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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' OPPOSITION TO EPA'S 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

*The June 28, 2018 hearing was vacated and submitted without appearance and argument. (*See* ECF No. 43.)

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I. INTRODUCTION

This Court not only has proper subject matter jurisdiction over this matter, this Court is the only appropriate forum to review the United States Environmental Protection Agency's ("EPA") continued use and application of unpromulgated statistical and other Whole Effluent Toxicity ("WET") procedures known as the Test of Significant Toxicity ("TST"). In its Motion to Dismiss the Second Amended Complaint ("Motion"), EPA entirely misses the point and fails to address Plaintiffs' main claim—that EPA's actions in "using, requiring the use, or allowing the use of unpromulgated non-Part 136 methods and statistical and other toxicity testing procedures, including the Test of Significant Toxicity ("TST"), in modified permitting and compliance provisions" in relation to WET requirements in National Pollutant Discharge Elimination System ("NPDES") permits and other agency decisions is *ultra vires* and directly contravenes EPA's statutory authority. (*See* ECF No. 37 at ¶¶3-4 (emphasis added); *see also id.* at ¶¶66-78.)

While EPA would like to have this Court rule that this case is more properly considered an NPDES permit appeal handled by state courts, this argument merely represents EPA's attempt to once again thwart federal court review of its illegal use and application of the unpromulgated TST guidance as a formal rule under the Administrative Procedure Act ("APA"). Undeniably, EPA's unlawful use and application of the TST based solely upon EPA guidance documents issued in 2010 ("TST Guidance"), and EPA's subsequent failure to incorporate or authorize use of the TST in 2012 by properly promulgating the TST in 40 Code of Regulations ("C.F.R.") Part 136 (referred to herein as "Part 136") as mandated by law, is in direct contravention of the authority Congress provided to EPA by statute. (*See* ECF No. 37 at pp. 2, 12; *see also* 33 U.S.C. §1314(a)(2)(C) and (a)(3) (requiring information on the measurement and classification of water quality to be revised from time to time and published in the Federal Register and otherwise made available to the public) (emphasis added); 5 U.S.C. §553(b), (c) and §701 *et seq.*) Furthermore, EPA's position belies this Court's very authority under the APA to review and "hold unlawful and set aside" EPA's actions "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." (*See* 5 U.S.C. §706(2)(C).)

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EPA's repeated recasting of this lawsuit as a permit challenge represents a naked attempt to evade federal judicial review of its illegal conduct and deprive Plaintiffs of any federal forum to directly challenge EPA's wrongful conduct. Although EPA would like to move this challenge to state administrative and judicial fora, state courts have no jurisdiction over EPA's unlawful actions. Given that Plaintiffs' APA case does not appeal the issuance of any NPDES permits, the Environmental Appeals Board ("EAB") is not the proper forum either. Plaintiffs' Second Amended Complaint ("SAC") *does not* challenge EPA's or the State's actions related to permitting. Rather, Plaintiffs challenge the *TST Guidance* as required, authorized, or applied by EPA. (ECF No. 37 at ¶¶65-78.)

EPA also argues that Plaintiffs' case must be dismissed because Plaintiffs have not alleged a final agency action. (ECF No. 42-1 at p. 19.) This argument does not withstand scrutiny. The TST Guidance, which was subsequently used and applied in other EPA decisions affecting Plaintiffs' members, and EPA's failure to act to include the TST in recent rulemakings constituted final agency actions "'by which rights or obligations have been determined, or from which legal consequences will flow.'" (*United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 117 (1997)); *see also* ECF No. 37 at ¶4.)

Finally, this action does not represent an untimely challenge to the 2010 TST Guidance. Plaintiffs can challenge the TST Guidance once applied with regard to (1) EPA's requirements of the use and application of the unpromulgated TST based upon the TST Guidance, and (2) EPA's use, requirement of the use, and application of the TST in contravention of the Ocean Plan, which anticipates the use of promulgated WET testing methods only. Again, Plaintiffs' SAC explains and EPA's Motion ignores, that EPA's continued use and application of the TST Guidance is *ultra vires* and contravenes EPA's statutory authority. (ECF No. 37 at ¶¶3-5.) A substantive challenge to an agency decision alleging an *ultra vires* action lacking statutory authority extends the time in which a challenge may be brought to the particular action by allowing a case within six years of the agency's application of that action to the specific challenger. (*See, e.g., Wind River Min. Corp. v. U.S.*, 946 F.2d 710, 715 (9th Cir. 1991) ("*Wind River*"); *see also* ECF No. 37 at ¶¶5, 53.)

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Here, the statute of limitations did not begin to run on the Plaintiffs' claims until EPA began to use the TST Guidance as a rule and apply the TST to Plaintiffs as if the TST were equivalent to a formal rule adopted under the APA and authorized by the Clean Water Act ("CWA"). Specific examples include, but are not limited to, the ocean discharge permit for the Orange County Sanitation District, a SCAP member, and the NPDES permit for the Joint Outfall System for the San Jose Creek Water Reclamation Plant. (ECF No. 37 at ¶¶38, 51, 55.) EPA does not even bother to distinguish or address *Wind River* and the Ninth Circuit's binding authority on this issue in its Motion, and cannot belatedly do so in its Reply. (*Compare* ECF No. 42-1 at pp. 19-20, *with* ECF No. 37 at ¶¶53-55.) Simply put, Plaintiffs' challenge is timely.

