

S E R V E D
November 8, 2010
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 09-08

**SSA TERMINALS, LLC and
SSA TERMINALS (OAKLAND), LLC**

v.

**THE CITY OF OAKLAND, ACTING BY AND THROUGH
ITS BOARD OF PORT COMMISSIONERS**

ORDER ON MOTION TO DISMISS AND MOTION TO STAY PROCEEDINGS

I.

On July 7, 2010, the City of Oakland, acting by and through its Board of Port Commissioners ("Port of Oakland" or "Port"), filed Respondent's Motion to Dismiss and Supporting Memorandum ("Motion to Dismiss") moving for dismissal based on Eleventh Amendment sovereign immunity grounds because the Port is trustee for California tidelands. On August 4, 2010, SSA Terminals, LLC and SSA Terminals (Oakland), LLC ("SSAT") filed Complainants' Reply to Respondent's Motion to Dismiss ("Reply to Motion to Dismiss") urging denial of the motion because the Eleventh Amendment does not extend to cities and municipal corporations.

On October 5, 2010, the Port of Oakland filed a Statement of Supplemental Authority Regarding Respondent's Motion to Dismiss. On October 8, 2010, the Port of Oakland filed a Motion to Stay Proceedings Pending Resolution of Motion to Dismiss on 11th Amendment Jurisdictional Grounds ("Motion to Stay") seeking a stay of the proceedings pending the initial determination of its Motion to Dismiss. On October 25, 2010, SSAT filed Complainants' Reply to Respondent's Motion for a Stay of Proceedings ("Reply to Motion to Stay"). On October 25, 2010, non-party Ports America Outer Harbor Terminal, LLC, which may be subject to discovery in the proceeding, submitted a letter supporting the Motion to Stay.

For the reasons stated below, the Motion to Dismiss will be denied and the Motion to Stay will be dismissed as moot. First, the positions of the parties are summarized. Then, the background of the tideland grant governing the Port of Oakland, establishment of the Port of Oakland, and the Port of Oakland's powers will be described. Next is a discussion of the judicial treatment of other California ports and the relevant leading cases establishing the tests used to evaluate Eleventh Amendment claims, all of which extended immunity to the entity at issue. After each case is summarized, the entity at issue is compared to the Port of Oakland. The Port of Oakland, even if it is considered an independent department of the City of Oakland, is not found to be an arm of the state under any of these tests.

II.

The Port of Oakland moves for dismissal, contending that the Eleventh Amendment precludes the Federal Maritime Commission's jurisdiction over SSAT's claims. The Port of Oakland argues that since the Port of Oakland functions solely as a trustee for the State of California's tidelands, the Port of Oakland is entitled to the same Eleventh Amendment immunity as any other agency or instrumentality of the State of California. Motion to Dismiss at 1-2. The Port focuses on recent legislation which says that California's power and right to control its tidelands is absolute; tidelands granted to local entities remain subject to the oversight authority of the state; grantees are required to manage the state's tidelands without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or exercises; and the purposes and uses of tidelands is a statewide concern. Motion to Stay at 5-11 (discussing Cal. Pub. Res. Code § 6009). Accordingly, the Port of Oakland argues that pursuant to the tidelands grant, the State of California retains control over the tidelands and port revenues are held in trust for California. *Id.* The Port of Oakland contends, therefore, that it is entitled to Eleventh Amendment immunity under any of the potential tests.

SSAT asserts that the Port of Oakland is a department of the City of Oakland with no separate legal personality or rights and that because the City of Oakland is a municipal corporation, it is not entitled to share in the State of California's immunity under the Eleventh Amendment. Reply to Motion to Dismiss at 1-2. SSAT argues that California granted the tidelands at issue to the City of Oakland and it is the City that created and controls the Port of Oakland, a local agency with local leadership appointed by the Oakland City Council. Reply to Motion to Dismiss at 14-20. SSAT contends that the Port of Oakland is financially self-sufficient and judgements would not be paid out of state funds. Reply to Motion to Dismiss at 20-23. Moreover, SSAT points out that the new legislation explicitly does not change existing law. Reply to Motion to Stay at 6. Accordingly, SSAT argues that Eleventh Amendment immunity is not available to the Port of Oakland. If immunity applies, there are no arguments regarding whether immunity has been waived.

