In the Supreme Court of the State of California

STATE DEPARTMENT OF FINANCE et al.,

Plaintiffs and Respondents,

v.

COMMISSION ON STATE MANDATES,

Defendant and Respondent,

COUNTY OF LOS ANGELES et al.,

Real Parties in Interest and Appellants.

COPY

Case No. S214855

Second Appellate District, Division One, Case No. B237153
Los Angeles County Superior Court, Case No. BS130730
Hon. Ann I. Jones, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

The California Regional Water Quality Control Board, Los Angeles Region, issued a sewer permit pursuant to its duty and authority under the federal Clean Water Act and United States Environmental Protection Agency (EPA) regulations. The Regional Board determined, as has every reviewing court, that the permit did not exceed the requirements of federal law. Yet when discrete terms of the permit were later challenged before the Commission on State Mandates, the Commission contradicted the legal conclusion of the Regional Board as well as the courts. The Commission held that the challenged permit terms exceeded the requirements of federal law and were therefore state mandates. Because the Commission erred in construing the requirements of federal law, the superior court issued a writ of mandate overruling the Commission's decision. The Court of Appeal affirmed that determination, and Respondents now ask this Court to do the same.

Under the California Constitution, when the State requires that local governments provide a new program or higher level of service, the State must reimburse the costs of the mandated activity. (Cal. Const., art. XIII B, § 6.) The Constitution does not, however, require the State to pay for local government compliance with federal mandates.

The permit issued by the Regional Board is a federal mandate. It is required by federal law and does not exceed the requirements of federal law. The Clean Water Act forbids local governments from operating a municipal separate storm sewer system (MS4) without a permit that implements the requirements of the Clean Water Act, including controls designed to reduce the discharge of pollutants in stormwater to the "maximum extent practicable." The permit, whether issued by the EPA or an authorized state agency acting in lieu of the EPA, must meet the maximum-extent-practicable standard. Congress delegated to authorized

permitting agencies the discretion to determine the particular combination of practices and controls that will meet this standard. This flexibility allows permitting agencies to effectively address the specific conditions in which different MS4s operate, which can vary widely. The permit defines how MS4 operators must comply with the Clean Water Act and is enforceable in federal district court. Because the permit that the Regional Board issued here did not exceed the requirements of federal law, it is a federal mandate.

The permit contains a set of interrelated terms designed to work together to achieve the federal standard, the requirements of which must be construed pursuant to federal law. As the courts below found, the Commission did not properly construe the requirements of federal law. Federal law does not prescribe an approved list of controls from which the permitting agency must choose in drafting a permit; it leaves the choice of controls that will achieve the federal standard to the expertise of the permitting authority, subject to judicial review. Thus, the extent to which the permit or its terms meets or exceeds the federal maximum-extent-practicable standard cannot fairly be analyzed, as the Commission did, by determining whether discrete terms of the permit are themselves expressly prescribed by federal law. While a regional board may in some circumstances exceed federal permitting requirements and impose additional requirements under California's Porter-Cologne Water Quality Control Act, the Regional Board found, and the courts that reviewed its decision agreed, that the permit here did not exceed federal requirements. The Appellants' arguments fail to provide grounds for reversal, and this Court should therefore affirm the judgment.

LEGAL FRAMEWORK

A. The Federal Clean Water Act and the Origin of the Maximum-Extent-Practicable Standard

The federal government regulates water pollution through the Federal Water Pollution Control Act, commonly known as the Clean Water Act. (33 U.S.C. § 1251 et seq.) The act makes it unlawful to discharge pollutants into waters of the United States from any "point source"—a pipe, ditch, or similar conveyance—without first obtaining a permit under the National Pollutant Discharge Elimination System (NPDES). (*Id.*, §§ 1311, 1342, 1362(14).) A permit translates the act's general requirements into specific obligations that allow a discharger to comply with the act. (See *id.*, § 1342(k).) Put differently, the permit facilitates compliance with, and enforcement of, the act by defining "a preponderance of a discharger's obligations" under the act. (*Environmental Protection Agency v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 205 (*Environmental Protection Agency*).)

An NPDES permit may be effective for up to five years. (33 U.S.C. § 1342(b)(1)(B).) Congress intended that compliance with the act would become increasingly demanding as water quality and pollution-control techniques improved, anticipating that each new permit would contain more stringent standards than the last. (See 55 Fed.Reg. 48052 (Nov. 16, 1990); see also volume 3, Administrative Record (AR) page 3797.) Every condition within an NPDES permit is enforceable in federal court, under federal law. (See 33 U.S.C. § 1365.) Violating the permit subjects the permittee to civil suit and criminal penalties. (See *id.*, §§ 1319, 1342(i).)

1. State Implementation of the Federal NPDES Permitting Program

"The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore

and maintain the chemical, physical, and biological integrity of the Nation's waters.'" (*Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101, quoting 33 U.S.C. § 1251(a).) Although it charged the EPA with administering the NPDES permitting program, Congress envisioned that states would assist in implementation of the program by issuing permits in lieu of the EPA. (See 33 U.S.C. §§ 1251(b), 1342(b).)

Regulations promulgated by the EPA implement the NPDES program, including the criteria that states must meet to obtain federal permitting authority. (See generally 40 C.F.R. parts 122 to 125.) In issuing permits, approved states must ensure that the permit complies with all applicable requirements of the Clean Water Act and its implementing regulations. (*Id.*, § 122.4(a).) But federal law and regulations form a regulatory floor. States may impose more stringent or extensive permit requirements under their own laws. (33 U.S.C. § 1370; 40 C.F.R. § 123.1(i); *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 627-628 (*City of Burbank*) [holding that state-issued NPDES permits may impose requirements more stringent than federal law].)

State permitting authority is also conditioned on compliance with general procedural requirements, like giving public notice of draft permits and allowing for the public to comment on them before they become final. (See, e.g., 40 C.F.R. §§ 124.3, 124.6, 124.8.) State issuers must also follow certain additional requirements. (See 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1 et seq.) For example, states issuing NPDES permits must have legal authority to carry out the permitting program and must provide for judicial review in state court of final approval or denial of permits. (See 33 U.S.C. § 1342(b)(1); 40 C.F.R. §§ 123.1(c), 123.30.) The EPA may review and veto a state-issued permit for failure to comply with the Clean Water Act or its implementing regulations. (See 33 U.S.C. § 1342(d); 40 C.F.R.

§ 123.44.) It also retains ultimate authority to rescind a state's approval to issue NPDES permits. (33 U.S.C. § 1342(c).)

2. Development of the Maximum-Extent-Practicable Standard for Issuance of MS4 Permits

Congress instituted the NPDES permitting program in a 1972 amendment to the Clean Water Act. (See generally *Environmental Protection Agency, supra*, 426 U.S. at pp. 202-205.) Initially, the EPA exempted MS4 discharges from the act's permitting requirements. (*Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 873 (*Building Industry*).) An environmental group successfully challenged that decision before the D.C. Circuit, which rejected the EPA's argument that the variable nature of stormwater pollution made restrictions on the amount of pollutants, called "effluent limitations" in the act, infeasible. (*Natural Resources Defense Council, Inc. v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1372-1373, 1377-1380.) The court held that the EPA Administrator did not have authority to exempt MS4s and ordered the EPA to promulgate regulations. (*Id.* at p. 1383.)

Over the next 15 years, the EPA attempted to draft regulations that "reconcile[d] the statutory requirement of point source regulation with the practical problems of regulating possibly millions of diverse point source discharges of storm water." (*Building Industry, supra*, 124 Cal.App.4th at p. 874.) During that same period, stormwater came to be seen as "one of the most significant sources of water pollution in the nation" because it carries "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States." (See *Environmental Defense Center, Inc. v. United States Environmental Protection Agency* (9th Cir. 2003) 344 F.3d

832, 840-841 (*Environmental Defense Center*).) In response to the EPA's struggle to develop a workable regulatory scheme for MS4s, and in recognition of the environmental threat posed by stormwater, Congress passed the Water Quality Act of 1987. (See *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency* (9th Cir. 1992) 966 F.2d 1292, 1296 (*Natural Resources Defense Council*).) The act added section 402(p) to the Clean Water Act to address stormwater permitting. (See 33 U.S.C. § 1342(p).) The new MS4 standard marked a shift away from the previous practice of requiring NPDES permittees to comply with numeric effluent limitations fixed by law or regulation. (*Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1163, 1165-1166.)

