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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| SOUTHERN CALIFORNIA ALLIANCE OF PUBLICLY OWNED TREATMENT WORKS, and CENTRAL VALLEY CLEAN WATER ASSOCIATION,<br><br>Plaintiffs,<br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; JARED BLUMENFELD, REGIONAL ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX; and DOES 1 to 10,<br><br>Defendants. | CASE NO. 2:14-cv-01513 MCE-DAD<br><br>**EPA'S OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: MOTION FOR PRELIMINARY INJUNCTION** |

Defendants United States Environmental Protection Agency and Regional Administrator Jared Blumenfeld (collectively, "EPA") respectfully submit their opposition to Plaintiffs' ex parte application for a temporary restraining order ("TRO") and order to show cause.

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## I. INTRODUCTION

The only "emergency" here is one that was unnecessarily created by Plaintiffs' delay. Plaintiffs waited almost two months after learning of the Environmental Protection Agency's Regional approval of an alternate water toxicity test before moving at the last minute for the "extraordinary remedy" of a temporary restraining order ("TRO"). Plaintiffs offer no explanation for their almost two month-delay to seek "emergency" relief less than two business days before they allege irreparable injury will result. Under Ninth Circuit law and this Court's local rules, Plaintiffs' delay establishes the lack of urgency and irreparable harm.

The Court lacks subject matter jurisdiction because this lawsuit is really a challenge to a permit requirement issued by the State of California to use a type of water toxicity test (the two-concentration Test of Significant Toxicity). That challenge belongs in state court. Plaintiffs are exercising that remedy by challenging the state permits at issue before the appropriate state body, including seeking a stay before the permit becomes effective on July 1, 2014. Those state proceedings should be allowed to continue without interference from this Court. If the EPA's letter is subject to judicial review at all, which EPA disputes, it may rest exclusively in the Ninth Circuit Court of Appeals.

If the Court finds that jurisdiction is not lacking, the Court should still deny the TRO because Plaintiffs cannot establish, by clear and convincing evidence, any of the four *Winter* factors required for the "extraordinary remedy" Plaintiffs seek, let alone all four factors. First, Plaintiffs cannot establish the likelihood of irreparable harm because the harm they claim is speculative and remote. Plaintiffs speculate that at some time in the future, they may be found to be non-compliant using the two-concentration TST test, and if that happens, they may be subject to liability or additional costs from running more tests. This is far from the kind of irreparable harm that is required to justify granting this "extraordinary remedy" at the last minute.

Second, Plaintiffs are not likely to succeed on the merits of their claims. The EPA's Regional approval of the use of the two-concentration TST test in California did not, and cannot, create a "mandate" forcing the California permitting authorities to implement this test. Nor did the EPA's Regional approval violate any law or regulation.

Third and fourth, the balance of equities and the public interest strongly weigh against granting

the extremely broad injunction Plaintiffs seek. The public has a strong interest in reducing the pollution in our waters and allowing the State to do its job of enforcing and implementing the Clean Water Act. Any potential injury to Plaintiffs is speculative and remote. The Court should deny the TRO.

## II. BACKGROUND

### A. Clean Water Act and NPDES Permits

The Clean Water Act is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see* 33 U.S.C. §§ 1251-1387; *Boise Cascade Corp. v. United States E.P.A.*, 942 F.2d 1427, 1429 (9th Cir. 1991). One goal of the Act is "that the discharge of toxic pollutants [into the Nation's waters] in toxic amounts be prohibited." 33 U.S.C. § 1251(a)(3). The Act prohibits the discharge of a pollutant from a point source into waters of the United States, except as in compliance with specific provisions in the statute, including provisions regarding permits issued under the National Pollutant Discharge Elimination System ("NPDES") program. 33 U.S.C. §§ 1311(a), 1342.

