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 No. 10-02
Petitioner	

REPLY TO AMERICAN HOME MORTGAGE SERVICING, INC.'S RESPONSE TO U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10 MOTION TO DISMISS

INTRODUCTION

The Environmental Protection Agency (EPA) Region 10 hereby submits its reply to Petitioner's response to EPA's Motion to Dismiss. Petitioner filed a Petitioner for Reimbursement of Costs it incurred in performing a voluntary cleanup at the Star Bright Plating facility in Mulino, Oregon. EPA Region 10 filed a Motion to Dismiss the petition with prejudice because Petitioner does not meet the statutory prerequisites for obtaining review of its petition under CERLCA Section 106(b). Petitioner filed a motion for an extension of time to file a response to EPA's Motion to Dismiss which the Board granted. On February 14, 2011, Petitioner filed its response to EPA's motion arguing that the Board should deny EPA's Motion to Dismiss and allow review on the merits.

Petitioner continues to incorrectly portray a series of communications between EPA Region 10 staff and Petitioner as a Section 106(a) Unilateral Administrative Order (Order) under CERCLA. In EPA's Motion to Dismiss, Region 10 argues that the communications at issue in this case do not possess the essential elements of a CERCLA Section 106(a) Order that the Board

set out in *In re Katania Shipping Company*, 8 E.A.D. 294, 299 (EAB 1999). First, these communications do not set out a directive requiring the recipient to undertake cleanup activities. Second, these communications do not carry the force of law. EPA asks the Board to dismiss the petition with prejudice for failure to meet a statutory prerequisite for obtain review because Petition did not incur response costs pursuant to a CERCLA Section 106(a) Order. EPA sets forth below additional arguments as to why AHMSI's Petition should be dismissed.

ARGUMENT

Petitioner argues that the law and public policy support its position. EPA urges the Board to consider otherwise. Here, the statute, its legislative history and Congressional intent all dictate that the Board should find that EPA did not issue an Order and dismiss AHMSI's petition. To rule otherwise would create uncertainty and unfairness for PRPs, impact EPA's ability to effectively implement CERCLA and unnecessarily invite many more CERCLA Section 106(b) petitions.

First, there was no ambiguity in EPA's communication and although EPA threatened to issue a UAO, EPA did not issue an Order. To rule otherwise would create unfairness and uncertainty for parties. It is common for EPA to notify PRPs of all options available to the Agency for site cleanup. It would be unreasonable to interpret these statements as anything more than they are – namely, notification to the party of actions the Agency *may* take.

As the Board noted in *Katania*, Congress was clear that in fairness to all parties, Section 106 Orders which carry with them sanctions need to be formal mechanisms to compel parties to perform response actions, not informal requests for eliciting voluntary assistance. *Katania*, 8 E.A.D. 294, 300. When penalties of up to $37,500 per violation per day are at stake pursuant to CERCLA Section 106 (b)(1) plus EPA's ability to seek treble damages for non-compliance with an Order pursuant to CERCLA Section 107(c)(3), there can be no room for questioning whether the Agency has or has not issued an Order. It must be absolutely clear to the respondent

when it has been Ordered to perform a response action and it must understand the consequences of non-compliance.

In this case, EPA did not issue an Order and Petitioner understood that EPA did not issue an Order. In fact, Petitioner characterized its response activities in at least two instances as voluntary. In Petitioner's Exhibit F, Petition refers to its "voluntary efforts" and in EPA's Exhibit 8, Petitioner tells the State that its client has "chosen voluntarily to cooperate with EPA." Petitioner argues that it selected the phrase "chosen voluntarily to cooperate with EPA" so as to discourage the State from asserting jurisdiction over Petitioner's activities. If Petitioner truly believed that EPA had issued it an Order, why didn't it say so in its communications to the State? It seems odd to EPA that the Petitioner would characterize its actions as voluntary if it was Ordered by EPA to perform the response action. Moreover, the surest way for Petitioner to make clear to the State that EPA had jurisdiction at the Site was to inform the State that Petitioner was conducting response activities under an EPA Section 106(a) Order. EPA urges the Board to consider and conclude that Petitioner chose its words based on its belief that it was performing the action voluntarily and that only in hindsight did it realize that in Order to pursue reimbursement for its costs, the costs needed to be incurred under an Order.

The Board in *Katania* recognized that the CERCLA Section 106(a) Order "is an important and powerful enforcement 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. 294, 300, footnote 3). EPA does not take this responsibility lightly. To meet this goal, when the Agency issues an Order it uses phrases such as "Respondents shall perform the response action" and "violation, failure or refusal to comply with any provision of this Order may subject Respondents to civil penalties of up to $37,500 per violation per day, as provided in Section 106(b)(1) of CERCLA." This, however, was not the type of language used by EPA in this case and the Petitioner understood

quite clearly that it was not being issued an Order and understood the difference between threatening to issue an UAO and issuing a UAO. [1] In this case, had the Petitioner decided not to perform the response activities, it would have suffered no consequences – EPA could not seek to impose penalties or treble damages - until and unless EPA issued an Order. EPA urges the Board to review both EPA and Petitioner's communications in this case and arrive at the same conclusion.

Second, to rule in Petitioner's favor would hinder rather than facilitate EPA's ability to use its CERCLA Section 106(a) Order authority effectively and compel parties to respond to environmental emergencies and non-emergencies. The issuance of an Order is a matter of enforcement discretion. Its power lies not only in its issuance but also in the threat of issuance. For the Board to blur this distinction would diminish the authority given to EPA by Congress in Section 106(a). It would violate the intent of Congress and serve no public policy to allow a party, and not the Agency, to determine when EPA has or has not issued an Order. Without this powerful enforcement tool, it would become more difficult for EPA to compel parties to take response actions.

Third, to rule in Petitioner's favor would create confusion where Congress has already set out in Section 106 a regime which authorizes formal Orders which carry with them sanctions and the force of law. A ruling contrary to this scheme would potentially expose parties to sanctions for failure to comply with some information communicated by staff, without the delegated authority to issue Orders, and only encourage parties to seek reimbursement from the Superfund for costs they have voluntarily chosen to expend. The Board and the Courts would be required to

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[1] See Petitioner's admission that EPA "threatened issuance of a unilateral administrative order if Petitioner failed to perform the work" Petitioner's Response to Motion to Dismiss, at 6.

adjudicate far more CERCLA 106(b) cases unnecessarily since the statute on its face it very clear.

CONCLUSION

EPA believes that Petitioner is creating a revisionist history of the events in this case in an attempt to recoup its expenditures which it incurred voluntarily. At the time the communications were generated and response activities were undertaken, Petitioner understood that EPA had threatened to issue an Order but had not issued an Order. Petitioner argues that it should not be penalized for acting immediately to protect public health "merely to assure that it constructed the best possible legal argument for reimbursement under CERCLA." The problem with this argument is that the law is clear. CERCLA requires that the only costs eligible for reimbursement are those incurred pursuant to a CERCLA Section 106(a) Order.

Because the Petitioner has failed to show that it received and complied with a CERCLA Section 106(a) Order it has not met a necessary prerequisite for obtaining review of its reimbursement Petition. Therefore the Board should grant EPA's motion and dismiss AHMSI's petition with prejudice.

Respectfully submitted,

By: _____

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