



**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

**In the Matter of:** )  
 )  
**El Dorado Chemical Company,** ) **Docket No. CWA-06-2011-1746**  
 )  
**Respondent.** )

**PREHEARING ORDER**

The Complaint in this matter was filed on June 9, 2011. The case was received by this Tribunal on December 7, 2011. The parties initially agreed to participate in the Alternative Dispute Resolution (“ADR”) services offered by this office. One week after ADR was initiated, the Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6 (“Complainant”), filed a Motion to Withdraw Complaint Without Prejudice and Postpone the Alternative Dispute Resolution Process. On January 12, 2012, Respondent El Dorado Chemical Company (“Respondent”), filed a Response opposing Complainant’s motion to withdraw. On January 19, 2012, upon the recommendation of the ADR Judge, the undersigned was designated to preside over this proceeding and rule on the pending motion to withdraw. On January 26, 2012, Complainant filed a reply to its motion to withdraw.

On February 23, 2012, the undersigned issued an Order Deferring Complainant’s Motion to Withdraw Complaint Without Prejudice Pending Additional Briefing which directed the parties to file additional briefs no later than March 23, 2012. By the undersigned’s Order Granting Motion to Stay Proceedings dated March 20, 2012, the deadline for filing additional briefs was extended to May 7, 2012. Both parties having failed to comply with these orders, Complainant’s Motion to Withdraw Complaint Without Prejudice is deemed abandoned, and is **DENIED**.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 through 22.45 (“Rules of Practice”). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. An informal Practice Manual, a Citizen’s Guide to proceedings before the EPA Office of Administrative Law Judges, and significant decisions issued by the Office are accessible on the world wide web at <http://www.epa.gov/oalj>.

U.S. Environmental Protection Agency (“EPA” or “Agency”) policy strongly supports settlement, and the procedures governing the documentation of settlement agreements are set forth in Rule 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. The record shows that settlement discussions in this proceeding have already been undertaken and the parties are commended for taking the initiative to resolve this matter informally and expeditiously. The parties are free to continue their settlement negotiations, but are reminded that bilateral negotiations are not affected by and do not affect the scheduling of this proceeding.

The parties shall prepare for hearing and strictly comply with the prehearing requirements of this Order, as set forth below.

**Prehearing Exchange.** Pursuant to Rule 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), the parties are directed to engage in the following prehearing exchange.

1. Each party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the undersigned as part of its Initial Prehearing Exchange:

(A) a list of names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, a brief narrative summary of each witness’s expected testimony, and a curriculum vitae or resume for each identified expert witness, or a statement that no witnesses will be called;

(B) copies of all documents and other exhibits intended to be introduced into evidence, identified as Complainant’s or Respondent’s exhibits, as appropriate, and numbered with Arabic numerals (*e.g.*, “CX 1” or “RX 1”); and

(C) a statement explaining its views as to the appropriate place for the hearing and the estimated amount of time needed to present its direct case. *See* Sections 22.21(d) and 22.19(d) of the Rules of Practice, 40 C.F.R. §§ 22.21(d) and 22.19(d). Also, state whether translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. In addition, Complainant shall file the following as part of its Initial Prehearing Exchange:

(A) a copy of any documents in support of those factual allegations denied or otherwise not admitted in Respondent’s Answer, including but not limited to the following paragraphs in the Complaint: 1, 3, 7, 11, 12, 15, 16, and 18;

(B) a copy of all documents referenced in paragraphs 7, 8, and 12 of the Complaint;

(C) pages 7 and 8 and Table A of the Complaint which have not been filed;

(D) a narrative statement explaining in detail how the proposed penalty was calculated, along with a copy of any EPA policy or guidance document upon which Complainant has relied, or intends to rely, in calculating or supporting the proposed penalty; and

(E) all factual information and supporting documentation relevant to the assessment of the proposed penalty.

3. In addition, Respondent shall submit the following as part of its Initial Prehearing Exchange(s):

(A) a copy of any documents in support of the denials and assertions made in the following paragraphs of Respondent's Answer: 1, 3, 7, and 11;

(B) a copy of all documents referenced in paragraph 7 and 11 of the Answer;

(C) all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation; and

(D) if Respondent takes the position that the proposed penalty should be mitigated or eliminated because of any consideration, such as an inability to pay, a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Initial Prehearing Exchange(s) as to provisions 3(A), 3(C) and 3(D) above.

The prehearing exchanges called for above shall be filed in seriatim fashion, pursuant to the following schedule:

<b>June 22, 2012</b>	Complainant's Initial Prehearing Exchange;
<b>July 13, 2012</b>	Respondent's Initial Prehearing Exchange;
<b>July 27, 2012</b>	Complainant's Rebuttal Prehearing Exchange.

Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), provides that, except in accordance with Section 22.22(a), **any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify.** Therefore, each party is advised to prepare its prehearing exchange very carefully and thoughtfully.

**Supplement to Prehearing Exchange.** Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

**Default and Opportunity for a Hearing.** The undersigned assumes (though it is not apparent from the incomplete version of the Complaint filed by Complainant) that the Complaint notified Respondent of the opportunity to request a hearing, in accordance with Section 554 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 554. In its Answer to the Complaint, Respondent requests a hearing. Pursuant to Section 554(c)(2) of the APA, 5 U.S.C. § 554(c)(2), a hearing will be conducted in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA, 5 U.S.C. § 556(d), provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondent has the right to defend against Complainant’s charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant’s witnesses. Respondent is entitled to elect any or all three means to pursue its defense. If Respondent intends to elect only to conduct cross-examination of Complainant’s witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its Initial Prehearing Exchange. **Respondent is hereby notified that the failure either to comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant’s witnesses can result in the entry of a default judgment against the defaulting party. Complainant is notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.**

**The mere pendency of settlement negotiations or even the existence of a settlement in principle does not constitute a basis for failing strictly to comply with the prehearing exchange requirements. Only the filing with the Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the judge, excuses noncompliance with filing deadlines.**

**Filing and Service.** A document is “filed” when the Regional Hearing Clerk receives it. A document is “served” upon mailing or when placed in the custody of a reliable commercial delivery service. However, the parties are encouraged to send a courtesy copy to the Office of Administrative Law Judges by facsimile or email, in addition to the mailed hard copy, as physical mail delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the email address is oaljfilng@epa.gov. A signed certificate of service must be attached to all filed documents.

All documents served on the undersigned shall be addressed as follows if sent by regular mail:

The Honorable Susan L. Biro, Chief Administrative Law Judge  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, N.W., Mail Code 1900L  
Washington, DC 20460.

All documents served on the undersigned via Federal Express or any delivery service that x-rays its packages as part of its routine security procedures may be delivered directly to:

The Honorable Susan L. Biro, Chief Administrative Law Judge  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
1099 14th Street, N.W., Suite 350  
Washington, DC 20005.

**The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the Presiding Judge, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the Presiding Judge except those that are fully executed and filed with the Regional Hearing Clerk.**

**Contact Information.** Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 to ask whether a document has been received or issued. Email or telephone contact may be made with my staff attorney, Steven Sarno, Esq., at (202) 564-6245 (sarno.steven@epa.gov) for other procedural questions.

**Courtesy Copies.** If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of substantive orders and decisions issued in this proceeding, the party shall submit a request for such copies by letter addressed to Maria Whiting-Beale at one of the addresses above. The letter shall include the case docket number, the party's e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motions for accelerated decision or dismissal, or (b) all decisions and substantive orders. The undersigned's office will endeavor to comply with such requests but does not guarantee the party's receipt of expedited courtesy copies.

**Motions.** Prior to filing any motion, the moving party is required to contact the non-moving party to determine whether the non-moving party has any objection to the granting of the relief sought in the motion. The motion shall state the position of the non-moving party. The mere consent of the non-moving party to the relief sought does not assure that the motion will be granted. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the non-moving party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice, 40 C.F.R. §§ 22.16(b) and 22.7(c), allow a 15-day response period for motions, with an additional five days added thereto if the motion is served by mail. Motions not filed in a timely manner may not be considered. **If any party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), it shall be filed within thirty**

**days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Pursuant to Section 22.16(d) of the Rules of Practice, 40 C.F.R. § 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The Office of Administrative Law Judges has access to videoconferencing technology and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and financial resources in connection with such arguments. A request for oral argument may be granted, in the undersigned's discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

**SO ORDERED.**



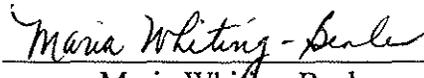
\_\_\_\_\_  
Susan L. Biro  
Chief Administrative Law Judge

Dated: May 23, 2012  
Washington, DC

In the Matter of El Dorado Chemical Company, Respondent  
Docket No. CWA-06-2011-1746

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated May 23, 2012, was sent this day in the following manner to the addressees listed below:

  
\_\_\_\_\_  
Maria Whiting-Beale  
Staff Assistant

Dated: May 23, 2012

Original And One Copy By Regular Mail To:

Lorena Vaughn  
Regional Hearing Clerk  
U.S. EPA  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Copy By Regular Mail To:

Tom Rucki, Esquire  
Assistant Regional Counsel (6RC-EW)  
U.S. EPA  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Charles R. Nestrud, Esquire  
Chisenhall, Nestrud & Julian, P.A.  
400 W. Capitol, Suite 2840  
Little Rock, AR 72201