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

In re:	)	CERCLA Section 106(b) Petition No. 10-02
American Home Mortgage Servicing, Inc.,	)	
	)	Docket No. ORN001002884
Petitioner.	)	

RESPONSE TO MOTION TO DISMISS

INTRODUCTION

American Home Mortgage Servicing, Inc. ("Petitioner") hereby submits its response to the motion to dismiss filed on behalf of the United States Environmental Protection Agency, Region 10 ("EPA") in the above-captioned matter ("EPA's Motion"). EPA incorrectly argues that Petitioner has failed to demonstrate that Petitioner's response costs were incurred pursuant to an order issued under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a). Although EPA did not issue a formal document labeled "unilateral administrative order," it did issue the functional equivalent of such an order through a series of written and oral communications with Petitioner, which in light of the circumstances of this case satisfy the jurisdictional requirement for Petitioner's Petition for Reimbursement under CERCLA Section 106(b). Consequently, Petitioner opposes EPA's Motion and urges the Environmental Appeals Board ("Board") to deny it, as explained below.

* * *

BACKGROUND

<u>Site Conditions</u>

The material facts of this case, which are undisputed, are important to provide a context to the parties' actions and communications preceding and during the removal action at the Star Bright Plating facility located in Mulino, Clackamas County, Oregon ("Site"). Without exception, every local, state, federal and private entity that performed inspections at the Site concurred that Site conditions constituted a genuine emergency and posed an immediate and unacceptably high risk of serious harm to the public. (*See*, *e.g.*, EPA's Mot. 3 & Exs. 1, 2, 3, 5.) The Clackamas Fire District #1, an emergency responder for the Site, noted that, in the event of a

fire, "smoke emitting from this [S]ite could possibly create a region wide tragedy" because it would be "highly toxic." (EPA's Mot. Ex. 3 at 2.) Because of the high risks that would be associated with suppressing a fire at the Site, the fire department noted: "all parties agreed that if a fire occurs in this facility, it would be too dangerous to attempt to extinguish." (*Id.*) As a result, widespread evacuations likely would be required. (*Id.*)

Fire was not the only severe risk the Site posed. The fire district noted that 14 residences are located within one-eight mile of the Site and that 45 residence are located within one-quarter mile of the Site. (*Id.*) These residences, including the residence on the Site, rely on drinking water wells, and leakage of hazardous and toxic substances from the degraded containers and open vats could contaminate these wells and cause substantial injury to public health and welfare. (*See* EPA Mot. Ex. 5 at 3-4.) Moreover, children or others in this rural residential neighborhood could readily access the unsecured building containing the degraded containers and open vats, resulting in a tragedy even in the absence of fire or leakage, particularly since the generator/operator, Victor Van der Star, who remained in sole possession of the Site during all relevant times, admitted leaving the Site for up to a week at a time. (EPA Mot. Ex. 2 at 2.)[1]

<u>Petitioner's Role</u>

As explained further in the Petition for Reimbursement of Costs, Petitioner is a residential loan servicing company headquartered in Texas. Under a servicing agreement, Petitioner has been acting on behalf of Deutsche Bank National Trust Company, trustee for the Certificate Holders of Soundview Home Loan Trust 2005-OPT1, Asset-Backed Certificates, Series 2005-OPT1 ("Trust"). The Trust, which had acquired the loan on the Site on the

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[1] Mr. Van der Star's statement that someone else would stay at the residence on the Site during these absences, (EPA Mot. Ex. 2 at 2), provided scant comfort to Petitioner, as there was no indication that such person(s) remained on the Site continuously or were adequately qualified to oversee the facility, to ensure that others could not access it or to respond appropriately in the event of an incident.

secondary markets, foreclosed on May 6, 2010, after the Van der Stars defaulted. Around late July 2010, staff level personnel with Power REO Management Services, Inc. ("Power REO"), an affiliate of Petitioner, became aware that drums containing chemicals were on the Site. However, these personnel, lacking personal knowledge of Site history and conditions, did not initially recognize the seriousness of the situation and did not immediately inform Petitioner's officers or legal counsel regarding the Site's conditions. Instead, consistent with reasonable business practices these personnel retained a local contractor, which inventoried, sampled and overpacked some of the drums on August 2-3, 2010. (EPA Mot. 3.) After this contractor visited the Site and reported back to Power REO, it became apparent that there were significant public health and safety and legal issues associated with the Site, and Petitioner's officers and in-house legal counsel were then notified.

