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Attorneys for National Association of Clean Water Agencies

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. 2:14-cv-01513

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Date: December 3, 2015
Time: 2:30 p.m.
Judge: Hon. Morrison C. England
Dept: Courtroom 7, 14th Floor

The National Association of Clean Water Agencies ("NACWA") respectfully moves, pursuant to the Court's inherent authority, to file a brief as *amicus curiae* addressing the implications of the unlawful approval of a whole effluent toxicity test ("WET") evaluation procedure called the Test of Significant Toxicity ("TST"), use of a truncated version of WET testing, and the California State Water Resources Control Board's ("State Board") subsequent internal memorandum from May 2015 stating the State Board's intent to use the TST to determine dischargers' compliance with the Clean Water Act. NACWA meets the standard to qualify for *amicus* status by providing useful information to the Court describing how the two-concentration TST procedure is scientifically unsound, improper in light of the procedural requirements for establishing test methods under the Administrative Procedure Act, and endangers NACWA members' compliance with NPDES permits nationwide. A copy of NACWA's proposed brief is attached to this Motion as Exhibit A.

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I. DISTRICT COURTS HAVE AUTHORITY TO ACCEPT *AMICUS* BRIEFS

Federal district courts possess the inherent authority to accept *amicus* briefs. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982); *In re Roxford Foods Litigation*, 790 F.Supp. 987, 997 (E.D. Cal. 1991). The role of *amici* is to assist the court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A. C.P. v. Town of Harrison*, N.J., 940 F.2d 792, 808 (3d Cir. 1991). There are no "strict prerequisites" that must be established prior to qualifying for *amicus* status; an individual seeking to appear as *amicus* must "merely make a showing that his participation is useful or otherwise desirable to the court." *In re Roxfords Foods Litigation*, 790 F.Supp. at 997. This authority supports the Court's exercise of its discretion to accept NACWA's *amicus* brief.

II. THE PROPOSED *AMICUS* BRIEF PROVIDES SUPPLEMENTAL ANALYSIS ON MATTERS RAISED BY PARTIES BUT NOT BRIEFED IN THEIR ENTIRETY

NACWA is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies nationwide – including 29 in California – that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge. NACWA Am. Cur. Br. 3. NACWA's membership is nationwide and includes agencies from parts of California not covered by the petitioners in the instant case, as well as the other states in Region IX, including Hawaii. NACWA members are subject to discharge prohibitions under the Clean Water Act, 33 U.S.C. § 1251 et seq., and have permits issued pursuant to the National Pollutant Discharge Elimination System ("NPDES"). These NPDES permits require NACWA members to sample and test discharges from their facilities for the presence and concentration of pollutants in their discharges.

NACWA brings an important, national perspective to the issue raised by the parties to this litigation regarding the use of the two-concentration WET test and TST evaluation procedure, which do not provide a true representation of aquatic toxicity and are encouraged by the federal Environmental Protection Agency's ("EPA") in contravention of rulemaking procedures required by the Administrative Procedure Act. NACWA Am. Cur. Br. 5-12. The State Water Resources Control Board's ("State Board") internal memorandum from May 12, 2015 ("State Board Memo"), states an intent to continue requiring the TST, despite EPA's withdrawal of its approval, on the basis that the EPA finds no issue with the scientific validity of the two-concentration WET test or TST evaluation procedure. This is troubling for NACWA.

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Neither the two-concentration WET test nor the TST evaluation procedure has gone through the rigorous public notice and comment procedures required by the APA. EPA's unlawful approval of the scientific underpinning for these methods and procedures and state regulatory agencies' subsequent adoption of jeopardizes the ability of NACWA members nationwide to demonstrate compliance with the Clean Water Act. NACWA Am. Cur. Br. 9. Under the Clean Water Act's strict liability scheme, use of scientifically sound testing methods is of utmost importance. The State Board's Memo thus proves that EPA is engaging in underground rulemaking by informally requiring use of a non–promulgated, legally and scientifically unsound WET testing method and evaluation procedure. NACWA Am. Cur. Br. 6.