III.

BACKGROUND

The preeminent purpose of state sovereign immunity is to accord states the dignity that is consistent with their status as sovereign entities. *Federal Maritime Commission v. South Carolina State Ports Auth.*, 535 U.S. 743, 460 (2002). Only states and arms of the state possess immunity from suits authorized by federal law. *Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189, 193 (2006). Although immunity extends to entities which are arms of the state, the Supreme Court has repeatedly refused to extend sovereign immunity to municipalities, even when such entities exercise a slice of state power. *Chatham*, 547 U.S. at 193-94; *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979). See also *Alden v. Maine*, 527 U.S. 706, 756 (1999) (sovereign immunity “does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State.”). The Supreme Court specifically has held that state sovereign immunity bars the Federal Maritime Commission from adjudicating a private party’s complaint against a state-run port. *South Carolina State Ports Auth.*, 535 U.S. at 747. Sovereign immunity does not, however, impact the Bureau of Enforcement’s ability to pursue violations of the Shipping Act. *Id.* at 768.

No case has addressed whether a tideland trustee relationship is sufficient to extend a state’s Eleventh Amendment protection to an entity. Commission cases have addressed the Eleventh Amendment immunity of ports in South Carolina, Puerto Rico, and Maryland. In all three cases, the ports were ultimately found entitled to immunity. *Id.* at 743; *Puerto Rico Ports Auth. v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008); *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 30 S.R.R. 358 (2004). However, the facts in those cases differ in material respects from the facts here. In those cases, the ports were created by the state, controlled by the state, and financed in some form by the state. In contrast, the Port of Oakland was created by the Oakland City Council, is controlled by the Oakland City Council, and its budget is independent of the State of California. Determining whether an entity is an arm of the state is a fact intensive inquiry. Therefore, it is necessary to understand the background of the tideland grant, establishment of the Port of Oakland, and the Port’s powers.

Port of Oakland

The states, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). The State of California acquired title to its tidelands as an incident of sovereignty when it became a state in 1850. *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 336 (N.D. Cal. 1986).

In 1911, the State of California granted the City of Oakland its interest in the tidelands at issue. The grant states, in relevant part:

There is hereby granted to the city of Oakland, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California held by said state by virtue of its sovereignty in and to all tide lands and submerged lands . . . to be forever held by said city and by its successors in trust for the use and purposes and upon the expressed conditions.

Stats. 1911, ch. 657 (Motion to Dismiss, Ex. 2).

The tidelands were to be held in trust subject to conditions including that "said lands shall be used by said city and its successors, only for the establishment, improvement and conduct of a harbor," that "said harbor shall be improved by said city without expense to the state, and shall always remain a public harbor for all purposes of commerce and navigation," and that there "is hereby reserved, however, in the people of the State of California the absolute right to fish in the waters of said harbor, with the right of convenient access to said waters over said land for said purpose." *Id.* Each city took legal title to the lands in fee, but the title is held subject to the express trust imposed in the legislative acts of conveyance. *City of Long Beach v. Morse*, 31 Cal. 2d 254, 259 (1947).

The State of California has amended the original 1911 grant. For example, a 1917 amendment limited the maximum term of leases from "limited periods" to 50 years while a 1981 amendment changed the maximum term to 66 years. Stats. 1917, ch. 59; Stats. 1981, ch. 1016. California has the power to revoke the tidelands trust if the tidelands are not being used for trust purposes or are not being effectively administered to benefit the people of the state. *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 207-08 (1955); *City of Coronado v. San Diego Unified Port Dist.*, 227 Cal. App. 2d 455, 474-75 (Cal. Ct. App. 1964).

