

IN RE KATANIA SHIPPING COMPANY AND UMPIRE INVESTMENT CORPORATION

CERCLA § 106(b) Petition No. 98-1

FINAL DECISION

Decided March 31, 1999

Syllabus

Katania Shipping Company and Umpire Investment Corporation filed a CERCLA section 106(b) petition for reimbursement of approximately 1.7 million dollars in response costs expended during a hazardous substance cleanup on board the M/V Katania, as directed by the United States Coast Guard.

Held: Petitioners have failed to show that they received a CERCLA section 106(a) order directing them to undertake cleanup activities on the Katania. Because receipt and compliance with a CERCLA section 106(a) order is a necessary predicate to obtaining reimbursement under section 106(b), the petition for reimbursement must be dismissed for failing to satisfy a statutory prerequisite.

***Before Environmental Appeals Judges Scott C. Fulton,
Ronald L. McCallum and Edward E. Reich.***

Opinion of the Board by Judge Fulton:

On June 9, 1998, the Board received a petition for reimbursement from Katania Shipping Company and Umpire Investment Corporation (collectively “petitioners”) pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). Reimbursement Petition of Katania Shipping Company and Umpire Investment Corporation (“Katania’s Petition”). At the time of the events pertinent to this case, these two companies were the owner and bareboat charterer, respectively, of a general cargo vessel named the M/V Katania. Petitioners seek reimbursement of approximately 1.7 million dollars in response costs expended during a hazardous substance cleanup on board the Katania, directed by the United States Coast Guard (“USCG”).

The USCG responded to the petition for reimbursement with a motion to dismiss. U.S. Coast Guard Motion to Dismiss Due to Incomplete Petition. The USCG asserted that Katania's Petition was incomplete because it did not include an administrative order issued under the authority of CERCLA section 106. It was unclear from the USCG's motion to dismiss whether USCG was asserting that no CERCLA section 106(a) order had ever been issued to petitioners or that petitioners had simply failed to include a copy of the CERCLA section 106(a) order with their petition for review. The Board therefore ordered briefing on the motion to dismiss, noting that "[t]he existence of a CERCLA § 106(a) order is a prerequisite to obtaining reimbursement under CERCLA § 106(b)." Scheduling Order at 1 (EAB, July 23, 1998). Petitioners filed a response to the motion to dismiss claiming that a CERCLA section 106(a) order had, in fact, been issued. The USCG filed a reply contesting petitioners' claim.

The Board issued a Preliminary Decision on the petition for reimbursement on February 9, 1999. Petitioners filed comments on the Preliminary Decision on March 18, 1999. Comments of Katania Shipping Company and Umpire Investment Corporation Regarding Preliminary Decision of the Environmental Appeals Board ("Katania's Comments"). The USCG filed its comments on March 26, 1999. U.S. Coast Guard Comment on Preliminary Decision. After due consideration of the comments received and making such changes as are appropriate, the Board issues this Final Order Denying Reimbursement. *See Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions*, 61 Fed. Reg. 55,298, 55,301 (Oct. 25, 1996).

This decision addresses the parties' dispute over the existence of a CERCLA section 106(a) order in this case. As discussed below, we find no documentation of a CERCLA section 106(a) order in the administrative record and therefore hold that petitioners have failed to satisfy a statutory prerequisite to obtaining reimbursement. Accordingly, the USCG's motion to dismiss is granted.

I. BACKGROUND

On March 9, 1998, a fire broke out in the cargo hold of the M/V Katania ("Katania") while the Katania was docked at the New Manchester terminal in the Port of Houston-Galveston. At the time of the fire, a stevedoring company was loading the Katania with cargo for export. The cargo included, among other things, twenty 1000 kilogram crates of sodium cyanide, enclosed in a twenty-foot shipping container. During firefighting efforts, water infiltrated the shipping container and became

contaminated with sodium cyanide. Ultimately, the contaminated water flooded the Katania's hold and came into contact with several other items of cargo.