NACWA strongly supports appropriate regulation to protect our nation's water quality and has been actively involved in the development of WET testing on behalf of its members for nearly three decades. NACWA's expertise on this highly technical issue, combined with NACWA's national perspective on policy situates NACWA to provide an important perspective on the present matter. For these reasons, NACWA respectfully seeks permission from this Court to file the attached amicus brief.

III. OPPORTUNITY TO RESPOND

If the Court grants NACWA's motion for leave to file an *amicus* brief, the parties should have an opportunity to respond to NACWA's brief. NACWA requests that the Court set November 20, 2015, as the due date for parties' responses to the *amicus* brief with no Reply brief permitted. This is the same date stipulated for Defendants' responsive brief. Parties Stip. and Order, ECF No. 65.

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Dated: November 5, 2015

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By: */S/ Gene Tanaka*
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Exhibit “A”

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NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES *AMICUS* BRIEF

Judge: Hon. Morrison C. England
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The National Association of Clean Water Agencies ("NACWA") respectfully submits this *amicus curiae* brief in support of Plaintiffs Southern California Alliance of Publicly Owned Treatment Works and Central Valley Clean Water Association's Complaint for Declaratory Judgment and Injunctive Relief ("Complaint").

NACWA submits this *amicus* brief to address the national implications of the unlawful approval by Defendants United States Environmental Protection Agency and Jared Blumenfeld, Regional Administrator, United States Environmental Protection Agency, Region IX (collectively, "EPA") of a whole effluent toxicity test ("WET") evaluation procedure called the Test of Significant Toxicity ("TST"), use of a truncated version of WET testing , and the California State Water Resources Control Board's ("State Board") subsequent internal memorandum from May 2015 stating the State Board's intent to use the truncated method to determine dischargers' compliance with the Clean Water Act.

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DISCUSSION

I. BACKGROUND

EPA is required to follow the Administrative Procedure Act ("APA") when issuing regulations establishing approved water quality testing methods under the Clean Water Act. 5 U.S.C. § 553(b), (c); 40 C.F.R. §§ 122.44(i)(2)(iv), 136.1(a). EPA's promulgated methods are codified at 40 C.F.R Part 136. The promulgated WET methods include, in part, multiple-concentration WET tests[1] and four statistical methods for evaluating the tests.[2] 40 C.F.R. § 136.3(a); EPA, *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms,* EPA-821-R-02-013, (Fourth Ed., Oct. 2002), AR002303. Importantly, EPA has never promulgated regulations allowing a WET test

[1] The promulgated methods require four or more concentrations plus a control with 0% sample; e.g., NOEC and IC_{25} for chronic toxicity in fresh water organisms.

[2] The four approved statistical methods are the Dunnett's Procedure, T-test with the Bonferroni Adjustment, Steel's Many-One Rank Test, and Wilcoxon Rank Sum Test with the Bonferroni Adjustment.

comprised of a single-concentration of a sample compared to a control (referred to here as a "two-concentration" test), allowing use of the TST (reversed null hypothesis assuming toxicity), or approving the TST evaluation procedure. *Id.*.

Although EPA has never promulgated the TST or a two-concentration WET test, EPA Region IX requires widespread use of the TST and has done so since at least 2012, after EPA released a 2010 guidance document entitled, *National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document*. Pls. Reply to Mot. for Recons., p. 6 (citing to AR001813), ECF No. 57, filed Aug. 18, 2015. EPA Region IX has imposed the TST on the States through its regional NPDES oversight role, in many cases telling state administrators that they must include TST in permit monitoring requirements. *See e.g.*, Req. for Judicial Notice ("RJN"), Exs. D, F, ECF No. 58-2, filed Aug. 18, 2015

In the instant case, EPA Region IX approved the State Board's request to require not just the TST, but a two-concentration WET test design for wastewater treatment and water reclamation plants in California. After EPA withdrew its approval as a result of Plaintiffs' challenge, EPA informed State Board staff that the withdrawal was procedural and that the substance of the TST and WET test remained valid. *Id.*; *see also*, Decl. of Melissa A. Thorme, Ex. A ("State Board Memo"), ECF No. 53-2, filed June 4, 2015. Emails between EPA and State Board staff prove that EPA continued to require the TST even after its lawful approval of the method had been vacated.