The City of Oakland established the Port of Oakland in 1927 to "promote and more definitely insure the comprehensive and adequate development of the Oakland Port through continuity of control, management and operation." Oakland City Charter ("Charter"), Art. VII, § 700. The exclusive control and management of the Port of Oakland is vested in the Board of Port Commissioners ("Board"), which is composed of seven members appointed by the Oakland City Council, upon nomination by the Mayor of Oakland, and who must be *bona fide* residents of the City of Oakland. *Id.* at § 701. Members of the Board may be removed from office by the vote of six members of the Oakland City Council. *Id.* at § 703.

The powers and duties of the Board of Port Commissioners include the complete and exclusive power to make provisions for the needs of commerce, shipping, and navigation of the Port. *Id.* at § 706. The Board may sue or be sued in the name of the City of Oakland, may acquire land in the name of the City, may enter into contracts, and may make leases of any properties belonging to the City. *Id.* at §§ 706(1), (15), (17), 709. Contracts entered into by the Board are subject to the bid limit and race and gender participation programs established by the Oakland City Council. *Id.* at § 710. Permanent places of employment in and under the Board are included within the personnel system of the City of Oakland. *Id.* at § 714.

Regarding financing, the Oakland City Charter states that the Board shall have the power:

To provide for financing of Port facilities through the issuance of bonds or other forms of debt instruments which are secured by a pledge of, or are payable from, all or any part of the revenues of the Port and/or which may be secured in whole or in part by interests, liens or other forms of encumbrance (other than in or on fee title in land) or lease in property. Such debt instruments shall be issued and sold in such manner and upon such terms and conditions, and shall contain such provisions and covenants, as the Board may fix and establish by the provisions of one or more procedural ordinances. Such debt instruments shall not constitute a debt, liability or obligation of the City of Oakland and shall be payable exclusively from revenues and other assets of the Port.

Id. at § 706(24).

The Board of Port Commissioners is required, on an annual basis, to prepare a budget stating the amount necessary to be raised by tax levy. *Id.* at § 715. In the event that the budget “shall request or provide for the allocation or appropriation to the Port by the Council of any funds raised or to be raised by tax levy or in any manner to be obtained from general revenues of the City,” the Oakland City Council “shall have the authority to reject the budget.” *Id.* at § 716. All income and revenue from the operation of the Port or from the facilities of the Port are deposited in a special fund in the city treasury designated as the port revenue fund. *Id.* at § 717(3). Surplus money in the port revenue fund may be transferred to the general fund of the City, although it must be used for purposes consistent with the public trust. *Id.* at § 717(3); Cal. Pub. Res. Code § 6306.

In addition to the tidelands granted to various municipalities in California, the State of California also created a State Lands Commission in 1938 vested with all “jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made.” Cal. Pub. Res. Code § 6301. Grantees are required to “establish and maintain accounting procedures, in accordance with generally accepted accounting principles, providing accurate records of all revenues received from the trust lands and trust assets and of all expenditures of those revenues,” and must file with the State Lands Commission an annual detailed statement of all revenues and expenditures relating to its trust lands and trust assets. *Id.* Moreover, “[a]ll revenues received from trust lands and trust assets shall be expended only for those uses and purposes consistent with the public trust for commerce, navigation, and fisheries, and the applicable statutory grant or grants.” *Id.*

The State Lands Commission policy statement explains:

The State Lands Commission exercises oversight over all granted lands. Generally, this means the Commission carries out this responsibility by working cooperatively with grantees to assure that requirements of the legislative grants and the Public Trust Doctrine are carried out and to achieve trust uses. The Commission monitors and

audits the activities of the grantees to insure that they are complying with the terms of their statutory grants and with the public trust. . . . However, where an abuse of the Public Trust Doctrine or violation of a legislative grant occurs, the Commission can advise the grantee of the abuse or violation; if necessary, report to the Legislature, which may revoke or modify the grant; or file a lawsuit against the grantee to halt the project or expenditure.

Reply to Motion to Dismiss, Ex. E at 3 (Public Trust Policy). The Commission itself does not have the power to revoke or modify a grant.