The Clean Water Act gives States "the primary responsibilit[y] and right[]... to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b); *see Boise Cascade Corp.*, 942 F.2d at 1429; *Chevron, U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984). To that end, Congress encourages States to "assume the major role in the operation of the NPDES program." *Boise Cascade Corp.*, 942 F.2d at 1429 (quoting *Shell Oil Co. v. Train*, 585 F. 2d 408, 410 (9th Cir. 1978)). California has been granted authority to administer the NPDES program itself. 39 Fed. Reg. 26,061 (1973); *Boise Cascade Corp.*, 942 F.2d at 1430. "The California State Water Resources Control Board (State Board) and its various Regional Water Quality Control Boards are responsible for the enforcement of the Act in California and for issuing NPDES permits." *Boise Cascade Corp.*, 942 F.2d at 1430. This means that California issues NPDES permits for discharges to waters within the state's jurisdiction, including the NPDES permits challenged by Plaintiffs in this lawsuit. "Jurisdiction to review decisions of the California State Board is conferred on California state courts." *Id.*; *see* Cal. Water Code § 13330.

NPDES permits place limits on the rate, amount, and/or concentration of pollutants that may be discharged. Permittees are also required to monitor their discharges and to file test results and other data with the relevant permitting authority. Effective self-reporting is essential to the Clean Water Act. *See*

*Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated & remanded on other grounds*, 485 U.S. 931 (1988). Accordingly, NPDES permittees must establish and maintain records, install and use monitoring equipment, sample effluent according to a prescribed schedule, and report the results to the permitting agency. *See* 33 U.S.C. §§ 1318(a), 1342(a)(2); 40 C.F.R. §§ 122.41(j)(3), 122.48, 123.25. The effluent reports, which are submitted in a standardized format, are known as Discharge Monitoring Reports ("DMRs"). *See* 40 C.F.R. §§ 122.2, 123.25.

**B. Testing Procedures to Analyze Pollutants**

"Pollutants" include individual chemicals as well as the combination of all the chemicals in a facility's wastestream (known as the "effluent"). 33 U.S.C. § 1362(6). The Act directs EPA to "promulgate guidelines establishing test procedures for the analysis of pollutants," which are to be used for permit applications. 33 U.S.C. § 1314(h); *see* 40 C.F.R. part 136 (testing procedures promulgated by EPA are published here). When the toxic effect of the combination of all the chemicals in the effluent is measured by a toxicity test, it is called "whole effluent toxicity," or "WET." 40 C.F.R. § 122.2.

Any person may apply to EPA for approval of an alternate test procedure to analyze pollutants, including an alternate to a WET test procedure to measure the toxicity of the effluent. 40 C.F.R. §§ 136.4, 136.5. The applicant may seek approval to use the alternate test procedure for a single discharger (and its laboratory) or for a broader group of dischargers (and their laboratories) under § 136.5 (called "limited use"), or on a nationwide basis under § 136.4. For nationwide use, the applicant submits its request to the EPA's National Alternate Test Procedure Program Coordinator in Washington, D.C. *See* 40 C.F.R. § 136.4. To be approved on a nationwide basis, an alternate test must go through rulemaking (i.e., public comment, publication in a final rule in the Federal Register, etc.) and the regulations must be amended to add this alternate test. 40 C.F.R. § 136.4(c).

For limited use requests, the process is different and does not involve rulemaking. Instead, the applicant submits its request to the EPA's Regional Alternate Test Procedure Coordinator. 40 C.F.R. § 136.5. The Regional Alternate Test Procedure Coordinator has the discretion to restrict the use of the alternate test procedure to a specific facility, or "to all discharger[s] or facilities (and their associated laboratories) specified in the approval for the Region." *Id.*

**C. California's Request for A Limited Use (State-Wide) Alternate Test Procedure**

Here, on February 12, 2014, the California State Water Resources Control Board requested Regional EPA approval of a state-wide alternate test procedure to the five-concentration WET test procedure. McNaughton Decl., ¶ 3; Compl., Exh. A (Dkt 1). The State Water Board's requested alternate test was the two-concentration test design using the Test of Significant Toxicity ("TST"). *Id.* The State Water Board's request was a limited use request governed by 40 C.F.R. § 136.5 because its request was limited to "statewide" use, not nationwide use. McNaughton Decl., ¶ 3; Compl., Exh. A. This is further supported by the State Water Board's submission of its request to the EPA's Regional Alternate Test Procedure Coordinator, Eugenia McNaughton, and not to the EPA's National Alternate Test Procedure Program Coordinator located in Washington, D.C. McNaughton Decl., ¶ 4; Compl., Exh. A; *see* 40 C.F.R. § 136.5.

On March 17, 2014, the EPA's Regional Alternate Test Procedure Coordinator approved the State Water Board's request for approval of the two-concentration TST test for "state-wide" use. McNaughton Decl., ¶ 5; Compl., Exh. B (emphasis added).