EPA's continued effort to require the TST procedure and two-concentration WET tests represents a complete disregard for the APA. EPA's actions constitute underground rulemaking and demonstrate that, yet again, EPA is attempting to force states to take actions that EPA lacks the authority to do itself. This is a nationwide pattern and practice by EPA that must end. The APA establishes a rigorous and open rulemaking process designed to ensure that federal agencies, including EPA, adopt scientifically and legally sound regulations. 5 U.S.C.

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§ 553(b), (c). These procedures are central to the function of the nation's administrative agencies, and whether EPA likes it or not, it must comply. The present matter thus raises issues of national significance for entities that discharge to the nation's navigable waters.

II. NACWA'S INTEREST IN THE PROCEEDINGS

NACWA is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies nationwide – including 29 in California – that own, operate, and manage publicly owned treatment works ("POTW"), wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge. NACWA brings an important, national perspective to the issues raised by the parties to this litigation. NACWA's membership is nationwide and includes agencies from parts of California not covered by the petitioners in the instant case, as well as the other states in Region IX, including Hawaii.

NACWA members are subject to discharge prohibitions and effluent limitations required under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and have NPDES permits that require discharges from their facilities to be tested for the presence and concentration of pollutants. NACWA has been engaged at the national level on WET testing for almost three decades and has developed significant technical expertise on the matter. As a party to the lawsuit challenging test methods promulgated by EPA in 2002, including the use of WET testing, NACWA is extremely familiar with the technical aspects of the testing methods. *Edison Elec. Inst. v. EPA*, 391 F.3d 1267, 1268 (D.C. Cir. 2004). NACWA strongly supports appropriate regulation to protect our nation's water quality and is actively involved in advocating for reliable methods for testing and assessing pollutants in discharges. NACWA thus offers a level of expertise on a technical matter and a national perspective on policy that provides an important analysis of

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the present case.

III. TST AND WET TESTING

Test methods used to determine compliance with NPDES permits (and ultimately with the Clean Water Act) must be formally promulgated by the EPA under the APA. 40 C.F.R. § 122.44(i)(1)(iv); 5 U.S.C. § 553(b), (c). Once promulgated, the methods codified in EPA's regulations must be used to measure waste constituents. 40 C.F.R. § 136.1(a). This case involves EPA's use and approval of the TST evaluation procedure and a truncated, two-concentration WET test that restrict the ability of toxicologists to identify and address testing anomalies. This leads to unreasonably high rates of false positive test results. Critically, the TST procedure and two-concentration test design have never been approved via formal rulemaking process.

EPA has used appropriate means to approve other relevant testing methods and evaluation procedures. In 2002, the EPA promulgated multiple-concentration WET testing methods and four analytical approaches, via regulation in compliance with the APA, for use in assessing toxicity in certain water samples, including stormwater discharges and discharges from POTWs (the "2002 Methods"). *Edison*, 391 F.3d at 1268. WET tests assume that a causal relationship exists between the concentration of pollutants in a sample (and hence, the test concentrations of the sample being evaluated) and the test organism response. In other words, the tests assume that an increasing organism response or effect is due to increasing pollutant/toxicant concentrations. If an effect is caused by "toxicity" as opposed to other stressors, higher concentrations of effluent should exhibit the same or greater effects, and lower concentrations should exhibit the same or lower effects. The only way this can be evaluated is by conducting multiple-concentration tests. A two-concentration test does not provide sufficient information to document the existence of the concentration/response relationship discussed above.

