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15 **IN THE UNITED STATES DISTRICT COURT**

16 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

17 SOUTHERN CALIFORNIA ALLIANCE OF
18 PUBLICLY OWNED TREATMENT
19 WORKS, CENTRAL VALLEY CLEAN
20 WATER ASSOCIATION, NATIONAL
ASSOCIATION OF CLEAN WATER
21 AGENCIES, and BAY AREA CLEAN
WATER AGENCIES,

22 Plaintiffs,

23 v.

24 UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; MIKE STOKER,
25 REGIONAL ADMINISTRATOR, UNITED
STATES ENVIRONMENTAL
26 PROTECTION AGENCY, REGION IX; and
27 DOES 1 to 10,

28 Defendants.

Case No. 2:16-cv-02960-MCE-DB

**EPA'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO
DISMISS THE SECOND AMENDED
COMPLAINT**

Date: June 28, 2018

Time: 2:00 p.m.

Place: Courtroom 7, 14th Floor

Judge: Hon. Morrison C. England, Jr.

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1 Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants United
2 States Environmental Protection Agency and Regional Administrator Mike Stoker (collectively,
3 “EPA”) respectfully move to dismiss for lack of jurisdiction and for failure to state a claim the
4 Second Amended Complaint (“SAC”) filed by Plaintiffs Southern California Alliance of
5 Publicly Owned Treatment Works (“SCAP”), Central Valley Clean Water Association
6 (“CVCWA”), and Bay Area Clean Water Agencies (“BACWA”). *See* SAC [ECF No. 37].

7 **I. INTRODUCTION**

8 Nothing has changed since the filing of the First Amended Complaint (“FAC”) and the
9 Court’s dismissal of it. The SAC simply repeats the same claims from the FAC challenging the
10 National Pollutant Discharge Elimination System (“NPDES”) Test of Significant Toxicity
11 (“TST”) Implementation Document (“2010 TST Guidance”), but re-packages and re-labels them
12 as “*ultra vires*.” *See* SAC. This Court has already ruled that to the extent Plaintiffs are
13 attempting to directly, or facially, challenge the 2010 TST Guidance, that claim falls under the
14 Administrative Procedure Act (“APA”), is time-barred, and that Plaintiffs failed to show that the
15 statute of limitations should be equitably tolled. 3/17/2018 Order at 10-14 [ECF No. 36]. The
16 SAC’s new allegations -- as to when such a cause of action accrued and alleged exceptional
17 circumstances to equitably toll the statute of limitations -- fail. The Court has already ruled on
18 these issues. Even if timely, the Court lacks jurisdiction because the 2010 TST Guidance is not a
19 final agency action subject to judicial review.
20

21 In addition, like the FAC, the SAC also continues to allege a non-specific as-applied
22 challenge to use of the 2010 TST Guidance in two of the same NPDES permits challenged in the
23 FAC. This Court has already correctly ruled that it lacks jurisdiction over challenges to NPDES
24 permits. Therefore, the Court should dismiss the Second Amended Complaint with prejudice
25 because amendment would be futile and Plaintiffs have repeatedly failed to cure the defects.

26 **II. BACKGROUND**

27 **A. Clean Water Act And NPDES Permits**

28 The Clean Water Act (“CWA” or the “Act”) was adopted “to restore and maintain the

1 chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). One
2 goal of the CWA is “that the discharge of toxic pollutants in toxic amounts be prohibited.” *Id.*
3 § 1251(a)(3). The CWA prohibits the discharge of a pollutant from a point source except in
4 compliance with, among other things, permits issued under the National Pollutant Discharge
5 Elimination System (“NPDES”) program. *Id.* §§ 1311(a), 1342. NPDES permits place limits
6 on the rate, amount, and/or concentration of pollutants that may be discharged and require
7 permittees to monitor their discharges and to file test results and other data with the relevant
8 permitting authority. NPDES permits are issued and administered by EPA or, where authorized
9 by EPA, by a state or tribal agency subject to EPA review. *See id.* § 1342(a)-(d). California has
10 been authorized to administer the NPDES program within the State. 39 Fed. Reg. 26,061 (July
11 16, 1974); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1430 (9th Cir. 1991). The CWA gives
12 states “the primary responsibilit[y] and right[... to prevent, reduce, and eliminate pollution.”
13 33 U.S.C. § 1251(b); *Barnum Timber Co. v. EPA*, 633 F.3d 894, 902 (9th Cir. 2011). EPA
14 “promulgate[s] guidelines establishing test procedures for the analysis of pollutants that shall
15 include the factors” that must be provided in NPDES permit applications. 33 U.S.C. § 1314(h).

17 **B. Whole Effluent Toxicity (“WET”) Testing**

18 Whole effluent toxicity (“WET”) is defined as “the aggregate toxic effect of an effluent
19 measured directly by a toxicity test.” 40 C.F.R. § 122.2. WET tests are used to determine
20 effects of toxicity on aquatic organisms, both the acute (severe) and chronic (less severe)
21 effects. *Id.* § 136.3. WET testing, in short, consists of exposing, in a laboratory setting, living
22 aquatic organisms (plants, vertebrates, and invertebrates) to concentrations of a test sample
23 (*e.g.*, a facility’s effluent) to measure the effect of an effluent test concentration on those
24 organisms’ ability to survive, grow, and reproduce. *See, e.g., Final Rule*, 60 Fed. Reg. 53,529,
25 53,532 (Oct. 16, 1995) (the “WET Rule”).

26 The aquatic toxicity test methods for measuring WET were standardized and approved
27 for use in NPDES monitoring in 1995 and were ratified in 2002. 60 Fed. Reg. at 53,529; *see*
28 *also* 67 Fed. Reg. 69,952 (Nov. 19, 2002). The WET Rule added acute toxicity methods and

1 short-term chronic methods for estimating toxicity to Table IA, 40 C.F.R. § 136.3(a), which
2 designates Agency-approved methods for conducting effluent testing. Specific requirements for
3 each of these test methods are presented in three EPA WET test methods manuals that are
4 incorporated by reference into the regulation. 40 C.F.R. § 136.3(a), nn.26-28,
5 § 136.3(b)(7)(viii)-(x). Table II specifies the required test duration, preservation techniques,
6 and holding times for each of the methods. *Id.* § 136.3(e). The WET test methods manuals
7 recommend, but do not require, certain statistical approaches to be applied to analyze WET test
8 results. 67 Fed. Reg. at 69,954.¹ One statistical approach for toxicity not enumerated in the
9 WET test methods manuals is the TST, which EPA published in June 2010 after an external
10 peer review and after EPA received comments on a draft of the TST Guidance.² *See* NPDES
11 TST Implementation Document (“2010 TST Guidance”), *available at*
12 www3.epa.gov/npdes/pubs/wet_final_tst_implementation2010.pdf); Laura Phillips Decl., ¶ 4 &
13 Exh. A [ECF No. 27-2].

