

# FEDERAL MARITIME COMMISSION

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

*Complainant,*

v.

THE CITY OF OAKLAND,  
Acting By And Through Its Board  
Of Port Commissioners,

*Respondent.*

Docket No. 09-08

Served: December 13, 2011

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**BY THE COMMISSION:** Richard A. Lidinsky, Jr.,  
*Chairman*; Joseph E. Brennan, Rebecca F. Dye, Michael A.  
Khouri, and Mario Cordero, *Commissioners*.

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## **Memorandum Opinion and Order**

In this appeal, the City of Oakland, acting by and through its Board of Port Commissioners (the Port), asks the Federal Maritime Commission (FMC or Commission) to find that the Port is an arm of the state, and thus entitled to sovereign immunity from complaints filed with the Commission. The presiding Administrative Law Judge (ALJ) concluded that the Port is not entitled to Eleventh Amendment

sovereign immunity protection. *SSA Terminals v. City of Oakland*, 31 S.R.R. 1601 (ALJ 2010). Because the Port has not demonstrated that it is an arm of the State of California, we affirm the decision of the ALJ and remand for further proceedings.

I.

SSA Terminals filed this Complaint proceeding with the Commission on December 11, 2009, naming the Port as a respondent. The Complaint seeks a cease and desist order and reparations for injuries for alleged violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c). On January 13, 2010, the Port served its answer to the Complaint, generally denying its allegations and interposing affirmative defenses including sovereign immunity. The Port thereafter filed a motion to dismiss the Complaint, arguing that it was immune from responding to the allegations contained in it based on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 734 (2002).

After a full briefing, the ALJ denied the Port's Motion on October 25, 2010. *See* 31 S.R.R. 1601. In the Order, the ALJ determined that the Port of Oakland is not an arm of the State of California, and was therefore not entitled to sovereign immunity based on the Eleventh Amendment. The Port filed a Motion for Leave to Appeal the ALJ's Order denying the motion to dismiss, and filed a motion to stay the proceeding in front of the ALJ while the appeal is pending before the Commission. On December 21, 2010 the ALJ granted the Port leave to appeal to the Commission the November 8, 2010,

denial of its Motion to Dismiss.<sup>1</sup> See *SSA Terminals v. City of Oakland*, 32 S.R.R. 107 (ALJ 2010).

## II.

“Whether an entity is an arm of the State for purposes of sovereign immunity under the U.S. Constitution is a question of federal law.” *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868, 872 (D.C. Cir. 2008) (“PRPA”). The Commission reviews denials of motions to dismiss *de novo*, as do the Courts of Appeals. See *Bombardier Corp. v. National R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003) (citing *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

## III.

When California entered the Union in 1850, it received from the United States ownership of the lands under waters subject to the ebb and flow of the tide. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (“[T]he States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.”). The State of California generally sets and controls the laws pertaining to property interests within its borders, including property rights and interests in navigable waters and tidelands. See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Prot.*, --- U.S. ----, ----, 130 S.Ct. 2592, 2597 (2010) (“Generally speaking, state law defines property interests . . .

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<sup>1</sup> SSA Terminals filed a Motion to Schedule Oral Argument or to Render Decision on Existing Record on February 11, 2011. The Commission granted SSA Terminals’ Motion to Schedule Oral Argument, and held argument September 9, 2011.

including property rights in navigable waters and the lands underneath them[.]” (citing *United States v. Cress*, 243 U.S. 316, 319-320 (1917); *St. Anthony Falls-Water Power Co. v. St. Paul Water Comm’rs*, 168 U.S. 349, 358-359 (1897)).

The State of California held the lands involved in public trust from 1850 until 1911, when the State granted the City of Oakland its interest in the lands that make up the Port. Cal. Stats. 1911, ch. 657, § 1. California granted to the City of Oakland “all 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 whether filled or unfilled,” but imposed certain requirements on the lands. *Id.*, § 1-1(a). For example, the City can grant leases to private parties, but it cannot convey the lands. *Id.* Importantly, California mandated that the use of the lands be limited to “purposes consistent with the trusts upon which said lands are held by the State of California, and with the requirements of commerce or navigation at said harbor.” *Id.*, §1(a). Thus, the City holds the land in public trust for uses consistent with the State’s grant of the lands.<sup>2</sup> The State may revoke the grant to the City for good reason (such as for an abuse of the public trust), or for no reason. *People ex rel S.F. Bay v. Town of Emeryville*, 69 Cal.2d 533, 549, 466 P.2d 790, 800 (1968).

