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14 Protection Agency and Alexis Strauss,
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15 **IN THE UNITED STATES DISTRICT COURT**
16
17 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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

23 v.

24 UNITED STATES ENVIRONMENTAL
25 PROTECTION AGENCY; ALEXIS
26 STRAUSS, ACTING REGIONAL
ADMINISTRATOR, UNITED STATES
27 ENVIRONMENTAL PROTECTION
28 AGENCY, REGION IX; and DOES 1 to 10,
Defendants.

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

**EPA'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO
DISMISS THE COMPLAINT**

Date: June 15, 2017

Time: 2:00 p.m.

Place: Courtroom 7, 14th Floor

Judge: Hon. Morrison C. England, Jr.

1 Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants United States
2 Environmental Protection Agency and Acting Regional Administrator Alexis Strauss
3 (collectively, “EPA”) respectfully move to dismiss for lack of jurisdiction the Complaint filed
4 by Plaintiffs Southern California Alliance of Publicly Owned Treatment Works (“SCAP”),
5 Central Valley Clean Water Association (“CVCWA”), National Association of Clean Water
6 Agencies (“NACWA”), and Bay Area Clean Water Agencies (“BACWA”).

7
8 **I. INTRODUCTION**

9 It is undisputed that Plaintiffs failed to timely file a facial challenge to the June 2010
10 Guidance within the six-year statute of limitations. 28 U.S.C. § 2401(a). As Plaintiffs have
11 already conceded, “the statute of limitations for a direct challenge to the 2010 Guidance ran in
12 June 2016.” *SCAP I*, Pls. Mot. Reopen at 7 [ECF No. 96]. After this Court rejected Plaintiffs’
13 post-judgment attempt in *SCAP I* to bring a facial claim challenging the 2010 Guidance,
14 Plaintiffs filed this second lawsuit under the Administrative Procedure Act (“APA”), which
15 could be viewed as an untimely, veiled facial challenge to the 2010 Guidance. The Complaint
16 appears to assert a general challenge to unspecified National Pollutant Discharge Elimination
17 System (“NPDES”) permits that use the Test of Significant Toxicity (“TST”).

18 The Court lacks subject matter jurisdiction because Plaintiffs fail to identify a specific
19 final agency action as required by the APA and because Plaintiffs have a remedy at law. Even
20 if Plaintiffs had identified any specific NPDES permit to challenge, the Court lacks jurisdiction
21 over challenges to State-issued NPDES permits because those challenges must be made in state
22 court and the Court lacks jurisdiction over challenges to EPA-issued NPDES permits because
23 those challenges must be made in the Environmental Appeals Board (“EAB”) or the appropriate
24 federal court of appeals. The Court should dismiss the Complaint for lack of jurisdiction.

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2 **II. BACKGROUND¹**

3 **A. Clean Water Act and NPDES Permits**

4 The Clean Water Act (“CWA” or the “Act”) was adopted “to restore and maintain the
5 chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). One
6 goal of the CWA is “that the discharge of toxic pollutants in toxic amounts be prohibited.” *Id.*
7 § 1251(a)(3). The CWA prohibits the discharge of a pollutant from a point source except in
8 compliance with, among other things, permits issued under the NPDES program. *Id.*
9 §§ 1311(a), 1342. NPDES permits place limits on the rate, amount, and/or concentration of
10 pollutants that may be discharged and require permittees to monitor their discharges and to file
11 test results and other data with the relevant permitting authority. NPDES permits are issued
12 and administered by EPA or, where authorized by EPA, by a State or tribal agency subject to
13 EPA review. *See id.* § 1342(a)-(d). California has been granted authority to administer the
14 NPDES program itself. 39 Fed. Reg. 26,061 (July 16, 1973); *Boise Cascade Corp. v. EPA*,
15 942 F.2d 1427, 1430 (9th Cir. 1991). The CWA gives States “the primary responsibilit[y] and
16 right[]... to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b); *Barnum Timber*
17 *Co. v. EPA*, 633 F.3d 894, 902 (9th Cir. 2011). Section 304(h) requires EPA to “promulgate
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19
20 ¹ In ruling on a Rule 12(b)(1) motion to dismiss, the district court may consider public
21 documents, affidavits submitted by the parties, and documents incorporated by reference in the
22 complaint. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (on review of motion
23 to dismiss the complaint that attached a photograph and caption from the defendant’s website,
24 under the incorporation by reference doctrine, the court considered the defendant’s home page
25 and content surrounding the photograph and caption at issue); *Savage v. Glendale Union High*
26 *Sch.*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003) (“Once the moving party has converted the
27 motion to dismiss into a factual motion by presenting affidavits or other evidence properly
28 brought before the court, the party opposing the motion must furnish affidavits or other
evidence necessary to satisfy its burden of establishing subject matter jurisdiction.”); *Gemtel*
Corp. v. Cmty. Redevelopment Agency of City of Los Angeles, 23 F.3d 1542, 1544 n.1 (9th Cir.
1994) (affirming dismissal for lack of jurisdiction and concluding that the district court properly
considered public documents submitted by the defendant without converting motion to dismiss
to a motion for summary judgment); *see also* Fed. R. Civ. P. 12(d) (conversion to motion for
summary judgment for consideration of matters outside the pleading applies to Rule 12(b)(6)
motions or Rule 12(c) motions, not Rule 12(b)(1) motions to dismiss for lack of jurisdiction).

