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Commission on State Mandates
980 9th Street, Suite 300
Sacramento, California 95814

RE: Comment in Support of Test Claims 13-TC-02 & 13-TC-01

Dear Commissioners:

We submit this comment in support of 13-TC-02, the joint test claim filed by the County of Los Angeles ("County") and the Los Angeles County Flood Control District ("District") on July 10, 2014, and 13-TC-01, a similar claim by several cities in Los Angeles combined by the Commission under the designation: *California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175* ("Test Claims"). The Test Claims request reimbursement for costs associated with permits issued to the County, the District, and 84 cities by the California Regional Water Quality Control Board, Los Angeles Region ("Los Angeles Board") on November 8, 2012 (individually, the "Permit," and collectively, the "Permits").

The Permits regulate the discharges from the municipal separate storm sewer systems operated, in part, by cities like South Pasadena. Under the Permits, individual cities are forced to undertake costly structural best management practices without any additional State or Federal funding and without the ability to raise revenue through fees or assessments. South Pasadena alone expects to spend $64.66 million on its Permit's requirements, almost three times the City's annual budget.

Consistent with recent appellate decisions, the Permits' requirements are compensable state mandates. Many of the requirements imposed by the Los Angeles Board are discretionary. The Los Angeles Board has not made an express finding that these requirements are the only means of meeting the standards under the federal Clean Water Act ("CWA"). The State must assist local agencies in achieving the costly environmental benchmarks it imposed.

The County and District's Test Claims

The Test Claims are made under article XIII B, section 6, of the California Constitution, which requires a subvention of funds whenever the Legislature or any state agency imposes a new program or higher level of service on any local government. The Permit requirements at issue here are "programs" within the meaning of section 6, in that they require the County, the District, and the City to provide certain services to the public. As noted in the Test Claims, the Permits requirements mandate new programs or higher levels of service related to the (1)

monitoring of compliance with Total Maximum Daily Loads ("TMDL"), (2) the prohibition on non-stormwater discharges to the storm sewer systems, and (3) public agency requirements.

The Test Claims indicate the County and District together incurred Permit-related expenses of $3,212,000 in Fiscal Year 2012–2013 and $10,692,000 in Fiscal Year 2013–2014, and expect to incur tens of millions of dollars in compliance costs in the coming years. South Pasadena is only one of the permittees, and cannot speak to the cost estimates provided by the Cities, County, or District. However, their estimates are reasonable given the expenses the City expects to incur as a member of the Upper Los Angeles Watershed Management Group ("Group") and individually.

Costs Borne by South Pasadena under the Permit

As a member of the Group, South Pasadena participated in crafting the Upper Los Angeles Watershed Management Group Enhanced Watershed Management Plan ("EWMP"), outlining a program for meeting the applicable numeric effluent limitations and other requirements of the Permit. The EWMP was prepared at a cost of approximately $1.4 million. The overall cost estimate of the EWMP programs is $6.1 billion in capital costs, in addition to more than $3 billion in annual operations and maintenance costs, for a total of $9.1 billion incurred over approximately 20 years. The cost to the City, individually, over the same 20 year period is estimated to be $64.66 million, nearly three times the City's annual budget.

The EWMP describes two main categories of what are known as structural "best management practices" ("BMPs"), namely "Regional BMPs" and "Distributed BMPs." Regional BMPs are defined as constructed structural practices intended to treat run-off from a contributing area of multiple parcels, and include like filtration basins, detention basins, constructed wetlands, and treatment facilities. Under the Permit, South Pasadena will participate in the construction of a large stormwater retention basin to be installed over approximately 22,506 square feet of area, at an estimated cost of $5,132,000.

Distributed BMPs are defined as constructed structural practices to treat run-off relatively close to the source and typically implemented at a single- or few- parcel level. Distributed BMPs include "Green Streets" — a term which generally connotes reconstructed public streets, often involving the installation of an aggregate of bioretention, biofiltratration and/or permeable pavement. Under the Permit, South Pasadena is required to build approximately 2 miles of Green Streets throughout the watershed area. To meet its obligation, the City has adopted a Green Streets policy, as well as a Low Impact Development Ordinance to require all street and road construction of 10,000 square feet or more of surface area to comply with that policy.

Funds Available to South Pasadena

It is unclear how the City will continue to fund its traditional services while implementing these extremely costly BMP programs. The City's general fund revenues are already budgeted for many critical public services such as police, fire and other emergency services, along with the maintenance of public parks, public libraries, public streets, etc. The City is currently evaluating the matter and has yet to identify how it will be able to obtain the necessary funds needed to fully implement its obligations under the EWMP to remain in compliance with the Permit.

South Pasadena is not aware of any designated Federal, State, or non-local agency funds that are or will be available to fund the mandated activities set forth above. The City is also restricted by the California Constitution with respect to its ability to assess fees or assessments sufficient to pay for the Permit's mandates because any assessment or fee to pay for compliance with these obligations would potentially be considered a "special tax," which may not be imposed without a two-thirds vote of the electorate.

The Permits' Requirements are State Mandates under Case Law

1. DOF I

The Permit's conditions imposed on the County, the District, and the City are compensable state mandates under the California Supreme Court's opinion in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 ("*DOF I*"). In *DOF I*, the Court evaluated conditions contained in permits issued by the Los Angeles Board in 2001 ("2001 Permits"). The 2001 Permits' conditions required local agencies to conduct inspections of certain facilities and construct sites and to install and maintain trash receptacles. The court held:

> It is clear federal law did not compel the Regional Board to impose these particular requirements. There was no evidence the state was compelled to administer its own permitting system rather than allowing the EPA do so under the CWA. (33 U.S.C. § 1342(a).) In this respect, the case is similar to *Division of Occupational Safety, supra*, 189 Cal.App.3d 794, 234 Cal.Rptr. 661. Here, as in that case, the state chose to administer its own program, finding it was "in the interest of the people of the state, *in order to avoid direct regulation by the federal government of persons already subject to regulation*" under state law. (Wat. Code, § 13370, subd. (c), italics added.) Moreover, the Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).)

(DOF I, supra, 1 Cal.5th at p. 767.) The same is true here for the 2012 Permits at issue, itself a significant expansion of the 2001 Permits at issue in *DOF I.*

Like the inspection and trash receptacle requirements of the 2001 Permits, the 2012 Permits are discretionary. The TMDL monitoring and compliance requirement applied to the individual permittees, the non-stormwater discharge prohibition, and the expansive public agency requirements are not mandated by the CWA. The burden to prove that a regulatory requirement under the CWA is federally mandated, and excepted from reimbursement, rests with the state. (*DOF I, supra*, 1 Cal.5th at p. 769.) Here, as in *DOF I*, the state failed to overcome its burden in adopting and defending the Permit. (Id. at p. 770–772.) Critically, the Regional Board, in issuing, and the State Board, in approving and upholding the Permit after appeal by South Pasadena and other permittees, both failed to demonstrate that the Permit's requirements do not exceed the CWA standard requiring permittees to apply best management practices to reduce impacts to protected waters to the maximum extent practicable. (42 U.S.C. § 402(p)(3)(B)(iii).)

Instead, South Pasadena contends, together with the Test Claims, that the Permit's requirements exceed this federally mandated compliance level and thus constitute unfunded state mandates.

2. DOF II

A similar outcome was reached in a recent decision of the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* (Dec. 19, 2017, Case No. C070357) ___ Cal.Rptr.3d ___ (2017 WL 6461994) ("*DOF II*"). The case involves a test claim filed by a number of cities in San Diego County ("San Diego Cities") with the Commission challenging the municipal separate storm sewer systems permits issued in 2007 ("2007 Permits") by the San Diego Regional Water Quality Control Board ("San Diego Board").

In *DOF II,* the Commission evaluated the San Diego Cities' test claim, finding the 2007 Permits were a state mandate, and the cost of compliance with its conditions must be reimbursed by the State.[1] The San Diego Board filed a writ to have a judge review the Commission's decision. The lower court reversed the Commission's decision, holding the Commission failed "to determine whether any of the permit requirements exceeded the 'maximum extent practicable' standard imposed by the [CWA]."[2] The San Diego Cities appealed. While the appeal was pending, the California Supreme Court issued its opinion in *DOF I.*

The court of appeal reversed the lower court, holding the 2007 Permits' conditions imposed a state mandate and the costs associated with the 2007 Permits is reimbursable. In reaching its conclusion, the court of appeal in *DOF II* relied on the test articulated by the California Supreme Court in *DOF I*: "If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated."[3] The court asserted the San Diego Board was vested "with discretion to choose how the permittees must meet the standard, and the exercise of that discretion resulted in imposing a state mandate."[4]

The court held the federal mandate exception to the reimbursement requirement did not apply.[5] For the exception to apply, the San Diego Board must have made an express finding that "the conditions are the only means by which the 'maximum extent practicable' standard can be met."[6] Although the San Diego Board found the 2007 Permits' requirements were "necessary" to meet the standard, "use of the word 'necessary' did not equate to finding the permit requirement was the *only* means of meeting the standard."[7] The Court thus concluded that the permit's requirements constituted reimbursable state mandates, not minimum federal mandates.

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[1] (Slip Op. at p. 6.)
[2] (*Ibid.*)
[3] (Slip Op. at p. 8, quoting *DOF I* at p. 765.)
[4] (Slip Op. at p. 7.)
[5] (Slip Op. at p. 11.)
[6] (*Ibid.*)
[7] (*Ibid,* emphasis in original)

The Los Angeles Board and the State Board, on appeal, did not find the Permit requirements are "the *only* means of meeting the standard." For example, the City's obligation to construct a large stormwater retention basin to detain runoff under its Regional BMP or to build approximately 2 miles of Green Streets under its Distributed BMP are one of many ways in which the City could have met the CWA standard, but was forced to take these steps by the terms of the Permit, expressly requiring Green Streets and effectively requiring the development of a regional diversion/clean up structure via the Enhanced Watershed Management Programs. These specific methods are not federally mandated, and are thus discretionary state mandates subject to compensation by this Commission.

Conclusion

In sum, the City of South Pasadena comments in support of Test Claims 13-TC-02 and 13-TC-01. South Pasadena, like many other local agencies, is required under State law to undertake new, expensive, and onerous programs as part of its EWMP to remain in compliance with its Permit. Under article XIII B, section 6, of the California Constitution, the Commission on State Mandates must find that these programs are discretionary and compensable, and require the State to reimburse the County, District, and all other local jurisdictions for the cost of these new programs.

Sincerely,

Rafael O. Casillas

Rafael O. Casillas
Acting Director of Public Works

DECLARATION OF RAFAEL CASILLAS

I, RAFAEL CASILLAS, declare as follows:

1. I am currently employed by the City of South Pasadena ("City") as the City's Acting Director of Public Works. I am making this declaration in support of the City's Comment in Support of Test Claims 13-TC-02 & 13-TC-01. Among my various responsibilities, I am responsible for assisting the City in overseeing implementation of the City's storm water management programs, including assisting in the development and implementation of various programs required under the Municipal National Pollutant Discharge Elimination System ("NPDES") permit issued by the Los Angeles Regional Water Quality Control Board ("LA Regional Board") by Order No. R4-2012-0175, NPDES Permit No. CAS004001, entitled "Waste Discharge Requirements for Municipal Separate Storm Sewer System ("MS4") discharges within the coastal watersheds of Los Angeles County, except those discharges originating from the City of Long Beach MS4" (hereafter, "Permit").

2. The City has a population of approximately 25,619 residents. For the 2016-2017 fiscal year, pursuant to its approved budget, the City's total annual estimated general fund revenues were $25,622,021. The City's total estimated general fund expenditures for this same 2016-2017 fiscal year were $26,945,693.

3. To do its best to attempt to remain in compliance with the applicable numeric effluent limitations ("NELs") required under the Permit, and the non-stormwater discharge prohibition requirement in the Permit, the City has participated in the preparation and timely submittal of what is termed in the Permit as an "Enhanced Watershed Management Plan, also known as an EWMP" (the "Program").

4. The Program in which the City is participating is known as the Upper Los Angeles Watershed Management Program. That Program was prepared at a cost of approximately $1.4 million. The City's Program was approved by the Regional Board on or about April 20, 2016.

5. The overall cost estimate for the implementation of the City's Program by all participating Permittees is $6.1 billion in capital costs, in addition to more than $3 billion in annual operations and maintenance costs, for a total of over $9 billion, to be incurred over approximately

the next 20 years, but this amount does not include ongoing operation and maintenance costs beyond that time period.

6. I have also calculated the total cost based on the estimates provided in the Program, for the City to implement its portion of the Program over the next 20 years. This estimated amount is $64.66 million in capital and operations and maintenance costs, but does not include the operation and maintenance incurred beyond that time period.

7. The City's Program, as do many of the WMPs/EWMPs, describes two main categories of what are known as structural "best management practices" ("BMPs"), namely "Regional BMPs" and "Distributed BMPs". These structural BMPs must be designed and implemented to provide "reasonable assurances" that the numerous applicable numeric effluent limitations ("NELs") required in the Permit, are all achieved.

8. Regional BMPs are commonly defined as "constructed structural practices intended to treat run-off from a contributing area of multiple parcels (normally on the order of 10s or 100s of acres or larger)." Regional BMPs typically include large structural BMPs, including large infiltration basins, detention basins, constructed wetlands and treatment facilities.

9. "Distributed BMPs," are typically defined as "constructed structural practices intended to treat run-off relatively close to the source and typically implemented at a single– or few–parcel level (normally less than one acre)." Distributed BMPs include those BMPs used in connection with the construction and implementation of what are known as "Green Streets" – a term which generally connotes reconstructed public streets, often involving the installation of an aggregate of bioretention, biofiltration and/or permeable pavement BMPs. Distributed BMPs would include detention basins, wet detention ponds, detention chambers, bioretention and biofiltration, infiltration BMPs (such as non-vegetated infiltrated trenches, dry wells and rock wells), as well as permeable pavement (used in Green Streets)and rain harvest BMPs (e.g., green roofs, cisterns and rain barrels).

10. The City's Program calls for the development of approximately a total of 21 miles of Green Streets throughout the watershed area, with 1.961 miles estimated to be needed to be constructed within the City. To attempt to meet this obligation, the City has adopted a Green Streets

Policy, the "City of South Pasadena Green Streets Policy," as well as a Low Impact Development ("LID") Ordinance to require all street and road construction of 10,000 square feet or more of surface area to comply with that policy.

11. An example of a Regional BMP project proposed with the Program is the Lower Arroyo Park Regional BMP Project, which involves the construction of a large stormwater retention basin to be installed over approximately 22,506 square feet of area, at an estimated cost of $5,132,000. This Regional BMP is to be designed to detain up to 1,210,000 gallons of runoff, from approximately 0.23 square miles of upgradient drainage area, and is proposed to be fully constructed and operational by 2028.

12. In addition to developing and implementing the Regional BMPs and Distributed BMPs, the City must continue to provide those basic public services every municipality is obligated to provide to its citizens. However, how the City will be able to continue to fund its traditional services, while at the same time implementing these extremely costly BMP programs, is unknown. The City's general fund revenues are already budgeted for many critical public services such as police, fire and other emergency services, along with the maintenance of public parks, public libraries, and public streets, etc., and other necessary municipal services. The City is currently unaware of how it will be able to obtain the necessary funds needed to fully implement its obligations under the Program in order to stay in compliance with the Permit's NELs.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct of my own personal knowledge, and if called upon as a witness I could and would competently testify thereto under oath.

Executed this 26th day of January, 2017, in the City of South Pasadena, County of Los Angeles, State of California.

Rafael Casillas

1 Cal.5th 749
Supreme Court of California

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.

S214855
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Filed 8/29/2016
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As Modified on Denial of Rehearing 11/16/2016

Synopsis

Background: Department of Finance, State Water Resources Control Board, and regional water quality control board filed petition for writ of administrative mandamus seeking to overturn decision of Commission on State Mandates that regional board's conditions on permit authorizing local agencies to operate storm drain systems constituted state mandates subject to reimbursement. The Superior Court, Los Angeles County, No. BS130730, Ann I. Jones, J., granted petition. Local agencies appealed. The Court of Appeal, Johnson, J., affirmed. Local agencies petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Corrigan, J., held that:

[1] permit itself did not indicate that permit conditions were federal mandates not subject to reimbursement;

[2] Commission was not required to defer to regional board's conclusion that challenged conditions were federally mandated;

[3] condition requiring local agencies to conduct inspections of certain facilities and construction sites was not a federal mandate; and

[4] condition requiring local agencies to install and maintain trash receptacles was not a federal mandate.