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<sup>2</sup> The California Legislature has amended the grant to the City of Oakland several times since the original grant in 1911. *See, e.g.*, Cal. Stats. 1917, ch. 59 § 1(a) (extending maximum term of Port leases to 50 years); Cal. Stats. 1981, ch. 1016, § 4 (extending maximum term of port leases to 66 years). None of these amendments, however, substantively impact the original relationship between the State of California and the City of Oakland that arose in the 1911 grant of trust lands.

The City of Oakland, in turn, established the Port of Oakland in 1927, which is controlled by the Board of Port Commissioners (the Board). *See* Oakland City Charter, Art. VII, § 700. The Mayor of the City of Oakland nominates *bona fide* city residents for positions on the Board, and the Oakland City Council thereafter appoints the members to the Board. Oakland City Charter, Art. VII, § 701. Members may be removed from office by a vote of six members of the City Council. *Id.* § 703. The Board may sue and be sued in the name of the City of Oakland, acquire land in the name of the City, and enter into contracts. *Id.* §§ 706(1), (15), (17); § 710. The Board may lease lands within the Port, but leases are subject to referendum. *Id.* § 709.

The Port may also issue bonds or other securities, but any debts do not constitute “debt[s], liabilit[ies], or obligation[s] of the City of Oakland and shall be payable exclusively from revenues and other assets of the Port.” *Id.* § 706(24). Any revenues generated from the Port or from the facilities of the Port are deposited in a special “Port Revenue Fund” in the City’s treasury. Charter § 717(3). Generally, revenue and income from the Port that is deposited in the Port Revenue Fund is used for Port related activities, but surplus funds may be transferred to the City’s “General Fund.” Charter § 717(3)(ninth). The City aggregates money in the Port Revenue Fund with the City’s other general monies for investment purposes, but accounts for the funds separately. Mot. Dismiss Exh. 5, Decl. Sara Lee, ¶¶ 5-6.

California also created a State Lands Commission in 1938 to oversee the State’s role as ultimate trustee for tidelands. Cal Pub. Res. Code § 6301; *see also* Cal. Stats. 1938, Ex. Sess., ch.5, p. 23, § 48. The State Lands Commission receives, as mandated by the State Legislature, an

annual detailed statement of revenues related to a grantee's operations and the trust's assets. *Id.* The State Lands Commission also ensures that revenues received from the operation of the trust are used in conformity with the terms of the Legislature's grant of the trust, and for the general public trust. *Id.* As counsel for the City of Oakland acknowledged, the State Lands Commission does not, however, approve proposed leases or possess a veto over actions undertaken by the Port. *See* Trans. Or. Arg. at 36 ("I don't know that [the State Lands Commission] ha[s] a formal vote to approve a lease. It's a slightly more informal process.").<sup>3</sup>

#### IV.

The Port argues, both on appeal and before the ALJ, that because it serves as a tidelands trustee for the State of California and because it accounts for revenue from the Port separately, it is an arm of the State and entitled to immunity under the Eleventh Amendment. This argument, however, fails all potentially applicable tests.

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<sup>3</sup> The relationship between the Port, the State of California, and the State Lands Commission eludes easy explanation. As noted in the Amicus Curiae Brief filed by the California Attorney General, "the State Lands Commission functions as the Legislature's day-to-day eyes and ears with respect to oversight" of the Port lands, but also "serves as the trustee of and has supervisory rights over sovereign lands that the State has granted to municipalities." Br. Amicus Curiae Cal. A.G. at 11. Elsewhere, the City of Oakland has been described as "a trustee for the State." *Id.* at 6. It appears that the State Lands Commission's authority enables it to file a suit in order to enforce trustee compliance, but this oversight requires judicial intervention.

## A.

In determining whether an entity is an arm of the State for purposes of sovereign immunity, the Supreme Court has not adopted a rigid test, but instead looks to a variety of factors. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994); *PRPA*, 531 F.3d at 872-73. This approach is reflected in the various multi-factor tests used by the Courts of Appeals to analyze whether an entity is an arm of the state. For example, the Ninth Circuit – the circuit in which the Port is found – applies the approach it used in *Belanger v. Madera Unified School District*, 963 F.2d 248, 250-251 (1992) (citing *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081, 109 S.Ct. 2102, 104 L.Ed.2d 663 (1989)). Thus, the Ninth Circuit evaluates “[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*, 963 F.3d at 250-51.

The D.C. Circuit examines 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.” *PRPA*, 531 F.3d at 873. The Commission has looked to two primary factors – structure of the entity and impact on state treasury – under *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 30 S.R.R. 358 (2004). When evaluating the structure of an entity, the Commission also evaluates 1) the degree of control the state exercises over the entity; 2) whether the entity deals with local rather than statewide concerns; and 3) the manner in which the applicable

state law treats the entity. *Id.*

In evaluating whether an entity is an arm of the state, the Supreme Court has noted that the prevailing view in the Courts of Appeals is that “vulnerability of the State’s purse [i]s the most salient factor in Eleventh Amendment determinations.” *Hess*, 513 U.S. at 51; *id.* at 47.

