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

10 UNITED STATES DISTRICT COURT  
11 EASTERN DISTRICT OF CALIFORNIA

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

14 Plaintiffs,

15 v.

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

20 Defendants.

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

**SECOND AMENDED COMPLAINT FOR  
DECLARATORY JUDGMENT AND  
INJUNCTIVE RELIEF**

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

21 Plaintiffs SOUTHERN CALIFORNIA ALLIANCE OF PUBLICLY OWNED  
22 TREATMENT WORKS (“SCAP”), CENTRAL VALLEY CLEAN WATER ASSOCIATION  
23 (“CVCWA”), and BAY AREA CLEAN WATER AGENCIES (“BACWA”) (collectively  
24 referred to as “Plaintiffs”) bring this action against Defendant UNITED STATES  
25 ENVIRONMENTAL PROTECTION AGENCY; Defendant ALEXIS STRAUSS, ACTING  
26 REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION  
27 AGENCY, REGION IX; and Doe Defendants 1 to 10 (collectively referred to as either “USEPA”  
28

1 or “Defendants”), to invalidate USEPA’s *ultra vires* action and to challenge USEPA’s failures to  
2 act that violated the Federal Water Pollution Control Act (commonly known as the “Clean Water  
3 Act” or “CWA”), 33 U.S.C. §1251 *et seq.*, and allege as follows:

#### 4 I. INTRODUCTION

5 1. Under the CWA, USEPA has no legal ability to exceed the authority provided to  
6 that agency by statute. In the context of whole effluent toxicity (“WET”) testing under the Clean  
7 Water Act, testing methodologies cannot be used or required pursuant to guidance documents,  
8 only by properly promulgated USEPA federal regulations incorporated into 40 Code of Federal  
9 Regulations (“C.F.R.”) Part 136 (referred to herein as “Part 136”). *See e.g.*, 33 U.S.C.  
10 §1314(a)(2)(C) and (a)(3) (requiring information on the measurement and classification of water  
11 quality to be revised from time to time and published in the Federal Register and otherwise made  
12 available to the public); *see also* Administrative Procedure Act (“APA”), 5 U.S.C. §553(b), (c)  
13 and §701 *et seq.*

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

23 3. USEPA has failed to comply with the CWA and exceeded its statutory authority in  
24 using, requiring the use, or allowing the use of unpromulgated non-Part 136 methods and  
25 statistical and other toxicity testing procedures, including the Test of Significant Toxicity  
26 (“TST”), in modified permitting and compliance provisions in relation to WET requirements.  
27 The issuance of guidance documents without complying with the CWA requirements is void  
28 *ab initio* and constitutes an unlawful *ultra vires* act. Because of these illegal actions, Plaintiffs’

1 members are now currently or will be imminently subjected to the unjustifiably onerous impacts  
2 of the TST guidance. These impacts include potentially higher costs and increased enforcement  
3 jeopardy due to an increased frequency of “false positive” test results (namely, erroneous test  
4 results indicating toxicity is present when in fact no toxicity is present). These impacts go beyond  
5 the effects of any single permit or regulatory action. USEPA’s actions threaten to unlawfully  
6 affect all subsequent NPDES permits, which can be enforced both civilly and criminally.  
7 (33 U.S.C. §1319.) This lawsuit is a substantive challenge to *ultra vires* actions by USEPA.

8 4. USEPA’s failure to act in compliance with the law, as set forth herein, constitutes  
9 final agency actions subject to judicial review under the APA. The TST guidance, which was  
10 subsequently used in other agency decisions affecting Plaintiffs’ members, and the USEPA’s  
11 failure to act to include in the TST in recent rulemakings constituted final agency actions “by  
12 which rights or obligations have been determined, or from which legal consequences will flow.”  
13 (*United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016) citing  
14 *Bennett v. Spear*, 520 U.S. 154, 117 (1997).) The new statistical method and related procedures  
15 for use in WET testing setting forth the TST (“TST guidance”) was *ultra vires* and in  
16 contravention of USEPA’s statutory authority.

17 5. Generally, a six-year statute of limitations applies to civil actions brought against  
18 the United States for judicial review brought pursuant to the APA (5 U.S.C. §§701-706). *See*  
19 28 U.S.C. §2401(a). An action commenced by filing a complaint for review of agency action is a  
20 “civil action” within the meaning of section 2401(a). The statute requires that the judicial  
21 complaint be filed “within six years after the right of action first accrues.” 28 U.S.C. §2401(a).  
22 A substantive challenge to an agency decision alleging an *ultra vires* action lacking statutory  
23 authority extends the time in which a challenge may be brought to that action by allowing a case  
24 within six years of the agency’s *application* of that decision to the specific challenger.

25 6. In this case, Plaintiffs seek a declaration that, in issuing or allowing the use of the  
26 TST guidance in NPDES permit monitoring and compliance requirements, and by not including  
27 the TST in subsequent rulemaking, USEPA has acted contrary to the mandates of the CWA and  
28 exceeded its statutory authority. As a result, USEPA’s actions in issuing the TST guidance was

1 *ultra vires* and void *ab initio*. (28 U.S.C. §2201; Fed. R. Civ. P. 57.) Plaintiffs further seek  
 2 preliminary and permanent injunctive relief to forestall continued and further injury to Plaintiffs’  
 3 members and others from the unjustifiably onerous impacts of the unpromulgated TST guidance.  
 4 (28 U.S.C. §2202; Fed. R. Civ. P. 65.)

## 5 II. JURISDICTION AND VENUE

6 7. This Court has jurisdiction over the subject matter of this action pursuant to  
 7 28 U.S.C. §1331 because this case arises under the “laws . . . of the United States.” This Court is  
 8 authorized to award declaratory relief pursuant to 28 U.S.C. §2201 and injunctive relief pursuant  
 9 to 28 U.S.C. §2202. This Court has the statutory power to review the USEPA’s agency actions at  
 10 issue pursuant to 5 U.S.C. §§702, 704, and 706 (providing for judicial review of agency action  
 11 under the APA where a person suffers a legal wrong because of agency action, or is adversely  
 12 affected or aggrieved by agency action).

