

1 approvals rendered pursuant to and/or in furtherance of the implementation of said Herbicide
2 Project, 2) preliminarily and permanently enjoin Respondent and Real Party in Interest from any
3 and all activities undertaken pursuant to the Herbicide Project, 3) award Petitioners costs of the
4 action and reasonable attorneys' fees, and 4) grant any other relief the court deems just and
5 proper.
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7 On August 14, 2023, Petitioners filed their Opening Brief. Respondent filed its
8 Opposition Brief on October 9, 2023, and Petitioners filed their Reply Brief on October 30,
9 2023. At the conclusion of the trial, which consisted of oral argument with reference to the
10 administrative record, the court took the matter under submission.

11 I. FACTUAL AND PROCEDURAL BACKGROUND

12 In 2017, the Tahoe Keys Property Owners Association (TKPOA) began the process of
13 seeking approval for testing herbicides in the Tahoe Keys, a community within the city of South
14 Lake Tahoe, to control the growth of aquatic invasive plants (AIPs). Per TKPOA, after decades
15 of trying to control the AIP problem in the lagoons surrounding their community through non-
16 chemical means, the TKPOA decided to resort to chemical means.
17

18 In order to receive the approval, TKPOA required an exemption from a prohibition
19 against the discharge of pesticides¹ contained within the Water Quality Control Plan for the
20 Lahontan Region (Basin Plan). Such exemptions must be approved by Regional Water Quality
21 Control Board, Lahontan Region (Board). Moreover, under the Clean Water Act, TKPOA
22 required a National Pollution Discharge Elimination System (NPDES) permit, which may be
23 issued by the United States Environmental Protection Agency or by a state agency with an EPA-
24 approved state permit program. (33 U.S.C. § 1342.) The Board is an EPA-approved state
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27 ¹The terms "pesticides" and "herbicides" were used interchangeably by the parties throughout their pleadings and
28 during the trial. The court follows their lead throughout this ruling.

1 permit program, with the authority to issue NPDES permits. Lastly, to receive approval, the
2 California Environmental Quality Act (CEQA) required the certification of an Environmental
3 Impact Report (EIR).

4 In July of 2018, TKPOA submitted an application for permission to test herbicides in
5 the Tahoe Keys to the Board and the Tahoe Regional Planning Agency. The Board found the
6 application to be incomplete, and TKPOA modified and resubmitted its application in April of
7 2021 for its proposed project, titled the Tahoe Keys Lagoons Aquatic Weed Control Methods
8 Test (“CMT,” “Herbicide Project,” or “Project”).

9 If approved, the Project would consist of a three-year test of aquatic weed control
10 strategies in the Tahoe Keys, utilizing chemical and non-chemical methods in year one followed
11 by additional non-chemical control strategies in the following two years. Year one would
12 involve the one-time application of herbicides to different location within the Tahoe Keys
13 lagoons. The Project primary targets would be the following AIPs: Eurasian watermilfoil,
14 curly-leaf pondweed, and coontail. The Project results would inform future determinations as to
15 the most effective means to eradicate and control AIPs.

16 On January 12-13, 2022, the Board held two days of public hearings regarding the
17 Project, which included testimony from interested stakeholders. On January 13, 2022, the
18 Board 1) adopted a resolution for certification of the CEQA EIR for the Project, 2) adopted a
19 resolution for granting an exemption from the pesticide discharge prohibition in the Basin Plan
20 for the Project, and 3) issued an NPDES permit to discharge pesticides associated with the
21 Project.

22 Throughout the approval process, Petitioners actively were involved, attending hearings
23 and submitting public comments. On February 4, 2022, Petitioner timely petitioned the State
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1 Water Resources Control Board to review the Project, after which the State Board took no
2 action. On June 15, 2022, Petitioner filed the underlying petition for writ of administrative
3 mandate challenging the Board's actions.

4 During the trial, the parties confirmed that the issues for resolution before the court were
5 1) whether the petition should be dismissed under the mootness doctrine, 2) whether approval of
6 the Project violates the Basin Plan, and 3) whether approval of the Project violates the CEQA.
7 The court addresses each of these issues below.
8

9 **II. APPLICABILITY OF THE MOOTNESS DOCTRINE**

10 As an initial threshold issue, Respondent claims that the challenge raised by Petitioners
11 is moot. As the permit was already approved, the herbicides were already applied, and no
12 repeat herbicide application is at issue, Respondent argues that, even if Petitioners were able to
13 meet their burden, there is no meaningful remedy that the court can grant. As such, under the
14 mootness doctrine, Respondent contends that the case should be dismissed.
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16 Petitioners counter that, while the herbicide application portion of the Project is
17 complete, the Project itself is still ongoing. Petitioner seeks to invalidate the Project so that it
18 cannot be used as a basis for future planning decisions. Moreover, Petitioner notes exceptions
19 to the mootness doctrine, specifically that the issues underlying the case are of significant public
20 interest and that the Project is capable of repetition and evading review.

21 In *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, the court
22 considered the public interest exception to the mootness doctrine. The court writes:
23

24 We denied the motion to dismiss because even if the matter were moot, it presented an
25 issue of public interest concerning the definition of an emergency which allows a school
26 district to dispense with the competitive bidding process. "It is now established law that
27 where ... issues on appeal affect the general public interest ..., and there is reasonable
28 probability that the same questions will again be litigated and appealed, an appellate
court may, although the appeal be subject to dismissal, nevertheless adjudicate the issues

1 involved. [Citations.] [Citation.]” (*California Ins. Guarantee Assn. v. Liemsakul* (1987)
2 193 Cal.App.3d 433, 437, fn. 1, 238 Cal.Rptr. 346.)

3 (*Id.* at 1250.)

4 Similarly, in *Department of Corrections v. Office of Administrative Hearings* (1998) 66
5 Cal.App.4th 1100, the court discussed the exception to the mootness doctrine based on the
6 capability of repetition and evasion of review. The matter involved a petition to administer
7 medication involuntarily to an inmate. The court held the following:

8 A threshold consideration in this appeal is that any ruling on the May 1997 petition to
9 renew authority for Holmes's medication is moot at this point. Even if the petition had
10 been granted, another petition would now be required because the Keyhea injunction
11 limits the period of involuntary medication on the basis of danger to others to 180 days
12 without a new petition. However, given the short time frames covered by these petitions,
13 the issues they raise are in the class of those “ ‘ ’ ” capable of repetition, yet evading
14 review’ “ ‘ ’ ” which may be addressed even though they are moot. (E.g., *Alfredo A. v.*
15 *Superior Court* (1994) 6 Cal.4th 1212, 1219 [26 Cal.Rptr.2d 623, 865 P.2d 56].) The
16 CDC indicates and Holmes evidently concedes that the issue in this case is an important
17 one to the class of prisoners involved and those who work with them. (*Chantiles v. Lake*
18 *Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914, 921 [45 Cal.Rptr.2d
19 1].) Accordingly, we will proceed to decide the issue for the guidance of future
20 proceedings before dismissing the appeal as moot.

21 (*Id.* at 1106.)

22 Respondent cites *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370 (*Hixon*) and
23 *Environmental Protection Information Center, Inc. v. Maxxam Corp.* (1992) 4 Cal.App.4th
24 1373 (*EPIC*), cases in which the respective courts found that the pending petitions were mooted
25 by the subsequent actions of the parties. *Hixon* concerned a challenge to the removal of trees as
26 part of a project in East Los Angeles. As the trees had already been removed, the court
27 reasoned that the petitioner’s request for an EIR on that specific project had been mooted. The
28 court writes, “[w]e agree with the trial court that preparation of an EIR for Phase I alone would
be futile. The project is ended, the trees are cut down and the subject is now moot insofar as
resort to a planning or informational document, which is what an EIR is.” (*Id.* at 378.)

