



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101-3140

JAN 7 2011

Clerk of the Board  
Environmental Appeals Board (Mail Code 1103B)  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Re: Petitioner for Reimbursement under CERCLA Section 106(b), Petition Number  
10-02, Docket Number: ORN001002884

Dear Clerk of the Board:

The U.S. Environmental Protection Agency, Region 10 moves to dismiss the petition filed in the case of *In re American Home Mortgage Servicing, Inc.* because the Petitioner has failed to meet the statutory prerequisites for obtaining review of its petition under Section 106 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607. The petition for reimbursement must be dismissed with prejudice because the Petitioner, American Home Mortgage Servicing, Inc. has failed to demonstrate that its response costs were incurred pursuant to a CERCLA Section 106(a) order. The Petitioner cannot now, or in the future meet this statutory prerequisite because EPA did not issue a CERCLA Section 106(a) order to the Petitioner.

In accordance with the Environmental Appeals Board January 28, 2010 Order governing the electronic filing of motions pertaining to CERCLA, Section 106(b) petitions, EPA Region 10 is filing electronically through the Central Data Exchange portal: 1) this cover letter and motion to dismiss; and 2) supporting multiple exhibits and attachments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Deniz Ergener".

Deniz Ergener  
Assistant Regional Counsel

Enclosure

cc: Karen Reed  
Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

Jared Hautamaki, OECA, EPA

Lee Tyner, OGC, EPA

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

In the Matter of: )  
American Home Mortgage Servicing, Inc. ) CERCLA 106(b) Petition  
Petitioner. ) No. 10-02  
\_\_\_\_\_ )

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10  
MOTION TO DISMISS WITH PREJUDICE FOR FAILURE TO MEET PREREQUISITES  
FOR OBTAINING REVIEW

## INTRODUCTION

The United States Environmental Protection Agency (EPA), Region 10 (the Region) moves to dismiss with prejudice the petition filed in this case because the Petitioner has failed to meet the statutory threshold prerequisites for obtaining review of its petition under Section 106(b) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

The Statutory Prerequisites for Obtaining Review on the Merits of a CERCLA Section 106(b) petition for reimbursement of costs are enumerated in Section III.B of the “Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions” (CERCLA Section 106(b) Revised Guidance) issued by the Environmental Appeals Board (EAB) November 10, 2004. In brief, the Petitioner must demonstrate that 1) it has incurred response costs; 2) the response costs were incurred in complying with a CERCLA Section 106(a) order (106(a) order); 3) the response action is completed; and 4) the petition is filed in a timely manner.

In this case, the petition for reimbursement must be dismissed with prejudice because the Petitioner, American Home Mortgage Servicing Inc. (AHMSI) has failed to demonstrate that its response costs were incurred pursuant to a CERCLA Section 106(a) order. It is impossible for Petitioner to demonstrate this statutory prerequisite because EPA did not issue a CERCLA Section 106(a) order to the Petitioner.

## BACKGROUND

In April 2010, Mr. Van der Star, the owner of the Star Bright Plating facility located at 24225 South Highway 213, Mulino, Clackamas County, Oregon (the Star Bright Plating Site or the Site) informed the Oregon Department of Environmental Quality (ODEQ) that he was closing his business and that the facility had ceased plating operations.

In response to this notice, the ODEQ conducted an inspection of the facility estimating that 7215 gallons and more than 2500 pounds of corrosive aqueous solutions, metal-bearing sludge, and other materials and wastes inadequately stored on-site (Exhibits 1 & 2)..

On June 1, 2010, Clackamas Fire Department personnel conducted a Site visit and further documented the deteriorating condition of the facility and the alarming condition of the vessels containing hazardous materials (Exhibit 3).

On July 23, EPA obtained consent from Mr. Van der Stars to enter the property for the purpose of taking samples and to perform necessary response actions (Exhibit 4). EPA conducted a removal assessment of the plating facility to determine if the Site warranted a removal action.

Upon leaving the Site, EPA on-scene coordinator, Jeffrey Fowlow received a cell phone call from Mr. Van der Star who stated that he had been contacted by Mr. Justin Piper of Cowlitz Clean Sweep (CCS), who informed Mr. Van der Star that he intended to begin clean-up the following week.

Mr. Fowlow then called Mr. Piper who explained that his company CCS had been hired by Mr. Dustin Peterson of Bio-Teck to perform the response action. Mr. Fowlow then called Bio-Teck and spoke to Dustin Peterson, who informed Mr. Fowlow that Bio-Teck had been retained by Petitioner to perform clean-up activities at the Site.

On August 2 and August 3, 2010, Petitioner's contractors inventoried, sampled, and prepared more than 110 containers of waste materials for shipment off-site.

On September 3, 2010, EPA issued its decision to initiate a time-critical removal action at the Site, documented in the attached Action Memorandum (Exhibit 5). The response action selected required the packing and removal of compatible liquid and solid wastes, and various tanks and containers containing hazardous substances. The response action also required the

proper labeling, transportation, and recycling or disposed of these materials at an EPA-approved facility.