In sum, EPA's Motion employs a kitchen sink approach to shield EPA's unlawful actions from judicial scrutiny on procedural grounds, but this case must be decided on the merits. Not only does this Court have proper subject matter jurisdiction, but Plaintiffs have alleged sufficient facts regarding EPA's *ultra vires* actions, which EPA does not and cannot defend. EPA itself used the TST Guidance as a formal rule, required permitting authorities to employ the TST, and did so in violation of promulgated federal rules and the Ocean Plan. Chasing every permit and every ruling by EPA would strain Plaintiffs' and judicial resources to a breaking point, which should not be required. Plaintiffs cannot obtain effective relief against EPA's unlawful use of underground rules from the EAB or in a state forum. The APA provides this Court with adequate jurisdiction to hold EPA accountable. EPA's Motion must be denied.

II. BACKGROUND

Plaintiffs are non-profit trade organizations whose members treat and recycle billions of gallons of wastewater in California each day. Pursuant to the CWA, Plaintiffs' members must obtain NPDES permits in order to release treated water into waterways. These permits are generally issued by the EPA, the State Water Board, or local Regional Water Boards. EPA promulgated formal rules for issuing such permits, and also prescribed the approved methods for testing water to determine whether the effluent discharged or the receiving water is considered acutely or chronically "toxic." The EPA and state Water Boards issue NPDES permits requiring monitoring that "must be

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conducted according to test procedures approved under 40 C.F.R. Part 136." (40 C.F.R. §122.41(j)(4).)

A. EPA Properly Allowed Only Promulgated WET Testing Methods Until 2010.

For nearly 15 years, EPA and state agencies required only the use of the 2002 promulgated WET testing methods. These EPA rules on WET testing were promulgated and enacted pursuant to the APA's notice and comment procedures. EPA first promulgated WET testing methods in the Federal Register in or about October 1995. (*See Whole Effluent Toxicity: Guidelines Establishing Test Procedures for the Analysis of Pollutants*, 60 Fed. Reg. 53,529 (Oct. 16, 1995), ECF No. 25-1, Request for Judicial Notice ("RFJN") Ex. A.) The purpose of this notice was to promulgate *standardized* WET testing methods, even though other possible methods existed. (*See id.*) The preamble of this notice clearly stated that all WET "testing must be conducted according to the toxicity test protocols described in the test manual cited in Table I–A, 40 C.F.R. Part 136, as amended." (*Id.*)

After judicial challenge, new proposed standard WET testing methods were re-promulgated, subject to notice and comment, and were finally published in November 2002 (the "2002 Rule"). (ECF No. 37 at ¶31 (citing *EPA Guidelines Establishing Test Procedures for the Analysis of Pollutants; Whole Effluent Toxicity Test Methods; Final Rule*, 67 Fed. Reg. 69,952 (Nov. 19, 2002)), ECF. No. 25-2, RFJN Ex. B; *Edison Elec. Institute v. EPA*, 391 F.3d 1267, 1268-70 (D.C. Cir. 2004) (describing history of WET test method rule-making process from 1995 through the promulgation of the 2002 Rule).) The 2002 Rule does not mention or authorize the TST statistical procedure and, in fact, limits the methods and statistical procedures that may be used to those promulgated in the 2002 Rule. (*See* ECF No. 37 at ¶32; 67 Fed. Reg. 69,952.) These methods are approved under Clean Water Act section 304(h) and specified at 40 C.F.R. 136.3, Table I–A.

In contravention of this clear limitation, EPA asserts that the WET test methods manual set forth in the 2002 Rule "recommend, but do not require, select statistical analyses to be applied to WET test result." (ECF No. 42-1 at p. 3; *see also* 2002 Methods at p. 40, Section 9.4.1.2 (explaining that even though other statistical methods are available, the ones included were chosen for a reason).) Contrary to EPA's claims, while the 2002 Rule recommends the specific methods that may

be used, this rule also provides that *only* the methods recommended in the 2002 Rule may be used. This could be analogized to a rule stating people can only wear black or white, but no other color. Here, EPA is requiring people to wear yellow, in blatant disregard for the black or white only rule.[1] While yellow may be more attractive and desirable, unless and until the black or white rule is modified, yellow is not authorized. The same applies to the TST. The 2002 promulgated methods allow the use of four statistical procedures, but only those four, no others. For hypothesis testing, the promulgated methods prescribe "Dunnett's Test, a t test with Bonferroni adjustment, Steel's Many-one Rank Test, or the Wilcoxon Rank Sum Test with the Bonferroni Adjustment." (*See EPA Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms*, Fourth Ed., EPA 821-R-02-013, Oct. 2002 ("2002 Methods") at pp. 37-38 (Section 9.2.1) and 41 (Section 9.5.1).) For point estimation techniques, the methods prescribe "Probit Analysis, Spearman-Karber Method, Trimmed Spearman-Karber Method, Graphical Method, or Linear Interpolation Method." (*Ibid.*) If EPA wishes to modify the allowed statistics or other procedures,[2] it may do so, but only through a formal rulemaking process that was not followed in the issuance of the TST Guidance.

The 2002 Rule, with its incorporated 2002 Methods, is consistent with California's Ocean Plan ("Ocean Plan"), which sets water quality objectives based on chronic toxicity units ("TUc") and has specified that TUc shall be used for critical life stage toxicity tests using Part 136 methods.

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[1] Nothing in the 2002 Rule supports the use of the TST procedures as approved or promulgated WET test methods. (*See* 2002 Rule, 67 Fed. Reg. 69,952, ECF No. 25-2, RFJN Ex. B.) Although EPA cites to the three testing method manuals released by EPA in 2002 to support its argument that WET testing methods need not be promulgated, none of these manuals can be read to support the use of a non-promulgated method since these manuals were incorporated by reference into the 2002 Rule. (ECF No. 42-1 at p. 3 n.2; *see generally*, *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, EPA 821-R-02-012 (5th ed., Oct. 2002); 2002 Methods; and *Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms*, EPA 821-R-02-014 (3d ed., Oct. 2002); 67 Fed. Reg. 69,952, ECF No. 25-2, RFJN Ex. B (stating that these "three method manuals [including the 2002 Methods]. . . were incorporated by reference in the WET final rule").)

