Case No. S214855

IN THE SUPREME COURT

OF CALIFORNIA

STATE DEPARTMENT OF FINANCE, et al,

Plaintiffs and Respondents,

vs.

COMMISSION ON STATE MANDATES,

Defendant and Respondent;

COUNTY OF LOS ANGELES et al.,

Real Parties in Interest and Appellants.

OPENING BRIEF OF REAL PARTIES IN INTEREST AND APPELLANTS COUNTY OF LOS ANGELES AND CITIES OF BELLFLOWER, CARSON, COMMERCE, COVINA, DOWNEY AND SIGNAL HILL

California Court of Appeal, Second District, Division One
Case No. B237153
Los Angeles Superior Court Case No. BS130730
Hon. Ann I. Jones, Superior Court Judge

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STATEMENT OF ISSUES FOR REVIEW

1. Is a state mandate created within the meaning of article XIII B, section 6, of the California Constitution where the federal Clean Water Act gives municipalities discretion in designing their stormwater programs, and the state usurps that discretion by mandating the manner in which the municipalities must implement the program?

2. Did the Court of Appeal err in substituting its judgment for that of the Commission on State Mandates as to what constitutes a state mandate versus a federal mandate, where the federal requirement, here the "maximum extent practicable" standard under the Clean Water Act, is not defined by federal statute?

3. To what authority should the Commission on State Mandates and the courts look to define a federal as opposed to a state mandate within the meaning of article XIII B, section 6, where the federal requirement is stated in general terms and not defined by federal statute?

4. Did the State create a state mandate within the meaning of article XIII B, section 6, where it shifted certain inspection obligations from itself to local municipalities under a permit issued by a California Regional Water Quality Control Board?

I. SUMMARY OF ARGUMENT

This appeal places before the Court the fundamental question of how article XIII B, section 6, of the California Constitution applies to stormwater pollution control permits issued by state agencies. The Court of Appeal held that the general mandate jurisprudence interpreting section 6 is of "limited utility" because in issuing these permits state regional water quality control boards are, according to the court, acting as arms of the federal government (Slip op. at 34). This holding is fundamentally flawed; it ignores not only mandate jurisprudence but also the statutory scheme and the nature of these permits, which this Court itself has held can contain both federal and state requirements.

Article XIII B, section 6(a) of the California Constitution provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the cost of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially

implementing legislation enacted prior to January 1, 1975.

This section was adopted by voter initiative in 1979. As this Court has held, "[i]ts purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limits that articles XIII A and XIII B impose." *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

This case presents a clear illustration of why the voters adopted article XIII B, section 6. Here, a state agency, the Los Angeles Regional Water Quality Control Board ("Regional Board"), imposed discretionary programs on Appellants and Real Parties in Interest Cities of Bellflower, Carson, Commerce, Covina, Downey and Signal Hill and County of Los Angeles (the "Cities and County"), as well as on other cities in Los Angeles County, which had no say in the imposition or development of these programs, but nevertheless must use general funds to pay for them, funds that would otherwise be available for police, fire, libraries and other important municipal obligations.

The Commission on State Mandates ("Commission") is the state agency charged with determining the existence of a state mandate and whether a local government is entitled to a subvention of funds for that mandate. The Commission found that the Regional Board's imposition of trash receptacle and inspection obligations on the Cities and County were state mandates within the meaning of article XIII B, section 6.

In reaching this conclusion, the Commission looked to federal authority to define the scope of the federal mandate and applied the rulings

of the courts of appeal in *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155 ("*Long Beach Unified*") and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 ("*Hayes*"). In *Long Beach Unified*, the court held that a state mandate within the meaning of article XIII B, section 6, is created where a state agency usurps a local agency's discretion as to the manner in which to comply with a federal mandate and imposes requirements that exceed federal law. 225 Cal.App.3d at 173. In *Hayes*, the court held that a state mandate is also created where a state agency freely chooses to impose upon a local agency the obligation to perform a federal mandate rather than perform that mandate itself. 11 Cal.App.4th at 1593-94.

The Court of Appeal in this action did not consider the evidence before the Commission (Slip op. at 36) and declined to follow *Long Beach Unified* and *Hayes*, holding that "general-purpose mandate analysis is of limited utility in the area of clean water law . . . ." (*Id.* at 34.) This holding followed from the court's belief that the Regional Board, in imposing the trash receptacle and inspection obligations through issuance of a National Pollutant Discharge Elimination System ("NPDES") municipal stormwater permit (the "Permit"), was not acting in the role of the state but as an arm of the United States Environmental Protection Agency ("USEPA"). (*Id.*)

The Court of Appeal then substituted its judgment for that of the Commission and held that the Permit requirements were not state mandates as a matter of law (*Id.* at 36). In so doing, the court looked to another court of appeal decision, *Building Industry Ass'n. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, to define the scope of the federal mandate. That court, however, used a definition of the federal mandate that was not derived from federal law but was simply

created by a regional board in and for another permit that was at issue in that case. *Id.* at 876 n.7, 889. The Court of Appeal applied that other permit's definition to the mandate issues in this case without reference to any federal authority (Slip op. at 31, 34-35).

The Court of Appeal's analysis was erroneous:

(1) in issuing the Permit, the Regional Board was not acting as an arm of USEPA, but as a state agency implementing a state program in lieu of the federal program. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.22; *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, 522;

(2) the Permit, like all NPDES permits, can contain both federal and state requirements, 33 U.S.C. § 1370; Water Code § 13377, and state requirements in a state-issued NPDES permit are subject to state law, *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 627-28;

(3) the Commission has the exclusive authority to determine the existence of a state mandate, including whether a mandate is state or federal, Govt. Code §§ 17552, 17556(c); *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333;

(4) the Commission properly applied federal authority in finding that that the Permit's trash receptacle and inspection obligations exceeded federal requirements;

(5) the Commission properly applied *Long Beach Unified's* holding that a state mandate is created where a state agency usurps a local agency's discretion as to the manner of compliance with a federal mandate and imposes requirements that exceed federal law, 225 Cal.App.3d at 173;

(6) the Commission properly applied the holding in *Hayes* that a state mandate is created where a state agency freely chooses to impose upon a local agency the obligation to perform a federal mandate rather than perform that mandate itself, 11 Cal.App.4th at 1593-94; and

(7) substantial evidence in the record supported the Commission's decision.

The Court of Appeal's decision should be reversed and the Commission's finding that the trash receptacle and inspection obligations are state mandates within the meaning of article XIII B, section 6, should be upheld.

II. STATEMENT OF APPEALABILITY

This appeal is from a final judgment after trial on a petition for writ of mandate pursuant to Code Civ. Proc. § 1094.5. The final judgment disposed of all issues between the parties as to the petition.

III. STATEMENT OF THE CASE

A. Course of Proceedings Below

In 2003, the Cities and County filed test claims with the Commission, seeking a subvention of funds under article XIII B, section 6, for the trash receptacle and inspection obligations at issue in this appeal. The Commission originally rejected the claims, citing former Govt. Code § 17516(c), which exempted from the term "executive order" any orders issued by the State Water Resources Control Board ("State Board") or the nine regional water quality control boards ('regional boards") (Administrative Record ("AR") 1163-67, 1173-77, 1185-89).

The Los Angeles County superior court thereafter issued a writ of mandate in favor of the Cities and County, ordering the Commission to hear the test claims. On appeal, the Second District Court of Appeal

affirmed the superior court and struck down former Govt. Code § 17516(c) as unconstitutional. *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal. App.4th 898, 904, 920.

The Cities and County re-filed their test claims with the Commission (AR 1535-2452; 2479-2670). On July 31, 2009, the Commission found that the Permit's trash and inspection obligations constituted state mandates (AR 5603; *see also* 1 CT 97, 144).[1] The Commission further found that the state was constitutionally required to reimburse the Cities and County for the trash receptacle obligation but not the inspection obligations because the Cities and County had the ability to assess fees to pay for them (AR 5625; 1 CT 166.)

The Department of Finance, the State Board and the Regional Board (collectively, the "state agencies") petitioned the superior court for a writ of mandate to set aside the Commission's findings (1 CT 11). The state agencies argued that the Permit was issued pursuant to the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq., and that the Commission had failed to consider whether the obligations were federally mandated pursuant to the "maximum extent practicable" standard set forth in the Act. The Cities and County filed a cross-petition seeking review of the Commission's decision that the Cities and County had the ability to assess fees to pay for the inspection obligations (2 CT 266).

The superior court agreed with the state agencies (4 CT 672-82) and ordered the Commission to set aside its decision (4 CT 726). The superior court did not reach the Cities' and County's cross-petition.[2]

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[1] "__ CT __" refers to the volume of the Clerk's Transcript followed by the transcript page.