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The WET testing methods promulgated as part of the 2002 Methods were the subject of a legal challenge on multiple grounds, one of which is the tendency of WET testing to result in an unacceptable number of false indications of toxicity and nontoxicity. *Edison,* 391 F.3d 1267 at 1271. The Court in *Edison* recognized that "WET tests are not without their flaws[,]" *id.* at 1274, particularly because WET test methods do not rely on comparisons with an independent, objective, true value, which means that "their scientific validity must be assessed through other means." *Id*. at 1270. The Court upheld the promulgated WET tests, despite the recognized flaws, because the multiple-concentration test design, developed over "years of scientific studies, negotiation, and public notice-and-comment" provided safeguards to protect against an unacceptably high number of false results. The Court described the safeguards as follows:

> A single WET test involves exposing multiple batches of organisms to the effluent at various concentrations, as well as to a "control" sample of pure water, and then aggregating the effects on each batch. Statistical analysis then is used to ensure that any observed differences between the organisms exposed to a given effluent concentration and those exposed to the control blanks most likely are not attributable to randomness - - that they are statistically significant. *See* Final Rule, 67 Fed. Reg. at 69,957-58. This safeguard addresses the petitioners' concerns [regarding false positives]. EPA, in short, has offered a reasoned and thorough explanation of its decision on this subject.

Id. at 1272-1273.

A multiple-concentration approach is thus an essential part of WET testing, because it provides an alternative, within-test assessment of the test's scientific reliability. *Id.* Multiple- concentration test methods provide this assessment of reliability by allowing a toxicologist to determine if the causal relationship described above exists and to ensure that any observed differences between the organisms exposed to effluent concentrations and those exposed in the control most likely are not attributable to mere randomness. *See id.* at 1274. Use of the TST, which has not been promulgated and by itself results in higher false positive rates,

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compounded by the use of a two-concentration WET test design, eliminates the multiple-concentration safeguards that formed the basis for the Court's decision to uphold WET testing in *Edison*.

EPA thus lacks the authority under the *Edison* case to require the TST and two-concentration WET tests. At a minimum, EPA must go through the rulemaking process and formally approve these methods before imposing them on dischargers. EPA is blatantly attempting to circumvent that limitation by using the TST in permits or requiring the State Board to impose these requirements. This sort of underground rulemaking constitutes an unacceptable violation of the APA.

IV. IMPLICATIONS OF EPA'S AND THE STATE BOARD'S CONDUCT

The EPA Region IX-issued permits and the State Board's Memo exposed by the Plaintiffs have national implications for dischargers. These documents demonstrate that EPA continues to impose its will on state regulatory agencies in contravention of federal law. In turn, California's reliance on EPA's support is particularly egregious because California then mandates use of the unpromulgated TST with a two-concentration WET test to determine compliance with the Clean Water Act. Under the Clean Water Act's strict liability scheme, use of scientifically sound testing methods is of utmost importance. The State Board's Memo thus proves that EPA is engaging in underground rulemaking by informally requiring use of a non–promulgated, legally and scientifically unsound WET testing method and evaluation procedure.

A. Legal Principles

The Clean Water Act prohibits the "discharge of any pollutant" to navigable waters from any point source unless the discharge occurs in compliance with the Act's provisions. 33 U.S.C. §§ 1311(a), 1362(12). The NPDES program established a permitting system that authorizes discharges of pollutants to navigable waters under certain conditions or limitations. 33 U.S.C. § 1342. The Clean Water Act's NPDES permitting program is a strict liability scheme that relies on water quality

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testing to determine compliance with permit requirements. 33 U.S.C. § 1362(12); *United States v. Earth Sciences, Inc*., 599 F.2d 368, 374 (10th Cir. 1979); *Cal. Pub. Interest Research Group v. Shell Oil Co.*, 840 F. Supp. 712, 714 (N.D. Cal. 1993). Where test results demonstrate that a test sample exceeds a permit limit based on water quality standards, the exceedance may constitute a permit violation and expose a discharger to potential administrative, civil, and criminal liability. 33 U.S.C. § 1319; Cal. Water Code, §§ 13300-13362.

Agencies that accept and treat sanitary and stormwater waste do not maintain precise control over the pollutants entering their systems. The agencies are predominantly publicly owned, operated and funded. In light of the strict liability scheme and the unpredictable nature of agencies' influent and stormwater, it is imperative that methods used to test the toxicity of waters be reliable.

The APA's rulemaking procedures are designed to "assure fairness and mature consideration of rules of general application." *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979). The procedures include prior publication and an opportunity for comment, which "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. Federal Power Com.*, 412 F.2d 740, 744 (3rd Cir. 1969); *see also Louis v. United States DOL*, 419 F.3d 970, 976-977 (9th Cir. 2005).