Within the next two weeks, Petitioner, which lacked the necessary in-house expertise, retained an environmental expert and outside environmental counsel and began its technical and legal evaluation of the Site. EPA, however, was unwilling to delay onsite action, and by August 20, 2010, Petitioner received a written directive from EPA, which reiterated its recent oral communications, demanding that Petitioner commence work no later than August 25 and threatening issuance of a unilateral administrative order under CERCLA if Petitioner failed to comply. (Pet. for Reimbursement Ex. B.) Petitioner's counsel was informed orally at that time that EPA was unwilling to continue negotiating with Petitioner unless it immediately commenced abatement activities, because of the severe risk of substantial harm to the public health and welfare posed by conditions at the Site. Petitioner took EPA's communications at face value and commenced work without obtaining any prior assurances or commitments.[2]

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[2] As EPA notes, (EPA's Mot. 8), Petitioner's counsel expressed appreciation for the professionalism and cooperation of EPA staff throughout the abatement process, (Pet. for Reimbursement Ex. F). However, this genuine

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ARGUMENT

EPA's Motion relies on the fact that EPA did not issue Petitioner a formal legal document labeled as a CERCLA Section 106(a) order. However, "there is neither a statutorily nor regulatorily defined format for 106(a) orders." *In re Katania Shipping Co.*, 8 E.A.D. 294, 299 (EAB 1999). Senator Jennings Randolph, a principal author and sponsor of CERCLA, explained during debate on Section 106 that, "the diverse nature of environmental emergencies does not lend itself to rigid rules for utilization of a variety of legal authorities." Senate Debate on P.L. 96-510, Cong. Rec. (daily ed. Nov. 24, 1980) (statement of Sen. Randolph), *reprinted in* Legislative History of CERCLA, CERCLA-LH 116 at *117 (Westlaw). Instead, the existence of an administrative order is determined by the *substance* of the communications between EPA and the potentially responsible party ("PRP"). The essence of "a CERCLA section 106(a) order is an enforceable directive requiring identifiable actions by the recipient," *Katania*, 8 E.A.D. at 300, and in this case, EPA's written and oral communications with Petitioner satisfied this definition.

In *Katania* the Board considered the defining features of CERCLA Section 106(a) orders. *Katania* involved the petition of two PRPs for reimbursement in the aftermath of a fire onboard a marine vessel, resulting in the release of sodium cyanide in the vessel's hold. 8 E.A.D. at 295-96. The U.S. Coast Guard coordinated the federal response and directed the PRPs' emergency response actions. Notably, the PRPs performed the emergency response work without receiving any written direction from the government regarding the requirements or specifications for these actions. Instead the Coast Guard issued its first written directive to the PRPs after the immediate emergency had been addressed. *Id.* at 296. This after-the-fact directive, a "Captain of the Port

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expression of appreciation cannot change the fact that EPA directed Petitioner to address Site conditions or face enforcement under CERCLA.

Order," did not reference CERCLA at all and instead cited a rule implementing the Ports and Waterways Safety Act, 33 U.S.C. § 1221 *et seq.* 8 E.A.D. at 296. Moreover, this order did not direct the PRPs to perform work, but instead directed them to cease work pending a full cleanup.

A week later, the PRPs received another letter that likewise did not order any prospective action, in which the Coast Guard erroneously referenced CERCLA Section 106 and stated that the PRPs had fulfilled their role for directing the cleanup operation. *Id.* at 300 & n.3. The PRPs argued that this second letter constituted a Section 106 order. Understandably, the Board took a skeptical view of the PRPs' argument; this letter did not direct any action and did not threaten any sanctions for noncompliance. In fact, it appeared likely that the PRPs performed subsequent remedial work in an attempt to have the Captain of the Port Order lifted. *Id.* at 299 n.2 (finding that it was credible to conclude that the PRPs were motivated not by fear of CERCLA enforcement but rather by a desire to resume active shipping operations).