[2] Counsel for the state agencies and the Cities and County appeared at trial;

On October 16, 2013, the Second District Court of Appeal affirmed the judgment of the superior court. *State Dept. of Finance v. Commission on State Mandates,* Case No. BS237153 (Oct. 16, 2013). On November 26, 2013, the Cities and County filed a Petition for Review in this Court, which granted the petition on January 29, 2014.

B. Facts

1. The Permit

The executive order at issue in this appeal is the Permit, adopted by the Regional Board on December 13, 2001 (1 CT 24). Four Permit requirements are at issue: Part 4.F.5.c.3, which requires the permittees, including the Cities and County, to place trash receptacles at public transit stops (1 CT 74); Part 4.C.2.a, which requires permittees to inspect commercial facilities such as restaurants and gas stations (1 CT 53-56); Part 4.C.2.b, which requires permittees to inspect certain industrial facilities (1 CT 56); and Part 4.E, which requires permittees to inspect certain construction sites as well as to have a program for permit approvals and training of staff with respect to these sites (1 CT 68-70).[3]

2. The Statutory and Regulatory Framework for the Permit

The Permit was issued as both a "waste discharge requirement" under the California Porter-Cologne Water Quality Act ("Porter-Cologne"), Water Code § 13000 *et seq.,* and as a NPDES permit under the CWA (1 CT 24). In 1969, three years before Congress enacted the CWA, the California Legislature enacted Porter-Cologne, which established the State Board and the nine regional control boards as the agencies responsible for the

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the Commission made no appearance and rested on its decision (4 CT 702).

[3] The specifics of the inspection requirements are discussed more fully in Section IV.E, *infra.*

coordination and control of water quality. Water Code § 13001. Under Porter-Cologne, any person who discharges or proposes to discharge "waste" that could affect the quality of the "waters of the state" is required to obtain a waste discharge requirement permit. Water Code §§ 13260 and 13263.

In 1972 Congress adopted what later became known as the CWA. In so doing, Congress expressly preserved the right of any state to adopt or enforce standards or limitations respecting discharges of pollutants or the control or abatement of pollutants, so long as such provisions were not "less stringent" than federal law. 33 U.S.C. § 1370. *See also* 40 C.F.R. § 123.1(i) ("Nothing in this part precludes a State from: (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part; (2) Operating a program with a greater scope of coverage than that required under this part.").

Under the CWA, the discharge of a pollutant to a navigable water of the United States is prohibited unless the discharge is in accordance with one of the statutory provisions of the Act. 33 U.S.C. § 1311(a). One of those provisions is the NPDES permit program. 33 U.S.C. § 1342.

The CWA provides that states may administer their own NPDES permit programs in lieu of the federal program. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.22. A state's decision to do so is entirely voluntary, and if the state chooses not to administer this program, NPDES permits for that state are issued by USEPA. *See* 33 U.S.C. § 1342(a).

To effectuate California's issuance of NPDES permits, the Legislature in 1972 added Chapter 5.5 to the Porter-Cologne Act, Water Code §§ 13370-13389. *Building Industry Ass'n, supra,* 124 Cal.App.4th at 875. In so doing, the Legislature ensured that California law would mirror

the CWA's savings clause by authorizing the State Board and regional boards to not only issue permits that complied with the CWA's requirements, but also to include in them "any more stringent effluent standards or limitations necessary to implement water quality control plans, or the protection of beneficial uses, or to prevent nuisance." Water Code § 13377.[4]

In California, NPDES permits are issued by the State Board and the nine regional boards. Water Code § 13377. Such permits can include both federal requirements and any other state provisions that are more stringent than the federal requirements. *Id.* As this Court recognized in *City of Burbank,* these additional requirements are state-imposed and subject to the requirements of state law. 35 Cal. 4th at 627-28.

The CWA provides that NPDES permits covering operators of municipal separate storm sewer systems, including the Permit, are required to contain, *inter alia,* "controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii) (the "maximum extent practicable" or "MEP" standard). The CWA, however, does not define "maximum extent practicable."

3. Role of the Commission

In November 1979, the voters adopted Proposition 4, which added article XIII B to the state constitution. Section 6 of article XIII B requires that the state provide a subvention of funds for any "new program or higher level of service" imposed by the state on any local government. Calif. Const. article XIII B, section 6(a). As this Court held in *County of San Diego, supra,* 15 Cal.4th at 81, the purpose of section 6 "is to preclude the

[4] As used in Water Code § 13377, the term "waste discharge requirements" refers to NPDES permits. Water Code § 13374.

state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."

In 1984, the Legislature enacted Government Code §17500 et seq. to implement section 6 "because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process." *Kinlaw, supra,* 54 Cal.3d at 331.

In this legislation, the Legislature created the Commission as a quasi-judicial body to adjudicate disputes over the existence of and reimbursement for state-mandated programs. Govt. Code §§17500, 17525, 17551, 17557. The Legislature established a test claim procedure to resolve disputes affecting multiple agencies, established the method of payment of claims, and created reporting procedures which enable the Legislature to budget adequate funds. Govt. Code §§ 17553, 17554, 17558, 17561, 17562, 17600, 17612(a). *See generally, Kinlaw,* 54 Cal.3d at 331-32.

The Commission has sole authority to adjudicate all disputes over the existence and reimbursement of state-mandated programs within the meaning of article XIII B, section 6. Govt. Code § 17552; *Kinlaw,* 54 Cal.3d at 333. Local agencies seeking a subvention of state funds must file a test claim with the Commission. Govt. Code § 17551. The Commission then acts on that test claim at a public hearing at which evidence may be presented by the claimant, the Department of Finance, any other state

agency affected by the claim, and any other interested person. Govt. Code § 17553.

4. The Commission's Action

Following the decision in *County of Los Angeles v. Commission, supra,* the Cities and County re-filed their test claims with the Commission. In addition to legal arguments, the Cities and County submitted the following evidence:

(a) a review of several municipal separate storm sewer system ("MS4") permits issued by USEPA that showed that many permits did not include the trash receptacle or inspection obligations at issue here (AR 3891-98);

(b) evidence that the trash receptacle and inspection obligations had not been included in prior MS4 permits issued by the Regional Board and approved by USEPA (AR 1540-41, 1552, 1782, 3865);

(c) letters from the USEPA Administrator and the head of the water program for Region IX of USEPA, confirming that the state of California, and not cities, had the obligation to inspect facilities for compliance with state-issued permits (AR 3878-881); and

(d) evidence that the Regional Board had negotiated with the County to pay the County to perform inspections of industrial facilities on the board's behalf before the Regional Board decided to impose that requirement on the Cities and County in the Permit without payment (AR 3885-86).

The Commission issued its decision on July 31, 2009, finding that all of the principal obligations in the test claims were state, not federal,

mandates.[5] In reaching this conclusion, the Commission applied the following five principles:

(a) Under the CWA, each state is free to enforce its own water quality laws so long as its requirements are not "less stringent" than those set out in the CWA (1 CT 119).

(b) This Court in *City of Burbank, supra,* 35 Cal.4th at 628, acknowledged that a NPDES permit may contain both terms that are federally mandated and terms that exceed federal law (*Id.*).

(c) An executive order can constitute a reimbursable state mandate where the order imposes requirements that go beyond federal requirements, citing *Long Beach Unified,* 225 Cal.App.3rd at 173 (1 CT 118-19).

(d) Where a federal law imposes a mandate on the state, and the state has a choice between incurring the federal obligation itself or imposing that obligation on a local agency, imposition of the obligation on the local agency creates a reimbursable state mandate. *Hayes, supra,* 11 Cal.App.4th at 1593-94 (1 CT 118).

(e) Govt. Code § 17556(c) states that the Commission shall not find costs mandated by the state if the statute or executive order imposes a requirement that is mandated by federal law or regulation "unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation" (*Id.*).

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[5] The Commission also found that the obligations were an executive order within the meaning of Govt. Code § 17516, constituted new programs or higher level of service, and the Cities and County had incurred costs in excess of $1,000 as required by Govt. Code § 17564 (1 CT 115-17; 144-47). The state agencies have not challenged these findings.

With respect to the trash receptacle requirement, the Commission found both that it exceeded the requirements of the CWA and federal regulations and that the state "freely chose" to impose it on the Cities and County (1 CT 122-27). In particular, the Commission analyzed the regulation cited by the State Board and the Regional Board as federal authority for the requirement, 40 C.F.R. § 122.26(d)(2)(iv)(A)(3).