1 In *EPIC*, the court upheld the dismissal of a petition for writ of mandate on mootness
2 grounds. Although the parties reached a partial settlement that resolved the issue of protecting
3 old growth timber from logging, petitioners nonetheless sought declaratory or injunctive relief.
4 The appellate court found that the petition failed to plead a cause of action for declaratory relief
5 and that due a change in departmental policies and regulations, the court saw “no basis for
6 issuing an injunction against threatened enforcement of a ‘statutory scheme’ in an illegal
7 manner.” (*Id.* at 1382.) Rather, if future actions were objectionable, petitioners could seek
8 relief then. The current issues, however, had been mooted.

10 Petitioners here argue that these cases are inapposite. Unlike in *Hixon* and *EPIC*,
11 “[t]here has been no stipulation to protect the environment, no change in regulatory law and
12 policy, and, most importantly, no completion of the Project, as the CMT is still ongoing.”
13 (Petitioners’ Reply Brief in Support of Verified Petition for Writ of Mandate (Petitioners’
14 Reply) at 6:15-17.)

16 The court agrees. In contrast to *Hixon* and *EPIC*, the court can grant meaningful relief –
17 that is, a setting aside of the Board’s actions and a prohibition of using the Project data as a
18 basis for analysis in determining future strategies to manage the AIP problem in the Tahoe Keys
19 lagoons. As such, the court finds that the matter is not moot and will adjudicate it on its merits.

21 As an independent basis to proceed on the merits, the court finds that the pending matter
22 is one of significant public interest. Neither party disputes the necessity in protecting the
23 integrity of Lake Tahoe. The pesticides prohibition in the Basin Plan itself reflects the extreme
24 care with which Lake Tahoe must be treated. While the Project only entails a one-time test
25 application, whether the criteria for an exemption to allow the pesticides to be applied has
26 sufficiently been met has implications for any future proposals to test chemical methods for the
27

1 purpose of controlling AIPs in protected bodies of water. The court finds there is a reasonable
2 probability that the same issues may arise again. Therefore, even if the court were to find that
3 the mootness doctrine applies, the court finds that the public interest exception applies as well.

4 While not necessary to reach this issue, the court briefly notes that it is not persuaded
5 that the other exception under the mootness doctrine – that is, the capability of repetition and
6 evasion of review – applies. As discussed above, while the issue certainly is capable of coming
7 before the court again, the court is not persuaded that it necessarily would evade review.
8 Rather, the court finds that an interested party could request injunctive relief to permit the
9 completion of judicial review prior to any application of pesticides occurring.
10

11 Either way, as the court finds that the Project is ongoing and not moot as meaningful
12 relief can still be granted and that the resolution of the issues before the court are in the public
13 interest, the court declines to find the matter moot.
14

15 **III. WHETHER APPROVAL OF THE PROJECT VIOLATES THE BASIN PLAN**

16 **Standard of Review**

17 The parties agree that the petition is governed by Water Code § 13330 and Code of Civil
18 Procedure (CCP) § 1094.5. Water Code § 13330(e) provides the following:

19 Except as provided in this section, Section 1094.5 of the Code of Civil Procedure shall
20 govern proceedings for which petitions are filed pursuant to this section. For the
21 purposes of subdivision (c) of Section 1094.5 of the Code of Civil Procedure, the court
22 shall exercise its independent judgment on the evidence in any case involving the
23 judicial review of a decision or order of the state board issued under Section 13320, or a
24 decision or order of a regional board for which the state board denies review under
25 Section 13320, other than a decision or order issued under Section 13323.

26 Therefore, Respondent concedes that the court must exercise its independent judgment in
27 adjudicating the matter. Under CCP § 1094.5(c), when the standard is independent judgment,
28

1 “abuse of discretion is established if the court determines that the findings are not supported by
2 the weight of the evidence.”

3 What the parties dispute is the level of deference to afford the Board in its findings. On
4 this question, both parties cite to *Fukuda v. City of Angels* (1999) 20 Cal.4th 805 (*Fukada*),
5 *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109
6 Cal.App.4th 1089 (*Communities*), and *Tesoro Refining & Marketing Co. LLC v. Los Angeles*
7 *Regional Water Quality Control Bd.* (2019) 42 Cal.App.5th 453 (*Tesoro*).

9 The California Supreme Court’s holding in *Fukada* is particularly instructive:

10 We concluded that when a court reviews an administrative determination such as the one
11 at issue, suspending a professional license, the court must “exercise its independent
12 judgment on the facts, as well as on the law” (*Drummey, supra*, 13 Cal.2d at p. 84.)
13 We also defined the extent of “independent judgment” review, explaining that such
14 review “does not mean that the preliminary work performed by the administrative board
15 in sifting the evidence and in making its findings is wasted effort.... [I]n weighing the
16 evidence the courts can and should be assisted by the findings of the board. *The findings*
17 *of the board come before the court with a strong presumption of their correctness, and*
18 *the burden rests on the complaining party to convince the court that the board's decision*
19 *is contrary to the weight of the evidence.* “ (*Id.* at p. 85, italics added.)

20 (*Fukada* at 811-812.)

21 The deference afforded to an administrative board is reflected in *Communities* as well,
22 which holds the following:

23 We first note our standard of review must extend appropriate deference to the
24 administrative agencies in this case, and their technical expertise. (See, e.g., *Industrial*
25 *Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702 [166 Cal.Rptr. 331, 613 P.2d
26 579]; *WaterKeepers, supra*, 102 Cal.App.4th at pp. 1457-1458.) (3) And while
27 interpretation of a statute or regulation is ultimately a question of law, we must also
28 defer to an administrative agency's interpretation of a statute or regulation involving its
area of expertise, unless the interpretation flies in the face of the clear language and
purpose of the interpreted provision. (See *Family Planning Associates Medical Group,*
Inc. v. Belshé (1998) 62 Cal.App.4th 999, 1004 [73 Cal.Rptr.2d 221].)

(*Communities* at 1103-1104.)

1 In a matter such as the case at bar, which involves complex scientific inquiries, the court
2 finds it appropriate and consistent with the above authorities to give deference to the Board’s
3 technical expertise and presume the correctness of its determinations; however, this deference
4 must be appropriate – that is, under an independent judgment standard, the court finds it cannot
5 simply accept the findings of the Board, particularly if they are contrary to the weight of the
6 evidence. Further, to the extent the Board’s findings are conclusory statements untethered to
7 the evidence or based on speculation without an adequate rationale, the court cannot rely upon
8 them.
9

10 Rather, as Petitioners correctly note, ““the trial court begins its review with a
11 presumption that the administrative findings are correct, it does not defer to the fact finder
12 below and accept its findings whenever substantial evidence supports them. Instead, it must
13 weigh all the evidence for itself and make its own decision about which party's position is
14 supported by a preponderance. [Citation.]”” (*Coastal Environmental Rights Foundation v.*
15 *California Regional Water Quality Control Bd.* (2017) 12 Cal.App.5th 178, 188, citing (*Alberda*
16 *v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 214 Cal.App.4th
17 426, 435; italics omitted.)
18

19 Therefore, even if *substantial evidence* supports the Board’s findings, while presuming
20 their correctness, this presumption is rebutted if the court finds that the determinations are not
21 supporting by the *weight of the evidence*.
22

