UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ENVIRONMENTAL APPEALS BOARD

APR - 4 2011

Mr. Daniel D. Opalski
Director, Office of Environmental Cleanup
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900, ECL-117
Seattle, WA 98101

Ms. Karen L. Reed
Bateman Seidel Miner Blomgren Chellis & Gram, P.C.
888 SW Fifth Ave., Suite 1250
Portland, OR 97204

Re: American Home Mortgage Servicing, Inc.
Petition Number: CERCLA 106(b) 10-02

Dear Mr. Opalski & Ms. Reed:

The Environmental Appeals Board has issued a Preliminary Decision proposing to deny the petition for reimbursement of response costs filed by Karen L. Reed, Bateman Seidel Miner Blomgren Chellis & Gram, P.C., on behalf of American Home Mortgage Servicing, Inc. A copy of the Preliminary Decision is enclosed.

American Home Mortgage Servicing, Inc. ("Petitioner") has until May 2, 2011, to submit to the Board, with a copy to the U.S. Environmental Protection Agency, Region 10 ("Region"), comments on this Preliminary Decision. The Region has until May 23, 2011, to submit to the Board, with a copy to the Petitioner, its comments (if any) on the Preliminary Decision. The Region's comments may include a response to the comments made by the Petitioner. The Board will issue a final decision after reviewing any comments that are submitted. If, after reviewing the parties' comments, the Board's ultimate conclusion remains that Petitioner has not shown that its petition should be granted, then the Board will enter a final order denying Petitioner's request for reimbursement.

All submissions shall reference the petition number above and are to be filed with the Environmental Appeals Board. Filing may be accomplished electronically pursuant to the

Board's Order of January 28, 2010.[1] Alternatively, filing may be accomplished by filing a paper original (signed in blue ink) and two copies of these materials with the Board (at the address shown below) by the dates specified above. **IMPORTANT**: Any envelope or other packaging containing documents sent to the Environmental Appeals Board's mailing address or hand-delivery address, as prescribed below, must bear a complete and accurate return address in the upper left hand corner. The envelope or packaging must also clearly state the case name and appeal number in the lower left hand corner.

Documents that are **sent through the U.S. Postal Service**[2] (except by Express Mail) **MUST** be addressed to the Environmental Appeals Board's mailing address, which is:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board 1103B
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Documents that are sent to the Environmental Appeals Board's hand-delivery address (below) through the U.S. Postal Service (except by Express Mail) will be returned to the sender and shall not be considered as filed.

Documents that are **hand-carried** in person, delivered via courier, mailed by Express Mail, or delivered by a non-u.s. Postal Service carrier (e.g., Federal Express or UPS) must be delivered to:

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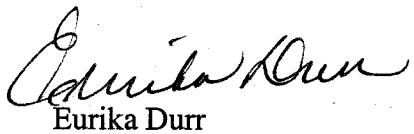
[1] The Board has issued an Order authorizing the electronic filing of documents in cases involving petitions for reimbursement pursuant to CERCLA Section 106(b). *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010), *available at* http://www.epa.gov/eab ("Standing Orders" link on sidebar). Instructions on registration and document filing are available by using the "Electronic Filing" link on the Board's website. Documents containing confidential business information should not be filed electronically as the Board considers business confidentiality claims waived when a document is electronically filed. *Id.* at 5-6.

[2] Mail sent to the Environmental Protection Agency via the U.S. Postal Service may be delayed by a random sterilization procedure applied to mail delivered to the federal government. Parties are encouraged to utilize the Board's e-filing system or non-U.S. Postal Service carriers and the Board's hand-delivery address when filing pleadings with the Board. Additional information regarding mail delivery to the Board is available on the Environmental Appeals Board website (www.epa.gov/eab) at the "Clerk of the Board" or "Frequently Asked Questions" links.

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board 1103B
Ronald Reagan Building, EPA Mail Room
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Documents that are hand-carried may be delivered to the Ronald Reagan Building from 8:00 a.m. to 4:00 p.m, Monday through Friday, excluding federal holidays. Documents filed electronically may be filed at any time up to 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.

