UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Community Management, Inc.	)	**Docket No. CWA 03-2001-0407**
	)	
and	)	
	)	
LHI, Inc.	)	
	)	
Respondents	)	

ORDER ON MOTION TO DISMISS

On June 27, 2002, Community Management Inc. and LHI, Inc. (Respondents) filed a motion to dismiss the Complaint filed by the United States Environmental Protection Agency (EPA) for violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq. In two Counts, the Respondents have been charged with violating effluent limitations for several pollutants and with failing to submit timely Discharge Monitoring Reports. The Motion seeks dismissal of the Complaint based on alleged improper disclosure of confidential business information ("CBI"). For the reasons which follow, the Court denies the motion to dismiss.

The record reveals that in February and March 2002, Respondents, in connection with settlement talks, submitted certain financial documents to EPA.[1] In submitting those documents, Respondents advised that the documents were to be treated as CBI. Thereafter, when EPA filed its Initial Prehearing Exchange, it included those documents, for which CBI claims had been made, within the Exchange. This, Respondents maintain caused CBI material to enter the public record and disclosure to EPA employees without CBI protections. In allowing this release, EPA acted inconsistently with CBI requirements at 40 C.F.R. §§ 2.209(e) and 2.211(b). While asserting that dismissal is warranted, Respondents alternatively assert that, at a minimum, the CBI information should be returned and EPA precluded from using the information in the proceeding.

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[1]Adding to the errors made in this proceeding, EPA Counsel relates in its Reply to the Motion to Dismiss assertions relating to Respondents' position during the Alternative Dispute Resolution ("ADR") phase. It is improper for Counsel to make references to a party's position during ADR, once that process has ended and the case has moved to the litigation phase.

In Reply, EPA concedes that Respondents did provide income tax returns claimed as CBI materials and that it did include those documents within its submitted prehearing exchange without identifying and segregating those documents as such. It notes, however, that most of the CBI claimed information appears in other documents within the prehearing exchange. Prehearing Exchange Exhibits 47, 60, and 62 through 72. Upon Respondents' protest that the CBI documents had not been properly treated, EPA immediately contacted the Regional Hearing Clerk ("RHC"), requesting that the identified Prehearing exchange documents be treated as CBI materials. At the same time EPA inquired whether the Respondents wanted to designate any other documents for CBI treatment, which prompted the Respondents to add other documents for CBI protection. After Respondents advised EPA that it intended to file the instant motion, EPA asked this Court and the RHC to return its Prehearing exchange submission and the following day resubmitted a revised prehearing exchange, consisting of two sets of exhibits: a CBI version and a redacted version, free of CBI claimed materials, which submission was consistent with 40 C.F.R. § 22.5(d). EPA has volunteered that after the problem was raised it discovered that a law school student, employed as a summer intern in EPA Counsel's office, saw the CBI documents, in the course of assembling the agency's prehearing submission, without CBI clearance to do so. Further, EPA Counsel discovered that the same documents were delivered to Industrial Economics ("IE"), an EPA contractor that assists in evaluating ability to pay issues in civil penalty proceedings.

EPA argues that despite the conceded CBI errors, Respondents have suffered no harm from the improper disclosures. Regarding the summer intern exposure to the documents, EPA asserts that the intern performed a mechanical, not an analytical role, as his participation only involved the assembly of the documents for mailing. As for the release to IE, while EPA concedes it did not follow the CBI regulations, the contractor, which specializes in financial analysis and has a national contract with EPA to perform such work, follows the CBI requirements. Thus, in neither release, did Respondents suffer actual harm. On that basis EPA contends that dismissal is unwarranted and that, if any sanction is imposed by the Court, it should be the exclusion of the documents from admission into the record.

Respondents filed a Response to EPA's Reply, stating that dismissal remains warranted, and that the additional improper CBI disclosures only reinforce that argument. Alternatively, Respondents urge that the Court bar those documents, and any documents derived from them, as admissible evidence in this proceeding.

The Court, while admonishing EPA for its failure to follow the CBI requirements, denies the Motion to Dismiss because no harm resulted from the inadvertent disclosures. The summer intern obviously had no cognizance of the contents of the documents, as his role was purely mechanical. The intern's declaration states that he did not read the documents for content and that he has no financial interest in the mobile home industry. As for EI, it is clear that had there been adherence to the proper procedures, ultimately it would have been able to view the documents. The Court also believes that the alternative sanction is unwarranted under these

particular circumstances.[2] While EPA Counsel embarrassed himself by failing to follow the CBI requirements, he quickly rectified those errors, and as an officer of the Court stoutly volunteered additional such errors, which may well have never been discovered. Last, the Court notes that the phrase "be careful what you wish for" may apply. That is because in the realm of demonstrating a respondent's "ability to pay" a proposed penalty, EPA has a minimal burden of production. As the Environmental Appeals Board has noted, in order for EPA to carry its burden regarding ability to pay, it need not present any specific evidence, but rather may rely on some general financial information. *See*, *e.g.*, *In re: Chempace Corporation* 2000 WL 696821. (EPA EAB May 18, 2000). If there is no information available for the agency to demonstrate an ability to pay the proposed penalty, it is presumed a respondent can pay the amount sought and the burden shifts to the respondent to demonstrate its inability. Indeed, Respondents only purpose in submitting the financial information to EPA was to demonstrate its financial straights. Accordingly, at this time, the Court denies the Respondents' alternative request for exclusion of the financial documents.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: January 15, 2003
Washington, D.C.

[2]40 C.F.R.§2.211 addresses the penalty for wrongful disclosures. This section states that violation of the safeguarding provisions for CBI materials constitutes grounds for adverse personnel actions, including dismissal but exclusion of such documents is not an expressed sanction. EPA Counsel acted rapidly to minimize any disclosure in the wake of the mistake and it is unlikely that Respondents suffered any actual harm to their business or financial interests. It would appear however that, should it choose, Respondents could seek to have EPA institute an adverse personnel action. Under these facts a reasonable course of action, in the Court's view, would be to let the matter rest.