No. S214855

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

STATE DEPARTMENT OF FINANCE, et al,

Plaintiffs and Respondents,

vs.

COMMISSION ON STATE MANDATES,

Defendant and Respondent;

COUNTY OF LOS ANGELES et al.,

Real Parties in Interest and Appellants.

REPLY TO ANSWER TO PETITION FOR REVIEW

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

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I. INTRODUCTION

This case raises the issue of how article XIII B, section 6, of the California Constitution is to be applied to mandates being imposed by California Regional Water Quality Control Boards ("regional boards") on municipalities through issuance of municipal stormwater permits. The Commission on State Mandates ("Commission") found that the municipal stormwater permit at issue here ("Permit") imposed two categories of state mandates within the meaning of article XIII B, section 6, and that the County of Los Angeles and cities that were permittees ("Cities and County") were entitled to a subvention of funds for one of those mandates. The Los Angeles County Superior Court reversed the Commission's decision and the Second Appellate District Court of Appeal affirmed, finding that the Permit mandates were federal, as opposed to state, mandates.

The implications of the appellate decision go beyond the specific Permit mandates at issue. The Court of Appeal broadly held that "general-purpose mandate analysis is of limited utility in the area of clean water law . . . ." *Department of Finance v. Commission on State Mandates,* Case No. B237153 (October 16, 2013), slip op. at 34, and on that basis did not apply relevant mandate jurisprudence and arrived at conclusions contrary to that established jurisprudence.

The appellate decision also raises issues that go beyond the mandates being imposed by regional boards under the Clean Water Act. How does the Commission or a court define a federal versus state mandate where the federal statute does not define the mandate? To what authority must the Commission or a court look when defining that mandate? Which entity makes that determination, the Commission or a court? These issues

have application to all mandate claims where a state agency is implementing a federal program.

Contrary to the assertions of plaintiffs and respondents State Department of Finance, State Water Resources Control Board, and Los Angeles Regional Water Quality Control Board ("State agencies"), the Court of Appeal's opinion is not a narrow decision with limited implications. It is a published opinion holding that "general-purpose mandate analysis is of limited utility in the area of clean water law." (Slip Op. at 34.) Its conclusions conflict with other opinions, creating substantial uncertainty as to the state of the law in this area. Do the prior mandate precedents apply? How is a state versus a federal mandate defined?

As evidenced by amicus letters submitted to this Court from multiple northern and southern California municipalities, the League of California Cities and the California State Association of Counties, and by the numerous test claims of other cities and public entities currently pending before the Commission that raise these same issues (*see* Petition for Review at 6 n.5), the issues raised by this case are of statewide concern and importance.

II. CONTRARY TO THE ASSERTIONS OF THE STATE AGENCIES, THE COURT OF APPEAL'S OPINION IS NOT LIMITED TO A FEW SPECIFIC PERMIT REQUIREMENTS BUT IS STATED IN SWEEPING TERMS THAT APPLY BROADLY TO IMPORTANT QUESTIONS OF LAW

In their Answer to the Petition for Review ("Answer"), the State agencies first contend that the Court of Appeal did not disregard prior mandate precedents and did not exempt regional board mandates from mandate jurisprudence (Answer at 4). This argument, however, ignores what the Court of Appeal actually held.

In its opinion, the Court of Appeal stated that it did not disagree with the holdings in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 ("*Hayes*") and *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155 ("*Long Beach Unified*"), but that 33 U.S.C. §1342(p)(3)(B)(iii) "is a unique statute and imposes a broad standard in recognition of developing clean water technology; thus, general-purpose mandate analysis is of limited utility in the area of clean water law . . . ." (Slip op. at 34.)[1] The Court of Appeal did not address whether the Commission correctly applied the holdings of either *Hayes* or *Long Beach Unified* nor did the court address whether the Permit's mandates were state mandates under the holdings of these cases. Instead, the Court of Appeal held that these cases were of limited utility and then proceeded to perform its own analysis of whether the mandates were federal or state (Slip op. at 34-35.)

Although the State agencies assert that the Court of Appeal's approach allows future courts to determine if other regional board mandates are state mandates in accordance with *Long Beach Unified* and *Hayes* (Answer at 4), this assertion ignores the court's holding that these cases are of limited utility, a holding that is binding on superior courts and the Commission. Thus, the Court of Appeal did effectively exempt this entire area of clean water law from the application of these prior precedents; it stated that these precedents were not applicable and then substituted its judgment for that of the Commission. (Slip op. at 34-35.)