The Commission found that this regulation did not require the installation and maintenance of the receptacles (1 CT 125). The Commission also distinguished the holding in *City of Rancho Cucamonga v. Regional Water Quality Control Board – Santa Ana Region* (2006) 135 Cal.App.4th 1377, which found that requirements in a MS4 permit issued by a different regional board to municipalities in a different region did not exceed the MEP standard. The Commission found that "[t]here is no indication in that case . . . that the permit at issue required trash receptacles at transit stops" (1 CT 126). Relying on *Long Beach Unified, supra,* the Commission concluded that the requirement "to place trash receptacles at all transit stops and maintain them is an activity . . . that is a *specified action* going beyond federal law." *Id.* (emphasis in original).

The Commission performed the same analysis with respect to the Permit's inspection obligations. Concerning the obligation to inspect restaurants, automotive service facilities, retail gas outlets and automotive dealerships (hereinafter, "commercial facilities"), the Commission reviewed the federal regulations cited by the water boards, 40 C.F.R. § 122.26(d)(2)(iv)(B)(1) and (C)(1). The Commission also reviewed an USEPA MS4 Program Evaluation Guide. The Commission found that "there is no express requirement in federal law . . . to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive

dealerships . . . Nor does the . . . MS4 Program Evaluation Guide . . . contain mandatory language to conduct inspections for these facilities." (1 CT 131-32.)

Next, the Commission found that the obligation to inspect facilities that hold State Board-issued general industrial stormwater permits also was a state mandate.[6] The Commission found that the federal obligation to regulate pollutant discharges in stormwater from industrial sites was being implemented by the state through the State Board's issuance of a statewide General Industrial Activities Stormwater Permit ("GIASP") and enforcement of this general permit by the regional boards. The Commission noted that the Permit itself included a finding that the "Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites." (1 CT 135-36.)[7]

The Commission then found that "there is nothing in the federal statutes or regulations that would prevent the state (rather than local agencies) from performing the inspections of industrial facilities . . . under the state-enforced general permit" (1 CT 136), and that "[i]n fact, the state board collects fees for the regional boards for performing inspections under the GIASP" (*Id.*). Because the state could perform these inspections itself, the Commission found that the state had "freely chosen" to impose this

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[6] A general NPDES permit regulates multiple dischargers within the same category. 40 C.F.R. § 122.28(a)(2).

[7] As discussed in Section IV.E, *infra,* the GIASP was first issued in 1991 (State Board Order No. 91-13–DWQ). The state-wide General Construction Activities Stormwater Permit ("GCASP") was first issued in 1992 (State Board Order No. 92-08).

obligation on the Cities and County and thus it was a state mandate, citing *Hayes,* 11 Cal.App.4th at 1593-94 (1 CT 136).

Finally, the Commission found that the obligation to inspect construction sites was a state mandate. The Commission noted that the federal regulation cited by the water boards, 40 C.F.R. § 122.26(d)(2)(iv)(D)(3), required that the municipal permittee provide "a description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality," but did not "specify the frequency or other specifics of the inspection program as the permit does." (1 CT 141.) Citing *Long Beach Unified,* the Commission ruled that the Permit's construction site activities "are specified actions going beyond the federal requirement . . . As such, it is not a federal mandate for the local agency permittees to inspect construction sites" (*Id.*).

The Commission further found that the Regional Board "freely chose" to impose the construction site inspections and related activities on the permittees as opposed to performing these activities itself (*Id.*). This was the case because such construction site inspections "may be conducted by the state under a state-wide, state-enforced, general permit." *Id.* Since the state had issued the GCASP, which was enforced by the regional boards, and was collecting fees for such inspections, *see* Water Code § 13260(d), there was "nothing in the federal statues or regulations that would prevent the state (rather than local agencies) from performing the inspection of construction sites and related activities . . . under the state-enforced general permit." (1 CT 142.)

5. Review of Commission's Decision by the Superior Court

The superior court granted the writ sought by the state agencies. In its Statement of Decision (4 CT 672-82), the court held that the Commission's analysis was "analytically defective as a matter of law." (4 CT 678.)

Discussing the trash receptacle requirement, the court first held that the state had not "freely chosen" to implement the stormwater permit program because municipal stormwater permits were required to be obtained from either USEPA or a state agency (4 CT 678-79).

The court next found that there was "no substantial evidence in the administrative record to support the Commission's conclusion that the state's mandate in this instance was inconsistent with or more stringent" than the MEP standard (4 CT 679). The court did not, however, analyze or discuss the evidence before the Commission nor did it attempt to define MEP with reference to any federal law. Instead, the court stated that "the Commission simply concluded that the claimed permit requirements were in excess of federal mandates because they could not be located in certain identified federal regulations." (4 CT 679.) The court found that this approach, which it believed the Commission had undertaken, ignored the MEP standard and, as such, was "legally erroneous." (4 CT 680.)

The superior court then reached its own conclusions. Noting that the placement and maintenance of trash receptacles at transit stops would "help prevent the introduction of these known contaminants into the water," the court concluded that this obligation is "clearly within the maximum extent practicable standard." (4 CT 680-81.)

The superior court performed the same analysis with respect to the Permit's inspection requirements. The court said that "the Commission's

rationale that these are not federal mandates because they are not expressly dictated by federal regulation is erroneous," and that because "there is nothing in the record to suggest that [the inspection requirements] exceed [the MEP] standard, the Commission's conclusion to the contrary must fail." (4 CT 681.) The court noted that federal regulations "specifically contemplate inspections of industrial facilities (40 C.F.R. § 122.26(d)(2)(iv)(B) & (C)), and construction sites (40 C.F.R. § 122.26(d)(2)(iv)(D))" (*Id.*).

The court also held that the fact that the inspection requirements had not been in previous municipal stormwater permits did not support the conclusion that they were not federal mandates because a "requirement that the discharge of pollutants requires a NDPES permit is neither new nor different" and the "inclusion of new and advanced measures is clearly anticipated" under the CWA (4 CT 682).

6. Court of Appeal Decision

The Court of Appeal took a different approach. It did not review the Commission's reasoning, but instead performed its own analysis of whether the trash receptacle and inspection obligations constituted federal mandates.

First, the court held that, while it did not disagree with the holdings of *Long Beach Unified* and *Hayes*, because it believed that the MEP standard of 33 U.S.C. § 1342(p)(3)(B)(iii) was unique and imposes a broad standard, general-purpose mandate analysis was of "limited utility." (Slip op. at 34.) In the court's view, in issuing the Permit the Regional Board was acting as an arm of USEPA, not as a state agency (*Id.*).

Next, the court applied a definition of MEP discussed in *Building Industry Ass'n of San Diego County, supra.* That definition of MEP was created by a regional board in another stormwater permit that was at issue

in that case. 124 Cal.App.4th at 876 n.7, 889. Applying that definition, the Court of Appeal found that the trash receptacle and inspection obligations were federal mandates as a matter of law (Slip op. at 35).

Finally, the Court of Appeal concluded that the Permit did not create a state mandate when it shifted the inspection obligations from the Regional Board to the Cities and County. According to the court, this was a shifting of a federal mandate, and therefore could not constitute a state mandate entitled to subvention within the meaning of article XIII B, section 6 (Slip op. at 36).

IV. ARGUMENT

A. In Issuing NPDES Permits, the Regional Board Acts as a State Agency, Issuing State Permits that Can Contain Both Federal and State Requirements; The State Requirements are Subject to State Law

1. When the Regional Board Issues an NPDES Permit, It Does So Pursuant to a State Program in Lieu of the Federal Program

The Court of Appeal reasoned that general purpose mandate analysis is of limited utility in the area of clean water law "because the Clean Water Act recognizes that the states function, for practical purposes, as arms of the EPA . . . ." (Slip op. at 34.) This was error. In issuing NPDES permits, the Regional Board acts as a state agency, issuing NPDES permits pursuant to a state program.

The CWA gives states the option to administer their own NPDES programs. 33 U.S.C. §1342(b). A state's decision to do so is voluntary and, if the state chooses not to administer the program, USEPA issues NPDES permits for that state. *See* 33 U.S.C. §1342(a).

Under 33 U.S.C. §1342(b), the state administers "*its own permit program* for discharges into navigable waters," which program is established and administered "*under State law.*" (Emphasis added.) *See also* 40 C.F.R. §123.22 ("Any State that seeks to administer a program . . . shall submit a description of the program it proposes to administer in lieu of the Federal program *under State law*. . . .") (emphasis added).