[2] The TST utilizes other procedures contrary to the 2002 Methods, including a hypothesis test presuming toxicity, a pass/fail endpoint, no dose response concentration review, and other anomalies. (*See e.g.*, 2002 Methods at p. 5, Section 2.2.3 ("Use of pass/fail tests consisting of a single effluent concentration [ ] and a control **is not recommended**.") (emphasis in original).)

(ECF No. 37 at ¶20.) EPA did not deviate from its promulgated WET testing methods from 2002 through 2009.

B. EPA Issued the Unpromulgated TST Guidance in 2010.

Everything changed in 2010, when EPA began a relentless campaign to insert the TST as a new WET testing method without subjecting the procedures and statistics in this guidance to notice and comment rulemaking as Congress required in 33 U.S.C. Section 1314(a)(2)(C) and (a)(3). That year, EPA informally issued the TST Guidance, which is comprised of guidance documents regarding a potential new procedure for use in WET testing and reporting referred to as the TST. (*See e.g.*, *National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document*, EPA 833-R-10-003 (June 2010); EPA Regions 8, 9, and 10 Toxicity Training Tool (January 2010).) The TST, as referenced in Plaintiffs' SAC includes, but is not limited to, use of an alternative hypothesis presuming tested water is toxic, allows for the use of one sample compared to a control instead of using five concentrations to determine dose/response, includes Pass/Fail endpoints not contained in or authorized by the promulgated 2002 Rule, and is inconsistent with the promulgated toxicity requirements of the Ocean Plan. (ECF No. 37 at ¶¶20, 35-48.) EPA does not and cannot deny that the TST Guidance was not promulgated through notice and comment rulemaking under the APA. Indeed, the document includes an explicit disclaimer confirming that the document is not "a permit or a regulation itself." (*Id.* at ¶35.)

C. EPA Began Requiring the Use of the TST in 2012, Even Though the TST Ran Counter to the Ocean Plan and Was Not Included in the Promulgated 2012 Rule.

The purportedly optional and problematic TST Guidance should have been considered superseded by EPA in 2012, when EPA amended the 2002 Rule's WET testing methods and procedures (the "2012 Rule") after promulgating the proposed rule through the normal notice and comment process. (*Id.* at ¶31 (citing *Guidelines for Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act; Analysis and Sampling Procedures*, 77 Fed. Reg. 29758 (May 18, 2012)), ECF No. 25-3, RFJN Ex. C).) The 2012 Rule did not incorporate or authorize use of the TST in WET testing, even though the TST approach had been available as guidance for nearly two years. (*Id.*; ECF No. 25-3, RFJN Ex. C.)

Nevertheless, in May of 2012 after the TST guidance had sat dormant and unused for two years, EPA issued and made available to EPA Regions and States the NPDES WET Spreadsheet, which calculates various WET endpoints and proposes determining the need for effluent limitations in permits "based on the statistical flowcharts provided in USEPA's test methods, as well as results using USEPA's NPDES WET Test of Significant Toxicity document (TST; EPA 833-R-10-003, June 2010)." (ECF No. 37 at ¶37.) Likewise, on July 15, 2012, EPA and the Regional Water Quality Control Board, Santa Ana Region, jointly issued NPDES Permit No. CA0110604 to the Orange County Sanitation District, a SCAP member, requiring the use of the unpromulgated TST, stating that "[t]he reported results shall include: determination of 'Pass' or 'Fail' and 'Percent Effect' following the Test of Significant Toxicity hypothesis testing approach in *National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document* (EPA 833-R-10-003, 2010)," which is the TST Guidance. (ECF No. 37 at ¶38; *see also National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document*, EPA 833-R-10-003 (June 2010).) To make matters worse for EPA, the Ocean Plan was re-promulgated and amended in October 2012, and made no allowance for use of the TST approach, despite the fact that the TST Guidance was available for over two years. (*See id.* at ¶20.)

D. EPA Issued the 2014 Alternative Test Procedure to Skirt the Promulgated Rules.

With the applicability of the TST in doubt, the State Water Board, at EPA's urging with a wink and a nod, asked EPA to approve the use of EPA's own TST procedures and two concentration test design as an Alternative Test Procedure ("ATP") in lieu of formal rulemaking under the APA. Soon thereafter, on March 17, 2014, EPA approved this request and allowed, if not mandated, the use of the TST in NPDES permits issued in California. (*Id.* at ¶¶43-44.) As a result, NPDES permits began to be issued using the TST based on the approved ATP.

Plaintiffs filed suit in *SCAP v. EPA*, Case No. 2:14-cv-01513 ("*SCAP I*") soon thereafter on June 25, 2014, and filed their First Amended Complaint in the action on July 14, 2014, which asserted two claims for declaratory relief: (1) that the EPA wrongfully approved the 2014 ATP in violation of the APA, and (2) that the EPA's mandate requiring the use of the TST violated the APA because the TST was not enacted pursuant to the APA's rulemaking process. (ECF No. 25-5, RFJN

Ex. E.) Just before a hearing on the merits in Plaintiffs' lawsuit, EPA withdrew its approval of the ATP for TST testing "effective immediately" (*see* ECF No. 25-6, RFJN Ex. F), and moved for summary judgment on the ground that Plaintiffs' claims were now moot due to this withdrawal. Based on these claims and the available evidence at the time, this Court granted EPA's motion for summary judgment due to mootness, reasoning that it was "highly unlikely that this exact situation [would] occur again in the future." (ECF No. 25-7, RFJN Ex. G at 4:25-26.)