**D. Plaintiffs Delayed For Almost Two Months Before Seeking Injunctive Relief**

Plaintiffs Southern California Alliance of Publicly Owned Treatment Works ("SCAP") and Central Valley Clean Water Association ("CVCWA") did not seek injunctive relief until the very last moment, artificially creating an emergency, unnecessarily burdening the Court, and compressing the time for the EPA to respond. At the latest, Plaintiff SCAP learned of the Regional EPA's March 2014 approval by May 8, 2014. *See* TRO Mot. at 4.[1] Plaintiffs do not disclose, however, when Plaintiff CVCWA first learned of the Regional EPA's March 2014 approval.

Plaintiffs offer no justification for why they delayed seeking injunctive relief for almost two months, and why they waited to seek relief until less than two business days remained before they would

[1] It appears that Plaintiffs actually learned of the Regional EPA's approval of the alternate test procedure by May 1, 2014 when the Los Angeles Regional Water Board responded in writing to comments to its draft permit for the Camarillo Sanitation District, a member of Plaintiff SCAP. At this time, it is unknown whether Plaintiffs learned of the Regional EPA's approval before May 1 (e.g., in communications with the Los Angeles Regional Water Board during the permit process). It is also unknown when Plaintiff CVCWA first learned of the Regional EPA's approval. Plaintiffs did not submit a declaration by Plaintiff CVCWA in support of their TRO request.

need a TRO to avoid their alleged "irreparable harm." Plaintiffs filed their "emergency" request for a TRO on Thursday evening, June 26, 2014, seeking a hearing and relief on or before Monday, June 30, for injury that would allegedly occur on July 1.

Nor was Plaintiffs' notice of their TRO sufficient. On Thursday, June 26 at approximately 3:00 p.m., Plaintiffs' counsel informed defense counsel of the filing of their Complaint on June 25 and of their intent to file an ex parte request for a TRO with a hearing on or before Monday, June 30. But Plaintiffs' counsel did not provide sufficient information to enable defense counsel to evaluate the alternatives to a TRO, and did not explain what federal action was allegedly being taken on July 1, 2014 that required an emergency TRO. Nor does Plaintiffs' Complaint refer to any July 1 action or deadline.

The first reference to this July 1 deadline is in Plaintiffs' TRO, which Plaintiffs did not provide to defense counsel until 10:00 a.m. on Friday, June 27, after this Court had ordered Defendants to file their opposition by 9:00 a.m. on Monday, June 30.

## III. LEGAL STANDARDS

### A. Subject Matter Jurisdiction

The Court lacks jurisdiction because the United States has not waived its sovereign immunity over Plaintiffs' claims against the EPA and Plaintiffs have failed to meet their burden to prove jurisdiction. Federal courts are courts of limited jurisdiction and may hear a case only if authorized to do so by the Constitution and statute. *Kokkonnen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Int'l. v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citations omitted). As sovereign, the United States and/or its agencies may be sued only when Congress has consented to suit and waives sovereign immunity by statute. *Fed. Aviation Admin. v. Cooper*, 132 S. Ct. 1441, 1448 (2012); *United States v. Bormes*, 133 S. Ct. 12, 16 (2012); *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003); *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007). A waiver of the United States' sovereign immunity must be "clear and unequivocal," not implied, and must be construed strictly in favor of the United States. *United States Department of Energy v. Ohio*, 503 U.S. 607, 615 , 619-20 (1992) (construing the Clean Water Act); *see United States v. Nordic Village, Inc*., 503 U.S. 30, 33-34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310, 318

(1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983).

**B. Temporary Restraining Order and Preliminary Injunction**

The purpose of a temporary restraining order is to preserve the status quo pending a further hearing on the merits of injunctive relief. *See, e.g.*, Fed. R. Civ. P. 65(b); E.D. Cal. L.R. 231(a). Issuance of a temporary restraining order, as a form of preliminary injunctive relief, is an "extraordinary remedy," and Plaintiffs have the burden of proving the propriety of such a remedy by clear and convincing evidence. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Similarly, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24 (reversing preliminary injunction). The standard for issuing a preliminary injunction is "substantially identical" to the standard for issuing a temporary restraining order. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brushy & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001); *see Cal. Indep. System Operator Corp. v. Reliant Energy Services*, 181 F. Supp. 2d 1111, 1126 (E.D. Cal. 2001).