The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is ‘No’—both legally and practically—then the Eleventh Amendment’s core concern is not implicated.

*Hess*, 513 U.S. at 51. Although some courts have stated that “*Hess* does not require a focus solely on the financial impact of the entity on the State,” *PRPA*, 531 F.3d at 874, that factor nevertheless plays an integral role in Eleventh Amendment immunity questions.

B.

Under any of these tests, the Port’s arguments must fail.

1.

As an initial matter, the State lacks any meaningful, day-to-day control over the Port. The Port Commissioners are nominated by the Mayor of Oakland and appointed by the City Council. The Oakland City Council may remove Port Commissioners by supermajority vote. The Board reviews and executes contracts and leases subject to referendum, but

does not otherwise face State-level scrutiny for its decisions, other than the parameters that were set forth as conditions of the original grant of the lands to the City. California could plausibly revoke the grant, or impose additional, more-restrictive requirements on the Port than it currently faces, but as with every entity established by a state, “ultimate control of every state-created entity resides with the State, for the State may reshape any unit it creates.” *Hess*, 513 U.S. at 47. While the California Legislature has amended the original trust grant and placed other limitations on the use of the tidelands, this ephemeral control does not dictate the actions of the Port other than to place an outermost limit on the Port’s conduct. Thus, the California Legislature’s ultimate control does not represent the type of state activity that is shielded by the Eleventh Amendment.

*Belanger* provides little support for the Port. The Port may sue and be sued in the name of the City, not the name of the State of California. Oakland Charter § 706(1). The same Charter that permits the Port to entertain lawsuits under the name of the City of Oakland also describes the Port as “a department of the City of Oakland.” *Id.* § 700. When the Port takes in property, it also does so “in the name of the City[.]” Oakland Charter § 706(15). The final three prongs of the *Belanger* test thus weigh decidedly against the Port.

2.

Likewise, the factor common to all tests, the overall impact on the State’s treasury, weighs heavily against immunity. A judgment against the Port would not come from the State of California’s treasury, as the Port acknowledged at argument. *See* Trans. Or. Arg. at 47 (“The original money would come from Tidelands Trust revenues, so it would not

come directly out of the state's treasury."); *see also* Trans. Or. Arg. at 66 ("What [SSA Terminals] is arguing is that this doesn't go directly against the state treasury, *and we don't assert that it does.*" (emphasis added)). Instead, according to the Port, any judgment would be satisfied from the revenue attributable to the Tideland's Trust (the Port Revenue Fund), which is segregated not only from the State's treasury, but also from the City's. *See id.* at 66-68; *see also* Mot. Dismiss Exh. 5, Decl. Sara Lee. This financial independence is not limited to responsibility for potential judgments in the case at bar. To the contrary, when the State first granted the trust, it severed financial ties by instructing that the "harbor shall be improved by said city *without expense to the state[.]*" Cal. Stats. 1911, ch. 657, § 1(b) (emphasis added); *see also PRPA*, 531 F.3d at 878 ("[T]he relevant issue is a State's overall responsibility for funding the entity or paying the entity's debts or judgments, *not* whether the State would be responsible to pay a judgment *in the particular case at issue.*" (emphasis in original)).<sup>4</sup>

The record does not indicate, and we have no reason to believe, that the City and the Port may somehow expose the State's treasury for other actions. *See PRPA*, 531 F.3d at 879-80 (noting that the entity at issue in *PRPA* could expose the Commonwealth to direct liability based on other statutory regimes); *see also* Br. Amicus Curiae Cal. Attorney Gen. at 9-10 ("[U]ntil the Legislature acts to revoke the grant . . . the Port Revenue Fund, and all liability for Port-incurred debts, resides with the Port.").

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<sup>4</sup> Some courts have also found that structuring an entity to avoid liability by a state's treasury shows a lack of intent to create an arm of the state. *See, e.g., Fresenius Medical Care Cardiovascular Res., Inc. v. Puerto Rico and Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 68-69 (1st Cir. 2003).

The State Legislature could conceivably revoke the grant to the City, exert control over the tidelands, and potentially put the State's treasury at risk, but such a specter is a contingency that is quite unlikely. Any potential exposure to the State's treasury would only be the result of a Rube Goldberg-type series of events that could hypothetically occur in the future. The Port has thus not demonstrated a legitimate risk to the State's treasury – what others have described as “the most salient factor in Eleventh Amendment determinations.” *Hess*, 513 U.S. at 47. Accordingly, we do not believe that Eleventh Amendment immunity can be supported by such implausible contingencies on the State's treasury. *See Hess*, 513 U.S. at 45 (“Pointing away from Eleventh Amendment immunity, the State[] lack[s] financial responsibility for” the Port.).