Clean Water Act section 402(p)(3)(B) introduced a flexible permitting standard for MS4 permits. (See 33 U.S.C. § 1342(p)(3)(B).) That is, rather than adopting effluent limitations that would apply across the board to all MS4 permittees or requiring immediate end-of-pipe compliance with water quality standards, Congress empowered the permitting authority—either the EPA or a state—to issue permits that respond to the unique circumstances of each MS4. (*Building Industry, supra*, 124 Cal.App.4th at p. 874; see also *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1092-1094 [discussing effluent limitations and NPDES permitting generally].)

Section 402(p)(3)(B) includes three discrete obligations for MS4 permits. First, permits for MS4 discharges must prohibit non-stormwater discharges into the MS4. (33 U.S.C. § 1342(p)(3)(B)(ii).) Second, permits for MS4 discharges must include "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods." (*Ibid.*) Third, the permits for MS4 discharges "shall require . . . such other

provisions as the Administrator or the State determines appropriate for the control of such pollutants." (*Ibid.*) Collectively, these statutory requirements reflect the federal standard, although this case concerns only the maximum-extent-practicable standard.

In 1990, the EPA adopted regulations implementing the new rule for large and medium MS4s. (See generally 55 Fed.Reg. 47990; *Natural Resources Defense Council, supra*, 966 F.2d at pp. 1296-1298.) Large MS4s serve populations of 250,000 or more, while medium MS4s serve populations between 100,000 and 250,000. (40 C.F.R. § 122.26(b)(4), (7).) The regulations, which are codified at 40 C.F.R. § 122.26, implement the Clean Water Act's maximum-extent-practicable standard. Neither the act nor the EPA's regulations, however, defines the maximum-extent-practicable standard. As the EPA's notice of rulemaking explained, the maximum-extent-practicable standard represented Congress's recognition that effectively regulating discharges from MS4s is a complex undertaking and that MS4 permit requirements "should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges." (55 Fed.Reg. at pp. 48037-48038.) Developing permits in a flexible manner allows the agencies charged with drafting them to "tailor permits to the site-specific nature of MS4 discharges," and it reflects Congress's recognition that different permits may have different requirements. (See *In re: City of Irving, Texas Municipal Separate Storm Sewer System* (U.S. E.P.A. Environmental Appeals Board, July 16, 2001) 10 E.A.D. 111 [2001 WL 988723 at p. *6] (*City of Irving*).) The "standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness." (*Building Industry, supra*, 124 Cal.App.4th at p. 889.)

Under the EPA's regulations, municipalities seeking permits to operate a large or medium MS4 must submit detailed applications. (See 40 C.F.R. § 122.26(d).) The applicant must propose a management program to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques, system, design and engineering methods, and any other appropriate approaches. (*Id.*, § 122.26(d)(2)(iv); see also 3 AR 3393.) As with any NPDES permit, although the applicant proposes permit provisions that it believes will comply with the Clean Water Act and EPA regulations, it is the permitting agency that ultimately "has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants" to comply with federal law. (See *City of Rancho Cucamonga v. Regional Water Quality Control Board – Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389 (*Rancho Cucamonga*); cf. *Environmental Defense Center, supra*, 344 F.3d at p. 856 [explaining that "stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable"].)

B. The Porter-Cologne Act and California's Implementation of the NPDES Permitting Program

The California Legislature passed the Porter-Cologne Water Quality Control Act in 1969 to promote conservation, to attain the highest water quality reasonable, and to protect the public health, safety, and welfare. (Wat. Code, § 13000.) The act required the State Water Resources Control Board (State Board) and nine regional boards (collectively, the Water Boards) to implement water law and policy. (*Id.*, §§ 13100, 13140, 13200, 13201, 13240, 13241, 13243.) Shortly after Congress added the NPDES program to the federal Clean Water Act in 1972, the California Legislature

determined that it was in the interest of the people to have the State issue NPDES permits in lieu of the EPA, "to avoid direct regulation by the federal government of persons already subject to regulation under state law . . . ." (See *id.*, § 13370.) The Legislature added chapter 5.5 to the Porter-Cologne Act to achieve that goal and to align California law with federal law. (See *id.*, § 13372.) In 1973, California became the first State to receive EPA approval to issue NPDES permits. (See *Environmental Protection Agency*, *supra*, 426 U.S. at p. 209.)

Under the Porter-Cologne Act, the Water Boards issue waste discharge requirements. (Wat. Code, § 13377.) Those requirements "are the equivalent of the NPDES permits required by federal law." (*City of Burbank*, *supra*, 35 Cal.4th at p. 621, citing Wat. Code, § 13374.) To obtain waste discharge requirements from the Water Boards, a discharger must submit a report of waste discharge, which is the equivalent of an NPDES permit application. (See Wat. Code, §§ 13260, 13374.) The Water Boards then process the application in accordance with federal NPDES permitting rules and procedures. (See Cal. Code Regs., tit. 23, §§ 2235.1-2235.2.) After considering an applicant's report of waste discharge, along with information learned before and during public hearings, the Water Boards prescribe waste discharge requirements that constitute an NPDES permit. (See Wat. Code, § 13263, subd. (a).) Any "aggrieved person," including the discharger, may petition the State Board for administrative review of the permit's appropriateness and propriety. (See *id.*, § 13320, subd. (c); Cal. Code Regs., tit. 23, §§ 2050-2068.) A party that disagrees with the State Board's decision may challenge it in superior court by petition for administrative mandamus. (See Wat. Code, § 13330, citing Code Civ. Proc., § 1094.5.) These application and judicial-review procedures govern MS4 permits. (See, e.g., *Rancho Cucamonga*, *supra*, 135 Cal.App.4th at pp. 1381-1391 [reviewing challenge to an MS4 permit].)

C. California Mandates Law

California mandates law has its origins in the late 1970's, when Proposition 13 and Proposition 4 added articles XIII A and XIII B to the California Constitution, limiting state and local governments' taxing and spending powers. (*Department of Finance v. Commission on State Mandates* (*Kern High School District*) (2003) 30 Cal.4th 727, 735.) Section 6 of article XIII B provides that "[w]henever 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 costs of the program or increased level of service . . . ." (Cal. Const., art. XIII B, § 6.) The section prohibits "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 limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 (*County of San Diego*).)

But when federal law requires local government entities to provide a new program or higher level of service, these subvention requirements do not apply. (See, e.g., *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 881, 888 (*San Diego Unified*).) The Constitution specifically excludes "[a]ppropriations required to comply with mandates of the . . . federal government." (Cal. Const., art. XIII B, § 9.) When the State implements a federal requirement through a statute or executive order, it creates a state mandate only if "the statute or executive order mandates costs that exceed" the federal requirement. (Gov. Code, § 17556, subd. (c).)

School districts and local agencies may seek redress for an unfunded state mandate before the Commission, a quasi-judicial body that the

Legislature created to administer the statutory procedures implementing article XIII B, section 6. (See Gov. Code, § 17500.) The Commission uses a test-claim procedure to adjudicate mandates claims. (See *id.*, §§ 17521, 17553; Cal. Code Regs., tit. 2, § 1181.2, subd. (s).) A "test claim" is "the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state . . . ." (Gov. Code, § 17521.) Though multiple claimants may join together in pursuing a single test claim, the Commission will not hear duplicate claims, and Commission decisions apply statewide to similarly situated school districts and local agencies. (See Cal. Code Regs., tit. 2, § 1183.1; *San Diego Unified, supra*, 33 Cal.4th at p. 872, fn. 10.) Thus, the test-claim "functions similarly to a class action and has been established to expeditiously resolve disputes affecting multiple agencies." (Cal. Code Regs., tit. 2, § 1181.2, subd. (s).) Filing a test claim is the exclusive procedure for claiming and obtaining reimbursement for costs mandated by the State. (Gov. Code, § 17552.)