Reversed and remanded.

Opinion, 163 Cal.Rptr.3d 439, superseded.

Cuéllar, J., filed separate concurring and dissenting opinion with which Liu and Kruger, JJ., concurred.

West Headnotes (14)

[1] Environmental Law
Purpose

Federal Clean Water Act (CWA) is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's water. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.

Cases that cite this headnote

[2] Environmental Law
Discharge of pollutants

State permitting system for issuing permits for pollutant discharge from storm sewer system regulates discharges under both state and federal law. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; Cal. Water Code §§ 13370(c), 13372(a), 13374, 13377.

Cases that cite this headnote

[3] Administrative Law and Procedure
Scope

Ordinarily, when scope of review in trial court is whether administrative decision is supported by substantial evidence, the scope of review on appeal is the same; however, appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions.

Cases that cite this headnote

[4] **Trial**
Construction of writings

Question whether statute or executive order imposes a mandate is a question of law.

1 Cases that cite this headnote

[5] **Municipal Corporations**
Power and Duty to Tax in General
States
Limitation of amount of indebtedness or expenditure
Taxation
Power of legislature in general

Constitutional provision restricting amounts state and local governments may appropriate and spend each year from proceeds of taxes and provision imposing direct constitutional limit on state and local power to adopt and levy taxes work in tandem, together restricting state and local governments' power both to levy and to spend for public purposes. Cal. Const. arts. 13A, 13B.

Cases that cite this headnote

[6] **Municipal Corporations**
Power and Duty to Tax in General
States
Limitation of amount of indebtedness or expenditure
States
Limitation of use of funds or credit
Taxation
Power of legislature in general

Reimbursement provision in constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government is entitled to reimbursement from state for associated costs, was included in recognition of the fact that provision restricting amounts state and local governments may appropriate and spend each year from proceeds of taxes and provision imposing direct constitutional limit on state and local power to adopt and levy taxes severely restrict taxing and spending powers of local governments. Cal. Const. arts. 13A, 13B, § 6(a).

2 Cases that cite this headnote

[7] **Municipal Corporations**
Power and Duty to Tax in General
States
Limitation of amount of indebtedness or expenditure
States
Limitation of use of funds or credit
Taxation
Power of legislature in general

Purpose of constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government is entitled to reimbursement from state for associated costs is to prevent 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 imposed by constitutional articles restricting amounts state and local governments may appropriate and spend each year from proceeds of taxes and imposing direct constitutional limit on state and local power to adopt and levy taxes. Cal. Const. arts. 13A, 13B, § 6(a).

2 Cases that cite this headnote

[8] **Environmental Law**
Conditions and limitations

Permit issued by regional water quality board authorizing local agencies to operate storm drain systems, which contained conditions designed to maintain quality of state water and to comply with federal Clean Water Act, did not itself demonstrate what conditions would have been imposed had federal Environmental Protection Agency (EPA) granted permit, and thus permit itself did not indicate that conditions were federal

mandates not subject to reimbursement under constitutional provision requiring state to reimburse local agency for costs associated with new program or higher level of service mandated by legislature or state agency; in issuing permit, regional board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Const. art. XIII B, § 6(a); Cal. Water Code §§ 13001, 13370(c), 13372(a), 13374, 13377; Cal. Gov't Code §§ 17514, 17556(c).

1 Cases that cite this headnote

[9] Environmental Law

Conditions and limitations

Commission on State Mandates was not required to defer to regional water quality control board's conclusion that challenged conditions contained in permits issued by regional board authorizing local agencies to operate storm drain systems were federally mandated, and thus qualified for exception to constitutional provision requiring state to reimburse local agency for costs associated with new program or higher level of service mandated by legislature or state agency; state had burden to show challenged conditions were mandated by federal law, requiring Commission to defer to regional board would have failed to honor legislature's intent in creating Commission, and policies supporting constitutional provision would have been undermined if Commission were required to defer to regional board on federal mandate question. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Const. art. XIIIB, § 6(a); Cal. Water Code §§ 13001, 13370(c); Cal. Gov't Code §§ 17514, 17556(c).

1 Cases that cite this headnote

[10] Environmental Law

Water pollution

In trial court action challenging regional water quality control board's authority to impose specific permit conditions for discharging pollutants from storm sewer system, board's findings regarding what conditions satisfied federal standard are entitled to deference. Federal Water Pollution Control Act §§ 402, 402, 33 U.S.C.A. §§ 1342(a)(1), 1342(a)(2); 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Water Code §§ 13001, 13263(a), 13370(c).

1 Cases that cite this headnote

[11] Environmental Law

Water pollution

In trial court action challenging regional water quality control board's authority to impose specific permit conditions for discharging pollutants from storm sewer system, party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Water Code §§ 13001, 13263(a), 13370(c).

1 Cases that cite this headnote

[12] States

State expenses and charges and statutory liabilities

Typically, the party claiming the applicability of exception to constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government is entitled to reimbursement from state for associated costs, bears the burden of demonstrating that exception applies. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c).

1 Cases that cite this headnote

[13] Environmental Law

Conditions and limitations

Condition contained in permit issued by regional water quality board authorizing local agencies to operate storm drain systems, which required local agencies to conduct inspections of certain commercial and industrial facilities and construction sites, was not a federal mandate, but rather was a state mandate subject to reimbursement under constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government was entitled to reimbursement from state for associated costs; neither federal Clean Water Act (CWA) nor Environmental Protection Agency (EPA) regulations required local agencies to inspect facilities or construction sites, state and federal law required regional board to conduct inspections, and regional board exercised its discretion and shifted obligation to conduct inspections to local agencies. Federal Water Pollution Control Act §§ 402, 402, 33 U.S.C.A. §§ 1342(p)(3)(A), 1342(p)(3)(B)(iii); 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(14)(x), 122.26(b)(19), 122.26(d)(2)(iv)(B)(1), 122.26(d)(2)(iv)(C)(1), 122.26(d)(2)(iv)(D)(3); Cal. Const. art. XIII B, § 6(a); Cal. Water Code §§ 13001, 13260, 13263, 13267(c), 13370(c); Cal. Gov't Code §§ 17514, 17556(c).

1 Cases that cite this headnote

[14] Environmental Law

Conditions and limitations

Condition contained in permit issued by regional water quality board authorizing local agencies to operate storm drain systems, which required local agencies to install and maintain trash receptacles at transit stops, was not a federal mandate, but rather was a state mandate subject to reimbursement under constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government was entitled to reimbursement from state for associated costs; while local agencies were required to include a description of practices for operating and maintaining roadways and procedures for reducing impact of discharges from storm sewers in their permit application under federal Clean Water Act (CWA) and Environmental Protection Agency (EPA) regulation, issuing agency had discretion whether to make those practices conditions of the permit, and EPA had issued permits in other cities that did not include trash receptacle condition. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19), 122.26(d)(2)(iv)(A)(3); Cal. Const. art. XIII B, § 6(a); Cal. Water Code §§ 13001, 13370(c); Cal. Gov't Code §§ 17514, 17556(c).

See 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 119.

2 Cases that cite this headnote

****359** *****48** Ct.App. 2/1 B237153, Los Angeles County Super. Ct. No. BS130730

Attorneys and Law Firms

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No appearance for Defendant and Respondent.

Opinion

Corrigan, J.

****360** ***754** Under our state Constitution, if the Legislature or a state agency requires a local government to provide a new program or higher level of service, the local government is entitled to reimbursement from the state for the associated costs. (Cal. Const., art. XIII B, § 6, subd. (a).) There are exceptions, however. Under

one of them, if the new program or increased service is mandated by a federal law or regulation, reimbursement is not required. (Gov. Code, § 17556, subd. (c).)

The services in question here are provided by local agencies that operate storm drain systems pursuant to a state-issued permit. Conditions in that permit are designed to maintain the quality of California's water, and to comply with the federal Clean Water Act. The Court of Appeal held that certain permit conditions were federally mandated, and thus not reimbursable. We reverse, concluding that no federal law or regulation imposed the conditions nor did the federal regulatory system require the state to impose them. Instead, the permit conditions were imposed as a result of the state's discretionary action.

**361 I. BACKGROUND

The Regional Water Quality Control Board, Los Angeles Region (the Regional Board) is a state agency. It issued a permit authorizing Los Angeles County, the Los Angeles County Flood Control District, and 84 cities (collectively, the Operators) to operate storm drainage systems. [1] ***50 Permit *755 conditions required that the Operators take various steps to reduce the discharge of waste and pollutants into state waters. The conditions included installing and maintaining trash receptacles at transit stops, as wells as inspecting certain commercial and industrial facilities and construction sites.

Some Operators sought reimbursement for the cost of satisfying the conditions. The Commission on State Mandates (the Commission) concluded each required condition was a new program or higher level of service, mandated by the state rather than by federal law. However, it found the Operators were only entitled to state reimbursement for the costs of the trash receptacle condition, because they could levy fees to cover the costs of the required inspections. (See discussion, *post*, at p. 12.) The trial court and the Court of Appeal disagreed, finding that all of the requirements were federally mandated.

We granted review. To resolve this issue, it is necessary to consider both the permitting system and the reimbursement obligation in some detail.

A. The Permitting System

The Operators' municipal storm sewer systems discharge both waste and pollutants. [2] State law controls "waste" discharges. (Wat. Code, § 13265.) Federal law regulates discharges of "pollutant[s]." (33 U.S.C. § 1311(a).) Both state and later-enacted federal law require a permit to operate such systems.

California's Porter–Cologne Water Quality Control Act (Porter–Cologne Act or the Act; Wat. Code, § 13000 et seq.) was enacted in 1969. It established the State Water Resources Control Board (State Board), along with nine regional water quality control boards, and gave those agencies "primary responsibility for the coordination and control of water quality." (Wat. Code, § 13001; see *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619, 26 Cal.Rptr.3d 304, 108 P.3d 862 (*City of Burbank*).) The State Board establishes statewide policy. The regional boards formulate and *756 adopt water quality control plans and issue permits governing the discharge of waste. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875, 22 Cal.Rptr.3d 128 (*Building Industry*).)

The Porter–Cologne Act requires any person discharging, or proposing to discharge, waste that could affect the quality of state waters to file a report with the appropriate regional board. (***51 Wat. Code, § 13260, subd. (a)(1).) The regional board then "shall prescribe requirements as to the nature" of the discharge, implementing any applicable water quality control plans. (Wat. Code, § 13263, subd. (a).) The Operators must follow **362 all requirements set by the Regional Board. (Wat. Code, §§ 13264, 13265.)

[1] The federal Clean Water Act (the CWA; 33 U.S.C. § 1251 et seq.) was enacted in 1972, and also established a permitting system. The CWA is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (*City of Burbank, supra,* 35 Cal.4th at p. 620, 26 Cal.Rptr.3d 304, 108 P.3d 862.) The CWA prohibits pollutant discharges unless they comply with: (1) a permit (see 33 U.S.C. §§ 1328, 1342, 1344); (2) established effluent limitations or standards (see 33 U.S.C. §§ 1312, 1317); or (3) established national standards of performance (see 33 U.S.C. § 1316). (33 U.S.C. § 1311(a).) The CWA allows

any state to adopt and enforce its own water quality standards and limitations, so long as those standards and limitations are not "less stringent" than those in effect under the CWA. (33 U.S.C. § 1370.)

The CWA created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the CWA or the EPA Administrator. (33 U.S.C. § 1342(a)(1), (a)(2).) The federal system notwithstanding, a state may administer its own permitting system if authorized by the EPA. [3] If the EPA concludes a state has adequate authority to administer its proposed program, it must grant approval (33 U.S.C. § 1342(b)) and suspend its own issuance of permits (33 U.S.C. § 1342(c)(1)). [4]

[2] ***757** California was the first state authorized to issue its own pollutant discharge permits. (*People of St. of Cal., etc. v. Environmental Pro. Agcy.* (9th Cir. 1975) 511 F.2d 963, 970, fn. 11, revd. on other grounds in *Environmental Protection Agency v. California* (1976) 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578.) Shortly after the CWA's enactment, the Legislature amended the Porter–Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was "in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter–Cologne Act]." (*Ibid.*) The Legislature provided that Chapter 5.5 be "construed to ensure consistency" with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements "ensur[ing] 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." ***52** (Wat. Code, § 13377, italics added.) To align the state and federal permitting systems, the legislation provided that the term " 'waste discharge requirements' " under the Act was equivalent to the term " 'permits' " under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452, 126 Cal.Rptr.2d 389; accord *Building Industry, supra,* 124 Cal.App.4th at p. 875, 22 Cal.Rptr.3d 128.)

In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (33 U.S.C. § 1342(p)(2)(C), (D).) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit non-storm water discharges into the storm sewers, and must "require controls to reduce the discharge of **363** pollutants *to the maximum extent practicable*." (33 U.S.C. § 1342(p)(3)(B), italics added.) The phrase "maximum extent practicable" is not further defined. How that phrase is applied, and by whom, are important aspects of this case.

EPA regulations specify the information to be included in a permit application. (See 40 C.F.R. § 122.26(d)(1)(i)-(vi), (d)(2)(i)-(viii).) Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv).) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (*Ibid.*)

***758 B. The Permit in Question**

In 2001, Los Angeles County (the County), acting for all Operators, applied for a permit from the Regional Board. The board issued a permit (the Permit), with conditions intended to "reduce the discharge of pollutants in storm water to the Maximum Extent Practicable" in the Operators' jurisdiction. The Permit stated that its conditions implemented *both* the Porter–Cologne Act and the CWA.

Part 4 of the Permit contains the four requirements at issue. Part 4(C) addresses commercial and industrial facilities, and required the Operators to inspect certain facilities twice during the five-year term of the Permit. Inspection requirements were set out in substantial detail. [5] Part 4(E) of the Permit addresses construction sites. It required each Operator to "implement a program to control runoff from construction activity at all construction sites within its jurisdiction," and to inspect

each construction ***53 site of one acre or greater at least "once during the wet season."[6] Finally, Part 4(F) of the Permit addresses pollution from public agency activities. Among other things, it directed each Operator not otherwise regulated to "[p]lace trash receptacles at all transit stops within its jurisdiction," and to maintain them as necessary.

C. Local Agency Claims

1. Applicable procedures for seeking reimbursement

As mentioned, when the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must "reimburse that local government for the costs of the program or increased level of service." (Cal. Const., art. XIII B, § 6, subd. (a) (hereafter, *759 section 6).)[7] However, reimbursement is not required if "[t]he statute or executive order imposes a requirement that is mandated by a 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." (Gov. Code, § 17556, subd. (c).)

**364 The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims (Gov. Code, § 17500 et seq.) and created the Commission to adjudicate them. (Gov. Code, §§ 17525, 17551.) It also established "a test-claim procedure to expeditiously resolve disputes affecting multiple agencies." (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 285 Cal.Rptr. 66, 814 P.2d 1308 (*Kinlaw*).)

The first reimbursement claim filed with the Commission is called a test claim. (Gov. Code, § 17521.) The Commission must hold a public hearing, at which the Department of Finance (the Department), the claimant, and any other affected department or agency may present evidence. (Gov. Code, §§ 17551, 17553.) The Commission then determines "whether a state mandate exists and, if so, the amount to be reimbursed." (*Kinlaw, supra,* 54 Cal.3d at p. 332, 285 Cal.Rptr. 66, 814 P.2d 1308.) The Commission's decision is reviewable by writ of mandate. (Gov. Code, § 17559.)

2. The test claims

The County and other Operators filed test claims with the Commission, seeking reimbursement for the Permit's inspection and trash receptacle requirements. The Department, State Board, and Regional Board (collectively, the State) responded that the Operators were not entitled to reimbursement because each requirement was federally mandated.

The Department argued that the EPA had delegated its federal permitting authority to the Regional Board, which acted as an administrator for the EPA, ensuring the state's program complied with the CWA. The Department acknowledged the Regional Board had discretion to set detailed permit conditions, but urged that the challenged conditions were required for the Permit to comply with federal law.