Without the ATP, no valid legal authority authorized the use of the TST. Even though the TST guidance was available after 2010, the 2015 Ocean Plan amendments continued to require that, where chronic toxicity effluent limitations must be included in ocean discharge permits, those limitations must be based on TUc, which is calculated based upon one of the 2002 Rule's recommended methods (*e.g.*, the No Observable Effect Level ("NOEL")), and not on a Pass/Fail basis as used with the TST. (ECF No. 37 at ¶20.) At that point, no conceivable basis existed to authorize use of the TST.

E. EPA Continues to Use the TST Guidance as a Rule Without Any Authority.

Undeterred, EPA kept using and has continued to require the use of the TST wherever possible. (*Id.* at ¶¶49-52.) EPA continues to require the use of TST Guidance as if this were a formal rule, despite the TST Guidance being inconsistent with the Ocean Plan and superseded by properly promulgated EPA regulations. (*See id.*) EPA is not going to stop requiring the use of the unpromulgated TST until a federal court finds that EPA has acted in an *ultra vires* manner and exceeded its statutory and regulatory authority. In this context, and because Plaintiffs were not allowed to amend their previous complaint in *SCAP I*, Plaintiffs filed this lawsuit ("*SCAP II*") on December 19, 2016, the First Amended Complaint on May 30, 2017, and the SAC on April 8, 2018. (*See* ECF Nos. 1, 18, 37.)

III. LEGAL ARGUMENT

A. Legal Standard.

EPA has moved to dismiss for lack of jurisdiction and for failure to state a claim. Because the facts related to this Court's subject matter jurisdiction are inseparable from the merits of Plaintiffs' claims for relief, a thorough finding of the facts by the Court is required and dismissal is

inappropriate. Where a defendant asserts that "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction, [the court is to] treat the challenge as any other motion to dismiss on the pleadings for lack of jurisdiction." (*Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (internal quotations omitted).) In such cases, the court will determine "whether the complaint alleges 'sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"" (*Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).)

In contrast, "[i]f the defendant instead makes a factual attack on subject matter jurisdiction, the defendant may introduce testimony, affidavits, or other evidence to dispute the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. (*Id.* (internal quotation omitted).) Where the plaintiff has attacked subject matter jurisdiction factually, "no presumptive truthfulness attaches to plaintiff's allegations." (*Id.* (quotation omitted).) The plaintiff must then offer proof as to why subject matter jurisdiction applies. Upon doing so, the burden shifts back to the defendant to prove the absence of subject matter jurisdiction by a "preponderance of the evidence." (*See id.*)

However, a "jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and the substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the 'merits' of an action." (*Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (internal citations and quotations omitted); *Friends of the River v. U.S. Army Corps of Engineers*, 870 F.Supp.2d 966, 972 (E.D. Cal. 2012).) "The question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" (*Id.* (quoting *Safe Air*, 373 F.3d at 1039)) In a claim filed under the APA, the finding of whether there is "the presence or absence of a final agency action" is a factual determination where the issues of subject matter jurisdiction and the merits of the case are too "intertwined" to form the basis of relief under Rule 12(b)(1). (*See id.* at 973-974.)

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B. EPA Failed to Challenge Plaintiffs' Substantive Claim that EPA's Application of the TST Guidance is *Ultra Vires* and in Contravention of EPA's Authority.

As a preliminary matter, this Court has proper subject matter jurisdiction and Plaintiffs have alleged sufficient facts related to EPA's use, requirement, and application of the TST Guidance being *ultra vires* and in excess of EPA's statutory authority. (*See, e.g.*, ECF No. 37 at ¶¶3-4, 53, 66-78.) Pursuant to the Ninth Circuit's binding authority from *Wind River* and its progeny, Plaintiffs' challenge of EPA's actions as *ultra vires* and exceeding EPA's statutory authority provides a completely valid basis for relief. (*Wind River*, 946 F.2d at 714 (involving a claim that an agency's action was *ultra vires* as exceeding the agency's statutory authority); *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1051 (9th Cir. 2016) (same); *see also* 5 U.S.C. §706(2)(C) (governing judicial review under the APA and authorizing this Court to "hold unlawful and set aside" EPA's actions "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.").)

Indeed, in *Northwest Environmental Advocates v. U.S. E.P.A.*, the plaintiffs similarly challenged EPA's promulgation of a rule under the CWA that exempted certain marine discharge permitting requirements. (*See* 537 F.3d 1006, 1010 (9th Cir. 2008).) The plaintiffs did not challenge any underlying NPDES permit, but rather EPA's promulgation of the regulation as *ultra vires* and exceeding EPA's statutory authority. (*See id* at 1010-1013, 1019.) The Ninth Circuit ultimately held that the district court had subject matter jurisdiction over the plaintiffs' suit alleging that EPA acted *ultra vires* in promulgating the regulation. (*Id.* at 1027.) Likewise, in *WildEarth Guardians v. United States Department of Justice*, the plaintiffs alleged that the Department of Justice ("DOJ") acted *ultra vires* by adopting a litigation policy with respect to the unlawful take of gray wolves without consulting with the Fish and Wildlife Service ("FWS") as required under the Endangered Species Act. (181 F.Supp.3d 651, 657-58, 669 (D. Ariz. 2015).) The court held that the plaintiffs' second amended complaint stated a claim for relief "because it charges that DOJ acted *ultra vires*" by adopting the litigation policy without satisfying the mandated requirement that DOJ consult with the FWS under the ESA. (*Id.* at 669.)

