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SOUTHERN CALIFORNIA ALLIANCE OF
7 PUBLICLY OWNED TREATMENT WORKS,
CENTRAL VALLEY CLEAN WATER
8 ASSOCIATION, NATIONAL ASSOCIATION OF
CLEAN WATER AGENCIES, and BAY AREA
9 CLEAN WATER AGENCIES

10 UNITED STATES DISTRICT COURT

11 EASTERN DISTRICT OF CALIFORNIA

12 SOUTHERN CALIFORNIA ALLIANCE OF
PUBLICLY OWNED TREATMENT
13 WORKS, CENTRAL VALLEY CLEAN
WATER ASSOCIATION, NATIONAL
14 ASSOCIATION OF CLEAN WATER
AGENCIES, and BAY AREA CLEAN
15 WATER AGENCIES,

16 Plaintiffs,

17 v.

18 UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; ALEXIS
19 STRAUSS, ACTING REGIONAL
ADMINISTRATOR, UNITED STATES
20 ENVIRONMENTAL PROTECTION
AGENCY, REGION IX; and DOES 1 to 10,

21 Defendants.
22

Case No.

**COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF**

(Related Case No. 2:14-cv-01513-MCE-DB
(E.D. Cal.))

23 Plaintiffs Southern California Alliance of Publicly Owned Treatment Works (“SCAP”),
24 Central Valley Clean Water Association (“CVCWA”), National Association of Clean Water
25 Agencies (“NACWA”), and Bay Area Clean Water Agencies (“BACWA”) (collectively referred
26 to as “Plaintiffs”) bring this action against Defendant United States Environmental Protection
27 Agency; Defendant Alexis Strauss, Acting Regional Administrator, United States Environmental
28 Protection Agency, Region IX; and Doe Defendants 1 to 10 (collectively referred to as either

1 “USEPA” or “Defendants”), to challenge and invalidate USEPA’s use of documents,
2 unpromulgated “rules,” and actions that violated the Administrative Procedure Act (“APA”),
3 5 U.S.C. §553(b), (c) and §701 *et seq.*, and violated regulations implementing the Federal Water
4 Pollution Control Act (commonly known as the “Clean Water Act” or “CWA”), 33 U.S.C. §1251
5 *et seq.*, and allege as follows:

6 **I. INTRODUCTION**

7 1. Under the APA, USEPA has no legal authority to utilize, impose, or mandate
8 “rules” that have not been properly promulgated by notice and comment rulemaking. In the
9 context of whole effluent toxicity (“WET”) testing under the Clean Water Act, testing
10 methodologies cannot be used or required until properly promulgated by USEPA and
11 incorporated into federal regulations at 40 Code of Federal Regulations (“C.F.R.”) Part 136.

12 2. Plaintiffs are trade associations with member agencies that own and operate
13 wastewater treatment plants and water reclamation plants, often called Publicly Owned Treatment
14 Works (“POTWs”), which are designed to collect and treat municipal and industrial wastewater.
15 Many of Plaintiffs’ members operate pursuant to National Pollutant Discharge Elimination
16 System (“NPDES”) permits under the Clean Water Act issued by States, including California’s
17 State Water Resources Control Board or Regional Water Quality Control Boards under a
18 delegated federal program, or by USEPA if discharges are to federal waters (e.g., ocean outside
19 state boundaries, tribal lands). Many of these NPDES permits include WET testing and
20 compliance provisions.

21 3. USEPA has failed to comply with the law and exceeded its statutory authority in
22 using or allowing the use of unpromulgated statistical procedures, including the Test of
23 Significant Toxicity (“TST”), in modified permitting and compliance requirements in relation to
24 WET requirements in NPDES permits. Because of these illegal actions, Plaintiffs’ members are
25 now currently or will be imminently subjected to the unjustifiably onerous impacts of the TST.
26 These impacts include potentially higher costs and increased enforcement jeopardy due to an
27 increased frequency of “false positive” test results (namely, erroneous test results indicating
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1 toxicity is present when in fact no toxicity is present). These impacts go beyond the effects of
2 any single permit. The USEPA's actions threaten to infect all subsequent NPDES permits.

3 4. USEPA's failure to comply with the law, as set forth herein, constitutes a final
4 agency action subject to judicial review under the APA. In this case, the use of the
5 unpromulgated rules in NPDES permits constitutes final agency action "by which rights or
6 obligations have been determined, or from which legal consequences will flow." (*United States*
7 *Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016) citing *Bennett v. Spear*,
8 520 U.S. 154, 117 (1997).)