***54 The State and Regional Boards argued somewhat differently. They contended the CWA required the Regional Board to impose specific permit *760 controls to reduce the discharge of pollutants to the "maximum extent practicable." Thus, when the Regional Board determined the Permit's conditions, those conditions were part of the federal mandate. The State and Regional Boards also argued that the challenged conditions were "animated" by EPA regulations. In support of the trash receptacle requirement, they relied on 40 Code of Federal Regulations part 122.26(d)(2)(iv)(A)(3).[8] In support of the inspection requirements, they relied on 40 Code of Federal Regulations part 122.26(d)(2)(iv)(B)(1),[9] (C)(1),[10] and (D)(3).[11]

**365 The Operators argued the conditions were not mandated by federal law, because nothing in the CWA or in the cited federal regulations required them to install trash receptacles or perform the required site inspections. They also submitted evidence showing that none of the challenged requirements were *761 contained in their previous permits issued by the Regional Board, nor were they imposed on other municipal storm sewer systems by the EPA.

As to the inspection requirements, the Operators argued that state law required ***55 the *state and regional boards* to regulate discharges of waste. This regulatory

authority included the power to inspect facilities and sites. The Regional Board had used the Permit conditions to shift those inspection responsibilities to them. They also presented evidence that the Regional Board was required to inspect industrial facilities and construction sites for compliance with statewide permits issued by the State Board (see *ante*, 207 Cal.Rptr.3d at pp. 52, 53, fns. 5, 6, 378 P.3d at p. 363, fns. 5, 6). They urged that the Regional Board had shifted that obligation to the Operators as well. Finally, the Operators submitted a declaration from a county employee indicating the Regional Board had offered to pay the County to inspect industrial facilities *on behalf of* the Regional Board, but revoked that offer after including the inspection requirement in the Permit.

The EPA submitted comments to the Commission indicating that the challenged permit requirements were designed to reduce the discharge of pollutants to the "maximum extent practicable." Thus, the EPA urged the requirements fell "within the scope" of federal regulations and other EPA guidance regarding storm water management programs. The Bay Area Stormwater Management Agencies Association, the League of California Cities, and the California State Association of Counties submitted comments urging that the challenged requirements were state, rather than federal, mandates.

3. The commission's decision

By a four-to-two vote, the Commission partially approved the test claims, concluding none of the challenged requirements were mandated by federal law. However, the Commission determined the Operators were not entitled to reimbursement for the inspection requirements because they had authority to levy fees to pay for the required inspections. Under Government Code section 17556, subdivision (d), the constitutional reimbursement requirement does not apply if the local government has the authority to levy fees or assessments sufficient to pay for the mandated program or service.

4. Petitions for writ of mandate

The State challenged the Commission's determination that the requirements were state mandates. By cross-petition, the County and certain cities challenged the Commission's finding that they could impose fees to pay for the inspections.

The trial court concluded that, because each requirement fell "within the maximum extent practicable standard," they were federal mandates not ***762** subject to reimbursement. It granted the State's petition and ordered the Commission to issue a new statement of decision. The court did not reach the cross-claims relating to fee authority. Certain Operators appealed.[12] The Court of Appeal affirmed, concluding as a matter of law that the trash receptacle and inspection requirements were federal mandates.

****366 II. DISCUSSION**

A. Standard of Review

[3] **[4]** Courts review a decision of the Commission to determine whether it is supported by substantial evidence. (Gov. Code, § 17559.) Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. (*****56** *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814, 38 Cal.Rptr.2d 304 (*County of Los Angeles*).) However, the appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810, 53 Cal.Rptr.2d 521.) The question whether a statute or executive order imposes a mandate is a question of law. (*Ibid.*) Thus, we review the entire record before the Commission, which includes references to federal and state statutes and regulations, as well as evidence of other permits and the parties' obligations under those permits, and independently determine whether it supports the Commission's conclusion that the conditions here were not federal mandates. (*Ibid.*)

B. Analysis

The parties do not dispute here that each challenged requirement is a new program or higher level of service. The question here is whether the requirements were mandated by a federal law or regulation.

1. The federal mandate exception

[5] Voters added article XIII B to the California Constitution in 1979. Also known as the "Gann limit," it "restricts the amounts state and local governments may appropriate and spend each year from the 'proceeds of taxes.' " (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58–59, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*).) "Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at ***763** the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*Id.* at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.)

[6] **[7]** The "concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.) The reimbursement provision in section 6 was included in recognition of the fact "that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312 (*County of San Diego*).) The purpose of section 6 is to prevent "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*, at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Thus, with certain exceptions, section 6 "requires the state 'to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.' " (*County of San Diego*, at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

As noted, reimbursement is not required if the statute or executive order imposes "a requirement that is mandated by a federal law or regulation," unless the state mandate imposes costs that exceed the federal mandate. (Gov. Code, § 17556, subd. (c).) The question here is how to apply that *****57** exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard. Previous decisions ****367** of this court and the Courts of Appeal provide guidance.

In *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, this court addressed local governments' reimbursement claims for the costs of extending unemployment insurance protection to their employees. (*Id.*, at p. 59, 266 Cal.Rptr. 139, 785 P.2d 522.) Since 1935, the applicable federal law had provided powerful incentives for states to implement their own unemployment insurance programs. Those incentives included federal subsidies and a substantial federal tax credit for all corporations in states with certified federal programs. (*Id.* at p. 58, 266 Cal.Rptr. 139, 785 P.2d 522.) California had implemented such a program. (*Ibid.*) In 1976, Congressional legislation required ***764** that unemployment insurance protection be extended to local government employees. (*Ibid.*) If a state failed to comply with that directive, it "faced [the] loss of the federal tax credit and administrative subsidy." (*Ibid.*) The Legislature passed a law requiring local governments to participate in the state's unemployment insurance program. (*Ibid.*)

Two local governments sought reimbursement for the costs of complying with that requirement. Opposing the claims, the state argued its action was compelled by federal law. This court agreed, reasoning that, if the state had "failed to conform its plan to new federal requirements as they arose, its businesses [would have] faced a new and serious penalty" of double taxation, which would have placed those businesses at a competitive disadvantage against businesses in states complying with federal law. (*City of Sacramento, supra,* 50 Cal.3d at p. 74, 266 Cal.Rptr. 139, 785 P.2d 522.) Under those circumstances, we concluded that the "state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses." (*Ibid.*) Because "[t]he alternatives were so far beyond the realm of practical reality that they left the state '*without discretion*' to depart from federal standards," we concluded "the state acted in response to a federal 'mandate.' " (*Ibid.* italics added.)

County of Los Angeles, supra, 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, involved a different kind of federal compulsion. In *Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, the United States Supreme Court held that states were required by the federal Constitution to provide counsel to indigent criminal defendants. That requirement had been construed to include "the right to the use of any experts that will assist counsel in preparing a defense." (*County of Los Angeles*, at p. 814, 38 Cal.Rptr.2d 304.) The Legislature enacted Penal Code section 987.9, requiring local governments to provide indigent criminal defendants with experts for the preparation of their defense. (*County of Los Angeles*, at p. 811, fn. 3, 38 Cal.Rptr.2d 304.) Los Angeles County sought reimbursement for the costs of complying with the statute. The state argued the statute's requirements were mandated by federal law.

The state prevailed. The Court of Appeal reasoned that, even without Penal Code section 987.9, the county would have been "responsible for providing ancillary services" under binding Supreme Court precedent. (*County of Los Angeles, supra,* 32 Cal.App.4th at p. 815, 38 Cal.Rptr.2d 304.) Penal Code section 987.9 merely codified an existing federal mandate. (***58** *County of Los Angeles*, at p. 815, 38 Cal.Rptr.2d 304.)

Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547 (*Hayes*) provides a contrary example. *Hayes* involved the federal Education of the Handicapped Act (EHA; 20 U.S.C. § 1401 et seq.). EHA was a "comprehensive measure designed to provide all handicapped children with basic educational opportunities." (*Hayes*, at p. 1594, 15 Cal.Rptr.2d 547 ***765**) EHA required each state to adopt an implementation plan, and mandated "certain substantive and procedural requirements," but left "primary responsibility for implementation to the state." (*Hayes*, at p. 1594, 15 Cal.Rptr.2d 547.)

Two local governments sought reimbursement for the costs of special education assessment hearings which were required under the state's adopted plan. The state argued the requirements imposed under its plan were federally mandated. The *Hayes* court rejected that argument. Reviewing ****368** the historical development of special education law (*Hayes, supra,* 11 Cal.App.4th at pp. 1582–1592, 15 Cal.Rptr.2d 547), the court concluded that, so far as the state was concerned, the requirements established by the EHA were federally mandated. (*Hayes*, at p. 1592, 15 Cal.Rptr.2d 547.) However, that conclusion "mark[ed] the starting point rather than the end of [its] consideration." (*Ibid.*) The court explained that, in determining whether federal law requires a specified function, like the assessment hearings, the focus of the inquiry is whether the "manner of implementation of the federal program was left to the *true discretion* of the state." (*Id.* at p. 1593, 15 Cal.Rptr.2d 547, italics added.) If the state "has adopted an implementing statute or regulation pursuant to the federal mandate," and had "no 'true choice' " as to the manner of implementation, the local government is not entitled to reimbursement. (*Ibid.*) If, on the other hand, "the manner of implementation of the federal program was left to the true discretion of the state," the local government might be entitled to reimbursement. (*Ibid.*)

According to the *Hayes* court, the essential question is how the costs came to be imposed upon the agency required to bear them. "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 whether the costs were imposed upon the state by the federal government." (*Hayes, supra,* 11 Cal.App.4th at p. 1594, 15 Cal.Rptr.2d 547.) Applying those principles, the court concluded that, to the extent "the state implemented the [EHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to" reimbursement. (*Ibid.*)

From *City of Sacramento*, *County of Los Angeles*, and *Hayes*, we distill the following principle: If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.

Division of Occupational Safety & Health v. State Bd. of Control (1987) 189 Cal.App.3d 794, 234 Cal.Rptr. 661 (*Division of Occupational Safety*) is ***766** instructive. The federal Occupational Safety and Health Act (Fed. OSHA; 29 U.S.C. § 651 et seq.) preempted states from regulating

matters covered by Fed. OSHA unless a ***59 state had adopted its own plan and gained federal approval. (*Division of Occupational Safety*, at p. 803, 234 Cal.Rptr. 661.) No state was obligated to adopt its own plan. But, if a state did so, the plan had to include standards at least as effective as Fed. OSHA's and extend those standards to state and local employees. California adopted its own plan, which was federally approved. The state then issued a regulation that, according to local fire districts, required them to maintain three-person firefighting teams. Previously, they had been permitted to maintain two-person teams. (*Division of Occupational Safety*, at pp. 798–799, 234 Cal.Rptr. 661.) The local fire districts sought reimbursement for the increased level of service. The state opposed, arguing the requirement was mandated by federal law.

The court agreed with the fire districts. As the court explained, a Fed. OSHA regulation arguably required the maintenance of three-person firefighting teams. (*Division of Occupational Safety, surpra,* 189 Cal.App.3d at p. 802, 234 Cal.Rptr. 661.) However, that federal regulation specifically excluded local fire districts. (*Id.* at p. 803, 234 Cal.Rptr. 661.) Had the state elected to be governed by *Fed. OSHA standards*, that exclusion would have allowed those fire districts to maintain two-person teams. (*Division of Occupational Safety*, at p. 803, 234 Cal.Rptr. 661.) The conditions for approval of the *state's plan* required effective enforcement and coverage of public employees. But those conditions did not make the costs of complying with the state regulation federally mandated. "[T]he decision to establish ... a federally approved [local] plan is an option which the state exercises **369 freely." (*Ibid.*) In other words, the state was not "*compelled* to ... extend jurisdiction over occupational safety to local governmental employers," which would have otherwise fallen under a federal exclusion. (*Ibid.*) Because the state "was not required to promulgate [the state regulation] to comply with federal law, the exemption for federally mandated costs does not apply." (*Id.* at p. 804, 234 Cal.Rptr. 661.) [13]

San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589 (*San Diego Unified*) provides another example. In *Goss v. Lopez* (1975) 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, the United States Supreme Court held that if a school principal chose to recommend a student for expulsion, federal due process principles required the school district to give that student a hearing. Education Code section 48918 provided for expulsion hearings. (*San Diego Unified*, at p. 868, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Under Education Code section 48915, a school principal had *767 *discretion* to recommend expulsion under certain circumstances, but was compelled to recommend expulsion for a student who possessed a firearm. (*San Diego Unified*, at p. 869, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Federal law at the time did not require expulsion for a student who brought a gun to school. (*Id.* at p. 883, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

The school district argued it was entitled to reimbursement of *all* expulsion hearing costs. This court drew a distinction between discretionary and mandatory expulsions. We concluded the costs of hearings for *discretionary* expulsions flowed from a federal mandate. (***60 *San Diego Unified, supra,* 33 Cal.4th at pp. 884–890, 16 Cal.Rptr.3d 466, 94 P.3d 589.) [14] We declined, however, to extend that rule to the costs related to *mandatory* expulsions. Because it was *state law* that required an expulsion recommendation for firearm possession, all hearing costs triggered by the mandatory expulsion provision were reimbursable state-mandated expenses. (*Id.* at pp. 881–883, 16 Cal.Rptr.3d 466, 94 P.3d 589). As was the case in *Hayes*, the key factor was how the costs came to be imposed on the entity that was required to bear them. The school principal could avoid the cost of a federally-mandated hearing by choosing not to recommend an expulsion. But, when a state statute *required* an expulsion recommendation, the attendant hearing costs did not flow from a federal mandate. (*San Diego Unified, supra,* 33 Cal.4th at p. 881, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

2. Application

Review of the Commission's decision requires a determination as to whether federal statutory, administrative, or case law imposed, or compelled the Regional Board to impose, the challenged requirements on the Operators.

It is clear federal law did not compel the Regional Board to impose these particular requirements. There was no evidence the state was compelled to administer its *own* permitting system rather than allowing the EPA do so under the CWA. (33 U.S.C. § 1342(a).) In this respect,

the case is similar to *Division of Occupational Safety, supra,* 189 Cal.App.3d 794, 234 Cal.Rptr. 661. Here, as in that case, the state chose to administer its own program, finding it was "in the interest of the people of the state, *in order to avoid direct regulation by the federal government* of persons already subject to regulation" under state law. (Wat. Code, § 13370, subd. (c), italics added.) Moreover, the Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum ****370** extent practicable. But the EPA's regulations gave the board discretion to determine which ***768** specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).) This case is distinguishable from *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, where the state risked the loss of subsidies and tax credits for all its resident businesses if it failed to comply with federal legislation. Here, the State was not compelled by federal law to impose any particular requirement. Instead, as in *Hayes, supra,* 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.

[8] **[9]** The State argues the Commission failed to account for the flexibility in the CWA's regulatory scheme, which conferred discretion on the State and regional boards in deciding what conditions were necessary to comply with the CWA. In exercising that discretion, those agencies were required to rely on their scientific, technical, and experiential knowledge. Thus, the State contends the Permit itself is the best indication of what requirements *would have been imposed* by the EPA if the Regional Board had not done so, and the Commission should have deferred to *****61** the board's determination of what conditions federal law required.

We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. (*City of Burbank, supra,* 35 Cal.4th at pp. 627–628, 26 Cal.Rptr.3d 304, 108 P.3d 862.) It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.

[10] **[11]** We also disagree that the Commission should have deferred to the Regional Board's conclusion that the challenged requirements were federally mandated. That determination is largely a question of law. Had the Regional Board found, when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate. The board's legal authority to administer the CWA and its technical experience in water quality control would call on sister agencies as well as courts to defer to that finding.[15] The State, however, provides no authority for the proposition that, absent such a finding, the Commission should defer to a state agency as to whether requirements were state or federally mandated. Certainly, in a trial court action challenging the *board's authority* to impose specific permit conditions, the board's findings regarding what conditions satisfied the federal standard would be entitled to deference. (See, e.g., *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1384, 38 Cal.Rptr.3d 450, citing *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817–818, 85 Cal.Rptr.2d 696, 977 P.2d 693 ***769**) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. (*Rancho Cucamonga*, at p. 1387, 38 Cal.Rptr.3d 450; *Building Industry, supra,* 124 Cal.App.4th at pp. 888–889, 22 Cal.Rptr.3d 128.)

Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.