1 guidelines establishing test procedures for the analysis of pollutants that shall include the
2 factors” that must be provided in NPDES permit applications. 33 U.S.C. § 1314(h).

3 **B. Whole Effluent Toxicity (“WET”) Testing**

4 Whole effluent toxicity (“WET”) is defined as “the aggregate toxic effect of an effluent
5 measured directly by a toxicity test.” 40 C.F.R. § 122.2. WET tests are used to determine
6 effects of toxicity on aquatic organisms, both the acute (severe) and chronic (less severe)
7 effects. *Id.* § 136.3. WET testing, in short, consists of exposing, in a laboratory setting, living
8 aquatic organisms (plants, vertebrates, and invertebrates) to concentrations of a test sample
9 (*e.g.*, a facility’s effluent) to measure the effect of an effluent test concentration on those
10 organisms’ ability to survive, grow, and reproduce. *See, e.g., Final Rule*, 60 Fed. Reg. 53,529,
11 53,532 (Oct. 16, 1995) (the “WET Testing Rule”).

12
13 The aquatic toxicity test methods for measuring WET were first standardized and
14 approved for use in NPDES monitoring in 1995 and were ratified in 2002. 60 Fed. Reg. at
15 53,529; *see also* 67 Fed. Reg. 69,952 (Nov. 19, 2002). The WET Testing Rule added acute
16 toxicity methods and short-term chronic methods for estimating chronic toxicity to Table IA,
17 40 C.F.R. § 136.3(a), which designates Agency-approved methods for conducting effluent
18 testing. Specific requirements for each of these test methods are presented in three EPA WET
19 test methods manuals that are incorporated by reference into the regulation. 40 C.F.R.
20 § 136.3(a), nn.26-28, § 136.3(b)(7)(viii)-(x). Table II then specifies the required containers,
21 preservation techniques, and holding times for each of the methods. *Id.* § 136.3(e). The WET
22 test methods manuals recommend, but do not require, certain statistical approaches to be
23 applied to WET test results. 67 Fed. Reg. at 69,954.² One statistical approach for toxicity not
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25
26 ² Part 136 does not apply to all WET testing. For example, the West Coast Marine
27 Methods are WET test methods that are not incorporated into Part 136. *See* 40 C.F.R. § 136.3,
28 Table IA (referring to the Atlantic Ocean and Gulf of Mexico, but not the Pacific Ocean);
67 Fed. Reg. at 69,962. The 2002 Final Rule expressly states that Part 136 does not apply to
West Coast WET test methods because, as public comments noted, the organisms in the Pacific
Ocean are different from the organisms in the Atlantic Ocean and the Gulf of Mexico. 67 Fed.

1 enumerated in the WET test methods manuals is the TST.³

2 **C. SCAPI Lawsuit Challenges EPA’s Limited Use ATP Approval**

3 On February 12, 2014, the California State Water Resources Control Board (“State
4 Board”) requested EPA’s approval of a statewide alternate to the five-concentration WET test
5 procedure under Part 136.⁴ The State’s requested Alternate Test Procedure (“ATP”) was the
6 two-concentration test design, *i.e.*, to test only one effluent concentration plus a control
7 concentration, when using the TST statistical approach. On March 17, 2014, EPA’s Regional
8 ATP Coordinator approved California’s ATP request. EPA did not approve the use of the TST
9 as a new WET test method because the TST is not a WET test method but rather, a statistical
10 approach that can be used to analyze WET test data. The 40 C.F.R. Part 136 test methods do
11 not require the use of any particular statistical approach for analyzing WET test data. *See SCAP*
12 *I*, 9/10/2015 Order at 2:21-22 [ECF No. 61].