A test claim must identify the sections of statutes or executive orders that purportedly impose a mandate, explain in detail how they create new costs, and include evidentiary support. (Gov. Code, § 17553, subd. (b); Cal. Code Regs., tit. 2, § 1183.1.) The Department of Finance and any other interested state agency or interested person may submit written comments on the test claim. (Cal. Code Regs., tit. 2, §§ 1183.2, 1181.2, subds. (j), (*l*); see also Gov. Code, § 17533, subd. (a)(1).) Either the claimant or the State may seek judicial review of a final Commission decision by petition for administrative mandamus. (Gov. Code, § 17559, subd. (b), citing Code Civ. Proc., § 1094.5.)

If a state mandate exists, and that mandate applies to cities, counties, or special districts, the State may choose either to appropriate funds to reimburse the affected local government entities, or to suspend the

operation of the mandate. (See Cal. Const., art. XIII B, § 6, subd. (b); Gov. Code, § 17581; *California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507, 1513-1514 ["with respect to a reimbursable mandate, for each fiscal year, the Legislature is required to choose to either fully fund the annual payment toward the arrearage or suspend the operation of the mandate"].)

SUMMARY OF FACTS

A. The Regional Board Issued an MS4 Permit

In February 2001, the County of Los Angeles, the Los Angeles County Flood Control District, and 84 incorporated cities within the flood control district applied for a renewal of their MS4 permit by submitting a report of waste discharge to the Regional Board. (See 3 AR 3663-3786.) The Regional Board issued the permit later that year. (1 Clerk's Transcript (CT) 24-95.) Among other provisions, the permit required the placement and maintenance of trash receptacles at transit stops, and inspections of various commercial, construction, and industrial facilities. At the time, 9.5 million people lived in the 3,100-square-mile area covered by the permit. (1 CT 31.) The six-part, 70-page permit was the result of a 10-month administrative process that generated an 80,000-page administrative record and included approximately 50 meetings between the Regional Board staff and interested parties. (3 CT 415; 1 CT 25.)

The Regional Board based the permit on the application, the Regional Board's experience with implementation of the previous permit, then-current EPA guidance, and other information learned before and during the public hearing. The Regional Board determined that the permit was necessary to meet minimum federal requirements and implement the federal maximum-extent-practicable standard:

> This permit, and the provisions herein, are intended to develop, achieve, and implement a timely, comprehensive,

> cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the [maximum extent practicable] from the permitted areas in the County of Los Angeles to the waters of the State.

(1 CT 48; see also 1 CT 32 [making similar statement]; 1 CT 82.)

B. The Permittees Challenge the Permit

The County of Los Angeles, Los Angeles County Flood Control District, and various cities sought review of the permit, first before the State Board and then in the courts by petition for administrative mandamus. (See 3 CT 408-431.) They raised several challenges, including an argument that the Regional Board exceeded its authority "under the federal Clean Water Act and California's Porter-Cologne Water Quality Act by imposing requirements that go beyond the 'maximum extent practicable' ('MEP') standard and/or the Porter-Cologne Act's 'reasonably achievable' standard." (3 CT 413-414.) The superior court denied the petition, ruling in part that "the administrative record contains significant evidence showing that the terms of the Permit taken, as a whole, constitute the Regional Board's definition of MEP" and that "[t]here is significant evidence in the administrative record that the Regional Board looked to both other states and jurisdictions, and conducted its own independent studies regarding various methods for compliance with MEP." (3 CT 418-419 & fn. 5.)

The County and cities appealed, and the Court of Appeal affirmed. (*County of Los Angeles v. California State Water Resources Control Board* (2006) 143 Cal.App.4th 985 (*State Water Board*) [complete opinion at 3 AR 3241-3268; unpublished portions at 3 AR 3257-3268].) An intervening development in the case law featured prominently in the County and cities' argument on appeal. Within weeks of the trial court's decision, this Court decided *City of Burbank*, *supra*, 35 Cal.4th 613. (See

3 CT 412.) In that case, this Court reviewed NPDES permits authorizing publicly owned water reclamation plants to discharge treated wastewater. (See *City of Burbank*, *supra*, 35 Cal.4th at pp. 622-623.) Those permits were subject not to the flexible maximum-extent-practicable standard, but rather to end-of-pipe effluent limitations based upon standards developed by EPA. (See *id.* at pp. 620-621.) This Court held that a state-issued NPDES permit can exceed federal Clean Water Act requirements, but it also held that the board issuing a permit that exceeds federal requirements must take into account the considerations listed in Water Code sections 13263 and 13241, including economic considerations, for those requirements that exceed federal law. (See *id.* at pp. 626-629.)

The County and cities argued that the permit issued by the Regional Board exceeded the requirements of the Clean Water Act and that because it did, *City of Burbank* required the Regional Board to consider the economic effect of the permit, which the Regional Board had not done. (See *State Water Board*, *supra*, 143 Cal.App.4th 985 [unpublished section G.3 at 3 AR 3259].) The Court of Appeal decided that argument had "no merit." (*Id.* [unpublished section G.3 at 3 AR 3260].) The court denied rehearing, and this Court denied review on February 14, 2007.

C. The County and Cities File Test Claims with the Commission

In 2003, nine months after filing the petition for mandamus directly challenging the permit in superior court, the County and several cities—Bellflower, Carson, Commerce, Covina, Downey, and Signal Hill—also filed test claims with the Commission. (See, e.g., 1 AR 19, 599.) The Commission initially refused to consider the claims because the then-current version of Government Code section 17516, subdivision (c), deprived it of authority to review Water Board orders. (See 1 AR 1153-1171; 2 AR 1173-1200.) The County and cities (collectively, the County)

challenged that statute's constitutionality in superior court, which issued a writ of mandate instructing the Commission to consider the test claims. The Court of Appeal affirmed. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.) The Legislature later amended section 17516 to remove the language excluding Water Board orders from Commission review. (See Stats. 2010, ch. 288, § 1, p. 9.)

The County and cities pursued four test claims. (See 2 AR 1535-1755; 2 AR 1757-1950; 2 AR 2259-2451; 3 AR 2479-2670.) The four test claims challenged four discrete provisions of the permit:

- Part 4.F.5.c.3, which requires certain permittees to place and maintain trash receptacles at all transit stops (1 CT 74; 2 AR 1540);
- Part 4.C.2.a, which requires permittees to inspect restaurants, automotive service facilities, retail gasoline outlets, and automotive dealerships to verify that those businesses meet certain criteria that prevent non-stormwater discharge, like restaurant grease, from entering the MS4 (1 CT 54-56; 2 AR 1762-1766);
- Part 4.C.2.b, which requires inspection of certain industrial facilities to confirm that they are meeting several criteria, including implementing best management practices in compliance with county and municipal ordinances (1 CT 56, 87; 2 AR 1766-1769); and
- Part 4.E, which requires inspections of certain construction sites to ensure that the sites meet the permit's minimum requirements, such as using best management practices to control erosion from slopes and channels (1 CT 67-70; 2 AR 2266-2267).

The claimants contended that the specific permit provisions requiring commercial inspections, industrial inspections, and construction-site inspections, as well as the placement and maintenance of trash receptacles, imposed new programs or higher levels of service on the permittees that were not required by the Clean Water Act and for which the permittees lacked funding authority. (See, e.g., 3 AR 2488-2497.) Given the

similarity and overlap among the four test claims, the Commission consolidated them. (See 5 AR 5681-5682.) After a hearing, it found that each of the four challenged permit provisions was not required by federal law. (5 AR 5603.)

The Commission did not review the record before the Regional Board, or analyze whether the permit exceeded the federal maximum-extent-practicable standard. Instead, it reasoned that because the Clean Water Act and its implementing regulations do not expressly require either trash receptacles at transit stops or inspections, these permit provisions exceeded the requirements of federal law. (See 5 AR 5584, 5590.) Relying on the Court of Appeal's decision in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594 (*Hayes*), the Commission reasoned that, absent an express federal statutory or regulatory command, the State had freely chosen to impose the trash receptacle requirement on the permittees. (See 5 AR 5584 & fn. 89.) It also reasoned that under the Court of Appeal's decision in *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173 (*Long Beach Unified*), the trash receptacle requirement amounted to a "specified action going beyond federal law." (5 AR 5585 & fn. 92.)