[12] Section 6 establishes a general rule requiring reimbursement of all state-mandated costs. Government Code section 17556, subdivision (c), codifies an exception to that ****371** rule. Typically, the party claiming

the applicability of an exception bears the burden of demonstrating that it applies. (See *Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 23, 109 Cal.Rptr.3d 329, 230 P.3d 1117; see also, *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 67, 172 Cal.Rptr.3d 56, 325 P.3d 460.) Here, the State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite. The State's proposed rule, requiring the Commission to defer to the Regional Board, would leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's ***62** intent in creating the Commission.

Moreover, the policies supporting article XIII B of the California Constitution and section 6 would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question. The central purpose of article XIII B is to rein in local government spending. (*City of Sacramento, supra,* 50 Cal.3d at pp. 58–59, 266 Cal.Rptr. 139, 785 P.2d 522.) The purpose of section 6 is to protect local governments from state attempts to impose or shift the costs of new programs or increased levels of service by entitling local governments to reimbursement. (*County of San Diego, supra,* 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Placing the burden on the state to demonstrate that a requirement is federally mandated, and thus excepted from reimbursement, serves those purposes.

Applying the standard of review described above, we evaluate the entire record and independently review the Commission's determination the challenged conditions were not federal mandates. We conclude the Commission was correct. These permit conditions were not federally mandated.

*770 *a) The inspection requirements*

[13] Neither the CWA's "maximum extent practicable" provision nor the EPA regulations on which the State relies expressly required the Operators to inspect these particular facilities or construction sites. The CWA makes no mention of inspections. (33 U.S.C. § 1342(p)(3)(B)(iii).) The regulations required the Operators to include in their permit application a description of priorities and procedures for inspecting certain industrial facilities and construction sites, but suggested that the Operators would have discretion in selecting which facilities to inspect. (See C.F.R. § 122.26(d)(2)(iv)(C)(1).) The regulations do not mention commercial facility inspections at all.

Further, as the Operators explained, state law made the *Regional Board* responsible for regulating discharges of waste within its jurisdiction. (Wat. Code, §§ 13260, 13263.) This regulatory authority included the power to "inspect the facilities of any person to ascertain whether ... waste discharge requirements are being complied with." (Wat. Code, § 13267, subd. (c).) Thus, state law imposed an overarching mandate that the Regional Board inspect the facilities and sites.

In addition, federal law and practice required the Regional Board to inspect all industrial facilities and construction sites. Under the CWA, the State Board, as an issuer of NPDES permits, was required to issue permits for storm water discharges "associated with industrial activity." (33 U.S.C. § 1342(p)(3)(A).) The term "industrial activity" includes "construction activity." (40 C.F.R. § 122.26(b)(14)(x).) The Operators submitted evidence that the State Board had satisfied its obligation by issuing a general industrial activity stormwater permit and a general construction activity stormwater permit. Those statewide permits imposed controls designed to reduce pollutant discharges from industrial facilities and construction sites. Under the CWA, those facilities and sites could operate under the statewide permits rather than obtaining site-specific pollutant discharge permits.

The Operators showed that, in those statewide permits, the State Board had placed responsibility for inspecting facilities and sites on the *Regional Board*. The Operators submitted letters from the EPA indicating the State and regional boards were responsible for enforcing the terms of the statewide permits. The Operators also noted the State Board was authorized ***63** to charge a fee to facilities and sites that subscribed to the statewide permits (**372 Wat. Code, § 13260, subd. (d)), and that a portion of that fee was earmarked to pay the Regional Board for "inspection and regulatory compliance issues." (Wat. Code, § 13260, subd. (d)(2)(B)(iii).) Finally, there was evidence the Regional Board offered to pay the County to inspect industrial facilities. There would have been little reason to make that offer if federal law required the County to inspect those facilities.

***771** This record demonstrates that the Regional Board had primary responsibility for inspecting these facilities and sites. It shifted that responsibility to the Operators by imposing these Permit conditions. The reasoning of *Hayes, supra,* 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, provides guidance. There, the EHA required the state to provide certain services to special education students, but gave the state discretion in implementing the federal law. (*Hayes*, at p. 1594, 15 Cal.Rptr.2d 547.) The state exercised its "true discretion" by selecting the specific requirements it imposed on local governments. As a result, the *Hayes* court held the costs incurred by the local governments were state-mandated costs. (*Ibid.*) Here, state and federal law required the Regional Board to conduct inspections. The Regional Board exercised its discretion under the CWA, and shifted that obligation to the Operators. That the Regional Board did so while exercising its permitting authority under the CWA does not change the nature of the Regional Board's action under section 6. Under the reasoning of *Hayes*, the inspection requirements were not federal mandates.

The State argues the inspection requirements were federally mandated because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required. That the EPA regulations contemplated some form of inspections, however, does not mean that federal law required the scope and detail of inspections required by the Permit conditions. [16] As explained, the evidence before the Commission showed the opposite to be true.

b) The trash receptacle requirement

[14] The Commission concluded the trash receptacle requirement was not a federal mandate because neither the CWA nor the regulation cited by the State explicitly required the installation and maintenance of trash receptacles. The State contends the requirement was mandated by the CWA and by the EPA regulation that directed the Operators to include in their application 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." (40 C.F.R. § 122.26(d)(2)(iv)(A)(3).)

The Commission's determination was supported by the record. While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make ***772** those practices conditions of the permit. (40 C.F.R. § 122.26(d)(2)(iv).) No regulation cited by the State required trash receptacles at *****64** transit stops. In addition, there was evidence that the EPA had issued permits to other municipal storm sewer systems in Anchorage, Boise, Boston, Albuquerque, and Washington, D.C. that did not require trash receptacles at transit stops. The fact the EPA itself had issued permits in other cities, but did not include the trash receptacle condition, undermines the argument that the requirement was federally mandated.

c) Conclusion

Although we have upheld the Commission's determination on the federal mandate question, the State raised other arguments in its writ petition. Further, the issues presented in the Operators' cross-petition were not addressed by either the trial court or the Court of Appeal. We remand the matter so those issues can be addressed in the first instance.

****373 III. DISPOSITION

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with our opinion.

We Concur:

Cantil–Sakauye, C.J.

Werdegar, J.

Chin, J.

CONCURRING AND DISSENTING OPINION BY CUÉLLAR, J.

A local government is entitled to reimbursement from the state when the Legislature or a state agency requires it to provide new programs or increased service. (Cal. Const., art. XIII B, § 6, subd. (a).) But one crucial exception

coexists with this rule. It applies where the new program or increased service is mandated by a federal statute or regulation. (Gov. Code, § 17556, subd. (c).) We consider in this case whether certain conditions to protect water quality included in a permit from the Regional Water Quality Board, Los Angeles Region (Regional Board or Board)—specifically, installation and maintenance of trash receptacles at transit stops, as well as inspections of certain commercial and industrial facilities and construction sites—constitute state mandates subject to reimbursement, or federal mandates within the statutory reimbursement exception.

What the majority concludes is that federal law did not compel imposition of the conditions, and that the local agencies would not necessarily have been required to comply with them had they not been imposed by the state. In doing so, the majority upholds and treats as correct a decision by the Commission on State Mandates (the Commission) that is flawed in its approach and far too parsimonious in its analysis. This is no small feat: not ***773** only must the majority discount any expertise the Regional Board might bring to bear on the mandate question (see maj. opn., *ante*, 207 Cal.Rptr.3d at pp. 61–62, 378 P.3d at pp. 370–371), but it must also overlook the Commission's reliance on an overly narrow analytical framework and prop up the Commission's decision with evidence on which the agency *could have relied*, rather than that on which it did (see *id.* at pp. 62–64, 378 P.3d at pp. 371–373).

Moreover, when the majority considers whether the permit conditions are indeed federally mandated, it purports to apply de novo review to the Commission's legal determination. (See maj. opn., *ante*, at pp. 207 Cal.Rptr.3d at pp. 55, 61, 62, 378 P.3d at pp. 365, 370, 371.) What it actually applies seems far more deferential to the Commission's decision—something akin to substantial evidence review—despite the Commission's own failure in affording deference *****65** to the Regional Board and, more generally, its reliance on the wrong decision-making framework. (Cf. *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052, 63 Cal.Rptr.3d 82, 162 P.3d 596 ["A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question"].) Indeed, what the majority overlooks is that the Commission itself should have considered the effect of the evidence on which the majority now relies in deciding whether the challenged permit conditions were necessary to comply with federal law. And in doing so, the Commission should have extended a measure of deference to the Regional Board's expertise in administering the statutory scheme. (See *County of Los Angeles v. Cal. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 997, 50 Cal.Rptr.3d 619 (*State Water Board*).)

Because the Commission failed to do so, and because the Commission's interpretation of the federal Clean Water Act (the CWA; 33 U.S.C. § 1251 et seq.) failed to account for the complexities of the statute, I would reverse the Court of Appeal's judgment and remand with instructions for the Commission to reconsider its decision. So I concur in the majority's judgment reversing the Court of Appeal, but dissent from its conclusion upholding the Commission's decision rather than remanding the matter for further proceedings.

I.

To determine whether it is the state rather than local governments that should bear ****374** the entirety of the financial burden associated with a new program or increased service, the Commission must examine the nature of the federal scheme in question. That scheme is the CWA, a statute Congress amended in 1972 to establish the National Pollutant Discharge Elimination System (the NPDES) as a means of achieving and enforcing limitations on ***774** pollutant discharges. (See *EPA v. State Water Resources Control Bd.* (1976) 426 U.S. 200, 203–204, 96 S.Ct. 2022, 48 L.Ed.2d 578.) The role envisioned for the states under the NPDES is a major one, encompassing both the opportunity to assume the primary responsibility for the implementation and enforcement of federal effluent discharge limitations by issuing permits as well as the discretion to enact requirements that are more onerous than the federal standard. (See 33 U.S.C. §§ 1251(b), 1342(b).)

But states undertaking such implementation must do so in a manner that complies with regulations promulgated by the Environmental Protection Agency (the EPA), as well as the CWA's broad provisions (including the "maximum extent practicable" standard (33 U.S.C. § 1342(p)(3)(B)(iii))), and subject to the EPA's continuing

revocation authority (see *id.*, § 1342(c)(3)). Despite the breadth of the requirements the statute imposes on states assuming responsibility for permitting enforcement and the expansive nature of the EPA's revocation authority, neither the statute nor its implementing regulations include a safe harbor provision establishing a minimum level of compliance with the federal standard—an absence the majority tacitly acknowledges. (See maj. opn., *ante*, 207 Cal.Rptr.3d at p. 60, 378 P.3d at p. 369 ["the Regional Board was not required by federal law to impose any specific permit conditions"].) Instead, implementation of the federal mandate requires the state agency—here, the Regional Board—to exercise technical judgments about the feasibility of alternative permitting conditions ***66** necessary to achieve compliance with the federal statute.

With no statutory safe harbor that the Regional Board could have relied on to ensure the EPA's approval of the state permitting process, the Board interpreted the federal standard in light of the statutory text, implementing regulations, and its technical appraisal of potential alternatives. In discharging its own role, the Commission was then bound to afford the Regional Board a measure of "sister-agency" deference. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031 [explaining that "the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation"].) In this case, the Regional Board informed localities that, in its view, the various permit conditions it imposed would satisfy the maximum extent practicable standard. The EPA agreed the requirements were within the scope of the federal standard. The Regional Board's judgment that these conditions will control pollutant discharges to the extent required by federal law is at the core of the agency's institutional expertise. That expertise merits a measure of deference because the Regional Board's ken includes not only its greater familiarity with the CWA (relative to other entities), but also technical knowledge relevant to judgments about the water quality consequences of particular permitting conditions relevant to the provisions of the *775 CWA. (See, e.g., 33 U.S.C. § 1342(p)(3)(B)(iii) [requiring that permits include "management practices, control techniques and system, design and engineering methods, and such other provisions as ... the State determines appropriate for the control of such pollutants"].) Casting aside the Regional Board's expertise on the issue at hand, the majority nonetheless upholds the Commission's ruling.

Remand to the Commission would have been the more appropriate course for multiple reasons. First, the Commission applied the wrong framework for its analysis. It failed to consider all the evidence relevant to whether the permit conditions were necessary for compliance with federal law. The commission compounded its error by relying on an interpretation of the CWA that misconstrues the federal statutory scheme governing the state permitting process.

375 In particular, the Commission treated the problem as essentially a simple matter of searching the statutory text and regulations for precisely the same terms used by the Regional Board's permit conditions. Unless the requirement in question is referenced explicitly in a federal statutory or regulatory provision, the Commission's analysis suggests, the requirement cannot be a federal mandate. With respect to trash receptacles, the Commission stated: "Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that 'mandate costs that exceed the mandate in the federal law or regulation.' " And with respect to industrial facility inspections, the Commission said this: "Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the 'owner or operator of the discharge') the Commission finds that the state has freely chosen to impose ***67 these activities on the permittees." (Fn. omitted.)

Existing law does not support this method of determining what constitutes a federal mandate. Instead, our past decisions emphasize the need to consider the implications of multiple statutory provisions and broader statutory context when interpreting federal law to determine if a given condition constitutes a federal mandate. (See *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*); see also *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 890, 16 Cal.Rptr.3d 466, 94 P.3d 589 ["challenged state

rules or procedures that are intended to implement an applicable federal law—and whose costs are, *in context*, de minimis—should be treated as part and parcel of the underlying federal mandate" (italics added)].) In contrast, ***776** the Commission's overly narrow approach to determining what constitutes a federal mandate risks creating a standard that will never be met so long as the state retains any shred of discretion to implement a federal program. It cannot be that so long as a federal statute or regulation does not expressly require every permit term issued by a state agency, then the permit is a state, rather than a federal, mandate. But this is precisely how the Commission analyzed the issue—an analysis that, remarkably, the majority does not even question. Instead, the majority combs the record for evidence that could have supported the result the Commission reached. In so doing, the majority implicitly acknowledges that the Commission's approach to resolving the question at the heart of this case was deficient.

But if the Commission applied the wrong framework for its analysis, the right course is to remand. Doing so would obviate the need to cobble together scattered support for a decision by the Commission that was premised, in the first instance, on the Commission's own misconstrual of the inquiry before it. Instead, we should give the Commission an opportunity to reevaluate its conclusion in light of the entire record and to, where appropriate, solicit further information from the parties to shed light on what permit conditions are necessary for compliance with federal law.

The potential consequences of allowing the Commission to continue on its present path are quite troubling. For if the law were as the Commission suggests, the state would be unduly discouraged from participating in federal programs like the NPDES—even though participation might otherwise be in California's interest—if the state knows ex ante that it will be unable to pass along the expenses to the local areas that experience the most costs and benefits from the mandate at issue. Our law on unfunded mandates does not compel such a result. Nor is there an apparent prudential rationale in support of it.

The Commission's approach also fails to appreciate the EPA's role in implementing (through its interpretation and enforcement of the CWA) statutory requirements that the CWA describes in relatively broad terms. Indeed, what may be "practicable" in Los Angeles ****376** may not be in San Francisco, much less in Kansas City or Detroit. (See *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 889, 22 Cal.Rptr.3d 128 (*Building Industry Assn.*) [explaining that "the maximum extent practicable 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"].) It also suggests a lack of understanding of two interrelated matters on which the Regional *****68** Board likely has expertise: the consequences of the measures included as permit conditions relative to any ***777** alternatives and the interpretation of a complex federal statute governing regulation of the environment.

Second, beyond failing to consider all the relevant evidence bearing on the necessity of the imposed permit conditions, the Commission failed to extend any meaningful deference to the Regional Board's conclusions —even though such deference was warranted given that the nature of the decisions involved in interpreting the CWA included evaluating appropriate alternatives and determining which of those were necessary to satisfy the federal standard. (See *State Water Board, supra,* 143 Cal.App.4th at p. 997, 50 Cal.Rptr.3d 619 ["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"]; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1384, 38 Cal.Rptr.3d 450 (*Rancho Cucamonga*) ["consideration [should be] given to the [regional board's] interpretations of its own statutes and regulations"]; *Building Industry Assn., supra,* 124 Cal.App.4th at p. 879, fn. 9, 22 Cal.Rptr.3d 128 ["we do consider and give due deference to the Water Boards' statutory interpretations [of the CWA] in this case"]; see also *Cal. Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 389–390, 196 Cal.Rptr.3d 94, 362 P.3d 792 [explaining that "an agency's expertise and technical knowledge, especially when it pertains to a complex technical statute, is relevant to the court's assessment of the value of an agency interpretation"].) In the direct challenge to the permit at issue here, the local agencies argued that the Regional Board exceeded even those requirements associated with the maximum extent practicable standard, an argument the appellate court rejected in an unpublished section of its opinion. Because of its failure to afford any deference to the Regional Board or to conduct an analysis more

consistent with the relevant standard of review, the Commission essentially forces the Board to defend its decision twice: once on direct challenge and a second time before the Commission.