3.

Further, we are not persuaded that California intended to create an arm of the State when it conveyed the tidelands to the City of Oakland. At the time California transferred the land to the City of Oakland in 1911, the Supreme Court had already determined that cities and municipalities are not entitled to immunity under the Eleventh Amendment based solely on their relation to the state that created them. *Lincoln County v. Luning*, 133 U.S. 529, 530, 10 S.Ct. 363, 363 (1890) (denying Eleventh Amendment sovereign immunity to a municipality). The mere conveyance by the State to the City of Oakland, without more evidence from the State that it intended to create some other instrumentality, does not support the Port's argument that it is an arm of the State of California.<sup>5</sup>

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<sup>5</sup> We might face a more difficult case if the State had

The City's Charter itself describes the Port as a "department" of the City of Oakland, rather than as an instrumentality or entity of the State of California. *See PRPA*, 531 F.3d at 875.

The representations of the State, in the Amicus Curiae Brief of the Attorney General, do not aid the Port in its attempts to show that the State intended to create an arm of the state. *See* Br. Amicus Curiae Cal. Attorney Gen. at 6 (stating that the state intended to create a trust, not an entity of the State, when it conveyed land to the City of Oakland); *see also PRPA*, 531 F.3d at 876 (analyzing the representations of Puerto Rico regarding its intent, as detailed in briefs filed with the court). The record does not indicate that the Port is subject to other state laws that apply to State instrumentalities that would not otherwise apply to a municipality. *See PRPA*, 531 F.3d at 876.

The overall nature of the Port's activities also provides no support for the Port's claims that it performs State-level governmental activities. As in *Hess*, the functions of the Port "are not readily classified as typically state or unquestionably local. States and municipalities alike own and operate . . . marine terminals[.]" *Hess*, 513 U.S. at 45. As the Supreme Court noted, "[t]his consideration, therefore, does not advance our Eleventh Amendment inquiry." *Id.*

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conveyed the tidelands to an entity other than the City of Oakland, or if by operation of California law, a City's conveyance of its rights to a separate entity might create some independent relationship that could somehow alter the State's original intent to grant the lands to the City. These scenarios are not present in this case, and we therefore only face the straightforward relationship that arises from the State's original grant to the City of Oakland.

On balance, and after reviewing the pertinent factors, we agree with the ALJ that the Port and the City are not arms of the State of California. The Port and the City are therefore not entitled to immunity under the Eleventh Amendment.

C.

We do not, however, adopt the position articulated by SSA Terminals. It argues that, because it named the City as a respondent, our inquiry must end because cities and municipalities are not entitled to immunity. *See* Trans. Or. Arg. at 55-56 (“We have made clear in our brief that we believe you don’t need to get to those factors at all, because you never need to reach that. To again repeat, this is a case against the city. It’s a case against the municipality. Municipalities are not entitled to sovereign immunity. End of story.”). Cities and municipalities are, of course, denied this immunity not because of their status as cities and municipalities, but rather because they are traditionally not arms of the state based solely on their status as subsidiaries to a state government. As *PRPA* noted, immunity may apply to entities that are not arms of the State under certain circumstances. 531 F.3d at 878-79 (“[E]ven for entities that are not arms of the State, sovereign immunity can apply in a particular case if the entity was acting as an agent of the State or if the State would be obligated to pay a judgment against an entity in that case.”) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n. 11 (1984); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000)). In other words, the Port and the City of Oakland are not entitled to immunity because they have failed to show that the Port is an arm of the state, not because SSA Terminals has demonstrated that the respondents are municipal entities.

Accordingly, we decline SSA Terminals' invitation to stop reading at the caption of the case. We are instead obligated to review the unique structure of the Port and its relationship with the City of Oakland and the State of California in order to determine whether the Port and the City are entitled to immunity based on the relevant factors set forth by the Supreme Court and the Courts of Appeals.

CONCLUSION

In sum, we believe that the Port, to borrow a phrase from the Fourth Circuit, "walks, talks, and squawks" like a city-run facility instead of an arm of the State of California. *See South Carolina State Ports Authority v. Fed. Maritime Comm'n*, 243 F.3d 165, 174 (4th Cir. 2001), affirmed 535 U.S. 743. As a result, the Port is not entitled to immunity under the Eleventh Amendment.

THEREFORE, IT IS ORDERED, That the Decision by the Administrative Law Judge is AFFIRMED; and

IT IS FURTHER ORDERED, That this matter is REMANDED for further proceedings.

By the Commission.

Karen V. Gregory  
Secretary