13 8. Defendants have waived sovereign immunity and this Court has the power to hear  
 14 Plaintiffs’ challenges to USEPA’s agency actions pursuant to provisions of the APA, 5 U.S.C.  
 15 §§701-706. The APA “creates a comprehensive remedial scheme for those allegedly harmed by  
 16 agency action.” (*Navajo Nation v. United States Dep’t of Interior*, 819 F.3d 1084, 1090 (9th Cir.  
 17 2016) (citing 5 U.S.C. §§701-706).) “Section 702 of the APA waives sovereign immunity for  
 18 suits alleging wrongful agency action or inaction.” (*Id.* (citing 5 U.S.C. §702).) “Section 704 of  
 19 the APA provides a right to judicial review of any ‘final agency action for which there is no other  
 20 adequate remedy in a court.’” (*Id.* (citing 5 U.S.C. §704).) Section 706 of the APA grants courts  
 21 the power to invalidate agency actions that are, *inter alia*, “arbitrary, capricious, an abuse of  
 22 discretion, or otherwise not in accordance with the law,” “in excess of statutory jurisdiction,  
 23 authority, or limitations, or short of statutory right,” and “without observance of procedure  
 24 required by law.” 5 U.S.C. §704. Accordingly, Plaintiffs’ challenge to USEPA’s actions lies  
 25 properly in this Court. (*See* 5 U.S.C. §§702, 704, 706; *Navajo Nation, supra*.)

26 9. Plaintiffs have standing to bring this suit on behalf of its members because at least  
 27 one of Plaintiffs’ members would have standing to sue in its own right; the interests these trade  
 28 associations seek to protect are germane to their organizations’ purpose; and neither the claims

1 asserted nor the relief requested requires an individual member to participate in this suit. (*See*  
 2 *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010).)

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

### 6 III. PARTIES

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

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

20 13. BACWA is a joint-powers agency created by the California Government Code.  
 21 BACWA is comprised of the five largest wastewater treatment agencies in the San Francisco Bay  
 22 Area and associate members that provide technical expertise and financial support to  
 23 municipalities and special districts providing sanitary sewer services to more than 6.5 million  
 24 people. BACWA participates in litigation where, as here, topics of import to the BACWA  
 25 membership are raised.

26 14. At the very least, SCAP has standing in this matter. (*See Lujan v. Defenders of*  
 27 *Wildlife*, 504 U.S. 555, 560-61 (1992).) Most of SCAP's members are currently operating under  
 28 NPDES permits that are or will be subject to permitting and compliance requirements that include

1 TST. CVCWA’s and BACWA’s members are concerned that USEPA’s unlawful actions to use,  
 2 mandate, implement, promote, encourage, and authorize the use by delegated States of  
 3 unpromulgated “rules” will increase the costs of compliance and the likelihood of false findings  
 4 of non-compliance for its members if TST requirements are placed in their members’ permits.  
 5 This result can be avoided by a finding in Plaintiffs’ favor. The standing of at least one  
 6 organization assures that this matter is justiciable, because only the presence of one party with  
 7 standing is required. (*See Director, Office of Workers’ Compensation Programs v. Perini North*  
 8 *River Associates*, 459 U.S. 297, 303-305 (1983).)

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

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

18 17. Doe Defendants 1 to 10 are responsible in some manner for the events herein  
 19 referred to, and caused injuries proximately thereby to Plaintiffs as alleged herein. The names of  
 20 the individual Doe defendants are at this time unknown. Plaintiffs will insert the true names and  
 21 capacities of the fictitiously named defendants when ascertained. Plaintiffs are informed and  
 22 believe that, at all times herein mentioned, each Doe defendant was an agent of Defendant  
 23 USEPA and, in taking the actions hereinafter alleged, was acting within the scope of their  
 24 authority as an agent and with the permission and consent of USEPA.

#### 25 IV. FACTUAL AND LEGAL BACKGROUND

##### 26 A. Overview of the Statutory Scheme

27 18. The CWA created a system for regulating water quality and permitting wastewater  
 28 discharges through the NPDES program. Under CWA sections 301 and 402, all facilities that

1 discharge pollutants from any point source into waters of the United States are required to obtain  
2 an NPDES permit. Effluent limitations serve as the primary mechanism in NPDES permits for  
3 controlling discharges of pollutants from point sources to receiving waters. Water quality  
4 standards are used as the basis for deriving the specific effluent limitations in NPDES permits.  
5 (40 C.F.R. §122.44(d).) A determination of “reasonable potential” to cause or contribute to an  
6 exceedance of water quality standards is a prerequisite to the inclusion of effluent limitations in  
7 an NPDES permit. 40 C.F.R. §122.44(d)(1)(i).

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

20 20. Since at least 2001, California’s Ocean Plan has set water quality objectives based  
21 on chronic toxicity units (“TUc”) and has specified that TUc shall be used for critical lifestage  
22 toxicity tests using Part 136 methods. (See 2015 Ocean Plan at 78-79.) Even though the TST  
23 guidance was available in 2012 and 2015 when the Ocean Plan was amended, the Ocean Plan  
24 clearly requires that, where chronic toxicity effluent limitations must be included, those  
25 limitations must be based on TUc, which is calculated based upon the NOEL, and not on a  
26 Pass/Fail basis as used with the TST. Use of the TST contradicts the promulgated toxicity  
27 requirements of the Ocean Plan.  
28

1 **B. WET Testing**

2 21. Within the NPDES program, freshwater and marine acute and chronic toxicity  
3 tests are used in conjunction with other chemical analyses to evaluate and assess the compliance  
4 of wastewater discharges and surface waters with water quality standards under the CWA.

5 22. WET (i.e., Whole Effluent Toxicity) describes the aggregate toxic effect of an  
6 aqueous sample (e.g., whole effluent wastewater discharge) as measured by laboratory  
7 organisms' responses upon exposure to the sample, including premature death, impaired growth,  
8 or reduced reproduction. WET is thus defined by the measured effects on organisms. Because  
9 toxicity is inherently defined by the measurement system employed, toxicity is referred to as a  
10 "method-defined analyte." (67 Fed. Reg. 69,965.)

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

15 24. The contrast with chemical measurements does not stop there. Chemical  
16 measurements have tremendous amounts of quality control/quality assurance ("QA/QC")  
17 procedures such as matrix spikes, matrix spike duplicates, known reference samples, etc. WET  
18 has no accuracy component, which is why the promulgated methods in Part 136 require five  
19 effluent treatments to provide more certainty in WET test results, which are not provided by the  
20 QA/QC common to chemical measurements.