9 5. In this case, Plaintiffs seek a declaration that, in using or allowing the use of
10 unpromulgated "rules," including the TST, in NPDES permit monitoring and compliance
11 requirements, USEPA has acted contrary to the mandates of the APA and the regulations
12 implementing the CWA and exceeded its statutory authority by issuing, utilizing and encouraging
13 the use of unpromulgated "rules." As a result, USEPA's actions are unlawful and void.
14 (28 U.S.C. §2201; Fed. R. Civ. P. 57.) Plaintiffs further seek preliminary and permanent
15 injunctive relief to forestall further injury to Plaintiffs' members and others from the unjustifiably
16 onerous impacts of the TST. (28 U.S.C. §2202; Fed. R. Civ. P. 65.)

17 II. JURISDICTION AND VENUE

18 6. This Court has jurisdiction over the subject matter of this action pursuant to
19 28 U.S.C. §1331 (federal question jurisdiction), §1346 (United States as a Defendant), §2201
20 (authorizing declaratory relief), §2202 (authorizing injunctive relief), and pursuant to 5 U.S.C.
21 §702 (providing for judicial review of agency action under the APA).

22 7. Plaintiffs each have standing to bring this suit on behalf of its members because at
23 least one of Plaintiffs' members would have standing to sue in its own right; the interests these
24 trade associations seek to protect are germane to their organizations' purpose; and neither the
25 claims asserted nor the relief requested requires an individual member to participate in this suit.
26 (*See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010).)

27 8. Defendants have waived sovereign immunity pursuant to provisions of the APA,
28 5 U.S.C. §§701-706.

1 9. Venue is proper in this Court under 28 U.S.C. §1391(e) because this is an action
2 against an agency of the United States, and CVCWA maintains its principal place of business in
3 this judicial district.

4 **III. PARTIES**

5 10. SCAP is a non-profit corporation organized to help ensure that regulations
6 affecting POTWs and collection systems are reasonable, lawful, and in the public's best interest.
7 SCAP provides leadership, technical assistance, and timely information to its members in order to
8 promote regulations and regulatory programs that focus on the sustainable protection of the
9 environment and public health, and acts to represent and advocate for the interests of its members
10 on issues of importance where, as here, federal or state agencies veer from the requirements set
11 forth in laws and regulations. SCAP has several members that have NPDES permits containing
12 TST-based requirements.

13 11. CVCWA is a non-profit industry trade association representing municipalities and
14 other public entities located within the Central Valley region that provide wastewater collection,
15 treatment, and water recycling services to millions of Central Valley residents and businesses.
16 CVCWA participates in litigation where, as here, topics of import to the CVCWA membership
17 are raised.

18 12. NACWA is a non-profit industry trade association representing the interests of
19 POTWs and stormwater agencies of all sizes across the nation, including 32 utilities in California.
20 Founded in 1970, NACWA is the nation's recognized leader in regulatory, legislative, and legal
21 advocacy on the full spectrum of clean water issues, and is involved in all facets of water quality
22 protection and advocates for its members before all branches of the federal government.
23 NACWA often participates in litigation where, as here, federal or state agencies veer from the
24 requirements set forth in laws and regulations. NACWA has several members that have NPDES
25 permits containing TST-based requirements.

26 13. BACWA is a joint-powers agency created by the California Government Code.
27 BACWA is comprised of the five largest wastewater treatment agencies in the San Francisco Bay
28 Area and associate members that provide technical expertise and financial support to

1 municipalities and special districts providing sanitary sewer services to more than 6.5 million
 2 people. BACWA participates in litigation where, as here, topics of import to the BACWA
 3 membership are raised.

4 14. At the very least, SCAP and NACWA have standing in this matter. (*See Lujan v.*
 5 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).) Most of SCAP's members are currently
 6 operating under NPDES permits that are or will be subject to permitting and compliance
 7 requirements that include TST. Many of these SCAP members are also members of NACWA.
 8 CVCWA's and BACWA's members are concerned that USEPA's unlawful actions to use,
 9 mandate, implement, promote, encourage, and authorize the use by delegated States of
 10 unpromulgated "rules" will increase the costs of compliance and the likelihood of false findings
 11 of non-compliance for its members if TST requirements are placed in their members' permits.
 12 This result can be avoided by a finding in Plaintiffs' favor. The standing of at least one
 13 organization assures that this matter is justiciable, because only the presence of one party with
 14 standing is required. (*See Director, Office of Workers' Compensation Programs v. Perini North*
 15 *River Associates*, 459 U.S. 297, 303-305 (1983).)

