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14 Protection Agency and Mike Stoker, Regional Administrator

15 **IN THE UNITED STATES DISTRICT COURT**

16 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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

22 Plaintiffs,

23 v.

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

28 Defendants.

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

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

1 Defendants United States Environmental Protection Agency and Regional Administrator
2 Mike Stoker (collectively, “EPA”) respectfully submit their reply responding to the opposition
3 to EPA’s motion to dismiss the Second Amended Complaint (“SAC”) filed by Plaintiffs
4 Southern California Alliance of Publicly Owned Treatment Works (“SCAP”), Central Valley
5 Clean Water Association (“CVCWA”), and Bay Area Clean Water Agencies (“BACWA”).

6 **I. ARGUMENT**

7 In dismissing the First Amended Complaint (“FAC”), the Court rejected Plaintiffs’
8 attempt to avoid the statute of limitations by re-packaging their claim challenging the National
9 Pollutant Discharge Elimination System (“NPDES”) Test of Significant Toxicity (“TST”)
10 Implementation Document (“2010 TST Guidance”) to an “as applied” claim. *See* 3/17/2018
11 Order at 11-14 [ECF No. 36]; FAC [ECF No. 18]. The Court dismissed the First Amended
12 Complaint as untimely and also for lack of jurisdiction, holding: “In sum, Plaintiffs’ argument in
13 the FAC is really ‘that EPA acted beyond its statutory and regulatory authority in using,
14 requiring the use, and allowing the use of the TST’ in the identified permits. This Court is not
15 the appropriate forum in which to raise these claims.” 3/17/2018 Order at 15-16 (quoting Pls.
16 Opp. to MTD FAC at 16 [ECF No. 24]).

17 In the Second Amended Complaint, Plaintiffs try a different tactic by re-packaging and
18 re-labeling their claim as an “*ultra vires*” claim. *See* SAC. Changing the label does not change
19 the fundamental nature of Plaintiffs’ claim, which remains an untimely procedural challenge and
20 a challenge over which the Court lacks jurisdiction. Plaintiffs are not alleging a different type of
21 claim, but use the label “*ultra vires*” to mean “exceeding the agency’s statutory authority” or
22 “not otherwise in accordance with the law,” which Plaintiffs already unsuccessfully pled in the
23 First Amended Complaint. Plaintiffs’ opposition further confirms that the Second Amended
24 Complaint remains a procedural challenge to EPA’s alleged failure to promulgate the TST.¹ In
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26 _____
27 ¹ *See* Pls. Opp. at 1 (“use and application of unpromulgated” procedures known as the
28 TST), 1 (EPA’s purported failure to properly promulgate), 5 (“formal rulemaking process that
was not followed in the issuance of the TST Guidance”), 6 (“TST Guidance was not promulgated
through notice and comment rulemaking under the APA”), 6-7 (EPA’s use of TST “without

1 addition, Plaintiffs’ opposition primarily repeats arguments this Court has already rejected. And
2 Plaintiffs’ new arguments either create further jurisdictional defects for Plaintiffs or are
3 meritless. For example, Plaintiffs argue that EPA should be precluded in its reply from
4 responding to Plaintiffs’ arguments in opposition to EPA’s motion. *See* Pls. Opp. at 3, 11. This
5 is meritless because the purpose of a reply is to respond to the opposition.

6 Finally, Plaintiffs argue that EPA is improperly attempting to evade judicial review,
7 thereby shifting their blame from the Court to EPA for Plaintiffs’ failed litigation strategy of
8 attempting to raise a new claim in *SCAP I* in their post-judgment reconsideration reply brief
9 rather than timely filing a new action challenging the 2010 TST Guidance. *See* Pls. Opp. at 2;
10 *SCAP v. EPA* (“*SCAP I*”), No. 2:14-cv-1513 MCE-DB (E.D. Cal.), 10/19/2016 Order at 10 (“at
11 no point prior to Plaintiffs’ reply brief on their motion to reconsider did they shift toward
12 challenging the 2010 Guidance. Plaintiffs chose to litigate on the narrow issue of the ATP’s
13 validity. Changing tactics in a reply brief on a motion to reconsider can in no way be construed
14 as excusable neglect, much less blamed on the Court’s September 2015 order.”) [ECF No. 102].
15 Plaintiffs cannot blame EPA for their failure to challenge the 2010 TST Guidance within the
16 lengthy six-year statute of limitations.