Where an action by EPA is functionally similar to a promulgation because it appears to be binding or is applied by an agency in a way that indicates it is binding, that action is subject to the formal rulemaking procedures, including public notice and comment. *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *see also Natural Res. Def. Council v. EPA*, 779 F.3d 1119 (9th Cir. 2015); *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011). Circuit Courts have repeatedly chastised EPA's pattern and practice of rulemaking contrary to the APA. *See e.g., Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d

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999 (D.C. Cir. 2014); *Iowa League of Cities v. EPA*, 711 F.3d 844, 862 (8th Cir. 2013); *Sierra Club v. EPA*, 699 F.3d 530 (D.C. Cir. 2012); *Natural Res. Def. Council*, 643 F.3d at 321; *Appalachian Power Co.*, 208 F.3d 1015. Following the EPA's lead, state regulatory agencies avoid "the rigors of rulemaking" when implementing the Clean Water Act. *See, e.g.*, *Fairfield County Bd. of Comm'rs v. Nally*, 143 Ohio St. 3d 93, 104 (2015).

The Court of Appeals for the District of Columbia addressed EPA's underground rulemaking in 2000 in *Appalachian Power Co*. In that case, the EPA issued a guidance document interpreting the Clean Air Act's "periodic monitoring" requirement for determining compliance with State emissions standards for stationary sources. In its own regulations, EPA required State permitting agencies to include in a permit a frequency for data collection already specified in the applicable requirement or to impose "periodic monitoring" requirements. *Id.* at 1019. Where a state or federal emission standard contained a testing requirement, the State was required to incorporate that standard into a permit without modification. *Id.* The guidance, however, stated that "periodic monitoring" was required of all emission points subject to Title V of the Clean Air Act, even where emissions standards imposed a one-time testing requirement. *Id.* at 1019-1020.

Although the EPA asserted that the guidance document was not binding, EPA acted as if it was controlling and led private parties and states to believe that the guidance was binding. *Id.* at 1021. As a result, the guidance document created a new legal regime governing permits that "should have been, but was not, promulgated in compliance with notice and comment rulemaking procedures." *Id.* at 1024.

EPA's actions in this case are even more egregious than its behavior in *Appalachian Power Co. v. EPA*. Here, EPA issued guidance, and then required compliance, either directly in permits or through its ATP approval, with the TST guidance document as if it had the force of law. Compl., Ex. A, ECF No. 1, filed

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June 25, 2014. When challenged, EPA backed off, Decl. of Eugenia McNaughton, Ex. A, ECF No. 40-1, filed Feb. 17, 2015, only to use informal efforts to impose the same requirements, RJN Exs. D, F. EPA cannot do this. Not only do EPA's actions violate the APA, but if allowed to stand, they will have far-reaching impacts on public sewer and stormwater agencies.

B. Mandatory Two-Concentration WET Method and TST Evaluation Procedure Eliminates Fundamental Safeguards Against False Results in WET Testing

EPA's imposition of the non-promulgated TST (and a two-concentration WET test evaluated using the TST) on POTWs eliminates safeguards that form the basis of WET testing and is contrary to the Clean Water Act's NPDES regulations. *Edison,* 391 F.3d at 1272-1273.

As noted above, the Court of Appeals for the District of Columbia addressed in detail the sufficiency of WET testing methods in *Edison.* The Court of Appeals upheld the promulgated methods because they allowed for the use of multiple-concentrations to "ensure that any observed differences between organisms exposed to a given effluent concentration and those exposed to the control blanks most likely are not attributable to randomness…." *Id*. at 1273.

EPA's present support for the two-concentration WET test and TST procedure is directly contrary to the Court of Appeals' holding in *Edison.* If the results of a TST, or a two-concentration WET test using the TST or any other informal evaluation procedure, erroneously indicate toxicity in violation of NPDES permit requirements, a discharger has no ability to rebut that evidence and may incur liability based on a flawed test rather than on impaired water quality. 40 C.F.R. § 122.41(j); *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 669 (9th Cir. 1988) (a discharger cannot "impeach its own reports of permit violations by showing sampling error"). Likewise, if test results erroneously indicate nontoxicity, a discharger will miss the opportunity to improve the quality of its discharge water.