14
15 **C. SCAPI Lawsuit Challenges EPA’s Limited Use ATP Approval**

16 On February 12, 2014, the California State Water Resources Control Board (“State
17 Board”) requested EPA’s approval of a statewide alternate to the five-concentration WET test
18 procedure under Part 136.³ The State’s requested Alternate Test Procedure (“ATP”) was the

19
20 ¹ Part 136 does not apply to all WET testing. For example, the West Coast Marine
21 Methods are WET test methods that are not incorporated into Part 136. *See* 40 C.F.R. § 136.3,
22 Table IA (referring to the Atlantic Ocean and Gulf of Mexico, but not the Pacific Ocean);
23 67 Fed. Reg. at 69,962.

24 ² The WET test methods manuals list the t-test statistical approach, and the TST is a
25 form of the t-test. *See* Short-term Methods for Estimating the Chronic Toxicity of Effluents and
26 Receiving Waters to Freshwater Organisms § 9.5.1 (Oct. 2002); Methods for Measuring the
27 Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms
28 §§ 11.3.4, 11.3.5.5 (Oct. 2002); Short-term Methods for Estimating the Chronic Toxicity of
29 Effluents and Receiving Waters to Marine and Estuarine Organisms §§ 9.2.1, 9.5 (Oct. 2002);
30 2010 TST Guidance at xv, 10, App. A.

31 ³ “Five-concentration” refers to a required test condition of certain Part 136 approved
32 WET test methods to test five different concentrations of the effluent plus a control. This
33 requirement is for testing effluents (not receiving water) and also does not apply to WET methods
34 that are not incorporated into Part 136, such as West Coast WET methods. *See supra* n.2.

1 two-concentration test design, *i.e.*, to test only one effluent concentration plus a control
2 concentration, when using the TST statistical approach. On March 17, 2014, EPA’s Regional
3 ATP Coordinator approved California’s ATP request. EPA did not approve the use of the TST
4 as a new WET test method because the TST is not a WET test method but rather, a statistical
5 approach that can be used to analyze WET test data. The 40 C.F.R. Part 136 test methods do not
6 require the use of any particular statistical approach for analyzing WET test data. *See* 67 Fed.
7 Reg. at 69,954; *SCAP I*, 9/10/2015 Order at 2:21-22 [ECF No. 61].

8 On June 25, 2014, Plaintiffs SCAP and CVCWA filed their initial complaint challenging
9 EPA’s ATP Approval under the Administrative Procedure Act (“APA”). *SCAP I*, Compl. [ECF
10 No. 1]. Plaintiffs filed an emergency request for a temporary restraining order and a preliminary
11 injunction, which EPA opposed and this Court denied. *SCAP I*, 7/2/2014 Order Denying TRO
12 [ECF Nos. 13, 14]. The parties filed cross-motions for summary judgment and Plaintiffs moved
13 for a permanent injunction. *SCAP I*, Pls. Mot. Summ. Judgt and EPA’s Cross-Mot. Summ.
14 Judgt. [ECF Nos. 25, 30]. On February 11, 2015, during summary judgment briefing, EPA
15 withdrew its ATP Approval, effective immediately. *SCAP I*, 2/12/2015 Eugenia McNaughton
16 Decl., Exh. A [ECF No. 40-1]. The Court agreed with EPA that the case was moot due to EPA’s
17 withdrawal of the ATP Approval, granted EPA’s motion for summary judgment, denied
18 Plaintiffs’ motion for summary judgment, and entered judgment for EPA on May 15, 2015.
19 *SCAP I*, 5/13/2015 Summary Judgt. Order, Judgment [ECF Nos. 51, 52].

20 Plaintiffs then moved for reconsideration and, in their reply brief, raised a new claim
21 based on the 2010 TST Guidance. *SCAP I*, Pls. Reply Mot. Recons. [ECF No. 57]. The Court
22 ordered supplemental briefing, finding that “the bulk of the argument on the 2010 Guidance is
23 contained in the [reconsideration] Reply brief and thus there is no governmental response to
24 many of Plaintiffs’ claims.” *SCAP I*, 9/10/2015 Order at 10-11 [ECF No. 61]. After reviewing
25 the supplemental briefing, the Court denied Plaintiffs’ motion for reconsideration, holding that
26 the new evidence “would have had no impact on Plaintiffs’ challenge to the ATP approval” and
27 that Plaintiffs did not assert a claim in connection with the 2010 TST Guidance. *SCAP I*,

1 8/22/2016 Order at 9-11 [ECF No. 94].

2 In order to file a motion to amend to add a new 2010 TST Guidance claim to challenge
3 the TST, Plaintiffs then moved to reopen the judgment under Rule 59(e) or alternatively under
4 Rule 60(b)(1) due to mistake, inadvertence, and excusable neglect. *SCAP I*, Pls. Mot. Reopen at
5 1 [ECF No. 96]. Plaintiffs recognized that the statute of limitations for their direct facial
6 challenge to the 2010 TST Guidance expired in June 2016. *SCAP I*, Pls. Mot. Reopen at 7 [ECF
7 No. 96]. The Court denied the motion to reopen under Rule 59(e) as not timely because it was
8 filed on September 2, 2016, more than 15 months after judgment was entered on May 15, 2015.
9 *See* Fed. R. Civ. P. 6(b)(2), 59(e), 60(c)(1); *SCAP I*, 10/19/2016 Order [ECF No. 102]. The
10 Court held that Rule 59(e)'s time limit cannot be waived by the court. *SCAP I*, 10/19/2016
11 Order at 9 [ECF No. 102]. The Court also denied the motion to reopen under Rule 60(b) for
12 excusable neglect, holding that Plaintiffs' tactical choice to focus *SCAP I* on challenging the
13 ATP did not provide a basis for reopening judgment more than one year after summary judgment
14 was granted to EPA. *Id.* at 10. Plaintiffs did not appeal this Court's decisions in *SCAP I*.