17
18 The Court should dismiss the Second Amended Complaint with prejudice because this is
19 Plaintiffs’ third complaint in *SCAP II* and further amendment would be futile. *See Rainero v.*
20 *Archon Corp.*, 844 F.3d 832, 840-41 (9th Cir. 2016); *Leadsinger, Inc. v. BMG Music Pub.*, 512
21 F.3d 522, 532-33 (9th Cir. 2008) (affirming dismissal of complaint seeking declaratory relief
22 without leave to amend for failure to state a claim) (“Federal courts do not have a duty to grant
23 declaratory judgment; therefore, it is within a district court’s discretion to dismiss an action for
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subjecting the procedures and statistics in this [G]uidance to notice and comment rulemaking” as
required), 11 (“because EPA has failed its mandatory duty to promulgate the TST Guidance
through formal notice and comment rulemaking under the APA”), 13 (“ducking the APA’s
notice and comment rulemaking procedures”), 18 (EPA should be “required to comply with the
APA and formally promulgate the TST procedures”) [ECF No. 51].

1 declaratory judgment. On this basis alone, the district court was within its discretion to dismiss
2 [the] complaint without leave to amend.”) (internal citations omitted).

3 **A. Like The First Amended Complaint, The Court Should Dismiss The Second**
4 **Amended Complaint As Untimely**

5 As Plaintiffs conceded in *SCAP I*, and this Court held in dismissing the First Amended
6 Complaint, Plaintiffs’ claim accrued when the TST Guidance was announced in June 2010 and
7 the six-year statute of limitations to raise this claim expired in June 2016. 3/17/2018 Order at
8 11-14; *SCAP I*, Pls. Mot. Reopen at 7 [ECF No. 96]; see *Cedars-Sinai Med. Ctr. v. Shalala*
9 (“*Cedars-Sinai II*”), 177 F.3d 1126, 1129 (9th Cir. 1999); *Shiny Rock Mining Corp. v. United*
10 *States*, 906 F.2d 1362, 1364-66 (9th Cir. 1990) (affirming dismissal of Administrative Procedure
11 Act (“APA”) action challenging regulation as time barred because statute of limitations began to
12 run when the regulation was published in the Federal Register, holding that the plaintiff’s actual
13 knowledge of the regulation, standing, and injury were not required for the plaintiff’s cause of
14 action to accrue); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315-16 (9th Cir. 1988) (holding new
15 APA claim challenging the agency’s “conduct in adopting [a] regulatio[n]” was time-barred
16 procedural challenge because the plaintiff attempted to add its new claim in its second amended
17 complaint filed more than six years after the regulation was published); *Utu Utu Gwaitu Paiute*
18 *Tribe of Benton Paiute Reservation v. Dep’t of Interior*, 766 F. Supp. 842, 844 (E.D. Cal. 1991)
19 (the agency’s failure “to comply with the notice and comment provisions of the APA” is a
20 procedural challenge). The Court further held that Plaintiffs failed to establish equitable tolling
21 of the limitations period and that therefore, *SCAP II* was not timely because it was filed in
22 December 2016. 3/17/2018 Order at 11-14.

23
24 The Court should dismiss the Second Amended Complaint on the same grounds because
25 like the First Amended Complaint, the Second Amended Complaint also fundamentally
26 challenges “EPA’s failure to formally promulgate the 2010 TST Guidance.” 3/17/2018 Order at
27 11; see SAC ¶¶ 1 (alleging promulgation required), 3 (challenging EPA’s use, requiring the use,
28 or allowing the use of “unpromulgated” statistical procedures, including the TST), 4 (EPA’s