With regard to the inspection requirements, the Commission also reasoned that neither the Clean Water Act nor its implementing regulations require local agencies, as opposed to the State, to conduct such inspections. (See 5 AR 5595, 5601.) The Commission noted that the State Board has issued statewide NPDES permits covering industrial facilities (GIASP) and construction facilities (GCASP) that the regional boards enforce. (See 5 AR 5594-5595, 5601; see also 3 AR 3579-3657 [GIASP]; 2 AR 2417-2444 [GCASP].) The Commission remarked that "[t]here is nothing in the federal statutes or regulations that would prevent the state (rather than the local agencies) from performing the inspections" of industrial facilities and

constructions sites, suggesting that because the Regional Board could choose to perform the same inspections under the statewide permit, it was in excess of the requirements of federal law to impose similar requirements in the MS4 permit. (5 AR 5595, 5600.) It concluded that the State freely chose to impose the industrial-facility and construction-site inspection requirements on the local agencies under *Hayes*. (See 5 AR 5595 & fn. 110, 5600 & fn. 120.) It also concluded that the construction-site inspection requirement amounted to a "specified action[] going beyond the federal requirement for inspections . . . ." (5 AR 5600 & fn. 119.)

Nevertheless, the Commission concluded that the three inspection provisions did not impose costs mandated by the State within the meaning of article XIII B, section 6 because the County and cities had fee authority to pay for the inspections. (See, e.g., 5 AR 5625.) It reached the opposite conclusion, however, with respect to the provision requiring installation and maintenance of trash receptacles, finding that it created a reimbursable state mandate. (See, e.g., 5 AR 5625.)

D. The Courts Reverse the Commission's Decision

The Department of Finance and the Water Boards petitioned for a writ of administrative mandamus challenging, among other things, the Commission's conclusion that the permit provisions at issue in the test claim were not required by federal law. (1 CT 11-22.) The superior court granted the petition, noting that the Commission's "search for a comparable federal regulation as the pre-condition for finding a federal mandate utterly ignores and misapplies the flexible regulatory standard inherent in the Clean Water Act." (See 4 CT 679.) The superior court also determined that the "Commission erred in isolating a specific requirement to conclude that the issued NPDES permit was a state mandate" and that "[o]ne permit provision cannot exceed the 'maximum extent practicable' standard imposed by the Clean Water Act where the permit as a whole does not." (4

CT 680.) The County and six cities appealed, and the Court of Appeal affirmed.

The County's primary theory on appeal was that the trial court failed to properly apply *Long Beach Unified* and *Hayes*. (See Slip Op. 23-24, 26.) The County contended that the EPA's regulations were specific in some areas and flexible in others and that, where the regulations were flexible, the local agencies, as permittees, had discretion to identify and propose programs that would satisfy the maximum-extent-practicable standard. (See Slip Op. 26.) By imposing specific requirements in the permit, the County argued, the Regional Board had imposed a state mandate. (See Slip Op. 26.)

The Court of Appeal rejected that argument, explaining that "there is no precise rule or formula for determining whether a cost imposed on a local government or agency is a federal mandate." (Slip Op. 27-28, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76 (*City of Sacramento*).) The court concluded that the broad, flexible standard established by the Clean Water Act and the State's role in implementing the act distinguished this case from *Long Beach Unified* and *Hayes*. (See Slip Op. 34.) The court noted that Congress intended the maximum-extent-practicable standard to account for the "practical realities" of regulating MS4s and that Congress intended it to be a highly flexible standard. (Slip Op. 31.) It also recognized that the Water Boards act in lieu of the EPA when implementing federal NPDES permitting standards.

Against that analytical backdrop, the court took up the County's objections to the four challenged permit provisions, recognizing at the outset the strong presumption of correctness and deference that agencies receive when acting within their area of expertise. (Slip Op. 35-36.) It affirmed the trial court, holding that the trash-receptacle and inspection requirements implemented the Clean Water Act's goal of reducing the

discharge of pollutants to the maximum extent practicable and thus constituted federal mandates. (Slip Op. 35-36.) The County petitioned for, and this Court granted, review.

STANDARD OF REVIEW

Courts may set aside Commission decisions that are legally erroneous or not supported by substantial evidence. (Gov. Code, § 17559, subd. (b); Code Civ. Proc., § 1094.5, subd. (b).) "The question of whether [a law] is a state-mandated program or higher level of service under article XIII B, section 6 of the California Constitution is a question of law [that courts] review de novo." (See *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195.) This Court also independently reviews "legal conclusions as to the meaning and effect of constitutional and statutory provisions." (*Ibid.*; see also *County of San Diego*, *supra*, 15 Cal.4th at p. 109 ["Where . . . a purely legal question is at issue, courts exercise independent judgment," quotation marks omitted].)

Because this Court reviews judgments, not decisions, it may affirm on any grounds in the record. (See *Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329.) That rule applies even where the parties did not advance the theory below, so long as it presents a question of law on the facts in the record. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 (*Ward*).)

ARGUMENT

I. THE FOUR CHALLENGED PERMIT REQUIREMENTS ARE FEDERAL MANDATES.

The courts below correctly applied federal and state law in holding that the permit and all its terms are not state mandates because they do not exceed the federal maximum-extent-practicable standard. This Court should affirm.

A. A Permit That Does Not Exceed the Federal Maximum-Extent-Practicable Standard Does Not Impose a State Mandate.

The permit and all its terms are federal mandates because they do not exceed the federal maximum-extent-practicable standard for issuance of an MS4 permit. California mandates law "preclud[es] a shift of financial responsibility for carrying out governmental functions from the state to local agencies . . . ." (See *County of Los Angeles v. California* (1987) 43 Cal.3d 46, 61, discussing Cal. Const., art. XIII B, § 6.) It does not require the State to subsidize local government compliance with federal mandates. (See, e.g., Gov. Code, § 17556, subd. (c) [providing that executive orders implementing federal requirements are state mandates only if they "exceed the mandate in [the] federal law or regulation"]; *County of Los Angeles v. Commission on State Mandates* (*Davis*) (1995) 32 Cal.App.4th 805, 816 (*Davis*) ["The courts have concluded that no state mandate exists if the requirements or provisions of a state statute are, nevertheless, required by federal law"].)

In *San Diego Unified*, this Court held that procedures used in discretionary expulsion proceedings "should be considered to have been adopted to implement a federal due process mandate" and they therefore constituted nonreimbursable federal mandates. (See *San Diego Unified*, *supra*, 33 Cal.4th at p. 888.) This Court's analysis followed the Court of

Appeal's reasoning in *Davis*, *supra*, 32 Cal.App.4th 805. (*San Diego Unified*, *supra*, 33 Cal.4th at pp. 888-890.) In *Davis*, the court addressed a Penal Code statute requiring counties to provide indigent criminal defendants with investigators and experts in addition to counsel, as required by the federal Constitution. (See *Davis*, *supra*, 32 Cal.App.4th at pp. 814-815.) The court held that the Penal Code did not create a state mandate because it merely implemented a federal constitutional requirement. (*Id.* at p. 816.)

Together, *San Diego Unified* and *Davis* recognize that the State may enforce the requirements of federal law without creating a reimbursable state mandate. In those cases, the courts examined *state* laws enacted to implement and make specific otherwise broad federal constitutional protections. The permit challenged here provides an even stronger case for a federal mandate, because the State is directly enforcing a *federal* law, in lieu of the EPA and subject to the same federal standards that govern the EPA when it drafts NPDES permits. It is the Clean Water Act and its implementing regulations that require the State to issue permits for MS4 discharges that, at a minimum, include controls sufficient to reduce pollutant discharge to the maximum extent practicable. (See 33 U.S.C. § 1342(b), (p)(3)(B); 40 C.F.R. § 122.26.)

That Congress has delegated authority to the permitting agencies—either the EPA or state agencies—to determine the specific controls or set of controls necessary to reduce pollutant discharges to the maximum extent practicable in the unique circumstances of each MS4 (see *Natural Resources Defense Council*, *supra*, 966 F.2d at p. 1296; *Building Industry*, *supra*, 124 Cal.App.4th at p. 874), does not change the analysis. A permit that requires controls to reduce pollutant discharges to the maximum extent practicable is a bedrock requirement of federal law, and federal law also requires the permitting agency to determine the controls that are necessary

to achieve that standard. Thus, where, as here, the permit does not exceed the maximum-extent-practicable standard, it imposes only a federal mandate that does not require a subvention of funds.