16 15. Defendant USEPA is the United States agency primarily responsible for the
 17 implementation of the Clean Water Act and for oversight of its regional offices, including
 18 USEPA Region IX, and the states acting or exercising permitting authority granted under the
 19 CWA. Defendant USEPA is also an agency of the United States charged with certain
 20 responsibilities under the APA.

21 16. Defendant Alexis Strauss is the Acting Regional Administrator of USEPA Region
 22 IX of the USEPA and is generally responsible for administering USEPA Region IX in accordance
 23 with the Clean Water Act and other applicable laws. Ms. Strauss is sued in her official capacity.

24 17. Doe Defendants 1 to 10 are responsible in some manner for the events herein
 25 referred to, and caused injuries proximately thereby to Plaintiffs as alleged herein. The names of
 26 the individual Doe defendants are at this time unknown. Plaintiffs will insert the true names and
 27 capacities of the fictitiously named defendants when ascertained. Plaintiffs are informed and
 28 believe that, at all times herein mentioned, each Doe defendant was an agent of Defendant

1 USEPA and, in taking the actions hereinafter alleged, was acting within the scope of their
2 authority as an agent and with the permission and consent of USEPA.

3 **IV. FACTUAL AND LEGAL BACKGROUND**

4 **A. Overview of the Statutory Scheme**

5 18. The CWA created a system for permitting wastewater discharges through the
6 NPDES program. Under CWA sections 301 and 402, all facilities that discharge pollutants from
7 any point source into waters of the United States are required to obtain an NPDES permit.
8 Effluent limitations serve as the primary mechanism in NPDES permits for controlling discharges
9 of pollutants from point sources to receiving waters. Water quality standards are used as the basis
10 for deriving the specific effluent limitations in NPDES permits. (40 C.F.R. §122.44(d).)

11 19. USEPA is required to review and to approve or disapprove state-adopted water
12 quality standards under the CWA. Under CWA section 303(c), a “revised or new water quality
13 standard shall consist of the designated uses of the navigable waters involved and the water
14 quality criteria for such waters based upon such uses.” (33 U.S.C. §1313(c)(2)(A) (emphasis
15 added).) Generally, “designated uses” are the types of activities for which the water can be
16 employed (e.g., recreation, agriculture), and “water quality criteria” are the numeric or narrative
17 water quality levels necessary to support the water’s designated uses. Numeric water quality
18 levels are expressed as specific concentrations of individual pollutants (e.g., no more than 5 mg/l
19 pollutant X). Narrative water quality levels (e.g., no toxics in toxic amounts) are the catch-alls of
20 water quality regulation, and are narrative statements describing a desired water quality goal.

21 **B. WET Testing**

22 20. Within the NPDES program, freshwater and marine acute and chronic WET tests
23 are used in conjunction with other chemical analyses to evaluate and assess the compliance of
24 wastewater discharges and surface waters with water quality standards under the CWA.

25 21. WET (i.e., whole effluent toxicity) describes the aggregate toxic effect of an
26 aqueous sample (e.g., whole effluent wastewater discharge) as measured by laboratory organisms
27 responses upon exposure to the sample, including premature death, impaired growth, or reduced
28 reproduction. WET is thus defined by the measured effects on organisms. Because toxicity is

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1 inherently defined by the measurement system employed, toxicity is referred to as a “method-
2 defined analyte.” (67 Fed. Reg. 69,965.)

3 22. In WET testing, the final result is not based on a single measurement, but is the
4 product of a series of replicated measurements on a range of at least five effluent concentrations
5 compared to a control sample, when testing final effluent. This contrasts with chemical methods,
6 which generally rely on a single instrument measurement.

7 23. The contrast with chemical measurements does not stop there. Chemical
8 measurements have tremendous amounts of quality control/quality assurance (“QA/QC”)
9 procedures such as matrix spikes, matrix spike duplicates, known reference samples, etc. WET
10 has no accuracy component, which is why the promulgated methods in Part 136 require five
11 effluent treatments to provide more certainty in WET test results, which are not provided by the
12 QA/QC common to chemical measurements.

