

NACWA Asks Court To Scrap EPA 'Underground' Water Testing Mandate

The National Association of Clean Water Agencies (NACWA) is urging a federal district judge to back California wastewater utilities' suit where they claim EPA is improperly enforcing a guidance on water testing procedures as if it were a binding rule, arguing that the agency has a "pattern" of similar water actions that the court should halt.

NACWA, in an April 19 *amicus* brief to the U.S. District Court for the Eastern District of California, says EPA and California regulators are violating the Administrative Procedure Act (APA) by using an ostensibly non-binding agency memo to support mandating a new Clean Water Act (CWA) test method for wastewater permittees.

The group continues that absent a court ruling holding the practice illegal, EPA will put similar conditions on regulated entities elsewhere.

"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" by legitimizing similar "underground rulemakings" in other regions, NACWA argues in its *Southern California Alliance Of Publicly Owned Treatment Works (SCAP), et al., v. EPA*.

SCAP and its co-plaintiff Central Valley Clean Water Association are suing over action by EPA and California permit writers that required treatment works in the state measuring the toxicity of their effluent discharges to use a toxicity test known as the test of significant toxicity (TST), which the agencies argue is less accurate than other methods.

They claim that the state has treated EPA's guidance to the state accepting the TST as a valid test method as a binding requirement for all permits to use that test, and are seeking a ruling on when regulators can rely on ostensibly non-binding guidance to justify enforceable mandates such as permit limits.

EPA withdrew its original memo in 2015, leading Chief District Judge Morrison C. England Jr. to dismiss the case as mooted on May 15, but the plaintiffs have sought to re-open their suit. They say an internal memo written by California water regulators shows the state is still planning to enforce the TST despite EPA's withdrawal.

NACWA's *amicus* brief says EPA has a "pattern and practice" of working with states to force regulated entities to follow guidance as if it were a binding regulation.

"The State Board's Memo further demonstrates EPA's pattern and practice of mandating use of methods such as the TST through backdoor channels when their use is contrary to promulgated regulations," it says.

England is currently weighing whether to reopen the *SCAP* litigation. While the plaintiffs and NACWA are arguing that California's memo shows the case is not moot as England originally ruled, the Department of Justice (DOJ) on EPA's behalf is arguing that the utilities missed the proper time to add new evidence to their case and should instead file a separate suit.

DOJ is arguing that the groups are seeking to shift the focus of their suit from the 2014 TST approval letter to EPA's earlier guidances that first outlined the test as an option for permit writers. — *David LaRoss*