21 25. The series of replicated measurements produced through WET testing can be  
22 assessed through a number of distinct statistical procedures outlined in 40 C.F.R. Part 136. The  
23 outcome of a statistical procedure is called the "endpoint," which under the promulgated test  
24 methods in Part 136 can include one of the following, although no specific one of these endpoints  
25 included in the approved list are mandated:

- 26 a. The No Observed Effect Concentration ("NOEC,") or the No Observed  
27 Effect Level ("NOEL"), both of which refer to the highest concentration of a toxicant that  
28 causes no observable effects in the exposed organisms;



1           b.       The 25% Inhibition Concentration (“IC25”), which is the concentration of  
2           a toxicant that causes a 25% inhibition in growth or reproduction in the exposed  
3           organisms; and

4           c.       The 50% Lethal Concentration (“LC50”), which is the concentration of a  
5           toxicant that causes death in 50% of the exposed organisms).

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

7           27.     The endpoints of NOEC/NOEL, IC25, and LC50 are all expressed as percent of  
8           the effluent, while an endpoint of Pass/Fail is “unitless” (i.e., not expressed as a percent or in  
9           terms of units). Because WET is a method-defined analyte, the statistical procedures used and the  
10          endpoint reported are important as different procedures often create different results. In other  
11          words, one statistical procedure may produce a result of “toxic,” while another may produce the  
12          result of “non-toxic” on the same tested effluent.

13          28.     WET tests are surrogates, designed to replicate the total effect and environmental  
14          exposure of aquatic life to toxic pollutants in water without initially requiring the identification of  
15          the specific pollutants. Because WET testing does not identify the specific pollutant(s), more in-  
16          depth analyses, known as Toxicity Identification Evaluations (“TIEs”) and Toxicity Reduction  
17          Evaluations (“TREs”) are often performed if toxicity is initially indicated in order to determine  
18          what pollutant(s) may be causing the toxicity effect.

### 19       **C.     The WET Regulatory Scheme**

20          29.     Section 304(a) of the CWA requires that USEPA “after consultation with  
21          appropriate Federal and State agencies and other interested persons, shall develop and publish . . .  
22          (and from time to time thereafter revise) information . . . (C) on the measurement and  
23          classification of water quality....” (33 U.S.C. §1314(a)(2)(C).) Section 304(a)(3) requires  
24          “[s]uch criteria and information and revisions thereof shall be issued to the States and shall be  
25          published in the Federal Register and otherwise made available to the public.” (33 U.S.C.  
26          §1314(a)(3)(emphasis added). Section 304(a)(8) requires that USEPA, after consultation with  
27          appropriate State agencies, “shall develop and publish information on methods for establishing  
28          and measuring water quality criteria for toxic pollutants, on other bases than pollutant-by-

1 pollutant criteria, including biological monitoring and assessment. (33 U.S.C. §1314(a)(8).  
2 Section 304(h) of the CWA requires USEPA to “promulgate guidelines establishing test  
3 procedures for the analysis of pollutants that shall include the factors which must be provided in  
4 any certification pursuant to section [401 of the CWA] or permit application pursuant to section  
5 [402 of the CWA].” (33 U.S.C. §1314(h); 33 U.S.C. §§1341, 1342.) Thus, the CWA Section  
6 304 requires rules, promulgated through a public review and comment process, related to the  
7 measurement of water quality and does not authorize the issuance of informal unpromulgated  
8 guidance setting forth test procedures or analysis that can be used for regulatory purposes.

9         30. In accordance with these CWA Section 304 mandates, USEPA regulations at  
10 40 C.F.R. Part 136 prescribe the specific methods and reporting units for each parameter tested  
11 that must be used for the analysis of pollutants in all applications and reports submitted under the  
12 NPDES program under section 402 of the CWA, as well as State certifications pursuant to section  
13 401 of the CWA. (40 C.F.R. §§136.1(a), 136.3.) Under USEPA rules, NPDES permit  
14 compliance monitoring must be done according to test procedures approved under 40 C.F.R.  
15 Part 136. (*See accord* 40 C.F.R. §122.41(j)(4) and §122.44(i)(iv) (monitoring must be done  
16 according to test procedures approved under 40 C.F.R. Part 136).)

17         31. In November of 2002, USEPA promulgated through a formal notice and comment  
18 rulemaking process acute and short-term chronic WET test methods and procedures, for use in  
19 monitoring compliance with NPDES permit limitations in accordance with 40 C.F.R. Part 136.  
20 (*See* USEPA Guidelines Establishing Test Procedures for the Analysis of Pollutants; Whole  
21 Effluent Toxicity Test Methods; Final Rule, 67 Fed. Reg. 69,952 (Nov. 19, 2002).) This  
22 regulation and the documents expressly incorporated by reference into that regulation are herein  
23 referred to as the “2002 Rule.” The 2002 Rule specifies the parameter to be measured and the  
24 required units for determining the acute and chronic toxicity for freshwater and saline water. The  
25 2002 Rule constituted the universe of USEPA’s published and promulgated WET methods and  
26 procedures. (*See* 2002 Rule, 67 Fed. Reg. 69,972.)

27         32. The 2002 Rule does not mention or authorize the TST statistical procedure. In  
28 addition, the 2002 Rule, among other things, also does not mention or authorize an alternative

1 hypothesis presuming the water tested is toxic. The 2002 Rule does not authorize and actually  
2 discourages the use of single sample “Pass/Fail” test results as is prescribed with the use of the  
3 TST. In fact, the 2002 Rule states that the “[u]se of pass/fail tests consisting of a single effluent  
4 concentration (e.g., the receiving water concentration or RWC) and a control is not  
5 recommended.” The 2002 Rule does not authorize Pass/Fail endpoints, or unitless expressions of  
6 toxicity. The 2002 Rule does not authorize a statistical method that relies only on the information  
7 from two tested concentrations instead of a minimum of six concentrations of effluent and control  
8 groups when testing final effluent. Plaintiffs challenge what is herein called “the TST,” which  
9 includes each of these unauthorized WET test and compliance related requirements. The  
10 2002 Rule does not authorize use of the TST or methods or procedures related to the TST.

