Clay R. Smith
Chief Editor, AILD
CWAG & AG Alliance
1807 W. Bannock St. **I** Boise ID 83702
208.350.6426 (Direct Dial) **l** 208.724.9780 (Cell)
Clay.Smith@cwagweb.org

Southern California Alliance of Publicly Owned Treatment Works v. U.S. E.P.A.—Ninth Circuit holds that 2010 EPA Test-of-Significant-Toxicity guidance document is not final agency action

In 1995, the Environmental Protection Agency issued regulations that required certain Clean Water Act permit holders to pass a "whole effluent toxicity" (WET) test to "measure[] the aggregate effect of a discharge on aquatic organisms such as minnows by exposing a test population of organisms to a discharge and counting how many die or become immobilized." 60 Fed. Reg. 53,529 (Oct. 16, 1995). These regulations incorporated several manuals for use in WET testing, each including recommended statistical testing methods. EPA updated the manuals in 2002. 67 Fed. Reg. 69,952 (Nov. 19, 2002). The agency then issued new guidance in 2010 that introduced a statistical method—Test of Significant Toxicity (TST)—that unlike the earlier methods imposed a null hypothesis of sample toxicity because existing methods did not control for false negative results. TST has not been adopted as a formal rule. It should be noted that EPA has transferred responsibility for issuing discharge permits to 47 States, including California.

Three trade organizations representing California municipal agencies operating wastewater treatment plants sued the agency and the relevant regional administrator in 2016 "alleg[ing] that the EPA had violated the APA by issuing the TST guidance without following notice-and-comment rulemaking procedures, and that the EPA had violated its own regulations by requiring and using the TST in discharge permits." The district court dismissed the complaint, as amended, as untimely under 28 U.S.C. § 2401(a). *S. Cal. Alliance of Publicly Owned Treatment Works v. U.S. E.P.A.*, No. 2:16-cv-02960-MCE-DB, 2019 WL 688157 (E.D. Cal. Feb. 19, 2019). The Ninth Circuit affirmed the judgment of dismissal but did so on jurisdictional grounds. *S. Cal. Alliance of Publicly Owned Treatment Works v. U.S. E.P.A.*, No. 19-15535, 2021 WL 3412744 (9th Cir. Aug. 5, 2021).

The panel premised its holding on *Bennett v. Spear*, 520 U.S. 154 (1997), where

> the Supreme Court set out two requirements that must be satisfied for agency action to be deemed final: "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

EPA argued, in turn, "that the guidance does not meet the second requirement because the guidance 'imposed no rights, obligations, or legal consequences.'" The panel agreed:

> Even if the 2010 guidance represents a departure from the view reflected in the earlier regulations, it creates no concrete consequences on its own. To be sure, under plaintiffs' theory, the 2010 guidance suggests that permitting authorities have a new testing

> option. But it is permits, not guidance documents, that create consequences for regulated entities like plaintiffs. Plaintiffs point out that permit holders may be subject to criminal penalties or civil enforcement actions for failing the TST if a state or federal permit requires it. ... But the "if" is key. The statute authorizes civil enforcement actions and criminal penalties for violations of "permit conditions." ... In other words, permit holders are subject to concrete consequences only if a state or federal permit incorporates the TST.

Here, however, "plaintiffs have disclaimed any challenge to specific permits in this litigation, and rightly so" because federally issued permits can be challenged only through review petitions filed in a federal circuit court and state issued permits can be challenged only in state court. In sum, "[p]laintiffs' challenge to the EPA's decision to allow use of the TST in individual permits is appropriately adjudicated in the context of individual permit decisions."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/05/19-15535.pdf