B. None of the Four Challenged Requirements Causes the Permit to Exceed the Maximum-Extent-Practicable Standard.

Congress intended the maximum-extent-practicable standard to be flexible: it did not prescribe a list of approved controls, and contemplated that permits would include site-specific terms to address the unique circumstances and threats posed by each MS4. (See 55 Fed.Reg. at pp. 48037-48038; *City of Irving, supra*, 10 E.A.D. 111 [2001 WL 988723 at p. *6].) That is, federal law contemplates that permits will include terms not expressly called for by the Clean Water Act or its implementing regulations. An agency that drafts a permit—either the EPA or a state issuer—must use its expertise to determine the "controls [that will] reduce the discharge of pollutants to the maximum extent practicable . . . ." (See 33 U.S.C. § 1342(p)(3)(B)(iii).) The permit here was thus not simply authorized or permitted by federal law, it was required by the Clean Water Act. Under the Clean Water Act, the permit, not the individual requirements must, at a minimum, include "controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." (33 U.S.C. § 1342(p)(3)(B).) The permittees must have an NPDES permit to operate their MS4, and that permit must implement the standards required by the Clean Water Act. Each of the challenged terms is an element of the stormwater pollution control program that carries out that federal standard. Considered individually or in combination with all the terms of the permit, those terms do not exceed, nor do they cause the permit to exceed, the requirements of federal law.

1. The Trash Receptacle Requirement Does Not Exceed the Maximum-Extent-Practicable Standard.

Requiring the County to place trash receptacles at transit stops implements the maximum-extent-practicable standard. The EPA's regulations identify "practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm systems" as one method for reducing the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv)(A)(3).) Requiring permittees to place trash receptacles at transit stops falls within that requirement, as both the trial court and Court of Appeal recognized. (See 1 CT 74.) The trial court said that putting trash receptacles at transit stops was an "obvious remedy" for stormwater pollution, noting that, "if litter and debris cannot be properly disposed of by persons waiting at transit stops, the inevitable downstream result will be the introduction of pollutants into the streets and, thereafter, into the storm drains—leading inevitably to the discharge of pollutants into nearby waterways." (4 CT 680.)

Likewise, the Court of Appeal explained that "[t]rash receptacles are a simple method of keeping stormwater clean because they prevent trash and other debris from entering storm drains and entering the ocean and local rivers and drainage canals." (Slip. Op. 35.) The EPA itself, in a 2008 letter, opined that the permit's trash-receptacle requirement fell within the maximum-extent-practicable standard. (See 3 AR 3798-3799.) And in its permit application, the County identified litter and debris on the streets as a source of pollution, and it suggested trash collection along or in improved open channels. (3 AR 3678.)

2. The Inspection Requirements Do Not Exceed the Maximum-Extent-Practicable Standard.

Similarly, requiring inspections of certain commercial and industrial facilities and construction sites implements the maximum-extent-practicable standard. Inspections are necessary to effectively control the discharge of pollutants in compliance with the Clean Water Act. "Federal law, either expressly or by implication, requires NPDES permittees to perform inspections for illicit discharge prevention and detection; landfills and other waste facilities; industrial facilities; construction sites; certifications of no discharge; non-storm water discharges; permit compliance; and local ordinance compliance." (*Rancho Cucamonga*, *supra*, 135 Cal.App.4th at p. 1390.)

Commercial-Facility Inspections. The EPA's regulations call for "inspections . . . to prevent illicit discharges to the municipal storm sewer system . . . ." (40 C.F.R. § 122.26(d)(2)(iv)(B)(1).) The permit requires inspection of certain commercial facilities, like restaurants and car-service facilities, to make sure that those businesses are not discharging food waste and motor oil, for example, into storm drains. (See 1 CT 54-55.) Both the trial court and Court of Appeal recognized that these inspections fell within the federal standard. (See 4 CT 681; Slip Op. 35.) The EPA's 2008 letter says these inspections were "well within the scope" of the MS4 permitting regulation. (3 AR 3798.) And the County's permit application recommended "visits" of automotive-service and food-service facilities similar to the inspections the permit ultimately required. (3 AR 3671.)

Industrial-Facility Inspections. The EPA's regulations call for permits to "[i]dentify priorities and procedures for inspections" of industrial facilities. (40 C.F.R. § 122.26(d)(2)(iv)(C)(1).) The permit implements that requirement by, for example, having the permittees inspect certain industrial facilities to ensure the operators follow best management

practices for stormwater discharges and comply with additional controls when the facility is in an environmentally sensitive area. (See 1 CT 56-67.) The trial and appellate court recognized that these provisions fell within the federal requirement. (See 4 CT 681; Slip Op. 35.) And, as with the commercial inspections, the EPA's 2008 letter says the industrial inspections are well within the MS4 requirements. (See 3 AR 3798.) Even the County's permit application recommended an "industrial[] educational site visit program . . . ." (3 AR 3670-3671.)

Construction-Site Inspections. The EPA's regulations call for permits to describe "procedures for identifying priorities for inspecting" construction sites. (40 C.F.R. § 122.26(d)(2)(iv)(D)(3).) The permit implements that requirement by requiring inspections to ensure that, among other things, sediment and construction-related materials, wastes, spills, or residues do not end up in the MS4. (See 4 CT 67-70.) As with the other inspection requirements, the trial and appellate courts recognized that the permit's provisions fell within the federal standard. (See 4 CT 681; Slip Op. 35.) Though the EPA's 2008 letter does not discuss the construction inspection requirement, an EPA guidance manual shows that the EPA believes the MS4 permits should impose construction-inspection provisions. (See 3 AR 3394.) And the County's own permit application recommended detailed construction-site requirements that included inspections. (3 AR 3672-3775.)

C. The Regional Board's Determination of What Federal Law Requires Is Entitled to Deference.

Unlike the Regional Board, the Commission was ill-equipped to determine in the first instance whether the permit exceeded the federal standard for MS4 permits. It does not have the expertise of the Regional Board, nor did it have the record that was before the Regional Board. Accordingly, it should have deferred to the Regional Board's determination

of what the Clean Water Act and EPA regulations require in a permit to operate the permittees' MS4. This is especially important in the context of MS4 permits, which include interlocking components that collectively must reduce pollutants to the maximum extent practicable.

Congress and the EPA conferred discretion on the Water Boards to use their expertise to decide the combination of terms necessary for any given MS4 to comply with the Clean Water Act. These state agencies are authorized by federal and state law to interpret the requirements of the Clean Water Act and related EPA regulations, and to issue the permit. (See 33 U.S.C § 1342(b), (p); Wat. Code, § 13377; Cal. Code Regs., tit. 23, § 2235.2.)

Here, the Regional Board drafted the permit after overseeing a 10-month administrative process that generated an 80,000-page administrative record and included approximately 50 meetings between the Regional Board staff and interested parties. (See 3 CT 415.) In the permit, the Regional Board specifically determined that the permit and its terms implemented a stormwater pollution control program to reduce the discharge of pollutants in stormwater to the maximum extent practicable. (See 1 CT 48.) As the expert in the Clean Water Act, the evolving science and technology of pollution control, and the unique factual circumstances surrounding the County's MS4, the Regional Board should receive deference in determining what federal law requires.

1. Deference to the Regional Board's Determination of What Federal Law Requires Is Appropriate in the MS4 Permitting Context.

When an agency—either the EPA or a designated state agency such as the Regional Board—drafts a permit and develops site-specific requirements, it brings to bear its scientific, technical, and legal knowledge, as well as its experience with the success and failure of controls required in

a particular MS4, in determining the type and combination of "controls [that will] reduce the discharge of pollutants to the maximum extent practicable," considering the unique circumstances and pollution threats posed by a particular applicant's MS4. (See 33 U.S.C. § 1342(p)(3)(B)(iii).)