Conditions as prosaic as trash receptacle requirements initially may not seem to implicate the Regional Board's expertise. Yet its unique experience and technical competence matter even with respect to these conditions, because the use of such conditions implicates a decision not to use alternatives that might require greater conventional expert judgment to evaluate. Moreover, the Regional Board is likely to accumulate a distinct and greater degree of knowledge regarding issues such as the reactions of stakeholders to different requirements, and related factors relevant to determining which conditions are necessary to satisfy the CWA's maximum extent practicable standard.

The Commission acknowledged that the State Water Resources Control Board—as well as the EPA—believed the permit requirements did not exceed ***778** this federal standard. "The comments of the State Water Board and U.S. EPA," the Commission noted, "assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations." But the Commission afforded these conclusions no clear deference in determining whether the requirements were state mandates.

Nor is the majority correct in suggesting that the Commission had only a limited responsibility, if it had one at all, to extend any deference to the Regional Board. (See maj. opn., *****69** *ante*, 207 Cal.Rptr.3d at pp. 61–62, 378 P.3d at pp. 370–371.) The Regional Board's judgment as to whether the imposed permit ****377** conditions were necessary to comply with federal law was a prerequisite to the Commission's own task, which was to review the Board's determination in light of all the relevant evidence. To the extent ambiguity exists as to whether the Regional Board's conclusions incorporated any findings that these conditions were necessary to meet the federal standard (see *id.* at pp. 61–62, 378 P.3d at pp. 370–371), remand to clarify the Board's position is in order. By instead simply upholding the Commission's conclusion without remand, the majority displaces any meaningful role for the Regional Board's expert judgment.

The majority does so even though courts have routinely emphasized the pivotal role regional boards play in interpreting the CWA's intricate mandate. (See *State Water Board, supra,* 143 Cal.App.4th at p. 997, 50 Cal.Rptr.3d 619; *Rancho Cucamonga, supra,* 135 Cal.App.4th at p. 1384, 38 Cal.Rptr.3d 450.) And for good reason: If the Regional Board's judgment is that the trash receptacle and inspection requirements are necessary to control pollutant discharges to the maximum extent practicable, such a conclusion is well within the purview of its expertise. Unsurprisingly, then, we have never concluded that the technical knowledge relevant to interpreting the requirements of the CWA—a statute that lacks a safe harbor and where discerning what phrases such as maximum extent practicable mean given existing conditions and technology is complex—lies beyond the ambit of the Regional Board's expertise, or otherwise proves distinct from the sort of expertise that merits deference.

Third, the Commission devoted insufficient attention in its analysis to the role of states in implementing the CWA, and to how that role can be harmonized with the significant protections against unfunded mandates that the state Constitution provides. (See Cal. Const., art. XIII B, § 6, subd. (a).) By allowing states to assume such an important role in implementing its provisions, the CWA reflects principles of cooperative federalism. (See 33 U.S.C. §§ 1251(b), 1342(b); see also *Boise Cascade Corp. v. EPA* (9th Cir. 1991) 942 F.2d 1427, 1430 ["The federal-state relationship established by the [Clean Water] Act is ... illustrated in Congress' goal of encouraging states to 'assume the major role in the operation of the NPDES program' "].) In accordance with the CWA's express provisions, California chose to assume ***779** the responsibility for implementation of the NPDES program in the state—a role that requires further specification of permitting conditions. (See 33 U.S.C. § 1342(c)(3) [states must administer permitting programs "in accordance with requirements of this section," including compliance with the maximum extent practicable standard].) In the process, the state must comply with the constitutional protections against unfunded mandates requiring reimbursement of localities if permit conditions exceed what is necessary to comply with the relevant federal mandate. But given the nature of the relevant CWA provisions—and particularly the maximum extent practicable standard—it is wrong to assume that the conditions at issue in this case exceed

what is necessary to comply with the CWA simply because neither the statute nor its regulations explicitly mention those conditions. The consequence of that assumption, moreover, risks discouraging the state from assuming cooperative federalism responsibilities—and may even encourage the state to withdraw from administering the NPDES. Indeed, counsel for the state indicated at oral argument that if the Commission's reasoning were upheld—and the state were required to foot the bill for any ***70** conditions not expressly mentioned in the applicable federal statutes or regulations—it might think twice about entering into such arrangements of cooperative federalism.

In light of these concerns with the Commission's approach to this case, it is difficult to see the basis for—or utility of—upholding the Commission's decision, even under the inscrutable standard of review the majority employs. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 586, 128 Cal.Rptr.2d 514 [substantial evidence review requires that all evidence be considered, including evidence that does not support the agency's decision]; see also *Sierra Club v. U.S. Army Corps of Engineers* (2d Cir. 1983) 701 F.2d 1011, 1030 ["the court may properly be skeptical as to whether an [agency report's] conclusions have a substantial basis in fact if the responsible agency has **378** apparently ignored the conflicting views of other agencies having pertinent expertise"].) The better course, in my view, would be for us to articulate the appropriate standard for evaluating the question whether these permit conditions are state mandates and then remand for the Commission to apply it in the first instance.

II.

The Commission relied on a narrow approach that only compares the terms of a permit with the text of the CWA and its implementing regulations. Instead, the Commission should have employed a more flexible methodology in determining whether the permit conditions were federally mandated. Such a flexible approach accords with our prior case law. (See *City of Sacramento, supra,* 50 Cal.3d at p. 76, 266 Cal.Rptr. 139, 785 P.2d 522 [whether local government appropriations are *780 federally mandated and therefore exempt from taxing and spending limitations under section 9, subdivision (b), of article XIII B of the California Constitution depends on, inter alia, the nature and purpose of the federal program, whether its design suggests an intent to coerce, when state or local participation began, and the legal and practical consequences of nonparticipation or withdrawal].) Moreover, it would have the added benefit of not discouraging the state from participating in ventures of cooperative federalism.

The majority may be correct that the facts of *City of Sacramento* are distinguishable. (See maj. opn., *ante*, 207 Cal.Rptr.3d at p. 60, 378 P.3d at p. 369.) In that case, the state risked forsaking subsidies and tax credits for its resident businesses if it failed to comply with federal law requiring that unemployment insurance protection be extended to local government employees. (*Id.* at p. 56, 378 P.3d at p. 366 .) Here, in contrast, the negative consequences of failing to comply with federal law may seem less severe, at least in fiscal terms: the EPA may determine that the state is not in compliance with the CWA and reassert authority over permitting. (See 33 U.S.C. § 1342(c)(3).) But *City of Sacramento* nonetheless remains relevant, even though a precisely comparable level of coercion may not exist here. The flexible approach we articulated in that case remains the best way to ensure that some weight is given to the Regional Board's technical expertise, and the conclusions resulting therefrom, while also taking account of the cooperative federalism arrangements built into the CWA.

So instead of adopting an approach foreign to our precedent, the Commission should have begun its analysis with the statutory and regulatory text—and then it should have considered other relevant materials and record evidence bearing on whether the permit conditions are necessary ***71** to satisfy federal law. Crucially, such evidence includes how the federal regulatory scheme operates in practice. The Commission could have examined, for instance, previous permits issued by the EPA in similarly situated jurisdictions, comparing them to the inspection and trash receptacle requirements the Regional Board imposed here and giving due consideration to the EPA's conclusion that the maximum extent practicable standard is applied in a highly site-specific and flexible manner in order to account for unique local challenges and conditions. (See 64 Fed. Reg. 68722, 68754 (Dec. 8, 1999).) The Commission could also have considered whether, instead of identifying permitting conditions necessary to comply with the CWA, the state

shifted onto local governments responsibility to conduct inspections or provide trash receptacles. The majority wisely notes that these are factors the Commission *could* have examined. (See maj. opn., *ante*, at pp. 62–64, 378 P.3d at pp. 371–373.) But the Commission mentioned this evidence only briefly, failing to grapple in any meaningful way with its implications for the issue at hand. We should allow the Commission an opportunity to do so in the first instance.

***781** The Commission should have also accorded appropriate deference to the Regional Board's conclusions regarding how best to comply with the federal maximum extent practicable standard. One way to ensure that such deference is given would be to place on the party seeking reimbursement the burden of demonstrating that the challenged permit conditions clearly exceed the federal standard, or that they were otherwise unnecessary ****379** to reduce pollutant discharges to the maximum extent practicable. Doing so would make sense where the state is implementing a federal program that envisions routine state participation, the federal program does not itself define the minimum degree of compliance required, and the state's implementing agency reasonably determines in its expertise that certain conditions are necessary to comply with the applicable federal standard.

* * *

The Commission's decision—and the approach that produced it—fails to accord with existing law and with the nature of the applicable federal scheme. The state is not responsible for reimbursing localities for permit conditions that are necessary to comply with federal law, a circumstance that renders interpretation of the CWA central to this case. A core principle of the CWA is to facilitate cooperative federalism, by allowing states to take on a critical responsibility in exchange for compliance with a set of demanding standards overseen by a federal agency capable of withdrawing approval for noncompliance. (See *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239 ["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' "]; *Shell Oil Co. v. Train* (9th Cir. 1978) 585 F.2d 408, 409 ["Shell's complaint must be read against the background of the cooperative federal-state scheme for the control of water pollution"].) The Commission failed to interpret the statute in light of nuances in its text and structure. And it failed to offer even a modicum of deference to the Regional Board's interpretation, despite the Board's clear expertise that the technical nature of the questions necessary to interpret the scope of the CWA demands.

Accordingly, I would remand the matter to the Court of Appeal with directions that it instruct the Commission to reconsider its decision. On reconsideration, the Commission should appropriately defer to the *****72** Regional Board, consider all relevant evidence bearing on the question at hand, and ensure the evidence clearly shows the challenged permit conditions were not necessary to comply with the federal mandate. This is the standard that most ***782** thoroughly reflects our existing law and the nature of the CWA. Any dilution of it exacerbates the risk of undermining the nuanced federal-state arrangement at the heart of the CWA.

We Concur:

Liu, J.

Kruger, J.

All Citations

1 Cal.5th 749, 378 P.3d 356, 207 Cal.Rptr.3d 44, 16 Cal. Daily Op. Serv. 9501, 2016 Daily Journal D.A.R. 8996, 2016 Daily Journal D.A.R. 11,393

Footnotes

1 The cities involved are the Cities of Agoura Hills, Alhambra, Arcadia, Artesia, Azusa, Baldwin Park, Bell, Bellflower, Bell Gardens, Beverly Hills, Bradbury, Burbank, Calabasas, Carson, Cerritos, Claremont, Commerce, Compton, Covina, Cudahy, Culver City, Diamond Bar, Downey, Duarte, El Monte, El Segundo, Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne, Hermosa Beach, Hidden Hills, Huntington Park, Industry, Inglewood, Irwindale, La Cañada Flintridge, La Habra Heights, Lakewood, La Mirada, La Puente, La Verne, Lawndale, Lomita, Los Angeles, Lynwood, Malibu, Manhattan Beach, Maywood, Monrovia, Montebello, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pasadena, Pico Rivera, Pomona, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, Rosemead,

San Dimas, San Fernando, San Gabriel, San Marino, Santa Clarita, Santa Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood, Westlake Village, and Whittier.

2 The systems at issue here are "municipal separate storm sewer systems," sometimes referred to by the acronym "MS4." (40 C.F.R. § 122.26(b)(19) (2001).) A "municipal separate storm sewer" is a system owned or operated by a public agency with jurisdiction over disposal of waste and designed or used for collecting or conveying storm water. (40 C.F.R. § 122.26(b)(8) (2001).) Unless otherwise indicated, all further citations to the Code of Federal Regulations are to the 2001 version.

3 For a state to acquire permitting authority, the governor must give the EPA a "description of the program [the state] proposes to establish," and the attorney general must affirm that the laws of the state "provide adequate authority to carry out the described program." (33 U.S.C. § 1342(b).)

4 The EPA may withdraw approval of a state's program (33 U.S.C. § 1342(c)(3)), and also retains some supervisory authority: States must inform the EPA of all permit applications received and of any action related to the consideration of a submitted application (33 U.S.C. § 1342(d)(1)).

5 As to commercial facilities, Part 4(C)(2)(a) required each Operator to inspect each restaurant, automotive service facility, retail gasoline outlet, and automotive dealership within its jurisdiction, and to confirm that the facility employed best management practices in compliance with state law, county and municipal ordinances, a Regional Board resolution, and the Operators' storm water quality management program (SQMP). For each type of facility, the Permit set forth specific inspection tasks.

Part 4(C)(2)(b) addressed industrial facilities, requiring the Operators to inspect them and confirm that each complied with county and municipal ordinances, a Regional Board resolution, and the SQMP. The Operators also were required to inspect industrial facilities for violations of the general industrial activity stormwater permit, a statewide permit issued by the State Board that regulates discharges from industrial facilities. (See discussion, *post*, at pp. 62–63, 378 P.3d at pp. 371–372.)

6 Part 4(E)(4) required inspections for violations of the general construction activity stormwater permit, another statewide permit issued by the State Board. (See discussion, *post*, at pp. 62–63, 378 P.3d at pp. 371–372.)

7 " 'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur ... as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution." (Gov. Code, § 17514.)

8 40 Code of Federal Regulations part 122.26(d)(2)(iv)(A) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls," and that, at a minimum, that description shall include, among other things, 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, including pollutants discharged as a result of deicing activities." (40 C.F.R. § 122.26(d)(2)(iv)(A), (A)(3).)

9 40 Code of Federal Regulations part 122.26(d)(2)(iv)(B) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program, including a schedule, to detect and remove ... illicit discharges and improper disposal into the storm sewer," and that the proposed program shall include a "description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26(d)(2)(iv)(B), (B)(1).)

10 40 Code of Federal Regulations part 122.26(d)(2)(iv)(C) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program to monitor and control pollutants in storm water discharges to municipal systems from 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 loading to the municipal storm sewer system," and that the program shall "[i]dentify priorities and procedures for inspections and establishing and implementing control measures for such discharges." (40 C.F.R. § 122.26(d)(2)(iv)(C), (C)(1).)

11 40 Code of Federal Regulations part 122.26(d)(2)(iv)(D) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program to implement and maintain structural and

nonstructural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system," which shall include, 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." (40 C.F.R. § 122.26(d)(2)(iv)(D), (D)(3).)

12 The appellants are County and the Cities of Artesia, Azusa, Bellflower, Beverly Hills, Carson, Commerce, Covina, Downey, Monterey Park, Norwalk, Rancho Palo Verdes, Signal Hill, Vernon, and Westlake Village.

13 In the end, the court held that the challenged state regulation did not obligate the local fire district to maintain three-person firefighting teams. Accordingly, the state regulation did not mandate an increase in costs. (*Division of Occupational Safety, supra,* 189 Cal.App.3d at pp. 807–808, 234 Cal.Rptr. 661.)

14 To the extent Education Code section 48918 imposed requirements that went beyond the mandate of federal law, those requirements were merely incidental to the federal mandate, and at most resulted in "a de minimis cost." (*San Diego Unified, supra,* 33 Cal.4th at p. 890, 16 Cal.Rptr.3d 466, 94 P.3d 589.) The State does not argue here that the costs of the challenged permit conditions were de minimis.

15 Of course, this finding would be case specific, based among other things on local factual circumstances.

16 The State also relied on a 2008 letter from the EPA indicating that the requirements to inspect industrial facilities and construction sites fell within the maximum extent practicable standard under the CWA. That letter, however, does not indicate that federal law required municipal storm sewer system operators to inspect all industrial facilities and construction sites within their jurisdictions.

18 Cal.App.5th 661
Court of Appeal,
Third District, California.

DEPARTMENT OF FINANCE et al., Plaintiffs and Respondents,
v.
COMMISSION ON STATE MANDATES, Defendant;
County of San Diego et al., Real Parties in Interest and Appellants.

C070357
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Filed 12/19/2017

Synopsis
Background: State petitioned for writ of administrative mandate, asserting that Commission on State Mandates erred in ruling that conditions imposed on a federal and state storm water permit held by municipal government permittees were state, and not federal, mandates. The Superior Court, Sacramento County, No. 34-2010-80000604-CU-WM-GDS, Allen Sumner, J., granted petition in part. Permittees appealed.