1 alleged failure to include TST in rulemaking), 6 (asserting injury from the “unpromulgated TST
2 guidance”), 14 (alleging EPA’s “unlawful actions to use ...and authorize the use ... of
3 unpromulgated ‘rules’” such as the TST), 29 (“rules, promulgated through a public review and
4 comment process” required and “the issuance of informal unpromulgated guidance” is not
5 authorized) (emphasis in original), 36 (TST was not promulgated in EPA’s 2012 Rule), 39-40
6 (TST was not promulgated in EPA’s 2017 Rule), 51 (San Jose Creek NPDES permit “require[d]
7 the use of the unpromulgated TST” Guidance), 70 (improperly “utilizing the TST as a rule”
8 before “incorporating the TST” in formal rulemaking), 71 (alleging use of the TST in NPDES
9 permits violated promulgation requirements), 78 (alleging EPA failed to incorporate the TST in
10 rulemaking), 80 (same), 82 (Plaintiffs required to use and report results from “an unpromulgated
11 rule”), 83 (TST not incorporated in recent rulemaking), 84 (asserting injury until formal
12 promulgation of the TST), Prayer for Relief ¶ D (enjoin EPA from using non-promulgated
13 procedures until those procedures are “properly and formerly promulgated as rules”); *see also*
14 FAC ¶¶ 3-5, 34, 36, 68, 69, 72, 74, 77. Therefore, Plaintiffs’ claim accrued in June 2010 when
15 the TST Guidance was announced. *See* 3/17/2018 Order at 10-14; EPA Mot. Dismiss SAC at
16 13-15; EPA Reply ISO Mot. Dismiss FAC at 1-6 [ECF No. 27].

18 Plaintiffs simply repeat their arguments regarding accrual and equitable tolling that the
19 Court previously rejected in dismissing the First Amended Complaint. *See* 3/17/2018 Order at
20 11-14. For example, Plaintiffs again argue that their claim did not accrue until 2012 because the
21 2010 TST Guidance was applied in a new and unforeseen way—an argument the Court has
22 already expressly rejected: “Plaintiffs’ argument that the 2010 TST Guidance is being applied in
23 some new and unforeseen way is also not supported ... If only promulgated approaches were
24 permitted then there would be no justification for issuing the 2010 TST Guidance in the first
25 place and no reason not to immediately challenge its endorsement of an unpromulgated
26 procedure.” *See* 3/17/2018 Order at 11. As they did with the First Amended Complaint,
27 Plaintiffs contend that the Second Amended Complaint’s claim accrued with the jointly issued
28 NPDES permit for the Orange County Sanitation District or accrued when NPDES permits

1 issued after the withdrawal of the Alternate Test Procedure (“ATP”). *Compare* Pls. Opp. to
2 MTD FAC at 12 [ECF No. 24], *with* Pls. Opp. to MTD SAC at 7, 15-16. In addition, the Court
3 should reject the Second Amended Complaint’s new accrual allegation regarding a May 2012
4 NPDES whole effluent toxicity (“WET”) Spreadsheet because it does not change the analysis
5 and does not change the holding that the 2010 TST Guidance was not applied in a new or
6 unforeseen way. *See* 3/17/2018 Order at 11-12; SAC ¶ 37; Pls. Opp. at 15.

7
8 Plaintiffs also argue that EPA cannot move to dismiss the Second Amended Complaint
9 based on the statute of limitations under Rule 12(b)(1) for lack of jurisdiction. Pls. Opp. at
10 16:19-17:15. This argument lacks merit and misunderstands Federal Rule of Civil Procedure
11 12(b). EPA properly moved to dismiss the Second Amended Complaint under Rule 12(b)(6) as
12 untimely and moved to dismiss on other grounds under Rule 12(b)(1) for lack of jurisdiction.
13 *See* EPA Mot. at 8-9 (providing Rule 12(b)(1) and Rule 12(b)(6) standards), 13-15. Equitable
14 tolling of the statute of limitations is not available when the statute of limitations is jurisdictional,
15 as previously addressed in EPA’s motion to dismiss the First Amended Complaint. *See* EPA
16 Reply ISO MTD FAC at 1-2 n.1 [ECF No. 27]. EPA addressed equitable tolling in its motion to
17 dismiss the Second Amended Complaint because the Ninth Circuit has held that the APA’s
18 statute of limitations is not jurisdictional and because the Second Amended Complaint alleged
19 equitable tolling. *See* EPA Mot. at 15 (statute of limitations not equitably tolled); SAC ¶¶ 59-61,
20 63 (alleging equitable tolling). If the statute of limitations for Plaintiffs’ claims was
21 jurisdictional, EPA would not have addressed equitable tolling in its motion to dismiss the
22 Second Amended Complaint. The Court may dismiss the Second Amended Complaint as
23 untimely under Rule 12(b)(6) and not entitled to equitable tolling. *See Coronado v. United*
24 *States*, 642 F. App’x 722, 725 (9th Cir. 2016) (affirming dismissal of APA action as time-barred
25 and holding that plaintiff was not entitled to equitable tolling); *Hall v. Reg’l Transp. Comm’n of*
26 *S. Nev.*, 362 F. App’x 694, 695 (9th Cir. 2010) (affirming dismissal of APA action as untimely);
27 *see also Boston v. Kitsap Cty.*, 852 F.3d 1182, 1184 (9th Cir. 2017) (reversing denial of Rule
28 12(b)(6) motion to dismiss Section 1983 action as time barred and remanding with instructions to

1 dismiss).