15
16 **D. The Present *SCAP II* Lawsuit**

17 Plaintiffs SCAP, CVCWA, BACWA, and National Association of Clean Water Agencies
18 ("NACWA") filed this new lawsuit on December 19, 2016 ("*SCAP II*"). Compl. [ECF No. 1].
19 Unlike the challenge in *SCAP I*, this litigation centers on the use of the TST statistical approach
20 generally. *See* Compl. EPA moved to dismiss the Complaint for lack of subject matter
21 jurisdiction because the Complaint failed to allege a final agency action and instead asserted a
22 general challenge to unspecified NPDES permits that use the TST. 5/10/2017 EPA Mot. to
23 Dismiss [ECF No. 14]; 5/10/2017 EPA RJN [ECF No. 15]. Implicitly acknowledging the
24 jurisdictional defects of their Complaint, Plaintiffs filed a First Amended Complaint instead of
25 opposing EPA's motion to dismiss. FAC [ECF No. 18]; *see* Fed. R. Civ. P. 15(a)(1)(B).

26 The First Amended Complaint identified the June 2010 TST Guidance, specific NPDES
27 permits, and other NPDES permit-related documents, including draft documents and an e-mail,
28 as final agency actions. EPA moved to dismiss the First Amended Complaint, which this Court

1 granted with leave to amend. 3/17/2018 Order at 10-14 [ECF No. 36]. The Court held that
2 Plaintiffs’ challenge to the 2010 TST Guidance was time-barred and that Plaintiffs failed to
3 establish equitable tolling. *Id.* at 10-14. The Court also held that Plaintiffs’ as applied challenge
4 failed, rejecting Plaintiffs’ arguments that the statute of limitations did not begin running until
5 2012 when EPA began to use the TST. *Id.* at 11-12. The Court dismissed the First Amended
6 Complaint for lack of jurisdiction, holding that Plaintiffs failed to identify a final agency action
7 subject to judicial review and that the Court lacked jurisdiction over Plaintiffs’ challenges to
8 EPA’s use of the TST in various NPDES permits. *Id.* at 15-17.

9 On April 8, 2018, Plaintiffs SCAP, CVCWA, and BACWA filed a Second Amended
10 Complaint.⁴ The Second Amended Complaint again challenges the 2010 TST Guidance and also
11 challenges EPA’s purported failure to promulgate the TST through rulemakings in 2012 and
12 2017. SAC ¶¶ 4, 53, 66-71. Like the First Amended Complaint, the Second Amended
13 Complaint seeks (1) declaratory relief that EPA’s “issuance, use, implementation, mandate of the
14 TST, or encouragement, allowance, approval or authorization for States to use the TST ... in the
15 NPDES program” is *ultra vires* (exceeds statutory authority) in violation of the APA, and that
16 the use of the “TST and associated methods and procedures” and all actions regarding the TST
17 and test results based on the TST are void *ab initio*; and (2) injunctive relief to enjoin EPA from
18 “using, implementing, mandating, or approving, allowing, encouraging, or authorizing the use”
19 of the TST for water quality regulation, permitting, and compliance determination purposes.
20 SAC Prayer for Relief, ¶¶ 78, 80; *see* FAC ¶¶ 77, 79. EPA moves to dismiss the Second Amend
21 Complaint for lack of jurisdiction and for failure to state a claim.

22 **III. ARGUMENT**

23 The Second Amended Complaint fails to cure the defects of the First Amended
24 Complaint because this Court still lacks jurisdiction and Plaintiffs’ claims are still time-barred.
25 Nothing has changed since the filing of the First Amended Complaint. Plaintiffs have simply re-
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27

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⁴ NACWA is no longer a plaintiff in this action. *See* SAC.

1 packaged and re-labeled their claims challenging the 2010 TST Guidance as *ultra vires* in
2 another unsuccessful attempt to avoid the jurisdictional and time bars. *See* SAC ¶ 53
3 (“Plaintiffs’ action is a substantive challenge to USEPA’s TST guidance, which was *ultra vires*
4 and in excess of USEPA’s statutory authority.”); FAC ¶ 59 (“Plaintiffs’ action is a substantive
5 challenge to USEPA’s use of the TST as a rule in excess of USEPA’s statutory authority ...”).
6 The Court has already ruled that to the extent Plaintiffs are attempting to directly, or facially,
7 challenge the 2010 TST Guidance, that claim is time-barred and that Plaintiffs failed to show that
8 the statute of limitations should be equitably tolled. 3/17/2018 Order at 10-14. The Court
9 dismissed that claim as untimely. *Id.*

10 Nonetheless, the Second Amended Complaint again alleges that the statute of limitations
11 did not begin to run until 2012 when Plaintiffs allege EPA began to use the TST. *See* SAC ¶¶ 53
12 (“The statute of limitations did not begin to run on the Plaintiffs’ claims until the TST guidance
13 began to be utilized as if it were a rule authorized by the CWA.”), 54 (“The earliest this
14 substantive action could have become ripe, concrete, and accrued was in 2012, when for the first
15 time (that Plaintiffs are aware of) USEPA used the TST guidance in a regulatory context.”), 55;
16 FAC ¶¶ 59, 60 (“The earliest this substantive action could have become ripe, concrete, and
17 accrued was in July 2012, when USEPA and Orange County Sanitation District jointly issued an
18 NPDES that, for the first time (that Plaintiffs are aware of) used the TST ... Plaintiffs claims
19 were not ripe until USEPA began requiring the TST as a rule based upon the TST Guidance, of
20 which Plaintiffs had no notice until July 2012.”), 61. The Second Amended Complaint’s new
21 allegations – both as to when such a cause of action accrued and exceptional circumstances that
22 Plaintiffs believe should excuse their failure to bring a timely challenge to the 2010 TST
23 Guidance – fail to change the analysis. *See* SAC ¶¶ 37 (now identifying a May 2012 NPDES
24 WET Spreadsheet as using the TST), 57-64. The Court has already ruled on these issues and
25 should not countenance Plaintiffs’ second bite at the apple. 3/17/2018 Order at 10-14.
26

27 Like the First Amended Complaint, Plaintiffs continue to allege a non-specific as-applied
28 challenge to use of the 2010 TST Guidance. The Second Amended Complaint includes only two

1 applications of the 2010 TST Guidance in NDPES permits – the same NPDES permits identified
2 in the First Amended Complaint that were issued in 2012 (the joint EPA-California issued
3 individual NPDES permit for Orange County) and in 2015 after withdrawal of the ATP (the
4 California-issued NPDES permit for the San Jose Creek Water Reclamation Plant). *See* SAC
5 ¶¶ 38, 51; FAC ¶¶ 4, 36, 51. This Court has already correctly held that an as-applied challenge
6 to application of the Guidance is a challenge to the permit, and that permit challenges must be
7 brought either in state court for state-issued permits or in the federal courts of appeals for EPA-
8 issued permits (after exhausting administrative remedies). 3/17/2018 Order at 11-12, 15-16.