The USCG was one of several government agencies that took part in response activities during and after the Katania fire. A Coast Guard officer served as the Federal On-Scene Coordinator ("FOSC"). In light of the exigencies of the fire and the presence of sodium cyanide solution in the hold, the USCG directed Katania's owners and crew to take various actions during and immediately after the incident. For example, during the firefighting effort, the USCG directed the Katania's crew to take steps to control the amount of water accumulating in the vessel. Further, beginning the day after the fire, the USCG requested that petitioners develop and implement a series of Incident Action Plans ("IAPs") to address removal of the sodium cyanide cargo and contaminated firefighting water. During the initial period of response, petitioners coordinated IAPs with the USCG and other government agencies and conducted response activities, including air monitoring, water sampling, and removal and decontamination of cargo affected by the contaminated water. Petitioners carried out these initial activities without receiving any written directives from the USCG setting forth requirements for the initial response.

The first written directive to petitioners was issued on March 12, 1998. The USCG directed all decontamination activities to cease temporarily in light of laboratory results indicating sodium cyanide levels in the hold water in excess of OSHA standards. Administrative Record ("AR") Vol I, No. 6. This notice also referenced the fact that the USCG had accessed CERCLA funds to cover costs incurred by the USCG and NOAA in addressing the sodium cyanide situation on board the Katania.

On March 13, 1998, the USCG issued a Captain of the Port Order, from K.J. Eldridge, Captain of the Port of Houston-Galveston, to petitioners' representative ("COTP Order"). AR Vol I, No. 7. The COTP Order stated that the Katania and its cargo "poses a substantial threat of release to the environment and a substantial risk to life due to sodium cyanide contamination resulting from fire fighting water." The document further ordered the Katania to "remain moored at New Manchester terminal until proper corrective measures are taken" and to "adequately remove[] the threat posed by sodium cyanide contamination from your vessel and its onboard cargo." The COTP Order contains only one legal citation, a reference to 33 C.F.R. § 160.7(b). Section 160.7 is one of the regulations that implement the Ports and Waterways Safety Act, 33 U.S.C. §§ 1221 *et seq.*

Also on March 13, 1998, the USCG issued a document to petitioners entitled, “Notice of Federal Interest for a Hazardous Substance Release.” AR Vol I, No. 9. This document puts the recipient on notice of a release or threatened release of a hazardous substance and potential financial responsibility under CERCLA. The letter implies that petitioners may choose to undertake their own removal action in order to avoid paying the costs of a federal removal action. The document states, “[i]f it is determined that you are not taking prompt and appropriate actions to contain, cleanup and dispose of the pollutant(s), Federal response may be initiated. You may then be held responsible for all actual costs incurred by the Federal Government as set forth in section 104(a) of [CERCLA].” Notably, the letter does not cite CERCLA section 106(a) and does not direct the petitioners to take any specific action. Further, the letter does not reference the CERCLA sanctions for failure to conduct a removal action in accordance with a CERCLA 106(a) order but rather merely contemplates that the recipient may be held liable for “actual costs.”

The administrative record also contains a CERCLA section 106(a) order stamped “DRAFT.” AR Vol I, No. 8. The document states that the sodium cyanide contamination on the Katania presents a “substantial threat of release to the environment and a substantial risk to life.” In contrast to the Notice of Federal Interest discussed above, this document, if effectuated, would have directed petitioners to take three immediate actions to further the decontamination efforts and notes that noncompliance with the order is subject to a penalty of \$25,000 per day. The draft document is styled as a “Directive/Administrative Order,” and it specifically cites CERCLA section 106. In addition to being stamped “DRAFT,” however, the document is both unsigned and undated.