On September 25, 2010, section 6009 was added to the California Public Resources Code. The section states:

The Legislature finds and declares all of the following:

- (a) Upon admission to the United States, and as incident of its sovereignty, California received title to the tidelands, submerged lands, and beds of navigable lakes and rivers within its borders, to be held subject to the public trust for statewide public purposes, including commerce, navigation, fisheries, and other recognized uses, and for preservation in their natural state.
- (b) The state's power and right to control, regulate, and utilize its tidelands and submerged lands when acting within the terms of the public trust is absolute.
- (c) Tidelands and submerged lands granted by the Legislature to local entities remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission.
- (d) Grantees are required to manage the state's tideland and submerged lands consistent with the terms and obligations of their grants and the public trust, without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises.
- (e) The purposes and uses of tidelands and submerged lands is a statewide concern.

Cal. Pub. Res. Code § 6009.

Other documents also describe the Port. The Port of Oakland's own financial services division describes the Port as "a Component Unit of the City of Oakland" and as "an independent department of the City of Oakland" and explains that "[e]xclusive control and management of the Port area . . . were delegated to a seven-member Board of Port Commissioners . . . in 1927 by an

amendment to the City Charter.” Motion to Dismiss, Ex. 6 at 1 (November 23, 2009). The report states that the “Board has exclusive control of all of the Port’s facilities and property, real and personal, all income and revenues of the Port, and proceeds of all bond sales initiated by it for harbor or Airport improvements, or for any other purpose.” *Id.*

The California State Auditor, in 2001, described the Port as “an independent, self-supporting department of the city of Oakland charged with managing and operating a seaport, a passenger and cargo airport, and the waterfront real estate in and around the Oakland Estuary.” Motion to Dismiss, Ex. 4 at 1 (October 2001 report). The State Auditor explains:

Because the State granted the waterfront property to the city of Oakland in a series of Tideland Trust grants, most of the property is subject to state tideland grant restrictions. These restrictions require that tideland property and revenues generated by the use of that property be used for tideland purposes, including commerce, navigation, fishing, and public access to the shoreline. Neither the city nor the Port owns the waterfront property; rather, the Port holds the property in trust for the people of California.

Id. at 5.

DISCUSSION

Tideland grants have been made to a number of municipalities in California. Some of those grants have been discussed by other courts. The Ninth Circuit found the port in the City of Long Beach to be entitled to Eleventh Amendment immunity while a district court and state court found the port in Los Angeles not to be entitled to Eleventh Amendment immunity. The treatment of other ports is relevant to the analysis used to determine whether the Port of Oakland is entitled to Eleventh Amendment immunity.

Although the Supreme Court in *South Carolina Ports Authority* addressed the Eleventh Amendment in relationship to Federal Maritime Commission private party litigation, the Court did not discuss the factors to be used to determine whether an entity is an arm of the state. *South Carolina State Ports Auth.*, 535 U.S. at 751 n.6. Indeed, there is no uniform test to determine whether an entity is an arm of the state and the parties suggest consideration under three possible tests. The approach used most recently in a case involving the Federal Maritime Commission was the District of Columbia Circuit’s test in *Puerto Rico Ports Authority*. *Puerto Rico Ports Auth.*, 531 F.3d at 868. Cases addressing other ports in California have utilized the Ninth Circuit’s five part *Belanger* test. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992). A different approach was utilized in *Ceres*, where the Commission focused on two factors to determine whether an entity is entitled to Eleventh Amendment protection. *Ceres*, 30 S.R.R. at 358. There are significant similarities among the various tests and under these facts, the different tests yield the same result. Each case, and the facts relevant to its disposition, will be discussed in turn. The

California ports cases will be discussed prior to an analysis of the various tests used to determine Eleventh Amendment sovereign immunity.

California Ports

According to the Supreme Court of California, the Port of Oakland is “the successor of all the rights and powers formerly exercised by said city.” *City of Oakland v. Williams*, 206 Cal. 315, 320 (1929). Another case explained that the “Port Commission is a legal entity, created by charter and empowered, by approval of the state legislature, to act as an agency of the municipality. Under such circumstances whatever rights may be given to the municipality may be bestowed upon the agency.” *City of Oakland v. Hogan*, 41 Cal. App. 2d 333, 342-43 (Cal. Ct. App. 1940). Moreover, “[s]ince the board acts as the agency of its principal, the city, it is a legislative body of the municipal corporation.” *Id.* at 343 (emphasis in original). This case also stated that the “legislature has generally treated the construction of docks, piers, etc., as a local matter.” *Id.* at 356-57.