9 The Court lacks subject matter jurisdiction over the Second Amended Complaint because
10 review under the APA is limited to review of final agency actions and there is no reviewable final
11 agency action alleged. In addition, Plaintiffs’ claims are time-barred. The Court should dismiss
12 the Second Amended Complaint with prejudice because amendment is futile and Plaintiffs have
13 repeatedly failed to cure deficiencies. *See Rainero v. Archon Corp.*, 844 F.3d 832, 840-41 (9th
14 Cir. 2016); *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532-33 (9th Cir. 2008).

15
16 **A. Legal Standards⁵**

17 Federal courts are courts of limited jurisdiction and may hear a case only if authorized to
18 do so by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
19 377 (1994). The United States and its agencies may be sued only when Congress has consented
20 to suit and waives sovereign immunity by statute. *Fed. Aviation Admin. v. Cooper*, 566 U.S.
21 284, 290 (2012). A waiver of the United States’ sovereign immunity “cannot be implied but
22 must be unequivocally expressed,” *United States v. King*, 395 U.S. 1, 4 (1969), and must be
23 construed strictly in favor of the United States. *United States v. Nordic Village, Inc.*, 503 U.S.
24 30, 33-34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra*

25
26
27 ⁵ In ruling on a Rule 12(b)(1) motion to dismiss, the district court may consider public
28 documents, affidavits submitted by the parties, and documents incorporated by reference in the
complaint. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005); *Savage v. Glendale
Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); *Gemtel Corp. v. Cmty.
Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994).

1 *Club*, 463 U.S. 680, 685-686 (1983). The plaintiff has the burden to prove subject matter
2 jurisdiction and waiver of sovereign immunity. *Kokkonen*, 511 U.S. at 377.

3 Here, Plaintiffs' lawsuit is brought pursuant to the APA, which provides for judicial
4 review over "final agency action for which there is no other adequate remedy in a court."
5 5 U.S.C. § 704; *see* SAC ¶¶ 4 (judicial review under the APA), 8 (APA jurisdiction). A claim
6 under the APA must be brought within six years of the final agency action that is challenged.
7 28 U.S.C. § 2401(a). The APA is a specific waiver of the United States' sovereign immunity for
8 actions for non-monetary relief brought under 28 U.S.C. § 1331. *See Cabrera v. Martin*, 973
9 F.2d 735, 741 (9th Cir. 1992). The Supreme Court has identified two conditions for an action to
10 be "final." First, the action "must mark the 'consummation' of the agency's decision-making
11 process" and not be "merely tentative or interlocutory." *Bennett v. Spear*, 520 U.S. 154, 177-78
12 (1997), overruled in part on other grounds. Second, the action "must be one by which 'rights or
13 obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178.

14 Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim on which
15 relief can be granted by lacking sufficient facts alleged under a cognizable legal theory or by
16 lacking a cognizable legal theory. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th
17 Cir. 1990); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550
18 U.S. 544 (2007). A pleading must contain a "short and plain statement of the claim showing that
19 the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a
20 complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
21 plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555-57, 570
22 (internal citations omitted)). Legal conclusions in a complaint are not entitled to this
23 presumption of truth. *Id.* "Threadbare recitals of the elements of a cause of action, supported by
24 mere conclusory statements, do not suffice." *Id.*

25
26 **B. The Court Lacks Subject Matter Jurisdiction Because The 2010 TST Guidance Is**
27 **Not A Final Agency Action Subject To APA Review, And Regardless, Any**
28 **Challenge To The 2010 TST Guidance Is Time Barred**

The Court lacks subject matter jurisdiction to review the 2010 TST Guidance because it

1 is not a final agency action.⁶ Consistent with the Supreme Court’s decision in *Bennett*, the Ninth
2 Circuit has found that “certain factors ‘provide an indicia of finality, such as whether the [action]
3 amounts to a definitive statement of the agency’s position, whether the [action] has a direct and
4 immediate effect on the day-to-day operations of the party seeking review, and whether
5 immediate compliance [with the terms] is expected.’” *Public Utility District No. 1 v. Bonneville*
6 *Power Admin.*, 506 F.3d 1145, 1152 (9th Cir. 2007) (quoting *Indus. Customers of Nw. Utils. v.*
7 *BPA*, 408 F.3d 638, 646 (9th Cir. 2005)) (internal quotations omitted). The 2010 TST Guidance
8 satisfies neither condition for finality under *Bennett*, nor presents any of the indicia of finality
9 described by the Ninth Circuit. It does not mark the consummation of any EPA decision-making
10 process and it imposes no obligation, denies no right, and fixes no legal relationship. In addition,
11 as this Court has already held, Plaintiffs’ challenge to the 2010 TST Guidance is not timely and
12 Plaintiffs fail to establish equitable tolling. 3/17/2018 Order at 10-14.

13
14 1. The 2010 TST Guidance Does Not Satisfy The First Prong Of *Bennett*

15 As an initial matter, publication of the 2010 TST Guidance to provide another statistical
16 approach does not consummate any agency decision-making process. As the Guidance makes
17 clear, EPA recommends that permitting authorities decide which approach to use and require in
18 permits whether it be “the EPA’s 1991 TSD approach, the TST approach, or another
19 scientifically defensible approach that is sufficient to meet the statutory and regulatory
20 requirements) they will follow (including for their RP procedures).” 2010 TST Guidance at viii.
21 The 2010 TST Guidance does not consummate any decision-making process. If the permitting
22 authority decides to include the TST in a permit, as described below, the permit holder can
23 challenge the permit in the appropriate forum (i.e., state court, Environmental Appeals Board
24 (“EAB”), circuit court).

25
26 ⁶ Though the January 2010 Toxicity Training Tool does not even refer to the TST,
27 Plaintiffs again erroneously allege that this tool is a TST Guidance document. *See* SAC ¶ 35.
28 As Plaintiffs are aware, having made this same allegation in the FAC and *SCAP I*, this is
incorrect. *See* EPA Mot. Dismiss FAC at 19 [ECF No. 20-1]. Because the SAC includes no
specific allegations regarding this tool and this Court has already held that any challenge to this
tool is untimely [3/17/2018 Order at 16 n.12], EPA does not address the tool here.

