agency charged to protect the environment. TRPA is not the Tahoe Regional *Protection* Agency, it is more the Tahoe Regional *Political* Agency, and it distresses me greatly to see how money talks and BS walks at TRPA. It’s disgusting, reprehensible, and I have no faith in TRPA to protect the waters or environment of Lake Tahoe.

The money-changers and thieves are in the temple, with TRPA presiding over the development party as the corrupt high priests of a half-baked regulatory scientism, seemingly beyond the reach of the law. I believed in the Compact, as its purpose was to prevent damaging land development—such as this ill-placed 112-foot wireless antenna tower—and to protect Tahoe’s special and scenic areas through stringent planning standards and rigorous environmental review. I believed Tahoe’s environmental laws protected the environment by requiring public input during the environmental review process of projects—that the gathering of local knowledge, wisdom, and observations would result in better informed and higher quality environmental decisions. Now I feel betrayed and harmed by TRPA’s degradation of the environment; harm which will last for generations. For all this I grieve.

Under penalty of perjury, I attest these facts to be true and correct, without intent to deceive.



Alan Miller,

Dated: October 19, 2023

PO Box 7526, South Lake Tahoe CA 96158

1 Alan Miller
2 PO Box 7526
3 South Lake Tahoe CA 96158
4 (530) 542-0243
5 Plaintiff, in *propria persona*

**ORIGINAL
FILED**

OCT 20 2023

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

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

**MOTION FOR ADMINISTRATIVE
RELIEF TO EXCEED PAGE LIMITS**

Summary of Motion

18 Out of an abundance of caution not to violate Judge Claire's Standing Orders, Plaintiff
19 files this Motion to Exceed Page Limits (hereinafter "Motion") to submit a 20 page "Reply and
20 Opposition." The reasons for this motion are because: (1) there is genuine ambiguity as to
21 whether a 20 page or ten page limit applies to my "Reply and Opposition"; and (2) the complexity
22 of this administrative review case ordinarily commands at least a 20 page opposition in the
23 interest of justice. I was granted two extra pages by Judge Claire's order in response to the
24 Stipulation And Order To Extend Summary Judgment Deadlines (ECF 34) then presuming the ten
25 page requirement applied, and in the final analysis find it may not apply and that the motion can't
26 be rightfully accomplished in under 20 pages.

Ambiguity Compels Motion

Application of Judge Claire’s Standing Orders for Civil Cases (hereinafter “Standing Orders”) to the local and federal rules raised ambiguity in my instant case. The Local Rules use different words to describe pleadings than Fed. R. Civ. P. 7. In any case, Local Rule 261(d) — “Procedure In Actions For Review On An Administrative Record In Non-Social Security Cases,” promulgates:

“In actions, other than Social Security actions, which require the Court to review an administrative record, the following deadlines shall apply unless otherwise ordered...**Reply and Opposition.** Within 15 days after the filing of the defendant’s opposition and cross-motion, the plaintiff may file a reply and any opposition to the defendant’s cross-motion”

The Local Rules expressly state that the plaintiff may file “any opposition to the defendant’s cross-motion,” and imply such motion be titled Plaintiff’s “Reply and Opposition.” Pursuant to the “Standing Orders”:

“PAGE LIMITS: Initial moving papers in non-discovery matters, and oppositions to such motions, are limited to 20 pages. Replies are limited to 10 pages. Page limits do not include the index or table of contents, table of cases, or exhibits (if any). Documents exceeding these limits without advance leave of court, for good cause shown, will be stricken without further notice.”

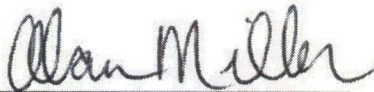
The “Standing Orders” expressly state that “oppositions” are “limited to 20 pages” and that “[r]epplies are limited to 10 pages.” A motion under Local Rule 261(d) is described as a “Reply and Opposition” making it plausibly susceptible to both page limit rules. It is a general maxim of jurisprudence that “[t]he greater should include the less” (*e.g.*, California Civil Code § 3536). Therefore when the motion contains both an opposition entitling it to 20 pages and a reply entitling it to ten pages, the applicable limit is 20 pages. It is only fair for a Plaintiff to be able to adequately oppose a defendant’s 20 page cross-motion potentially involving substantially different allegations with a 20 page opposition. After all, the Defendant also gets the last say with a ten page reply.

Complexity of Case

This case involves a 3,429 page administrative record and complex and arcane legal principles pertaining to Inter-state Compacts under the U.S. Constitution, administrative law, diversity jurisdiction, standards of review, and an extremely large body of agency regulations. It is in large part the complexity of these regulations that has obscured the astonishing facts and matters of law revealed in my Reply and Opposition, which enlarge the dimensions of the case, requiring at least 20 pages to brief adequately. It is far better and more efficient to allow the case to resolve justly at the District Court than on appeal. Based on limited research of other court practices and rules an allowance of 20 or more pages is not unusual for such a reply, especially considering the case complexities.¹

I am not seeking license to be wordy. I am a *pro se* Plaintiff and respectfully make this motion to accompany my Reply and Opposition asking for the court to advance its discretion on page limits so that nationally important matters of law and justice are served for the protection of the civil rights of the people and for the protection of Lake Tahoe, a national and global resource.

DATED: October 20, 2023



Alan Miller

P. O. Box 7526

South Lake Tahoe CA 96158

Plaintiff, in propria persona

¹ E.g., D. Nev. LCR 47-2 ("motions, and responses to motions are limited to 30 pages"); S.D. CA. LCR 7.1(h) ("Briefs or memoranda in support of or in opposition to all motions noticed for the same motion day must not exceed a total of twenty-five (25) pages in length"); N. Dist. CA. LCR. (generally promulgating that a brief or memorandum may not exceed 25 pages of text).