No cases were identified by the parties or the undersigned which determine whether the Port of Oakland is an arm of the state for Eleventh Amendment purposes, although courts have discussed the immunity of the ports in the City of Long Beach and in Los Angeles. The Ninth Circuit found that the port in the City of Long Beach was not entitled to immunity even though it was acting as a trustee, stating:

The city argues that it was entitled to the protection of the Eleventh Amendment because it was acting as “trustee” of the lands and was thus “an arm of the state” for purposes of the Eleventh Amendment. The city has not pointed to any authority suggesting that this doctrine should extend to non-state agencies. We would be reluctant to engage in such a radical departure from the law in light of the Supreme Court’s repeated and clear admonition that Eleventh Amendment immunity “does not extend to counties and similar municipal corporations.”

City of Long Beach v. Standard Oil Co. of Cal., 53 F.3d 337, 1995 WL 268859, at *1 (9th Cir. 1995) (quoting *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). The Ninth Circuit did not specifically address the *Belanger* factors.

Addressing a different California port, and without mentioning *City of Long Beach*, in 2009, the United States District Court reached the opposite result, stating that “[w]eighing all of the *Belanger* factors, mindful that the first factor is the most important, the Court concludes, as did the *Hanson* court, that the City Defendants are arms of the state.” *Mosler v. City of Los Angeles*, CV 02-02278 SJO (RZX), 8 (C.D. Cal. 2009)¹ (Motion to Dismiss, Ex. 8). In *Hanson*, the court held that “[w]eighing all the *Belanger* factors, recognizing that the first two have been held to be the most important, the court finds that the Defendant City/Board of Harbor Commissioners is acting as an arm or instrumentality of the state for purposes of ‘constitutional’ immunity under the *Alden* case.”

¹ The case is currently on appeal to the Ninth Circuit.

Hanson v. Port of Los Angeles, No. BC 221839, 8 (L.A. Super. Ct. 2001) (Motion to Dismiss, Ex. 7) (italics added) (citations omitted). The Long Beach grant differed in material respects from the Oakland grant at issue, including that in Long Beach, eight-five percent of excess revenue is remitted to the state's treasury. *Id.* at 7.

Puerto Rico Ports Authority

To determine whether an entity qualifies for Eleventh Amendment immunity, the District of Columbia Circuit has “generally focused on the ‘nature of the entity created by state law’ and whether the State ‘structured’ the entity to enjoy its immunity from suit.” *Puerto Rico Ports Authority* (“PRPA”), 531 F.3d at 873 (citations omitted). The inquiry “required examination of three factors: (1) the State’s intent as to the status of the entity, including the functions performed by the entity; (2) the State’s control over the entity; and (3) the entity’s overall effects on the state treasury. *Id.* at 873; see also *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986).

In the *Puerto Rico Ports Authority* case, the Court of Appeals for the District of Columbia concluded that “[w]hen considered together, the three arm-of-the-state factors – intent, control, and overall effects on the treasury – lead us to conclude that PRPA is an arm of the Commonwealth entitled to sovereign immunity.” *PRPA*, 531 F.3d at 880. In that case, the first factor of intent was established because the enabling act “describes PRPA as a ‘government instrumentality of the Commonwealth of Puerto Rico’ and ‘government controlled corporation;’” PRPA performs functions to promote the general welfare and to increase commerce and prosperity for the benefit of the people of Puerto Rico; PRPA’s internal regulations are governed by Puerto Rico laws that apply to Commonwealth agencies generally; PRPA submits yearly financial statements to the legislature and Governor; and the Commonwealth filed an amicus curie brief “emphatically declaring that PRPA is an arm of the Commonwealth entitled to sovereign immunity.” *Id.* at 875-76. The second factor of control was established because the Governor controls the appointment of the entire Board and the Governor may remove a majority of the Board at will. *Id.* at 877-78. Although the PRPA was financed largely through user fees and bonds, the determination of the overall effects on the treasury, the third factor, weighed in favor of immunity because some of PRPA’s actions could create legal liability for the Commonwealth, and payment for judgments for certain torts would come out of the Commonwealth’s coffers. *Id.* at 879-80. Given all of these facts, the District of Columbia Circuit found that PRPA was an arm of the state.