13 24. The series of replicated measurements produced through WET testing can be
14 assessed through a number of distinct statistical procedures outlined in 40 CFR Part 136. The
15 outcome of a statistical procedure is called the “endpoint,” which under the promulgated test
16 methods in Part 136 can include one of the following, although no specific one of these endpoints
17 included in the approved list are mandated:

- 18 a. The No Observed Effect Concentration (“NOEC,”) or the No Observed
19 Effect Level (“NOEL”), both of which refer to the highest concentration of
20 a toxicant that causes no observable effects in the exposed organisms;
21 b. The 25% Inhibition Concentration (“IC25”), which is the concentration of
22 a toxicant that causes a 25% inhibition in growth or reproduction in the
23 exposed organisms; and
24 c. The 50% Lethal Concentration (“LC50”), which is the concentration of a
25 toxicant that causes death in 50% of the exposed organisms).

26 An endpoint of “Pass/Fail” is not authorized under the promulgated methods.

27 25. The endpoints of NOEC/NOEL, IC25, and LC50 are all expressed as percent of
28 the effluent, while an endpoint of Pass/Fail is “unitless” (i.e., not expressed as a percent or in

1 terms of units). Because WET is a method-defined analyte, the statistical procedures used and the
 2 endpoint reported are important as different procedures often create different results. In other
 3 words, one statistical procedure may produce a result of “toxic,” while another may produce the
 4 result of “non-toxic” on the same tested effluent.

5 26. WET tests are surrogates, designed to replicate the total effect and environmental
 6 exposure of aquatic life to toxic pollutants in water without initially requiring the identification of
 7 the specific pollutants. Because WET testing does not identify the specific pollutant(s), more in-
 8 depth analyses, known as Toxicity Identification Evaluations (“TIEs”) and Toxicity Reduction
 9 Evaluations (“TREs”) are often performed if toxicity is detected in order to determine what
 10 pollutant(s) may be causing the toxicity effect.

11 C. The WET Regulatory Scheme

12 27. Section 304(h) of the CWA requires USEPA to “promulgate guidelines
 13 establishing test procedures for the analysis of pollutants that shall include the factors which must
 14 be provided in any certification pursuant to section [401 of the CWA] or permit application
 15 pursuant to section [402 of the CWA].” (33 U.S.C. §1314(h); 33 U.S.C. §§1341, 1342.)

16 28. USEPA regulations at 40 C.F.R. Part 136 prescribe the specific methods and
 17 reporting units for each parameter tested that must be used for the analysis of pollutants in all
 18 applications and reports submitted under the NPDES program under section 402 of the CWA, as
 19 well as State certifications pursuant to section 401 of the CWA. (40 C.F.R. §§136.1(a), 136.3;
 20 *see also* 40 C.F.R. §122.41(j)(4) and §122.44(i)(iv) (monitoring must be done according to test
 21 procedures approved under 40 C.F.R. Part 136).)

22 29. In November of 2002, USEPA promulgated through a formal rulemaking process
 23 acute and short-term chronic WET test methods and procedures, for use in monitoring
 24 compliance with NPDES permit limitations in accordance with 40 C.F.R. Part 136. (*See*
 25 *Guidelines Establishing Test Procedures for the Analysis of Pollutants; Whole Effluent Toxicity*
 26 *Test Methods; Final Rule, 67 Fed. Reg. 69,952 (Nov. 19, 2002).*) This regulation and its
 27 incorporated by reference documents are herein referred to as the “2002 Rule.” The 2002 Rule
 28 specifies the parameter to be measured and the required units for determining the acute and

1 chronic toxicity for freshwater and saline water. The 2002 Rule constitutes the universe of
2 USEPA's promulgated WET methods and procedures. (*See* 2002 Rule, 67 Fed. Reg. 69,972.)

3 30. The 2002 Rule does not mention or authorize the TST statistical procedure. In
4 addition, the 2002 Rule, among other things, also does not mention or authorize an alternative
5 hypothesis presuming the water tested is toxic. The 2002 Rule does not authorize and actually
6 discourages the use of single sample "Pass/Fail" test results as is prescribed with the use of the
7 TST. In fact, the 2002 Rule states that the "[u]se of pass/fail tests consisting of a single effluent
8 concentration (e.g., the receiving water concentration or RWC) and a control is not
9 recommended." The 2002 Rule does not authorize Pass/Fail endpoints, or unitless expressions of
10 toxicity. The 2002 Rule does not authorize a statistical method that relies only on the information
11 from two tested concentrations instead of a minimum of six concentrations of effluent and control
12 groups when testing final effluent. Plaintiffs challenge what is herein called "the TST," which
13 includes each of these unauthorized WET test and compliance related requirements. Because the
14 2002 Rule does not authorize use of the TST or methods or procedures related to the TST, the
15 TST and its related procedures may not be used to set permit limits or determine compliance with
16 NPDES permit requirements.