An affidavit submitted by USCG Commander Robert E. Acker states that he drafted the Directive/Administrative Order and that another USCG officer showed the draft order to the petitioners’ representative on March 13, 1998. Acker Aff. ¶ 9. This is the same date that the COTP Order and the Notice of Federal Interest for a Hazardous Substance Release were issued. Commander Acker states that the purpose of the draft CERCLA section 106(a) order was to educate the petitioners regarding the USCG’s options for proceeding, but that the USCG did not intend to issue the order unless the petitioners failed to satisfy the FOSC supervising the decontamination effort.¹ *Id.*

¹ Petitioners object to the Acker affidavit on the grounds that it contains “hearsay within hearsay.” Katania’s Comments at 1. Petitioners further object to the Board’s reliance on this hearsay. *Id.* at 2. The Board’s holding in this case is not based in whole or in part

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On March 18, 1998, Commander Acker sent a letter to the petitioners summarizing the Katania incident and response efforts as of that date. AR Vol II, No. 14. The letter states, “[i]n response to the substantial threat of a release of Sodium Cyanide into the environment, under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 106, the U.S. Coast Guard Captain of the Port Houston-Galveston directed the operator of the vessel to properly decontaminate the water, cargo, and the vessel itself.” *Id.* The letter continues by citing the CERCLA limits of liability for vessels that carry hazardous substances as cargo. *See* 42 U.S.C. § 9607(c)(1)(A).

II. DISCUSSION

A. A CERCLA Section 106 Order is a Necessary Prerequisite to Reimbursement Under CERCLA Section 106(b)

Petitioners are requesting reimbursement pursuant to CERCLA section 106(b)(2)(A) for amounts expended in responding to the Katania incident. The statutory provision governing reimbursement states:

Any person who *receives* and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition * * * for reimbursement from the Fund * * *.

CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A) (emphasis added). In order to proceed with a petition for reimbursement, petitioners must first establish that they received a CERCLA section 106(a) order and that they complied with its terms. Notably, reimbursement under CERCLA section 106(b)(2)(A) is available only when an order under section 106(a) is actually issued. The fact that CERCLA section 106(a) authority potentially may be available in a given circumstance does not, by itself, give rise to a right of reimbursement under CERCLA section 106(b). In addition, cleanups ordered pursuant to some other authority can not serve as a predicate for CERCLA reimbursement.

on the Acker affidavit. The Board mentions the Acker affidavit in the recitation of the background of this case solely to provide context for the “DRAFT” CERCLA section 106(a) order contained in the administrative record. Even disregarding the affidavit, the Board finds that the administrative record does not establish, and petitioners have not shown, that a CERCLA section 106(a) order was issued in this case.

B. Was a CERCLA Section 106 Order Issued Here?

Petitioners have not argued that the USCG's initial oral directives, or its March 12 and 13 written communications, were tantamount to a CERCLA section 106(a) order. Rather, petitioners have pointed to the March 18, 1998 letter as the CERCLA section 106(a) administrative order in this case. Response to USCG's Motion to Dismiss at 2 ("Katania's Response"). Petitioners correctly point out that there is neither a statutorily nor regulatorily defined format for 106(a) orders. Katania's Response at 2. They cite to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, and APA case law in support of their argument that the March 18, 1998 letter is an administrative order.

The USCG maintains that the March 18, 1998 letter is not a CERCLA section 106(a) order and that the letter was merely intended to inform petitioners about the CERCLA limits of liability for this incident. U.S. Coast Guard Reply to Petitioners' Response to Motion to Dismiss Due to Incomplete Petition at 3 ("USCG Reply"). The USCG claims that the March 18, 1998 letter cannot be a CERCLA section 106 order because it does not direct petitioners to take any actions. USCG Reply at 4. The USCG also points out that the letter does not "carry the threat of sanctions and other penalties to ensure compliance * * *." *Id.* at 5.

The USCG Reply identifies two defining features of CERCLA section 106(a) orders. First, the essence of a section 106(a) order is a directive requiring the recipient to undertake certain cleanup activities. Second, a section 106(a) order carries the force of law. CERCLA provides that substantial penalties may attach for failure to comply with a section 106(a) order. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1). In addition, punitive damages of up to three times the amount of response costs incurred by the federal government may be recovered from a recipient of a section 106(a) order who, without sufficient cause, does not perform the cleanup activities directed in the order. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3). The USCG argues that the March 18, 1998 letter does not enjoy these key attributes.² We agree.