Sincerely,



Eurika Durr
Clerk of the Board

Enclosure: Preliminary Decision

cc: Deniz Ergener
U.S. Environmental Protection Agency, Region 10
Office of Regional Counsel
1200 Sixth Avenue, Suite 900, ORC-158
Seattle, WA 98101

Jared Hautamaki
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Avenue, N.W., Mail Code 2272A
Washington, D.C. 20460

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

In re:	)	
American Home Mortgage Servicing, Inc. (Star Bright Plating Site)	)	CERCLA § 106(b) Petition No. 10-02
Docket No. ORN001002884	)	

PRELIMINARY DECISION

American Home Mortgage Servicing, Inc. ("AHMSI"), filed a petition with the Environmental Appeals Board ("Board") seeking reimbursement of costs AHMSI incurred in responding to what it characterizes as an order issued under section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986.[1] The U.S. Environmental Protection Agency ("EPA"), Region 10 ("Region"), responded by moving to dismiss the petition for failure to meet the threshold requirements for obtaining reimbursement.

The analysis set forth below represents the Board's preliminary conclusions as to whether AHMSI has met the threshold requirements to obtain reimbursement of costs under CERCLA section 106(b). Consistent with the Board's practice for CERCLA reimbursement petitions, the

[1] The President delegated his authority to decide claims for reimbursement under section 106(b) to the EPA Administrator, Exec. Order 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and the Administrator has re-delegated that authority to the Board. U.S. EPA Delegation of Authority 14-27, *Petitions for Reimbursement* (June 27, 2000). The Board is also authorized, as appropriate, to authorize payments of such claims. U.S. EPA Delegation of Authority 14-27 § 2.a.

parties shall have an opportunity to comment on this Preliminary Decision before the Board issues its final decision in this matter. U.S. EPA, Environmental Appeals Board, *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions* 9-10 (Nov. 10, 2004).

I. *ISSUE BEFORE THE BOARD*

AHMSI asserts that it has met the prerequisites for obtaining reimbursement under CERCLA section 106(b). Although AHMSI did not receive a document titled and stylized as a section 106(a) administrative order, AHMSI claims that a series of email and contemporaneous oral communications received from an Assistant Regional Counsel in the Region's Office of Regional Counsel is tantamount to receipt of a section 106(a) order. The Region disagrees that receipt of such communications meets the threshold requirement of receipt of a section 106(a) administrative order. Neither party disputes that receipt of a section 106(a) order is a prerequisite to obtaining reimbursement.

The parties' assertions present one question for the Board's consideration: Does AHMSI's receipt of email and oral communications from an Assistant Regional Counsel constitute receipt of an "order issued under" CERCLA section 106(a)?

II. *FACTUAL AND PROCEDURAL HISTORY*

AHMSI is a residential loan servicing company acting as agent for the trustee of a trust that obtained title to the Star Bright Plating facility in Mulino, Oregon ("Facility"). Petition at 3-4. The Region learned of potentially unlawful and dangerous storage of hazardous substances – including corrosive aqueous solutions and metal bearing sludge – at the Facility and contacted AHMSI orally and in writing regarding those storage conditions. Petition at 6-7; Motion to Dismiss at 3. Specifically, an Assistant Regional Counsel for the Region communicated by email with AHMSI on the following dates: August 20, 2010; August 25, 2010; August 27, 2010; and September 2, 2010.[2] Petition at 6-7; Petition Exs. B, C, D, & E. There were also contemporaneous oral communications, the substance of which were generally memorialized in the email communications. Petition at 2; Motion to Dismiss at 8; AHMSI Response at 4.

AHMSI employed a contractor to perform an emergency abatement action at the Facility. Petition at 4. On October 4, 2010, "[t]he final materials that were consolidated and packed for transportation were removed" from the Facility. Motion to Dismiss at 4. *See also* Petition at 5 ("On or about October 4, 2010, the last of the known hazardous substances contained in drums and vats was removed from the [Facility] for disposal.").

On December 8, 2010, AHMSI filed a petition for reimbursement of approximately $200,000 in costs, plus interest, under CERCLA section 106(b). On January 7, 2011, the Region

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[2] Additional email correspondence concerning a request for "a draft agreement of some sort covering [AHMSI's] work at this site" was exchanged between the parties between September 30, 2010, and October 5, 2010. Pet. Ex. F. Because AHMSI does not rely on these later email communications in its argument that it received an order issued under CERCLA section 106(a), *see* Petition at 6-7; Response to Motion to Dismiss at 6, they are not discussed in detail in this Preliminary Decision.

moved to dismiss the petition on grounds that AHMSI failed to meet the statutory prerequisites for obtaining reimbursement. AHMSI responded to the motion to dismiss on February 14, 2011. On February 23, 2011, the Region sought leave to reply to AHMSI's response. The Board now grants the Region's motion for leave and accepts the reply brief for filing.