13
14 On June 25, 2014, Plaintiffs SCAP and CVCWA filed their initial complaint challenging
15 EPA’s ATP Approval under the APA. *SCAP v. EPA*, No. 2:14-cv-01513 MCE-DB (“*SCAP I*”).

16 Reg. at 69,962. For this reason, Table IA identifies “the Atlantic Ocean and Gulf of Mexico,”
17 but not the Pacific Ocean. *Id.* (“Because test procedures for measuring toxicity to estuarine and
18 marine organisms of the Pacific Ocean are not listed at 40 CFR part 136, permit writers may
19 include (under 40 CFR 122.41(j)(4) and 122.44(i)(1)(iv)) requirements for the use of test
20 procedures that are not approved at part 136, such as West Coast WET methods (USEPA,
1995b) on a permit-by-permit basis.”).

21 ³ The WET test methods manuals list the t-test statistical approach, and the TST is a
22 form of the t-test. *See* Short-term Methods for Estimating the Chronic Toxicity of Effluents and
23 Receiving Waters to Freshwater Organisms § 9.5.1 (Oct. 2002); Methods for Measuring the
24 Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms
25 §§ 11.3.4, 11.3.5.5 (Oct. 2002); Short-term Methods for Estimating the Chronic Toxicity of
26 Effluents and Receiving Waters to Marine and Estuarine Organisms §§ 9.2.1, 9.5 (Oct. 2002);
27 2010 Guidance at xv, 10, App. A, *available at*
28 https://www3.epa.gov/npdes/pubs/wet_final_tst_implementation2010.pdf.

29 ⁴ “Five-concentration” refers to a required test condition of certain Part 136 approved
30 WET test methods to test five different concentrations of the effluent plus a control. This
31 requirement is for testing effluents, and does not apply to receiving water. This requirement
32 also does not apply to WET test methods that are not incorporated into Part 136, such as the
33 West Coast WET methods. *See supra* n.2.

1 Plaintiffs filed an emergency request for a temporary restraining order and a preliminary
2 injunction, which EPA opposed and this Court denied. *SCAP I*, 7/2/2014 Order Denying TRO
3 [ECF No. 13, 14]. Plaintiffs filed a First Amended Complaint on July 14, 2014, and EPA
4 lodged the administrative record related to the ATP approval on October 15, 2014. *SCAP I*,
5 FAC [ECF No. 15], EPA Notice of Lodging Administrative Record [ECF No. 22, 23]. The
6 parties then filed cross-motions for summary judgment and Plaintiffs moved for a permanent
7 injunction. *SCAP I*, Pls. Mot. Summ. Judgt and EPA's Cross-Mot. Summ. Judgt. [ECF No. 25,
8 30]. On February 11, 2015, during summary judgment briefing, EPA withdrew its ATP
9 Approval, effective immediately. *SCAP I*, 2/12/2015 Eugenia McNaughton Decl., Exh. A [ECF
10 No. 40-1]. The Court agreed with EPA that the case was moot due to EPA's withdrawal of the
11 ATP Approval, granted EPA's motion for summary judgment, denied Plaintiffs' motion for
12 summary judgment, and entered judgment for EPA on May 15, 2015. *SCAP I*, 5/13/2015
13 Summary Judgment Order, Judgment [ECF No. 51, 52].

14
15 Plaintiffs then moved for reconsideration and, in their reply brief, raised a new claim
16 based on a 2010 Guidance document, the NPDES TST Implementation Document ("2010
17 Guidance"). *SCAP I*, Pls. Reply Mot. Recons. [ECF No. 57]. The Court ordered supplemental
18 briefing, finding that "the bulk of the argument on the 2010 Guidance is contained in the
19 [reconsideration] Reply brief and thus there is no governmental response to many of Plaintiffs'
20 claims." *SCAP I*, 9/10/2015 Order at 10-11 [ECF No. 61]. After reviewing the supplemental
21 briefing,⁵ the Court denied Plaintiffs' motion for reconsideration, holding that the new evidence
22 "would have had no impact on Plaintiffs' challenge to the ATP approval" and that Plaintiffs did
23 not assert a claim in connection with the 2010 Guidance. *SCAP I*, 8/22/2016 Order at 9-11
24 [ECF No. 94].

