

Whole Effluent Toxicity/Clean Water Act: Federal Appellate Court Addresses Challenge to U.S. Environmental Protection Agency Nonbinding Guidance



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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in an August 5th Opinion a judicial challenge to nonbinding guidance that had been issued by the United States Environmental Protection Agency (“EPA”). See *Southern California Alliance of Publicly Owned Treatment Works, et al. v. U.S. Environmental Protection Agency*, No. 19-15535.

The challenged guidance relates to a statistical method for assessing water toxicity in the Clean Water Act context.

Guidance documents have been used by federal and state environmental agencies since the enactment and/or promulgation of their companion statutes and regulations (i.e., for many years). They provide agencies the ability to move quickly (because of the absence of notice and comment). However, guidance is sometimes challenged by regulated entities arguing they are being treated as binding regulations. This frustration can be amplified if a judicial challenge is dismissed on the basis that the guidance is not a final agency action under the Administrative Procedures Act (“APA”).

The EPA imposes on certain Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permittees a requirement to pass “whole effluent toxicity” (“WET”) tests. See 40 C.F.R. § 122.44(d)(1)(iv). This test measures the aggregate effect (evaluating the integrated effects of all chemicals in the aqueous sample) of a discharge on aquatic organisms. It is one of the ways the agency implements the Clean Water Act’s prohibition of the discharge of toxic pollutants in toxic amounts.

WET tests measure wastewater’s effects on specific organisms’ ability to survive, grow and reproduce. For example, a test population of minnows may be exposed to a permittee’s wastewater effluent. The number of organisms that die or become immobilized will then be counted to determine whether or not the wastewater is “toxic.”

EPA issued guidance in 2010 that relates to the Clean Water Act WET test regulations. The agency stated the guidance was issued in an attempt to limit false positive results (i.e., test results that incorrectly indicate that wastewater is toxic) to no more than five percent. The guidance provides an explanation of how to use what is referenced in the Opinion as:

... a new statistical method called the Test of Significant Toxicity (TST).

A trade association, whose members include California municipal agencies operating wastewater treatment plants (collectively “Plaintiffs”), filed suit in the United States District Court (Eastern District of California) (“Court”) challenging EPA’s use of the TST. They argued that EPA’s use of TST violated the APA when the State of California’s application to use the TST as an “alternative test procedure” for permits under 33 U.S.C. § 1314(h) was approved by EPA.

EPA subsequently withdrew its approval of California’s alternative test procedure and the Court dismissed the case as moot.

Plaintiffs brought another action alleging EPA had violated APA by issuing the TST guidance without following notice-and-comment rulemaking procedures. It also argued that EPA violated its Clean Water Act regulations by requiring the use of TST in certain NPDES discharge permits. This challenge was dismissed by the Court on the basis that the APA’s six-year statute of limitations had expired.

Plaintiffs then amended their Complaint to allege that EPA’s actions were ultra vires, violating the Clean Water Act. The Complaint was again dismissed.

The Court stated that placing a different label on the action did nothing to change the substance of their allegations. Plaintiffs appealed from that dismissal.

The Ninth Circuit references the two requirements that the United States Supreme Court has set out for determining whether an agency action should be deemed final under the APA. They include:

1. The action must mark the consummation of the agency’s decision-making process (i.e., it cannot be of a merely tentative or interlocutory nature)
2. The action must be one by which rights or obligations have been determined or from which legal consequences will flow

EPA conceded that the TST guidance met the first requirement. However, the federal agency argued that the guidance does not meet the second requirement because it:

. . . imposed no rights, obligations, or legal consequences.

The Plaintiffs argued that the TST guidance changed the legal regime by allowing Clean Water Act NPDES permitting authorities to use the TST. EPA disagreed, citing language in a prior WET rule that describes the selective method for interpreting test data as:

. . . not the only appropriate techniques.

The Ninth Circuit concludes that even if the TST guidance “represents a departure from the view reflected in earlier regulations,” it does not create its own consequences. It states:

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.”

NPDES permittees are deemed subject to concrete consequences only if a state or federal NPDES permit incorporates the TST.

The Ninth Circuit also rejects the argument that even if the TST guidance is not final that subsequent EPA actions “crystallized” it into final agency action. Documents cited by the Plaintiffs as problematic are noted to indicate that TST is an “option” – not a “requirement.”

Finally, the Ninth Circuit recognized the Plaintiffs concern that if they are unable to challenge the TST in District Court, it could not be brought in any other forum. It replied stating that:

- State courts can interpret federal law

- State courts can review and enjoin state authorities from issuing NPDES permits that violate Clean Water Act requirements

As a result, the Ninth Circuit holds that the Plaintiffs' challenge to EPA's use of TST in NPDES permits should be adjudicated in individual NPDES permit decisions.

The Ninth Circuit affirms the Court's decision, dismissing the Plaintiffs' challenge to the TST guidance.

A copy of the Opinion can be downloaded [here](#).