[1] 33 U.S.C. § 1342(p)(3)(B)(iii) provides that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ."

This holding is particularly erroneous given this Court's holding in *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 618, 627-28, that an NPDES permit can contain both federal and state requirements. Given that dual federal-state character and applying *Long Beach Unified,* a state mandate would exist to the extent a permit's requirements exceeded federal requirements or the regional board removed the discretion of a city or county as to how to comply with a federal program and instead directed the manner of compliance. *Long Beach Unified,* 225 Cal.App.3d at 173. *Hayes* would apply if the state freely chose to shift federal requirements from itself to cities or counties. *Hayes,* 11 Cal.App.4th at 1593-94.

It is for the Commission to determine if the Permit contains mandates to which these precedents apply. Govt. Code § 17552; s*ee also County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 917-18 ("A review of the pleadings and the matters that may be judicially noticed . . . leads to the inescapable conclusion that whether the two obligations in question constitute federal or state mandates presents factual issues which must be addressed in the first instance by the Commission . . . ."). The Commission performed that analysis here. The Court of Appeal's role was then to review the Commission's decision to determine if it was supported by substantial evidence, not to perform its own factual analysis. Govt. Code § 17559(b).

Second, the State agencies contend that the Court of Appeal's decision is consistent with this Court's decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51. *City of Sacramento*, however, does not address the issues raised by this case.

In *City of Sacramento,* the issue was whether the Legislature's requirement that local governments provide unemployment insurance constituted a "new program" or "higher level of service" within the meaning of article XIII B, section 6. 50 Cal.3d at 57. The Legislature imposed this requirement on local governments after the federal government enacted a law that required federally certified state plans to include coverage of public agency employees. *Id.* at 58.

In *City of Sacramento,* this Court held that extending unemployment coverage to public employees was neither a governmental function of providing services to the public nor a unique requirement imposed on local governments. As a result, it was not a "new program" or "higher level of service" within the meaning of article XIII B, section 6. 50 Cal.3d at 66-67. In reaching this result, this Court followed *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, which held that a general increase in workers' compensation benefits, when applied to local governments, did not constitute a reimbursable state mandate within the meaning of article XIII B, section 6. *City of Sacramento*, 50 Cal.3d at 66-67.

After reaching that conclusion, this Court then addressed whether the Legislature's requirement that local governments participate in the unemployment insurance program was a "federal mandate" within the meaning of article XIII B, section 9(b). If participation was a federal mandate, an appropriation required to provide this unemployment insurance would be excluded from the constitutional spending limits otherwise imposed on the local governments. 50 Cal.3d at 70-71. This Court concluded that a federal mandate could exist for the purpose of excluding an appropriation from a local government's constitutional spending limits

not only where there was direct compulsion by the federal government, but also where, through legislative inducements or incentives, the state or its citizens could face a substantial penalty. *Id.* at 73-74.

Thus, the portion of *City of Sacramento* cited by the Court of Appeal (Slip op. at 27-28) and by the State agencies in their Answer (Answer at 4-5) addresses the question of when the "carrot and stick" approach of federal legislation rises to the level of federal compulsion. 50 Cal.3d at 71-74. It does not address how the Commission or a court defines what is required by that mandate. In *City of Sacramento*, the requirement, the provision of unemployment insurance, was already defined by the federal statute. *Id.* at 58.

Here, the issue is not whether the federal statute, 33 U.S.C. § 1342(p)(3)(B)(iii), is compulsory. Instead, the issue raised by this case is how does one define what is federally required when the federal dictate (here the maximum extent practicable ("MEP") standard) is not defined by the federal statute. Is it proper to look to federal regulations or other federal authority, as the Commission did, to determine if the Permit's trash and inspection obligations fell within the federal dictate, or to look to a definition adopted by a state agency in another stormwater permit, as the Court of Appeal did? *City of Sacramento* does not answer this question. Neither does the Court of Appeal's decision. This is an important question of law of state-wide significance that requires this Court's resolution.[2]

[2] Indeed, contrary to the State agencies' assertion (Answer at 4-5), the Court of Appeal did not rely on *City of Sacramento* in reaching its holding. Instead the court cited *Building Industry Ass'n of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, and stated that it was basing its decision on the definition of MEP set forth in that case. (Slip op. at 34) ("Balancing the standards of *Building Industry, supra,* 124 Cal.App.4th 866, we conclude the Permit's requirements for the trash

Third, the State agencies assert that the Court of Appeal's decision is not inconsistent with existing mandate jurisprudence because this is the first case to address whether mandates imposed by regional boards in stormwater permits are state mandates (Answer at 5). The Court of Appeal's opinion is, however, inconsistent with *Long Beach Unified* and *Hayes*. In *Long Beach Unified,* the court held that, where the state removes the discretion of a local agency as to how to comply with a federal program and instead directs the manner of compliance, the state has created a state mandate. 225 Cal.App.3d at 173. In *Hayes*, the court held that where the state "freely chooses" to shift an obligation created under a federal program from itself to a local agency, the state also creates a state mandate. 11 Cal.App.4th at 1593-94.