11 33. In promulgating the 2002 Rule, USEPA specifically considered allowing  
12 alternative statistical procedures, but chose not to do so, explaining that, “EPA has not included  
13 such alternative statistical methods in today’s modifications to WET test methods. EPA believes  
14 that the statistical methods currently recommended in the WET methods [NOEC, IC25, LC50]  
15 are appropriate.” (67 Fed. Reg. 69,964 (emphasis added).) The 2002 Rule acknowledged that  
16 other techniques exist and that the statistical methods adopted into 40 C.F.R. Part 136 are not the  
17 only possible methods. However, the 2002 Rule further states that, “[t]he recommended  
18 statistical methods described in the method manual were selected because they are (1) applicable  
19 to most of the different toxicity test data sets for which they are recommended, (2) powerful  
20 statistical tests, (3) hopefully “easily” understood by nonstatisticians, and (4) amenable to use  
21 without a computer, if necessary.” (*Id.* (emphasis added).) Thus, the 2002 Rule clearly stated  
22 that a reasoned decision had been made to only include and approve use of certain statistical  
23 procedures. Significantly, the TST was not among them.

24 34. To validate the performance of the test methods included in the 2002 Rule,  
25 USEPA relied on an Interlaboratory Variability Study and established a false positive error rate  
26 for each WET test method. The Interlaboratory Variability Study did not include the TST  
27 statistical procedure, and the USEPA has not conducted a study to determine the false positive  
28 error rate of the TST statistical procedure.

1 **D. USEPA’s TST Guidance and Subsequent Rulemaking**

2 35. In 2010, USEPA issued TST guidance, which is comprised of guidance documents  
3 regarding a potential new statistical method for use in WET testing called the TST. (*See e.g.*,  
4 National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation  
5 Document, EPA 833-R-10-003 (June 2010); EPA Regions 8, 9, and 10 Toxicity Training Tool  
6 (January 2010).) The TST relies on an alternative hypothesis presuming toxicity and includes  
7 Pass/Fail endpoints not contained in or authorized by the promulgated 2002 Rule. Furthermore,  
8 the TST guidance includes an *explicit disclaimer* confirming that the document is not “a permit or  
9 a regulation itself.” In fact, the TST guidance at pg. ii states:

10 “This document does not... substitute for the CWA, an NPDES permit, or EPA or  
11 state regulations applicable to permits or WET testing; nor is this document a  
12 permit or a regulation itself. The TST approach does not result in changes to  
13 EPA’s WET test methods promulgated at Title 40 of the *Code of Federal*  
14 *Regulations* Part 136. The document does not and cannot impose any legally  
15 binding requirements on EPA, states, NPDES permittees, or laboratories  
16 conducting or using WET testing for permittees (or for states in evaluating  
17 ambient water quality). EPA could revise this document without public notice to  
18 reflect changes in EPA policy and guidance.”

19 Given these disclaimers, no one (including Plaintiffs) was aware or on notice in 2010 that this  
20 guidance document would be used in a regulatory context, or could be construed to modify the  
21 promulgated methods.

22 36. In 2012, as required by the CWA to from time to time amend the information ...  
23 on the measurement and classification of water quality (33 U.S.C. §1314(a)(2)(C)), USEPA  
24 formally amended the 2002 Rule’s WET test methods and procedures in its modifications to the  
25 Promulgated Guidelines Establishing Test Procedures for the Analysis of Pollutants under the  
26 Clean Water Act: Analysis and Sampling Procedures (“2012 Rule”). (77 Fed. Reg. 29758  
27 (May 18, 2012); see 40 C.F.R. Part 136.) USEPA’s amendments failed to incorporate or  
28 authorize use of the TST, even though the TST approach had been available as guidance for  
nearly two years. *See* 5 U.S.C. § 551(13) (failure to act may constitute agency action).

37. Also in May of 2012, USEPA Headquarters, Office of Wastewater Management,  
Water Permits Division, issued and made available to USEPA Regions and States the NPDES

1 WET Spreadsheet, which calculates various WET endpoints “based on the statistical flowcharts  
2 provided in USEPA’s test methods, as well as results using USEPA’s NPDES WET Test of  
3 Significant Toxicity document (TST; EPA 833-R-10-003, June 2010).” The Spreadsheet  
4 document *for the first time* indicated a regulatory use of the TST guidance by stating that the  
5 NPDES WET spreadsheet can be used for:

- 6 “> **Determining reasonable potential.** Point estimates using EPA’s  
7 Technical Support Document approaches, as well as TST can be used for  
8 determining Reasonable Potential (RP).
- 9 > **Compliance determinations.** NOEC/LOEC and point estimates, as well  
10 as TST results can be used to determine permit compliance.

11 38. Despite the fact that the TST guidance was unauthorized by the CWA, the 2012  
12 Rule, or the 2002 Rule, on July 15, 2012, USEPA and the Regional Water Quality Control Board,  
13 Santa Ana Region, issued NPDES Permit No. CA0110604 to the Orange County Sanitation  
14 District, a SCAP member. This NPDES Permit required the use of the TST, and stated “The  
15 reported results shall include: determination of ‘Pass’ or ‘Fail’ and ‘Percent Effect’ following the  
16 Test of Significant Toxicity hypothesis testing approach in *National Pollutant Discharge*  
17 *Elimination System Test of Significant Toxicity Implementation Document* (EPA 833-R-10-003,  
18 2010) [the TST guidance].”

19 39. In 2015, USEPA again proposed to modify the regulations in 40 C.F.R. Part 136.  
20 These proposed modifications included clarifications and corrections to the procedures for  
21 toxicity testing (*see* 80 Fed. Reg. 8956-9075 (February 19, 2015) accessible at  
22 <http://www.gpo.gov/fdsys/pkg/FR-2015-02-19/pdf/2015-02841.pdf> ). Significantly, the newly  
23 proposed rule failed to include the TST. (80 Fed. Reg. 8968-8969.) SCAP and its members  
24 commented on this proposed rule.

25 40. On August 7, 2017, the USEPA Administrator signed and submitted the final rule  
26 for publication, again updating the Part 136 Rule for Analysis of Effluent. Again, USEPA’s  
27 amendments failed to modify the Part 136 rule to include the TST. In fact, Table 1A (“List of  
28 Approved Biological Methods for Wastewater and Sewage Sludge”) continues to include only

1 NOEC or IC25, percent effluent, in the listings for chronic toxicity. 82 Fed. Reg. 40847-8. This  
2 rule finalizing the proposed rule from 2015 was published at 82 Federal Register 40,836 on  
3 August 28, 2017, and became effective September 27, 2017 (“2017 Final Rule”). USEPA once  
4 again failed to act in accordance with the CWA and promulgate the TST, or at least incorporate  
5 the TST guidance by reference into the rule, making it a lawful regulation under the requirements  
6 of CWA Section 304.