To obtain a TRO, Plaintiffs must establish four elements: (1) they are likely to suffer irreparable harm in the absence of preliminary relief; (2) they are likely to succeed on the merits; (3) the balance of equities tips in Plaintiffs' favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20, 22-24 (reversing the Ninth Circuit's "possibility of harm" standard as "too lenient"). The "plaintiff must satisfy the four-factor [*Winter*] test in order to obtain equitable injunctive relief, even if that relief is preliminary." *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 997 (9th Cir. 2011). In the Ninth Circuit, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added). The court must "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396 (1987)). The public interest may preclude an injunction even if the other requirements are satisfied. *Id.* at 32-33; *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982); *Lands Council v. McNair*, 537 F.3d 981, 1003-04 (9th Cir. 2008) (en banc), *overruled in*

*part on other grounds*, *Winter*, 555 U.S. 7.

As discussed below, Plaintiffs cannot establish by clear and convincing evidence, the four *Winter* elements to justify granting a TRO, even under the Ninth Circuit's serious questions approach. There is no likelihood of irreparable harm, there are no serious questions going to the merits, the hardships do not tip sharply toward Plaintiffs, and the injunction is not in the public interest.

## IV. ARGUMENT

### A. The Court Lacks Subject Matter Jurisdiction.

The Court lacks subject matter jurisdiction over Plaintiffs' claims because these claims belong in state court. The Court also lacks subject matter jurisdiction over the relief Plaintiffs seek, which is much broader than the acts challenged. In addition to enjoining the EPA's March 2014 letter, Plaintiffs ask the Court to enjoin EPA from "mandating the use of the two-concentration TST or the use of analytical results obtained by using this non-promulgated method for NPDES compliance determination or other Clean Water Act purposes." Compl., Prayer for Relief ¶ D; *see* TRO Prop. Order (Dkt 4-7). The Court lacks jurisdiction to grant such broad relief and Plaintiffs fail to carry their burden of proving jurisdiction to grant such relief.

At bottom, Plaintiffs' lawsuit is a challenge to California's requirement in three state permits issued to Plaintiff SCAP's members that the two-concentration test design of the TST be used in reporting toxicity test results. The appropriate place for Plaintiffs' challenge is in state court and this Court lacks subject matter jurisdiction over a challenge to the requirements in a state permit. *See* 40 C.F.R. § 123.30 (judicial review of permits issued by the State are reviewed in state court); Cal. Water Code §§ 13320, 13321, 13330 (providing for review and petition for stay by state board, and review in superior court); *Shell Oil Co.* 585 F.2d at 411, 414 ("The existence of a state judicial forum for the review of the regional board's action forecloses the availability of the federal forum under the terms of the" APA.).

"Jurisdiction to review decisions of the California State Board is conferred on California state courts." *Boise Cascade Corp.*, 942 F.2d at 1430. Plaintiffs have a remedy at law, and in fact are exercising that remedy. The Camarillo Sanitary District, which is a member of Plaintiff SCAP and is represented by the same counsel as Plaintiffs here, is already challenging its permit before the California

State Water Resources Control Board and has petitioned for a stay before the permit becomes effective on July 1, 2014. EPA's Request for Judicial Notice, Exhs. 1 & 2. In that appeal and stay petition, Plaintiffs' member challenges the same test at issue here that is required in its state permit. If Plaintiffs do not succeed in their appeal to the state board, they may seek judicial review in California state court. *See* Cal. Water Code § 13330. The state proceedings are the proper place for Plaintiffs' challenge and those proceedings should be permitted to continue.