Here, the Ninth Circuit's binding authority from *WindRiver* and its progeny clearly applies in this case. Like *Wind River* and *Cal. Sea Urchin Comm'n*, Plaintiffs claim that EPA's unlawful use,

requirement of the use, and application of the TST based solely upon the TST Guidance, and EPA's subsequent failure to incorporate or authorize use of the TST in 2012 or 2015 by properly promulgating the TST in Part 136 as mandated by law, is *ultra vires* in direct contravention of the authority Congress provided to the Agency by statute. (*See, e.g.*, ECF No. 37 at pp. 2, 12; *see also* 33 U.S.C. §1314(a)(2)(C) and (a)(3).) Moreover, just like *Northwest Environmental Advocates*, Plaintiffs do not challenge any underlying NPDES permit, but EPA's use and application of the TST based on the TST Guidance as exceeding the Agency's statutory authority. (ECF No. 37 at ¶¶65-78.) Thus, this Court has proper subject matter jurisdiction over this matter. (*See Northwest Environmental Advocates*, 537 F.3d at 1027.) Although here the TST Guidance is not a formal rule because EPA has failed its mandatory duty to promulgate the TST Guidance through formal notice and comment rulemaking under the APA, as explained in greater detail below (*see infra* at pp. 12-14), EPA's use and application of the TST Guidance is a final agency action because EPA began treating the TST Guidance as a formal rule in 2012 for all intents and purposes. Moreover, like *WildEarth Guardians*, Plaintiffs have pled sufficient facts in the SAC that EPA's policy regarding the TST Guidance is *ultra vires* and in violation of EPA's statutory authority under the CWA. (*See WildEarth Guardians*, F.Supp.3d at 669.)

This Court should deny EPA's Motion on this basis alone. Further, EPA cannot remedy their failure to address this allegation in the SAC by arguing in reply that the Court lacks jurisdiction to hear a challenge of EPA's *ultra vires* actions. EPA cannot be allowed to present this belated argument, which would "disadvantage" Plaintiffs, who would have no opportunity to respond prior to this matter being submitted to the Court without a hearing. (*See City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4197307, at *2 (E.D. Cal. Nov. 26, 2007) (holding that "[n]ew arguments cannot be raised in a reply brief because it disadvantages the opposing side" and "fails to satisfy the notice requirement Local Rule 230") (citing *State of Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991)).) Accordingly, EPA's Motion should be denied because this case can proceed at a minimum with respect to EPA's *ultra vires* actions to continue using and applying the TST Guidance.

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C. The Court May Hear a Challenge to the TST Guidance.

Notwithstanding the above, this litigation is properly subject to this Court's jurisdiction as a final agency action under the APA. The TST Guidance represents a final agency action, because this document turned out to be not guidance at all, but instead transformed in 2012 into a *de facto* formal rule for all intents and purposes because the TST Guidance establishes a testing method that EPA is requiring for effluent compliance monitoring for chronic toxicity in NPDES permits. Further, this litigation is timely given EPA's use and application of the TST as the required test method, thereby establishing the TST as a *rule* beginning as early as July 2012.

1. The TST Guidance Represents a Final Agency Action.

Despite EPA's arguments to the contrary, the TST Guidance represents a final agency action subject to review by this Court.[3] EPA's application of the TST Guidance equates to a final agency action because, beginning in 2012, it evidenced the consummation of EPA's decision-making process and imposed obligations from which legal consequences began to flow. (*See Bennet*, 520 U.S. at 178.) In *Barrick Goldstrike Mines Inc. v. Browner*, the D.C. Circuit held that a guidance document combined with "a series of agency pronouncements" constituted a "final agency action within APA §704's meaning." (215 F.3d 45, 48-49 (D.C. Cir. 2000); *see also Defenders of Wildlife v. Tuggle*, 607 F.Supp.2d 1095, 1110 (D. Ariz. 2009) (denying the government's motion to dismiss and holding that a standard operating procedure for wolf control actions taken as part of a Mexican wolf reintroduction project "crystallized" the agency's decision-making process and was, therefore, a final agency action within the APA's meaning).) The court in *Barrick Goldstrike Mines Inc.* reasoned that while the guidance contained "non-binding" language, there was "not the slightest doubt that EPA directed regulated entities to comply with the . . . Guidance regarding their treatment of waste rock." (*Barrick Goldstrike Mines Inc.*, 215 F.3d at 49 n.3.)

Here, EPA has required the use of the TST pursuant to the TST Guidance in the series of final agency actions alleged in the SAC. (ECF No. 37 at ¶¶4, 49-52.) This "crystallize[d]" EPA's

[3] This Court did not previously address or determine whether the TST Guidance itself constituted a final agency action when the Court ruled on EPA's Motion to Dismiss the First Amended Complaint. (*See* ECF No. 36 at p. 16 n.10.)

"position into final agency action" under the APA, since EPA required the use of the TST pursuant to the TST Guidance, and immediate compliance was expected from the State and regulated entities subject to NPDES Permits. (*See Barrick*, 215 F.3d at 48-49; *see also* (*Hawkes*, 136 S. Ct. at 1813-15 (holding that an Army Corps' CWA jurisdictional determination was a final action reviewable under the APA in federal district court even though additional state or federal actions followed).)