Here, the Commission found that state mandates were created because the regional board removed the Cities and County's discretion as to how to implement the municipal stormwater program and the state shifted an inspection obligation created under a federal program from itself to the Cities and County (1 CT 125-26, 131-32, 134-36, 141). The Court of Appeal did not distinguish *Long Beach Unified* or *Hayes*; instead, as noted above, the court held that these cases were of limited applicability (Slip op. at 34).

Thus, the Court of Appeal's opinion is inconsistent with existing mandate jurisprudence. This inconsistency creates great uncertainty and

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receptacles and inspection of commercial, industrial, and construction sites as a matter of law constitute federal mandates.") *See also* Slip op. at 35 ("In reviewing whether particular mandates fall within the maximum extent practicable standard . . . we apply *Building Industry, supra,* 124 Cal.App.4th 866 and balance numerous factors, including the particular requirement's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness.")

the need for this Court to both settle these important questions of law and secure uniformity of these decisions.

III. THE COURT OF APPEAL'S OPINION CREATES A LACK OF UNIFORMITY BECAUSE IT CONFLICTS WITH *LONG BEACH UNIFIED* AND *HAYES*

The State agencies assert that the Court of Appeal did not decline to follow *Long Beach Unified* or *Hayes* but instead harmonized its decision with those two cases, comparing the MEP standard with the federal requirements in those two cases (Answer at 6).

On the contrary, based on its erroneous conclusion that the regional board was acting only as an arm of the federal EPA in adopting the Permit, the Court of Appeal found these decisions to be of "limited utility" and proceeded to arrive at conclusions entirely contrary to those decisions. (Slip op. at 34-36.) The Court of Appeal did not, however, articulate why removal of a local agency's discretion is a state mandate with respect to compliance with federal constitutional requirements to desegregate schools (*Long Beach Unified)* but not with respect to federal clean water requirements. Similarly, the Court of Appeal did not explain why the state's freely choosing to shift a federal obligation imposed by the federal Education of the Handicapped onto local schools constituted a state mandate in *Hayes* but not when the state shifted a mandate imposed by the Clean Water Act. The Court of Appeal's decision gives no guidance as to when or how *Long Beach Unified* or *Hayes* might ever apply to NPDES permits, which, as this Court held in *City of Burbank,* can contain both federal and state requirements. 35 Cal.4th at 628. (*See* Slip op. at 34-35.)

Nor, as explained *supra,* did the Court of Appeal apply *City of Sacramento,* as suggested by the State agencies (Answer at 6). *City of*

Sacramento goes neither to the issue of whether a mandate exceeds federal requirements, the issue addressed by *Long Beach Unified,* nor to whether a state agency shifted a federal obligation from itself to local agencies, the issue addressed by *Hayes,* and the Court of Appeal did not rely on *City of Sacramento* in reaching its conclusion. The Court of Appeal stated that it was applying the standards set forth in *Building Industry,* (Slip op. at 34-35).

In the wake of the Court of Appeal's opinion, a lack of uniformity and great uncertainty now exists as to the applicability of *Long Beach Unified* and *Hayes,* as well as other mandate precedents, to state-issued NPDES permits and to general clean water requirements applicable to local agencies across the state. The Court should grant the Petition for Review to resolve these important questions of law.

IV. THE ISSUE OF WHETHER A COURT CAN SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION WHERE THE FEDERAL REQUIREMENT IS NOT DEFINED BY FEDERAL STATUTE IS AN IMPORTANT QUESTION OF LAW

The Commission undertook an extensive analysis to determine if the Permit's trash receptacle and inspection obligations constituted state or federal mandates (*See* 1 CT 117-44). Pursuant to Govt. Code § 17559(b), a party may seek review of the Commission's decision pursuant to Code of Civil Procedure § 1094.5 on the ground that the Commission's decision is not supported by substantial evidence.