23 Specifically to the question of the level of deference to afford to an agency’s own
24 interpretation of the law under the independent judgment standard, the parties not only both cite
25 to *Communities* and *Tesoro*, but to the same language in each of these cases. As quoted above,
26 *Communities* limits the deference to an administrative body’s interpretation of a statute or
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1 regulation, when “the interpretation flies in the face of the clear language and purpose of the
2 interpreted provision.” (*Communities* at 1104.) Moreover, the *Tesoro* court writes, “[j]udicial
3 deference is particularly appropriate in cases, such as the one here, where the agency has
4 ““expertise and technical knowledge”” and ““has consistently maintained the interpretation in
5 question.”” [Citations.]” (*Tesoro* at 472.)
6

7 The court finds that the parties do not disagree on the legal standard regarding the level
8 of deference to afford an administrative board in interpreting the law; instead, the parties
9 disagree as to whether, under these facts, the interpretation of the Board “flies in face of the
10 clear language and purpose of the interpreted provision” and whether the interpretation has been
11 consistently maintained by the Board. (*Communities* at 1104; *Tesoro* at 472.) The court
12 addresses that question below.
13

14 **Whether the Basin Plan permits Pesticide Testing**

15 The Basin Plan prohibits the “discharge of pesticides to surface or ground waters,”
16 subject to limited exemptions. (Basin Plan at AR 39774.) To qualify for an exemption,
17 provided that the proposed project is not claimed to be an emergency or time-sensitive, the
18 proponent must demonstrate that the project satisfies seven criteria. Petitioners contend that the
19 Project fails to satisfy criteria 1, 5, and 6, which are the following:
20

- 21 1. Demonstration that non-chemical measures were evaluated and found
22 inappropriate/ineffective to achieve the project goals. (Alternatives to pesticide use
23 must be thoroughly evaluated and implemented when feasible (as defined in CEQA
24 Guideline 15364: “Feasible” means capable of being accomplished in a successful
25 manner within a reasonable period of time, taking into account economic,
26 environmental, legal, social, and technological factors.)
- 27 5. Purpose and Goals statement that (a) demonstrates that the target organism is a
28 primary cause of the problem being addressed, and (b) provides evidence that the
proposed application of pesticides will accomplish the project goals.
6. A description of the failure of non-chemical measures to effectively address the
target organisms. The description will include either (1) evidence that non-chemical

1 efforts have failed to address target organisms or (2) justification, accepted by
2 Regional Board, of why non-chemical measures were not employed or are not
feasible (CEQA Guideline 15364) to achieve the treatment goals.

3 (AR 39781.)

4 Per the Exemption to the Aquatic Pesticide Discharge Prohibition for the Tahoe Keys
5 Lagoons Aquatic Weed Control Methods Test Staff Report (Staff Report), relied upon by the
6 Board in approving the exemption at its January 12-13, 2022 meeting (AR46103), “[t]he
7 primary purpose and goal of the CMT project is to evaluate the effectiveness of multiple AIP
8 treatment methodologies, including chemical and non-chemical methodologies and
9 combinations of both, to identify methodologies that will: 1) quickly reduce the AIP biomass, 2)
10 bring infestation to a level that can be managed by non-chemical treatment methodologies, 3)
11 improve water quality, 4) improve recreational benefits, and 5) reduce re-infestation.” (AR
12 46109.) The Project consists of 21 test sites, which include 9 herbicide-only sites, 6 sites with
13 only non-chemical methods employed², 6 sites which combine both chemical and non-chemical
14 methods, and 3 control sites. (*Id.*) Initially, a multi-year application of herbicides was
15 proposed, later modified to a single-year application. Afte the single year of application, only
16 non-chemical methods are used, with the Project gathering data to monitor the effectiveness of
17 various control strategies. (AR 46108.)

18
19
20 Petitioners argue that testing of pesticides is not permitted by the Basin Plan and
21 therefore the Board in approving the Project, a test of pesticides (as well as of other non-
22 chemical methods in comparison to and in conjunction with some of the pesticides-testing
23 sites), failed to proceed in the manner proscribed by law. Therefore, Petitioner contends, the
24 Board abused its discretion.
25

26
27 ²The non-chemical methods used at these sites are Ultraviolet-C Light and Laminar Flow Aeration, discussed in
more depth below.

1 Buttressing this contention is the testimony from three former Board staff members.
2 Harold Singer, former Board Executive Officer, testified at the January 2022 Board meeting,
3 stating that he served as the Executive Officer when the Basin Plan was amended to provide for
4 exemptions for the discharge of pesticides. (AR 44091.) Of note, Mr. Singer made the
5 following comment³:
6

7 [S]ince the goal of the project is to apply and test pesticides along with other methods,
8 the goal can only be achieved by discharging pesticides. Under this logic, the first
9 criteria does not have a purpose or meaning as defining a project goal using pesticide[s]
10 would automatically satisfy the criteria. This is totally contradictory to the language of
11 criteria one, which was included in the exemption language to preclude the discharge of
12 pesticides until all other options to achieving environmental goals were demonstrated to
13 be infeasible.

14 (AR 44099.)

15 In response, Respondent argues that Petitioners' contention regarding the prohibition of
16 testing under the Basin Plan is unsupported in fact or law. Additionally, Respondent asserts that
17 the court must give deference to the Board's interpretation of the Basin Plan. Lastly,
18 Respondent states that, while past Board staff may have specialized expertise on this topic, their
19 comments are not entitled to any more weight than other public commenters.
20

21 The court agrees with Respondent in part. Starting with the last contention first, the
22 court finds that comments of past Board staff certainly are not dispositive on any issues; instead,
23 such comments are accorded their due weight in the same fashion as any other member of the
24 public.
25

26 Moreover, upon its independent review of the exemption criteria within the Basin Plan,
27 the court can find no explicit prohibition of granting an exemption to test pesticides nor can the
28

³At the trial, Respondent correctly noted that in the same testimony Mr. Singer confirmed that he is not opposed to the discharge of pesticides. (AR 44091.) However, he clarified that his lack of opposition was under the right circumstances, which the court reasonable infers includes appropriate findings under criterion 1. (*Id.*)

1 court read an implicit prohibition into the text. At the same time, the court cannot find that
2 pesticide testing can be approved absent a showing that non-chemical methods are inappropriate
3 or ineffective under criterion 1. The court notes that criterion 1 states that “[a]lternatives to
4 pesticide use must be thoroughly evaluated and implemented when feasible.” (AR 39781.) If
5 the Board could deem alternatives to pesticides to be infeasible *per se* because of a narrowly-
6 drawn project goal, it would render criterion 1 essentially meaningless. For instance, what
7 would prevent the Board from approving a project with the stated goal of testing the
8 effectiveness of a particular pesticide, with a finding under criterion 1 that non-chemical
9 methods are inappropriate or ineffective because they cannot be used to achieve the project goal
10 – that is, to test the pesticide? Such an outcome clearly would be absurd and contrary to the
11 intent of the exemption criteria to allow the discharge of pesticides only in limited
12 circumstances.
13

14 Yet, this precisely is the approach taken by the Board as reflected in the Staff Report.

15 With regard to criterion 1, the Staff Report indicates the following:
16

17 In order to compare the effectiveness of the different AIP treatment methodologies with
18 minimal variability in testing conditions, it is important that all AIP treatment
19 methodologies being considered for future use be evaluated at the same time in the same
20 or very similar environment. **That is why both chemical and non-chemical treatment
methodologies identified in the CMT project need to be evaluated concurrently.
Failing to do so, (sic) will fail to meet the project’s goals, as outlined, above.**

21 (AR 46114 (emphasis added).)