1 2. The 2010 TST Guidance Does Not Satisfy the Second Prong of *Bennett*

2 Further, the 2010 TST Guidance does not constitute final agency action because it has
3 no independent or binding legal effect and lacks any of the indicia of finality. It is an
4 implementation document and merely describes “another statistical option to analyze valid
5 WET test data for NPDES WET reasonable potential and permit compliance determinations” in
6 addition to statistical approaches recommended in EPA’s test methods manuals. 2010 TST
7 Guidance at ii. Here, no obligations arise as a result of the Guidance. The Guidance is just that,
8 a guidance document, without binding effect on Plaintiffs, EPA, states, or anyone else. *Id.*

9 “The document does not ... substitute for the CWA, an NPDES permit, or EPA or state
10 regulations applicable to permits or WET testing; nor is this document a permit or a regulation
11 itself.” *Id.* While it offers “recommendations,” it does not prescribe the use of a particular
12 statistical approach to analyze WET test data. *See Holistic Candles & Consumers Ass’n v.*
13 *FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (finding the use of “should” and “may” make plain
14 that “there has been no order compelling the appellants to do anything”) (internal citation
15 omitted); *Broadgate, Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 245
16 (D.D.C. 2010) (“In contrast, a good indication of a general policy statement is the agency’s use
17 of permissive, rather than binding, language; if the ‘rule’ leaves the agency free to exercise
18 discretion, it is likely a policy statement.”) (citing *Am. Mining Congress v. Mine Safety &*
19 *Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993)).

20 Further, the 2010 TST Guidance did not and still does not bind EPA or state permitting
21 authorities to require a particular statistical approach for WET testing, nor could it do so. The
22 statistical approach used to analyze WET data is not part of any of EPA’s WET test methods
23 promulgated at 40 C.F.R. Part 136, nor do those test methods require the use of a particular
24 statistical approach. Nothing in the Guidance requires state permitting authorities (or EPA
25 regions) to take any affirmative action or to refrain from acting – “EPA regions and their
26 NPDES states [such as California] can still use EPA’s TSD approaches.” 2010 TST Guidance
27 at v (emphasis added) (TSD approaches are the statistical approaches offered in EPA’s 1991
28

1 Technical Support Document for Water Quality-Based Toxics Control (“TSD”); *Community*
2 *Fin. Services Ass’n v. FDIC*, 132 F. Supp. 3d 98, 120 (D.D.C. 2015) (“Guidance documents
3 must establish a ‘new substantive rule’ before they can be characterized as final action under the
4 APA.”) (citing *Broadgate*, 730 F. Supp. 2d at 245). Thus, the 2010 TST Guidance has no legal
5 effect. *See, e.g., Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 82-83 (D.D.C. 2013) (“EPA’s
6 encouragement that one option might be the most logical one does not command a State to
7 implement it.”). Indeed, the fact that EPA did not publish the 2010 TST Guidance in the
8 Federal Register is a further “indication that the [Guidance] was not meant to be a regulation.”
9 *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986).

10 That EPA is providing an option, or even a new recommendation of a statistical
11 approach, does not change the legal obligations of any party. *See Ctr. for Auto Safety v. Nat’l*
12 *Highway Traffic Safety Admin.*, 452 F.3d 798, 811 (D.C. Cir. 2006) (finding that “if the practical
13 effect of the agency action is not a certain change in the legal obligations of a party, the action is
14 non-final for the purposes of judicial review under the APA” (citation omitted)). Though each
15 methods manual recommends particular statistical approaches,⁷ none requires a specific
16 approach. Thus, the 2010 TST Guidance simply has no “direct and immediate effect on the day-
17 to-day operations of the party seeking review,” nor is “immediate compliance” expected. *See*
18 *Indus. Customers of Nw. Utils.*, 408 F.3d at 646.

19
20
21
22 ⁷ *See* 40 C.F.R. § 136.3, n.26, Methods for Measuring the Acute Toxicity of Effluents
23 and Receiving Waters to Freshwater and Marine Organisms. EPA-821-R-02-012. Fifth Edition,
24 October 2002. U.S. EPA (AR002028-2302) (“it is recognized that the methods selected are not
25 the only possible methods of analysis of acute toxicity data”); *id.* § 136.3, n.27, Short-term
26 Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater
27 Organisms. EPA-821-R-02-013. Fourth Edition, October 2002. U.S. EPA (AR002303-2652)
28 (“The statistical methods recommended in this manual are not the only possible methods of
statistical analysis. Many other methods have been proposed and considered. Certainly there are
other reasonable and defensible methods of statistical analysis for this kind of toxicity data.”); *id.*
§ 136.3, n.28, Short-term Methods for Estimating the Chronic Toxicity of Effluents and
Receiving Waters to Marine and Estuarine Organisms. EPA-821-R-02-014. Third Edition,
October 2002. U.S. EPA (AR002653-3138) (same).

1 3. Plaintiffs’ Challenge To The 2010 TST Guidance Is Time Barred

2 Even if the 2010 TST Guidance were found to be a final agency action, Plaintiffs’
3 challenge is far too late. In *SCAP I*, Plaintiffs unsuccessfully tried post-judgment to add a direct
4 facial challenge to the 2010 TST Guidance, claiming that the use of the TST in NPDES permits
5 violated the APA because the TST was based on the unpromulgated guidance. *SCAP I*, Pls.
6 Recons. Reply Br. at 1-7 [ECF No. 57]; Pls. Supp. Br. at 7-14 [ECF No. 67]. **Plaintiffs**
7 **conceded that their challenge was a direct facial challenge and that “the statute of**
8 **limitations for a direct challenge to the 2010 Guidance ran in June 2016,”** which Plaintiffs
9 argued justified reopening the judgment so Plaintiffs’ challenge to the 2010 TST Guidance
10 would be timely. *SCAP I*, Pls. Mot. Reopen at 7 [ECF No. 96]. This Court denied Plaintiffs’
11 attempt to add this new claim, and Plaintiffs did not appeal the Court’s *SCAP I* decisions. *SCAP*
12 *I*, 8/22/2016 Order [ECF No. 94] & 10/19/2016 Order [ECF No. 102]. The Court should reject
13 Plaintiffs’ attempts to raise these arguments again now in the SAC. *See* SAC ¶¶ 45-48, 63.

14 In *SCAP II*, the Court dismissed the First Amended Complaint and held that “[i]t is clear
15 from the FAC and Plaintiffs’ opposition [to the motion to dismiss] that despite their assertions to
16 the contrary they fundamentally take procedural issue with the EPA’s failure to formally
17 promulgate the 2010 TST Guidance pursuant to notice-and-comment requirements.” 3/17/2018
18 Order at 11; *see, e.g.*, FAC ¶¶ 3-5, 34, 36, 68, 69, 72, 74, 77. The Court further held that the
19 lengthy six-year statute of limitations for a claim challenging the 2010 TST Guidance ran in June
20 2016, Plaintiffs failed to establish equitable tolling of the limitations period, and that therefore,
21 the *SCAP II* claim filed in December 2016 was not timely. 3/17/2018 Order at 11-14.