When a state administers a NPDES program, therefore, the state is not acting as an arm of USEPA, but is acting *in lieu* of USEPA's program. 40 C.F.R. § 123.22; *State of California v. United States Department of the Navy,* 845 F.2d 222, 225 (9th Cir. 1988) (CWA legislative history "clearly states that the state permit programs are 'not a delegation of Federal Authority' but instead are state programs which 'function . . . in lieu of the Federal program.'"); *Voices of the Wetlands, supra,* 52 Cal.4th at 522 ("It is true, as these parties observe, that the Clean Water Act does not directly delegate a state agency the authority to administer the federal clean water program; instead, it allows the EPA director to "suspend" operation of the federal permit program in individual states in favor of EPA-approved permit systems that operate under those state's own laws in lieu of the federal framework.")

2. NPDES Permits Can Contain Both Federal and State Requirements; The State Requirements are Subject to State Law

The Court of Appeal also erred in failing to recognize that NPDES permits can contain both federal and state requirements.

In adopting the CWA, Congress expressly preserved the right of any state to adopt or enforce provisions addressing any "standard or limitation respecting discharges of pollutants" or any requirement "respecting control

or abatement of pollutants," so long as such provisions are not less stringent than federal law. 33 U.S.C. § 1370. *See also* 40 C.F.R. § 123.1(i). As Justice Stevens wrote in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 723 (Stevens, J. concurring), "Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraints on a State's power to regulate the quality of its own waters more stringently than federal law might require."[8]

California law recognizes this authority. Water Code § 13377 provides that, in issuing NPDES permits, regional boards shall apply and ensure compliance with all applicable provisions of the CWA "together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance."

In *City of Burbank,* this Court recognized that the state retains authority to include state requirements in NPDES permits and that, when it does so, the state must comply with state law. 35 Cal.4th at 618, 627-28. *City of Burbank* involved a challenge to NPDES permits for three wastewater treatment plants. 35 Cal.4th at 621. The operators of the plants, *inter alia,* challenged the permits on the ground that in establishing the numeric effluent limits in the permits, the Regional Board had not considered the cost of compliance, as required by Water Code §§ 13241 and 13263. *Id.* at 622. The defendants countered by claiming that since the

[8] The United States Supreme Court has held that the "Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective . . . ." *Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992), *quoted in City of Burbank,* 35 Cal.4th at 620. In adopting the CWA, Congress stated that "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and elimination pollution . . . ." 33 U.S.C. § 1251(b).

permit was issued under the NPDES program, the provisions were federal and not subject to these sections of the Water Code. *Id.* at 623.

This Court disagreed with the defendants, finding that NPDES permits can contain both federal and state requirements. This Court held that regional boards can include provisions in NPDES permits that are more stringent than federal law, and when they do, the regional board must comply with state law. *Id.* at 627-28.

In support of its conclusion that the state acts as an arm of the USEPA in issuing NPDES permits, the Court of Appeal cited both USEPA's oversight of the program and the fact that USEPA can veto an NPDES permit issued by a regional board (Slip op. at 34). These factors, however, do not go to the dual state/federal nature of NPDES permits as identified by this Court in *City of Burbank.* USEPA's oversight is expressly limited to a state program's compliance with federal requirements. *See* 40 C.F.R. § 123.1(i)(2): "If an approved State [NPDES] program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program." Similarly, USEPA's veto power is not determinative of whether a permit contains a state mandate because EPA's authority in vetoing a permit is addressed to the federal aspects of the permit. *See* 33 U.S.C. § 1342(d)(2).

Thus, any USEPA oversight would not go to additional state requirements in an NPDES permit. This oversight does not turn an NPDES permit into solely a federal permit. As this Court found in *City of Burbank*, NPDES permits can contain both federal and state requirements, and when they do, the state requirements are subject to state law.

B. The Commission is the Agency Charged with Exclusive Authority to Determine Whether a Mandate is State or Federal

1. The Commission Has Exclusive Jurisdiction to Determine Whether a State Mandate Exists

The Commission is the state agency exclusively charged with determining whether a local government is entitled to a subvention of funds. The Commission has sole authority to adjudicate all disputes over the existence and reimbursement of state-mandated programs within the meaning of article XIII B, section 6. Govt. Code §17552; *Kinlaw*, 54 Cal.3d at 333. *See also County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 819 ("[T]he Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists.")

2. The Court of Appeal Erred In Substituting Its Judgment for That of the Commission

Because the Commission is the agency charged with exclusive jurisdiction to determine whether a state mandate exists, the Court of Appeal was required to uphold the Commission's decision if it was supported by substantial evidence. Govt. Code § 17559(b). The Court of Appeal, however, did not honor the Commission's jurisdiction. Instead, the Court of Appeal substituted its own judgment as to whether the trash receptacle and inspection obligations were federal mandates, applying the factors discussed in *Building Industry* (Slip op. at 35). This was error.

Although it is within the province of a court to determine whether a statute or executive order is a mandate as a matter of law, a court cannot substitute its judgment for that of the Commission's with respect to factual determinations as to whether a state mandate exists. Such factual issues are present here, as the court of appeal that heard the first appeal in this case

found. *County of Los Angeles v. Commission on State Mandates,* 150 Cal.App.4th at 917-18. In determining that Govt. Code § 17516(c) was unconstitutional, that court found itself led "to the inescapable conclusion that whether the two obligations in question constitute federal or state mandates *presents factual issues which must be addressed in the first instance by the Commission . . . .*" *Id.* (emphasis added).

Upon remand from that decision the Commission held a hearing, considered evidence and made findings as to whether the trash and inspection obligations fell within the federal mandate (1 CT 117-144). The Court of Appeal, however, did not review those findings to determine if they were supported by substantial evidence (Slip op. at 36). Instead, the court made its own determination and concluded that the trash and inspection obligations were federal mandates as a matter of law (*Id.*). This was error. It was not for the court to substitute its judgment for that of the Commission.[9]

3. It is the Commission, Not the Regional Board, that Determines if a Mandate is State or Federal

The state agencies have argued in this appeal that the Commission should defer to a regional board's determination as to whether a municipal stormwater permit requirement falls within the MEP standard for the purpose of determining whether it is a state or federal mandate (*See e.g.* 3 CT 473-74; Court of Appeal Case No. B237153, Respondent's Brief at 32-33, filed October 25, 2012). This argument, however, ignores Govt. Code §

[9] Indeed, the factors that the Court of Appeal applied in reaching its own conclusion involved inherently factual questions, i.e., "the particular requirement's technical feasibility, costs, public acceptance, regulatory compliance, and effectiveness" (Slip op. at 35) and would thus be for the Commission to decide in the first instance.

17552 and the exclusive jurisdiction the Legislature has placed in the Commission.

Government Code §17552 provides that the filing of a test claim with the Commission is the exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state.

In contrast, the regional boards have no jurisdiction to determine whether a mandate is a state or federal mandate or whether a local agency is entitled to a subvention of funds. As such, any determination that they would make with respect to this issue is entitled to no weight. *See Larson v. State Personnel Board* (1994) 28 Cal.App.4th 265, 273-74 (decisions of personnel board are not entitled to deference where board acts in excess of its jurisdiction); *Department of Parks and Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 824 (same).

In no case has this Court or any court of appeal ever deferred to the decision of the very agency that imposes the mandate when making a determination as to whether a state mandate exists. Indeed, the courts of appeal have gone so far as to hold that, as to the Legislature, its own legislative findings or determinations as to whether a statute creates a state mandate are entitled to no weight. As the court held in *California School Board's Ass'n v. State of California* (2009) 171 Cal.App.4th 1183, "the Legislature's declarations concerning its intent in enacting the state mandate reimbursement provisions are simply irrelevant to the determination of whether a state mandate exists. . . . On remand, the Commission must disregard any declarations of legislative intent and, instead, decide for itself whether a reimbursable state mandate exists." *Id.* at 1204. *See also County of Los Angeles v. Commission, supra,* 32 Cal.App.4th at 819 ("[T]he Commission, as a quasi-judicial body, has the

sole and exclusive authority to adjudicate whether a state mandate exists. Thus any legislative findings are irrelevant to the issue of whether a state mandate exists."); *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1198, 1199-1201 (same). Certainly, if the Legislature's findings with respect to the mandates it imposes are entitled to no weight, the findings of a state agency imposing its mandate are also entitled to no weight.

It is for the Commission to decide whether a mandate is a state or federal mandate, and it is for the court to uphold that determination if it is supported by substantial evidence in the record. Govt. Code §17559(b).

C. The Commission Correctly Applied Federal Authority in Finding that the Permit's Trash Receptacle and Commercial and Construction Inspection Obligations Exceeded Federal Requirements

1. The Commission Properly Looked to Federal Authority to Define the Scope of the Federal Mandate

a. The Issue Before the Court is Not Whether the Maximum Extent Practicable Standard is a Federal Mandate; The Issue is To What Authority the Commission or the Court Should Look to Define that Mandate

As the Commission recognized, Govt. Code § 17556(c) provides that the Commission shall not find costs mandated by the state if the statute or executive order "imposes a requirement that is mandated by federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation." (1 CT 118.)