22 Further, in regards to criterion 6, the Staff Report states that, “...limiting the CMT project to
23 evaluating only non-chemical treatment methodologies will reduce the knowledge to be gained
24 and **will not accomplish the goals of the project.**” (AR 46119 (emphasis added).)
25

26 The Board cannot approve a project based on goals that by their definition exclude the
27 consideration of alternatives to pesticides first. While Respondent urges the court to defer to the
28

1 Board's interpretation of the criteria for exemptions to the discharge of pesticides contained
2 within the Basin Plan, allowing such an interpretation, the court finds, "flies in the face of the
3 clear language and purpose of the interpreted provision." (*Communities* at 1104.) Moreover,
4 there is no evidence to suggest that such an interpretation has consistently been maintained the
5 Board. (*Tesoro* at 472.) Rather, the only evidence the court could find about the history of
6 applications for exemptions was from Mr. Singer, who testified that "this is the first time the
7 Water Board has been asked to approve an exemption to the prohibition on the discharge of
8 pesticides to Lake Tahoe." (AR 44098.) As such, to the extent the Board interprets the criteria
9 to allow a narrowly-drawn project goal to *per se* exclude the consideration of non-chemical
10 methods first, the court declines to afford deference to the Board on this interpretation.
11

12 All of that being said, the court finds that the above analysis does not lead to the
13 conclusion that an exemption can never be granted for pesticide testing. Petitioners' argument
14 to the contrary is an overstatement. However, non-chemical means first must be evaluated and
15 deemed infeasible, and any finding of infeasibility must not merely be because the use of non-
16 chemical methods does not satisfy the goal of testing pesticides. Whether the Board has
17 sufficiently made the necessary findings under the criteria for the Project is discussed below.
18

19 **Whether the Project satisfies Exemption Criteria 1 and 6**

20 Petitioners claim that the Board incorrectly concluded that the Project satisfied
21 exemption criteria 1, 5, and 6 and therefore the Board failed to proceed in a manner required by
22 the Basin Plan, an abuse of its discretion. Central to the determination for criteria 1 and 6 is
23 whether non-chemical methods are ineffective or inappropriate. The court will address this
24 issue first.
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1 The Staff Report notes that the TKPOA has tried various non-chemical methods to
2 address AIPs for over 30 years. (AR 46113). Rather than including a detailed analysis of the
3 purported inappropriateness and ineffectiveness of non-chemical methods to address the AIPs,
4 the Staff Report primarily references the analysis and conclusions of the TKPOA, including the
5 TKPOA's April 30, 2021 Updated Basin Plan Exemption Application (Application). (*Id.*)
6 While the Staff Report finds that the non-chemical methods are inappropriate or ineffective,
7 Petitioners contend that at minimum bottom barriers, Ultraviolet C light (UV-C), and laminar
8 flow aeration (LFA) are feasible, effective, and appropriate. The court reviews each of these
9 methods below to determine whether the weight of the evidence is contrary to the Board's
10 finding that these non-chemical methods are inappropriate or ineffective.

11
12 Bottom Barriers

13 Per the Application, “[b]ottom Barriers, also known as benthic barriers, are mats of
14 fabric that are anchored to the substrate with weights before or during the early stage of
15 seasonal plant growth, with the purpose of physically suppressing growth and blocking
16 sunlight.” (AR 02317.) The TKPOA concludes that their success in the Tahoe Keys lagoons is
17 short term with recolonization of the AIPs common. The TKPOA asserts that such results are
18 consistent with tests at lakes in other parts of the country. At the same time, the Application
19 notes the success of bottom barriers at Emerald Bay, another part of Lake Tahoe. At Emerald
20 Bay, the bottom barriers were used in conjunction with diver-assisted hand removal. (AR
21 02317.)

22 To the contrary, Petitioners point to studies that suggest the effectiveness of bottom
23 barriers in addressing AIPs. (*Integrating hot water under a benthic barrier for curlyleaf*
24 *pondweed turion control* at AR 28711-28716; *Potential For Pondweed Control In Lake Tahoe*
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1 *Using Bottom Barriers* at AR 24884.) Additionally, Petitioners reference the August 2020
2 Lake-Wide Control of Aquatic Invasive Plants Project, which found that “[bottom b]arriers have
3 been used successfully where plant growth is dense, usually greater than 50% density, and is
4 less time and effort intensive than other control methods over large areas.” (AR 34973.)

5
6 Petitioner also cite to the 2013 Final Report of the Tahoe Keys Aquatic Plant
7 Management Research Project (AIP Management Project). While the AIP Management Project
8 notes that, “[s]ynthetic barriers and jute barriers were both effective at suppressing submerged
9 aquatic plants in the short term of less than 12 months,” it indicates that in the treatment areas
10 the plants recolonized after a period of 12-24 months to reach a level of density similar to that in
11 the untreated areas. (AR 28129.) The AIP Management Project concludes that mechanical
12 techniques (like bottom barriers and diver-assisted removal) have been successful in particular
13 areas of Lake Tahoe “even to the point of localized eradications,” but in enclosed, man-
14 modified areas like marinas the results were less successful at addressing AIPs over the long
15 term. Instead, the AIP Management Project determines that solely using mechanical methods
16 would be unlikely to effectively control AIPs in the Tahoe Keys lagoons. (AR 28130.)

17
18 Petitioners attack the conclusions TKPOA has drawn as to the effectiveness of bottom
19 barriers in the Tahoe Keys lagoons. Referencing the TKPOA Bottom Barrier Monitoring
20 Reports for 2016 to 2020, Petitioners note the obstacles faced by homeowners, including
21 difficulties installing barriers and a lack of monitoring (at least for 2016 to 2018 when the
22 installation was left to individual homeowners as opposed to professionals), the need for
23 cooperation between nearby homeowners to effectively harvest aquatic weeds, and the impacts
24 of boat traffic which likely led to the siltation on the top of the barriers permitting new weeds to
25 take root. (AR 9495, 10131, 10855, 11326, and 11699.)
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1 The court finds that, while bottom barriers have shown success in some lake
2 environments, their success has been limited in the Tahoe Keys, leading to the recolonization of
3 aquatic weeds after their removal. However, with improved cooperation between homeowners
4 and with the integration of the other non-chemical methods in conjunction with bottom barriers,
5 the court finds that bottom barriers could be part of a successful coordinated effort to use non-
6 chemical methods to address the AIPs in the Tahoe Keys lagoons.
7

8 LFA

9 Per the Application, “[p]hysical mixing or aeration of water can improve dissolved
10 oxygen levels and reduce nutrient loading, which can otherwise contribute to increased algal
11 and plant growth. One method for aeration is laminar flow aeration (LFA), a technology often
12 used for improving water quality in water bodies where there is consistently low dissolved
13 oxygen and a buildup of fine sediment.” (AR 02331.) Per the Application, “LFA has been used
14 successfully with shallow, warmer waters with minimal circulation at low elevation; however it
15 has not been fully tested in an area such as Lake Tahoe, which has deeper, colder water at a
16 much higher elevation.” (*Id.*) Nonetheless, the Application acknowledges the “significant
17 reductions in organic sediment thickness, sediment nutrient concentrations, and aquatic plant
18 coverage” from the use of LFA in the Ski Run Marina of South Lake Tahoe. (AR 02332.)
19

20 Petitioners as well highlight the successes of the application of LFA to the Ski Run
21 Marina. Petitioners further assert, that while the TKPOA points to limited success of LFA when
22 it was tested in the Tahoe Keys lagoons beginning in 2019, the results show that LFA was
23 successful in increasing dissolved oxygen and reducing muck layer thickness, which decreases
24 habitability for AIPs. (AR 11465; See also *Laminar Flow Aeration: A Sustainable Lake*
25 *Improvement Option* at AR 22745-22747 [noting the encouraging results of using LFA to
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1 improve habitats to address AIPs] and *Evaluation of Laminar Flow Aeration and*
2 *Bioaugmentation for Water Quality Improvements in the South Basin of Austin Lake,*
3 *Kalamazoo County, Michigan* at AR 27839 [noting the benefits of LFA, including, “in lakes
4 with both prominent algal blooms and nuisance aquatic plants, [...offering] continuous and
5 sustainable benefits relative to other management methods that are executed only a few times
6 per season or that need to be re-applied”].) Petitioners contend that with the right timing and
7 conditions and in coordination with other non-chemical methods, LFA can successfully reduce
8 the infestation of AIPs.

