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15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA

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

22 Plaintiffs,

23 v.

24 UNITED STATES ENVIRONMENTAL
25 PROTECTION AGENCY; MIKE STOKER,
26 REGIONAL ADMINISTRATOR, UNITED
27 STATES ENVIRONMENTAL PROTECTION
28 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.)

TABLE OF CONTENTS

Page

1

2

3 TABLE OF AUTHORITIES..... 3

4 I. INTRODUCTION 5

5 II. BACKGROUND..... 7

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

7 2010..... 8

8 B. EPA Issued the Unpromulgated TST Guidance in 2010..... 10

9 C. EPA Began Requiring the Use of the TST in 2012, Even Though the TST

10 Ran Counter to the Ocean Plan and Was Not Included in the Promulgated

11 2012 Rule..... 10

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

13 Rules 11

14 E. EPA Continues to Use the TST Guidance as a Rule Without Any Authority..... 12

15 III. LEGAL ARGUMENT 12

16 A. Legal Standard..... 12

17 B. EPA Failed to Challenge Plaintiffs’ Substantive Claim that EPA’s

18 Application of the TST Guidance is *Ultra Vires* and in Contravention of

19 EPA’s Authority..... 14

20 C. The Court May Hear a Challenge to the TST Guidance. 16

21 1. The TST Guidance Represents a Final Agency Action..... 16

22 2. Plaintiffs’ Claims Regarding the TST Guidance Are Timely. 18

23 D. This Court Has Subject Matter Jurisdiction Over EPA’s Use of the TST

24 Guidance in NPDES Permits..... 21

25 1. The District Court Is the Proper Forum..... 22

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

27 Actions..... 23

28 IV. CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

1

2

3

4 *Appalachian Power Co. v. EPA,*
208 F.3d 1015 (D.C. Cir. 2000) 17, 21

5 *Ashcroft v. Iqbal,*
556 U.S. 662 (2009)..... 13

6 *Barrick Goldstrike Mines Inc. v. Browner,*
215 F.3d 45 (D.C. Cir. 2000) 16, 17

7 *Bell Atl. Corp. v. Twombly,*
550 U.S. 544 (2007)..... 13

8 *Bennett v. Spear,*
520 U.S. 154 (1997)..... 6, 16

9 *Cal. Energy Commission v. Dep’t of Energy,*
585 F.3d 1143 (9th Cir. 2009)..... 22

10 *Cal. Sea Urchin Comm’n v. Bean,*
828 F.3d 1046 (9th Cir. 2016)..... 14, 18, 20

11 *Cedars-Sinai Med Ctr. v. Shalala,*
125 F.3d 765 (9th Cir. 1997)..... 21

12 *City of Grass Valley v. Newmont Mining Corp.,*
No. 2:04-cv-00149-GEB-DAD, 2007 WL 4197307 (E.D. Cal. Nov. 26, 2007) 15

13 *City of San Diego v. Whitman,*
242 F.3d 1097 (9th Cir. 2001)..... 23, 24

14 *Cty. of Amador, Cal. v. U.S. Dep’t of the Interior,*
136 F.Supp.3d 1193 (E.D. Cal. 2015)..... 19

15 *Defenders of Wildlife v. Tuggle,*
607 F.Supp.2d 1095 (D. Ariz. 2009)..... 16

16 *Edison Elec. Institute v. EPA,*
391 F.3d 1267 (D.C. Cir. 2004) 8

17 *Friends of the River v. U.S. Army Corps of Engineers,*
870 F.Supp.2d 966 (E.D. Cal. 2012)..... 13, 17, 22

18 *Hinkle v. Astrue,*
No. 1:07-cv-01068, 2008 WL 2490396 (E.D. Cal. June 17, 2008) 20

19 *Irwin v. Dep’t of Veterans Affairs,*
498 U.S. 89 (1990)..... 20

20 *McFalls v. Purdue,*
2018 WL 785866 (D. Ore. Feb. 8, 2018) 19

21 *Northwest Environmental Advocates v. U.S. E.P.A.,*
537 F.3d 1006 (9th Cir. 2008)..... 14, 15, 18, 19

22 *Owner-Operators Independent Drivers Ass’n v. Skinner,*
931 F.2d 582 (9th Cir. 1991)..... 22