25 In order to file a motion to amend the First Amended Complaint to add a new 2010
26

27
28 ⁵ The Court granted NACWA's motion for leave to file an amicus curiae brief in *SCAP I*
and considered NACWA's amicus brief in deciding Plaintiffs' motion for reconsideration.
SCAP I, 4/12/2016 Order [ECF No. 87], 8/22/2016 Order at 7 [ECF No. 94].

1 Guidance claim to challenge the TST, Plaintiffs then moved to reopen the judgment under Rule
 2 59(e) or alternatively under Rule 60(b)(1) due to mistake, inadvertence, and excusable neglect.
 3 *SCAP I*, Pls. Mot. Reopen at 1 [ECF No. 96]. Plaintiffs recognized that the statute of limitations
 4 for a direct facial challenge to the 2010 Guidance ran in June 2016. *SCAP I*, Pls. Mot. Reopen
 5 at 7 [ECF No. 96]. The Court denied the motion to reopen under Rule 59(e) as not timely
 6 because it was filed on September 2, 2016, more than 15 months after judgment was entered on
 7 May 15, 2015. *See* Fed. R. Civ. P. 6(b)(2), 59(e), 60(c)(1); *SCAP I*, 10/19/2016 Order [ECF
 8 No. 102]. The Court held that Rule 59(e)'s time limit cannot be waived by the court. *SCAP I*,
 9 10/19/2016 Order at 9 [ECF No. 102]. The Court also denied the motion to reopen under Rule
 10 60(b) for excusable neglect, holding that Plaintiffs' tactical choice to focus *SCAP I* on
 11 challenging the ATP did not provide a basis for reopening judgment more than one year after
 12 summary judgment was granted to EPA. *Id.* at 10.

13
 14 **D. *SCAP II* Lawsuit Fails to Identify a Final Agency Action**

15 Plaintiffs SCAP, CVCWA, BACWA, and NACWA filed this new lawsuit on December
 16 19, 2016 ("*SCAP II*"). Compl. [ECF No. 1]. Unlike Plaintiffs' previous challenge in *SCAP I*,
 17 this litigation does not relate to the subject of the ATP (limited use authorization to test only one
 18 effluent concentration plus a control concentration when using the TST statistical approach in
 19 situations when Part 136 applies) and instead centers on the use of the TST statistical approach
 20 generally, rather than a specific final agency action. Plaintiffs allege that unspecified NPDES
 21 permits that use the TST constitute "final agency action" subject to APA review: "In this case,
 22 the use of the unpromulgated rules in NPDES permits constitutes final agency action 'by which
 23 rights or obligations have been determined, or from which legal consequences will flow.'" *Id.*
 24 Compl. ¶ 4. The Complaint fails, however, to identify any specific "unpromulgated rules in
 25 NPDES permits" that form the basis for Plaintiffs' suit. *See* Compl. Even if the Complaint did
 26 identify specific NPDES permits, this Court lacks jurisdiction, as explained below.

27 The Complaint seeks (1) declaratory relief that the use of "the TST or the Pass/Fail
 28 option in NPDES permits constitutes an unlawful underground regulation without promulgating

1 the use of the TST statistical procedure as a rule, or under an approved ATP” violates the APA;
2 and (2) injunctive relief to enjoin the EPA from “using, implementing, mandating, or approving,
3 allowing, encouraging, or authorizing the use” of the TST for water quality regulation,
4 permitting, and compliance determination purposes. Compl. ¶¶ 56, 58. The Court lacks subject
5 matter jurisdiction over the Complaint because review under the APA is limited to review of
6 final agency actions and there is no final agency action alleged.

7 **III. ARGUMENT**

8 Because Plaintiffs have failed to timely file a facial challenge to the 2010 Guidance
9 within the six-year statute of limitations, Plaintiffs now assert that this Court has subject matter
10 jurisdiction pursuant to 5 U.S.C. § 702 (providing for judicial review of final agency action
11 under the APA), 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1346 (United
12 States as a defendant), 28 U.S.C. § 2201 (authorizing declaratory relief), and 28 U.S.C. § 2202
13 (authorizing injunctive relief). Compl. ¶ 6. As explained below, none of these statutes provides
14 an applicable waiver of sovereign immunity for Plaintiffs’ claims.