EPA makes much of the TST's Guidance's disclaimer that it "does not and cannot impose any legally binding requirements on EPA, states, NPDES permittees, or laboratories conducting or using WET testing for permittees (or for states in evaluating ambient water quality)." (ECF No. 37 at ¶35; 42-1 at p. 11 (citing TST Guidance).) However, EPA cannot hide behind boilerplate disclaimer language characterizing the TST Guidance as "non-binding" to escape accountability for regulating without a rule. (*See Barrick*, 215 F.3d at 48-49; *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (expressly discounting "boilerplate" disclaimer inserted in guidance document in finding that guidance conferred "obligations" and represented a final agency action).) EPA simply cannot get away with issuing non-final "optional" guidance and subsequently applying that guidance as formal rule while ducking the APA's notice and comment rulemaking procedures. (*See Barrick*, 215 F.3d at 48-49.) "The short of the matter is that the Guidance, insofar as relevant here, is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies like those represented by" Plaintiffs who must obtain NPDES permits in order to continue operating. (*See Appalachian Power Co.*, 208 F.3d at 1023.)

Moreover, whether the TST Guidance as applied in the actions alleged in the SAC constitutes a "final agency action" is a factual determination dependent upon an examination of the complete administrative record of both the TST Guidance as well as each of the alleged *ultra vires* actions where EPA used, required the use of, or allowed the use of the TST pursuant to the TST Guidance. The Court does not yet have the benefit of the full administrative record in this case. The resolution of this jurisdictional question goes to the merits of this case, which itself, requires a denial of EPA's Motion under Rule 12(b)(1). (*See Friends of the River*, 870 F.Supp.2d at 976 (denying motion to dismiss because determining whether actions were "final agency actions . . . require[d] a review of

the full administrative record because . . . 'the question of jurisdiction is dependent on the resolution of factual issues going to the merits'").)

2. Plaintiffs' Claims Regarding the TST Guidance Are Timely.

Plaintiffs' claims regarding the TST Guidance are also timely because an *ultra vires* and "substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's *application* of that decision to the specific challenger." (*Wind River*, 946 F.2d at 716 (emphasis added).) More specifically, in *Wind River*, the Ninth Circuit held that the general six-year statute of limitations for claims under the APA does not apply where a plaintiff challenges an agency's *ultra vires* actions as applied to that plaintiff. (*Id.* at 714-16.) The court reasoned that the "government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." (*Id.* at 715 (footnote omitted).) In other words, an agency cannot wait six years and one day to implement guidance and avoid review.

Multiple courts within the Ninth Circuit have similarly held that, pursuant to *Wind River*, a plaintiff's claim is not barred by the APA's general six-year statute of limitations where the plaintiff challenges an agency's *ultra vires* action as applied within six years. For example, in *Cal. Sea Urchin Comm'n*, the Ninth Circuit held that the plaintiffs' challenge under the APA to the FWS' termination of a translocation program for sea otters began to accrue on the date the FWS terminated the program (not on the date of the relevant rulemaking, which took place nearly a decade before), because FWS' *application* of the termination date of the program was a recent and independent final agency action that caused the plaintiffs' injuries. (828 F.3d at 1049-51.) A different result, the Ninth Circuit explained, would make the APA's statute of limitations "a sword to vanquish a challenge like the case here, without ever considering the merits." (*Id.* at 1051.) Likewise, in *Northwest Environmental Advocates*, the Ninth Circuit held that the plaintiffs' *ultra vires* action alleging that EPA acted beyond its statutory authority under the CWA when it promulgated a rule exempting certain marine discharge permitting requirements was timely and not barred by the APA's six-year statute of limitations because the plaintiffs challenged EPA's "'adverse application'" of the rule to the plaintiffs within six years. (537 F.3d at 1019 (citing *Wind River*, 946 F.2d at 714-

16; *see also McFalls v. Purdue*, 2018 WL 785866, at *14 (D. Ore. Feb. 8, 2018) (denying the defendants' motion to dismiss and holding that several plaintiffs' as applied challenge of housing regulations were not time-barred under the APA); *WildEarth Guardians*, 181 F.Supp.3d at 669, 673 (D. Ariz. 2015) (holding that the plaintiffs' case fit within *Wind River* because plaintiffs' substantive challenge was not apparent until plaintiffs discovered the policy); *Cty. of Amador, Cal. v. U.S. Dep't of the Interior*, 136 F.Supp.3d 1193, 1205-1207 (E.D. Cal. 2015) (same).) Indeed, even this Court in *SCAP I* held that EPA "cannot avoid review by shifting the bases of its actions until the statute of limitation on challenging the issuance of its regulatory documents runs" and EPA's "actions can remain open to challenge on an 'as applied" basis when regulations are used in new ways." (*SCAP I*, 2016 WL 6135872, at *7 (E.D. Cal. Oct. 21, 2016).)

Here, the first post-2010 use of the TST of which Plaintiffs are aware was in another EPA document called the 2012 NPDES WET Spreadsheet. (*See* ECF No. 37 at ¶¶37, 55.) The Spreadsheet document, *for the very first time*, indicated a regulatory use of the TST Guidance by stating that the NPDES WET Spreadsheet can be used for:

> "› **Determining reasonable potential**. Point estimates using EPA's Technical Support Document approaches, as well as TST can be used for determining Reasonable Potential (RP).
>
> › **Compliance determinations.** NOEC/LOEC and point estimates, as well as TST results can be used to determine permit compliance."

(ECF No. 37 at ¶37 (emphasis added).) This document went beyond the point estimates and NOEC/LOEC approaches authorized in the 2002 Methods, to also authorize TST. Moreover, the first NPDES permit using the TST that Plaintiffs are aware of was in the ocean discharge permit for the Orange County Sanitation District, *a SCAP member*, adopted jointly by EPA and California in July 2012. (*See* ECF No. 37 at ¶¶38, 55.) These more recent and independent final agency actions triggered the start of the six-year statute of limitations on the TST Guidance document as an *ultra vires* action of EPA. (*Wind River*, 946 F.2d at 716; *Northwest Envtl. Advocates*, 537 F.3d at 1019.)