Finally, if EPA's March 2014 letter is subject to judicial review at all, which EPA in no way concedes, that review may rest exclusively in the court of appeals. *See* 33 U.S.C. §§ 1369(b)(1)(D)-(F); *Defenders of Wildlife v. EPA*, 420 F.3d 946, 955 (9th Cir. 2005), *overruled on other grounds, Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

**B. There Is No Irreparable Harm Because Plaintiffs' Claim of Harm is Speculative and Remote.**

Even if the Court determines that some judicial review is proper here, which EPA disputes, the Court should deny the TRO because there is no irreparable harm and injunctive relief cannot issue without it. Plaintiffs cannot prove a likelihood of irreparable harm because the harm they claim they will suffer is speculative. Because Plaintiffs cannot show that they are "likely to suffer irreparable harm in the absence of preliminary relief," the Court should deny the requested injunctive relief. *Winter*, 555 U.S. at 22-24. Without establishing a likelihood of irreparable harm, neither a temporary restraining order nor a preliminary injunction may issue. *Id.*; *see Cottrell*, 632 F.3d at 1135 (likelihood of irreparable harm is still required under the Ninth Circuit's serious questions approach); *Cal. Indep. System Operator*, 181 F. Supp. 2d at 1126. As the Supreme Court made clear in *Winter*, the mere possibility of harm is insufficient. *Winter*, 555 U.S. at 22-24.

1. The Harm Plaintiffs Claim Is Speculative and Remote.

The harm Plaintiffs claim they will suffer without a TRO is speculative and not imminent. Plaintiffs argue that the use of the two-concentration TST test required in three permits may result in "potential" liability, if enforcement is even sought, for a "failure to consistently comply," or an "increased risk of non-compliance," at some unknown date in the future. TRO Mot. at 6 (emphasis added). This is purely speculative. "[A] preliminary injunction will not be issued simply to prevent the

possibility of some remote future injury." *Winter*, 555 U.S. at 22.

Plaintiffs present no evidence that Camarillo (or the two anonymous permit holders)[2] will be found to be erroneously out of compliance with their NPDES permits due to the use of the two-concentration TST test. If Plaintiffs' effluent discharge exceeds the toxicity allowed in their NPDES permits, then a finding of non-compliance is warranted. Plaintiffs also speculate some uncertain number of future state permits of their members may also require use of the two-concentration TST test. TRO Mot. at 6 ("These SCAP members will soon be joined by other POTWs and dischargers, including other SCAP and CVCWA member" because NPDES permits expire every five years.). Plaintiffs continue to speculate without any support that "it seems likely that USEPA would veto any NPDES permit that did not comply with its mandate." TRO Mot. at 7. EPA's March 2014 letter was not a mandate and the State's decision not to use the alternate test would not be a basis for objection, much less a "veto," by EPA. Plaintiffs do not even attempt to offer any evidence or cite to any authority for their various speculative claims of potential injury.

Plaintiffs' claim that they may suffer some undisclosed amount of economic loss from undertaking additional testing also does not establish irreparable harm.[3] TRO Mot. at 6. "[M]onetary injury is not normally considered irreparable." *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (reversing preliminary injunction and holding that the plaintiff's lost revenues did not constitute irreparable harm). As the Supreme Court explained, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended are not enough" to constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Plaintiffs' claim of economic harm is speculative because it is based on an unsupported assumption that additional testing may be needed "to try to ensure compliance." TRO Mot. at 6. As described above,

[2] Plaintiff CVCWA has not met its burden to prove standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiff CVCWA fails to show the necessary 1) injury-in-fact, which is "an invasion of a legally protected interest which is" "concrete and particularized," and "actual or imminent, not conjectural or hypothetical"; 2) "a causal connection between the injury and the conduct complained of"; and 3) that it is "likely," and not merely "speculative, that the injury will be redressed by a favorable decision." *Id*. at 560 (internal quotation marks omitted). Reference to both Plaintiffs in this Opposition does not concede standing in any way.

[3] In addition, Plaintiffs do not account for economic savings from the reduction in the number of concentrations needed for testing.

Plaintiffs' concerns about potential compliance results from the two-concentration test are speculative and the cost of potential additional testing if non-compliance is found adds even more speculation.

Plaintiffs also argue that they may suffer "reputational injury for non-compliance with permit requirements." TRO Mot. at 6. Plaintiffs could only suffer reputational harm if the use of the two-concentration test results in false findings of non-compliance. Again, this injury is also speculative and remote because it is based on potential compliance results at some unknown time.

Finally, Plaintiffs claim harm based on an unsupported assertion that "there is no way to influence the State Water Board to adopt anything different than what USEPA has mandated in its March 17, 2014 letter." *See* TRO Mot. at 7. This does not constitute irreparable harm.