17 31. In undertaking the 2002 Rule, USEPA specifically considered allowing alternative
18 statistical procedures, but chose not to do so, explaining that, "EPA has not included such
19 alternative statistical methods in today's modifications to WET test methods. EPA believes that
20 the statistical methods currently recommended in the WET methods [NOEC, IC25, LC50] are
21 appropriate." (67 Fed. Reg. 69,964 (emphasis added).) The 2002 Rule acknowledged that other
22 techniques exist and that the statistical methods adopted into 40 C.F.R. Part 136 are not the only
23 possible methods. However, the 2002 Rule further states that, "[t]he recommended statistical
24 methods described in the method manual were selected because they are (1) applicable to most of
25 the different toxicity test data sets for which they are recommended, (2) powerful statistical tests,
26 (3) hopefully "easily" understood by nonstatisticians, and (4) amenable to use without a
27 computer, if necessary." (*Id.* (emphasis added)) Thus, the 2002 Rule clearly stated that a

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1 reasoned decision had been made to only include and approve use of certain statistical
2 procedures. Significantly, the TST was not among them.

3 32. To validate the performance of the test methods included in the 2002 Rule,
4 USEPA relied on an Interlaboratory Variability Study and established a false positive error rate
5 for each WET test method. The Interlaboratory Variability Study did not include the TST
6 statistical procedure, and the USEPA has not run a study to determine the false positive error rate
7 of the TST statistical procedure.

8 **D. USEPA's Unpromulgated TST Guidance**

9 33. In June of 2010, USEPA issued guidance documents regarding a potential new
10 statistical method for use in WET testing called the TST. (*See e.g.*, National Pollutant Discharge
11 Elimination System Test of Significant Toxicity Implementation Document, EPA 833-R-10-003
12 (June 2010).) The TST relies on an alternative hypothesis presuming toxicity and includes
13 Pass/Fail endpoints not contained in or authorized by the promulgated 2002 Rule. Furthermore,
14 the TST Guidance was not promulgated through notice-and-comment rulemaking, and the
15 document even includes an explicit disclaimer confirming that the document is not “a permit or a
16 regulation itself.” In fact, the TST Guidance further states:

17 “The document does not and cannot impose any legally binding
18 requirements on EPA, states, NPDES permittees, or laboratories
19 conducting or using WET testing for permittees (or for states in
20 evaluating ambient water quality). EPA could revise this
document without public notice to reflect changes in EPA policy
and guidance.”

21 34. In 2012, USEPA amended the 2002 Rule's WET test methods and procedures in
22 its modifications to the Promulgated Guidelines Establishing Test Procedures for the Analysis of
23 Pollutants under the Clean Water Act: Analysis and Sampling Procedures. (Final Rule, 77 Fed.
24 Reg. 29758 (May 18, 2012).) These amendments did not incorporate or authorize use of the TST,
25 even though the TST approach had been available as guidance for nearly two years.

26 35. In California, the Water Quality Control Plan for Ocean Waters of California
27 (“Ocean Plan”) was amended on October 16, 2012, approved by USEPA, and became effective
28 on August 19, 2013. There were also subsequent changes to the Ocean Plan in 2015. The Ocean

1 Plan sets water quality objectives based on chronic toxicity units (“TUc”) and specifies that TUc
 2 shall be used for critical lifestage toxicity tests. (Ocean Plan at 7 and 79.) Even though the TST
 3 guidance was available in 2012 and 2015 when the Ocean Plan was amended, the Ocean Plan
 4 clearly requires that, where chronic toxicity effluent limitations must be included, those
 5 limitations must be based on TUc, which is calculated based upon the NOEL, and not on a
 6 Pass/Fail basis as used with the TST. Use of the TST contradicts the promulgated toxicity
 7 requirements of the Ocean Plan.

8 36. In 2015, USEPA again proposed to modify the regulations in 40 C.F.R. Part 136.
 9 These proposed modifications included clarifications and corrections to the procedures for
 10 toxicity testing (*see* 80 Fed. Reg. 8956-9075 (February 19, 2015) accessible at
 11 <http://www.gpo.gov/fdsys/pkg/FR-2015-02-19/pdf/2015-02841.pdf>) Significantly, the newly
 12 proposed rule failed to include the TST. (80 Fed. Reg. 8968-8969.)