Preliminarily, the issue before the Court is not whether the MEP standard of 33 U.S.C. §1342(p)(3)(B)(iii) is a federal mandate. The Cities

and County do not dispute that the MEP standard is a federal mandate. The issue is how the scope of that mandate is to be defined where, as here, the federal statute does not define that federal requirement.[10]

In defining the federal mandate, the Commission looked to the federal regulations that implement the NPDES program, and in particular the municipal stormwater permit portion of that program, and a USEPA Program Evaluation Guide. In contrast, the Court of Appeal relied upon a definition of the federal mandate, the MEP standard, discussed in another Court of Appeal decision, *Building Industry Ass'n of San Diego, supra.* (*See* Slip op. at 34-35.) That definition was created by a state agency, a regional board, for use in another stormwater permit that was at issue in that case. 124 Cal.App.4th 866 at 876 n.7, 889. The Commission's reliance on federal authority was correct.

b. When Interpreting a Federal Statute, the Commission and the Courts Must Look to Federal Authority

It is axiomatic that, when interpreting a federal statute, a court or agency must give effect to the intent of Congress. *Household Credit Servs.,*

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[10] For this reason, the Court of Appeal's citation to *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 as to the test for what constitutes a federal mandate was misplaced (Slip op. at 27-28).

In *City of Sacramento*, the issue was whether the requirement that local governments participate in the unemployment insurance program was a federal mandate within the meaning of article XIII B, section 9(b), which exempts federal mandates from a city's constitutional spending cap. 50 Cal. 3d at 71-72. This Court held that a federal mandate could exist for the purpose of excluding an appropriation from a local government's constitutional spending limits not only where there was direct compulsion by the federal government, but also where, through legislative inducements or incentives, the state or its citizens could face a substantial penalty. *Id.* at 73-74. *City of Sacramento* does not address the issue presented in this case: how one defines the scope of a federal mandate where that mandate is not defined by the statute that imposes it.

Inc. v. Pfennig, 541 U.S. 232, 239 (2004); *see also City of Burbank,* 35 Cal. 4th at 625. The fundamental objective of statutory construction is to ascertain the Legislature's intent and give effect to it. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146.

In construing a federal statute, the Commission and the courts must look to federal authority. It is the federal, not the state, government that has ultimate responsibility for implementing federal statutes. Thus, in construing a federal statute, in addition to the plain meaning of the statute and its legislative history, one must look to federal authority as well as case law construing that authority.

This is the approach that this Court and other courts have taken in the past to define federal mandates. In *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, this Court considered a state law that addressed school expulsion hearings. *Id.* at 868. To define the federal mandate (there, federal due process requirements), this Court looked to the federal cases that established those due process requirements. *Id.* at 880 (citing *Goss v. Lopez*, 419 U.S. 565 (1975)). *See also Hayes, supra,* 11 Cal.App.4th at 1587-88 (court looked to 20 U.S.C. § 1401 *et seq.* and case law to define federal requirements); *Long Beach Unified, supra,* 225 Cal.App.3d at 172 (court looked to federal as well as state case law to define federal constitutional duty to desegregate schools).

Here, Congress has explicitly delegated to USEPA the obligation to define the MEP requirement by regulation. Congress, in 33 U.S.C. § 1342(p)(3)(B)(iii), provided that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." Congress did not, however, define "maximum extent practicable." Instead, Congress specifically delegated to

USEPA the obligation to adopt regulations setting forth the permit application requirements for these discharges. 33 U.S.C. § 1342(p)(4)(A) and (B).

Where Congress has explicitly directed an agency to adopt regulations to elucidate specific provisions of a statute, "such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc., v. NRDC, Inc.,* 467 U.S. 837, 843-44 (1984).

Thus, the Commission and the courts must look principally to the federal regulations implementing the NPDES stormwater program to define the permit requirements necessary to meet MEP. These regulations are to be given "controlling weight." *Household Credit Srvs.,* 541 U.S. at 239; *Chevron U.S.A., Inc.,* 467 U.S. at 843-44.

To the extent that the federal statute or regulations do not answer the question being considered by the Commission, the Commission and the courts should then look to secondary federal sources. These could include agency action itself, such as the USEPA-issued stormwater permits here, court cases, and other secondary authorities that reflect the understanding of the federal statute by the federal agency charged with implementing it. *See Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 543-544 (Board of Control and court looked to letter from federal Occupational Safety and Health Administration as well as federal statute in determining whether state requirement was state or federal mandate).

2. The Commission Correctly Applied Federal Authority

As set forth above, Congress did not define the MEP standard, but instead directed USEPA to adopt regulations defining the elements of stormwater programs necessary to meet that standard. 33 U.S.C. §1342(p)(4)(A) and (B). In 1990, in accordance with that directive, USEPA adopted such regulations for industrial and large and medium municipal stormwater discharges (known as "Phase I permits"). 55 Fed. Reg. 47990 (November 16, 1990). In 1999, USEPA adopted such regulations for small municipal and small construction discharges (known as "Phase II permits"). 64 Fed. Reg. 68722 (December 8, 1999).[11] Because Congress delegated to USEPA the power to define the elements of CWA-required stormwater programs, these regulations are to be given controlling weight as to the federal requirements for these programs. *Chevron U.S.A., Inc.*, 467 U.S. at 843-44.

Consistent with *Chevron*, the Commission analyzed the federal regulations cited by the State and Regional Boards themselves as authority for the trash receptacle and commercial and construction inspection obligations. The Commission also had before it other, secondary evidence of USEPA's construction of the statute. This evidence included USEPA's MS4 Program Evaluation Guidance manual (AR 3391-3493), other USEPA-issued permits (AR 3891-4190), evidence that the trash receptacle and inspection obligations had not been included in prior permits issued by the Regional Board and approved by USEPA (AR 1540-41, 1552, 1782, 3865), and letters from the USEPA administrator and the head of the water program for Region IX of USEPA, confirming that the state, and not the

[11] Because the Cities and County are large municipalities, the Permit is a Phase I permit.

Cities and County, was obligated to inspect facilities for compliance with state-issued permits (AR3878-81). With this evidence before it, the Commission then applied the holding in *Long Beach Unified* that a state mandate is created where the state imposes a mandate that exceeds federal requirements (1 CT 124-25, 130-32, 134-36, 139-42).

(a) Neither 40 C.F.R. § 122.26(d)(2)(iv)(A)(3) Nor Other Federal Authority Requires the Installation of Trash Receptacles

With respect to the trash receptacles, the Commission analyzed 40 C.F.R. § 122.26(d)(2)(iv)(A)(3), the regulation cited by the state agencies as authority for requiring the receptacles (1 CT 124-25) This regulation provides that the proposed management program required of municipal permittees under 40 C.F.R. § 122.26(d)(2)(iv) shall include a "description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems . . . ." The Commission found that this regulation, which related only to a description of practices and not their implementation, did not expressly require the installation and maintenance of the receptacles (1 CT 125). Citing *Long Beach Unified,* the Commission concluded that the requirement "to place trash receptacles at all transit stops and maintain them is an activity . . . that is a *specified action* going beyond federal law." (1 CT 126) (emphasis in original).

The Commission's analysis and conclusion was correct. 40 C.F.R § 122.26(d)(2)(iv)(A)(3) addresses the operation and maintenance of public streets. It does not address the collection of trash. Thus, the installation of trash receptacles is not an activity required by the federal regulations that define the permit application requirements necessary to meet the statutory

MEP standard.[12] This conclusion is buttressed by the fact that other stormwater permits, including USEPA-issued permits, did not include this requirement (AR 1552, 3892, 3896). If trash receptacles were federally mandated, they would have been present in those USEPA-issued or approved permits.

(b) Neither 40 C.F.R. §§ 122.26(d)(2)(iv)(B)(1), 122.26(d)(2)(iv)(C)(1), Nor Other Federal Authority Requires the Inspection of Commercial Facilities as Required by the Permit[13]

With respect to the commercial inspection obligation, the Commission analyzed the regulations cited by the State and Regional Boards, 40 C.F.R. §§ 122.26(d)(2)(iv)(B)(1) and (C)(1), and the USEPA MS4 Program Evaluation Guidance manual (1 CT 130-32). After reviewing these materials, the Commission found that "there is no express requirement in federal law . . . to inspect restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships . . . Nor does the portion of the MS4 Program Evaluation Guide . . . contain mandatory language to conduct inspections for these facilities." (1 CT 131-32).