23

24

25

26

27

28

1	<i>Pace v. DiGuglielmo</i> , 544 U.S. 408 (2005).....	20
2	<i>Safe Air for Everyone v. Meyer</i> , 373 F.3d 1035 (9th Cir. 2004).....	13
3	<i>San Luis Unit Food Prods. v. U.S.</i> , 772 F.Supp.2d 1210 (E.D. Cal. 2011).....	20
4	<i>SCAP v. EPA</i> , No. 2:14-cv-01513 (E.D. Cal. Jan. 21, 2016)	11, 19, 20
5	<i>State of Nevada v. Watkins</i> , 914 F.2d 1545 (9th Cir. 1990), <i>cert. denied</i> , 499 U.S. 906 (1991)).....	15
6	<i>Supermail Cargo, Inc. v. United States</i> , 68 F.3d 1204 (9th Cir. 1995).....	20, 21
7	<i>Terenkian v. Republic of Iraq</i> , 694 F.3d 1122 (9th Cir. 2012).....	13
8	<i>United States Army Corps of Engineers v. Hawkes Co., Inc.</i> , 136 S. Ct. 1807 (2016).....	6, 17, 23, 24
9	<i>WildEarth Guardians v. United States Department of Justice</i> , 181 F.Supp.3d 651 (D. Ariz. 2015).....	14, 15, 19
10	<i>Wind River Min. Corp. v. U.S.</i> , 946 F.2d 710 (9th Cir. 1991).....	passim
11	STATUTORY AUTHORITIES	
12	5 U.S.C. §553.....	5
13	5 U.S.C. §701.....	5, 22
14	5 U.S.C. §703.....	22
15	5 U.S.C. §706.....	5, 14
16	33 U.S.C. §1314.....	passim
17	RULES AND REGULATIONS	
18	40 C.F.R. §122.41.....	8
19	40 C.F.R. Part 136.....	8
20	60 Fed. Reg. 53,529.....	8
21	67 Fed. Reg. 69,952.....	8, 9
22	77 Fed. Reg. 29,758.....	10
23	ADDITIONAL AUTHORITIES	
24	<i>EPA Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms</i> , Fourth Ed., EPA 821-R-02-013, Oct. 2002	8, 9
25	<i>Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms</i> , EPA 821-R-02-012 (5th ed., Oct. 2002)	9
26	<i>National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document</i> (June 2010)	10, 11
27	<i>Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms</i> , EPA 821-R-02-014 (3d ed., Oct. 2002).....	9
28		

1 **I. INTRODUCTION**

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

13 While EPA would like to have this Court rule that this case is more properly considered an
 14 NPDES permit appeal handled by state courts, this argument merely represents EPA's attempt to
 15 once again thwart federal court review of its illegal use and application of the unpromulgated TST
 16 guidance as a formal rule under the Administrative Procedure Act ("APA"). Undeniably, EPA's
 17 unlawful use and application of the TST based solely upon EPA guidance documents issued in 2010
 18 ("TST Guidance"), and EPA's subsequent failure to incorporate or authorize use of the TST in 2012
 19 by properly promulgating the TST in 40 Code of Regulations ("C.F.R.") Part 136 (referred to herein
 20 as "Part 136") as mandated by law, is in direct contravention of the authority Congress provided to
 21 EPA by statute. (*See* ECF No. 37 at pp. 2, 12; *see also* 33 U.S.C. §1314(a)(2)(C) and (a)(3)
 22 (requiring information on the measurement and classification of water quality to be revised from
 23 time to time and published in the Federal Register and otherwise made available to the public)
 24 (emphasis added); 5 U.S.C. §553(b), (c) and §701 *et seq.*) Furthermore, EPA's position belies this
 25 Court's very authority under the APA to review and "hold unlawful and set aside" EPA's actions "in
 26 excess of statutory jurisdiction, authority, or limitations, or short of statutory right." (*See* 5 U.S.C.
 27 §706(2)(C).)