15 **A. Legal Standards**

16 Federal courts are courts of limited jurisdiction and may hear a case only if authorized to
17 do so by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
18 375, 377 (1994). As sovereign, the United States and its agencies may be sued only when
19 Congress has consented to suit and waives sovereign immunity by statute. *Fed. Aviation*
20 *Admin. v. Cooper*, 132 S. Ct. 1441, 1448 (2012). A waiver of the United States’ sovereign
21 immunity “cannot be implied but must be unequivocally expressed,” *United States v. King*, 395
22 U.S. 1, 4 (1969), and must be construed strictly in favor of the United States. *United States v.*
23 *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310,
24 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983). The plaintiff has the
25 burden to prove subject matter jurisdiction and waiver of sovereign immunity. *Kokkonen*, 511
26 U.S. at 377.
27
28

1 **B. The Court Lacks Subject Matter Jurisdiction Under the Administrative Procedure**
2 **Act Because There Is No Final Agency Action By EPA Challenged In The**
3 **Complaint.**

4 The Court lacks subject matter jurisdiction under the APA because this Court’s review
5 under the APA is limited to reviewing “final agency action” and the Complaint does not allege a
6 cognizable final agency action by the EPA. 5 U.S.C. § 704; *see* Compl. Unspecified NPDES
7 permits that use the TST appear to be the final agency action that Plaintiffs challenge in *SCAP*
8 *II*: “In this case, the use of the unpromulgated rules in NPDES permits constitutes final agency
9 action ‘by which rights or obligations have been determined, or from which legal consequences
10 will flow.’” Compl. ¶ 4. As an initial matter, the Court lacks jurisdiction because Plaintiffs fail
11 to identify a specific final agency action and Plaintiffs have a remedy at law.⁶ Even if Plaintiffs
12 had identified any specific NPDES permit, as this Court has already correctly held, the Court
13 lacks jurisdiction over challenges to State-issued NPDES permits because those challenges must
14 be made in state court. *SCAP I*, 5/13/2013 Summary Judgment Order at 7 [ECF No. 51].
15 Alternatively, to the extent Plaintiffs seek to challenge any specific EPA-issued NPDES permit,
16 *see* Compl. ¶ 41, this Court also lacks subject matter jurisdiction because challenges to
17 individual NPDES permits must first be made to the Environmental Appeals Board (“EAB”)
18 and then the appropriate federal court of appeals. 33 U.S.C. § 1369(b)(1)(F) (issuance or denial
19 of NPDES permit by EPA must be made in the appropriate circuit court of appeals within 120
20 days); 40 C.F.R. §§ 124.19(a)(1), 124.19(a)(3); *SCAP v. EPA*, 853 F.3d 1076, 1080 (9th Cir.
21 2017); *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001).

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23
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25 ⁶ Even assuming Plaintiffs are challenging unspecified NPDES permits, Plaintiffs also
26 appear to concede that Plaintiffs CVCWA and BACWA lack standing because none of their
27 members have any NPDES permits with the TST. *See* Compl. ¶¶ 11, 13, 14. In addition, there
28 is no standing to base a challenge on the 2012 Orange County Sanitation District, Compl. ¶ 41,
because the regulated entity— the permit holder— did not challenge the use of the TST in this
permit. *See* 5/9/2017 Stuber Decl., ¶ 3. EPA reserves the right to address these deficiencies
should this case survive the present motion to dismiss.

1 1. APA Standards

2 The APA provides for judicial review over “final agency action for which there is no
3 other adequate remedy in a court.” 5 U.S.C. § 704. A claim under the APA must be brought
4 within six years of the final agency action that is challenged. 28 U.S.C. § 2401(a). The APA is
5 a specific waiver of the United States’ sovereign immunity for actions for non-monetary relief
6 brought under 28 U.S.C. § 1331. *See Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir.1992). In
7 order to be “final,” the action “must mark the ‘consummation’ of the agency’s decision-making
8 process” and not be “merely tentative or interlocutory.” *Bennett v. Spear*, 520 U.S. 154, 177-78
9 (1997), overruled in part on other grounds. In addition, the action “must be one by which
10 ‘rights or obligations have been determined,’ or from which ‘legal obligations will flow.’” *Id.*
11 at 178 (citations omitted).

12 2. The Court lacks jurisdiction because Plaintiffs fail to identify a specific or
13 discrete final agency action by EPA as required to bring an APA claim.