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Thus, these 2012 actions extended the length of the statute of limitations by two years after the TST Guidance was wrongfully issued in 2010 in contravention of the CWA's requirements. (33 U.S.C. §1314(a)(2)(C) and (a)(3).)

An alternative trigger date could also be tied to recent permits adopted after EPA's withdrawal of the ATP. (*See* ECF No. 37 at ¶¶45-52.) Because EPA withdrew the ATP in February 2015, the statute of limitations arguably did not start to run on Plaintiffs' claims until at least that time, when TST requirements in permits began to be justified on the TST Guidance documents directly (*e.g.*, the revised NPDES permit for the Joint Outfall System for the San Jose Creek Water Reclamation Plant), instead of on an approved, valid ATP. (ECF No. 37 at ¶¶51, 56-58.) In either case, Plaintiffs' challenge to EPA's *ultra vires* actions in issuing the TST Guidance would still be timely under the Ninth Circuit's decision in *Wind River* and its progeny.

Again, EPA's Motion made no effort to refute this point made in the SAC, ignoring binding authority from the Ninth Circuit. Instead, EPA continues to seek this Court's help to avoid all challenges to its actions and use the APA's statute of limitations as "a sword to vanquish a challenge like the case here, without ever considering the merits[,]" which the Ninth Circuit in *Wind River* and *Cal. Sea Urchin Comm'n* explicitly cautioned against. (*See Cal. Sea Urchin Comm'n*, 828 F.3d at 1051.)

EPA's Motion should be dismissed because a complaint cannot be dismissed under Rule 12(b)(1) unless the particular statute of limitations is jurisdictional. (*Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995) (citing, *inter alia*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).) The six-year limitations period for actions under the APA "is not jurisdictional and is subject to traditional exceptions, such as equitable tolling, waiver, and estoppel."[4] (*San Luis Unit Food Prods. v. U.S.*, 772 F.Supp.2d 1210, 1228 (E.D. Cal. 2011) (citing

[4] Equitably tolling could also apply to the six-year statute of limitations, rendering the new challenge timely. (*See* ECF No. 37 at ¶¶59-63; Minute Order, *SCAP v. EPA*, No. 2:14-cv-01513 (E.D. Cal. Jan. 21, 2016) (Dkt. No. 84); ECF No. 24-1, Thorme Decl. at ¶6; *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (statute of limitations may be equitably tolled).) Whether the doctrine of equitable tolling applies is a factual issue not amenable to resolution on a motion to dismiss. (*See Hinkle v. Astrue*, No. 1:07-cv-01068, 2008 WL 2490396, at *4 (E.D. Cal. June 17, 2008) (citing *Supermail*, 68 F.3d at 1206-07)). Accordingly, to the extent EPA's Motion is based upon the statute of limitations, that Motion must be denied.

Cedars-Sinai Med Ctr. v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997).) Accordingly, EPA cannot dismiss any claims under Rule 12(b)(1) due to the statute of limitations. (*See Supermail*, 68 F.3d at 1206 n.2.)

The proper rule to bring such a motion is Rule 12(b)(6). (*See id.*) A court may not dismiss a claim due to the statute of limitations under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." (*Id.* at 1206-07 (quotation omitted).) That is not the case here as a result of EPA's *ultra vires* actions. The right to challenge EPA's use and application of the TST Guidance as a rule became concrete and accrued when EPA applied the TST Guidance as a formal rule. Further, EPA continues to use, require and apply the TST Guidance despite the fact that the TST was and is inconsistent with the Ocean Plan and was not included in the 2002 Rule, 2012 Rule, or the 2016 promulgated federal rules setting forth WET testing methods. (*See, e.g., id.* ¶¶20, 31-35, 40, 42-47, 51, 53, 65-71.) All of these actions applying the TST Guidance were taken within six years before the filing of this lawsuit. (*See id.* ¶58.) Since clearly a set of facts exists that establishes the timeliness of these claims, the Court may not dismiss any claims in this action under Rule 12(b)(6).

D. This Court Has Subject Matter Jurisdiction Over EPA's Use of the TST Guidance in NPDES Permits.

This Court unquestionably has subject matter jurisdiction over final agency actions under the APA. The crux of this litigation is EPA's misuse and application of the TST Guidance in NPDES permits, *not* the NPDES permits themselves.[5] Instead, the permits provide illustrative concrete evidence of EPA's improper use and application of the TST Guidance. EPA wishes to distort the facts and misconstrue Plaintiffs' claims as challenges to NPDES permits to avoid federal court review. (ECF No. 42-1 at pp. 17-19.) Plaintiffs have not challenged the issuance of any NPDES permits. (*See* ECF 37.) Plaintiffs seek to enjoin EPA from "using, mandating, or encouraging the use of the *ultra vires* TST, or allowing, approving, or authorizing States to use the

[5] Indeed, even in *Appalachian Power Co.*, an analogous case and discussed *supra*, the underlying challenge dealt with EPA guidance, not challenges to the issuance of Clean Air Act Title v. permits themselves. (*See Appalachian Power Co.*, 208 F.3d at 1020-23.)

TST, and . . . from the us[ing] analytical results obtained through non-promulgated procedures and methods for NPDES toxicity compliance determination or other Clean Water Act purposes unless and until those procedures and methods are properly and formally promulgated as rules." (*Id.* at p. 27.)