2 **B. The Second Amended Complaint’s “*Ultra Vires*” Label Does Not Cure Its Defects**

3 Plaintiffs argue that EPA may not respond to Plaintiffs’ opposition regarding the Second
 4 Amended Complaint’s allegations that EPA’s actions are “*ultra vires* and exceeding EPA’s
 5 statutory authority” because EPA did not raise such arguments in EPA’s opening motion. Pls.
 6 Opp. at 3 (citing SAC ¶¶ 53-55), 10-11. This argument lacks merit. First, EPA directly
 7 addressed the Second Amended Complaint’s “*ultra vires*” allegations in its opening motion.
 8 EPA Mot. at 1, 19-20. Second, the purpose of a reply brief is to respond to arguments raised in
 9 the opposition to the motion even if the opening motion did not address the issue. *See Miller v.*
 10 *Glenn Miller Prods., Inc.*, 454 F.3d 975, 979 n.1 (9th Cir. 2006) (district court did not err in
 11 considering evidence submitted with the defendant’s reply that responded to the plaintiff’s
 12 opposition); *James v. United States*, 65 F.3d 175, 1995 WL 497888, *8 (9th Cir. 1995) (reply
 13 arguments responding to opposition arguments are permissible); *Grange Ins. Ass’n v. Sran*, 184
 14 F. Supp. 3d 799, 819 (E.D. Cal. 2016); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 955 (C.D.
 15 Cal. 2015) (same), *aff’d*, 844 F.3d 1121 (9th Cir. 2017); *All Star Seed v. Nationwide*
 16 *Agribusiness Ins. Co.*, No. 12cv146 L(BLM), 2014 WL 1286561, at *15 (S.D. Cal. Mar. 31,
 17 2014); *PSM Holding Corp. v. Nat’l Farm Fin. Corp.*, No. CV 05-08891 MMM(FMOx), 2013
 18 WL 12080306, at *4 (C.D. Cal. Oct. 8, 2013) (“The court may properly consider evidence and
 19 argument submitted with a reply that is responsive to points raised in the non-moving party’s
 20 opposition”).

21
 22 The First Amended Complaint already alleged that EPA exceeded its statutory and
 23 regulatory authority. *See* FAC ¶¶ 3, 5, 7, 42, 59 (“Plaintiffs’ action is a substantive challenge to
 24 USEPA’s use of the TST as a rule in excess of USEPA’s statutory authority...”), 62, 65, 73; Pls.
 25 Opp. to MTD FAC at 2 (violating the Ocean Plan), 8 (“EPA has exceeded its statutory and
 26 regulatory authority”), 16 (“In this case, Plaintiffs allege that EPA acted beyond its statutory and
 27 regulatory authority”). The Court has already rejected Plaintiffs’ argument and allegations that
 28 EPA acted beyond its statutory and regulatory authority. 3/17/2018 Order at 15-16, 15 n.9 (“this

1 argument is fundamentally, as discussed above, a facial challenge to the 2010 TST Guidance
2 itself”). The Second Amended Complaint does not allege a different claim, but simply re-
3 packages and re-labels as “*ultra vires*” the claims that this Court dismissed in the First Amended
4 Complaint. See SAC ¶¶ 1, 3, 6, 46, 53 (repeating FAC ¶ 59 allegation but adding “*ultra vires*”
5 label), 75; Pls. Opp. to MTD SAC at 2 (violating the Ocean Plan), 7, 8, 10, 11.

6 But re-packaging and re-labeling Plaintiffs’ claims as “*ultra vires*” in the Second
7 Amended Complaint does not change the Court’s conclusion that “despite [Plaintiffs’] assertions
8 to the contrary they fundamentally take procedural issue with the EPA’s failure to formally
9 promulgate the 2010 TST Guidance pursuant to notice-and-comment requirements.” 3/17/2018
10 Order at 11. Plaintiffs’ opposition reveals why Plaintiffs re-packaged and re-labeled their claim
11 as “*ultra vires*” in the Second Amended Complaint— because an “*ultra vires*” challenge in *Wind*
12 *River Mining Corp. v. United States* that was made more than six years later was deemed timely,
13 Plaintiffs apparently believe that re-packaging and re-labeling their claim as “*ultra vires*” will
14 also transform their claim into a timely one. See Pls. Opp. at 10-11 (relying on *Wind River*, 946
15 F.2d 710 (9th Cir. 1991)).