14 The Court lacks jurisdiction over Plaintiffs’ claims, which are brought under the APA,
15 because Plaintiffs fail to identify a specific or discrete final agency action, which is required for
16 an APA claim. *See Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 62-64, 124 S. Ct.
17 2373, 2378-79 (2004); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891-94, 110 S. Ct. 3177,
18 3190-91 (1990) (APA review by court not permitted until “a specific ‘final agency action’ has
19 an actual or immediately threatened effect”); *Nevada Ass’n of Counties v. U.S. Dep’t of Interior*,
20 No. 15-15620, 2017 WL 1208591, at *1 (9th Cir. Apr. 3, 2017) (not published) (affirming
21 dismissal for lack of jurisdiction where plaintiff “failed to identify a specific final agency action
22 or discrete action unlawfully withheld” required by the APA) (internal citations omitted).

23 The Complaint appears to assert a general challenge to unspecified NPDES permits that
24 allegedly apply rules that have not been promulgated (including but not limited to the 2010 TST
25 Guidance⁷), whether the NPDES permit is issued by the state or by EPA, including actions
26

27
28 ⁷ EPA disputes that the 2010 TST Guidance is a “rule” and reserves the right to address
this deficiency should this case survive the present motion to dismiss.

1 taken “by others” besides EPA. *See, e.g.*, Compl. ¶¶ 3, 4 (“the use of the unpromulgated rules
 2 in NPDES permits”), 5, 41, 45, 46, 56. It is unclear what “unpromulgated rules” the Complaint
 3 is challenging in addition to the 2010 Guidance and it is unclear what additional “associated
 4 methods and procedures” are being challenged. *See* Compl. ¶¶ 5, 54, 56, 58. The Complaint
 5 does not specify which NPDES permits are being challenged, which governmental entity issued
 6 these NPDES permits, when the NPDES permits were issued, to whom the permits were issued,
 7 whether any enforcement actions have been taken, or whether the NPDES permit is being
 8 challenged in a different forum.⁸ *See* Compl. Plaintiffs therefore fail to identify a specific or
 9 discrete final agency action required to bring their APA claim. As described below, even if
 10 Plaintiffs were to cure their failure to identify which NPDES permits they are challenging, this
 11 Court would still lack jurisdiction over this action.

12
 13 Further, to the extent Plaintiffs are seeking review of the 2010 Guidance, it is beyond
 14 dispute that Plaintiffs failed to timely file a facial challenge to that Guidance.⁹ Plaintiffs now
 15 assert that their *SCAP II* claims are timely because Plaintiffs have brought an “as applied”
 16 challenge to the 2010 Guidance as rulemaking without notice and comment, rather than a direct
 17

18
 19 ⁸ As described below, this Court lacks jurisdiction over challenges to EPA-issued
 20 permits, which cannot be brought in district court. *See* 33 U.S.C. § 1369(b)(1)(F); 40 C.F.R.
 21 §§ 124.19(a)(1), 124.19(a)(3), 124.19(o); *SCAP v. EPA*, 853 F.3d at 1083 n.4; *Whitman*, 242
 22 F.3d at 1101. The Complaint only identifies one NPDES permit: the 2012 Orange County
 23 Sanitation District permit jointly issued by EPA and California. Compl. ¶ 41. The regulated
 24 entity—the permit holder—did not challenge the use of the TST in this 2012 permit in the
 25 EAB, the required forum for challenging EPA-issued individual permits. 5/9/2017 Stuber
 26 Decl., ¶ 3. In addition, this permit uses West Coast WET methods, which are expressly not
 27 incorporated into the Part 136 methods. *See supra* n.2; 5/9/2017 Stuber Decl., ¶ 3. Therefore,
 28 Plaintiffs’ general grievance that the TST must be listed in Part 136 cannot apply to this permit
 or other NPDES permits that use WET methods that are not incorporated into the Part 136
 methods.

⁹ This Court rejected Plaintiffs’ attempt in *SCAP I* to bring a new claim post-judgment
 challenging the 2010 Guidance. *SCAP I*, 8/22/2016 Order [ECF No. 94]; *SCAP I*, 10/19/2016
 Order [ECF No. 102].

1 challenge.¹⁰ See Compl. ¶¶ 41, 51. This does not solve the Complaint’s jurisdictional defects
2 because Plaintiffs fail to identify a final agency action in which the 2010 Guidance is being
3 applied. See *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Service*, 112 F.3d 1283,
4 1287 (5th Cir. 1997) (“It is possible, however, to challenge a regulation after the limitations
5 period has expired, provided that the ground for the challenge is that the issuing agency
6 exceeded its constitutional or statutory authority. To sustain such a challenge, however, the
7 claimant must show some direct, final agency action involving the particular plaintiff within six
8 years of filing suit.”).