The Court of Appeal properly recognized the specialized nature of the Regional Board's permitting process, and cited both the presumption of regularity in official acts and the doctrine of deference to agency expertise. (See Slip Op. 35, citing Evid. Code, § 664, *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812 (*Fukuda*).) It quoted this Court's decision in *Fukuda* for the proposition that "considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence." (Slip Op. 25, quoting *Fukuda, supra*, 20 Cal.4th at p. 812.) *Fukuda* held that deference applies even where the courts exercise their independent judgment when reviewing the evidence. (*Fukuda, supra*, 20 Cal.4th at pp. 817-818; see also Wat. Code, § 13330, subd. (e).) Deference to an agency is "fundamentally situational." (*Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 12 [italics omitted].) An agency's interpretation of a statute should receive deference where it has a comparative interpretive advantage stemming from its application of technical or scientific expertise to entwined issues of fact, policy, and discretion. (*Ibid.*; accord *American Coatings Association, Inc. v. South Coast Air Quality District* (2012) 54 Cal.4th 446, 475 [deferring, in a rulemaking challenge, to air district's expertise in categorizing pollutant sources under a statute requiring "best available retrofit technology" because the trade association making the challenge could neither point to an "objectively correct categorization" of pollutant sources nor show that the district acted arbitrarily in creating its categories].) The Regional Board's

expertise gives it a tremendous advantage in interpreting the requirements of federal law for each individual MS4.

2. The Commission's Failure to Defer to the Regional Board's Decision Invited Legal Error and Inconsistent Results.

The Commission should have deferred to the Regional Board's determination of the permit terms required by federal law. Generally speaking, "[a] decision by an agency primarily qualified to determine a question is binding on another agency . . . ." (2 Pierce, Administrative Law Treatise (5th ed. 2010) § 13.4, p. 1145.) Judge Friendly, writing for the Second Circuit, put a finer point on this principle, noting that where one agency has the expertise to pass on a matter and does so, "it would be quite unseemly for [another agency] to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it . . . ." (See *Safir v. Gibson* (2d Cir. 1970) 432 F.2d 137, 143.)

Here, the Legislature has confided the determination of what the Clean Water Act and EPA regulations require to the Water Boards. (See, e.g., Wat. Code, § 13377.) The Commission, by contrast, is not qualified to and does not engage in the complex analysis that the Water Boards conduct to determine the requirements of federal law for operation of a particular MS4 under the Clean Water Act. The Commission did not evaluate the permit application, the historical success and failure of pollution controls, the current state of the science and technology of pollution control, or the cost in determining the set of controls that would reduce pollution to the maximum extent practicable. (See generally 5 AR 5581-5603.) Instead, the Commission misinterpreted federal law and simply looked to see whether the terms of the permit matched specific terms prescribed by federal law. (See, e.g., 5 AR 5585.) This was an inappropriate test for

determining what is required to achieve the maximum-extent-practicable standard, which does not prescribe specific permit terms.

Failure to give appropriate deference to the Regional Board creates a variety of problems. When the Commission disagrees with the Water Boards about what federal law requires, it sets up a second round of judicial review in which the burden of proof is shifted to the Water Boards. On a direct challenge to a permit, the "party challenging the scope of [the] permit . . . has the burden of showing the [Water Boards] abused [their] discretion or [their] findings were unsupported by the facts." (*Building Industry*, *supra*, 124 Cal.App.4th at pp. 888-889.) Regional board determinations are subject to a strong presumption of correctness, and they receive deference in areas of policymaking and technical expertise. (See *Fukuda*, *supra*, 20 Cal.4th at pp. 812, 817; see also *State Water Board*, *supra*, 143 Cal.App.4th at p. 997 ["we defer to the regional board's expertise in construing language which is not clearly defined in statutes involving pollutant discharge into storm drain sewer systems"].) In the direct challenge to the permit, the County and cities argued that the Regional Board exceeded the requirements of the maximum-extent-practicable standard, an argument that the Court of Appeal squarely rejected. (See *State Water Board*, *supra*, 143 Cal.App.4th 985 [unpublished section G.3 at 3 AR 3259-3260].) But when the Water Boards challenge a Commission decision determining what federal law requires, the burden of proof arguably shifts to the Water Boards. If the Water Boards are not given deference, they will be forced to affirmatively establish the correctness of their decision, and the party challenging the permit, as here, will argue that it is the Commission's decision, not that of the Water Boards, that is entitled to deference and should be reviewed under the substantial evidence standard. (See Appellants' Opening Brief (AOB) 47-50.)

These concerns dovetail with fundamental principles favoring finality of agency and judicial decisions. (See *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 868 (*Murray*).) It is inefficient for the parties to litigate twice, first in the permitting process and later in the mandates process, the issue of what federal law requires. And duplicative litigation could, as here, lead to inconsistent decisions and conflicting obligations under state and federal law. Under state law, a local government is not required to "implement or give effect to" any state mandate for which the State has not provided a subvention of funds. (Gov. Code, § 17581, subd. (a); see also Cal. Const., art. XIII B, § 6, subd. (b).) But under federal law, requirements in NPDES permits can be enforced in civil and criminal actions in federal court. (See 33 U.S.C. §§ 1319, 1342(i), 1365.) If the permit or one of its terms is determined to be a state mandate and the Legislature chooses to suspend the operation of the mandate rather than reimburse its costs—as it, or the Governor, through the exercise of the line-item veto, is constitutionally authorized to do (see *California School Boards Association v. Brown, supra*, 192 Cal.App.4th at 1511-1512)—the permit and all its terms arguably remain no less enforceable, under federal law.

3. Collateral Estoppel Should Ordinarily Bar Permittees from Relitigating Before the Commission Matters of Federal Law Fully Litigated and Finally Decided in the Permitting Process.

Even in the absence of deference, the related doctrines of collateral estoppel and judicial exhaustion should ordinarily limit local government's ability to relitigate before the Commission the Water Boards' final determinations of what federal law requires, and thus reduce the likelihood of interagency conflict and its adverse consequences.

Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*).) It applies to quasi-judicial agency decisions, just as it does to court decisions. (See *Murray*, *supra*, 50 Cal.4th at p. 867.) The requirements for collateral estoppel are met here: [1] (1) the issue sought to be precluded is identical to an issue actually litigated and necessarily decided in the earlier proceeding; (2) the earlier decision was final and on the merits; and (3) the party against whom preclusion is sought is identical to the party to the former proceeding. (See *Lucido*, *supra*, 51 Cal.3d at p. 341.) The claimants to the Commission proceeding were parties in the permitting proceedings (compare 5 AR 5557 & fn. 2, 3 AR 2480, 2 AR 2260 with 3 CT 412-413, *State Water Board*, *supra*, 143 Cal.App.4th at p. 989 & fn. 1); the decision on the matter became final when this Court denied review of the Court of Appeal's decision on February 14, 2007 (see Cal. Rules of Court, rule 8.532(b)(2)(A)); and the issue of whether the permit exceeds the requirements of federal law is identical to the issue of whether the Regional Board exceeded the requirements of the Clean Water

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[1] In the courts below, Respondents argued that the litigation directly challenging the permit had preclusive effect. (See Respondents' Brief at pp. 33-34, filed on Oct. 26, 2012 in Case No. B237153; Petitioners' Memorandum of Points and Authorities in Support of Petitioner for Writ of Mandamus at pp. 22-23, filed on June 10, 2011 in Case No. BS130730.) They did not, however, frame the issue as one of collateral estoppel. Even if this argument were treated as newly raised on review, this Court nonetheless would have discretion to consider it because it presents issues of law that can be resolved based on facts in the record and because it presents important public policy issues. (See *Ward*, *supra*, 51 Cal.2d at p. 742; see also *Redevelopment Agency of the City of Berkeley v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [applying doctrine of waiver is discretionary]; *United California Bank v. Bottler* (1971) 16 Cal.App.3d 610, 616 ["Since the [newly raised argument] is based upon public policy rather than private convenience, we cannot invoke any doctrine of waiver, but must face the issue and apply the limitation which the law imposes"].)

Act, which was actually litigated and necessarily decided in the direct challenge to the Regional Board's permitting decision. On appeal in that case, the County argued that the permit "imposes conditions more stringent than required by the Clean Water Act." (*State Water Board, supra*, 143 Cal.App.4th 985 [unpublished section G.3 at 3 AR 3259].) The Court of Appeal flatly rejected that argument, saying it had no merit. (See *id.* [unpublished section G.3 at 3 AR 3260].)