16 Plaintiffs are wrong. See *Cedars-Sinai II*, 177 F.3d at 1129. In *Wind River*, the
17 plaintiff’s challenge was deemed timely because the Ninth Circuit held that the challenge was a
18 substantive challenge to an agency decision and was brought within six years of the agency’s
19 application of its decision to the specific challenger. 946 F.2d at 716. The *Wind River* plaintiff
20 claimed that the agency should not have classified certain land as a wilderness area and this
21 challenge was deemed a substantive challenge. 946 F.2d 710. Unlike the *SCAP II* Plaintiffs, the
22 *Wind River* plaintiff did not raise a procedural challenge to the land classification.

23 The Ninth Circuit issued *Cedars-Sinai II* years after *Wind River*, even citing *Wind River*
24 for its primary holding that “[u]nder well-settled circuit authority,” a claim challenging
25 procedural errors accrues on the issuance of the challenged agency decision. *Cedars-Sinai II*,
26 177 F.3d at 1129 (the plaintiffs’ claim challenging the agency’s failure to promulgate its policy
27 pursuant to the APA’s rulemaking requirements accrued when the agency announced its policy
28

1 in its Medicare manual amendment that was not subject to rulemaking).

2 As described in more detail in EPA’s prior briefing, and as this Court has already held,
 3 despite Plaintiffs’ arguments to the contrary, Plaintiffs’ challenge is a procedural one—that EPA
 4 failed to promulgate the TST Guidance through notice and comment rulemaking—that could
 5 have been raised at the time of the issuance of the 2010 TST Guidance. *See* 3/17/2018 Order at
 6 11 (“It is clear from the FAC and Plaintiffs’ opposition that despite their assertions to the
 7 contrary they fundamentally take procedural issue with the EPA’s failure to formally promulgate
 8 the 2010 TST Guidance pursuant to notice-and-comment requirements.”) & 12 (“Plaintiffs were
 9 on notice at the time the 2010 TST guidance was issued that they could have raised the instant
 10 claims at that time, and there is no reason alleged as to why they needed to wait until the
 11 Guidance was actually applied”); EPA Reply ISO Mot. Dismiss FAC at 2-6 [ECF No. 27]; EPA
 12 Mot. Dismiss SAC at 13-15; SAC ¶¶ 1, 3, 4, 6, 14, 29, 36, 39, 40, 51, 70, 71, 80, 82-84.
 13 Therefore, *Cedars-Sinai II* is controlling, not *Wind River*.²

14
 15 **C. The Court Lacks Subject Matter Jurisdiction Because There Is No Final Agency
 16 Action**

17 The Court lacks subject matter jurisdiction to review the 2010 TST Guidance because it
 18 is not a final agency action and because Plaintiffs fail to identify a final agency action in which
 19 the 2010 TST Guidance is being applied that is reviewable in this Court. Like the First Amended
 20 Complaint, the Second Amended Complaint identifies the same 2012 NPDES permit (Orange
 21 County) and the same 2015 NPDES permit (San Jose Creek) as examples of the application of
 22 the 2010 TST Guidance in excess of EPA’s statutory and regulatory authority. *See* SAC ¶¶ 38,

23
 24 ² In addition, the other cases Plaintiffs cite in their opposition applying *Wind River*
 25 similarly are distinguishable because those cases also raised substantive, not procedural,
 26 challenges. *See* Pls. Opp. at 10-11; *California Sea Urchin Comm’n v. Bean*, 828 F.3d 1046,
 27 1049 (9th Cir. 2016) (substantive challenge to the 2012 termination of translocation program for
 28 southern sea otter); *Nw. Envtl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1019 (9th Cir. 2008)
 (substantive challenge to EPA’s exemption of vessel discharges); *WildEarth Guardians v. U.S.
 Dep’t of Justice*, 181 F. Supp. 3d 651, 672-73 (D. Ariz. 2015) (substantive challenge to a DOJ
 litigation policy regarding prosecution of taking endangered species). Further, though the district
 court in *WildEarth Guardians* addressed *Wind River*, the court expressly did not consider *Wind
 River* in ruling on the statute of limitations issue. *WildEarth Guardians*, 181 F. Supp. 3d at 673.