22 Like the FAC, the SAC also fundamentally challenges “EPA’s failure to formally
23 promulgate the 2010 TST Guidance.”⁸ 3/17/2018 Order at 11. Therefore, as described in more
24

25 _____
26 ⁸ *See* SAC ¶¶ 1 (promulgation required), 3 (challenging EPA’s use, requiring the use, or
27 allowing the use of “unpromulgated” statistical procedures, including the TST), 4 (EPA’s failure
28 to include TST in rulemaking), 6 (injury from the “unpromulgated TST guidance”), 14 (EPA’s
“unlawful actions to use ...and authorize the use ... of unpromulgated ‘rules’” such as the TST),
29 (“rules, promulgated through a public review and comment process” required and “the

1 detail in EPA’s prior briefs, Plaintiffs’ challenge accrued in June 2010 when the TST Guidance
 2 was published. *See* EPA Reply at 2-6 [ECF No. 27]; 3/17/2018 Order at 11-12; *Cedars-Sinai*
 3 *Med. Ctr. v. Shalala* (“*Cedars-Sinai I*”), 177 F.3d 1126, 1129 (9th Cir. 1999). Merely adding
 4 the label “*ultra vires*” does not change Plaintiffs’ fundamental claim. Even the two as-applied
 5 examples alleged in the SAC – the 2012 Orange County NPDES permit and the 2015 San Jose
 6 Creek NPDES permit – were already pled in the FAC, which the Court dismissed as untimely
 7 and for lack of jurisdiction. *Compare* SAC ¶¶ 38, 51, 55, 56, *with* FAC ¶¶ 4, 36, 51, 58(a).

8 The SAC repeats the FAC’s allegations that Plaintiffs’ challenge to the 2010 TST
 9 Guidance did not accrue until 2012 when the TST was first used, or until 2015 when the TST
 10 was used after withdrawal of the ATP. *See, e.g.*, SAC ¶¶ 49, 51, 53-55; FAC ¶¶ 42, 51, 59, 60.
 11 The fact that the SAC now identifies a May 2012 WET Spreadsheet as also using the TST does
 12 not change the analysis. *See* SAC ¶ 37. Nor does the fact that the SAC refers to using the TST
 13 in a “regulatory context,” while the FAC refers to using the TST as a “rule,” change the
 14 analysis. *See* SAC ¶ 54; FAC ¶ 60. As the Court has already held, the use of the 2010 TST
 15 Guidance in NPDES permits was not new or unforeseen. 3/17/2018 Order at 11. It is a use that
 16 was clearly contemplated when the 2010 TST Guidance was published because the 2010 TST
 17 Guidance directly and expressly addresses the use of the TST in NPDES permits, including for
 18 determining reasonable potential and for compliance determinations.⁹ Even the title of the
 19

20
 21 issuance of informal unpromulgated guidance” is not authorized) (emphasis in original), 36 (TST
 22 was not promulgated in EPA’s 2012 Rule), 39-40 (TST was not promulgated in EPA’s 2017
 23 Rule), 51 (San Jose Creek NPDES permit “require[d] the use of the unpromulgated TST”
 24 Guidance), 70 (improperly “utilizing the TST as a rule” before “incorporating the TST” in
 25 formal rulemaking), 71 (use of the TST in NPDES permits violated promulgation requirements),
 26 78 (EPA failed to incorporate the TST in rulemaking), 80 (same), 82 (Plaintiffs required to use
 27 and report results from “an unpromulgated rule”), 83 (TST not incorporated in recent
 28 rulemaking), 84 (injury until formal promulgation of the TST), Prayer for Relief ¶ D (enjoin
 EPA from using non-promulgated procedures until those procedures are “properly and formerly
 promulgated as rules”).

⁹ *See* 2010 TST Guidance at ii (“This document provides the basis for implementing the
 [TST] approach under the [NPDES] for permitting authorities...” and “describes ...another
 statistical option to analyze valid WET test data for NPDES WET reasonable potential and

1 Guidance expressly and clearly states this use— NPDES TST Implementation Document.

2 Finally, the Court should reject Plaintiffs’ alternative argument that the statute of
3 limitations on their 2010 TST Guidance claim was equitably tolled because Plaintiffs have not
4 met their burden to prove diligence and that “some extraordinary circumstance stood in [their]
5 way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The SAC does not (and cannot) allege
6 that Plaintiffs lacked knowledge or notice of the 2010 TST Guidance when it was published. *See*
7 SAC. The SAC repeats the arguments the Court already rejected in *SCAP I*, which Plaintiffs did
8 not appeal, and rejected in dismissing the FAC. *See* SAC ¶¶ 43-47, 57. As this Court already
9 found, “at no point prior to Plaintiffs’ reply brief on their motion to reconsider did they shift
10 toward challenging the 2010 Guidance. Plaintiffs chose to litigate on the narrow issue of the
11 ATP’s validity. Changing tactics in a reply brief on a motion to reconsider can in no way be
12 construed as excusable neglect, much less blamed on the Court’s September 2015 order.” *SCAP*
13 *I*, 10/19/2016 Order at 10 [ECF No. 102]. Where Plaintiffs failed to prove excusable neglect
14 before, Plaintiffs cannot now prove diligence and extraordinary circumstances.
15

16 4. Plaintiffs Have Not Identified Any EPA Mandatory Duty to Act

17 The SAC also repeats the FAC’s allegations that EPA failed to promulgate the TST as
18 part of EPA’s 2012 and 2017 rulemaking. *See, e.g.*, SAC ¶¶ 36, 39, 40 (2017 Rule finalized
19 2015 Proposed Rule), 70; FAC ¶¶ 35, 37 (2015 Proposed Rule), 54 (2016 Final Rule). The
20 SAC’s new allegation that this failure constitutes a final agency action is a weak attempt to
21 make an untimely claim timely.¹⁰ *See* SAC ¶ 4. Using Plaintiffs’ logic, their challenge to the
22 2010 TST Guidance has no statute of limitations because Plaintiffs could raise it whenever EPA
23 promulgates any WET-related rules. Further, as the Supreme Court emphasized, “a claim under
24

25 permit compliance determinations.”), v, vii (TST use in “WET regulatory decisions”), 13-14,
26 App. D, App. E WET Reasonable Potential Analysis Using the TST Approach.