28 ///

1 EPA's repeated recasting of this lawsuit as a permit challenge represents a naked attempt to
2 evade federal judicial review of its illegal conduct and deprive Plaintiffs of any federal forum to
3 directly challenge EPA's wrongful conduct. Although EPA would like to move this challenge to
4 state administrative and judicial fora, state courts have no jurisdiction over EPA's unlawful actions.
5 Given that Plaintiffs' APA case does not appeal the issuance of any NPDES permits, the
6 Environmental Appeals Board ("EAB") is not the proper forum either. Plaintiffs' Second Amended
7 Complaint ("SAC") *does not* challenge EPA's or the State's actions related to permitting. Rather,
8 Plaintiffs challenge the *TST Guidance* as required, authorized, or applied by EPA. (ECF No. 37 at
9 ¶¶65-78.)

10 EPA also argues that Plaintiffs' case must be dismissed because Plaintiffs have not alleged a
11 final agency action. (ECF No. 42-1 at p. 19.) This argument does not withstand scrutiny. The TST
12 Guidance, which was subsequently used and applied in other EPA decisions affecting Plaintiffs'
13 members, and EPA's failure to act to include the TST in recent rulemakings constituted final agency
14 actions "by which rights or obligations have been determined, or from which legal consequences
15 will flow." (*United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813
16 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 117 (1997)); *see also* ECF No. 37 at ¶4.)

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

28 ///

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

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

20 II. BACKGROUND

21 Plaintiffs are non-profit trade organizations whose members treat and recycle billions of
22 gallons of wastewater in California each day. Pursuant to the CWA, Plaintiffs' members must
23 obtain NPDES permits in order to release treated water into waterways. These permits are generally
24 issued by the EPA, the State Water Board, or local Regional Water Boards. EPA promulgated
25 formal rules for issuing such permits, and also prescribed the approved methods for testing water to
26 determine whether the effluent discharged or the receiving water is considered acutely or chronically
27 "toxic." The EPA and state Water Boards issue NPDES permits requiring monitoring that "must be
28 ///

1 conducted according to test procedures approved under 40 C.F.R. Part 136.” (40 C.F.R.
2 §122.41(j)(4).)

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

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

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

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

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

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

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20 _____
 21 ¹ Nothing in the 2002 Rule supports the use of the TST procedures as approved or promulgated
 22 WET test methods. (*See* 2002 Rule, 67 Fed. Reg. 69,952, ECF No. 25-2, RFJN Ex. B.) Although
 23 EPA cites to the three testing method manuals released by EPA in 2002 to support its argument that
 24 WET testing methods need not be promulgated, none of these manuals can be read to support the use
 25 of a non-promulgated method since these manuals were incorporated by reference into the 2002
 26 Rule. (ECF No. 42-1 at p. 3 n.2; *see generally*, *Methods for Measuring the Acute Toxicity of*
 27 *Effluents and Receiving Waters to Freshwater and Marine Organisms*, EPA 821-R-02-012 (5th ed.,
 28 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).)

Commented [PV1]: Need cite to where we have discussed this before – or whether we need new RJN

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

3 **B. EPA Issued the Unpromulgated TST Guidance in 2010.**

4 Everything changed in 2010, when EPA began a relentless campaign to insert the TST as a
5 new WET testing method without subjecting the procedures and statistics in this guidance to notice
6 and comment rulemaking as Congress required in 33 U.S.C. Section 1314(a)(2)(C) and (a)(3). That
7 year, EPA informally issued the TST Guidance, which is comprised of guidance documents
8 regarding a potential new procedure for use in WET testing and reporting referred to as the TST.
9 (*See e.g., National Pollutant Discharge Elimination System Test of Significant Toxicity*
10 *Implementation Document*, EPA 833-R-10-003 (June 2010); EPA Regions 8, 9, and 10 Toxicity
11 Training Tool (January 2010).) The TST, as referenced in Plaintiffs' SAC includes, but is not
12 limited to, use of an alternative hypothesis presuming tested water is toxic, allows for the use of one
13 sample compared to a control instead of using five concentrations to determine dose/response,
14 includes Pass/Fail endpoints not contained in or authorized by the promulgated 2002 Rule, and is
15 inconsistent with the promulgated toxicity requirements of the Ocean Plan. (ECF No. 37 at ¶¶20,
16 35-48.) EPA does not and cannot deny that the TST Guidance was not promulgated through notice
17 and comment rulemaking under the APA. Indeed, the document includes an explicit disclaimer
18 confirming that the document is not "a permit or a regulation itself." (*Id.* at ¶35.)