7 **E. SCAP’s Challenge to USEPA’s Approval of TST as an Alternative Test Procedure**

8 41. Under limited circumstances and subject to specific regulatory requirements, a  
9 person may request an Alternative Test Procedure (“ATP”) authorizing the use of test methods  
10 and procedures not previously approved and formally promulgated by USEPA. (40 C.F.R.  
11 §136.3(a).) The ATP process was designed to “encourage organizations external to EPA to  
12 develop and submit for approval new analytical methods.” (*See Guide to Method Flexibility and*  
13 *Approval of EPA Water Methods*, USEPA Office of Water (Dec. 1996) at p. 77.) USEPA  
14 regulations at sections 136.4 and 136.5 describe the specific procedures and requirements for  
15 obtaining USEPA review and approval of ATPs. (40 C.F.R. §§136.4, 136.5.)

16 42. USEPA Region IX had been urging the State of California to utilize the TST in  
17 NPDES permits and its pending Toxicity Policy for several years. Regulated dischargers  
18 objected to the use of the TST over concerns regarding high false positive error rates and because  
19 the TST was not included in a formally promulgated and publicly vetted rule as required by the  
20 CWA.

21 43. On February 12, 2014, to overcome these concerns, the California State Water  
22 Resources Control Board requested USEPA Region IX approval to use the TST statistical method  
23 in conjunction with a test design incorporating only two samples (effluent and control) rather than  
24 the minimum of six required for effluent testing under the 2002 Rule. A little more than a month  
25 later, on March 17, 2014, USEPA Region IX approved a statewide, limited use ATP allowing the  
26 use of the TST with just two concentrations (effluent sample and control) under 40 C.F.R.  
27 Part 136.5. Further, USEPA applied this ATP to non-ocean and ocean waters, even though  
28

1 application to ocean waters was not requested by the State Water Board in its ATP request, and  
2 was inconsistent with the terms of the promulgated Ocean Plan.

3 44. After USEPA approved the ATP for California in 2014, NPDES permits in the Los  
4 Angeles Region began to be issued using the TST based on the modified test design approved in  
5 ATP. Plaintiffs challenged USEPA's approval of the ATP in this court (see *SCAP et al, v.*  
6 *USEPA*, Case No. 2:14-CV-01513-MCE-DAD ("*SCAP I*").

7 45. In *SCAP I*, which was filed in 2014, even though the main focus of that case was  
8 challenging the ATP that allowed the use of the TST, Plaintiffs raised the issue that USEPA  
9 violated the APA by imposing or mandating the use of this two-concentration TST until that  
10 method has been promulgated by USEPA as an approved method under 40 C.F.R. Part 136.  
11 *SCAP I*, First Amended Complaint at ¶ 3. Further, Plaintiffs raised the issue that "Analytical  
12 results obtained by using a non-promulgated method cannot be used for NPDES compliance  
13 determination purposes until that method has been properly incorporated into 40 C.F.R.  
14 Part 136." *Id.*

15 46. In *SCAP I*, Plaintiffs specifically challenged: "USEPA's failure to comply with the  
16 law, as set forth [t]herein, subjects that federal agency's actions to judicial review under the APA.  
17 In this case, Plaintiffs seek a declaration that USEPA acted contrary to the mandates of the APA  
18 and the regulations implementing the CWA and exceeded its statutory authority. As a result,  
19 USEPA's actions are unlawful and void. (28 U.S.C. §2201; Fed. R. Civ. P. 57.) Plaintiffs further  
20 seek preliminary and permanent injunctive relief to maintain the status quo pending adjudication,  
21 and to forestall irreparable injury to Plaintiffs' members and others in the meantime. (28 U.S.C.  
22 §2202; Fed. R. Civ. P. 65.)" *SCAP I*, First Amended Complaint at ¶ 6. This paragraph was  
23 expressly incorporated into the causes of action. *Id.* at ¶¶ 38, 53, 63.

24 47. In *SCAP I*, Plaintiffs included a prayer for relief seeking an "Order that USEPA  
25 and its officers, employees, and agents, are temporarily and permanently enjoined from  
26 mandating the use of the two-concentration TST or the use of analytical results obtained by using  
27 this non-promulgated method for NPDES compliance determination or other Clean Water Act  
28 purposes." *SCAP I*, First Amended Complaint at 17, ¶ E. This Court understood that there were

1 two prongs to this case — “Plaintiffs filed this action in order to overturn the ATP approval and  
2 to obtain a permanent injunction preventing the EPA from ‘mandating the use of the two-  
3 concentration TST or use of analytical results obtained using this nonpromulgated method for  
4 NPDES compliance determination or other Clean Water Act purposes.’” *SCAP I*, Document 102,  
5 p. 4 of 13, lines 14-18 (Filed 10/21/16); *see also SCAP II*, Case 2:16-cv-02960-MCE-DB,  
6 Document 36, Page 4 of 17, lines 15-17 (Filed 03/19/18)(“Plaintiffs filed that action seeking to  
7 overturn the ATP approval and to obtain a permanent injunction preventing the EPA from  
8 mandating use of the two-concentration TST.”).

9 48 Before a ruling was issued in *SCAP I*, USEPA withdrew that ATP in 2015.  
10 Therefore, currently, no valid ATP for WET testing using the TST or two concentration design  
11 exists or is approved in California. After determining the case was moot after the ATP was  
12 withdrawn, the Court would not allow the judgment on mootness to be modified or an  
13 amendment to the *SCAP I* complaint, and instead required a new case to be filed and related back  
14 to the initial case. Given the several organizations involved, each of which had to get approval  
15 from their boards to file new litigation, a new complaint in this case could not be filed until  
16 December of 2016.

17 **F. USEPA Continues to Require the Use of the TST**

18 49. Despite withdrawing the ATP, USEPA has continued to use, require the use, and  
19 approved of the use of the TST as a statistical procedure for toxicity tests, testing just two  
20 concentrations, utilizing a different null hypothesis, and prescribing a Pass/Fail endpoint for  
21 analyzing WET test results and determining compliance with NPDES permit requirements. Upon  
22 information and belief, USEPA continues to do so. USEPA failed to act to include these  
23 requirements in the 2012 Rule, or 2017 Final Rule, in excess of its statutory and regulatory  
24 authority.