Holdings: The Court of Appeal, Nicholson, J., held that:

[1] provision of Clean Water Act granting regional water quality board discretion to meet "maximum extent practicable" standard in providing for pollutant reduction in storm water permits was not a federal mandate, and thus permittees were required to be reimbursed for cost of meeting permit condition requiring reduction of pollutants to maximum extent practicable, and

[2] Environmental Protection Agency (EPA) regulation requiring storm water permittees to describe, in permit application, practices for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems was also not a federal mandate.

Reversed and remanded.

West Headnotes (9)

[1] States
Exercise of supreme executive authority
Statutes
Questions of law or fact

The question whether a statute or executive order imposes a mandate is a question of law.

Cases that cite this headnote

[2] Environmental Law
Discharge of pollutants

Provision of Clean Water Act granting regional water quality board discretion to meet "maximum extent practicable" standard in providing for pollutant reduction in storm water permits was not a federal mandate, and therefore, under state constitution's subvention provision, reimbursement of local government permittees was required for cost of storm water permit condition requiring reduction of pollutants to "maximum extent practicable"; regulation vested board with discretion to choose how permittees were to meet the standard at issue, and exercise of that discretion resulted in imposition of state mandate. Cal. Const. art. XIII B, § 6; Federal Water Pollution Control Act § 402, 33 U.S.C.A. § 1342(p)(3)(B)(iii); Cal. Gov't Code § 17556(c).

Cases that cite this headnote

[3] States
State expenses and charges and statutory liabilities

To be a "federal mandate" that would trigger exception to state constitutional subvention provision's requirement for reimbursement of local government for cost of increased program or service requirements, the federal law or regulation must expressly or explicitly require the condition imposed in the permit. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c).

Cases that cite this headnote

[4] **Environmental Law**
Discharge of pollutants

Federal Environmental Protection Agency (EPA) regulation requiring storm water permittees to describe, in permit application, practices for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems was not a federal mandate for street sweeping and cleaning of storm sewer systems, and therefore, under state constitution's subvention provision, reimbursement of local government permittees was required for cost of storm water permit condition requiring street sweeping and cleaning of storm sewer system, where EPA regulation did not expressly require the scope and detail of street sweeping and facility maintenance that permit imposed. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c); 40 C.F.R. § 122.26(d)(2)(iv)(A)(3).

Cases that cite this headnote

[5] **Environmental Law**
Discharge of pollutants

Federal Environmental Protection Agency (EPA) regulation requiring storm water permit applicants to describe procedures for developing and enforcing controls to reduce discharge of pollutants which received discharges from areas of new development and significant redevelopment was not a federal mandate for storm water permittees to develop a hydromodification plan, and therefore, under state constitution's subvention provision, reimbursement of local government permittees was required for cost of storm water permit condition requiring development of hydromodification plan; regulation did not require a hydromodification plan nor restrict regional water quality board from exercising its discretion to require a specific type of plan. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c); 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).

Cases that cite this headnote

[6] **Environmental Law**
Discharge of pollutants

Federal Environmental Protection Agency (EPA) regulation requiring storm water permit applicants to describe procedures for developing and enforcing controls to reduce discharge of pollutants which received discharges from areas of new development and significant redevelopment was not a federal mandate for storm water permittees to implement particular low impact development requirements, and therefore, under state constitution's subvention provision, reimbursement of local government permittees was required for cost of storm water permit condition requiring implementation of specified low impact development management practices; nothing in regulation required regional water quality board to impose specific requirements at issue. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c); 40 C.F.R. § 122.26(d)(2)(iv)(A)(2).

Cases that cite this headnote

[7] **Environmental Law**
Discharge of pollutants

Federal Environmental Protection Agency (EPA) regulations requiring storm water permit applicants to describe various proposed educational programs in permit application was not a federal mandate for particular educational requirements imposed by permit granted to municipal government permittees, and therefore, under state constitution's subvention provision, permittees were required to be reimbursed for cost of such educational requirements; educational program and list of topics required by permit, including use of all media as appropriate to measurably increase impacts of urban runoff and best management practices, surpassed what federal regulations

required. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c); 40 C.F.R. §§ 122.26(d)(2)(iv)(A)(6), 122.26(d)(2)(iv)(A)(6), (B)(6), (D)(4), 122.26(d)(2)(iv)(B)(6), 122.26(d)(2)(iv)(D)(4).

Cases that cite this headnote

[8] Environmental Law
Discharge of pollutants

Federal Environmental Protection Agency (EPA) regulation allowing storm water permit applicants to propose a management program that imposed controls beyond a single jurisdiction was not a federal mandate for storm water permittees to implement regional and watershed urban runoff management programs, and therefore, under state constitution's subvention provision, local government permittees were required to be reimbursed for cost of such programs when programs were required by permit; regulation merely gave regional water quality board the discretion to require controls on a systemwide, watershed, or jurisdictional basis. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c); 40 C.F.R. § 122.26(d)(2)(iv).

Cases that cite this headnote

[9] Environmental Law
Discharge of pollutants

Federal Environmental Protection Agency (EPA) regulation requiring storm water permit applications to show that applicant had legal authority to control, through interagency agreements, the contribution of pollutants to a different jurisdiction was not a federal mandate for permittees to collaborate or to execute an agreement that established a management structure, and therefore, under state constitution's subvention provision, local government permittees were required to be reimbursed for cost of permit requirements to execute such an agreement; regulation required regional water quality board to assure itself that permittees had authority to address runoff pollution regionally, but it did not require board to define how permittees would organize themselves to do so. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c); 40 C.F.R. § 122.26(d)(2)(i)(D).

See 9 Witkin, Summary of Cal. Law (11th ed. 2017) Taxation, § 119 et seq.

Cases that cite this headnote

***849** APPEAL from a judgment of the Superior Court of Sacramento County, Allen Sumner, Judge. Reversed with directions. (Super. Ct. No. 34-2010-80000604-CU-WM-GDS)

Attorneys and Law Firms

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No appearance for Defendant.

Opinion

NICHOLSON, J.

****1** The California Constitution requires the state to provide a subvention of funds to compensate local governments for the costs of a new program or higher level of service the state mandates. (Cal. Const., art. XIII B, § 6 (section 6).) Subvention is not available if the state imposes a requirement that is mandated by the federal government, unless the state order mandates costs that exceed those incurred under the federal mandate. (Gov. Code, § 17556, subd. (c).) The Commission on State Mandates (the Commission) adjudicates claims for subvention.

***850** In *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 207 Cal.Rptr.3d 44, 378 P.3d 356 (*Department of Finance*), the California Supreme Court upheld a Commission ruling that certain conditions a regional water quality control board imposed on a storm water discharge permit issued under federal and state law required subvention and were not federal mandates. The high court found no federal law, regulation, or administrative case authority expressly required the conditions. It ruled the federal requirement that the permit reduce pollution impacts to the "maximum extent practicable" was not a federal mandate, but rather vested the regional board with discretion to choose which conditions to impose to meet the standard. The permit conditions resulting from the exercise of that choice were state mandates.

In this appeal, we face the same issue. The parties and the permit conditions are different, but the legal issue is the same—whether the Commission correctly determined that conditions imposed on a federal and state storm water permit by a regional water quality control board are state mandates. The Commission reached its decision by applying the standard the Supreme Court later adopted in *Department of Finance*. The trial court, reviewing the case before *Department of Finance* was issued, concluded the Commission had applied the wrong standard, and it remanded the matter to the Commission for further proceedings.

Following the analytical regime established by *Department of Finance*, we reverse the trial court's judgment. We conclude the Commission applied the correct standard and the permit requirements are state mandates. We reach this conclusion on the same grounds the high court in *Department of Finance* reached its conclusion. No federal law, regulation, or administrative case authority expressly required the conditions. The requirement to reduce pollution impacts to the "maximum extent practicable" was not a federal mandate, but instead vested the regional board with discretion to choose which conditions to impose to meet the standard. The permit conditions resulting from the exercise of that choice in this instance were state mandates.

We remand the matter so the trial court may consider other issues the parties raised in their pleadings but the court did not address.

BACKGROUND

In *Department of Finance*, the Supreme Court explained the storm water discharge permitting system and the constitutional reimbursement system in detail. We quote from the opinion at length:

A. *The storm water discharge permitting system*

****2** "The Operators' municipal storm sewer systems discharge both waste and pollutants.[1] State law controls 'waste' discharges. (Wat. Code, § 13265.) Federal law regulates discharges of 'pollutant[s].' (33 U.S.C. § 1311(a).) Both state and later-enacted federal law require a permit to operate such systems.

"California's Porter-Cologne Water Quality Control Act (Porter-Cologne Act ***851** or the Act; Wat. Code, § 13000 et seq.) was enacted in 1969. It established the State Water Resources Control Board (State Board), along with nine regional water quality control boards, and gave those agencies 'primary responsibility for the coordination and control of water quality.' (Wat. Code, § 13001; see *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619, 26 Cal.Rptr.3d 304, 108 P.3d 862

(*City of Burbank*).) The State Board establishes statewide policy. The regional boards formulate and adopt water quality control plans and issue permits governing the discharge of waste. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875, 22 Cal.Rptr.3d 128 (*Building Industry*).)

"The Porter-Cologne Act requires any person discharging, or proposing to discharge, waste that could affect the quality of state waters to file a report with the appropriate regional board. (Wat. Code, § 13260, subd. (a)(1).) The regional board then 'shall prescribe requirements as to the nature' of the discharge, implementing any applicable water quality control plans. (Wat. Code, § 13263, subd. (a).) The Operators must follow all requirements set by the Regional Board. (Wat. Code, §§ 13264, 13265.)

"The federal Clean Water Act (the CWA; 33 U.S.C. § 1251 et seq.) was enacted in 1972, and also established a permitting system. The CWA is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (*City of Burbank, supra,* 35 Cal.4th at p. 620, 26 Cal.Rptr.3d 304, 108 P.3d 862.) The CWA prohibits pollutant discharges unless they comply with (1) a permit (see 33 U.S.C. §§ 1328, 1342, 1344); (2) established effluent limitations or standards (see 33 U.S.C. §§ 1312, 1317); or (3) established national standards of performance (see 33 U.S.C. § 1316). (33 U.S.C. § 1311(a).) The CWA allows any state to adopt and enforce its own water quality standards and limitations, so long as those standards and limitations are not 'less stringent' than those in effect under the CWA. (33 U.S.C. § 1370.)

"The CWA created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the CWA or the EPA Administrator. (33 U.S.C. § 1342(a)(1), (2).) The federal system notwithstanding, a state may administer its own permitting system if authorized by the EPA.[2] If the EPA concludes a state has adequate authority to administer its proposed program, it must grant approval (33 U.S.C. § 1342(b)) and suspend its own issuance of permits (33 U.S.C. § 1342(c)(1)).[[3]]

3 "California was the first state authorized to issue its own pollutant discharge permits. (*People ex rel. State Water Resources Control Bd. v. Environmental Protection Agency* (9th Cir. 1975) 511 F.2d 963, 970, fn. 11, revd. on other grounds in ***852 *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578.) Shortly after the CWA's enactment, the Legislature amended the Porter-Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was 'in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter-Cologne Act].' (*Ibid.*) The Legislature provided that chapter 5.5 be 'construed to ensure consistency' with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements 'ensur[ing] 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.' (Wat. Code, § 13377, italics added.)[4] To align the state and federal permitting systems, the legislation provided that the term ' "waste discharge requirements" ' under the Act was equivalent to the term ' "permits" ' under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452, 126 Cal.Rptr.2d 389; accord, *Building Industry, supra,* 124 Cal.App.4th at p. 875, 22 Cal.Rptr.3d 128.)

"In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (33 U.S.C. § 1342(p)(2)(C), (D).) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit non-stormwater discharges into the storm sewers, and must 'require controls to reduce the discharge of pollutants *to the maximum extent practicable*.' (33 U.S.C. § 1342(p)(3)(B), italics added.) The phrase 'maximum extent practicable' is not further defined. How that phrase is applied, and by whom, are important aspects of this case.

"EPA regulations specify the information to be included in a permit application. (See 40 C.F.R. § 122.26(d)(1)(i)-(vi), (2)(i)-(viii).) Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv).) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (*Ibid.*)" (*Department of Finance, supra,* 1 Cal.5th at pp. 755-757, 207 Cal.Rptr.3d 44, 378 P.3d 356, original italics.) [5]

B. *The permit before us*

In 2007, the Regional Water Quality Control Board, San Diego Region (the San Diego Regional Board), issued a permit to real parties in interest and appellants, the County of San Diego and the cities located in the county (the "permittees" or "copermittees"). [6] The permit was actually a renewal ***853** of an NPDES permit first issued in 1990 and renewed in 2001. The San Diego Regional Board stated the new permit "specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP)." The San Diego Regional Board found that although the permittees had generally been implementing the management programs required in the 2001 permit, "urban runoff discharges continue to cause or contribute to violations of water quality standards. This [permit] contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards."

****4** The permit requires the permittees to implement various programs to manage their urban runoff that were not required in the 2001 permit. It requires the permittees to implement programs in their own jurisdictions. It requires the permittees in each watershed to collaborate to implement programs to manage runoff from that watershed, and it requires all of the permittees in the region to collaborate to implement programs to manage regional runoff. The permit also requires the permittees to assess the effectiveness of their programs and collaborate in their efforts.

The specific permit requirements involved in this case require the permittees to do the following:

(1) As part of their jurisdictional management programs:

(a) Sweep streets at certain times, depending on the amount of debris they generate, and report the number of curb miles swept and tons of material collected;

(b) Inspect, maintain, and clean catch basins, storm drain inlets, and other storm water conveyances at specified times and report on those activities;

(c) Collaboratively develop and individually implement a hydromodification management plan to manage increases in runoff discharge rates and durations; [7]

(d) Collectively update the best management practices requirements listed in their local Standard Urban Storm Water Mitigation Plans (SUSMP's) and add low impact development best management practices for new real property development and redevelopment;

(e) Individually implement an education program using all media to inform target communities about municipal separate storm sewer systems (MS4's) and impacts of urban runoff, and to change the communities' behavior and reduce pollutant releases to MS4's;

(2) As part of their watershed management programs, collaboratively develop and implement watershed water quality activities and education activities within established schedules and by means of frequent regularly scheduled meetings;

(3) As part of their regional management programs:

(a) Collaboratively develop and implement a regional urban runoff management program to reduce the ***854** discharge of pollutants from MS4's to the maximum extent practicable;

(b) Collaboratively develop and implement a regional education program focused on residential sources of pollutants;

(4) Annually assess the effectiveness of the jurisdictional, watershed, and regional urban runoff management programs, and collaboratively develop a long-term effectiveness assessment to assess the effectiveness of all of the urban runoff management programs; and

(5) Jointly execute a memorandum of understanding, joint powers authority, or other formal agreement that defines the permittees' responsibilities under the permit and establishes a management structure, standards for conducting meetings, guidelines for workgroups, and a process to address permittees' noncompliance with the formal agreement.

The permittees estimated complying with these conditions would cost them more than $66 million over the life of the permit.

C. *Reimbursement for state mandates*

"[W]hen the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must 'reimburse that local government for the costs of the program or increased level of service.' (Cal. Const., art. XIII B, § 6, subd. (a) (hereafter, section 6).)[[8]]" (*Department of Finance, supra,* 1 Cal.5th at pp. 758-759, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

****5** "Voters added article XIII B to the California Constitution in 1979. Also known as the ' "Gann limit," ' it 'restricts the amounts state and local governments may appropriate and spend each year from the "proceeds of taxes." ' (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58-59, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*).) 'Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes.' (*Id.* at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.)

"The 'concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.' (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].) The reimbursement provision in section 6 was included in recognition of the fact 'that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments.' (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 [61 Cal.Rptr.2d 134, 931 P.2d 312] (*County of San Diego*).) The ***855** purpose of section 6 is to prevent '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*, at p. 81 [61 Cal.Rptr.2d 134, 931 P.2d 312].) Thus, with certain exceptions, section 6 'requires the state "to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies." ' (*County of San Diego*, at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.)" (*Department of Finance, supra,* 1 Cal.5th at pp. 762-763, 207 Cal.Rptr.3d 44, 378 P.3d 356, original italics.)