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

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

1 Nevertheless, in May of 2012 after the TST guidance had sat dormant and unused for two
 2 years, EPA issued and made available to EPA Regions and States the NPDES WET Spreadsheet,
 3 which calculates various WET endpoints and proposes determining the need for effluent limitations
 4 in permits “based on the statistical flowcharts provided in USEPA’s test methods, as well as results
 5 using USEPA’s NPDES WET Test of Significant Toxicity document (TST; EPA 833-R-10-003,
 6 June 2010).” (ECF No. 37 at ¶37.) Likewise, on July 15, 2012, EPA and the Regional Water
 7 Quality Control Board, Santa Ana Region, jointly issued NPDES Permit No. CA0110604 to the
 8 Orange County Sanitation District, a SCAP member, requiring the use of the unpromulgated TST,
 9 stating that “[t]he reported results shall include: determination of ‘Pass’ or ‘Fail’ and ‘Percent Effect’
 10 following the Test of Significant Toxicity hypothesis testing approach in *National Pollutant*
 11 *Discharge Elimination System Test of Significant Toxicity Implementation Document* (EPA 833-R-
 12 10-003, 2010),” which is the TST Guidance. (ECF No. 37 at ¶38; *see also National Pollutant*
 13 *Discharge Elimination System Test of Significant Toxicity Implementation Document*, EPA 833-R-
 14 10-003 (June 2010).) To make matters worse for EPA, the Ocean Plan was re-promulgated and
 15 amended in October 2012, and made no allowance for use of the TST approach, despite the fact that
 16 the TST Guidance was available for over two years. (*See id.* at ¶20.)

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

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

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

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

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

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

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

24 **III. LEGAL ARGUMENT**

25 **A. Legal Standard.**

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

1 inappropriate. Where a defendant asserts that “the allegations contained in a complaint are
2 insufficient on their face to invoke federal jurisdiction, [the court is to] treat the challenge as any
3 other motion to dismiss on the pleadings for lack of jurisdiction.” (*Terenkian v. Republic of Iraq*,
4 694 F.3d 1122, 1131 (9th Cir. 2012) (internal quotations omitted).) In such cases, the court will
5 determine “whether the complaint alleges ‘sufficient factual matter, accepted as true, to ‘state a
6 claim to relief that is plausible on its face.’” (*Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678
7 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).)

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

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

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

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

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

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

1 requirement of the use, and application of the TST based solely upon the TST Guidance, and EPA's
2 subsequent failure to incorporate or authorize use of the TST in 2012 or 2015 by properly
3 promulgating the TST in Part 136 as mandated by law, is *ultra vires* in direct contravention of the
4 authority Congress provided to the Agency by statute. (*See, e.g.*, ECF No. 37 at pp. 2, 12; *see also*
5 33 U.S.C. §1314(a)(2)(C) and (a)(3).) Moreover, just like *Northwest Environmental Advocates*,
6 Plaintiffs do not challenge any underlying NPDES permit, but EPA's use and application of the TST
7 based on the TST Guidance as exceeding the Agency's statutory authority. (ECF No. 37 at ¶¶65-
8 78.) Thus, this Court has proper subject matter jurisdiction over this matter. (*See Northwest*
9 *Environmental Advocates*, 537 F.3d at 1027.) Although here the TST Guidance is not a formal rule
10 because EPA has failed its mandatory duty to promulgate the TST Guidance through formal notice
11 and comment rulemaking under the APA, as explained in greater detail below (*see infra* at pp. 12-
12 14), EPA's use and application of the TST Guidance is a final agency action because EPA began
13 treating the TST Guidance as a formal rule in 2012 for all intents and purposes. Moreover, like
14 *WildEarth Guardians*, Plaintiffs have pled sufficient facts in the SAC that EPA's policy regarding
15 the TST Guidance is *ultra vires* and in violation of EPA's statutory authority under the CWA. (*See*
16 *WildEarth Guardians*, F.Supp.3d at 669.)

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

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

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

9 1. The TST Guidance Represents a Final Agency Action.