25 50. USEPA has issued or approved of issuance of NPDES Permits and allowed many  
26 other permits to be adopted, many held by SCAP members, that included requirements to conduct  
27 WET testing and determine complaints based upon the TST guidance, even though the TST  
28



1 guidance was *ultra vires* contrary to the CWA and federal regulations, *inter alia*, the APA,  
2 40 C.F.R. Part 136, 40 C.F.R. §122.41(j) and §122.44(i), and the Ocean Plan.

3 51. By way of example, on or about April 9, 2015, after the ATP used to justify the  
4 previous permit was withdrawn by USEPA, the Regional Water Quality Control Board, Los  
5 Angeles Region, revised the NPDES permit for the Joint Outfall System, Order R4-2015-0070,  
6 for the San Jose Creek Water Reclamation Plant, to continue to require the use of the  
7 unpromulgated TST, now directly relying upon “current USEPA guidance in *National Pollutant*  
8 *Discharge Elimination System Test of Significant Toxicity Implementation Document (EPA 833-*  
9 *R-10-003, June/2010)* [the TST guidance] *and EPA Regions 8, 9, and 10 Toxicity Training Tool*  
10 *(January 2010).*” This and other Los Angeles Region permits also required that “[t]he discharge  
11 is subject to determination of ‘Pass’ or ‘Fail’ from a chronic toxicity test using the Test of  
12 Significant Toxicity (TST) statistical t-test approach described in *National Pollutant Discharge*  
13 *Elimination System Test of Significant Toxicity Implementation Document (EPA 833-R-10-003,*  
14 *2010)* [the TST guidance].”

15 52. On or about May 21, 2015, USEPA emailed various individuals at the State Water  
16 Board to inform them that the ATP had been withdrawn three months earlier. In response,  
17 Charles Reed of the State Water Board emailed Elizabeth Sablad and Robyn Stuber of USEPA,  
18 and inquired as to the effect of the ATP withdrawal on California Ocean Plan-based NPDES  
19 permits. Ms. Sablad replied that “[d]espite the withdrawal of the ATP approval, the state is still  
20 able to use this new test evaluation method,” referring to TST, “which is superior to methods  
21 previously used.” Despite this determination that the TST is “superior,” the TST guidance is  
22 *ultra vires* and USEPA failed to incorporate the TST into Part 136 as required by the CWA.  
23 Upon information and belief, USEPA will continue its unlawful actions and failures to act in the  
24 absence of an injunction.

25 53. Generally, challenges to agency regulations have a six-year statute of limitations.  
26 (28 U.S.C. §2401(a).) Plaintiffs’ action is a substantive challenge to USEPA’s TST guidance,  
27 which was *ultra vires* and in excess of USEPA’s statutory authority. USEPA withdrew the ATP  
28 in February 2015, at which point TST requirements in permits began to be justified on the TST

1 guidance documents directly, instead of on an approved, valid ATP. If a person wishes to  
2 challenge a mere procedural violation in the adoption of a regulation or other agency action, the  
3 challenge must be brought within six years of the decision. *Wind River Min. Corp. v. U.S.*,  
4 946 F.2d 710, 715 (9th Cir. 1991). Because the TST guidance was not adopted as a formal  
5 published regulation, there are no procedural violations to challenge within six years of  
6 publication in the Federal Register. “If, however, a challenger contests the substance of an  
7 agency decision as exceeding constitutional or statutory authority, the challenger may do so later  
8 than six years following the decision by filing a complaint for review of the adverse application  
9 of the decision to the particular challenger.” *Id.* The statute of limitations did not begin to run on  
10 the Plaintiffs’ claims until the TST guidance began to be utilized as if it were a rule authorized by  
11 the CWA. The Ninth Circuit has held that the “government should not be permitted to avoid all  
12 challenges to its actions, even if *ultra vires*, simply because the agency took the action long  
13 before anyone discovered the true state of affairs.” *Id.* Furthermore, Plaintiffs could not petition  
14 to rescind the TST as a “rule” because USEPA would claim there was never any rule  
15 promulgated.

16 54. The earliest this substantive action could have become ripe, concrete, and accrued  
17 was in 2012, when for the first time (that Plaintiffs are aware of) USEPA used the TST guidance  
18 in a regulatory context. A guidance document never utilized for any regulatory purpose is not  
19 subject to review and has no statute of limitations period. With respect to the TST guidance,  
20 Plaintiffs claims were not ripe until USEPA began requiring the TST that made that guidance  
21 document contrary to the mandates of the CWA, of which Plaintiffs were not aware and had no  
22 notice of until 2012.

23 55. In either case, this challenge is timely. Even this Court in the previous *SCAP I*  
24 case held that USEPA “cannot avoid review by shifting the bases of its actions until the statute of  
25 limitation on challenging the issuance of its regulatory documents runs” and the USEPA’s  
26 “actions can remain open to challenge on an ‘as applied’ basis when regulations are used in new  
27 ways.” (*See Southern California Alliance of Publically Owned Treatment Works v. EPA.*,  
28 No. 2:14-cv-01413-MCE-DB, 2016 WL 6135872, at \*6 (E.D. Cal. Oct. 21, 2016); *accord Utu*

1 *Utu Gwaitu*, 766 F.Supp. 842, 846 (E.D. Cal. 1991) (stating that if court accepted agency’s  
2 position that action accrued on substantive challenge at point regulation was published in federal  
3 register that “agency could effectively shield its interpretation of [that] regulation from all judicial  
4 scrutiny either by not enforcing it until after the statute of limitations has run or by reinterpreting  
5 it after the statute has run”).) Otherwise, an agency could sit on guidance until the statute ran to  
6 shield itself from review. (*See accord* Memorandum and Order at 11, *Southern California*  
7 *Alliance of Publically Owned Treatment Works v. EPA.*, No. 2:14-cv-01413-MCE-DB (E.D. Cal.  
8 Oct. 21, 2016).) The first post-2010 use of the TST in another UESPA document was in the 2012  
9 NPDES WET Spreadsheet. The first NPDES permit using the TST that Plaintiffs are aware of  
10 was in the ocean discharge permit for the Orange County Sanitation District, a SCAP member,  
11 adopted jointly by USEPA and California in 2012. These 2012 actions triggered the start of the  
12 six year statute of limitations on the TST guidance document as an *ultra vires* action of USEPA.  
13 *Wind River Min. Corp. v. U.S.*, 946 F.2d at 716 (“a substantive challenge to an agency decision  
14 alleging lack of agency authority may be brought within six years of the agency’s application of  
15 that decision to the specific challenger.”) Thus, these 2012 actions extended the length of the  
16 statute of limitations by two years after the TST guidance was wrongfully issued in 2010 in  
17 contravention of the CWA’s requirements.