27 ¹⁰ In addition, a claim for failure to perform a mandatory duty cannot be brought under
28 the APA where, as here, there is an “adequate remedy” under the CWA citizens’ suit provision,
33 U.S.C. § 1365. 5 U.S.C. § 704 (limited waiver of sovereign immunity). Further, even if
Plaintiffs had pled a claim for failure to perform a mandatory duty under the CWA, they have
failed to provide the 60-day notice required for CWA citizen suits. *See* 33 U.S.C. § 1365(b).

1 § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete
2 agency action that it is required to take.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55,
3 64 (2004). Here, there is no mandatory duty imposed by the CWA that would have required
4 EPA to “incorporate the TST” into rulemaking. Plaintiffs have identified no statutory provision
5 requiring the rulemakings undertaken to amend the WET Rule in 2012, *Final Rule*, 77 Fed.
6 Reg. 29,758 (May 18, 2012), or in 2017, *Final Rule*, 82 Fed. Reg. 40,836 (Aug. 28, 2017), to
7 mention the TST statistical approach or to require use of that or any other statistical approach.
8 Therefore, the Court lacks jurisdiction over Plaintiffs’ claim that EPA failed to act.

9 **C. Plaintiffs’ As-Applied Challenge Again Fails Because The Court Lacks Subject**
10 **Matter Jurisdiction Over Challenges To NPDES Permits**

11 Plaintiffs yet again seek to bring an as-applied challenge to the 2010 TST Guidance in
12 order to circumvent the statute of limitations. But even if Plaintiffs’ 2010 TST Guidance claims
13 were deemed timely, this does not solve the Second Amended Complaint’s jurisdictional defects
14 because Plaintiffs fail to identify a final agency action in which the 2010 TST Guidance is being
15 applied that is reviewable in this Court.

16 Like the First Amended Complaint, the Second Amended Complaint identifies the same
17 2012 NPDES permit and the same 2015 NPDES permit as examples of the application of the
18 2010 TST Guidance, apparently alleging that these are timely and final agency actions. *See SAC*
19 ¶¶ 6 (referring to issuance or use of the 2010 TST Guidance in NPDES permits without
20 including the TST in rulemaking), 38, 51, 55, 56. As the Ninth Circuit has made clear,¹¹ and as
21 the Court has already held in dismissing the First Amended Complaint, which also identified
22 these same permits, this Court lacks jurisdiction over Plaintiffs’ challenges to NPDES permits,
23 whether issued by EPA or states, because NPDES permits are not reviewable in federal district
24 courts. 3/17/2018 Order at 15-17. Because the Court has already ruled that the Court lacks
25

26 _____
27 ¹¹ The Supreme Court also recently denied Plaintiff SCAP certiorari in SCAP’s
28 unsuccessful challenge of the Ninth Circuit’s decision denying its challenge to state-issued
NPDES permits that SCAP improperly brought in the circuit court. *See SCAP v. EPA*, 853 F.3d
1076, 1081, 1083 n.4 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1042 (2018).

1 jurisdiction over challenges to NPDES permits, EPA only briefly summarizes its arguments,
2 which are more fully addressed in EPA’s briefs on its motion to dismiss the First Amended
3 Complaint. EPA Mot. Dismiss FAC [ECF No. 20-1]; EPA Reply [ECF No. 27].

4 1. This Court Lacks Jurisdiction To Review EPA-Issued Permits

5 Though not specifically identified as a final agency action, the SAC identifies one joint
6 EPA-California issued individual NPDES permit from 2012 as applying the 2010 TST Guidance
7 — the 2012 Orange County Sanitation District NPDES permit. SAC ¶¶ 38, 54 (referring to first
8 use of 2010 TST Guidance in “a regulatory context” occurred in 2012), 55;¹² *see* Stuber Decl.,
9 ¶ 3. This Court has already held that it lacks subject matter jurisdiction over claims based on
10 EPA-issued individual permits because challenges to an EPA-issued individual NPDES permit
11 must first be made to the EAB within 30 days of the EPA notice of the permit’s issuance, and
12 then to the appropriate federal court of appeals. 33 U.S.C. § 1369(b)(1)(F); 40 C.F.R.
13 §§ 124.19(a)(1), 124.19(a)(3), 124.19(l)(1) (“A petition to the [EAB] . . . is, under 5 U.S.C. 704,
14 a prerequisite to seeking judicial review of the final agency action.”); *SCAP v. EPA*, 853 F.3d at
15 1081, 1083 n.4; *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001). The Ninth
16 Circuit has made clear that for EPA-issued individual NPDES permits, the district courts lack
17 subject matter jurisdiction and that no challenge may be brought without first exhausting
18 administrative review before the EAB. *See City of San Diego*, 242 F.3d at 1101; *see also*
19 40 C.F.R. § 124.19(l)(2); *SCAP v. EPA*, 853 F.3d at 1081, 1083 n.4. Indeed, the Ninth Circuit
20 has consistently rejected attempts, including by Plaintiff SCAP, to circumvent the administrative
21 process and the “complex statutory scheme . . . of cooperative federalism” by prematurely
22 seeking judicial review by the district court or the circuit court. *SCAP v. EPA*, 853 F.3d at 1081,
23 1083; *see City of San Diego*, 242 F.3d at 1101.

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¹² The permit holder for the 2012 Orange County Sanitation District NPDES permit is a Plaintiff SCAP member who has not challenged the use of the TST in this permit before the EAB. Robyn Stuber Decl., ¶ 3. In addition, the Orange County NPDES permit uses West Coast WET methods for chronic testing, which are expressly not incorporated into the Part 136 methods. *See supra* n.1; Stuber Decl., ¶ 3.

1 In addition, the APA only authorizes judicial review over final agency actions “for which
 2 there is no other adequate remedy in a court,” 5 U.S.C. § 704, and because the Clean Water Act
 3 provides such a remedy to challenge NPDES permits, an APA challenge is impermissible. Even
 4 if brought pursuant to the CWA, such a challenge cannot be brought in district court and must be
 5 brought within statutory time limits. *See* 33 U.S.C. § 1369(b)(1)(F).

6 Therefore, the Court lacks jurisdiction over Plaintiffs’ challenge to the 2012 Orange
 7 County NPDES permit because such challenges cannot be brought in this Court and because this
 8 EPA-issued individual permit is not a final agency action reviewable by this Court.