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

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

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 27 ³ This Court did not previously address or determine whether the TST Guidance itself constituted a
 28 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.)

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

6 EPA makes much of the TST’s Guidance’s disclaimer that it “does not and cannot impose
7 any legally binding requirements on EPA, states, NPDES permittees, or laboratories conducting or
8 using WET testing for permittees (or for states in evaluating ambient water quality).” (ECF No. 37
9 at ¶35; 42-1 at p. 11 (citing TST Guidance).) However, EPA cannot hide behind boilerplate
10 disclaimer language characterizing the TST Guidance as “non-binding” to escape accountability for
11 regulating without a rule. (*See Barrick*, 215 F.3d at 48-49; *see also Appalachian Power Co. v. EPA*,
12 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (expressly discounting “boilerplate” disclaimer inserted in
13 guidance document in finding that guidance conferred “obligations” and represented a final agency
14 action).) EPA simply cannot get away with issuing non-final “optional” guidance and subsequently
15 applying that guidance as formal rule while ducking the APA’s notice and comment rulemaking
16 procedures. (*See Barrick*, 215 F.3d at 48-49.) “The short of the matter is that the Guidance, insofar
17 as relevant here, is final agency action, reflecting a settled agency position which has legal
18 consequences both for State agencies administering their permit programs and for companies like
19 those represented by” Plaintiffs who must obtain NPDES permits in order to continue operating.
20 (*See Appalachian Power Co.*, 208 F.3d at 1023.)

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

1 the full administrative record because . . . ‘the question of jurisdiction is dependent on the resolution
2 of factual issues going to the merits’’.)

3 2. Plaintiffs’ Claims Regarding the TST Guidance Are Timely.

4 Plaintiffs’ claims regarding the TST Guidance are also timely because an *ultra vires* and
5 “substantive challenge to an agency decision alleging lack of agency authority may be brought
6 within six years of the agency’s *application* of that decision to the specific challenger.” (*Wind River*,
7 946 F.2d at 716 (emphasis added).) More specifically, in *Wind River*, the Ninth Circuit held that the
8 general six-year statute of limitations for claims under the APA does not apply where a plaintiff
9 challenges an agency’s *ultra vires* actions as applied to that plaintiff. (*Id.* at 714-16.) The court
10 reasoned that the “government should not be permitted to avoid all challenges to its actions, even if
11 *ultra vires*, simply because the agency took the action long before anyone discovered the true state
12 of affairs.” (*Id.* at 715 (footnote omitted).) In other words, an agency cannot wait six years and one
13 day to implement guidance and avoid review.

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

1 16; *see also* *McFalls v. Purdue*, 2018 WL 785866, at *14 (D. Ore. Feb. 8, 2018) (denying the
 2 defendants’ motion to dismiss and holding that several plaintiffs’ as applied challenge of housing
 3 regulations were not time-barred under the APA); *WildEarth Guardians*, 181 F.Supp.3d at 669, 673
 4 (D. Ariz. 2015) (holding that the plaintiffs’ case fit within *Wind River* because plaintiffs’ substantive
 5 challenge was not apparent until plaintiffs discovered the policy); *Cty. of Amador, Cal. v. U.S. Dep’t*
 6 *of the Interior*, 136 F.Supp.3d 1193, 1205-1207 (E.D. Cal. 2015) (same.) Indeed, even this Court in
 7 *SCAP I* held that EPA “cannot avoid review by shifting the bases of its actions until the statute of
 8 limitation on challenging the issuance of its regulatory documents runs” and EPA’s “actions can
 9 remain open to challenge on an ‘as applied’ basis when regulations are used in new ways.” (*SCAP I*,
 10 2016 WL 6135872, at *7 (E.D. Cal. Oct. 21, 2016).)

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

15 “> **Determining reasonable potential.** Point estimates using EPA’s Technical Support
 16 Document approaches, as well as TST can be used for determining Reasonable Potential
 17 (RP).
 18 > **Compliance determinations.** NOEC/LOEC and point estimates, as well as TST results
 19 can be used to determine permit compliance.”