This conclusion also was correct. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1) provides that a municipal permittee's management program must include a "description of a program, including inspections, to implement and enforce

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[12] Although relied upon by the Commission with respect to commercial inspections but not the trash receptacles, the USEPA MS4 Program Evaluation Guidance manual also did not specify trash receptacles as a federally mandated requirement. (*See* AR 3439-40 (no mention of trash receptacles in evaluating street operation and maintenance).)

[13] The Commission found that the Permit's industrial inspection obligations were a state mandate because the state freely chose to shift that obligation from itself to the Cities and County (1 CT 134-36). See Section IV.E, *infra.*

an ordinance, orders or similar means *to prevent illicit discharges* to the municipal separate storm sewer system." (Emphasis added.) This regulation addresses "illicit discharges" to the storm sewer system, not inspections of commercial facilities. (Illicit discharges are discharges to the municipal storm sewer that are not composed entirely of storm water except discharges pursuant to a NPDES permit or resulting from fire fighting activities. 40 C.F.R § 122.26(b)(2).)

Similarly, 40 C.F.R. § 122.26(d)(2)(iv)(C)(1) does not require commercial inspections. This regulation provides that the permittee's management program must identify priorities and procedures for inspections and implement control measures for discharges from four specific categories of facilities, "*municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant load to the storm sewer system . . .*" (Emphasis added.)[14] This regulation sets forth the facilities that must be inspected as part of the federal stormwater program. It specifically does not include restaurants, automotive service facilities, retail gasoline outlets, or automotive dealerships.

The USEPA MS4 Program Evaluation Guidance manual also supported the Commission's decision (AR 3391). The purpose of the guide

[14] Industrial facilities that are subject to section 313 of SARA Title III, the Emergency Planning and Community Right-to Know Act, are facilities of a statutorily designated size and type that manufacture, process or use certain toxic chemicals. 42 U.S.C. § 11023(b).

is to assist permitting agencies in assessing the compliance and effectiveness of MS4 programs (AR 3393). The guide notes that MS4 permits usually include programmatic requirements involving the implementation of Best Management Practices ("BMPs") and permittees are often allowed flexibility with the types of BMPs and activities implemented to meet permit requirements. *Id.*

With respect to commercial and industrial facilities, the guide first cites the federal regulations that set forth the requirements that municipalities must meet. The guide does not cite 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), relating to illicit discharges, but only section 122.26(d)(2)(iv)(C)(1), which specifies the four types of facilities that must be inspected.[15] According to the guide, "NPDES MS4 permits must address these requirements *and often include more specific state requirements*." (AR 3467.) (Emphasis added.) Thus, both the regulations and USEPA's own guide for evaluating municipal stormwater programs supported the Commission's conclusion that federal authority did not require the commercial inspections.

(c) Neither 40 C.F.R. § 122.26(d)(2)(iv)(D)(3) Nor Other Federal Authority Requires the Inspection of Construction Sites as Required by the Permit

Finally, in analyzing 40 C.F.R. § 122.26(d)(2)(iv)(D)(3), the federal regulation cited by the State and Regional Boards as authority for construction site inspections, the Commission found the Permit's obligation

[15] The guide also referenced two other regulations, 40 C.F.R. § 122.26 (d)(2)(i)(A) and (ii). These regulations require, respectively, that a permittee has legal authority to control discharges to the storm sewer system from industrial facilities and creates an inventory of such facilities. The regulations do not require inspections.

to inspect construction sites to be a state mandate for the same reason. This regulation requires "a description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality . . . ." The Commission recognized that, while this regulation imposes a duty to inspect construction sites, it does not "specify the frequency or other specifics of the inspection program as the permit does" (1 CT 141).[16]

Again, the Commission's conclusion was correct. 40 C.F.R. § 122.26(d)(2)(iv)(D) requires permittees to identify priorities for inspecting and enforcing control measures at construction sites. The regulation leaves the mechanics of those inspections to the municipalities' design. The regulations do not require the frequency or the other specifics of the inspection program required by the Permit.

In imposing the Permit's trash receptacle and inspection requirements, the Regional Board imposed obligations that went beyond federal requirements and thus, under *Long Beach Unified*, created state mandates.

3. The Commission Considered the MEP Standard

In the superior court, the state agencies contended that the Commission looked only at the federal regulations and did not consider the MEP standard itself (3 CT 474). The superior court agreed with that

[16] The Commission also found that the construction site inspections were a state mandate because the state freely chose to shift that obligation from itself to the Cities and County (AR 141-42). This finding is addressed in Section IV.E, *infra.*

contention (4 CT 679, 681). This was not correct; the Commission did consider the MEP standard.

The longest section of the Commission's decision is devoted to whether the trash receptacle and inspection obligations constituted federal mandates (1 CT 117-44). In that discussion, the Commission specifically recognized that the CWA provides that MS4 permits shall require controls to reduce the discharges of pollutants to the MEP (1 CT 119, 124). The Commission further acknowledged the State Board's position that "the federal NPDES permit will identify specific requirements for municipalities to reduce pollutants in their stormwater to the maximum extent practicable" (1 CT 119).

The Commission also recognized this requirement in other portions of its decision. *See* 1 CT 123 ("The State Water Board . . . states that the requirements 'reflect the federal requirement to reduce pollutants from the MS4 to the maximum extent practicable.'"); 1 CT 132 (Commission acknowledges State Board's argument that the Regional Board was "mandated by federal law to select BMPs that would result in compliance with the federal MEP . . . standard.")

There is thus no question that the Commission considered the MEP standard. The Commission, however, found that the issue of whether the trash receptacle and inspection obligations were a federal or state mandate was governed by *Long Beach Unified* and *Hayes* (1 CT 126, 132, 136, 141). In doing so, the Commission analyzed both the federal regulations, which, because Congress delegated to USEPA the responsibility to adopt permit application requirements, were the principle authority on which the Commission was to rely, *Chevron U.S.A., Inc.,* 467 U.S. at 843-44 and other, secondary authority such as the USEPA Guidance manual.

D. The Commission Correctly Found That a State Mandate is Created Where a State Agency Usurps a Local Agency's Discretion as to the Manner in Which to Comply With a Federal Mandate and Imposes Requirements that Exceed Federal Law

The Court of Appeal's refusal to follow *Long Beach Unified* was error for another reason. *Long Beach Unified* holds that, even where a requirement is federal, if the state usurps the discretion given to a local agency as to the means to comply with that federal requirement and directs what activities are required, a state mandate is created.

In *Long Beach Unified*, the court was called upon to determine whether regulations issued by the state Department of Education ("DOE") to alleviate racial segregation in schools constituted a state mandate. The state argued that the regulations did not constitute a state mandate because, in part, school districts in California had a federal, constitutional duty to eliminate racial segregation. 225 Cal.App.3d at 172. The court rejected that argument, finding that, whereas public schools had a federal constitutional duty to take "reasonably feasible" steps to eliminate segregation, DOE's regulations set forth specific activities that the school districts were required to perform. Because DOE mandated specific activities instead of allowing the school districts discretion as to how to comply with the federal constitutional mandate, DOE's regulations went beyond federal requirements and constituted a reimbursable state mandate within the meaning of article XIII B, section 6. *Id.* at 173.

The Commission applied *Long Beach Unified's* reasoning to the Permit's requirements. The Commission recognized that, while federal law required programs that would reduce pollutants in MS4 discharges to the "maximum extent practicable" (*see e.g.* 1 CT 119, 124), the Permit required specific activities not found in the federal regulations, thus removing the

Cities and County's discretion as to how to comply with the federal requirement. According to the Commission, this specification itself created a state mandate. (1 CT 124-25, 132, 141).

This Court should affirm the Commission's application of *Long Beach Unified* to the Permit's requirements. Where the state takes away a local agency's discretion as to the manner in which it can comply with a federal mandate, the state's directive is no longer optional, but mandatory. The state is requiring compliance with its directive; other means to comply with the federal mandate are no longer sufficient. As the court in *Long Beach Unified* reasoned in finding the DOE's directives to be a "higher level of service" within the meaning of article XIII B, section 6, "while all of these steps fit within the [federal mandate], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts." 225 Cal.App.3d at 173.

Here the Cities and County had several options available to them to address trash and pollutants coming from commercial, industrial and construction sites. For example, the Cities and County could have addressed trash through the installation of screens on catch basins, increased street sweeping, increased enforcement of litter laws, a combination of these measures, or through other means.