The facts in the case *sub judice* vary significantly from the facts in *Puerto Rico Ports Authority*. There is an argument that the first factor – intent as to the status of the entity, including the functions performed by the entity – weighs in favor of immunity, as the state has expressed an interest in the tidelands and retains oversight through the State Lands Commission. The State of California said that the “state’s power and right to control, regulate, and utilize its tidelands and submerged lands when acting within the terms of the public trust is absolute” and that the “purposes and uses of tidelands and submerged lands is a statewide concern.” Cal. Pub. Res. Code § 6009. On the other hand, the State of California transferred “all the right, title and interest” in the tidelands to the City of Oakland. Stats. 1911, Ch. 657 (Motion to Dismiss, Ex. 2). Although the State of

California has indicated that the purposes and uses of tidelands and submerged lands is a statewide concern, the State has not said that grantees are arms of the state. The State did not create the Port of Oakland, but rather it was created by the Oakland City Council. The Port is referred to as “a Component Unit of the City of Oakland” and “an independent department of the City of Oakland.” Motion to Dismiss, Ex. 6 at 1 (November 23, 2009). Because the State of California did not create the Port of Oakland nor define the Port’s functions, it is difficult to believe that the State intended the Port of Oakland to be an arm of the State. It is also hard to imagine that the state’s dignity would be impacted by a lawsuit filed against the City of Oakland, as suits against the Port must be.

The State of California created the State Lands Commission which has oversight authority of the Port of Oakland, but does not control the actions of the Port or its Board. The State Lands Commission can merely report to the Legislature or file a lawsuit against the grantee to halt a project or expenditure with which it disagrees. Motion to Dismiss, Ex. E at 3. The State of California may revoke or modify its grant to the City of Oakland (and thereby the City’s grant to the Port of Oakland) through legislative action. *Mallon*, 44 Cal. 2d at 207-08; *City of Coronado*, 227 Cal. App. 2d at 474-75. Thus, the State Land Commission’s control over the Port is limited. As the Supreme Court in *Hess* stated, “ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. ‘[P]olitical subdivisions exist solely at the whim and behest of their State,’ yet cities and counties do not enjoy Eleventh Amendment immunity.” *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (internal citation omitted). While the State Land Commission does have oversight authority, its ability to control the Port is limited. In addition, the State Lands Commission’s authority to audit the Port is similar to the State’s authority to audit counties, cities, and other local government agencies, which does not convert those local municipalities into arms of the state.

Part of the intent factor is an evaluation of the functions performed by the entity. The Commission has held that in some states, the functions of a port are a statewide concern. *Carolina Marine Handling, Inc. v. South Carolina State Ports Auth.*, 30 S.R.R. 1017, 1032 (2006); *Ceres*, 30 S.R.R. at 369. However, at least one court in California has stated that the “legislature has generally treated the construction of docks, piers, etc., as a local matter.” *Hogan*, 41 Cal. App.2d at 356-57. California granted tidelands to a number of different municipalities in California. Those ports compete against one another. See, e.g., Reply to Motion to Dismiss, Ex. G at 12 (Strategic Plan); Reply to Motion to Dismiss, Ex. H at A-91 to A-93 (Feasibility Report). While the tidelands grant says that the tidelands are held in trust for the benefit of the whole state, and the State of California has declared the tidelands a “statewide concern,” the City of Oakland has structured the Board of Port Commissioners to ensure a benefit to the local community. It makes sense that a municipality cannot immunize functions delegated to it by the State of California by creating a separate department or agency to carry out those functions. The City of Oakland itself does not have sovereign immunity and cannot confer sovereign immunity on an entity it creates. Accordingly, the intent factor does not weigh as heavily in its favor as the Port of Oakland contends, where the State of California intended to transfer control over the tidelands to the City of Oakland, the State of California did not create the Port of Oakland, oversight is limited to notifying the legislature or filing a lawsuit, and construction of port facilities has been treated as a local matter.