III. *ANALYSIS*

CERCLA section 106(b)(2)(A) provides that "[a]ny 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 the President for reimbursement * * * for the reasonable costs of such action, plus interest." 42 U.S.C. § 9606(b)(2)(A). "[R]eimbursement under CERCLA section 106(b)(2)(A) is available only when an order under section 106(a) is actually issued. * * * [C]leanups ordered pursuant to some other authority can not serve as a predicate for CERCLA reimbursement." *In re Katania Shipping Co.*, 8 E.A.D. 294, 298 (EAB 1999). Petitioner bears the burden of demonstrating that it received an order issued under section 106(a). *Id.*

There is no dispute that AHMSI did not receive a document that was stylized or titled as an administrative order issued under CERCLA section 106(a). Rather, at issue is whether AHMSI's receipt of email and oral communications from an Assistant Regional Counsel constitutes receipt of an order issued under CERCLA section 106(a).

The authority to issue orders under CERCLA section 106(a) is vested in the President. Pursuant to a series of delegations, that authority has been delegated to the EPA Regional Offices, and specifically, in Region 10, to the Director, Office of Environmental Cleanup. No

further re-delegation is permitted.[3] Notably, an Assistant Regional Counsel is not a person authorized to issue such orders.

In *In re Katania Shipping Co.*, the Board observed that, although the format for administrative orders issued under section 106(a) is not defined in CERCLA or its regulations, three key features of a such orders are (1) a directive to perform specified cleanup activities; (2) the order is enforceable; and (3) formality. *Id.* at 299-300. Recognizing that substantial penalties — up to $37,500 per violation per day and treble damages — may result from failure to comply with a section 106(a) order, the Board cautioned that "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." *Katania*, 8 E.A.D. at 300 n.3. *See also* CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (as modified by the Civil Monetary Penalty Inflation Adjustments, 40 C.F.R. § 19.4, for penalties effective after January 12, 2009); *Katania*, 8 E.A.D. at 299. Thus, "[t]he use of the

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[3] Under CERCLA section 106(a), the President is authorized to issue administrative orders as may be necessary to protect the public health and welfare, and the environment, when there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility. CERCLA § 106(a), 42 U.S.C. § 9606(a). The President's authority to issue section 106(a) administrative orders has been delegated to various federal officers, including the EPA Administrator. Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987). *See also* Exec. Order No. 13,016 (Aug. 28, 1996), 61 Fed. Reg. 45,871 (Aug. 28, 1996). The authority delegated to the EPA Administrator has, in turn, been re-delegated to EPA's Regional Administrators. U.S. EPA Delegation of Authority 14-14-A, *Determinations of Imminent and Substantial Endangerment* (Apr. 15 1994); U.S. EPA Delegation of Authority 14-14-B, *Administrative Actions Through Unilateral Orders* (May 11, 1994). The Regional Administrator, Region 10, has re-delegated the authority to issue unilateral administrative orders to the Director, Office of Environmental Cleanup, with no further re-delegation permitted. EPA Region 10 Delegation of Authority R10-14-14-B, *Administrative Actions Through Unilateral Orders* §§ 1, 4 (Oct. 5, 1998).

term 'order' rather than 'request' [in section 106(a)] 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." *Katania*, 8 E.A.D. at 300.

The August 20, August 25, August 27, and September 2 email communications are each less than a page long. In the August 20 email, the Assistant Regional Counsel who sent the message identifies the Facility and references a conference call. The email then states:

> It is EPA's expectation and understanding that [the trustee] will obtain the necessary approvals to hire a contractor to remove the hazardous substances from the [Facility] by Wednesday, August 25, 2010. * * * *If company procedures will not allow you to obtain the necessary approvals by this date, under the authority of the Comprehensive Environmental Response, Compensation and Liability Act, EPA will conduct the removal or issue a Unilateral Administrative Order to [the trustee] to perform the removal.*

Pet. Ex. B (emphasis added).

The next email, dated August 25, references a conversation that occurred earlier in the day and provides "the scope of work for Part I of Phase 1," which is further described as the following:

> Removal [of] all hazardous materials which are unsecured in open vats, including all liquids and sludges containing hazardous substances, by an EPA approved method(s).
>
> Transport hazardous substances and materials removed from the [Facility] to an EPA approved disposal facility.