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EPA's promulgated WET test methods were upheld because a multiple-concentration test design provides a within-test quality assurance, which the TST and a two-concentration design do not provide. EPA's support of a two-concentration test method and use of the TST procedure are contrary to law and scientifically unsound. The State Board Memo and EPA-issued permits demonstrate that EPA has mandated or strongly encouraged use of the TST and a two-concentration WET test method without regard for the lack of within-test quality assurance.

C. Mandatory TST Circumvents Transparent Notice and Comment Process

EPA has a pattern of using guidance documents, determinations, and other informal approvals to contravene the public notice and comment procedures mandated by the APA. See *Nat'l Envtl. Dev. Ass'ns Clean Air Project*, 752 F.3d 999; *Iowa*, 711 F.3d at 862; *Sierra Club*, 699 F.3d 530; *Natural Res. Def. Council*, 643 F.3d at 321; *Appalachian Power Co.*, 208 F.3d at 1020.

In the instant case, two actions in particular demonstrate EPA's authorization of the TST procedure without following the rulemaking procedures required by the APA. *See Id.*; 5 U.S.C. § 553(b), (c). First, as in *Appalachian Power Co.*, EPA released guidance documents in 2010 that contemplate the use of a two-concentration data analysis ("2010 Guidance") and encourage widespread use of the TST. Pls. Reply to Mot. for Recons., p. 6 (citing to AR001813).

Second, although the 2010 Guidance is not a regulation and was not formally promulgated under the APA, *id.* at p. 6, EPA first formally approved, then informally required California's use of a two-concentration method and the non-promulgated TST procedure as an alternative test procedure on scientific grounds. The State Board memo demonstrates that the State Board interprets EPA's withdrawal as merely procedural in nature. The EPA continues to support and direct use of the TST even after withdrawing its approval. RJN, Ex. D. EPA

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encouraged use of the TST and WET testing methods and as a result, the State Board intends to move forward with widespread mandatory use of the two-concentration WET test and TST procedure. Decl. Eugenia McNaughton, Ex. A, (the "TST approach … forms the basis for utilizing numeric water quality objectives and acts as the primary means of determining compliance with the proposed effluent limitations.")

The State Board's Memo further demonstrates EPA's pattern and practice of mandating use of methods such as the TST though backdoor channels when their use is contrary to promulgated regulations. *See, e.g.*, *Iowa*, 711 F.3d at 865; *Nat'l Cotton Council of Am. v. United States EPA*, 553 F.3d 927 (6th Cir. 2009). California Regional Water Quality Control Boards have already been issuing permits that incorporate the TST. Compl., Ex. A. Beyond California, similar provisions in NPDES permits have been issued by EPA Region IX in Hawaii and Guam. *Id.*; RJN, ECF No. 58. Because the TST and two-concentration tests lack essential safeguards promulgated by EPA and have not been vetted through the notice and comment process required by the APA, widespread mandatory use of a non-promulgated procedure jeopardizes dischargers' ability to demonstrate compliance with the Clean Water Act.

Of great concern here is that a legally and scientifically flawed method or evaluation procedure will result in an unreasonably high number of false indications of violations or an unreasonably high number of false indications of nontoxicity. Neither of these results will be based on actual water conditions. One will expose dischargers to administrative, civil, and criminal liability, and the other fails to protect water quality. Without providing the public an opportunity to engage these issues in an open and transparent manner, the EPA threatens all dischargers' compliance status and undermines dischargers' ability to protect water quality on the basis of a scientifically defensible method.

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CONCLUSION

The TST and the two-concentration WET method lack the quality control integral to the promulgated five-concentration testing methods and evaluation procedures and are scientifically flawed. EPA's use and widespread support for the use of the TST and the two-concentration WET test, contrary to its own regulations and in circumvention of the rigorous public notice and comment procedures, places all wastewater and storm sewer operators and the environment at risk of liability and harm. For these reasons, NACWA supports the Plaintiffs' request for declaratory and injunctive relief against the EPA.

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