13 **E. USEPA’s Use of an Alternative Test Procedure as an End-Run around Rulemaking**

14 37. Under limited circumstances and subject to specific regulatory requirements, a
 15 person may request an Alternative Test Procedure (“ATP”) authorizing the use of test methods
 16 and procedures not previously approved and formally promulgated by USEPA. (40 C.F.R.
 17 §136.3(a).) The ATP process was designed to “encourage organizations external to EPA to
 18 develop and submit for approval new analytical methods.” (*See Guide to Method Flexibility and*
 19 *Approval of EPA Water Methods*, USEPA Office of Water (Dec. 1996) at p. 77.) USEPA
 20 regulations at sections 136.4 and 136.5 describe the specific procedures and requirements for
 21 obtaining USEPA review and approval of ATPs. (40 C.F.R. §§136.4, 136.5.)

22 38. USEPA Region IX had been urging the State of California to utilize the TST in
 23 NPDES permits for the past few years. Permit holders objected to the use of the TST over
 24 concerns regarding high false positive error rates and most importantly because the TST is not a
 25 formally promulgated and publicly vetted rule.

26 39. On February 12, 2014, to overcome concerns over the lack of a promulgated rule,
 27 the California State Water Resources Control Board requested USEPA Region IX approval to use
 28 the TST statistical method in conjunction with a test design incorporating only two samples

1 (effluent and control) rather than the minimum of six required for effluent testing under the 2002
2 Rule. A little more than a month later, on March 17, 2014, USEPA Region IX approved a
3 statewide, limited use ATP under 40 C.F.R. Part 136.5. Further, USEPA applied this ATP to
4 non-ocean and ocean waters, even though application to ocean waters was not requested by the
5 State Water Board in its ATP request.

6 40. After USEPA approved the ATP for California in 2014, NPDES permits began to
7 be issued using the TST based on the modified test design approved in ATP. Plaintiffs
8 challenged USEPA's approval of the ATP in federal court, but before a ruling was issued,
9 USEPA withdrew that ATP in 2015. Therefore, currently, no valid ATP for WET testing exists
10 or is approved in California.

11 41. Final agency decisions are subject to judicial review. Generally, challenges to
12 agency regulations have a six-year statute of limitations. The statute of limitations has not run on
13 the Plaintiffs' claims. USEPA "cannot avoid review by shifting the bases of its actions until the
14 statute of limitation on challenging the issuance of its regulatory documents runs" and the
15 USEPA's "actions can remain open to challenge on an 'as applied' basis when regulations are
16 used in new ways." (*See accord* Memorandum and Order at 11, *Southern California Alliance of*
17 *Publically Owned Treatment Works v. EPA.*, No. 2:14-cv-01413-MCE-DB (E.D. Cal. Oct. 21,
18 2016).) This makes sense because otherwise an agency could sit on guidance until the statute ran
19 to shield itself from review. The first permit using the TST that Plaintiffs are aware of was the
20 Orange County Sanitation District's ocean discharge permit adopted jointly by USEPA and
21 California in 2012, which could have been a potential trigger for the APA's six year statute of
22 limitations. Alternatively, the trigger date may be more appropriately tied to recent permits
23 adopted after the withdrawal of the ATP. Because the USEPA withdrew the ATP in February
24 2015, the APA's statute of limitations arguably did not start to run on the Plaintiffs' claims until
25 at least that time, when TST requirements in permits began to be justified on the TST guidance
26 documents directly, instead of on an approved, valid ATP. (*See id.*) In either case, this challenge
27 would still be timely.

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V. PLAINTIFFS' CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Declaratory Relief Pursuant to 28 U.S.C. §2201 and Federal Rule of Civil Procedure 57 – Wrongful Use or Approval of TST in Violation of the Administrative Procedures Act)

42. Plaintiffs refer to and incorporate by this reference all allegations set forth in paragraphs 1 through 41 above.

43. The APA authorizes the Court to hold unlawful and set aside final USEPA actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” (5 U.S.C. §706(2)(A).)

44. The APA also authorizes the Court to hold unlawful and set aside final USEPA actions that are “in excess of statutory . . . authority.” (5 U.S.C. §706(2)(C).)