10 Nonetheless, the Staff Report, referencing the Application, states that, “[o]ther options
11 for non-chemical control methods (LFA and UV-C light) are limited in number and are
12 experimental and unproven in controlling AIPs under the conditions found in the Tahoe Keys
13 Lagoons.” (AR 46113.) Assuming arguendo that LFA (and UV-C light) are experimental and
14 unproven, this does not necessarily lead to the conclusion that they are ineffective or
15 inappropriate. Rather, per the dictates of criterion 1, these methods must be thoroughly
16 evaluated, not summarily (and speculatively) dismissed.

18 It is noteworthy that LFA is one of the non-chemical control methods employed at
19 several sites in the Project to be assessed in comparison to the herbicide-only and combined
20 herbicide/non-chemical methods sites. The inclusion of LFA (in addition to UV-C as discussed
21 below) in the Project undercuts the argument that alternatives to pesticide have already been
22 thoroughly evaluated and that non-chemical measures are inappropriate or ineffective to achieve
23 the project goals⁴ under criterion 1.

26
27 ⁴The court is mindful that the stated project goal is to test various methods, including herbicides, but as discussed in
28 the preceding section such a narrow-tailored project goal cannot be used to evade the need to evaluate non-chemical
methods first to achieve the overarching goal of protecting water quality.

1 herbicide/non-chemical method testing sites. As discussed in the preceding section, its
2 inclusion in the Project undercuts its argument that UV-C light has been thoroughly tested and
3 determined to be inappropriate and ineffective under criterion 1. Moreover, the fact that the
4 Lakeside Marina, where UV-C light has had successful results, differs structurally from the
5 Tahoe Keys lagoons does not mean that UV-C light could not be effective, albeit with possible
6 modifications, in the Tahoe Keys lagoons. Concluding otherwise, the court finds, is overly
7 speculative and does satisfy the requirement to thoroughly evaluate this method.
8

9 Feasibility Factors

10 Upon review of the record, the court finds that the most compelling argument in favor of
11 finding non-chemical methods ineffective or inappropriate is their purported relative cost to
12 chemical methods. For instance, per the Application, “[t]he labor-intensive nature of bottom
13 barrier installation, combined with the large per acre expense [approximately \$95,000 in 2017
14 dollars], make bottom barriers an infeasible large-scale solution for the Tahoe Keys lagoons.”
15 (AR 02318.) Per the Application, LFA costs range anywhere from \$15,000 to \$100,000 for a 6-
16 acre test site, whereas UV-C light costs about \$60,000 for a one-year treatment for 1 acre. (AR
17 02333, 02336.)
18

19 Yet, in evaluating the feasibility of a method, cost is but one of many factors.

20 Criterion 1 defers to the definition of feasibility as defined in CEQA Guideline 15364:

21 “Feasible” means capable of being accomplished in a successful manner within a
22 reasonable period of time, taking into account economic, environmental, legal, social,
23 and technological factors.

24 (AR 39781.)

25 Upon review of the record, and specifically the Application, the court finds that the analysis as
26 to cost is insufficient to find the three non-chemical methods discussed above to be infeasible.
27
28

1 For LFA, cost is not noted as a reason for dismissing this option. (AR 02341.) For bottom
2 barriers and UV-C light, cost is listed is a reason for dismissing these options (as well as length
3 of time required to utilize the method for UV-C light). (AR 02339, AR 02342.) However, these
4 costs are presented in a vacuum – that is, there is little analysis as to what these costs would
5 mean for this particular community and how the other factors within the feasibility definition of
6 CEQA Guideline 15364 play into the analysis. Specifically, the Application notes that “the
7 [Tahoe Keys] development includes 1,529 homes and townhouse, a commercial marina, and a
8 commercial center.” (AR 02274) The court reasonably infers that these homeowners and
9 businesses would share the costs of this undertaken. Absent a more detailed cost-benefit
10 analysis, the court cannot find that the costs of these non-chemical methods alone make them
11 infeasible.
12

13
14 The Application also states that non-chemical methods “cannot be employed at a scale
15 that can address the full magnitude of the infestation within the Tahoe Keys.” (AR 02316.) The
16 court finds that absent the thorough evaluation required by criterion 1, which the court finds the
17 TKPOA has not established that it has conducted, such a conclusion is overly speculative and
18 cannot form a basis for deeming the three non-chemical methods discussed above to be
19 infeasible or inappropriate.
20

21 Determination as to Criteria 1 and 6

22 Under the independent judgment standard, starting with the presumption that the
23 Board’s findings are correct, Petitioners have the burden of establishing that these findings are
24 contrary to the weight of the evidence. (*Fukada* at 811-812.) To satisfy criteria 1 and 6⁵ to
25

26 ⁵The court is mindful that in its analysis above that it has referred primarily to the requirements under criterion 1.
27 The court finds that if criterion 1 is not met – that is, that there has been insufficient demonstration that non-
28 chemical means are ineffective or inappropriate – that criterion 6, which provides for a finding regarding “the failure
of non-chemical measures to effectively address the target organisms,” would not be met either.

1 Board must find that non-chemical methods were thoroughly evaluated and found to be
2 infeasible. Upon court's review of the evidence, the weight of the evidence is contrary to such a
3 finding. Rather, at minimum, the weight of the evidence does not establish that bottom barriers,
4 LFA, and UV-C light are infeasible. Instead, the evidence suggests that with proper
5 coordination, including potentially with other non-chemical methods, these three non-chemical
6 methods could be part of a successful control strategy for AIPs in the Tahoe Keys lagoons, one
7 in which does not require the use of aquatic herbicides.
8

9 As such, the court finds that Board has failed to follow the Basin Plan in approving the
10 exemption for the Project and therefore abused its discretion.

11 **Whether the Project satisfies Exemption Criterion 5**

12 To satisfy criterion 5, the Board must find that the Project "(a) demonstrates that the
13 target organism is a primary cause of the problem being addressed, and (b) provides evidence
14 that the proposed application of pesticides will accomplish the project goals." (AR 39781.)
15

16 Petitioners contend that "[u]ntil the excessive nutrient loading, muck layers, stagnant
17 waters, lack of filtration, and flawed design of the Tahoe Keys is addressed, the weeds will
18 continue to excessively grow, and the Herbicide Testing Project will not fix the issue."
19 (Opening Brief in Support of Petition for Writ of Mandate (Opening Brief) at 33:3-6.) On the
20 other hand, Respondent argues that "[a]n overabundance of a plant [namely Eurasian
21 watermilfoil, coontail, and curlyleaf pondweed] is the primary cause of an AIP infestation (e.g.,
22 "the problem")." (Opposition Brief of the Regional Water Quality Control Board, Lahontan
23 Region (Opposition Brief) at 32:9-10.) Respondent maintains that Petitioners is urging the
24 court to read a requirement into the Basin Plan that does not exist – that is, that all conditions
25 supporting the AIP growth must be addressed or eliminated before granting an exemption.
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1 Instead, Respondent asserts that the court should afford considerable deference to the Board in
2 interpreting its own regulations. (*Id.* at 32:12-19.)