On September 7, 2010 Petitioner's contractor began response activities at the Site with EPA oversight and performed the response action in accordance with EPA's Action Memorandum. The final materials that were consolidated and packed for transportation were removed from the Site on October 4, 2010.

#### ARGUMENT

The Petitioner argues that a series of EPA communications to the Petitioner constitute a CERCLA Section 106(a) order. This characterization is legally incorrect and should be rejected by the EAB because Section 106(a) orders are written legal documents signed by the Office Director containing express terms and enforcement provisions as described below:

First, CERCLA Section 106(a) orders are written legal instruments which only certain EPA officials are authorized to issue. EPA Region 10's authorized official never issued a CERCLA Section 106(a) order to the Petitioner to perform a response action at the Star Bright Plating facility. Second, Section 106(a) orders contain terms, conditions and sanctions for non-compliance which are enforceable in a court of law. EPA communications to the Petitioner did not include such terms, conditions or sanctions and could not be enforced in a court of law. These communications simply served to inform the Petition of EPA's authorities and facilitate a response action which the Petitioner chose to undertake voluntarily.

As the EAB concluded in *In re Katania Shipping Company and Umpire Investment Corporation*, 8 E.A.D. 294, 300 (EAB 1999), a CERCLA Section 106(a) order is an "enforceable directive requiring identifiable actions by the recipient." The communications to which the Petitioner refers do not constitute an enforceable directive requiring identifiable actions which the Petitioner must perform or be subject to sanction. Therefore, AHMSI's

petition should be dismissed.

**I. Only certain EPA officials are authorized to issue CERCLA Section 106(a) Orders. EPA Region 10's authorized official never issued a 106(a) order to the Petitioner.**

The issuance of CERCLA Section 106(a) orders is a matter of administrative law. Executive Order 12580 delegates to various Federal officials including the EPA Administrator, the responsibilities vested in the President for implementing CERCLA. The responsibilities delegated to the EPA Administrator include the ability to issue CERCLA Section 106(a) orders as may be necessary to protect human health and welfare and the environment.

Pursuant to EPA's Delegation of Authority 14-14-B (Exhibit 6), the EPA Administrator delegated to each of the Regional Administrators the authority to issue CERCLA Section 106(a) orders. Region 10's Regional Administrator further delegated this authority to the Director of the Office of Environmental Cleanup (Exhibit 7). Pursuant to EPA's Delegation of Authority, the CERCLA Section 106(a) order authority "may not be re-delegated."

In this case, the Director of the Office of Environmental Cleanup, Daniel D. Opalski, the individual delegated the authority to issue CERCLA Section 106(a) orders never issued a 106(a) order to the Petitioner directing it to conduct a response action at the Star Bright Plating facility site. The EPA communications to which the Petitioner refers were written by an Assistant Regional Counsel; pursuant to principles of administrative law, these communications cannot constitute a Section 106(a) order because Assistant Regional Counsel lacks the authority to issue such orders.

**II. Communications to which the Petition refers do not constitute a 106(a) order. They lack enforceable terms and conditions for the performance of a response action and do not contain or refer to sanctions for non-compliance.**

The EPA communications to which the Petitioner refers in Petitioners' Exhibits B, C, D

and E do not contain terms, conditions or sanctions for non-compliance with a response action. These communications in no way directed the Petitioner to perform a response action and in no instance refer to CERCLA penalties or statutory damages for failure to conduct a response action. Lacking such terms and conditions, the communications are unenforceable and therefore do not constitute a CERCLA Section 106(a) order within the meaning of CERCLA.

Rather, these EPA communications served several purposes. First, communications informed the Petitioner of options available to EPA under CERCLA to address Site conditions. Second, EPA communications were designed to get a decision quickly from the Petitioner as to whether it was going to perform the response action due to the potentially dangerous Site conditions. Third, EPA communications facilitated the voluntary response action Petitioner chose to undertake.

#### Communications to Inform the Petitioner

As the EAB is well aware, under CERCLA, EPA may, among other things, issue an administrative order requiring the recipient to undertake response actions under Section 106(a) of CERCLA or perform the cleanup itself, using Superfund money under Section 104 of CERCLA, with the possibility of later seeking to recover cleanup costs. EPA's communications explained these options to the Petitioner. In Petitioners' Exhibits B and D, Assistant Regional Counsel presents the options available to EPA under CERCLA to address Site conditions. Simply put, EPA could issue a 106(a) order or perform the response work and seek legal recourse for its costs.

#### Communications to Solicit a Timely Decision from Petitioner

It was critical to determine who had the authority to make a decision on the Petitioner's behalf and to determine whether the Petitioner intended to perform the response action. The Clackamas County Fire Department was concerned that were the facility to catch fire the

community and region “would be facing an extremely dangerous situation” and EPA was willing to undertake the response action if the Petitioner would not<sup>1</sup>. In Petitioner’s Exhibit D EPA purposefully outlined a schedule and deadline by which the Petitioner needed to make up its mind about going forward with the voluntary response action due to the time-critical nature of the Site conditions.

#### Communications to Facilitate a Voluntary Response Action

It is clear that the Petitioner undertook the response action voluntarily and that EPA communications facilitated this voluntary response action.