45. USEPA’s use and approval of the TST for use as a statistical procedure, with a Pass/Fail endpoint, for analyzing WET test results or determining compliance with NPDES permit requirements, is contrary to law and federal regulations, *inter alia*, the APA, 40 C.F.R. Part 136, 40 C.F.R. §122.41(j) and §122.44(i), and the Ocean Plan.

46. USEPA violated federal regulations by using or approving the use of the TST in the NPDES program in contravention of 40 C.F.R. Part 136 and the Ocean Plan.

47. Nothing in the CWA or its implementing regulations grants USEPA the authority to use or approve of the use of the non-promulgated TST with or without a Pass/Fail endpoint in place of other officially promulgated statistical procedures and endpoints in the NPDES program.

48. USEPA’s use or approval of the use of the TST in NPDES permits failed to conform to the requirements for promulgation of test methods and procedures under CWA Section 304(h) and 40 C.F.R. Part 136.

49. USEPA’s actions were arbitrary and capricious, violated federal regulations, and work to prejudice the regulated community, including Plaintiffs’ members. USEPA violated the APA, federal regulations implementing CWA section 304(h), and the Ocean Plan, and thus acted in an arbitrary and capricious manner, abused its discretion, and acted in a manner not in accordance with law, as set forth herein.

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1 50. The APA authorizes the Court to hold unlawful and set aside final USEPA actions
2 that are without observance of procedure required by law. (5 U.S.C. §706(2)(D).)

3 51. To the extent USEPA contends that the TST is authorized under the 2010
4 Guidance, then use of that guidance as a rule constitutes an unlawful regulation as applied
5 because that guidance was contrary to the requirements of the APA.

6 52. USEPA has exceeded its statutory authority under CWA section 304(h) and 40
7 C.F.R. Part 136 in violation of the APA.

8 53. When an agency promulgates a rule, the APA requires that “[g]eneral notice of
9 proposed rule making shall be published in the Federal Register” and that “the agency shall give
10 interested persons an opportunity to participate in the rule making through submission of written
11 data, views, or arguments with or without opportunity for oral presentation.” (5 U.S.C. §553(b),
12 (c).)

13 54. An actual and substantial controversy has arisen and presently exists between
14 Plaintiffs and USEPA regarding the validity of USEPA’s use and approval of the use of the TST
15 and associated methods and procedures in violation of federal and state law and regulations.
16 USEPA’s actions as described herein are unlawful and therefore invalid. Plaintiffs are informed
17 and believe that USEPA disputes these contentions.

18 55. Because Plaintiffs have no adequate remedy at law for USEPA’s actions, and
19 Plaintiffs’ members have incurred or will imminently incur substantial harm as the result of
20 USEPA’s wrongdoing, a declaration is necessary to clarify the parties’ obligations and to inform
21 the public.

22 56. Plaintiffs seek an order pursuant to 28 U.S.C. section 2201 and Federal Rule of
23 Civil Procedure 57, declaring the USEPA’s actions to use, implement, mandate, approve of,
24 authorize, encourage, or allow the use of the TST or the Pass/Fail option in NPDES permits
25 constitutes an unlawful underground regulation without promulgating the use of the TST
26 statistical procedure as a rule, or under an approved ATP, and that all actions taken by the
27 USEPA or by others in reliance upon USEPA regarding the TST and Pass/Fail approach in
28 contravention of such procedures are void and shall have no legal force or effect. In addition,

1 Plaintiffs seek an order that any test results based on the TST and associated methods and
2 procedures that were previously incorporated into NPDES permits are void and no enforcement
3 actions can be taken for any previous violations of effluent limitations or monitoring requirements
4 based on the unpromulgated TST.

5 **SECOND CLAIM FOR RELIEF**
6 **(Injunctive Relief Pursuant to 28 U.S.C. §2202 and Federal Rule of Civil Procedure 65 –**
7 **Preliminary and Permanent Injunctive Relief)**

8 57. Plaintiffs refer to and incorporate by this reference all allegations set forth in
9 paragraphs 1 through 56 above.

10 58. Plaintiffs seek an order pursuant to 28 U.S.C. §2202 and Federal Rule of Civil
11 Procedure 65 to enjoin the USEPA from using, implementing, mandating, or approving, allowing,
12 encouraging, or authorizing the use of the unpromulgated TST and its associated methods and
13 procedures for water quality regulation, permitting, and compliance determination purposes.

14 59. A substantial likelihood exists that Plaintiffs will succeed on the merits of the
15 claims for the relief pled herein.