9
10 3. Plaintiffs’ challenge to any specific State-issued NPDES permits must be made
in state court and this Court lacks jurisdiction over such challenges.

11 Even if Plaintiffs had identified a specific State-issued NPDES permit, the Court lacks
12 jurisdiction over Plaintiffs’ challenge to any California-issued NPDES permits. First, NPDES
13 permits issued by California and its Regional Water Quality Control Boards cannot constitute
14 final agency action subject to judicial review under the APA because these are not EPA’s
15 actions and APA review is limited to reviewing a federal government agency’s final actions.
16 5 U.S.C. §§ 701(b)(1) (defining “agency” under the APA); see Compl. ¶¶ 2, 4.

17 Second, Plaintiffs’ challenge to California’s NPDES permits must be made in state
18 proceedings and this Court lacks subject matter jurisdiction over a challenge to the requirements
19 in a state NPDES permit. See 40 C.F.R. § 123.30 (judicial review of permits issued by the State
20 is limited to state court); Cal. Water Code §§ 13320, 13321, 13330 (review and petition for stay
21 by state board, and review in superior court); *SCAP v. EPA*, 853 F.3d at 1081 (“The [NPDES]
22

23
24 ¹⁰ Plaintiffs’ actual grievance could be viewed as a veiled facial challenge to the 2010
25 Guidance because Plaintiffs generally challenge the use of the TST statistical approach in
26 NPDES permits, a use that was clearly contemplated when the 2010 Guidance was issued
27 because the 2010 Guidance directly addresses the use of the TST statistical approach in NPDES
28 permits. See 2010 Guidance. As Plaintiffs have already conceded, “the statute of limitations
for a direct challenge to the 2010 Guidance ran in June 2016.” *SCAP I*, Pls. Mot. Reopen at 7
[ECF No. 96]; see 28 U.S.C. § 2401(a). EPA reserves the right to address this deficiency
should this case survive the present motion to dismiss.

1 permits issued by the state are subject to administrative and judicial review in accordance with
2 state law.”); *Boise Cascade Corp.*, 942 F.2d at 1430; *Shell Oil Co. v. Train*, 585 F.2d 408, 411,
3 414 (9th Cir. 1978) (“The existence of a state judicial forum for the review of the regional
4 board’s action forecloses the availability of the federal forum under the terms of the” APA.); *see*
5 *also SCAP I*, 5/13/2013 Summary Judgment Order at 7 [ECF No. 51].

6 The Clean Water Act gives States “the primary responsibilit[y] and right[]... to prevent,
7 reduce, and eliminate pollution.” 33 U.S.C. § 1251(b); *see Boise Cascade Corp.*, 942 F.2d at
8 1429; *Chevron, U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984). To that end,
9 Congress encourages States to “assume the major role in the operation of the NPDES program.”
10 *Boise Cascade Corp.*, 942 F.2d at 1429 (quoting *Shell Oil Co.*, 585 F.2d at 410). California has
11 been granted authority to administer the NPDES program itself. 39 Fed. Reg. 26,061 (1973);
12 *Boise Cascade Corp.*, 942 F.2d at 1430. “Under the CWA, California may impose restrictions
13 that exceed the CWA’s minimum requirements and EPA’s regulations. 33 U.S.C. § 1370; 40
14 C.F.R. § 122.44(d). The [Regional] Board (or the State Board) may take a more aggressive
15 view of the requirements for keeping the state’s waters clean.” *SCAP v. EPA*, 853 F.3d at 1084.
16 “The California State Water Resources Control Board (State Board) and its various Regional
17 Water Quality Control Boards are responsible for the enforcement of the Act in California and
18 for issuing NPDES permits.” *Boise Cascade Corp.*, 942 F.2d at 1430. This means that
19 California issues NPDES permits for discharges to waters within the State’s jurisdiction,
20 including some of the unspecified NPDES permits generally referenced in the Complaint.
21 “Jurisdiction to review decisions of the California State Board is conferred on California state
22 courts.” *Id.*; *see* Cal. Water Code § 13330.

24 Plaintiffs have a remedy at law, they are exercising that remedy by challenging various
25 NPDES permits before the state, and the state proceedings should continue without interference.
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1 See EPA's 5/9/2017 Request for Judicial Notice ¶¶ 1-4 & Exhs. 1-4;¹¹ see also *SCAP I*, EPA's
2 6/30/2014 Request for Judicial Notice [ECF No. 9-2] (Plaintiff SCAP member Camarillo
3 Sanitary District petitions); *SCAP I*, 12/17/2014 Decl. of Robyn Stuber, Exh. E [ECF No. 30-2
4 at 22-89] (Plaintiff SCAP member Los Angeles County Sanitation District petition).

