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## **Ninth Circuit Rules That EPA's 2010 WET Testing Methodology Is Not Subject to APA Review: Taft Stettinius & Hollister**

In *Southern California Alliance of Publicly Owned Treatment Works v. U.S. Environmental Protection Agency*, — F.4th —, No. 19-15535, 2021 WL 3412744 (9th Cir. Aug. 5, 2021), the Ninth Circuit held that the Environmental Protection Agency's (EPA) nonbinding guidance recommending a new statistical method for assessing water toxicity under the Clean Water Act (CWA) was not a reviewable final action under the Administrative Procedures Act (APA). Instead, challenges to the guidance must be made in the context of individual permit decisions.

Under EPA's National Pollutant Discharge Elimination System (NPDES) program, the CWA permitting scheme, some permit holders must pass a whole effluent toxicity (WET) test which measures the "aggregate effect of a discharge on aquatic organisms." *Id.* EPA previously recommended several statistical methods to satisfy the WET test requirements and in June 2010, recommended an additional method called the Test of Significant Toxicity (TST) in a separate nonbinding guidance document (2010 Guidance). *Id.* at \*2. The plaintiffs, municipal wastewater trade associations, alleged that EPA violated the APA by issuing the 2010 Guidance and the TST without following notice-and-comment procedures. *Id.*

The Ninth Circuit affirmed the district court's dismissal of the plaintiffs' challenge on the alternative ground that the 2010 guidance was not a reviewable final agency action. Under the APA, plaintiffs are only allowed to challenge final agency action and an agency's action is final only if it imposes legal consequences. *Id.* at \*1.

The Ninth Circuit determined that the 2010 guidance does not impose any legal consequences on its own because it merely recommended the TST as another WET testing methodology from which permitting authorities may choose. *Id.* at \*4. In fact, the court found that the 2010 guidance will not have legal consequences at all unless the TST is incorporated into an entity's individual NPDES permit. The court explained that "an agency action is not final when subsequent agency decision making is necessary to create any practical consequences." *Id.* The court, therefore, held that the 2010 guidance was not reviewable under the APA.

Plaintiffs argued that if they are not permitted to challenge the 2010 guidance in the district court, they will have no forum to do so. The Ninth Circuit disagreed and advised plaintiffs and other would-be challengers that the appropriate forum to challenge the TST and 2010 guidance is in the context of individual NPDES permit decisions. *Id.* at \*5.

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