A significant exception to section 6's subvention requirement is at issue here. Under that exception, "reimbursement is not required if '[t]he statute or executive order imposes a requirement that is mandated by a 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.' (Gov. Code, § 17556, subd. (c).)

"The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims (Gov. Code, § 17500 et seq.) and created the Commission to adjudicate them (Gov. Code, §§ 17525, 17551). It also established 'a test-claim procedure to expeditiously resolve disputes affecting multiple agencies.' (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 285 Cal.Rptr. 66, 814 P.2d 1308 (*Kinlaw*).)

"The first reimbursement claim filed with the Commission is called a test claim. (Gov. Code, § 17521.) The Commission must hold a public hearing, at which the Department of Finance (the Department), the claimant, and any other affected department or agency may present

evidence. (Gov. Code, §§ 17551, 17553.) The Commission then determines 'whether a state mandate exists and, if so, the amount to be reimbursed.' (*Kinlaw, supra,* 54 Cal.3d at p. 332, 285 Cal.Rptr. 66, 814 P.2d 1308.) The Commission's decision is reviewable by writ of mandate. (Gov. Code, § 17559.)" (*Department of Finance, supra,* 1 Cal.5th at pp. 758-759, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

D. *The test claim and the writ petition*

****6** In 2008, the permittees filed a test claim with the Commission. They contended the permit requirements mentioned above constituted new or modified requirements that were compensable state mandates under section 6. The State, the San Diego Regional Board and the Department of Finance (collectively the "State") claimed the requirements were not compensable because they were mandated by the federal CWA's NPDES permit requirements.

In 2010, the Commission ruled all of the targeted requirements were state mandates and not federal mandates. The Commission found the requirements were not federal mandates because they were not expressly specified in, or they exceeded the scope of, federal regulations. The Commission determined the permittees were entitled to subvention by the state for all of the requirements except two. The Commission ruled the requirements to develop a hydromodification plan and to include low impact development practices in the SUSMP's were not entitled to subvention because the permittees had authority to impose fees to recover the costs of those requirements.

The State petitioned the trial court for a writ of administrative mandate. It contended the Commission erred because the permit requirements are federal mandates ***856** and are not a new program or higher level of service. It also contended the Commission erred in concluding the County of San Diego did not have fee authority to pay for all of the permit conditions.

The County of San Diego filed a cross-petition for writ of mandate to challenge the Commission's decision that the conditions requiring a hydromodification plan and low impact development practices were not reimbursable.

The trial court granted the State's petition in part and issued a writ of mandate. It concluded the Commission applied an incorrect standard when it determined the permit conditions were not federal mandates. It held the Commission was required to determine whether any of the permit requirements exceeded the "maximum extent practicable" standard imposed by the CWA. "The Commission never undertook this inquiry," the court stated. "Instead, it simply asked whether the permit conditions are expressly specified in federal regulations or guidelines. This is not the test. The fact that a permit condition is not specified in a federal regulation or guideline does not determine whether the condition is 'practicable,' and thus required by federal law. The mere fact that a permit condition is not promulgated as a federal regulation does not mean it exceeds the federal standard."

The trial court remanded the matter to the Commission to reconsider its decision in light of the court's ruling. The court did not address the fee issues raised by the petition and cross-petition.

The permittees appeal from the trial court's judgment. [9] , [10]

DISCUSSION

I

Standard of Review

****7** While this appeal was pending, the Supreme Court issued *Department of Finance*. There, the high court had to answer the same question we must answer: are certain requirements imposed by the San Diego Regional Board in an NPDES permit federal mandates and not reimbursable state mandates? Although the high court reviewed conditions different from those before us, it established the law we must apply to resolve this appeal. [11]

[1] As to the standard of review, "[t]he question whether a statute or executive order imposes a mandate is a question of law. [(*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810, 53 Cal.Rptr.2d 521.)] Thus, we review the entire record before the Commission, which includes references to federal and state statutes and regulations, as well as evidence of other permits and the parties' ***857** obligations under those permits, and independently determine whether it supports the Commission's conclusion that the conditions here were

not federal mandates. (*Ibid.*)" (*Department of Finance, supra,* 1 Cal.5th at p. 762, 207 Cal.Rptr.3d 44, 378 P.3d 356.) To do this, we must determine "whether federal statutory, administrative, or case law imposed, or compelled the [San Diego] Regional Board to impose, the challenged requirements on the [permittees]." (*Id.* p. 767, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

II

Analysis

Under the test announced in *Department of Finance*, we conclude federal law did not compel imposition of the permit requirements, and they are subject to subvention under section 6. This is because the requirement to reduce pollutants to the "maximum extent practicable" was not a federal mandate for purposes of section 6. Rather, it vested the San Diego Regional Board with discretion to choose how the permittees must meet that standard, and the exercise of that discretion resulted in imposing a state mandate. We also find no federal law, regulation, or administrative case authority that, under the test provided by *Department of Finance*, expressly required the conditions the San Diego Regional Board imposed.

A. *The* Department of Finance *decision*

We first describe *Department of Finance*, its context, its holding, and its analysis. Prior to its *Department of Finance* decision, the California Supreme Court declared in *City of Sacramento, supra*, 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522 that "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes" are federal mandates and not reimbursable under section 6. (*Id.* at pp. 73-74, 266 Cal.Rptr. 139, 785 P.2d 522.) In that case, the court held federal legislation requiring local governments to provide unemployment insurance protection to their employees was a federal mandate. It was a federal mandate because failing to extend the protection would have resulted in the state's businesses facing additional unemployment taxation and penalties by both state and federal governments. (*Id.* at p. 74, 266 Cal.Rptr. 139, 785 P.2d 522.) "[T]he state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (*Ibid.*)

The *City of Sacramento* court refused to announce a "final test" for determining whether a requirement imposed under a cooperative federal-state program was a federal mandate. (*City of Sacramento, supra,* 50 Cal.3d at p. 76, 266 Cal.Rptr. 139, 785 P.2d 522.) Instead, it required courts to determine whether a requirement was a federal mandate on a case-by-case basis. It stated: "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9, subd. (b) [of the California Constitution]: neither ***858** state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary." (*City of Sacramento, supra*, at p. 76, 266 Cal.Rptr. 139, 785 P.2d 522.)

****8** In *Department of Finance*, the Supreme Court changed course and announced a test for determining whether a requirement imposed on a permit under a cooperative federal-state program is a federal mandate. To determine whether a requirement imposed under the CWA and state law on an NPDES permit is a federal mandate, a court applies the following test: "If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated." (*Department of Finance, supra,* 1 Cal.5th at p. 765, 207 Cal.Rptr.3d 44, 378 P.3d 356.) If the state in opposition to the petition contends its requirements are federal mandates, it has the burden to establish the requirements are in fact mandated by federal law. (*Id.* at p. 769, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

In *Department of Finance*, the high court held conditions imposed on an NPDES permit issued by the Regional

Water Quality Control Board, Los Angeles Region (the Los Angeles Regional Board), to Los Angeles County and various cities were not federal mandates and were subject to subvention under section 6. The permit conditions required the permittees to install and maintain trash receptacles at transit stops, and to inspect certain commercial and industrial facilities and construction sites. (*Department of Finance*, *supra*, 1 Cal.5th at p. 755, 207 Cal.Rptr.3d 44, 378 P.3d 356.) The Commission determined each of the conditions was a compensable state mandate, and the Supreme Court, reversing the Court of Appeal, upheld the Commission's decision.

The high court ruled federal law did not compel the conditions to be imposed. The court stated: "It is clear federal law did not compel the [Los Angeles] Regional Board to impose these particular requirements. There was no evidence the state was compelled to administer its *own* permitting system rather than allowing the EPA do so under the CWA. (33 U.S.C. § 1342(a).) ... [T]he state chose to administer its own program, finding it was 'in the interest of the people of the state, *in order to avoid direct regulation by the federal government* of persons already subject to regulation' under state law. (Wat. Code, § 13370, subd. (c), italics added.) Moreover, the [Los Angeles] Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).) This case is distinguishable from *City of Sacramento*, *supra*, 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, where the state risked the loss of subsidies and tax credits for all its resident businesses if it failed to comply with federal legislation. Here, the State was not compelled by federal law to impose any particular requirement. Instead, ... the [Los Angeles] Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard." (*Department of Finance*, *supra*, 1 Cal.5th at pp. 767-768, 207 Cal.Rptr.3d 44, 378 P.3d 356, original italics.)

***859** The State contended the Commission decided the existence of a federal mandate on grounds that were too rigid. It argued the Commission should have accounted for the flexibility in the CWA's regulatory scheme and the "maximum extent practicable" standard. It also should have deferred to the terms of the permit as the best expression of what federal law required in that instance since the terms were based on the agencies' scientific, technical, and experiential knowledge.

The Supreme Court rejected both arguments. The court stated: "We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the [Los Angeles] Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. (*City of Burbank, supra*, 35 Cal.4th at pp. 627-628, 26 Cal.Rptr.3d 304, 108 P.3d 862.) It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.

****9** "We also disagree that the Commission should have deferred to the [Los Angeles] Regional Board's conclusion that the challenged requirements were federally mandated. That determination is largely a question of law. Had the [Los Angeles] Regional Board found, when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate. The board's legal authority to administer the CWA and its technical experience in water quality control would call on sister agencies as well as courts to defer to that finding. The State, however, provides no authority for the proposition that, absent such a finding, the Commission should defer to a state agency as to whether requirements were state or federally mandated. Certainly, in a trial court action challenging the *board's authority* to impose specific permit conditions, the board's findings regarding what conditions satisfied the federal standard would be entitled to deference. (See, e.g., *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1384, 38 Cal.Rptr.3d 450, citing *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817-818, 85 Cal.Rptr.2d 696, 977 P.2d 693.) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. (*Rancho Cucamonga*, at p. 1387, 38 Cal.Rptr.3d 450; *Building*

Industry, supra, 124 Cal.App.4th at pp. 888-889, 22 Cal.Rptr.3d 128.)

"Reimbursement proceedings before the Commission are different. The question here was not whether the [Los Angeles] Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law." (*Department of Finance*, *supra*, 1 Cal.5th at pp. 768-769, 207 Cal.Rptr.3d 44, 378 P.3d 356, fn. omitted, original italics.)

Addressing the permit's specific requirements, the Supreme Court determined they were not mandated by federal law but instead were imposed pursuant to the State's discretion. Regarding the site inspection ***860** requirements, the court found neither the CWA's "maximum extent practicable" standard, the CWA itself, nor the EPA regulations "expressly required" the inspection conditions. (*Department of Finance*, *supra*, 1 Cal.5th at p. 770, 207 Cal.Rptr.3d 44, 378 P.3d 356.) The court also determined that in this instance, state and federal law required the Los Angeles Regional Board to conduct the inspections. By exercising its discretion and shifting responsibility for the inspections onto the permittees as a condition of the permit, the Los Angeles Regional Board imposed a state mandate. (*Id.* at pp. 770-771, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

The State argued the inspection requirements were federal mandates because EPA regulations contemplated that some kind of operator inspections would be required. The court was not persuaded: "That the EPA regulations contemplated some form of inspections ... does not mean that federal law required the scope and detail of inspections required by the Permit conditions." (*Department of Finance*, *supra*, 1 Cal.5th at p. 771, 207 Cal.Rptr.3d 44, 378 P.3d 356, fn. omitted.)

As for the trash receptacle requirement, the Supreme Court agreed with the Commission that it was not a federal mandate because neither the CWA nor the federal regulation cited by the state "explicitly required" the installation and maintenance of trash receptacles. (*Department of Finance*, *supra*, 1 Cal.5th at p. 771, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

The State argued the condition was mandated by the EPA regulations that required the permittees to include in their application a description of practices for operating roads and procedures for reducing the impact of discharges from MS4's. The Supreme Court rejected this argument: "While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit. (40 C.F.R. § 122.26(d)(2)(iv).) No regulation cited by the State required trash receptacles at transit stops." (*Department of Finance*, *supra*, 1 Cal.5th at pp. 771-772, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

****10** In addition, the court found evidence the EPA had issued NPDES permits in other cities that did not require trash receptacles at transit stops. "The fact the EPA itself had issued permits in other cities, but did not include the trash receptacle condition, undermines the argument that the requirement was federally mandated." (*Department of Finance*, *supra*, 1 Cal.5th at p. 772, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

B. *Applying* Department of Finance *to this appeal*

Having reviewed *Department of Finance*, we now turn to apply its ruling and analysis to the permit requirements before us. Again, our task is two-fold. We must determine first whether the CWA, its regulations and guidelines, and any other evidence of federal mandate such as similar permits issued by the EPA, required each condition. If they did, we conclude the requirement is a federal mandate and not entitled to subvention under section 6. Second, if the condition was not "expressly required" by federal law but was instead imposed pursuant to the State's discretion, we conclude the requirement is not federally mandated and subvention is required. The State has the burden to establish the requirements were imposed by federal law. It has not met its burden here.

1. *The "maximum extent practicable" standard*

[2] The State contends the permit requirements were federal mandates because it had no discretion but to impose conditions ***861** that satisfied the "maximum

extent practicable" standard. We disagree with the state's interpretation of its discretion. The "maximum extent practicable" standard by its nature is discretionary and does not by itself impose a federal mandate for purposes of section 6. Before *Department of Finance* was issued, the State argued here that the Clean Water Act's "maximum extent practicable" standard was a federal mandate because it is flexible and contemplates that specific measures will be implemented to meet the unique requirements of any particular waterway and water quality. *Department of Finance* rejected this argument for purposes of subvention under section 6. "The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).)" (*Department of Finance*, *supra*, 1 Cal.5th at pp. 767-768, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

There is no dispute the CWA and its regulations grant the San Diego Regional Board discretion to meet the "maximum extent practicable" standard. The CWA requires NPDES permits for MS4's to "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions *as the Administrator or the State determines appropriate* for the control of such pollutants." (33 U.S.C.S. § 1342(p)(3)(B)(iii), italics added.)

EPA regulations also describe the discretion the State will exercise to meet the "maximum extent practicable" standard. The regulations require a permit application by an MS4 to propose a management program. This program "shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. ... Proposed programs *will be considered by the Director when developing permit conditions* to reduce pollutants in discharges to the maximum extent practicable." (40 C.F.R. § 122.26 (d)(2)(iv), italics added.) This regulation implies the San Diego Regional Board has wide discretion to determine how best to condition the permit in order to meet the "maximum extent practicable" standard.

****11** Yet the State argues the San Diego Regional Board really did not exercise discretion in imposing the challenged requirements. It contends the Supreme Court in *Department of Finance* did not look for differences between federal law and the terms of the permit. Rather, the court allegedly searched the record to see if the Los Angeles Regional Board exercised a true choice in imposing permit conditions or if it instead imposed requirements necessary to satisfy federal law. Applying that test here, the State asserts the San Diego Regional Board in this case did not exercise a true choice in imposing any of the permit requirements because it was required to impose requirements that satisfied the "maximum extent practicable" standard. Indeed, the San Diego Regional Board here made a finding its requirements were "necessary" in order to reduce pollutant discharge to the maximum extent practicable, a finding the Los Angeles Regional Board in *Department of Finance* did not expressly make.

The State also contends the San Diego Regional Board did not make a true choice ***862** because the permittees in their permit application proposed methods of compliance, and the San Diego Regional Board made modifications "so those methods would achieve the federal standard." The State asserts the permit requirements were not state mandates because they were based on the proposals in the application, "not the [San Diego] Regional Board's preferences for how the copermittees should comply."