3 Evidence in the record supports the presence of a multitude of factors that may be
4 contributors to the AIP infestation in the Tahoe Keys lagoons, including factors not specifically
5 noted by Petitioners, such as air pollution. (See *Tahoe Keys Lagoons: Contributing Sources of*
6 *Nutrient Pollution* at AR 09014 [suggesting the contribution of pollution and urban runoff to the
7 proliferation of AIPs in the Tahoe Keys lagoons].) Certainly the root causes of the AIP
8 infestation in the Tahoe Keys lagoon are not the weeds themselves. The court finds that the
9 weeds merely are a symptom of many factors.

11 However, the court finds that the TKPOA properly has framed the “problem” to be
12 addressed as the AIP infestation. Substantial evidence is in the record to establish that the
13 application of pesticides will address this problem. While the weight of the evidence raises
14 significant questions as to whether the AIPs will return even after the application of pesticides
15 (see AR 23380, 18226-18230, 25375, 41064), the court finds the requirement under criterion 5
16 that evidence be provided that “the proposed application of pesticides will accomplish the
17 project goals” has been met, particularly since the Project is framed as one to *control* the AIP
18 infestation, not necessarily to *eradicate* it.

20 If the court were to read criterion 5 to require all root causes of the problem (or even a
21 subset thereof) to be addressed before allowing the discharge of pesticides, it would render
22 criterion 5 practically meaningless. Just as the Board cannot characterize the project goals to
23 require the use of pesticides, thereby negating the utility of criterion 1, Petitioners cannot
24 characterize the problem as being the upstream root causes, rather than the problem as stated in
25 the Application, thereby negating the utility of criterion 5. The court agrees with Respondent
26
27

1 that the Board is entitled to deference on this interpretation. Instead of flying “in the face of the
2 clear language and purpose of the interpreted provision” (*Communities* at 1104), such an
3 interpretation is consistent with the intent of the Basin Plan and specifically the exemption from
4 the pesticide discharge prohibition within the plan.

5
6 It very well may be a better policy choice to require that the root causes be addressed
7 prior to allowing the discharge of pesticides in a body of water; however, that is not what the
8 court deems criterion 5 to require. The court finds that the Board may use its discretion to grant
9 an exemption if it finds that the requesting party has met all of the criteria including criterion 5’s
10 requirement to “demonstrate that that target organism is a primary cause of the problem being
11 addressed.” It is important to note that the language used is “a primary cause,” not “the
12 primary cause.” Therefore, the court finds that it within the Board’s discretion to approve an
13 exemption for pesticides if it deems that the target organism is one of the primary causes, even
14 if other primary causes also exist.
15

16 To be clear, this finding does not absolve the Board from its requirement to thoroughly
17 evaluate alternatives to pesticides. Such alternatives might include efforts to address the
18 upstream root causes, such as stagnant water, nutrient loading, and water filtration. Yet, the
19 court finds that this analysis is most appropriate in criteria 1 and 6, not under criterion 5.
20

21 As such, the court finds that Petitioners have failed to meet their burden in establishing
22 that the weight of the evidence is contrary to the Board’s finding that criterion 5 was satisfied by
23 the Project.
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1 **IV. WHETHER APPROVAL OF THE PROJECT VIOLATES CEQA**

2 **Standard of Review**

3 Under Public Resources Code § 21168.5, “[a]buse of discretion is established if the
4 agency has not proceeded in a manner required by law or if the determination or decision is not
5 supported by substantial evidence.” If the asserted error is a legal error, the court reviews the
6 matter de novo. If, however, the asserted error is one of fact, the substantial evidence standard
7 of review applies.
8

9 Neither party disputes that the above standard of review applies to challenges to the
10 certification of an EIR under CEQA. Rather, the parties disagree on whether Petitioners’
11 challenges are properly framed as claims of legal error or of factual error.

12 Petitioners make two primary arguments in challenging the certification of the EIR: that
13 the Board failed to proceed in a manner required by law 1) in approving a Final EIR with an
14 unduly narrow project description and 2) in approving a Final EIR without an analysis of the
15 reasonably foreseeable consequences of repeated pesticide use. The court finds that both
16 challenges plainly are claims of legal error. As such, the less deferential standard – a de novo
17 review – is appropriate.
18

19 **Whether the Board erred in approving a Final EIR with an unduly narrow project**
20 **description**

21 Petitioners contend that the Final EIR contains an artificially-narrow project description,
22 specifically a project that seeks to test aquatic weed control methods, including herbicides, and
23 therefore “point blank requires the use of herbicides.” (Opening Brief at 33:27.) By having an
24 artificially-narrow project description, Petitioners claim that the Board violated CEQA as the
25 Final EIR omitted the analysis of reasonable alternatives.
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1 In *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647 (*Kawamura*),
2 the court considered an EIR for a project that initially sought eradication of pests, but at the last-
3 minute changed the project objective to control of pests. The court writes:

4 We conclude that, even before the new information came to light that eradication was no
5 longer attainable, the EIR violated CEQA by giving the project's "objective" an
6 artificially narrow definition ("eradication of LBAMs") and thereby omitting analysis of
7 pest control as a reasonable alternative to the eradication program. The EIR
8 acknowledged the project's "purposes" included protecting California native plants and
9 agricultural crops from damage. **While a control program may have achieved these**
10 **"purposes" to some extent (as evidenced by the ultimate approval of a control**
11 **program), the EIR declined to evaluate a control program as an alternative to an**
12 **eradication program on the ground that a control program would not achieve the**
13 **"objective" of eradication.** The EIR did not even address in its cumulative impacts
14 discussion the incremental effect of the reasonably foreseeable future need to continue
15 anti-LBAM measures after expiration of the seven-year period. The EIR's omissions
16 leave the record devoid of evidence to prove CDFA's claim that the last-minute change
17 was legally acceptable because the adopted control program was narrower than the EIR's
18 eradication program.

19 (*Id.* at 654 (emphasis added).)

20 Similarly, reasons Petitioners, "the Herbicide Testing Project description also violates
21 CEQA because it maintains an unduly narrow project objective that precludes non-chemical
22 methods from achieving the true project goal of controlling AIP." (Opening Brief at 34: 15-18.)

23 Respondent counter that, rather than the Final EIR project description being artificially
24 narrow, Petitioners are artificially narrowing the project description themselves. Instead,
25 Respondent points to the analysis of what it contends are a reasonable range of alternatives:
26 testing of non-herbicide methods only (AR 45247), dredge and replace substrate (*Id.*), and the
27 no action alternative to continue existing aquatic weed control methods (AR 45259). Upon the
28 court's review of the Final EIR, specifically the Draft EIR attached as Appendix C, the court
finds that the EIR provides a sufficient analysis of these three alternatives.