18 56. An alternative trigger date could also be tied to recent permits adopted after the  
19 withdrawal of the ATP. Because the USEPA withdrew the ATP in February 2015, the statute of  
20 limitations arguably did not start to run on the Plaintiffs’ claims until at least that time, when TST  
21 requirements in permits began to be justified on the TST guidance documents directly, instead of  
22 on an approved, valid ATP. (*See id.*) In either case, this challenge to USEPA’s *ultra vires* action  
23 would still be timely.

24 57. This Court ruled in *SCAP I* that: “a challenge in Plaintiffs’ FAC that alleged the  
25 EPA improperly relied on the 2010 guidance to issue permits “would have been speculative and  
26 unripe at the time” of Plaintiffs’ FAC. Mem. & Order, ECF No. 94, at 11:17-18. That is because  
27 Plaintiffs had only alleged that the EPA was impermissibly relying on the ATP to issue such  
28 permits, and not that permits were being issued based on the 2010 guidance. If Plaintiffs are now

1 alleging that the EPA is relying on the 2010 guidance in a way that it was not when the ATP was  
2 in effect, then the statute of limitations on such allegations would not have started running until  
3 that change occurred. This is because the statute of limitations only begins to run ‘after the right  
4 of action first accrues.’ 28 U.S.C. §2401(a). Under *Acri v. International Association of*  
5 *Machinists*, 781 F.2d 1393 (9th Cir. 1986), any cause of action based on the EPA using the 2010  
6 guidance in a new way in response to the revocation of the ATP would likely have not accrued  
7 until—at the very earliest—the ATP was revoked in February 2015. The EPA cannot avoid  
8 review by shifting the bases of its actions until the statute of limitation on challenging the  
9 issuance of its regulatory documents runs. The EPA’s actions can remain open to challenge on an  
10 “as applied” basis when regulations are used in new ways.” *SCAP I*, Document 102, p. 11, lines  
11 10-25.

12 58. Under the two-prong test enunciated in *Acri*, the Plaintiffs’ right to challenge did  
13 not accrue until Plaintiffs were aware of the wrong and could successfully bring a cause of action.  
14 The first time this test was met was in 2012, approximately two years after the 2010 TST  
15 guidance was issued. Thus, the six-year statute would not run until 2018. Since the complaint in  
16 this case was initially filed in December of 2016, this challenge to the *ultra vires* TST guidance is  
17 timely. The Ninth Circuit has ruled that “different considerations guide the application of the  
18 statute of limitations to challenges to an action exceeding the agency’s authority, although we  
19 remain sensitive to the government’s interest in the finality of its policy decisions.” *Wind River*  
20 *Min. Corp, supra*, 946 F.2d at 714.

21 59. Plaintiffs further allege strict application of the statute of limitations is  
22 inappropriate and may be subject to doctrines such as waiver, equitable tolling, or estoppel. *See*  
23 *Cedars Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir.1997)(holding Section  
24 2401(a) erects only a procedural bar, thus permitting parties to assert traditional exceptions to the  
25 statute of limitations).

26 60. A statute of limitations can be equitably tolled. (*See Pace v. DiGuglielmo*,  
27 544 U.S. 408, 418 (2005) (statute of limitations may be equitably tolled where litigant establishes  
28 “(1) that he has been pursuing his rights diligently, and (2) some extraordinary circumstance

1 stood in his way”). “[T]he equitable tolling doctrine ‘enables courts to meet new situations [that]  
2 demand equitable intervention, and to accord all the relief necessary to correct ... particular  
3 injustices.’ ” *Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir.2013) (quoting *Holland v. Florida*,  
4 560 U.S. 631, 650 (2010)).

5 61. Extraordinary circumstance stood in Plaintiffs’ way from challenging the TST  
6 guidance. Before 2012, Plaintiffs were not aware that the guidance document, which declared it  
7 could not be used as a regulation, had been or could be utilized by USEPA in any manner that  
8 could be deemed regulatory in nature. A challenge to the use of the TST guidance in new ways  
9 starting in 2012 was timely filed by Plaintiffs in less than six years.

10 62. A claim subject to the § 2401(a) limitations period first accrues when the plaintiff  
11 comes into possession “of the critical facts that he has been hurt and who has inflicted the injury.”  
12 *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979); *Acri v. Int’l*  
13 *Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1396 (9th Cir. 1986) (“Under federal  
14 law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring  
15 a cause of action.”). Stated another way, “[t]he moment at which a cause of action first accrues  
16 within the meaning of Section 2401(a) is when ‘the person challenging the agency action can  
17 institute and maintain a suit in court.’ ” *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170,  
18 190–91 (D.D.C.2011).

19 63. “Extraordinary circumstances” have also been found in “situations where the  
20 claimant has actively pursued his judicial remedies by filing a defective pleading during the  
21 statutory period, or where the complainant has been induced or tricked by his adversary’s  
22 misconduct into allowing the filing deadline to pass.” *O’Donnell v. Vencor Inc.*, 465 F.3d 1063,  
23 1068 (9th Cir.2006). Plaintiffs believed that the Complaint in the related action concerning the  
24 ATP in *SCAP I*, Case No. 2:14-cv-01513-MCE-DB was broad enough to cover a challenge to the  
25 TST guidance. *See supra* ¶¶ 45-47. This Court, however, disagreed in its October 2016 order and  
26 found Plaintiffs’ complaint not broad enough, or defective in that regard. *See SCAP v. USEPA*,  
27 No. 2:14-cv-01413-MCE-DB, 2016 WL 6135872, at \*6 (E.D. Cal. Oct. 21, 2016). Upon gaining  
28 approval for new litigation from each of its clients, Plaintiffs moved swiftly to prepare its initial

1 complaint in this related action, which was filed on December 19, 2016.

2 64. A challenge to USEPA's failure to act to include the TST in the 2012 Rule or the  
3 2017 Final Rule are also timely as filed within 6 years of each of these failures to act.