Regarding the second factor, control of the Port of Oakland rests with the City of Oakland, which appoints and removes the Board of Port Commissioners. When the functions performed by the Port are analyzed, it is clear that the Port was created and is controlled by the City. The Port of Oakland was created by the City of Oakland to control, manage, and operate the Port. Charter, Art.VII, § 700. The Port of Oakland is managed by a Board of Port Commissioners which is nominated by the City's mayor, approved by the City Council, and removed by the City Council. *Id.* at § 702. The facts here are very different than the facts present in the port in Puerto Rico. The City of Oakland clearly controls the Port of Oakland which weighs against finding Eleventh Amendment sovereign immunity.

Regarding the third factor, there is no evidence that any judgments would be payable out of the State of California treasury and the Oakland City Charter indicates that debt instruments issued by the Port "shall not constitute a debt, liability or obligation of the city of Oakland and shall be payable exclusively from revenues and other assets of the Port." *Id.* at § 706(24). California law requires a local public entity, including a public agency or political subdivision, to be responsible for a judgment rendered against it and specifically permits entities to use bonds to raise money to pay for judgments. Cal. Gov't Code, §§ 970.2, 970.8, 975.2. The City Charter creating the Port of Oakland explicitly states that "[s]uch debt instruments shall not constitute a debt, liability or obligation of the city of Oakland and shall be payable exclusively from revenues and other assets of the Port." Charter, Art. VII, § 706(24). Moreover, the initial 1911 grant from the State of California required that "said harbor shall be improved by said city without expense to the state." Stats. 1911, Ch. 657.

The Port Authority is financially self-supporting and any judgements would be paid out of the Port's revenue and assets. There is no evidence that there would be an impact on the state's treasury. The Port argues that money held in the Port Revenue Fund is the property of the State of California, relying on *Mosler* and *Hanson*. However, those cases were reviewing the tidelands grant to the city of Long Beach which required eight-five percent of excess revenue to be remitted to the state's treasury. *Mosler*, CV 02-02278 SJO (RZX) at 8-9; *Hanson*, No. BC 221839 at 7. There is no such requirement in Oakland and the 1911 enabling statute that requires improvement of the Port without expense to the state would control.

Belanger

In *Belanger*, the Ninth Circuit considered the following factors to determine whether a governmental agency is an arm of the state: (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state; and (5) the corporate status of the entity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250-51 (9th Cir. 1992). These five factors have been utilized in a number of cases, including *Moser* and *Hanson*, discussed above. In *Belanger*, the court weighed the five factors to determine that the school district was immune to suit under the Eleventh Amendment, finding that the school district's budget was controlled and funded by the state; schooling was a statewide or

central governmental function and the State of California exercised substantial centralized control, including dictating when students could be expelled and which textbooks were used; school districts could sue and be sued in their own name; school districts could own property in their own name; and school districts had the corporate status of state agents. *Id.* at 251-54.

In the case *sub judice*, the Port of Oakland's budget is not controlled or funded by the state and there is no evidence that a judgement would be payable from state funds; as discussed above, the Port of Oakland does not perform central government functions and is not involved in day-to-day decisions; the Port can sue and be sue in its own name; the Port can own property in its own name; and the Port is a creation of the City of Oakland, a municipal corporation. Unlike in *Belanger*, here, the Port of Oakland does not receive funding from the State and the State has not assumed substantial centralized control over the Port, but rather delegated that responsibility to the City of Oakland, which in turn delegated the authority to the Port of Oakland. That the State of California has made a declaration of control, oversight, and statewide concern does not outweigh the other factors. As the Ninth Circuit found in *City of Long Beach*, Eleventh Amendment immunity is not appropriate.