16 60. Plaintiffs' members are likely to suffer or have already suffered irreparable injury
17 in the absence of injunctive relief. Many of Plaintiffs' members operate POTWs pursuant to
18 NPDES permits issued by delegated States, including California's State Water Resources Control
19 Board and Regional Water Quality Control Boards, or by USEPA that include chronic toxicity
20 testing and compliance provisions. If not enjoined from the use of the unpromulgated TST for
21 testing and compliance purposes in all NPDES permits, many, if not all, of Plaintiffs' members as
22 well as other dischargers in the affected States will be required to begin using and reporting WET
23 testing results derived from an unpromulgated rule that adversely affects their compliance status.

24 61. Use of the TST will result in an increased cost to Plaintiffs' members in
25 undertaking the additional replicate measurements necessary to reduce the likelihood of being
26 found in violation; an increased frequency of false positives in toxicity testing and further
27 unnecessary but significant costs in TIEs, TREs and potentially facility upgrades; and, as a result,
28 a higher incidence of alleged noncompliance with NPDES permits, potentially resulting in civil
and even criminal liability. Injunctive relief is necessary given the fact that many of Plaintiffs'

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1 members have recently obtained or are in the process of obtaining new or revised NPDES permits
2 from the State Water Board, Regional Water Quality Control Boards, or USEPA that include
3 chronic toxicity testing and compliance provisions based on the unpromulgated TST and
4 associated methods and procedures. Furthermore, rulemaking without notice and comment
5 violates the APA, stifles public participation, and harms the Plaintiffs' members as well as the
6 public in general.

7 62. The threatened injuries outweigh any damage that an injunction may cause the
8 Defendant since an injunction would merely maintain the status quo that existed prior to the use
9 of TST in NPDES permits.

10 63. An order enjoining USEPA from using or authorizing the use of an unlawful rule
11 is consistent with and serves the public interest.

12 64. Because Plaintiffs have no adequate remedy at law for the unjustified additional
13 and substantial costs enumerated above, and because Plaintiffs' members have or will imminently
14 incur substantial harm in the form of increased enforcement jeopardy as the result of USEPA's
15 wrongdoing, preliminary and permanent injunctive relief is appropriate. Injunctive relief that
16 maintains the status quo that existed prior to use of the TST until and after resolution of this
17 adjudication of this matter is necessary in order to forestall irreparable injury to Plaintiffs and
18 their members as demonstrated above.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiffs respectfully request that the Court:

21 A. Declare that USEPA's use, implementation, mandate of the TST, or
22 encouragement, allowance, approval or authorization for States to use the TST and associated
23 requirements in the NPDES program was:

24 1. Made without observance of procedure required by law within the meaning
25 of APA section 706(2)(D); or

26 2. Not in accordance with law within the meaning of APA section 706(2)(A);

27 and

28 ///

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1 3. Beyond USEPA’s statutory jurisdiction, authority or limitations, within the
2 meaning of APA section 706(2)(C).

3 B. Declare that the use of USEPA’s TST and associated methods and procedures
4 unless and until promulgated as a rule, and that all actions taken by the USEPA or others in
5 reliance upon USEPA’s guidance regarding the TST in contravention of promulgated methods
6 and procedures are void and shall have no legal force or effect.

7 C. Declare that any test results based on the TST and associated methods and
8 procedures, which was previously incorporated into NPDES permits, are void and no
9 enforcement actions can be taken for any previous violations of effluent limitations or monitoring
10 requirements based on the unpromulgated TST.

11 D. Order that USEPA and its officers, employees, and agents, are enjoined from
12 using, mandating, or encouraging the use of the TST, or allowing, approving, or authorizing
13 States to use the TST, and are enjoined from the use of analytical results obtained through non-
14 promulgated procedures and methods for NPDES toxicity compliance determination or other
15 Clean Water Act purposes unless and until those procedures and methods are properly and
16 formally promulgated as rules.

17 E. Award Plaintiffs reasonable attorneys’ fees and costs incurred in the prosecution of
18 this action.

19 F. Grant such other and further relief as this Court deems just and proper.
20

21 DATED: December 19, 2016

DOWNEY BRAND LLP

22 By: 
23 MELISSA A. THORME

24 Attorney for Plaintiffs,
25 SOUTHERN CALIFORNIA ALLIANCE OF
26 PUBLICLY OWNED TREATMENT WORKS,
27 CENTRAL VALLEY CLEAN WATER
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CLEAN WATER AGENCIES, and BAY AREA
CLEAN WATER AGENCIES