Pet. Ex. C. In the same August 25 email, the Assistant Regional Counsel also inquires as to when a conference call can be scheduled and indicates the purpose of that call: "At that time EPA would need to know whether it is possible for your client to have a contractor on the site to begin work no later than next week." *Id.*

The August 27 email states that it is based on an earlier conversation, and the Assistant Regional Counsel outlines "EPA's anticipated schedule of possible events for the next few weeks." Pet. Ex. D. Specifically, three weeks from August 30 through September 13 are listed. For the week of August 30 through September 3, the email provides: "[AHMSI] contractor on site, performing substantial work as described in 8/25 email * * *. Provide advance notice to EPA, the first date on which AHMSI contractor will be on-site to being the work." *Id.* For the week of September 6, the email indicates that "*[i]n the event that AHMSI's contractor is not [able] to perform the work to abate the imminent and substantial endangerment at the site, [EPA will] issue a Unilateral Administrative Order to AHMSI to perform the removal action*," and for the week of September 13, the email states, "In the event that AHMSI does not comply with the Unilateral Administrative Order, EPA will perform the work." *Id.* (emphasis added).

Finally, in the September 2 email, the Assistant Regional Counsel expresses the importance of clear and prompt communication, and states the need to identify "a single contact person who is responsible for coordinating with EPA." Pet. Ex. E. The email then lists "two issues that need immediate attention," which appear to be quotations from emails sent by other individuals. *Id.*

The Region characterizes these emails as communications that served to inform AHMSI of its options regarding the Facility, to solicit a timely decision regarding those options, and to facilitate a voluntary response action. Motion to Dismiss at 6-7. Although one email identifies a "scope of work for Part I of Phase I," *see* Pet. Ex. C, the Board does not glean from the emails, nor has AHMSI shown, that the sum of the email communications set forth an enforceable directive to conduct the described work. To the contrary, an objective reading of the emails

suggests that the Region was trying to determine whether AHMSI would conduct the cleanup; if AHMSI did not act timely to conduct a cleanup, then and only then would the Region consider issuing a section 106(a) order. *See* Pet. Exs. B, D. Short of such issuance, AHMSI was conducting a voluntary cleanup.

In this case, the so-called order lacks the three principal features of a section 106(a) order discussed in *Katania*: an enforceable directive, sanctions, and formality. The language in the email communications that AHMSI received falls considerably short of formally invoking the Region's CERCLA section 106 authority, and the emails do not expressly compel certain clean-up work, or include sanctions for failure to do so. The email communications make this demonstrably clear: the described consequence of AHMSI not proceeding at a pace satisfactory to the Region is the Region either conducting the cleanup itself or issuing a section 106(a) order, not the sanction of treble damages available to EPA for non-compliance with a section 106(a) order.[4] In addition, the methods of communication – email and telephone conversations – reflect an informality that is at odds with the formal way that EPA issues CERCLA section 106(a) orders. Finally and significantly, the sender of these communications was an Assistant Regional Counsel, who has not been delegated the authority to issue section 106(a) orders. Accordingly, the Board is not persuaded that AHMSI has received an order issued under CERCLA section 106(a).

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[4] In fact, to conclude, as AHMSI urges, that the communications it received are tantamount to a section 106(a) order could yield the nonsensical result of EPA issuing a section 106(a) order upon noncompliance with the so-called section 106(a) order AHMSI claims to have received.

In its reply brief, the Region persuasively identifies the dangers of blurring the clear lines between the formal issuance of a section 106(a) order by a person authorized to issue it and communications about the consequences of failing to conduct a voluntary cleanup. AHMSI's argument muddies the waters. It would seriously undermine the CERCLA statutory scheme for the Board to treat informal comments by an EPA lawyer seeking to ascertain whether a voluntary cleanup will occur as tantamount to the formal issuance of a section 106(a) order, particularly given the severe consequences that can arise from noncompliance with a section 106(a) order.

IV. *CONCLUSION*

Based on the foregoing discussion, it is the Board's preliminary conclusion that AHMSI has not received an order issued under CERCLA section 106(a), and thus AHMSI lacks a legal basis to seek reimbursement under CERCLA section 106(b). If, after reviewing the parties' comments, the Board's ultimate decision remains that AHMSI lacks a legal basis to seek reimbursement under CERCLA section 106(b), then the Board will enter an order denying AHMSI's petition for reimbursement.

ENVIRONMENTAL APPEALS BOARD[5]

Dated: 4/4/11

By: _____
for Kathie A. Stein
Environmental Appeals Judge

[5] The three-member panel deciding this matter consists of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Preliminary Decision** in the matter of *American Home Mortgage Servicing, Inc. (Star Bright Plating Site)*, CERCLA § 106(b) Petition No. 10-02, were sent to the following persons in the manner indicated:

By Facsimile and First Class U.S. Mail, Return Receipt Requested:

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Date: APR - 4 2011

Annette Duncan
Secretary