1 51, 55, 56; FAC ¶¶ 4, 36, 51, 58(a), 60.

2 Plaintiffs argue that the Second Amended Complaint is not challenging NPDES permits,
3 but this Court has already rejected this argument in dismissing the First Amended Complaint for
4 lack of subject matter jurisdiction: “In sum, Plaintiffs’ argument in the FAC is really ‘that EPA
5 acted beyond its statutory and regulatory authority in using, requiring the use, and allowing the
6 use of the TST’ in the identified permits. This Court is not the appropriate forum in which to
7 raise these claims.” 3/17/2018 Order at 15-16 (quoting Pls. Opp. to MTD FAC at 16 [ECF No.
8 24]).³

9 Finally, Plaintiffs failed to respond to EPA’s argument that the Court lacks jurisdiction
10 over other final agency actions not specified in the Second Amended Complaint (*see, e.g.,* SAC
11 ¶¶ 4, 6) because Plaintiffs must identify a specific or discrete final agency action for an APA
12 claim. *Compare* Pls. Opp., *with* EPA Mot. at 19.

13 **D. Plaintiffs’ Remaining Arguments Establish That The Court Lacks Jurisdiction**

14 In their attempt to avoid dismissal of the Second Amended Complaint as untimely,
15 Plaintiffs have created additional jurisdictional defects by arguing that the TST is a WET test
16 method and by arguing that EPA failed to perform a mandatory duty. *See* Pls. Opp. at 1, 6, 11,
17 12.

18 First, WET test methods are used to determine effluent limitations and are, therefore,
19 “other limitations” under Clean Water Act section 509(b)(1)(E). *See* 33 U.S.C. § 1369(b)(1)(E);
20 *Edison Electric Institute v. EPA*, 391 F.3d 1267 (D.C. Cir. 2004) (considering a challenge to
21 EPA’s promulgation of the WET testing methods); Industry & Municipal Petitioners’ Br., *Edison*
22 *Electric Institute v. EPA*, 2004 WL 3190502, at *1-2 (2004) (jurisdiction over challenge to WET
23 test methods pursuant to CWA § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), and filing petition in
24 court of appeal within 120 days). Assuming *arguendo* that Plaintiffs are correct that the TST is a
25

26
27
28 ³ Plaintiffs concede that the Court lacks jurisdiction to review challenges to any state-
issued NPDES permits, and that challenges to EPA-issued permits must first be made to the
Environmental Appeals Board (“EAB”). Pls. Opp. at 2, 19 n.6; *see* EPA Mot. at 16-19.

1 WET test method rather than a statistical approach, then the Court lacks jurisdiction because any
2 such challenge must be filed in the courts of appeal within 120 days of EPA's publication of the
3 2010 TST Guidance.⁴ See 33 U.S.C. § 1369(b)(1)(E). If the TST is a WET test method, the
4 Second Amended Complaint was filed in the wrong court years too late.

5 Second, Plaintiffs' argument that EPA failed to perform a mandatory duty under the
6 Clean Water Act by not promulgating the TST is a claim that cannot be brought under the APA
7 because APA review is limited to "final agency action for which there is no other adequate
8 remedy in a court." 5 U.S.C. § 704; see *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)
9 ("Congress did not intend the general grant of review in the APA to duplicate existing
10 procedures for review of agency action."); Pls. Opp. at 1, 11 (citing Clean Water Act 33 U.S.C.
11 §§ 1314(a)(2)(C) and 1314(a)(3)). The Clean Water Act provides an adequate remedy under its
12 citizens' suit provision for the alleged failure to perform a mandatory act or duty required by the
13 Clean Water Act. 33 U.S.C. § 1365. Plaintiffs did not respond in their opposition to this
14 argument. Compare Pls. Opp., with EPA Mot. at 15-16.

16 II. CONCLUSION

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

19 Respectfully submitted,

20 Dated: October 16, 2018

21 McGREGOR W. SCOTT
22 United States Attorney
23 /s/ Chi Soo Kim

CHI SOO KIM
Assistant United States Attorney

24 Dated: October 16, 2018

/s/ Leslie M. Hill

LESLIE M. HILL

Environmental Defense Section

27 _____
28 ⁴ Jurisdictional arguments cannot be waived, and regardless, Defendant is properly responding to Plaintiffs' opposition arguments.