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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 DENYING COMPLAINANT'S MOTION TO STRIKE WITNESSES

This order responds to the Complainant's May 14, 1998, Motion to Strike Witnesses, objecting to certain witnesses who had been referenced in the Respondent's prehearing exchange mailed on January 6, 1998, and Amended Prehearing Statement mailed on April 30, 1998.<sup>(1)</sup> The Complainant's Motion to Strike Witnesses will be denied at this time.

This dispute began when, on February 13, 1998, the Complainant filed a Motion to Compel Respondent's Compliance with the Prehearing Order, alleging various deficiencies in the Respondent's prehearing exchange, to which the Respondent mailed a Response on February 27, 1998.<sup>(2)</sup> On March 18, 1998, the undersigned entered an Order Compelling Compliance with the Prehearing Order and Denying Complainant's Motion to Strike Proposed Witnesses. In this March 18, 1998, order, the undersigned directed the Respondent to amend its prehearing exchange so as to supplement its narrative summaries for ten of its proposed witnesses to avoid exclusion of these witnesses from testifying at the hearing.

On April 30, 1998, the parties mailed a Joint Motion for a Stay of Proceedings, requesting a stay until October 31, 1998, due to a recently initiated criminal investigation of Respondent Henry Velleman in connection with the activities underlying this proceeding. On April 30, 1998, the Respondent also mailed its amended prehearing exchange pursuant to the March 18, 1998, order.<sup>(3)</sup>

On May 8, 1998, the undersigned entered an Order Granting in Part the Joint Motion for a Temporary Stay of the Proceedings and Rescheduling the Hearing, which stayed the proceeding for approximately three (3) months. The hearing date was postponed to November 17, 1998, and the filing date for the stipulated facts, exhibits, and testimony was continued to November 9, 1998. However, in the May 8, 1998, order, the undersigned pointed out that the May 14, 1998, deadline for the filing of the Complainant's rebuttal prehearing exchange, if any, remained as scheduled.

The Complainant's Reply to Respondent's Amended Prehearing Exchange and Motion to Strike Witnesses, which is at issue here, was filed on May 14, 1998, and the Respondent's Response thereto was mailed on May 28, 1998. The Complainant argues that the Respondent's supplementary narrative summaries for several of its proposed witnesses contained in the Respondent's amended prehearing exchange do not provide any appreciable detail beyond that provided in its initial prehearing exchange and therefore the Respondent has failed to comply with the undersigned's March 18, 1998, Order Compelling Compliance with the Prehearing Order. The Complainant moves to strike six of the Respondent's proposed witnesses. The Respondent argues that it is not necessary for it to reply to the Complainant's Motion to Strike Witnesses at this time because this matter was temporarily stayed by this court's order of May 8, 1998. Alternatively, the Respondent argues that its supplementary narratives for its proposed witnesses are adequate to satisfy the requirements of the March 18, 1998, order.

The purpose for reviewing the procedural history of this case in such detail is to clarify the reason for denying the Complainant's present motion to strike witnesses. Put simply, this proceeding has been stayed until October 31, 1998, pursuant solely to a joint motion for such a stay. The entertainment of procedural motions at this time would contravene the whole purpose of the parties' efforts to obtain the stay. Other than the Complainant's filing of its rebuttal prehearing exchange by May 14, 1998, all elements of this proceeding were stayed as requested until **October 31, 1998**. Any premature acquiescence by the Complainant in joining in the motion for a stay cannot be remedied by the instant motion during the stay. Upon reconvention of this proceeding on November 1, 1998, the Complainant may renew its motion to strike witnesses. [\(4\)](#)

#### Order

The Complainant's Motion to Strike Witnesses is **Denied** at this time.

Original signed by undersigned

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Barbara A. Gunning  
Administrative Law Judge

Dated: 6-15-98  
Washington, DC

1. There is no proof in the file before me as to the dates on which the Respondent's documents were filed with the Regional Hearing Clerk as evidenced by a date stamp.
2. On March 10, 1998, the Complainant filed a Reply to Respondent's Response to Motion to Compel Compliance with Prehearing Exchange.
3. The filing deadline for the Respondent's amended prehearing exchange was April 30, 1998. The certificate of service for the amended prehearing exchange states that the exchange was mailed to the Regional Hearing Clerk, the Complainant, and the undersigned on April 30, 1998. The undersigned received the amended prehearing exchange on May 5, 1998. According to counsel for the Complainant, neither the

Regional Hearing Clerk nor the Complainant had received the amended prehearing exchange as of May 6, 1998. On May 7, 1998, the Complainant filed a Motion to Strike Witnesses based on the Respondent's alleged failure to timely file its amended prehearing exchange. Then later on May 7, 1998, the Complainant received the amended prehearing exchange. As a result, on May 11, 1998, the Complainant filed a Motion to Withdraw its Motion to Strike Witnesses.

I point out that although the governing Rules of Practice state that service of a document is complete upon mailing, the Rules further provide that five (5) days are added to the time allowed for the filing of a responsive document where a document is served by mail. 40 C.F.R. § 22.07(c). I generally consider a document to be filed untimely if it is received by the Regional Hearing Clerk more than five (5) days after the scheduled filing date. See In re Lyon County Landfill, Docket No. 5-CAA-96-011 (ALJ, Sept. 11, 1997): see also In re Alaska Pulp Corporation and Technic Services, Inc., Docket No. 10-97-0042 (ALJ, January 26, 1998).

4. The undersigned notes that in granting the requested stay, much reliance was placed on the parties' assertions that they are actively engaged in settlement discussions.

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