The County had thus fully litigated whether the Regional Board exceeded the requirements of federal law by the time the Commission issued its decision. In these circumstances, collateral estoppel should have barred the County from relitigating that question before the Commission.[2]

II. THE COUNTY'S ARGUMENTS MISCONSTRUE THE CLEAN WATER ACT AND MANDATES LAW.

None of the County's arguments overcome the conclusion reached by the courts below that the permit and all its terms express a federal mandate. The County misapprehends the nature of MS4 permits, the maximum-extent-practicable standard, and the Regional Board's permit authority under the Clean Water Act and EPA regulations. The County's reliance on the Court of Appeal's decision in *Long Beach Unified* is misplaced because the permit did not exceed the requirements of federal law. Its reliance on the Court of Appeal's decision in *Hayes* is misplaced because the permit did not pass any costs associated with the State's compliance with federal

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[2] If a permittee chooses not to challenge a regional board's determination of what federal law requires in the direct permit-review process, the doctrine of judicial exhaustion will still preclude it from relitigating that issue before the Commission. (See *Murray, supra*, 50 Cal.4th at p. 867 [judicial exhaustion recognizes that, out "respect for the administrative decisionmaking process requires," parties to the process complete it, "including exhausting any available judicial avenues for reversal of adverse findings"]; see also Wat. Code, §§ 13320, 13330.)

law to the permittees. Its argument that the Court of Appeal failed to give effect to the Commission's exclusive primary jurisdiction misapprehends the Court of Appeal's decision. And the evidence the County references does not support its argument that the permit exceeded the requirements of federal law.

A. The County Incorrectly Relies on *Long Beach Unified.*

The County mistakenly relies on *Long Beach Unified, supra,* 225 Cal.App.3d 155, to make two arguments: the County argues first, that any permit term not expressly required by federal law exceeds the requirements of federal law and creates a state mandate; and second, that the Clean Water Act gives the discharger or permittee—rather than the regional board or the EPA—discretion to determine the terms of the permit that will achieve the maximum-extent-practicable standard. (See AOB 31-35, 37-41.) The case does not support either argument.

The decision in *Long Beach Unified* addressed California Department of Education regulations that directed certain school districts to develop and adopt plans to alleviate and prevent racial and ethnic segregation. (*Long Beach Unified, supra,* 225 Cal.App.3d at pp. 164-165.) The State argued that the regulations did not constitute a new program or higher level of service because the school districts had a constitutional duty to try to desegregate schools. (*Id.* at p. 172.) The court disagreed, holding that the regulations exceeded federal constitutional and case-law desegregation requirements. (*Id.* at p. 173.) Specifically, the court held that the State regulations "*require* specific action" that federal case law had previously only "*suggested* . . . may be helpful." (*Ibid.*, italics in original.) "[T]he 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." (*Ibid.*)

Long Beach Unified does not support the County's argument that any permit requirement not expressly required by the Clean Water Act or its implementing regulations exceeds the Regional Board's federal permitting authority and creates a state mandate. (See, e.g., AOB 30-35.) This is because the court in *Long Beach Unified* was addressing state regulations that attempted to interpret and codify the requirements of federal law and which the court found imposed requirements in excess of federal law; it was not addressing a federal law that imposed a flexible permitting standard requiring the State to exercise discretion to determine the terms necessary to comply with that standard. In *Long Beach Unified*, the State imposed its rules despite an evolving body of case law whose hallmark was courts "wary of requiring specific steps in advance of a demonstrated need for intervention." (See *Long Beach Unified*, *supra*, 225 Cal.App.4th at p. 173.) By contrast, the Clean Water Act, which prohibits the discharge of all pollutants without a permit, presupposes a need for intervention by creating an elaborate regulatory scheme superintended by the EPA and implemented, in part, by states.[3]

Rather than looking at the four challenged permit terms in the full complexity of federal law, the County skips the essential step of determining what, exactly, federal law requires, and would have this Court adopt the Commission's approach of simply comparing the text of federal law to the text of the permit. The analysis that the County urges boils down to this: if a federal statute or regulation does not expressly require the

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[3] No party disputes that Water Boards may use their authority under the Porter-Cologne Act to impose requirements that exceed those of the Clean Water Act. (See *City of Burbank*, *supra*, 35 Cal.4th at pp. 627-628.) But that has not occurred here, and is not likely to be a common occurrence in the context of MS4 permits, where the federal standard for MS4 permitting provides a broad federal mandate.

permit term at issue, and if the permit was written by a state permitting authority rather than the EPA, then the permit term is a state, not a federal, mandate. (See AOB 31-35; see also 5 AR 5576-5603.) The upshot of that reasoning, as the trial court noted, is that "a permit requirement that is merely practicable or easy (not even practicable to the maximum extent) would be a state mandate if the U.S. EPA failed to express the requirement as a regulation." (See 4 CT 680.)

That approach not only misconstrues federal law, it also misconstrues mandates law. When analyzing whether a particular requirement is a federal mandate, the question is not whether that requirement is imposed in any particular manner (e.g., "expressly"), but rather whether it is genuinely imposed by federal law, or is instead a creation of state law. (See *Davis*, *supra*, 32 Cal.App.4th at p. 816 ["no state mandate exists if the requirements or provisions of a state statute are, nevertheless, required by federal law"]; *Long Beach Unified*, *supra*, 225 Cal.App.3d at 173 [to constitute a federal mandate, the mandate must be required by federal law, not merely suggested]; see also *City of Sacramento*, *supra*, 50 Cal.3d at p. 76 [recognizing that whether a cost imposed on a local agency constitutes a federal mandate requires consideration of the specific program and deciding not to attempt a "final test for 'mandatory' versus 'optional' compliance with federal law"].)

The County's second argument in reliance on *Long Beach Unified*, that the operator of the MS4, rather than the Regional Board, has the discretion to determine how to comply with the maximum-extent-practicable standard, is also mistaken. (See AOB 37-41.) In California, only the Water Boards are authorized by the EPA to issue the MS4 permit. Under federal law, although it may suggest permit terms sufficient to meet the maximum-extent-practicable standard, a permit application merely proposes methods for compliance. (See Cal. Code Regs., tit. 23, §§ 2235.1-

2235.2; 40 C.F.R. § 122.26(d).) The permitting agency may incorporate all or part of a permittee's application into the permit; indeed, the permitting agency may rely heavily on the application. (See *City of Irving*, *supra*, 10 E.A.D. 111 [2001 WL 988723 at p. *8].) But the law charges the Water Boards, as EPA-approved permit issuers, with determining what will satisfy the maximum-extent-practicable standard. (See 33 U.S.C § 1342(b), (p); Wat. Code, § 13377; Cal. Code Regs., tit. 23, § 2235.2; see also *Environmental Defense Center*, *supra*, 344 F.3d at pp. 854-856 [remanding rule regarding small MS4 operators to the EPA because it did not provide for agency review of permit applications and noting that "nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable"].) Unlike the school districts in *Long Beach Unified*, which had discretion to choose the method adequate to comply with federal law, the County has no discretion under the Clean Water Act. It can comply in only one way: by adhering to the requirements of the permit. (See 33 U.S.C. § 1342(k); *Environmental Protection Agency*, *supra*, 426 U.S. at p. 205.)

B. The County Incorrectly Relies on *Hayes*.

The County's reliance on *Hayes* to argue that the Regional Board shifted state inspection requirements to the County is similarly misplaced. (See AOB 42-47.) The County's argument again misconstrues federal law. Under the act and EPA regulations, the Regional Board's MS4 permitting authority is coextensive with that of the federal government. (See, e.g., 40 C.F.R. §§ 122.1(a)(2), 122.5.) That principle has a necessary corollary: if the EPA could have drafted a permit or permit term to satisfy the federal requirement that MS4 permits implement a program to reduce the discharge of pollutants to the maximum extent practicable, then that permit or permit

term—which not only defines a permittee's compliance with the Clean Water Act but which also may form the basis for civil liability and criminal penalties under the act—must be a federal mandate.