In July 2010, Petitioner initiated contact with a response action contractor before EPA contacted it to determine if it was interested in performing a response action. Petitioner took the initiative to address site conditions before EPA made a decision in an Action Memo that a response action was needed.

In August, with very little EPA involvement, Petitioner’s contractor was on-site inventorying hazardous materials.

In a September 3, 2010 e-mail from the Petitioner to the State of Oregon requesting a RCRA Site ID number, necessary to transport hazardous substances off-site (Exhibit 8), Petitioner wrote:

As you may be aware, the current owner is a trust representing a group of lenders that recently foreclosed on the property and received a trustee’s deed in May 2010. My client believes that it has an absolute defense to liability, but nonetheless is **fully cooperating with EPA** to perform an emergency abatement action at the site...

[A]s stated above, **we believe we are a potentially responsible party under CERCLA with an absolute defense to liability that has chosen voluntarily to cooperate with EPA and the State** to perform a CERCLA Section 106

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<sup>1</sup> The EPA Action Memo signed September 3 but date stamped September 20, 2010 states that “if a PRP is unwilling or unable to conduct the removal action described herein, EPA will conduct the action and pursue cost recovery against the PRPs”. The EPA Action Memo does not contemplate the issuance of Section 106(a) order or the invocation of penalties associated with such an order.



emergency abatement.

By all accounts, EPA communications were successful in achieving the desired results.

The voluntary response action was successfully undertaken and Petitioner's view of the working relationship between EPA and Petitioner is indicated in Petitioner's Exhibit F, in which the

Petitioner wrote:

My client and I both **appreciate the professionalism and cooperation that EPA has shown** to us throughout this trying and unpleasant process, and we hope that spirit of cooperation will continue as we work to resolve the legal issues related to this site.

By Petitioner's own admissions, Petitioner understood that EPA communications were not the functional equivalent of a 106(a) order.

Communications are unenforceable and therefore cannot constitute a CERCLA Section 106(a) order

The Petitioner did not perform the response action because it was required to do so under CERCLA Section 106(a) order with the threat of sanctions for failure to comply. The communications were devoid of any directive, sanctions or penalties and therefore are unenforceable,

Petitioner's Exhibit C contains a reference to a prospective action – identifying a scope of work- but this was not a directive. This e-mail was written *in response* to a contemporaneous oral request *by the Petitioner* to outline the scope of the voluntary response action and was drafted specifically for this purpose.

Petitioner's Exhibit E was written to determine who specifically represented the Petitioner while its contractors were on-site and to follow-up on issues necessary to complete the voluntary response action. The Petitioner can point to no communication threatening sanction for non-compliance and EPA communications do not once reference the statutory penalty

provision of CERCLA Section 106.

Petitioner may have been motivated to perform the voluntary response action for any number of reasons. Petitioner may have conducted the response action to be a good citizen although the public would not have gone unprotected had the Petitioner chosen not to act; EPA would have conducted the response action. The Petitioner may have decided that it was a prudent business decision to undertake the response; it could then actively seek to sell or otherwise divest itself of the property and avail itself of liability protection as a lender and/or recoup the outstanding loan obligation.<sup>2</sup> Petitioner may have performed the voluntary response action for any number of reasons. Petitioner did not, however, perform the response action because it was required to do so under a CERCLA 106(a) order with the threat of sanctions for failure to comply.

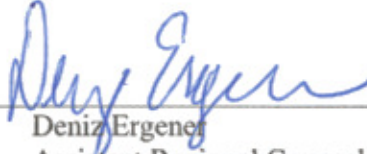
#### CONCLUSION

The communications to which the Petitioner refers do not constitute a CERCLA Section 106(a) order. These EPA communications were not written by an EPA employee authorized to issue such an order and therefore could not have the force of law. Furthermore, these communications *were not* intended to direct the Petitioner to take a response action and *did not* contain any directive required of Petitioner under the threat of legal sanctions. For the reasons stated above, the petition should be dismissed with prejudice because the Petitioner has not met the statutory elements required for the EAB to review the petition.

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<sup>2</sup> On May 17, 2010, Deutsch Bank National Trust, acting as trustee for Soundview Home Loan Trust, paid \$271,920 to Fidelity National Title Insurance Company in a public auction for the Star Bright Plating facility property.

United States Environmental Protection Agency  
Region 10, Office of Regional Counsel



By: Deniz Ergener  
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United States Environmental Protection Agency  
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Dated: January 7, 2011

CERTIFICATION OF SERVICE

I hereby certify that I caused a copy of the forgoing Motion to Dismiss CERCLA Section 106(b) Petition for Reimbursement in the matter of American Home Mortgage Services Inc, Petitioner, to be served by electronic mail on the following person, this 7<sup>th</sup> day of January, 2011:

Karen L. Reed  
Counsel for the Petitioner  
Bateman Seidel Miner Blomgren Chellis & Gram, P.C.  
888 SW Fifth Ave., Suite 1250  
Portland, Oregon 97204

  
Deniz Ergener  
Assistant Regional Counsel for the U.S. Environmental Protection Agency