1 Petitioners nonetheless argue that feasible non-chemical methods were dismissed for not
2 satisfying the Project’s goals of testing herbicides. As discussed above regarding Petitioners’
3 contention that the Basin Plan does not permit testing, the Board cannot exclude consideration
4 of non-chemical methods simply by crafting project goals that require the use of herbicides.
5 Petitioners have provided clear examples of the Board rejecting the use of non-chemical means
6 only, claiming such use would not meet the project goals. (See Responses to Exemption,
7 NPDES, and MMRP Comments at AR 46472 [“In order to compare the effectiveness of the
8 different AIP treatment methodologies with minimal variability in testing conditions, it is
9 important that all AIP treatment methodologies being considered for future use be evaluated at
10 the same time in the same or very similar environment. Testing only non-chemical methods
11 would be ineffective in achieving the project goals.”]; Staff Report at AR 46114 [“That is why
12 both chemical and non-chemical treatment methodologies identified in the CMT project need to
13 be evaluated concurrently. Failing to do so, will fail to meet the project’s goals, as outlined,
14 above.”] The EIR itself includes nearly verbatim language to the above at section 2.1.2 in
15 response to one of its comments. (AR 44256-44257.)

18 Despite this response, however, the EIR still evaluates a non-chemical only option,
19 consisting of using LFA and UV-C light only as a test. The evaluation of a non-chemical only
20 option contradicts Petitioners’ claim that an artificially narrow project description omits analysis
21 of reasonable alternatives. Petitioners fail to provide additional cites to the record that show
22 otherwise.

24 Further, State CEQA Guidelines § 15126.6(a) provides the following regarding the
25 consideration of alternatives to a proposed project:

26 An EIR shall describe a range of reasonable alternatives to the project, or to the location
27 of the project, which would feasibly attain most of the basic objectives of the project but

1 would avoid or substantially lessen any of the significant effects of the project, and
2 evaluate the comparative merits of the alternatives. **An EIR need not consider every**
3 **conceivable alternative to a project. Rather it must consider a reasonable range of**
4 **potentially feasible alternatives that will foster informed decision making and**
5 **public participation.** An EIR is not required to consider alternatives which are
6 infeasible. The lead agency is responsible for selecting a range of project alternatives for
7 examination and must publicly disclose its reasoning for selecting those alternatives.
8 There is no ironclad rule governing the nature or scope of the alternatives to be
9 discussed other than the rule of reason. (*Citizens of Goleta Valley v. Board of*
10 *Supervisors* (1990) 52 Cal.3d 553 and *Laurel Heights Improvement Association v.*
11 *Regents of the University of California* (1988) 47 Cal.3d 376).

12 (CEQA Guidelines § 15126.6(a).)

13 Review of the EIR reflects that its contents are consistent with the dictates of the above
14 CEQA section. 2.2.2 of the Draft EIR (attached as Appendix C to the Final EIR) sets forth the
15 selection criteria for alternatives (AR 45226), and following this criteria the EIR selected and
16 reviewed the alternatives noted above. Petitioners have failed to demonstrate through evidence
17 in the record that the EIR acted outside of the law in making these determinations. Instead,
18 upon review of the record, the court finds that the EIR appropriately analyzed reasonable
19 alternatives. As such, the court declines to find that the Board failed to proceed in a manner
20 required by law in approving a Final EIR with an unduly narrow project description.

21 **Whether the Board erred in approving a Final EIR without an analysis of the reasonably**
22 **foreseeable consequences of repeated pesticide use**

23 In *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47
24 Cal.3d 376 (*Laurel Heights*), the California Supreme Court held the following:

25 [A]n EIR must include a (sic) analysis of the environmental effects of future expansion
26 or other action if: **(1) it is a reasonably foreseeable consequence of the initial project;**
27 **and (2) the future expansion or action will be significant in that it will likely change**
28 **the scope or nature of the initial project or its environmental effects.** Absent these
two circumstances, the future expansion need not be considered in the EIR for the
proposed project. Of course, if the future action is not considered at that time, it will
have to be discussed in a subsequent EIR before the future action can be approved under
CEQA.

1
2 This standard is consistent with the principle that “environmental considerations do not
3 become submerged by chopping a large project into many little ones—each with a
4 minimal potential impact on the environment—which cumulatively may have disastrous
5 consequences.” (*Bozung, supra*, 13 Cal.3d at pp. 283–284, 118 Cal.Rptr. 249, 529 P.2d
6 1017.) The standard also gives due deference to the fact that premature environmental
7 analysis may be meaningless and financially wasteful. Under this standard, the facts of
8 each case will determine whether and to what extent an EIR must analyze future
9 expansion or other action.

10 (*Id.* at 396.)

11 Petitioners argue that the Board failed to proceed in the manner required by law by
12 certifying a Final EIR that failed to analyze what it deems is the reasonably foreseeable
13 consequence of the Project of repeated pesticide applications. Petitioners note the evidence in
14 the record supporting the likelihood of repeat pesticide use. For instance, as discussed above, as
15 pesticides do not address the root causes of the AIP infestation, Petitioners argue that the AIPs
16 are likely to re-emerge.

17 Petitioners maintain that nutrient loading is one of these root causes. (See *Curly-leaf*
18 *Pondweed Trends and Interrelationships with Water Quality* at 22090 [Minnesota study finding
19 that, “these case studies [which included the application of herbicides] show that removing
20 curly-leaf pondweed without other in-lake and watershed management practices occurring
21 simultaneously that reduce phosphorus loading may not improve native plant or water quality
22 conditions.”] Per the Staff Report of the 2006 Lake Tahoe Atmospheric Deposition Study:

23 Biological accessible forms of phosphorus (P) and nitrogen (N) contribute to algal
24 growth, which is a major factor in the decline of water clarity in most bodies of water.
25 The sources of these nutrients entering Lake Tahoe are not easily differentiated and the
26 amount entering via air or water are not well quantified. Water runoff containing
27 fertilizers, seepage of contaminated groundwater into the Lake, and direct atmospheric
28 deposition are all likely contributors to the phosphorus and nitrogen loading of Lake
Tahoe...Likely atmospheric sources of [particulate matter] and nutrients (N and P)
include smoke from planned and unplanned vegetative fires, wood stoves, and
fireplaces; vehicle exhaust, roadway dust (e.g., dirt, sanding material), and potential

1 transport from global and regional sources (e.g., Asian dust, ammonia and fine particles
2 from the Central Valley).

3 (AR 19835.)

4 (See also *Lake Tahoe Region Aquatic Invasive Species Management Plan – May 2014* at AR
5 25655 [“Stormwater runoff from the region’s developed landscape and atmospheric deposition
6 are the primary sources of elevated fine sediment and nutrient concentrations in the lake.”].)

7 Additionally, Petitioners point to the impact of climate change in warming waters that
8 create habitats more suitable for AIPs. (See *Projecting impacts of climate change on surface*
9 *water temperatures of a large subalpine lake: Lake Tahoe, USA* at 23403 [“Our results suggest
10 that Lake Tahoe...will continue to warm under climate change.”]; CalEPA Office of
11 Environmental Health Hazard Assessment’s *Indications of Climate Change in California* at AR
12 33102.)

14 Importantly, Petitioners cite studies which suggest that need for repeat use of herbicides
15 to control AIPs. (See *Effects of repeated, early season, herbicide treatments of curly pondweed*
16 *on native macrophyte assemblages on Minnesota lakes* at AR 23380 [finding that “curlyleaf
17 persisted at moderate to high frequencies over the 4 years [of herbicide treatment]”];
18 *Eutrophication and Aquatic Plant Management in Massachusetts* at AR 18226-18230
19 [evidencing the resurgence of AIPs after use of herbicides in several Massachusetts case
20 studies]; *Persistence and movement of diquat and the effectiveness of limnobarriers after*
21 *curlyleaf pondweed treatment in Crystal Lake, Connecticut* at AR 25375 [finding that “[e]ach
22 treatment yielded nearly complete control in the treatment year but substantial regrowth in the
23 following year]; *Evaluation of lakewide, early season herbicide treatment for controlling*
24 *curlyleaf pondweed (Potamogeton crispus) in Minnesota lakes* at AR 41064 [“Despite these
25 reductions [in curlyleaf pondweed], viable turions remained in the sediments of treated lakes
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1 after up to 5 consecutive year of [herbicide] treatment” suggesting the need for “ongoing
2 management...to maintain long-term control”). Admittedly, the cited studies are from different
3 states; however, they nonetheless suggest that it is reasonable to anticipate the re-emergence of
4 AIPs after the use of pesticides and therefore investigate further.