9 2. This Court Also Lacks Jurisdiction To Review State-Issued Permits

10 Though not specifically identified as a final agency action, the SAC also identifies one
 11 state-issued NPDES permit as applying the 2010 TST Guidance — the 2015 San Jose Creek
 12 Water Reclamation Plant NPDES permit. SAC ¶¶ 51, 56 (referring to NPDES permits issued
 13 after withdrawal of the ATP in February 2015 that use the 2010 TST Guidance as triggering the
 14 statute of limitations). As this Court and the Ninth Circuit have already held, challenges to state-
 15 issued NPDES permits must be made in state court. 3/17/2018 Order at 15-17; *SCAP I*,
 16 5/13/2015 Summary Judgt. Order at 7 [ECF No. 51]; 40 C.F.R. § 123.30 (judicial review of
 17 permits issued by the State is limited to state court); Cal. Water Code §§ 13320, 13321,
 18 13330 (review and petition for stay by state board, and review in superior court); *SCAP v. EPA*,
 19 853 F.3d at 1081 (“The [NPDES] permits issued by the state are subject to administrative and
 20 judicial review in accordance with state law.”)¹³; *Boise Cascade Corp.*, 942 F.2d at 1430; *Shell*
 21 *Oil Co. v. Train*, 585 F.2d 408, 411, 414 (9th Cir. 1978). Thus, this Court lacks jurisdiction to
 22 review a state-issued NPDES permit such as the 2015 NPDES permit identified by Plaintiffs.¹⁴

23 Finally, NPDES permits issued by California and its regional water boards cannot
 24

25
 26 ¹³ In its Ninth Circuit case, Plaintiff SCAP was represented by the same counsel in
 27 *SCAP I* and *SCAP II*. SCAP Rev. Op. Brief, 2015 WL 2156689 (May 5, 2015). The draft
 NPDES permits at issue— Whittier Narrows and Pomona— included the TST. *Id.* at *17.

28 ¹⁴ Plaintiffs are exercising their remedy by challenging the San Jose Creek permit and
 other permits in the appropriate state proceedings. 6/13/2017 EPA RJN, ¶ 5 & Exh. 5 [ECF No.
 21].

1 constitute final agency action subject to judicial review under the APA because these are not
2 EPA's actions and APA review is limited to reviewing a federal government agency's final
3 actions. 5 U.S.C. § 701(b)(1) (defining "agency" under the APA); *see* SAC ¶¶ 51, 56.

4 **D. This Court Lacks Jurisdiction Over Plaintiffs' Claims Based On Unspecified Final**
5 **Agency Actions**

6 To the extent Plaintiffs attempt to challenge other final agency actions not specified in the
7 Second Amended Complaint, the Court lacks jurisdiction over such claims because Plaintiffs
8 must identify a specific or discrete final agency action for an APA claim. *See* SAC ¶ 4 (alleging
9 that the 2010 TST Guidance "was subsequently used in other agency decisions affecting
10 Plaintiffs' members," but failing to specify those "other agency decisions"), ¶ 6 (in "allowing the
11 use of the TST guidance in NPDES permit monitoring and compliance requirements"); *Norton*,
12 542 U.S. at 62-64; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990) (APA review by
13 court not permitted until "a specific 'final agency action' has an actual or immediately threatened
14 effect"); *Nevada Ass'n of Counties v. U.S. Dep't of Interior*, No. 15-15620, 2017 WL 1208591,
15 at *1 (9th Cir. Apr. 3, 2017) (not published) (affirming dismissal for lack of jurisdiction where
16 plaintiff "failed to identify a specific final agency action or discrete action unlawfully withheld"
17 required by the APA) (internal citations omitted); *Del Monte Fresh Produce N.A., Inc. v. United*
18 *States*, 706 F. Supp. 2d 116, 119 (D.D.C. 2010) (dismissing for lack of jurisdiction APA claim
19 challenging a "pattern and practice," rather than specifying discrete final agency actions) ("The
20 Supreme Court has made explicit that a court may only review an agency's failure to act, or
21 unreasonable delay in acting, if the action not taken, or taken too late, is discrete."). As the
22 Court has already held, "[a]bsent identification of some final agency action over which this
23 Court has jurisdiction, Plaintiffs' claims again fail." 3/17/2018 Order at 17.

25 **E. Plaintiffs Cannot Evade The Statute of Limitations Or Jurisdictional Bars By**
26 **Labeling Their Claims *Ultra Vires***

27 It is unclear what Plaintiffs are trying to allege in the Second Amended Complaint by
28 adding the label "*ultra vires*." *Compare* FAC ¶ 59 ("Plaintiffs' action is a substantive challenge
to USEPA's use of the TST as a rule in excess of USEPA's statutory authority through the final

1 agency actions”), with SAC ¶ 53 (“Plaintiffs’ action is a substantive challenge to USEPA’s TST
2 guidance, which was *ultra vires* and in excess of USEPA’s statutory authority”). To the extent
3 Plaintiffs are attempting to cure the First Amended Complaint’s jurisdictional and timeliness
4 defects by recasting their allegations in the Second Amended Complaint as “*ultra vires*,” this
5 attempt fails. As the Court has already held: (1) facial challenges to the 2010 TST Guidance
6 must be brought under the APA, but Plaintiffs’ challenge to the Guidance is untimely (even if the
7 Guidance were a final agency action (it is not)); and (2) Plaintiffs have an adequate remedy
8 under the CWA for their as-applied challenge to the use of the TST in various NPDES permits,
9 but permit challenges must be brought in a different forum. *See* 3/17/2018 Order at 11
10 (Plaintiffs’ challenge to the 2010 TST Guidance is an APA claim), 15-16 (judicial review of
11 challenges to NPDES permits available in state court for state-issued permits and in the EAB
12 then court of appeals for EPA-issued permits). Plaintiffs allege that EPA “took an *ultra vires*
13 action by issuing [the 2010 TST Guidance] that allows the use of the TST in the NPDES
14 program” contrary to and in excess of EPA’s statutory authority under the CWA, the APA,
15 40 C.F.R. part 136, and California’s Ocean Plan. SAC ¶ 69; *see id.* at ¶ 68. This is the same
16 facial challenge to the 2010 TST Guidance that was dismissed by the Court as an untimely APA
17 claim. 3/17/2018 Order at 10-14. Describing EPA’s actions in approving permits including the
18 TST or permits referencing the 2010 TST Guidance as *ultra vires* does not alter the Court’s
19 holding that it lacks jurisdiction to hear challenges to NPDES permits. 3/17/2018 Order at 15-
20 17. Therefore, adding the phrase “*ultra vires*” to various allegations in the Second Amended
21 Complaint does not cure the jurisdictional and timeliness defects.

22 IV. CONCLUSION

23 The Court should dismiss with prejudice the Second Amended Complaint for lack of
24 subject matter jurisdiction and failure to state a claim.

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Respectfully submitted,

Dated: May 30, 2018

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