Ceres

In *Ceres*, the Commission considered two factors, the structure of the entity and the risk to the state treasury, to determine whether the Maryland Port Administration ("MPA") was an arm of the State of Maryland. *Ceres*, 30 S.R.R. at 366-67 (2004). The Commission concluded that the MPA had not provided enough evidence to show that a judgment against it would impact the Maryland state treasury. *Id.* at 368-69. Next, the Commission considered the degree of control that the State exercises over the entity; whether the entity deals with local rather than statewide concerns; and the manner in which State law treats the entity. *Id.* at 369. The Commission found that MPA is a constituent unit of the Maryland Department of Transportation and overseen by commissioners who are appointed by the Governor and compensated from funds in the state budget; MPA funds are audited by the State Legislative Auditor; the MPA services an essential government function to the State; and at least one Maryland court had held the MPA immune from suit in state court. *Id.* These facts outweighed the MPA's authority to bring and defend against lawsuits, to lease port facilities and other properties, to enter into contracts in its own name, and to appear in its own name before federal and state agencies. *Id.* Because the State of Maryland exercised a significant degree of control over the MPA, "an entity that deals with statewide concerns and that has been treated as an arm of the state by at least one Maryland state court," the Commission found that a proceeding against MPA would therefore infringe upon Maryland's dignity. *Id.* at 370.

The *Ceres* case shows that no impact on the state treasury combined with the ability to litigate and enter into contracts are not sufficient distance from the state to undermine an argument that an entity is an arm of the state. Those factors are present in the Port of Oakland. However, in the Port of Oakland there are additional indicia of control which impact the analysis of the structure of the entity. Specifically, the Board of Port Commissioners, as discussed above, is not appointed by the state, and is not compensated from funds in the state budget, and no court has held that the

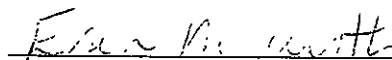
Port of Oakland is an arm of the state. In addition, in the case *sub judice*, the Port of Oakland was created and controlled by the City of Oakland so that the State of California has significantly less control over the Port of Oakland than the State of Maryland had over the MPA. Therefore, in the structure of the entity analysis, although the Port of Oakland deals with a statewide concern, this factor is outweighed by the degree of control exercised by the City of Oakland and the manner in which state law treats the entity. Although the Port, as tidelands trustee is overseen by the State Lands Commission and the State has declared its interest in the tidelands, that is not a sufficient nexus to invoke Eleventh Amendment immunity under this test.

CONCLUSION

The Port of Oakland was created by the City of Oakland, the Board of Port Commissioners is appointed by the Oakland City Council and must be residents of the City of Oakland, and the Port of Oakland may sue and be sued, enter into contracts, and make leases in the name of the City. Contracts are governed by City of Oakland programs and employees are included within the personnel system of the City of Oakland. The Port is financially self-sufficient, although the City may reject its budget. California law requires the harbor to be improved without expense to the State. Although California says that its power and right to control its tidelands is absolute; tidelands granted to local entities remain subject to the oversight authority of the state; grantees are required to manage the state's tidelands without subjugation of statewide to the inclination of local or municipal affairs; and the purposes and uses of tidelands is a statewide concern, under current case law that this is not sufficient to extend Eleventh Amendment immunity to the Port of Oakland. The State Lands Authority has oversight, but can only inform the legislature or file a lawsuit if it believes the land is not being managed within the terms of the grant. Reviewing the creation of the Port of Oakland by the City of Oakland, the degree of control exercised by the City, the lack of impact on the state treasury, and the conflict of legal decisions regarding California ports, the Port of Oakland is not entitled to Eleventh Immunity sovereign immunity protection. Accordingly, the Motion to Dismiss will be denied and the Motion to Stay dismissed as moot.

IV.

For the reasons indicated above, it is hereby ordered that the Motion to Dismiss be **DENIED**. It is further ordered that the Motion to Stay be **DISMISSED AS MOOT**. The parties shall file a joint status report with a proposed schedule for filing Rule 502.95 statements and for presentation of the case by November 17, 2010.



Erin M. Wirth
Administrative Law Judge

