



April 17, 2025

Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th Street NW, Washington, DC 20503

Submitted via: [Regulations.gov](https://www.regulations.gov)

Re: Request for information: Deregulation Docket ID OMB-2025-0003

Action: Repeal USEPA's Test of Significant Toxicity guidance [EPA 833-R-10-003/004, June 2010]; USEPA should require only the use of more reliable, promulgated Part 136 methods.

To whom it may concern:

Clean Water SoCal is an association of cities, special districts, and other public agencies, formed in 1992, to concentrate resources to effect reasonable local, state and federal regulations impacting publicly owned treatment works (POTWs) and collection systems. Our organization is currently comprised of over 80 wastewater treatment and collection system agencies that together collect and/or treat the wastewater for over 20 million southern Californians in seven counties. Our regular Members are public agencies, either municipalities, joint power authorities, or special districts, charged with the responsibility for treating and disposing of wastewater in a safe and economically viable manner for their ratepayers. Our Associate members are associated with the treatment of water and/or the collection, treatment, disposal, recycling or reuse of wastewater and its residuals within California. For years, Clean Water SoCal has been litigating over the use of guidance documents as regulations and appreciates this opportunity afforded by President Trump's Executive Order 14219, *Ensuring Lawful Governance and Implementing the President's "Department Of Government Efficiency" Deregulatory Initiative* (February 19, 2025) to ask for repeal of U.S. Environmental Protection Agency (USEPA) guidance and regulations related to toxicity testing authorized under the Clean Water Act that have put our Members in compliance jeopardy unnecessarily.

Clean Water Act section 1314(a)(8) requires that USEPA "develop and publish information on methods for establishing and measuring water quality criteria for toxic pollutants on other bases than pollutant-by-pollutant criteria, including biological monitoring and assessment methods." (33 U.S.C. § 1314(a)(8) [emphasis added].) These methods must be *published* in the Federal Register for formal public notice and comment before being codified in 40 Code of Federal Regulation Part 136.



Notwithstanding this statutory requirement, USEPA issued the Test of Significant Toxicity (TST) guidance in June of 2010 (EPA 833-R-10-003/004) and later issued an implementing spreadsheet in May of 2012. Instead of including TST in public notices about modifications to the promulgated methods in 40 Code of Federal Regulation Part 136, USEPA staff, particularly in USEPA Region 9, encouraged the use of these guidance methods. Suggestions or recommendations contained in informal USEPA guidance documents should not be used as regulations.

Due to substantial encouragement from USEPA Region 9, the State of California's State Water Resources Control Board inappropriately used TST to adopt water quality standards, define impaired waterbodies, and implement monitoring programs despite recent studies showing that TST can be wrong up to 50% of the time, finding known non-toxic laboratory blank water samples to be "toxic."

The problems:

- The TST gets a different answer from the formally promulgated methods in 40 C.F.R. Part 136;
- The TST changes the hypothesis used from one with water being presumed non-toxic to one where presumed toxic (i.e., guilty until proven innocent, which is contrary to all tenets of American jurisprudence);
- The TST is more likely to incorrectly declare a non-toxic sample "toxic"; and
- As recognized in *Sackett v. USEPA*, 598 U.S. 651 (2023), the Clean Water Act includes severe civil and even criminal penalties, such that the TST can cause potential hardship and unfounded liability for public utility ratepayers and other Clean Water Act permittees.

Judicial challenges to the USEPA and the State of California's actions have been unsuccessful to date due to a single sentence in the approved methods guidelines incorporated into the promulgated methods under 40 C.F.R. §136.3, which states: "The statistical methods recommended in this manual are not the only possible methods of statistical analysis." Judges have interpreted this sentence to allow any unpromulgated guidance to be used through USEPA's discretion. However, the guidelines in the next sentence go on to say: "the statistical methods contained in this manual have been **chosen** because they are (1) applicable to most of the different toxicity test data sets for which they are recommended; (2) powerful statistical tests; (3) hopefully 'easily' understood by non-statisticians; and (4) amenable to use without a computer, if necessary." Thus, the first sentence should not be maintained since its intent and meaning is being abused.

Request: To protect public agency ratepayers and others from unnecessary and unlawful legal jeopardy:

- 1) Repeal USEPA's TST guidance [EPA 833-R-10-003/004, June 2010] and the 2012 spreadsheet designed to implement the TST. Instead, USEPA should use and require the use of more reliable, promulgated Part 136 methods.



- 2) Remove the first sentence [“The statistical methods recommended in this manual are not the only possible methods of statistical analysis.”] in Section 9.4.1.2 on page 40 of USEPA’s Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms Fourth Edition [EPA-821-R-02-013, October 2002] to ensure that this is not continually used to justify non-regulatory methods.

These two simple deregulatory actions would be consistent with *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) because USEPA’s interpretation of the CWA is not consistent with the “single, best meaning” of that statute that clearly requires regulations, not binding, unreviewed guidance.

The requested actions are also consistent with *Michigan v. EPA*, 576 U.S. 743 (2015) because the USEPA violated the Administrative Procedure Act by utilizing regulations and binding guidance without properly considering the cost as well as the benefits. Here, the costs imposed on Clean Water SoCal Members, such as additional monitoring costs and additional liability for non-compliance with an unreliable test are not justified by any public benefits, and such a cost/benefit analysis was never conducted before utilizing the TST in USEPA and State issued permits and encouraging States to use the TST for regulatory purposes over the promulgated methods.

For the reasons described herein, Clean Water SoCal on behalf of its Members strongly urges that these unlawful regulation provisions and guidance documents be expeditiously repealed using the Administrative Procedure Act’s “good cause” exception.

For additional explanation or clarification please do not hesitate to reach out to me via email at sjepsen@cleanwatersocal.org

Respectfully submitted,

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