The Court of Appeal, however, declined to determine whether substantial evidence supported the Commission's decision. Instead, the court substituted its judgment for that of the Commission and held that the Permit requirements were not state mandates as a matter of law (Slip op. at

36). The Court of Appeal based this holding on its own conclusion that the Permit's mandates fell within the MEP standard of 33 U.S.C. § 1342(p)(3)(B)(iii). (Slip op. at 35.)

Although it is within a reviewing court's purview to determine whether a requirement is a state or federal mandate as a matter of law, for the Court of Appeal to do so here, the court would have to rely on undisputed facts in the record before the Commission. *See No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79 n.6 ("In an action for administrative mandamus, the court reviews the administrative record, receiving additional evidence only if that evidence was unavailable at the time of the administrative hearing, or improperly excluded from the record."); *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 674 ("We may neither substitute our views for those of the agency whose determination is being reviewed, nor reweigh conflicting evidence presented to that body.")

The Court of Appeal failed to do this, citing to no facts in the record before the Commission. Instead, the court performed its own analysis, "balanc[ing] numerous factors, including the particular requirement's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness." (Slip op. at 35.)

By its terms, the balancing of factors such as "technical feasibility," "cost," "public acceptance" and "effectiveness" necessarily is a factual inquiry. When the Court of Appeal undertook this analysis, unsupported by any facts in the record, the court necessarily invaded the exclusive jurisdiction of the Commission to make factual determinations. Govt. Code § 17552. Nor did the Court of Appeal in its decision cite to any facts relating to these five factors. The Court of Appeal simply stated that it

would apply various factors, including these five, and then held that the mandates were federal mandates as a matter of law (Slip op. at 35).

The issue of whether a court can engage in its own factual analysis and substitute its judgment for the Commission where the federal requirement is not defined by federal statute is an important question of law. It has a substantial impact on constitutional subvention requirements arising from municipal stormwater permits being issued throughout the state. It also has a substantial impact on determining constitutional subvention requirements where the state imposes requirements based on other federal programs.

V. THIS APPEAL RAISES THE IMPORTANT ISSUE OF TO WHAT AUTHORITY THE COMMISSION AND THE COURTS SHOULD LOOK TO DEFINE A FEDERAL AS OPPOSED TO STATE MANDATE WHERE THE FEDERAL REQUIREMENT IS NOT DEFINED BY FEDERAL STATUTE

The issue of to what authority the Commission and the courts should look to define a federal as opposed to state mandate within the meaning of article XIII B, section 6, where the federal requirement is not defined by federal statute, is an important one. It arises here in the context of the application of the Clean Water Act, but it could arise with respect to any federal program implemented by the state.

Here, the Commission looked to the federal regulations that govern stormwater permits (1 CT 124-25, 130-31, and 135-36). The Commission also had before it other federal materials, including federal EPA guidance documents and manuals, EPA-issued permits, and letters from EPA officials (AR 3439-40, 3466-67, 3891-4192, and 3878-81).

The Court of Appeal did not consider any of this evidence in determining what constituted a federal mandate nor did it cite to any federal

authority. Instead the court applied a definition of MEP developed by another regional board in another stormwater permit that was discussed in *Building Industry*, 124 Cal.App.4th 866. (Slip op. at 34-35.) *See* 124 Cal.App.4th at 876 n.7 and 889.

The issue of to what authority the Commission or a court should turn in defining a federal requirement, where that requirement is itself not defined by federal statute, is an ongoing issue of great importance. It arises not only with respect to NPDES permits but could arise with respect to the state's implementation of any federal program.

Neither the State agencies' Answer nor the Court of Appeal's opinion addresses this question. The Court of Appeal concluded that the mandates in the Permit were federal mandates without conducting any analysis of this issue. This Court should resolve this important question of law.

VI. CONCLUSION

For the foregoing reasons, and the reasons set forth in the Cities and County's Petition, the Petition for Review should be granted.

Dated: January 2, 2014

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.504(d) of the California Rules of Court, the undersigned counsel certifies that this Reply contains 3,435 words, including footnotes, as indicated by the word count of the word processing program used.

Dated: January 2, 2014

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PROOF OF SERVICE

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

On January 2, 2014, I served the foregoing document, described as

REPLY TO ANSWER TO PETITION FOR REVIEW

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in separate sealed envelopes addressed as follows:

See Attached List

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☐ **FEDERAL**: I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 2, 2014 at Los Angeles, California.

Danette Armstead

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State of California Department of Finance v. County of Los Angeles
Case No. B237153/BS130730

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