UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HENRY VELLEMAN, individually,	)	DOCKET NO. 5-CAA-97-008
AND d/b/a PROGRESSIVE	)	
POLETOWN PROPERTIES,	)	
	)	
RESPONDENT	)	

ORDER COMPELLING COMPLIANCE WITH PREHEARING ORDER

ORDER DENYING MOTION TO STRIKE PROPOSED WITNESSES

This matter arises under the authority of Section 113(d)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d)(1), and was initiated by the May 30, 1997, filing of an administrative Complaint by the Director of the Air and Radiation Division of the United States Environmental Protection Agency, Region 5. The undersigned, having been designated as presiding officer on July 23, 1997, issued a Prehearing Order on August 6, 1997, directing the parties to exchange prehearing information, including, among other things, the names of all intended witnesses and brief narratives of their expected testimony.

Procedural History

Complainant timely filed its prehearing exchange on October 3, 1997. In a letter dated October 28, 1997, from Complainant to the undersigned, Complainant reported that its prehearing exchange served on Respondent had been returned by the Postal Service and marked "refused." In response to Complainant's letter, Respondent on November 9, 1997, replied that no mail was "refused" as reported by Complainant but that Respondent had been unavailable for several weeks due to travel and surgery. Meanwhile, Respondent failed to meet its prehearing exchange filing deadline of November 6, 1997, and, on November 18, 1997, the undersigned ordered Respondent to show cause, on or before December 12, 1997, why it had failed to meet its prehearing exchange filing deadline.[(1)]

On November 18, 1997, William A. Wichers, Esquire, telephonically contacted the

undersigned's office and requested an extension of time for Respondent based on his recent appointment as counsel for Respondent. In a letter dated November 20, 1997, counsel for Complainant stated that it interpreted Respondent's letter of November 9, 1997, to be a request for an extension of time for filing its prehearing exchange and that Complainant took no position on this request other than to request an extension for the filing of Complainant's rebuttal prehearing exchange if Respondent's request was granted by the undersigned. On November 26, 1997, the undersigned's office telephonically advised both parties that Respondent's request for an extension of time was granted.

On December 5, 1997, Respondent submitted a Response to the Order to Show Cause and a Motion for an Extension of Time until January 6, 1998, to file its prehearing exchange. Complainant did not oppose this motion. On December 23, 1997, Respondent again moved for an extension of time to file its prehearing exchange, this time until January 30, 1998. Again, Complainant did not oppose the motion.

Respondent submitted its prehearing exchange on January 6, 1998, and Complainant filed its rebuttal prehearing exchange on January 20, 1998. On February 10, 1998, the undersigned entered an Order Scheduling Hearing in this matter for July 28-30, 1998, in Detroit, Michigan.

On February 13, 1998, Complainant filed a Motion to Compel Compliance with the Prehearing Order that is at issue here. In addition, new counsel for Complainant entered her appearance on February 13, 1998. On March 3, 1998, the undersigned received Respondent's Response to Motion to Compel Compliance with Prehearing Order. Finally, on March 10, 1998, Complainant filed its Reply to Response to Motion to Compel Compliance with Prehearing Order and Motion to Strike Proposed Witnesses.

Arguments

In its motion to compel, Complainant lists a number of objections to Respondent's prehearing exchange, all of which flow from an alleged lack of substantive information in the narratives for the proposed witnesses. First, Complainant argues that the lack of substantive information suggests that the named witnesses will offer duplicative testimony. Second, Complainant argues that Respondent's failure to specify the involvement of various witnesses with the renovation activities at the site in question provides Complainant no opportunity to prepare for such witnesses.[(2)] Third, Complainant argues that the lack of substantive information in Respondent's narratives compels the conclusion that certain witnesses will provide irrelevant character and business practice information. These infirmities, argues Complainant, make it impossible for Complainant to prepare adequately for the hearing. Finally, Complainant insinuates that Respondent's delay in meeting the filing deadline of the Prehearing Order and/or Respondent's failure to adequately respond to the Order to Show Cause merit default.

In its response to Complainant's motion, Respondent first suggests that, because Complainant's narratives occupy fewer pages than Respondent's narratives, Complainant cannot attack the sufficiency of Respondent's narratives. Respondent asserts that Complainant's narratives are "not appreciably more detailed." Respondent also argues that it cannot predict the substantive testimony of nondeposed witnesses that have signed no affidavits. Respondent responds to Complainant's assertions that certain witnesses will offer only irrelevant testimony by claiming that those witnesses will be called as adverse witnesses or will be called only to rebut challenges to Respondent's credibility.