2. Plaintiffs Unduly Delayed By Not Seeking Relief For Almost Two Months.

Plaintiffs' long delay in seeking injunctive relief establishes "a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *see Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief"); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (finding that a 44-day delay in filing a motion for a temporary restraining order was "inexcusable" and justified the denial of the motion). This Court's Local Rule 231(b) also provides:

> In considering a motion for a temporary restraining order, the Court will consider whether the applicant could have sought relief by motion for preliminary injunction at an earlier date without the necessity for seeking last-minute relief by motion for temporary restraining order. Should the Court find that the applicant unduly delayed in seeking injunctive relief, the Court may conclude that the delay constitutes laches or contradicts the applicant's allegations of irreparable injury and may deny the motion solely on either ground.

Plaintiffs cannot artificially create an "emergency" by filing their TRO request at the last minute. At the latest, Plaintiffs learned of the EPA approval on May 8, 2014—almost two months before Plaintiffs filed their TRO request. Plaintiffs seek imposition of an emergency TRO today, Monday, June 30, 2014. But Plaintiffs waited to file their TRO request until the evening of Thursday, June 26, less

than two business days before needing "emergency" relief.[4]

**C. Plaintiffs Are Unlikely To Succeed On the Merits.[5]**

Because Plaintiffs' inability to prove the likelihood of irreparable harm requires denial of Plaintiff's TRO request, the Court need not reach the likelihood of success on the merits. *Winter*, 555 U.S. at 22-24. Regardless, Plaintiffs are unlikely to succeed on the merits of their claims that the EPA's March 2014 letter was an improper "mandate" and that the approval of the alternate test procedure violated various regulations. The Court "must be at its 'most deferential" when reviewing the EPA's approval of this alternate test procedure. *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1054 (9th Cir. 2013) (quoting *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010)) (most deferential when reviewing scientific judgments and technical analyses within the agency's expertise).

1. Legal Standard - Administrative Procedure Act

If the Court finds that judicial review is appropriate here, which the EPA denies, that review is pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Dioxin / Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1521 (9th Cir. 1995). A plaintiff must satisfy a "high threshold" to set aside federal agency actions under the APA. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1067 (9th Cir. 2010). A "court's task is not to make its own judgment," because Congress has delegated that responsibility to the respective agencies. *Id.* at 1070. Instead, "'[t]he [agency's] action . . . need only be a reasonable, not the best or most reasonable, decision.'" *Id.* (quoting *Nat'l Wildlife Federation v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989)) (alterations in original). The agency's decision may be reversed only if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

[4] Plaintiffs suggest that filing their appeal and petition for stay before the California Water Board was more urgent due to the Board's 30-day deadline. *See* Declaration of Bruce Feng, ¶ 5 (Dkt 4-4). Plaintiffs may seek judicial review in state court of their petitions to the California Water Board. Cal. Water Code § 13330. Plaintiffs have an adequate remedy and the "extraordinary remedy" Plaintiffs seek in federal court is not warranted.

[5] EPA does not concede in any way that judicial review of the merits is appropriate in this case and reserves its arguments that the Court lacks subject matter jurisdiction.

problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994). "The court may not set aside agency action as arbitrary or capricious unless there is no rational basis for the action." *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986).

The Ninth Circuit requires that "when reviewing scientific judgments and technical analyses within the agency's expertise, the reviewing court must be at its 'most deferential.'" *Conservation Congress*, 720 F.3d at 1054 (quoting *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010)); *see also Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004).

2. The EPA's March 2014 Letter Is Not A Mandate.

Plaintiffs' case is based on the erroneous assumption that the EPA's March 2014 letter "mandates" the use of the two-concentration test over, and instead of, other tests. TRO Mot. at 2, 6-7. Plaintiffs argue that the EPA letter "impos[es] obligations on the State Water Board and Regional Water Quality Control Boards in California" to require that only this test is used, and on regulated entities such as Plaintiffs' members. TRO Mot. at 8.

The EPA's approval of a limited use alternate test does not impose any obligation on the California Water Boards that issue NPDES permits, or on permit holders. By approving the limited use of this alternate test, the EPA did not "mandate" the exclusive use of the two-concentration test, and it cannot require the California Water Boards to include this alternate test in NPDES permits issued by the State. *See* Declaration of Eugenia McNaughton, ¶¶ 5-6. The EPA simply approved the use in California of the two-concentration test as an alternate test to the five-concentration test. *See id*. Ultimately, it is up to the California Water Boards that issue NPDES permits to decide which test(s) to require permit holders to use in reporting, not the EPA. *See id*. at ¶ 6. After the EPA's March 2014 letter, the California Water Boards could still issue permits that require permit holders to use the five-concentration test, or that provide permit holders with a choice of which test to use.