4 **V. PLAINTIFFS' CLAIMS FOR RELIEF**

5 **FIRST CLAIM FOR RELIEF**

6 **(Declaratory Relief Pursuant to 28 U.S.C. §2201 and Federal Rule of Civil Procedure 57 –**  
7 ***Ultra Vires* Wrongful Creation, Use, or Approval of TST**  
8 **and Failure to Act to Incorporate TST into Promulgated Rules**  
9 **Violation of the CWA and Administrative Procedures Act)**

10 65. Plaintiffs refer to and incorporate by this reference all allegations set forth in  
11 paragraphs 1 through 64 above.

12 66. Issuance of the TST guidance document with new WET test methods contravened  
13 the requirements of the CWA at 33 U.S.C. section 1314 and is, therefore, *ultra vires* and void  
14 *ab initio*. The APA authorizes the Court to hold unlawful and set aside final USEPA actions that  
15 are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."  
16 (5 U.S.C. §706(2)(A).)

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

19 68. USEPA's TST, which created a new statistical procedure, with a Pass/Fail  
20 endpoint, for analyzing WET test results or determining compliance with NPDES permit  
21 requirements, is *ultra vires*—beyond the scope or in excess of USEPA's legal power or authority  
22 —and contrary to law and federal regulations, *inter alia*, the CWA at 33 U.S.C. §1314; the APA;  
23 40 C.F.R. Part 136, 40 C.F.R. §122.21(j)(4)(viii) ("Applicants must collect samples of effluent  
24 and analyze such samples for pollutants in accordance with analytical methods approved under  
25 40 C.F.R. Part 136..."); 40 C.F.R. §122.21(j)(5)(viii) ("Whole effluent toxicity testing conducted  
26 pursuant to paragraph (j)(5)(ii) of this section must be conducted using methods approved under  
27 40 C.F.R. Part 136"); 40 C.F.R. §122.21(d)(2)(iii) (applicant must collect a sample of effluent and  
28 analyze it for the pollutant in accordance with analytical methods approved under part 136 of this

1 chapter”); 40 C.F.R. §122.41(j)(4) (“Monitoring must be conducted according to test procedures  
2 approved under 40 C.F.R. Part 136...”); and §122.44(i)(iv), and the Ocean Plan.

3 69. USEPA took an *ultra vires* action by issuing a guidance document that allows the  
4 use of the TST in the NPDES program in contravention of the CWA, 40 C.F.R. Part 136, and the  
5 Ocean Plan.

6 70. Nothing in the CWA or its implementing regulations grants USEPA the authority  
7 to use or approve of the use of the TST with or without a Pass/Fail endpoint in place of other  
8 officially promulgated statistical procedures and endpoints in the NPDES program. USEPA also  
9 failed to act by not incorporating the TST into the formal rulemakings for the 2012 Rule and 2017  
10 Final Rule before utilizing the TST as a rule.

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

14 72. An *ultra vires* act of an administrative agency is either void or voidable.  
15 *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134,  
16 56 S.Ct. 397, 399, 80 L.Ed. 528 (1936) (A regulation which ... operates to create a rule out of  
17 harmony with the statute, is a mere nullity.); *Pacific Gas & Electric Co. v. United States*,  
18 664 F.2d 1133, 1136 (9th Cir.1982).

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

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

26 75. USEPA exceeded its statutory authority under CWA section 304 and 40 C.F.R.  
27 Part 136 in violation of the CWA and the APA.  
28





1 procedures for water quality regulation, permitting, and compliance determination purposes,  
2 because the TST is *ultra vires* and contrary to CWA section 304, 33 U.S.C. §1314, and because  
3 USEPA failed to act to incorporate the TST into the 2012 Rule or 2017 Final Rule..

4 81. A substantial likelihood exists that Plaintiffs will succeed on the merits of the  
5 claims for the relief pled herein.

6 82. Plaintiffs' members are likely to suffer or have already suffered irreparable injury  
7 in the absence of injunctive relief that would not occur or have occurred but for the *ultra vires*  
8 action of USEPA. Many of Plaintiffs' members operate POTWs pursuant to NPDES permits  
9 issued by delegated States, including California's State Water Resources Control Board and  
10 Regional Water Quality Control Boards, or by USEPA that include chronic toxicity testing and  
11 compliance provisions. If not enjoined from the use of the *ultra vires* TST for testing and  
12 compliance purposes in all NPDES permits, many, if not all, of Plaintiffs' members as well as  
13 other dischargers in the affected States will be required to begin using and reporting WET testing  
14 results derived from an unpromulgated rule that adversely affects their compliance status. "One  
15 does not have to await the consummation of threatened injury to obtain preventive relief. If the  
16 injury is certainly impending, that is enough." *Pacific Gas & Electric v. State Energy Resources*  
17 *Conservation and Development Comm.*, 461 U.S. at 201, 103 S.Ct. at 1721, quoting *Pennsylvania*  
18 *v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923).

19 83. Use of the TST will result in an increased cost to Plaintiffs' members in  
20 undertaking the additional replicate measurements necessary to reduce the likelihood of being  
21 found in violation; an increased frequency of false positives in toxicity testing and further  
22 unnecessary but significant costs in TIEs, TREs and potentially facility upgrades; and, as a result,  
23 a higher incidence of alleged noncompliance with NPDES permits, potentially resulting in civil  
24 and even criminal liability. Injunctive relief is necessary given the fact that many of Plaintiffs'  
25 members have recently obtained or are in the process of obtaining new or revised NPDES permits  
26 from the State Water Board, Regional Water Quality Control Boards, or USEPA that include  
27 chronic toxicity testing and compliance provisions based on the *ultra vires* TST and associated  
28 methods and procedures not incorporated into recent USEPA rulemaking.



1 of the CWA and its promulgated methods and procedures are void and shall have no legal force  
2 or effect;

3 C. Declare that any test results based on the *ultra vires* TST and associated methods  
4 and procedures, which were previously incorporated into NPDES permits, are void and no  
5 enforcement actions can be taken for any previous violations of effluent limitations, permit  
6 provisions, or monitoring requirements based on the unpromulgated TST;

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

13 E. Award Plaintiffs' reasonable attorneys' fees and costs incurred in the prosecution  
14 of this action; and

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

16  
17 DATED: April 6, 2018

DOWNEY BRAND LLP

18  
19 By: \_\_\_\_\_  
MELISSA A. THORME

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26 BAY AREA CLEAN WATER AGENCIES  
27  
28