The State misconstrues *Department of Finance* in numerous respects. First, the Supreme Court did in fact look for differences between federal law and the terms of the permit to determine if the condition was a federal mandate. The high court stated that, to be a federal mandate for purposes of section 6, the federal law or regulation must "expressly" or "explicitly" require the specific condition imposed in the permit. (*Department of Finance*, *supra*, 1 Cal.5th at pp. 770-771, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

Second, the Supreme Court found the "maximum extent practicable" did not preclude the State from making a choice; rather, it gave the State discretion to make a choice. "The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant

discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).)" (*Department of Finance*, *supra*, 1 Cal.5th at pp. 767-768, 207 Cal.Rptr.3d 44, 378 P.3d 356.) As the high court stated, except where a regional board finds the conditions are the only means by which the "maximum extent practicable" standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard. (*Id.* at p. 768, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

That the San Diego Regional Board found the permit requirements were "necessary" to meet the standard establishes only that the San Diego Regional Board exercised its discretion. Nowhere did the San Diego Regional Board find its conditions were the only means by which the permittees could meet the standard. Its use of the word "necessary" did not equate to finding the permit requirement was the *only* means of meeting the standard. "It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." (*Department of Finance*, *supra*, 1 Cal.5th at p. 768, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

The use of the word "necessary" also does not distinguish this case from *Department of Finance*. By law, a regional board cannot issue an NPDES permit to MS4's without finding it has imposed conditions "necessary to carry out the provisions of [the Clean Water Act]." (33 U.S.C. § 1342(a)(1).) That requirement includes imposing conditions necessary to meet the "maximum extent practicable" standard, and the regional board in *Department of Finance* found the conditions it imposed had done so. The Los Angeles Regional Board stated: "This permit is 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 (MEP) from the permitted areas in the County of Los Angeles to the waters of the U.S. subject to the Permittees' jurisdiction." It further stated: "[T]his Order requires that the [Storm Water Quality Management Plan] specify BMPs [best management practices] that will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable."

****12** Third, the Supreme Court in *Department of Finance* rejected the State's argument ***863** that the permit application somehow limited a board's discretion or denied it a true choice. "While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make those practices conditions of the permit. (40 C.F.R. § 122.26(d)(2)(iv).)" (*Department of Finance*, *supra*, 1 Cal.5th at pp. 771-772, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

The State had a true choice and exercised its discretion in determining and imposing the conditions it concluded were necessary to reduce storm water pollutants to the maximum extent practicable. Because the State exercised this discretion, the permit requirements it imposed were not federal mandates.

2. *No express demand by federal law*

[3] The State contends federal law nonetheless required the conditions it imposed. It relies on regulations broadly describing what must be included in an NPDES permit application by an MS4 instead of express mandates directing the San Diego Regional Board to impose the requirements it imposed. To be a federal mandate for purposes of section 6, however, the federal law or regulation must "expressly" or "explicitly" require the condition imposed in the permit. (*Department of Finance*, *supra*, 1 Cal.5th at pp. 770-771, 207 Cal.Rptr.3d 44, 378 P.3d 356.) This is the standard the Commission applied and found the State's claims unwarranted. We do as well. The State cites to no law, regulation, or EPA case authority presented to the Commission or the trial court that expressly required any of the challenged permit requirements. We briefly review the requirements.

a. *Street sweeping and cleaning storm water conveyances*

[4] The State contends the requirements for street sweeping and cleaning of the storm sewer system are federal mandates because EPA regulations required the permittees to describe in their permit application their practices for operating and maintaining streets and procedures for reducing the impact of discharges from storm sewer systems. (40 C.F.R. § 122.26(d)(2)(iv)(A)(3).) This regulation does not expressly require the scope and detail of street sweeping and facility maintenance the permit imposes. Because the State imposed those specific

requirements, they are not federal mandates and must be compensated under section 6.

The permit requires the permittees to sweep streets a certain number of times depending on how much trash and debris they generate. Streets that consistently generate the highest volume of trash must be swept at least twice per month. Streets that generate moderate volumes of trash must be swept at least monthly, and those that generate low volumes of trash must be swept at least annually. Permittees must annually report the total distance of curb miles swept and the tons of material collected.

The permit also requires the permittees to implement a schedule of maintenance activities for their storm sewer systems and facilities, such as catch basins, storm drain inlets, open channels, and the like. At a minimum, the permittees must inspect all facilities at least annually and must inspect facilities that receive high volumes of trash at least once a year between May 1 and September 30. The permit requires any catch basin or storm drain inlet that has accumulated trash greater than 33 percent of its design capacity to be cleaned in a timely manner. Any facility designed to be self-cleaning must be cleaned immediately of any accumulated trash. The permittees must keep ***864** records of their maintenance and cleaning activities.

****13** We see nothing in the regulation requiring permittees to describe in their application their street and facility maintenance practices a mandate to impose the specific requirements actually imposed in the permit.

b. *Hydromodification plan*

[5] The State claims the requirement to develop a hydromodification plan (HMP) arises from EPA regulations requiring the permit applicant to include in its application a description of planning procedures to develop and enforce controls "to reduce the discharge of pollutants from [MS4's] which receive discharges from areas of new development and significant redevelopment." (40 C.F.R. § 122.26(d)(2)(iv)(A)(2).) The permit requires the HMP to establish standards of runoff flow for channel segments that receive runoff from new development. It must require development projects to implement control measures so that the flows from the completed project generally do not exceed the flows before the project was built. The HMP must include other performance criteria as well as a description of how the permittees will incorporate the HMP requirements into their local approval process.

The regulation cited by the State does not require an HMP. Nor does it restrict the San Diego Regional Board from exercising its discretion to require a specific type of plan to address the impacts from new development. The San Diego Regional Board admittedly exercised its discretion on this condition. It determined the permittees' application was insufficient and it required them to collaborate to develop an HMP. The requirement is thus a state mandate subject to subvention.

c. *Low impact development practices in the SUSMP*

[6] The State relies upon the same regulation to support the low impact development requirements as it did for the HMP. (40 C.F.R. § 122.26(d)(2)(iv)(A)(2).) The permit requires the permittees to implement specified low impact development best management practices at most new development and redevelopment projects. These practices include designing the projects to drain runoff into previous areas on site and using permeable surfaces for low traffic areas. The practices also require projects to conserve natural areas and minimize the project's impervious footprint where feasible.

The permit also requires the permittees to develop a model SUSMP to establish low impact development best management practices that meet or exceed the requirements just mentioned. The model must include siting, design, and maintenance criteria for each low impact development best management practice listed in the model SUSMP. Again, nothing in the application regulation required the San Diego Regional Board to impose these specific requirements. As a result, they are state mandates subject to section 6.

d. *Jurisdictional and regional education programs*

[7] The State claims regulations requiring the permittees to describe in their permit application the educational programs they will conduct to increase the public's knowledge of storm water pollution imposed a federal mandate. (40 C.F.R. § 122.26(d)(2)(iv)(A)(6), (B)(6), (D)(4).) The regulations require the application to include

descriptions of proposed educational activities to reduce pollutants associated with the application of pesticides, herbicides and fertilizer (40 C.F.R. § 122.26(d)(2)(iv)(A)(6)), to facilitate the ***865** proper management and disposal of used oil and toxic materials (40 C.F.R. § 122.26(d)(2)(iv)(B)(6)), and to reduce pollutants in storm runoff from construction sites. (40 C.F.R. § 122.26(d)(2)(iv)(D)(4).)

****14** The permit requires each permittee to do much more. Each must implement an education program using all media as appropriate to "measurably increase" the knowledge of MS4's, impacts of urban runoff, and potential best management practices, and to "measurably change" people's behaviors. The program must address at a minimum five target communities: municipal departments and personnel; construction site owners and developers; industrial owners and operators; commercial owners and operators; and the residential community, the general public, and school children. The program must educate each target community where appropriate on a number of specified topics. It must educate them on federal, state, and local water quality laws and regulations, including the storm water discharge permitting system. It must address general runoff concepts, such as the impacts of urban runoff on receiving waters, the distinctions between MS4's and sanitary sewers, types of best management practices, water quality impacts associated with urbanization, and non-storm water discharge prohibitions. It must discuss specific best management practices for such activities as good housekeeping, proper waste disposal, methods to reduce the impacts from residential and charity car washing, non-storm water disposal alternatives, preventive maintenance, and equipment and vehicle maintenance and repair. The program must also address public reporting mechanisms, illicit discharge detection, dechlorination techniques, integrated pest management, the benefits of native vegetation, water conservation, alternative materials and designs to maintain peak runoff values, traffic reduction, and alternative fuel use. The permit also requires additional specific topics to be addressed that are relevant to each particular target community.

The San Diego Regional Board imposed an educational program and a list of topics that surpasses what the regulations required the permittees to propose in their application. Nothing in the regulations required the San Diego Regional Board to impose the educational requirements in the scope and detail it did. As a result, they are state mandates subject to section 6.

e. *Regional and watershed urban runoff management programs*

[8] To claim the requirements to develop regional and watershed urban runoff management programs are federal mandates, the State relies on the regulation requiring permit applications to propose a management program as part of their application. The regulation authorizes the applicants to propose a program that imposes controls beyond a single jurisdiction: "Proposed programs *may* impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls." (40 C.F.R. § 122.26(d)(2)(iv), italics added.)

The permit *requires* the permittees to collaborate, develop, and implement watershed and regional urban runoff management programs. As part of the watershed management program, the permittees must, among other things, annually assess the water quality of receiving waters and identify the water quality problems attributable to MS4 discharges. They must develop and implement a list of water quality activities and education activities and submit the list for approval by the San Diego Regional Board. The permit describes what information must be included on the list for each activity, and it requires the permittees to implement each of them.

***866** The permit requires the permittees, as part of developing a regional management program, to implement a residential education program as described above, develop standardized fiscal analysis of the programs in their jurisdictions, and facilitate the assessment of the jurisdictional, watershed, and regional programs' effectiveness.

The regulation relied upon by the State does not mandate any of these watershed and regional management requirements. It clearly leaves to the San Diego Regional Board the discretion to require controls on a systemwide, watershed, or jurisdictional basis. The State exercised that discretion in imposing the controls it imposed. They thus are state mandates subject to section 6.

f. *Program effectiveness assessments*

Federal regulations require a permit application to include, as part of assessing the effectiveness of controls, "[e]stimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water." (40 C.F.R. § 122.26(d)(2)(v).)

The regulations also require the operator of an MS4 to submit a status report annually. The report must include: "(1) The status of implementing the components of the storm water management program that are established as permit conditions; [¶] (2) Proposed changes to the storm water management programs that are established as permit conditions[;] [¶] (3) Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit application[;] [¶] (4) A summary of data, including monitoring data, that is accumulated throughout the reporting year; [¶] (5) Annual expenditures and budget for year following each annual report; [¶] (6) A summary describing the number and nature of enforcement actions, inspections, and public education programs; [and] [¶] (7) Identification of water quality improvements or degradation[.]" (40 C.F.R. § 122.42(c).)

****15** The State contends these regulations mandated the San Diego Regional Board to impose the assessment requirements the permit contains, but the permit imposes additional obligations. The permit requires the permittees to assess, among other things, the effectiveness of each significant jurisdictional activity or best management practice and each watershed water quality activity and the implementation of the jurisdictional and watershed runoff management plans. They must identify and utilize "measureable targeted outcomes, assessment measures, and assessment methods" for each of these items. They must utilize certain predefined "outcome levels" to assess the effectiveness of each of the items. They must also collaborate to develop a long-term effectiveness assessment based on the same outcome levels.

While the regulations required estimated reductions in the amount of pollutants and a report on the status of implementing controls and their effectiveness, the San Diego Regional Board exercised its discretion to mandate how and to what degree of specificity those assessments would occur. The regulations did not require the San Diego Regional Board to impose the assessment systems and procedures it actually imposed. Accordingly, those systems and procedures are state mandates subject to section 6.

g. *Permittee collaboration*

[9] EPA regulations require the permittees, as part of their application, to ***867** show they have legal authority, either by statute, ordinance, or contract, to control through interagency agreements among themselves the contribution of pollutants from a portion of the municipal system to another portion in a different jurisdiction. (40 C.F.R. § 122.26(d)(2)(i)(D).) The State claims this regulation mandated the San Diego Regional Board to require the permittees to collaborate and, in particular, execute an agreement that establishes a management structure. Under the terms of the permit, the management structure must, among other things, define the permittees' responsibilities; promote consistency, development, and implementation of regional activities; establish standards for conducting meetings, making decisions and sharing costs; and establish a process for addressing noncompliance with the agreement.

The EPA regulation did not impose on the San Diego Regional Board a mandate to define the terms and organization of a management structure that would allow the permittees to control pollutants that cross borders. The regulation required the San Diego Regional Board to assure itself the permittees had the authority to address runoff pollution regionally, but it did not require the San Diego Regional Board to define how the permittees would organize themselves to do so. The conditions of the San Diego Regional Board went beyond what was federally required, and are thus state mandates subject to section 6.

In short, there is no federal law, regulation, or administrative case authority that expressly mandated the San Diego Regional Board to impose any of the challenged requirements discussed above. As a result, their imposition are state mandates, and section 6 requires the State to provide subvention to reimburse the permittees for the costs of complying with the requirements.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are awarded to real parties in interest and appellants. (Cal. Rules of Court, rule 8.278(a).)

We concur:

BLEASE, Acting P. J.

BUTZ, J.

All Citations

18 Cal.App.5th 661, 226 Cal.Rptr.3d 846, 2017 WL 6461994, 17 Cal. Daily Op. Serv. 12,021, 2017 Daily Journal D.A.R. 11,993

Footnotes

1 "The systems at issue here are 'municipal separate storm sewer systems,' sometimes referred to by the acronym 'MS4.' (40 C.F.R. § 122.26(b)(19) (2001) [ ].) A '[m]unicipal separate storm sewer' is a system owned or operated by a public agency with jurisdiction over disposal of waste and designed or used for collecting or conveying storm water. (40 C.F.R. § 122.26(b)(8) (2001) [ ].) Unless otherwise indicated, all further citations to the Code of Federal Regulations are to the 2001 version."

2 "For a state to acquire permitting authority, the governor must give the EPA a 'description of the program [the state] proposes to establish,' and the attorney general must affirm that the laws of the state 'provide adequate authority to carry out the described program.' (33 U.S.C. § 1342(b).)"

3 "The EPA may withdraw approval of a state's program (33 U.S.C. § 1342(c)(3)), and also retains some supervisory authority: States must inform the EPA of all permit applications received and of any action related to the consideration of a submitted application (33 U.S.C. § 1342(d)(1))."

4 The federal CWA does not prevent states from imposing any permit requirements that are more stringent than the CWA requires. (33 U.S.C. § 1370.)

5 Using the Porter-Cologne Act's name for a permit application, the NPDES permit application in California is referred to as a Report of Waste Discharge.

6 Real parties in interest and appellants are the County of San Diego and the Cities of Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

7 Hydromodification is the "change in the natural watershed hydrologic processes and runoff characteristics ... caused by urbanization or other land use changes that result in increased stream flows and sediment transport."

8 " ' "Costs mandated by the state" means any increased costs which a local agency or school district is required to incur ... as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.' (Gov. Code, § 17514.)"

9 The permittees request we take judicial notice of the NPDES permit the San Diego Regional Board issued to them in 2013 that allegedly contains less specific conditions. The State requests we take judicial notice of an NPDES permit issued by the EPA in 2011 to the District of Columbia that includes a condition similar to one above. We deny both of these requests. Neither document was before the Commission or the trial court at the time those bodies ruled in this matter, and no exceptional circumstances justify deviating from that rule. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3, 58 Cal.Rptr.2d 899, 926 P.2d 1085.) The State has also requested we take judicial notice of the NPDES permit at issue in *Department of Finance* pursuant to subdivisions (c) and (d) of Evidence Code section 452. We grant that request.

10 Building Industry Legal Defense Foundation and the California Stormwater Quality Association, et al., filed amicus curiae briefs in support of the permittees.

11 At our request, the parties briefed the effect of *Department of Finance* on this appeal.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

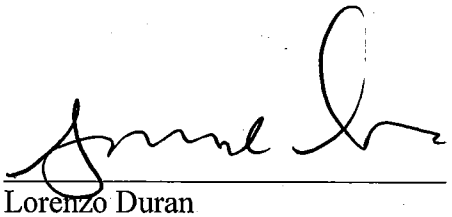
On January 31, 2018, I served the:

- **Interested Party's (City of South Pasadena) Comments on the Test Claim filed January 29, 2018**

  California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, 13-TC-01 and 13-TC-02
  Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Marino, Santa Clarita, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier, County of Los Angeles, and Los Angeles County Flood Control District, Claimants

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 31, 2018 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/21/17

Claim Number: 13-TC-01 and 13-TC-02

Matter: California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175

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City of Bellflower
City of Beverly Hills
City of Carson
City of Cerritos
City of Commerce
City of Downey
City of Huntington Park
City of Lakewood
City of Manhattan Beach
City of Norwalk
City of Pico Rivera
City of Rancho Palos Verdes
City of Redondo Beach
City of San Marino
City of Santa Clarita
City of Santa Fe Springs
City of Signal Hill
City of South El Monte
City of Vernon
City of Westlake Village
City of Whittier
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Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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