² The USCG claims that the petitioners conducted cleanup activities on the Katania, not because they were required to do so under a CERCLA section 106(a) order, but because they wanted to get the March 13, 1998 COTP Order—issued under the authority of the Ports and Waterways Safety Act—lifted. USCG Reply at 9. This strikes us as a credible view of the facts of this case. The COTP Order required the Katania to remain moored at the New Manchester terminal until the sodium cyanide contamination was removed. Until the COTP Order was lifted, the Katania could not resume its shipping activities.

In the brief legislative history of the enactment of CERCLA in 1980, there is a Senate debate that points out that the language of section 106(a) originally referred to “requests,” but was dropped in favor of the term “orders”:

[T]he original terminology of sections 106(a) and 107(c)(3) referring to Presidential “requests” has been changed to Presidential “orders” in the interest of fairness to all parties.

126 Cong. Rec. 30,986 (Nov. 24, 1980). The use of the term “order” rather than “request” reflects a conscious choice on the part of the Congress to construct a regime under section 106 that relies not on informal methods for eliciting voluntary assistance, but rather on formal orders which carry with them sanctions and the force of law.

Concluding, as we do, that a CERCLA section 106(a) order is an enforceable directive requiring identifiable actions by the recipient, we find that the March 18, 1998 letter is not a CERCLA section 106(a) order. This letter may strongly suggest that a section 106(a) order *was* issued, but the letter itself is simply not such an order.³ The letter does not order any prospective action whatsoever. Written largely in the past tense, it states that the petitioners’ representative “fulfilled the responsible party’s role for directing [the] cleanup operation.” In addition, the letter does not reference any penalties or sanctions or otherwise discuss the consequences of failing to comply. CERCLA section 106(a) orders typically contain such features. Indeed, devoid as it is of any requirements or directives, and therefore unenforceable, the document cannot constitute an “order” within the meaning of CERCLA section 106(a).⁴

We recognize that the administrative record contains other references to CERCLA section 106, as well as evidence that the USCG invoked certain CERCLA authorities during the course of the Katania incident. The

³ As best we can discern, the USCG’s mention of CERCLA section 106 in the March 18, 1998 letter was an erroneous citation of the authority for the petitioners’ cleanup activities. This type of error concerns us, especially when the recipient may not be familiar with CERCLA. CERCLA section 106 authority is an important and powerful tool for impelling private party cleanups, and agencies authorized to issue section 106(a) orders should be mindful of the need to invoke the authority in a clear and unambiguous manner.

⁴ We can well imagine that petitioners would argue that the March 18, 1998 letter is not a section 106(a) order if the tables were turned and USCG was pursuing an enforcement action against them seeking penalties or treble damages. As the letter fails to reference any actions required pursuant to CERCLA section 106(a), there is no doubt on our part that it would not support an enforcement case.

USCG, for example, accessed CERCLA funds to pay for its own response activities. By issuing the Notice of Federal Interest for a Hazardous Substance Release, the USCG also put the petitioners on notice that the USCG considered them responsible parties under CERCLA and would, as appropriate, pursue them for response costs related to the incident. We further recognize that the USCG prepared a draft CERCLA section 106(a) order, although there is no evidence that the order was formally issued.

Despite the somewhat ambiguous documentation in the administrative record, there is no basis for concluding that the instrument that petitioners point to here—an unenforceable, non-directive letter—is an order issued pursuant to section 106(a) of CERCLA. In the absence of a CERCLA section 106(a) order, petitioners have no legal basis to seek reimbursement under CERCLA section 106(b).

III. CONCLUSION

Petitioners have failed to show that they received a CERCLA section 106(a) order directing them to undertake cleanup activities following the March 9, 1998 fire aboard the *Katania*. The petition for reimbursement therefore must be dismissed for failing to satisfy a statutory prerequisite for reimbursement under CERCLA section 106(b)(2)(A).

So ordered.