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

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

4 An alternative trigger date could also be tied to recent permits adopted after EPA's
 5 withdrawal of the ATP. (See ECF No. 37 at ¶¶45-52.) Because EPA withdrew the ATP in February
 6 2015, the statute of limitations arguably did not start to run on Plaintiffs' claims until at least that
 7 time, when TST requirements in permits began to be justified on the TST Guidance documents
 8 directly (e.g., the revised NPDES permit for the Joint Outfall System for the San Jose Creek Water
 9 Reclamation Plant), instead of on an approved, valid ATP. (ECF No. 37 at ¶¶51, 56-58.) In either
 10 case, Plaintiffs' challenge to EPA's *ultra vires* actions in issuing the TST Guidance would still be
 11 timely under the Ninth Circuit's decision in *Wind River* and its progeny.

12 Again, EPA's Motion made no effort to refute this point made in the SAC, ignoring binding
 13 authority from the Ninth Circuit. Instead, EPA continues to seek this Court's help to avoid all
 14 challenges to its actions and use the APA's statute of limitations as "a sword to vanquish a challenge
 15 like the case here, without ever considering the merits[.]" which the Ninth Circuit in *Wind River* and
 16 *Cal. Sea Urchin Comm'n* explicitly cautioned against. (See *Cal. Sea Urchin Comm'n*, 828 F.3d at
 17 1051.)

18 EPA's Motion should be dismissed because a complaint cannot be dismissed under Rule
 19 12(b)(1) unless the particular statute of limitations is jurisdictional. (*Supermail Cargo, Inc. v. United*
 20 *States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995) (citing, *inter alia*, *Irwin v. Dep't of Veterans Affairs*,
 21 498 U.S. 89, 96 (1990).) The six-year limitations period for actions under the APA "is not
 22 jurisdictional and is subject to traditional exceptions, such as equitable tolling, waiver, and
 23 estoppel."⁴ (*San Luis Unit Food Prods. v. U.S.*, 772 F.Supp.2d 1210, 1228 (E.D. Cal. 2011) (citing

24 _____
 25 ⁴ Equitably tolling could also apply to the six-year statute of limitations, rendering the new challenge
 26 timely. (See ECF No. 37 at ¶¶59-63; Minute Order, *SCAP v. EPA*, No. 2:14-cv-01513 (E.D. Cal.
 27 Jan. 21, 2016) (Dkt. No. 84); ECF No. 24-1, **Thorne Decl.** at ¶6; *Pace v. DiGuglielmo*, 544 U.S.
 28 408, 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.

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

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

16 **D. This Court Has Subject Matter Jurisdiction Over EPA’s Use of the TST**
 17 **Guidance in NPDES Permits.**

18 This Court unquestionably has subject matter jurisdiction over final agency actions under the
 19 APA. The crux of this litigation is EPA’s misuse and application of the TST Guidance in
 20 NPDES permits, *not* the NPDES permits themselves.⁵ Instead, the permits provide illustrative
 21 concrete evidence of EPA’s improper use and application of the TST Guidance. EPA wishes to
 22 distort the facts and misconstrue Plaintiffs’ claims as challenges to NPDES permits to avoid federal
 23 court review. (ECF No. 42-1 at pp. 17-19.) Plaintiffs have not challenged the issuance of any
 24 NPDES permits. (*See* ECF 37.) Plaintiffs seek to enjoin EPA from “using, mandating, or
 25 encouraging the use of the *ultra vires* TST, or allowing, approving, or authorizing States to use the
 26

27 ⁵ Indeed, even in *Appalachian Power Co.*, an analogous case and discussed *supra*, the underlying
 28 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.)

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

5 1. The District Court Is the Proper Forum.

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

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

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

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

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

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

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

18 Further, this case can be distinguished from *City of San Diego v. Whitman*, 242 F.3d 1097,
19 1101 (9th Cir. 2001), in that the agency actions at issue there were provided as mere assistance in
20 response to hypothetical questions. In *Whitman*, the “action” at issue was an isolated letter from the
21 EPA sent in response to a city’s request for “assistance” that informed the city that Ocean Pollution
22 Reduction Act would apply to the city’s unfiled application for a renewal of its NPDES permit. This

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

28 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.)

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

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

14 IV. CONCLUSION

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

24 DATED: September 28, 2018

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25 By: _____

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