Plaintiffs cannot transform the California Water Board's actions requiring the two-concentration test into federal agency action reviewable in federal district court. *See Shell Oil Co.*, 585 F.2d at 413 (rejecting permit holder's theory that the EPA Administrator caused, forced, or coerced the regional

board to compel the regional board to take certain actions on its permits). "States are not simply private citizens, they are sovereigns." *Id*. The Court should not permit Plaintiffs, who are now "dissatisfied with a decision of a state board" to "circumvent" the state's administrative and judicial review process "envisioned by the statute and bestow jurisdiction upon a federal court simply by alleging coercion or undue influence." *Id*. at 414.

Plaintiffs' argument that the EPA's March 2014 letter constitutes an improper mandate is based on taking part of one sentence out of context. *See* TRO Mot. at 2, 9. The last sentence of the EPA's March 2014 letter states:

> Please note that **approval** is in this case state-wide, that is, **it** will apply to all new or revised NPDES permits issued by the State Water Board and Regional Water Quality Control Boards and any EPA-issued California permits that include whole effluent toxicity testing provisions.

Compl., Exh. B (emphasis added). Plaintiffs fail to examine the whole sentence in context of the whole letter to determine the effect of the letter. Instead, Plaintiffs cherry-pick just the second half of the last sentence, then impermissibly expand upon it to argue that the EPA "letter now expressly mandates that the two-concentration TST 'will apply to all new or revised NPDES permits…'" TRO Mot. at 2. Examining the whole sentence makes clear that the "it" refers to "approval," and does not create an "express mandate" requiring the use of only the two-concentration test as Plaintiffs argue. Compl., Exh. B.

3. The EPA Properly Reviewed and Approved the California Water Board's Request As A Limited Use Request.

Plaintiffs argue that the EPA violated its regulations because the February 2014 California Water Board's request was for nationwide approval of an alternate test procedure under 40 C.F.R. § 136.4, not a request for limited use under § 136.5. Plaintiffs further argue that as such, the EPA failed to follow the rulemaking requirements for nationwide use under § 136.4. Plaintiffs' arguments fail on three grounds.

First, Plaintiffs rely on the California Water Board letter's one-time citation to 40 C.F.R. § 136.4[6] to conclude that the request is a nationwide request, but fail to examine the letter as a whole.

[6] In addition, before EPA regulations were recently revised in June 2012, 40 C.F.R. § 136.4 governed approval for alternate test procedures for both limited use and nationwide use. When EPA regulations were revised in June 2012, the nationwide use alternate test procedure request was located in 40 C.F.R. § 136.4 and the limited use procedure was moved to 40 C.F.R. § 136.5. 77 Fed. Reg. 29809,

TRO Mot. at 8-9. When reviewing the California Water Board's letter as a whole, it is clear that the request is limited to California, and is not nationwide. For example, the letter seeks "review and approval of the statewide Alternate Test Procedure." Compl., Exh. A at 1:line 3 (emphasis added). The letter then describes the goals of creating uniformity for "all NPDES wastewater and point source WDR dischargers in California" and "strengthen[ing] toxicity regulation throughout California." *Id*. at 1:line 25 (emphasis added), 2:lines 29-30 (emphasis added). The letter also notes the benefit of "reduc[ing] the cost of toxicity monitoring for most wastewater dischargers in California." *Id*. at 2: lines 32-33. In addition, the EPA Regional ATP Coordinator expressly approved the California Water Board's request for "state-wide" use and the California Water Board never informed the EPA Regional ATP Coordinator that it was actually seeking nationwide use. Compl., Exh. B; McNaughton Decl., ¶ 7.

Second, instead of relying on the text of the regulations themselves, Plaintiffs rely on an outdated draft 1996 EPA Guidance document to argue that limited use alternate test procedures cannot be used for a statewide request. TRO Mot. at 9; Compl. ¶ 26. Plaintiffs are incorrect. Section 136.5(d) expressly provides that the EPA Regional ATP Coordinator has the discretion to approve the use of an alternate test procedure for "a specific discharge or facility" or for "all discharger or facilities …specified in the approval for the Region." 40 C.F.R. § 136.5(d). Here, the EPA Regional ATP Coordinator exercised her discretion and approved the request for statewide use. *See* Compl., Exh. B.