5
6 The TKPOA initial efforts to obtain an exemption from the pesticide prohibition as well
7 reflect the likelihood of repeated pesticide use. Per the Board’s August 27, 2018 letter to the
8 TKPOA requesting additional information for the exemption application, “[f]ollowing the
9 [initial] two-year test, TKPOA proposed to apply one or more of the aquatic herbicides noted
10 above to the Tahoe Keys Lagoons over a period of up to ten additional years based on lessons
11 learned during the two-year test.” (AR 02132.) The same letter continues that, “[a]vailable
12 evidence from use of herbicides along with non-chemical controls to control AIS in California
13 indicates long-term herbicide use will be required,” citing evidence from the 2015 Lake Tahoe
14 Region Aquatic Invasive Species Management Plan. (AR 02138.) Moreover, the Board’s
15 December 13, 2018 letter to the Washoe Tribe of Nevada and California states that, “[t]he
16 currently proposed Project is significantly larger in scope than the previously proposed Test
17 Project and proposed long-term aquatic weed control methods including use of aquatic
18 pesticides.” (AR 03233.)

19
20 In response, Respondent clarifies that the Project was authorized as a one-time
21 application of pesticides only and that the assumption that it will lead to future repeated
22 pesticide use is speculative and erroneous. Respondent cites to multiple sections in the Staff
23 Report (AR 46107, 46121), the Summary of Responses and Comments to the Staff Report (AR
24 46121, 46575), and the EIR itself (AR 44328, 44256), all which highlight the one-time
25 application of pesticides. “Future treatment methodologies may or may not include chemical
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1 treatments” (AR 46107), with “[a] separate environmental review and permitting process...
2 required for any future herbicide projects.” (AR 46575.)

3 While acknowledging the holding in *Laurel Heights*, Respondent adds that the *Laurel*
4 *Heights* also found that, “where future development is unspecified and uncertain, no purpose
5 can be served by requiring an EIR to engage in sheer speculation as to future environmental
6 consequences.” (*Id.* at 395.) To Respondent, engaging in sheer speculation is exactly what
7 Petitioners are requesting the Board to require the EIR to do.
8

9 In *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438 (*Santee*), the court
10 provided additional guidance on what must be considered in an EIR. In *Santee*, the court found
11 an EIR to be inadequate because it had failed to consider the reasonably foreseeable
12 consequence of a temporary detention facility remaining in operation past the seven years
13 initially claimed as its lifetime. The court writes:
14

15 Further, Guidelines section 15151 outlines the standard for an adequate EIR. Such
16 provides “[a]n EIR should be prepared with a sufficient degree of analysis to provide
17 decisionmakers with information which enables them to make a decision which
18 intelligently takes account of environmental consequences. An evaluation of the
19 environmental effects of a proposed project need not be exhaustive, but the sufficiency
20 of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement
21 among experts does not make an EIR inadequate, but the EIR should summarize the
22 main points of disagreement among the experts. The courts have looked not for
23 perfection but for adequacy, completeness, and a good faith effort at full disclosure.”

24 **Thus “reasonably anticipated future projects” should be considered in an EIR and**
25 **discussed in a cumulative analysis.** (See *Laurel Heights Improvement Assn. v. Regents*
26 *of University of California, supra*, 47 Cal.3d 376, 394, 253 Cal.Rptr. 426, 764 P.2d 278
27 and *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, supra*,
28 172 Cal.App.3d 151, 168, 217 Cal.Rptr. 893.)

As noted in *Citizens Assn. for Sensible Development of Bishop Area*, “[r]elated projects
currently under environmental review unequivocally qualify as probable future projects
to be considered in a cumulative analysis. [Citation.] **In addition, even projects**
anticipated beyond the near future should be analyzed for their cumulative effect.
[Citation.]” (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo,*
supra, 172 Cal.App.3d 151, 168, 217 Cal.Rptr. 893.)

1 (Santee at 1452-1453.)

2 Applying these principles to the case at bar, the court finds that repeated pesticide use is
3 reasonably foreseeable and should have been considered in the EIR. While Respondent
4 emphasizes that the Project is for one-time use of pesticides, there is ample evidence in the
5 record, as cited by Petitioners, that make the repeat use of pesticides reasonably anticipated.
6 Further, limiting the EIR's analysis to just the one-time use, in the court's view, is tantamount to
7 "chopping a large project into many little ones," explicitly disfavored by *Laurel Heights*.
8 (*Laurel Heights* at 396.) Instead, the cumulative impact of repeated pesticide use should have
9 been addressed by the EIR.
10

11 Following the guidance in the case law, the court finds that "(1) [repeated use of
12 pesticides] is a reasonably foreseeable consequence of the initial project; and (2) the future
13 expansion or action will be significant in that it will likely change the scope or nature of the
14 initial project or its environmental effects." Thus, the court finds that that the Board failed to
15 proceed in a manner required by law in approving a Final EIR without an analysis of the
16 reasonably foreseeable consequences of repeated pesticide use.
17

18 V. DISPOSITION

19 As articulated above, the court finds that the matter is not moot as meaningful relief can
20 be granted to the Petitioners. Further, even if the mootness doctrine did apply, the court finds
21 that the resolution of the issues before the court are in the public interest triggering an exception
22 to the doctrine. Thus, the court declines to dismiss the case per the mootness doctrine.
23

24 The court finds that the weight of the evidence is contrary to the Board's finding that
25 Project satisfied exemption criteria 1 and 6 of the pesticide prohibition of the Basin Plan. The
26 court therefore finds that the Board abused its discretion in granting the exemption.
27
28

1 The court finds that Petitioners have failed to meet their burden that the weight of
2 evidence is contrary to the Board's finding that the Project satisfied criterion 6. The court
3 further finds that the Basin Plan does not categorically prohibit issuing exemptions for pesticide
4 testing, provided that all criteria are satisfied.

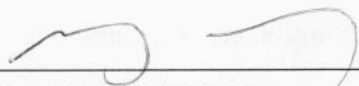
5 As to the challenges under CEQA, the court finds that the evidence does not establish
6 that the Board failed to proceed in a manner required by law in approving a Final EIR with an
7 unduly narrow project description. However, the court does find that the Board failed to
8 proceed in a manner required by law in approving a Final EIR without an analysis of the
9 reasonably foreseeable consequences of repeated pesticide use.

10 Finally, the court finds that Petitioners have failed to provide argument specific to their
11 Second Cause of Action for a violation of the Clean Water Act. As such, the court dismisses
12 this cause of action.
13

14 The court issues a writ of mandate commanding the Board to vacate and set aside its
15 approval of the Project and any and all approvals rendered pursuant to and/or in furtherance of
16 the implementation of the Project. The court further orders the Board to withdraw its approval
17 of the Pesticide Prohibition Exemption and to withdraw its certification of the Final EIR.
18 Petitioners are deemed the prevailing parties for any costs or attorney's fees which may be
19 allowable under the law.
20

21
22
23 IT IS SO ORDERED.

24 Dated: April 25, 2024

25
26 
27 GARY SLOSSBERG
Superior Court Judge