In this case, EPA, the agency responsible for enforcement of CERCLA, issued a series of written and oral demands containing the key attributes of a Section 106(a) order, beginning several weeks before Petitioner's response action, that: (1) unambiguously relied on EPA's authority under CERCLA; (2) identified Petitioner as a PRP; (3) contained specific descriptions of the required work; (4) expressly found that Site conditions constituted "an imminent and substantial endangerment to the public health or welfare"; and (5) threatened issuance of a unilateral administrative order if Petitioner failed to perform the work. (Pet. for Reimbursement Exs. B-E.) The cumulative effect of these communications from EPA was to leave Petitioner with the choices of undertaking the specified cleanup activities or of facing enforcement under CERCLA § 106 for failure to do so.[3]

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[3] Moreover, Petitioner was well aware that, if EPA performed the work itself and then sought cost recovery, the cost would be much higher. Petitioner's total cost to perform the work was approximately $200,000, (Pet. for

There was no doubt that EPA was asserting authority under CERCLA § 106(a) and that Petitioner must take immediate action to abate these conditions. Prior to commencing its abatement activities, Petitioner expressly communicated its understanding that its actions were undertaken pursuant to CERCLA and not pursuant to some other authority such as the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"). (EPA's Mot. Ex. 8.)[4] Moreover, unlike in *Katania*, there can be no argument that Petitioner was motivated to conduct its activities at the Site because it desired favorable regulatory treatment, either under CERCLA or under any other authority. Instead Petitioner proceeded under the threat of enforcement and despite the fact that EPA refused Petitioner's repeated requests for written or oral assurances that EPA would not pursue Petitioner for remedial costs following completion of the emergency abatement action. (Pet. for Reimbursement Ex. F.)

Not only the law but also public policy weighs heavily in favor of finding that EPA issued a CERCLA § 106(a) order to Petitioner. Petitioner agreed with EPA that the Site conditions were both extremely urgent and very hazardous, involving a high potential for a great degree of harm to the public and the environment. Petitioner requested favorable regulatory treatment, but did not receive it. Instead, EPA reiterated its intent to pursue enforcement under Section 106. Under these circumstances, Petitioner demonstrated responsible conduct that

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Reimbursement 14), whereas EPA estimated its costs to perform the work at approximately $770,000, (EPA's Mot. Ex. 5 at 7).

[4] EPA argues that this email from Petitioner's counsel to the State of Oregon establishes that Petitioner's activities at the Site were voluntary and thus ineligible for CERCLA Section 106 reimbursement. (EPA Mot. 7-8.) EPA is incorrect. The purpose of this email was to respond to the state's request that Petitioner apply for a RCRA generator identification number by asserting Petitioner's view that it was not a RCRA generator and that its work was not performed pursuant to RCRA. Petitioner's statement that it was voluntarily cooperating with EPA was made in an effort to discourage the state from asserting jurisdiction over Petitioner's activities by providing assurances that the emergency was being addressed, which is demonstrated by the fact that EPA cannot produce any communications, oral or written, between Petitioner and EPA discussing a voluntary response action. EPA's attempt to take this statement out of context and use it as an admission by Petitioner is not reasonable, particularly in light of EPA's multiple written communications threatening issuance of a unilateral administrative order. Instead, Petitioner reached an objectively reasonable conclusion that, under the totality of the circumstances, EPA was ordering it to perform the work.

should be encouraged, by proceeding expeditiously to contain and remove the hazardous substances from the Site, rather than waiting for the inevitable enforcement action. It would severely undermine the public policies underlying CERCLA, and elevate form over substance, to find that Petitioner should have resisted EPA's demands to act immediately to protect public health merely to assure that it constructed the best possible legal arguments for reimbursement under CERCLA § 106(b). Section 106 was intended to be an efficient, rapid mechanism to protect the public from risks like those posed by the Site, and in this case Petitioner's conduct advanced this important public policy.

* * *

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Board find that EPA issued Petitioner an order under CERCLA § 106(a) and deny EPA's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Response to Motion to Dismiss to be served by United States First Class Mail, postage prepaid, and by electronic mail on the following person, this 14th day of February, 2011:

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