1. The District Court Is the Proper Forum.

Despite EPA's allegations to the contrary, and as stated above, Plaintiffs are *not appealing* the issuance of any NPDES Permits here—Plaintiffs are challenging EPA's use, requirement to use, and allowance of the use of the TST in violation of the APA. If this Court were to enjoin EPA from using and applying the TST in NPDES Permits, any current permits containing TST would not automatically be revoked—EPA would simply be required to comply with the APA and formally promulgate the TST procedures before using the TST to regulate chronic toxicity, which is already required by Congress under the CWA. (33 U.S.C. §1314(a)(2)(C) and (a)(3).)

It is well-settled that "agency action is typically located in the district courts under the APA absent a specific statutory provision to the contrary." (*See Cal. Energy Commission v. Dep't of Energy*, 585 F.3d 1143, 1148 (9th 2009); *accord* 5 U.S.C. §703 ("If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer."); *see also Owner-Operators Independent Drivers Ass'n v. Skinner*, 931 F.2d 582, 585 (9th Cir. 1991) ("[U]nless Congress specifically maps a judicial review path for an agency, review may be had in federal district court under its general federal question jurisdiction."); *Friends of the River*, 870 F.Supp.2d 966 (Eastern District of California opinion denying Rule 12(b)(1) motion to dismiss action against U.S. Army Corps of Engineers ("Corps") filed under 5 U.S.C. §701 *et seq.*).)

In this case, Plaintiffs allege that EPA acted *ultra vires* and beyond its statutory and regulatory authority in using, requiring and applying the TST. This challenge of EPA's actions cannot be heard before the EAB, as Plaintiffs are not challenging the issuance of any permits, nor

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can this challenge be heard in a similar State administrative or judicial forum, which cannot enjoin EPA from such illegal conduct.[6] The proper forum for this action is in this federal Court.

2. The Issuance of the NPDES Permits Are Triggering Final Agency Actions.

The issuance of each NPDES Permit using and requiring the use of the TST represents a triggering final agency action under the APA for review of the underlying *ultra vires* action. Here, the SAC plainly states that each NPDES Permit issued, including the joint EPA/California issued NPDES permit for the Orange County Sanitation District, marks the "consummation of the agency's decision-making process" and represents an action "by which rights or obligations have been determined, or from which legal consequences will flow." (*See Hawkes*, 136 S. Ct. at 1813 (internal quotation omitted); ECF No. 37 at ¶¶4, 40, 66-79; *supra* at pp. 12-14.)

EPA asserts that this Court "has already held that it lacks subject matter jurisdiction over claims based on EPA issued individual permits because challenges to an EPA issued individual NPDES permit must first be made to the EAB within 30 days of the EPA notice of the permit's issuance, and then to the appropriate federal court of appeals." (ECF No. 42-1 at 17:9-13.) This argument, however, is based upon the theory that Plaintiffs are appealing the NPDES permits themselves.[7] As set forth above, *this case is not a permit appeal*. EPA's continued efforts to recast Plaintiffs' underlying claim should not be overlooked or sanctioned by this Court.

Further, this case can be distinguished from *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001), in that the agency actions at issue there were provided as mere assistance in response to hypothetical questions. In *Whitman*, the "action" at issue was an isolated letter from the EPA sent in response to a city's request for "assistance" that informed the city that Ocean Pollution Reduction Act would apply to the city's unfiled application for a renewal of its NPDES permit. This

[6] EPA argues that the District Court "lacks jurisdiction to review a state-issued NPDES permit." (ECF No. 42-1 at p. 18.) Plaintiffs agree and do not challenge any state-issued NPDES permits. The jointly issued state/EPA permits and EPA issued permits cited in the SAC are illustrative of EPA's use, approval of the use, or application of the unpromulgated TST procedures as a rule.

[7] The Declaration of Robyn Stuber in support of EPA's Motion (ECF No. 42-2) is completely irrelevant on this issue and simply stands as another attempt by EPA to thwart federal court review of its illegal use, requirement and application of the unpromulgated TST as a rule under the APA. Moreover, contrary to EPA's assertion, the EPA/California issued NPDES permit for the Orange County Sanitation District still incorporates the TST Guidance in contravention of the Ocean Plan and federal law. (*See* ECF No. 37 at ¶38.)

letter, written in response to a hypothetical question posed by the city, did not determine any rights or obligations because the city had yet to renew its permit, and did not mark the consummation of EPA's decision-making process because EPA's response was prompted by a request for advice, rather than a statement of the agency's position. (*See id.*)

Moreover, the Supreme Court explained in its decision in *Hawkes*, that it had "long taken" a "'pragmatic' approach . . . to finality." (*Hawkes*, 136 S. Ct. at 1815.) The court held that a jurisdictional determination issued by the Corps constituted a "final agency action" under the APA, even though the determination could still be challenged in the Clean Water Act Section 404 permitting process, reasoning that "the permitting process can be arduous, expensive, and long" and that engagement in that process did not "alter the finality of the approved [jurisdictional determination]." (*See id.* at 1815-16.) Accordingly, this Court possesses the requisite subject matter jurisdiction to hear Plaintiffs' challenge of EPA's *ultra vires* actions to use, require and apply the TST Guidance.

IV. CONCLUSION

Since at least 2012, EPA has regulated using the unpromulgated TST with impunity, despite the fact that the TST conflicts with the 2002 Rule and the Ocean Plan, and was not even considered in EPA's 2012 and 2015 amendments of federal regulations in Part 136. Throughout that time, EPA has bobbed and weaved, using procedural technicalities in Court to continue requiring the use of the TST unfettered, and all to the detriment of Plaintiffs' public agency members. EPA's Motion is just EPA's latest attempt to shield itself from any accountability for its unlawful and *ultra vires* behavior. This case deserves an evidentiary hearing with the benefit of a full record, at which point, the Court can make a determination as to the merits of this dispute. Plaintiffs respectfully request that EPA's Motion be denied.

DATED: September 28, 2018

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