The Cities and County did in fact propose alternatives such as collecting trash along open channels, voluntary programs for trash collection in natural streams (AR 3675), public information programs (AR 3670) and continued implementation of their stormwater management plans, which included street sweeping (AR 3678) and programs to reduce trash from recreational facilities (AR 3677). Some of these approaches

might have been more cost effective than trash receptacles and would have served multiple purposes. The Cities' and County's ability to choose a more effective program, however, was usurped when the Regional Board mandated that the Cities and County *had* to use trash receptacles. This created a state mandate.[17]

This usurpation also occurred with respect to the Permit's requirements to inspect commercial, industrial and construction sites. The Regional Board mandated the nature, scope and frequency of these inspections. It took away the Cities' and County's ability to address pollutants coming from these facilities in other ways, such as through educational visits, or combining inspections with other regulatory programs that had different frequencies or enforcement approaches. The Cities and County had in fact proposed such alternatives in their Permit application (AR 3661, 3670-71, 3672-74).

Thus, this Court should affirm the reasoning of the court in *Long Beach Unified* and the Commission's application of it in this case. Although the federal regulations set forth certain requirements that a municipal stormwater permit must contain, *see e.g.,* 40 C.F.R. § 122.26(d)(2)(iv)(C)(5), the regulations give municipal dischargers substantial discretion with respect to the design of the other portions of their permit programs. With respect to those other portions, the regulations provide that a municipality should submit a proposed stormwater

[17] The Permit did provide that the permittees could request the Regional Board's Executive Officer's approval to substitute a site-specific "best management practice" for one specified by the Permit (1 CT 48 (Permit, Part 4. A)). This provision, however provided only for substitution of "site-specific" activities. It did not allow substitution of an entire program throughout a permittee's entire jurisdiction.

management program. The regulations address the subjects this municipal stormwater program must address, but not the specific activities that must be implemented, which are left to the municipalities to design. *See* 40 C.F.R. § 122.26(d)(2)(iv).

Nevertheless, the state agencies contended below that the MEP standard is flexible, and therefore the Regional Board was free to mandate any program in the Permit that the board found appropriate. The state agencies' argument, however, is contrary to the legislative history and regulatory implementation of the MEP standard.

The legislative history of the CWA amendments makes clear that the flexibility Congress intended to provide under the MEP standard is for the benefit of the municipality, to allow site-specific permit terms. According to the legislative history, not all the types of controls listed in section 1342(p)(3) were required to be in every permit. House Committee on Public Works and Transportation, Section-by-Section Analysis (100th Sess. 1987) *reprinted in* 1987 U.S.C.C.A.N. (101 Stat. 7) at 38-39. USEPA reflected this flexibility by adopting regulations that allow permits to reflect site-specific conditions, with an emphasis on management programs rather than the "end-of-pipe" treatment imposed by traditional, industrial NPDES permits. 55 Fed. Reg. 48037-38, 48052.

Under these regulations, a municipality must submit a permit application with a proposed management program addressing four categories of sources: (1) runoff from commercial and residential areas; (2) illicit discharges and improper disposal into the storm sewer; (3) municipal landfills, hazardous waste treatment, disposal and recovery facilities, SARA 313 industrial facilities, and industrial facilities that the municipality determines are contributing substantial pollutants to the municipal storm

sewer system; and (4) runoff from construction sites. 40 C.F.R. § 122.26(d)(2)(iv) (A), (B), (C), and (D).

It is the municipality that proposes these programs. As USEPA stated in adopting these regulations, "Part 2 of the permit application has been designed to allow the applicant the opportunity to propose MEP control measures for each of these components of the discharge." 55 Fed. Reg. 48052.[18]

The flexibility of the MEP standard, therefore, does not mean that the Regional Board is given carte blanche to require whatever it wants. Flexibility is given to the municipality to design its own stormwater management program. It is the Regional Board's obligation to assure that the municipality's program has controls designed to reduce pollutants to the maximum extent practicable in the four categories set forth by the regulations, 40 C.F.R. § 122.26(d)(2)(iv)(A-D). The municipality, however, has the discretion to design its own program within these categories.

Because the Regional Board in the Permit usurped the Cities' and County's discretion as to how to implement their stormwater programs and mandated specific, required activities, the Regional Board imposed mandates within the meaning of article XIII B, section 6. *Long Beach Unified,* 225 Cal.App.3d at 173.

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[18] USEPA reiterated this principle in 1999 when it adopted the Phase II regulations. In these regulations, USEPA set forth six "minimum control measures" that each small municipality is required to have in its stormwater management plan if the city wanted to obtain coverage under a general permit. USEPA left the design of these programs to each city, to be described in the city's notice of intent to participate under the general permit. 40 C.F.R. § 122.34(b).

E. A State Mandate is Created Within the Meaning of Article XIII B, Section 6, Where the State Freely Chooses to Shift Obligations From Itself to Local Municipalities

In *Hayes*, the court of appeal held that, where a state agency freely chooses to impose upon a local agency or school district the obligation to perform a federal mandate rather than perform that mandate itself, the state imposes a state mandate within the meaning of article XIII B, section 6. 11 Cal.App.4th at 1593-94. Applying *Hayes*, the Commission found that the Permit's obligations to inspect industrial and construction facilities constituted state mandates for this reason also. This Court should affirm the reasoning of *Hayes* and the Commission's application of it here.

1. The Permit's Industrial and Construction Inspection Requirements.

The CWA and its implementing regulations require that certain industrial and construction facilities obtain their own NPDES stormwater permits. 42 U.S.C. § 1342(p)(2)(B) and (3)(A); 40 C.F.R. § 122.26(b)(14) and (c). These permits can be issued to individual dischargers or as general permits. 40 C.F.R. § 122.26(c)(1).

In California, the State Board issues general NPDES permits to these industrial and construction facilities pursuant to Water Code § 13377. The State Board collects a fee from the permittees in an amount necessary to recover costs incurred in connection with the permit's issuance, administration and enforcement. Those fees are separately accounted for. Water Code § 13260(d)(2)(B)(i). Upon appropriation by the Legislature, fifty percent of those fees is available to defray expenditures by the regional board with jurisdiction over the industrial or construction site that generated the fee. *Id.*, subd. (d)(2)(B)(ii). Each regional board that receives this money is required to spend not less than fifty percent "solely on stormwater

inspection and regulatory compliance issues associated with industrial and construction stormwater programs." *Id.*, subd. (d)(2)(B)(iii).

Pursuant to this authority, in 1991 the State Board issued its first General Industrial Activity Stormwater Permit ("GIASP"), followed in 1992 by its first state-wide General Construction Activity Stormwater Permit ("GCASP"). Both of these permits specifically provided that "the regional boards shall enforce the provisions of the permit (State Board Order No. 91-13-DWQ, p. 2, ¶ n. 14; State Board Order No. 92-08-DWQ, p. 2, ¶ 10).)

In 1997, the State Board reissued the GIASP (AR 3579-657). In doing so the State Board again specifically directed that, "following the adoption of this General Permit, the *Regional Water Boards shall enforce its provisions"* including "*conducting compliance inspections*." (AR 3596, Finding 13; AR 3601, Finding 1.a) (emphasis added). In 1999 the State Board reissued the GCASP (AR 2417-44) and again directed that, "following the adoption of this General Permit, the [Regional Boards] shall enforce the provisions herein" including "*conducting compliance inspections*." (AR 2419, Finding 11; AR 2423, Finding 1.a) (emphasis added).

The Permit at issue in this case refers to the industrial facilities subject to the GIASP as "USEPA Phase I" facilities (1 CT 87). Permit Part 4.C.2.b required the Cities and County to inspect these Phase I facilities. The Cities and County were required to assure that industrial facilities possessed a GIASP-required Waste Discharge Identification ("WDID") number, a GIASP-required stormwater pollution prevention plan, and that the facility was implementing BMPs in compliance with the Regional

Board's own Resolution No. 98-08. Permittees also were required to inspect the facilities for compliance with local ordinances (1 CT 56).

The Regional Board also required the Cities and County to inspect construction sites subject to the GCASP. The Permit required that the Cities and County assure that the site owners have GCASP-required WDID numbers and GCASP-required stormwater prevention plans. The Permit also required the Cities and County to track grading permits issued to these construction sites and to train construction inspection staff with respect to these requirements (1 CT 69-70).

The Permit specifically provided that the purpose of each of these industrial and construction inspections was to determine the facility's compliance (1 CT 81). The Permit provided that identified violations of Regional Board Resolution No. 98-08 or the GIASP "may" be referred to the Regional Board for enforcement and the construction sites which lack the required WDID number "shall" be referred to the Regional Board for enforcement (1 CT 58, 69).