Third, Plaintiffs incorrectly argue that the EPA's approval violated regulations that prohibit modification to method-defined analytes. TRO Mot. at 9; Compl. ¶ 28 (citing 40 C.F.R. § 136.6(b)(3)). The regulations, including the provision cited by Plaintiffs, make no such prohibition. The regulations only prohibit an "analyst," not the EPA, from modifying an analytical method for a method-defined analyte. 40 C.F.R. § 136.6(b)(3). An "analyst" is defined as "the person or laboratory using a test procedure (analytical method)." 40 C.F.R. § 136.6(a)(1). Therefore, the EPA did not abuse its discretion and its approval was not arbitrary, capricious, or otherwise not in accordance with law.

29762 (May 18, 2012). The California Water Board's citation to the old EPA regulation (40 C.F.R. § 136.4), rather than the revised regulation for limited use requests (40 C.F.R. § 136.5), did not convert the Board's request to a nationwide use request.

**D. The Balance Of Equities Does Not "Tip Sharply" In Plaintiffs' Favor And The Public Interest Weighs Against An Injunction, Even A Temporary One.**

The court must "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396 (1987)). The public interest may preclude an injunction even if the other requirements are satisfied. *Id.* at 32-33; *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982); *Lands Council v. McNair*, 537 F.3d 981, 1003-04 (9th Cir. 2008) (en banc), *overruled in part on other grounds by Winter*, 555 U.S. 7.

The balance of equities and the public interest weigh strongly against the issuance of an injunction, even a temporary one. As described above, the harm to Plaintiffs is speculative and remote. Plaintiffs' claim of harm is that with the two-concentration test, there is "potential" liability if one of its three members is found to be out of compliance with their NPDES permit, at some unknown point in the future, and only if the finding of non-compliance is actually false. Their claim of economic loss from increased test costs is also speculative. Further, even if injunctive relief is granted, Plaintiffs still may face "potential" liability if one of its members is found to be out of compliance with their NPDES permit under a different test, including the five-concentration test.

On the other hand, the public interest weighs in favor of denying the TRO because the EPA's approval of the two-concentration TST test for limited use in California as an alternate testing procedure is beneficial to the environment and promotes the overarching purpose of the Clean Water Act to reduce pollution in our waters. The public interest also weighs in favor of ensuring that the State can do its job under the Clean Water Act as the entity with the primary responsibility for implementing and enforcing the Act. California's goals in seeking approval of the two-concentration TST test were to create uniformity and strengthen toxicity regulation throughout California. Compl., Exh. A. These goals should not be impeded because Plaintiffs speculate that they may face liability, if enforcement is even sought, at some unknown future date for non-compliance. In addition, the public interest weighs in favor of allowing the State to maintain its authority to operate its NPDES permit program. Allowing Plaintiffs to challenge the State's NPDES permits in federal court when Plaintiffs not only have adequate review in state court, but are also currently pursuing their state administrative remedies,

undermines the federal-state regulatory framework.[7]

Therefore, Plaintiffs cannot establish by clear and convincing evidence the four *Winter* elements to justify granting this "extraordinary remedy." The Court should deny Plaintiffs' request for a TRO.

**E. The Court Has The Discretion To Determine The Appropriate Bond Amount.**

If the Court believes it must issue a TRO, the Court has the discretion to determine the appropriate bond amount. *See* Fed. R. Civ. P. 65(c); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (affirming imposition of bond on environmental plaintiffs). While courts have imposed a nominal bond or waived the bond requirement, Plaintiffs here have not "show[n] that the imposition of anything other than a nominal bond would constitute an undue hardship." *Save Our Sonoran*, 408 F.3d at 1126.

## V. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a temporary restraining order and a preliminary injunction.

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[7] The EPA's March 2014 letter is limited to California. In the unlikely event that Plaintiffs overcome the jurisdictional limits and irreparable harm requirement, and a TRO is granted, it should be limited to the California permits using toxicity methods listed in the methods table of 40 C.F.R. part 136 and not more broadly limit EPA's discretion on a nationwide basis.