5 4. The Court also lacks jurisdiction over challenges to any specific EPA-issued
6 NPDES permits.

7 To the extent Plaintiffs seek to challenge NPDES permits that have been issued by EPA,
8 see Compl. ¶ 41, this Court also lacks subject matter jurisdiction over these challenges because
9 challenges to an EPA-issued individual NPDES permit must first be made to the EAB within 30
10 days of the EPA notice of its issuance, and then the appropriate federal court of appeals.

11 33 U.S.C. § 1369(b)(1)(F); 40 C.F.R. §§ 124.19(a)(1), 124.19(a)(3); *SCAP v. EPA*, 853 F.3d at
12 1083 n.4; *Whitman*, 242 F.3d at 1101. As for EPA-issued general NPDES permits, the appeal
13 must be made in the federal court of appeals within 120 days of issuance. 33 U.S.C.

14 § 1369(b)(1)(F); 40 C.F.R. § 124.19(o). The permit holder for the only EPA-issued NPDES
15 permit identified in the Complaint, Compl. ¶ 41, has not challenged the use of the TST in this
16 permit before the EAB. 5/9/2017 Stuber Decl., ¶ 3. The APA only authorizes judicial review
17 over final agency actions "for which there is no other adequate remedy in a court," 5 U.S.C.

18 § 704, and because the Clean Water Act provides such a remedy to challenge NPDES permits,
19 an APA challenge is impermissible. Even if brought pursuant to the CWA, such a challenge
20 cannot be brought in district court and must be brought within statutory time limits. See
21 33 U.S.C. § 1369(b)(1)(F). Thus, even if Plaintiffs were to cure their failure to identify which
22 EPA permits they are challenging, this Court would still lack jurisdiction over this action.

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27 ¹¹ EPA concurrently files a Request for Judicial Notice to provide the Court with a
28 sample of the state petitions filed by Plaintiffs challenging certain California-issued NPDES
permits that use the TST. See EPA's 5/9/2017 Request for Judicial Notice. These state
petitions were filed by same counsel representing Plaintiffs in *SCAP I* and *SCAP II*.

1 **C. The Court Lacks Subject Matter Jurisdiction Under the Federal Question Statute,**
2 **United States as Defendant Statute, and the Declaratory Judgment Act.**

3 1. The Federal Question Statute Is Not a Waiver of Sovereign Immunity.

4 Plaintiffs cite to the federal question statute, 28 U.S.C. § 1331, as a basis for this Court's
5 jurisdiction. Compl. ¶ 6. It is well settled that the federal question statute does not provide a
6 general waiver of sovereign immunity. The federal question statute provides: "The district
7 courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or
8 treaties of the United States." 28 U.S.C. § 1331. This provision merely establishes subject
9 matters that are within the jurisdiction of federal courts to entertain. *Hughes v. United States*,
10 953 F.2d 531, 539 n. 5 (9th Cir. 1992) ("A mere assertion that general jurisdictional statutes
11 apply does not suffice to confer jurisdiction when, as in this case, the government did not waive
12 its immunity."). Where the United States is the defendant, federal subject matter jurisdiction is
13 not enough; there must also be a statutory cause of action through which Congress has waived
14 sovereign immunity. *Nordic Village*, 503 U.S. at 34; *Hughes*, 953 F.2d at 539 n.5. Thus, the
15 federal question statute does not itself provide a waiver of sovereign immunity allowing
16 Plaintiffs to bring suit against EPA.

17 2. The Waiver of Sovereign Immunity in 28 U.S.C. § 1346 Does Not Apply to
18 Plaintiffs' Claims.

19 Plaintiffs also cite to 28 U.S.C. § 1346 as a basis for this Court's jurisdiction because the
20 United States is a defendant. Compl. ¶ 6. Section 1346 does contain a limited waiver of
21 sovereign immunity – for civil actions seeking tax refunds and other monetary damages against
22 the United States. 28 U.S.C. § 1346. The limited waiver, however, does not extend to claims
23 for equitable relief. *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997). Section
24 1346, therefore, does not constitute a waiver of sovereign immunity with respect to Plaintiffs'
25 claims, which specifically seek declaratory and injunctive relief. *Cermak v. Babbitt*, 234 F.3d
26 1356, 1361 (Fed. Cir. 2000).
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