Hayes is inapposite because the court did not interpret the Clean Water Act or its implementing regulations in that case. In *Hayes*, the State passed laws adopting the federal Education of the Handicapped Act and requiring school districts to provide special education services to pupils in need. (See *Hayes*, *supra*, 11 Cal.App.4th at pp. 1574-1575.) The court ruled that the distinction between what state and federal law required the school districts to do was unclear, so it remanded the case to the trial court to determine whether the State was "freely choosing" to impose the costs it incurred in complying with federal law on school districts. (See *id.* at p. 1594.)

Both the County and the Commission reasoned that the Regional Board passed costs to the County because neither the Clean Water Act nor the EPA regulations expressly required the challenged permit terms. (See AOB 42; 5 AR 5584, 5595, 5600.) But the State does not "freely choose" to impose specific permit requirements as the court understood that idea in *Hayes*. While federal law confers discretion on the State to choose the permit terms that will meet federal standards, imposing that standard is not discretionary. Under the Clean Water Act, all MS4 operators must have a permit that, at a minimum, meets the maximum-extent-practicable standard. (33 U.S.C. § 1342(p); 40 C.F.R. § 122.26(a)(3)(i), (d)(iv).) They cannot discharge from their MS4s to waters of the United States without one. (See 33 U.S.C. § 1311.) The act thus requires all terms necessary to achieving its standard, and regardless of whether they are drafted by the EPA or a regional board acting in lieu of the EPA, the permit is a federal mandate.

The County's contention that the evidence supported the Commission's conclusion that the State freely chose to shift costs

associated with industrial-facility and construction-site inspections to the County is similarly incorrect. (See 5 AR 5593-5595, 5601-5602.) This evidence shows only that the Water Boards perform permit inspections of certain industrial and construction sites to determine compliance with other, statewide permits. (3 AR 3601, 3640-3641; 2 AR 2423, 2436-2437.) On that basis, the Commission concluded—and the County here argues—that "nothing in the federal statutes or regulations . . . would prevent the state, rather than the local agencies, from performing" the industrial and construction-site inspections required by the MS4 permit. (5 AR 5595, 5601; AOB 42-47.)

But federal law can, and often does, require both state and local agencies to perform inspections. (See *Rancho Cucamonga, supra*, 135 Cal.App.4th at pp. 1389-1390 [holding that state and local inspection requirements were independently required by state and local federal permits].) The mere fact that the MS4 permit required the County to assure that industrial facilities and construction site owners had documentation also required by the statewide NPDES permits is not evidence that the State was relieving itself of its own responsibility to check documentation. (See AOB 44, alluding to 1 CT 58, 69.) Two separate NPDES permits imposing related inspection requirements cannot create a state mandate under *Hayes*, because the State was not passing its costs to the County. These inspection requirements can each be required by federal law and can coexist, with the Water Boards having inspection obligations and the County having inspection obligations.

C. The County Incorrectly Argues That the Commission's Primary Jurisdiction to Adjudicate State Mandates Is Threatened by the Judgment.

The County contends that the Court of Appeal improperly substituted its judgment for that of the Commission, which has "exclusive jurisdiction" to determine state mandate claims. (See AOB 23-26.) This jurisdiction is not in question. (See generally Gov. Code, §§ 17500, 17552.) The County argues that the Commission should not defer to the Regional Board's interpretation of the Clean Water Act and EPA regulations because to do so would impair its jurisdiction to decide what a state mandate is. (AOB 24-25.) This argument fails because the Regional Board did not—and could not—determine whether the challenged permit terms impose a state mandate; it decided only what federal law requires, and, as the courts held in the direct permit challenge, the Regional Board did not impose provisions that exceeded those requirements. While the Regional Board's interpretation of what federal law requires may be binding on the County and on the Commission, it no more impinges on the Commission's jurisdiction than does a decision of this Court or the U.S. Supreme Court construing the Clean Water Act.

Alternatively, the County argues that the Commission made a factual, not legal, determination when it concluded that the challenged permit requirements were not required by federal law. (See AOB 23-24.) As a threshold matter, the Commission could not decide whether or not the permit exceeded federal law without properly construing federal law. Indeed, though its analysis was incorrect, the Commission's decision reflects legal analysis, not adjudication of facts. The portion of the Commission's decision addressing what federal law requires consists almost entirely of comparing the text of the United States Code and Code of Federal Regulations to the permit's text. (See 5 AR 5576-5603.) Unlike

the Regional Board, the Commission did not, for example, consider any scientific reports or address alternative pollution-fighting measures. It simply ruled that any permit term not expressly required by the Clean Water Act or its implementing regulations exceeded the act's requirements.

The County also compares the Regional Board's final permitting decision to cases in which the Legislature has made findings or declarations that a law it has enacted is not a state mandate in an attempt to foreclose a subvention obligation. (See AOB 25-26, citing *California School Boards Association v. State* (2009) 171 Cal.App.4th 1183, 1204, and *Davis*, *supra*, 32 Cal.App.4th at p. 819.) This analogy is inapt. Unlike a legislative declaration that a state law does not create a state mandate, the Regional Board's final decision does not purport to determine the ultimate constitutional issue of whether the permit imposes a new program or higher level of service. Moreover, the Regional Board's determination that the permit did not exceed the requirements of the Clean Water Act is within the Regional Board's specific area of expertise and was twice affirmed on judicial review.

D. The Evidence on Which the County Relies Does Not Support Its Argument That the Challenged Terms Exceeded the Federal Standard.

The County references evidence to support its argument that the challenged permit requirements exceed the federal maximum-extent-practicable standard. (See AOB 30-31.) But the evidence it cites—an EPA stormwater program guidance manual, permits issued by the EPA in other states, earlier permits issued to the County of Los Angeles and cities therein, and a 2001 letter from the EPA about state-wide construction and industrial permits—does not support its argument. (See AOB 30-31.) The manual says that state permit issuers should not use it as a "script or checklist" and that it is not an "enforcement 'how to.'" (3 AR 3393.) And even though

the manual does not prescribe specific conditions, it does give some examples of what permits should contain, one of which is construction-site inspections: "EPA regulations require permittees to develop 'procedures for site inspection and enforcement' for addressing construction activities. MS4 permits will likely elaborate on this requirement in more detail, such as by specifying a minimum frequency for inspection." (3 AR 3394.)

The County's citation to other permits also does not support its position. Relying on EPA permits issued in other states ignores Congress's intent that MS4 permits contain site specific requirements. (See 55 Fed.Reg. at pp. 48037-48038; *City of Irving, supra*, 10 E.A.D. 111 [2001 WL 988723 at p. *6].) What the EPA required a permittee to do to reduce the MS4 discharge of pollutants to the maximum extent practicable in a moderately populated, landlocked area like Boise, Idaho, says little about what the Regional Board could and should require a permittee to do to meet that standard in a littoral metropolis like Los Angeles, California. (See 4 AR 3893-3898.)

Similarly, relying on earlier Los Angeles County MS4 permits ignores Congress's intent that permits evolve over time as knowledge is gained about stormwater and technology advances. (See 55 Fed.Reg. at p. 48052 ["The Permits for discharges from municipal separate storm sewer systems will be written to reflect changing conditions that result from program development and implementation and corresponding improvements in water quality"]; 3 AR 3797 ["The EPA . . . expects stormwater permits to follow an iterative process whereby each successive permit becomes more refined, detailed, and expanded as needed, based on experience under the previous permit"].) A permit condition's novelty has no relevance to determining whether the condition or the permit meets or exceeds federal law.

The County's reliance on the 2001 EPA letter is also misguided. (See 4 AR 3878-3879.) The EPA said that the State had a duty to inspect commercial and industrial sites for compliance with a state permit. (See 4 AR 3878.) But that does not mean that federal law does not also require local governments to conduct inspections. The EPA confirmed that local-government permittees may also be required to inspect and monitor commercial and industrial facilities. (See 4 AR 3878.)

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the judgment.

Dated: August 22, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 12,295 words.

Dated: August 22, 2014

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Department of Finance v. Commission on State Mandates (County of Los Angeles)**

No.: **S214855**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On August 22, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight (GSO)**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 22, 2014, at San Francisco, California.

M. Argarin
Declarant

Signature

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