Complainant's reply to Respondent's response rearticulates its claim of insufficient narratives and its concern that certain of Respondent's witness may be introduced as expert witnesses. Complainant argues that its motion to compel is not an attempt to circumvent the discovery requirements of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), but rather is an effort to enforce the prehearing requirements of

the Prehearing Order and as prescribed by the Rules of Practice.[3] Finally, Complainant requests that it be given the opportunity to depose the witnesses it suspects to be expert if their narratives are not sufficiently supplemented.

Discussion

The governing Rules of Practice state that each party's prehearing exchange shall include "[t]he names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony." 40 C.F.R. § 22.19(b). The purpose of the prehearing exchange is to afford the parties a fair and full opportunity to prepare for and to participate in the hearing. Such purpose can be achieved only if the prehearing exchange conveys sufficient information concerning the testimony of each witness and each proposed witness' connection to the case at hand.

Complainant's assertion that Respondent's narratives are inadequate is persuasive. As stated, the purpose of a prehearing exchange is to provide the opposing party an opportunity to prepare generally to respond to each witness and exhibit. Although it would not be reasonable to expect a detailed preview of the testimony of each witness, some information must be shared. Moreover, Respondent's argument that Complainant's narratives are "not appreciably more detailed" is rejected. Complainant's narratives suffice to notify the Respondent of the general substance and context of the testimony of each witness, information lacking in many of Respondent's narratives.[4] As specified below, Respondent is directed to supplement the witness narratives whose generality imparts little, if any, useful information. Failure to provide the requisite supplementary information for each witness can result in the exclusion of that witness from testifying at the hearing.

As for Complainant's other objections to Respondent's prehearing exchange and its Motion to Strike Witnesses, the undersigned agrees that Respondent's narratives do suggest potentially duplicative or irrelevant witnesses. It would be premature, however, to strike any witnesses at this time, particularly given the paucity of information about them. Arguments considering the propriety of witnesses may be renewed upon the submission of the supplemented narratives for the proposed witnesses or at the hearing and, if appropriate, witnesses will be stricken at that time.

Complainant is correct in noting that Respondent has failed to meet the requirements of the Prehearing Order in a timely manner. The undersigned, however, notes that Complainant construed Respondent's letter of November 9, 1997, as a request for an extension of time and that Complainant did not oppose Respondent's requests for extensions of time. Moreover, a default order is deemed an inappropriate response to this minor procedural infraction.[5] With regard to Complainant's assertion that Respondent's response to the Order to Show Cause is inadequate, the undersigned disagrees. Respondent, however, is admonished to strive for greater success in following proper procedure, as delineated in the orders of the undersigned and in the Rules of Practice.

ORDER

Respondent is directed to amend its prehearing exchange so as to supplement its narrative summaries, indicating the general substance and context of the expected testimony, for the following proposed witnesses:

1) Henry Velleman
2) Max Tarrance
3) Todd Sachse
4) Paul Jacoby
5) Gary Chrostowski
6) Thomas Vincent
7) Gerald Krawiec
8) Kenneth Lawler
9) Joseph Konrad
10) Stuart Yankee[6]

The amendments specified above or any desired supplements to Respondent's prehearing exchange material shall be filed by April 30, 1998. Complainant's rebuttal Prehearing exchange, if necessary, shall be filed by May 14, 1998.

Complainant's Motion to Strike Proposed Witnesses is Denied.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Dated: 3/18/98
Washington, D.C.

1. The Order to Show Cause entered on November 18, 1997, was returned to the undersigned's office as undeliverable mail.

2. Complainant states that these witnesses appear to be expert witnesses and that Rule 26 of the Federal Rules of Civil Procedure entitles Complainant to a written report concerning these witnesses' testimony. The undersigned notes that the Federal Rules of Civil Procedure are not binding on administrative agencies, but that many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513, n. 10 (EAB Feb. 24, 1993).

3. Discovery beyond prehearing exchange requirements is controlled by 40 C.F.R. § 22.19(f), which allows additional discovery only when the presiding officer has determined that: 1) the discovery will not unreasonably delay the proceeding, 2) the information is not otherwise obtainable, and 3) the information has significant probative value.

4. Likewise, Respondent's argument that the fact that its narratives cover more pages than Complainant's somehow suggests that its narratives are sufficient is rejected. Such a claim merits no response.

5. This conclusion is further supported by the fact that Complainant did not move for a default order, but merely implied that one might be appropriate. Furthermore, at no point in this proceeding has Complainant indicated that it has suffered prejudice from Respondent's untimely responses.

6. Should the supplemented narratives indicate that one or more of the listed witnesses will be employed as an expert, or should the narratives compel such an inference due to their inadequacy, Complainant may renew its discovery request through a proper motion.