2. The Commission Properly Found that the Regional Board Created a State Mandate When it Freely Chose to Shift the Inspection Obligations from Itself to the Cities and County

Applying *Hayes,* the Commission found that the inspection obligations were state mandates because the Regional Board freely chose to impose them on the Cities and County rather than perform the inspections itself (1 CT 136, 142). This conclusion was correct.

First, under Porter-Cologne, the Regional Board regulates the discharges of pollutants from any entity discharging to "waters of the state." This authority includes the regulation of discharges from the commercial, industrial and construction sites that are required to be

inspected under the Permit. Water Code §§ 13050(d) and (e), 13260, 13263.

Porter-Cologne further authorizes the Regional Board to inspect the facility of any person or entity to ascertain whether the purposes of the Act are being met. Water Code § 13267(c). The State Board is given this same authority if it will not duplicate the efforts of the Regional Board. *Id.*, subd. (f).

Porter-Cologne does not exempt from its regulation discharges from commercial, industrial or construction sites. Accordingly, the state, acting through the State Board and the regional boards, has the authority and responsibility for regulating the discharge or proposed discharge of any waste from any of these facilities, including the inspection of these facilities.

Second, as discussed *supra,* the regional boards have also explicitly been charged with the obligation to enforce both the GIASP and GCASP, including the obligation to inspect the industrial and construction facilities that hold these permits. The Permit itself includes a specific finding that the Regional Board is the enforcement authority in the Los Angeles region for these two permits (1 CT 36-37).

Third, as set forth in *Hayes*, the conclusion that a requirement is a federal mandate can mark the starting rather than the end point of a mandate analysis. As the *Hayes* court explained, a central purpose underlying article XIII B, section 6:

> is to prevent the state from shifting the cost of government from itself to local agencies . . . Nothing in the statutory or constitutional subvention provisions would suggest that the

> state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government.

11 Cal.App.4th at 1593. According to the court:

> If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government.

Id. at 1594.

In this regard, the Court of Appeal misinterpreted the holding in *Hayes*. The Court of Appeal held that *Hayes* was inapplicable because, according to the court, the shifting of the federally-mandated GIASP and GCASP inspection obligations via the Permit's inspections "could not constitute the shifting of a *state* mandate." Slip op. at 36 (emphasis in original). *Hayes*, however, applied to the shifting of a *federal* mandate. The court in *Hayes* held that, even if special education requirements were federally required, the state created a state mandate within the meaning of article XIII B, section 6, when the state freely chose to shift those federal requirements onto local school districts rather than perform them itself. 11 Cal.App.4th at 1593-94.

This Court should affirm the reasoning of *Hayes* and the Commission's application of it. Where the manner of the implementation of the federal program is left to the discretion of the state, the state is not obligated to impose those costs on a local agency or school district. The

state's choice to do so is a shifting of financial responsibility that article XIII B, section 6 is meant to address.

Here, Porter-Cologne imposes an obligation on the state to regulate discharges from industrial and construction facilities.[19] In addition, the state issued state GIASP and GCASP permits to these facilities. In these permits the State Board specifically required the Regional Board to enforce their provisions, including conducting compliance inspections.

As the Commission found, the Regional Board could have continued to perform these inspections itself as directed by the State Board in the GIASP and GCASP, but instead chose to shift those obligations to the permittees (1 CT 135-36, 142), while keeping the fees it was allocated to perform these inspections. The shifting of responsibility for these inspections from the state to the Cities and County while the state retains the fees assessed to pay for these inspections is precisely the activity that article XIII B, section 6, was intended to prevent.

F. The Commission's Decision is Supported By Substantial Evidence in the Record

Finally, the Commission's decision must be upheld if it is supported by substantial evidence. Govt. Code § 17559(b). Substantial evidence means "such relevant evidence as a reasonable man might accept as adequate to support a conclusion." *Spurrell v. Spurrell* (1962) 205

[19] Although not the basis for the Commission's finding with respect to commercial facilities, this analysis applies to those facilities also. Under Porter-Cologne, the State and regional boards are responsible for regulating the discharges from commercial facilities. Water Code §§ 13260 and 13263. This includes compliance inspections of these facilities. Water Code § 13267(c). The Permit's imposition of an obligation to inspect commercial facilities was thus not only in excess of federal requirements, but also was a shifting of the Regional Board's obligations under Porter-Cologne itself.

Cal.App.2d 786, 790-91. It requires only that the evidence be reasonable, credible, and of solid value. It does not require that the evidence appear to the appellate court to outweigh the contrary showing. *People v. Javier A.* (1985) 38 Cal.3d 811, 819.

The Commission's decision was supported by substantial evidence here. As a result, the superior court and the Court of Appeal should have upheld it. As discussed above, the evidence before the Commission included the following:

(1) **The federal regulations.** As discussed in the Commission's decision (1 CT 124-25, 131-32, 141), the federal NPDES stormwater regulations do not specifically require installation of trash receptacles or the inspection obligations imposed by the Permit.

(2) **USEPA-issued guidance documents.** The USEPA MS4 Program Evaluation Guidance manual did not list either the trash receptacles or the inspection obligations as federal requirements. *See* AR 3439-40 (no mention of trash receptacles when evaluating street operation and maintenance); AR 3467 (commercial and industrial inspections); AR 3446 (municipalities not required to ensure that construction projects comply with NPDES construction general permits). In fact, this guide specifically noted that MS4 permits may often contain more specific state requirements (AR 3446, 3467).

(3) **USEPA-issued stormwater permits did not include the trash receptacle obligation.** The Cities and County submitted to the Commission a review of several MS4 permits issued by USEPA (AR 3891-4190). None of these USEPA-issued permits included the trash receptacle requirement, the inspection of the commercial facilities or included the extensive requirements for inspection of industrial facilities that were

included in the Permit. Julie Quinn Declaration, ¶¶ 5-6 (AR 3891-92). If these requirements were not included in these USEPA-issued permits, they could not be federally mandated.

(4) **The trash receptacle and inspection requirements had not been included in prior permits.** The trash receptacle requirement and inspection requirements also had not been included in prior permits, permits that had been approved by USEPA as meeting the CWA's requirements (AR 1540-41, 1552, 1782-83, 3865).[20]

(5) **Letters from the USEPA Administrator and the head of the water program for Region IX of USEPA.** These letters confirmed that the state, and not the Cities and County, had the obligation to inspect facilities for compliance with state-issued permits (AR 3878-881); and

(6) **Evidence that the Regional Board had initiated negotiations for a contract with the County whereby the Board would pay the County to perform the inspections of industrial facilities on the Board's behalf.** Following issuance of the Permit, the Regional Board terminated those negotiations. Declaration of Adam Ariki, ¶¶ 4-6 (AR 3885). This evidence reflects, in stark terms, the shifting of state responsibility to the municipalities once the Permit was issued, a responsibility acknowledged

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[20] The superior court found that the fact that these obligations had previously not been required was not determinative because the MEP standard contemplates the introduction of new and advanced technology in subsequent permits (4 CT 680). Trash receptacles and inspections, however, are not new technology. The ability to install trash receptacles at transit stops and to perform inspections were well established when the prior two MS4 permits were issued to the Cities and County. If the federal CWA required installation of trash receptacles or inspections, the Regional Board and USEPA would have been statutorily required to impose it in the prior permits. The fact that neither agency previously required these obligations is evidence on which the Commission could rely.

by the Regional Board through its earlier negotiations to pay the County to conduct these inspections. If these inspection obligations had always been City or County obligations, the Regional Board would have had no reason to negotiate to pay the County to perform them.

Thus, substantial evidence in the record supported the Commission's decision that the trash receptacle and inspection obligations were state mandates, both because the Regional Board specified activities that exceeded federal requirements and because the Regional Board freely chose to shift the inspection obligations to the Cities and County rather than continue to perform these inspections itself.

V. CONCLUSION

For the foregoing reasons, the Court of Appeal's decision should be reversed and the court directed to uphold the Commission's decision that the Permit's trash receptacle and inspection obligations are state mandates. This action should then be remanded to the superior court to address the Cities' and County's cross-petition regarding the availability of funding for the inspection obligations, which the superior court did not address in light of its judgment in this case.

Dated: May 1, 2014

Respectfully submitted,

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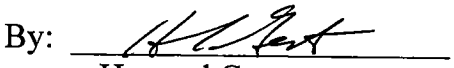
By: 
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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, the undersigned counsel certifies that this opening brief contains 13,513 words, including footnotes, as indicated by the word count of the word processing program used.

Dated: May 1, 2014

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PROOF OF SERVICE

I am employed in Los Angeles County. I am over the age of 18 and not a party to this action. My business address is 624 S. Grand Avenue, 22nd Floor, Los Angeles, California 90017.

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Executed on May 1, 2014 at Los Angeles, California.

Danette Armstead

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