UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
DOMINO'S PIZZA, L.L.C.	)	
	)	
	)	Docket Nos. CERC-03-2007-0302
	)	EPCRA-03-2007-0302
Respondent.	)	

PREHEARING ORDER

As you have been previously notified, I am designated to preside over this proceeding. This proceeding will be governed by the Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. §22.1 et seq., ("Rules of Practice"). The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice.

Agency policy strongly supports settlement and the procedures regarding documenting settlements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. §22.18. The record reflects that the parties have engaged in settlement discussions as part of an alternative dispute resolution process and, while those discussions to date have not been fruitful, the parties are nevertheless commended for taking the initiative to attempt to resolve this matter informally and expeditiously. Each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away. With such thoughts in mind the parties are directed to engage in a settlement conference on or before **February 29, 2008**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **March 7, 2008.** If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **March 28, 2008**, with a copy sent to the undersigned.

Should a Consent Agreement not be finalized on or before the latter date, the parties must prepare for hearing and shall strictly comply with the prehearing requirements of this Order.

This Order is issued pursuant to Section 22.19(a) of the Rules. Accordingly, it is directed that the following prehearing exchange take place between the parties:

1. Pursuant to Section 22.19(a) of the Rules, each party shall file with the Regional Hearing Clerk and shall serve on the opposing party and on the Presiding Judge:

(A) the names of the expert and other witnesses intended to be called at hearing, identifying each as either a fact witness or expert witness, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called;

(B) copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vita or resume for each identified expert witness. The documents and exhibits shall be identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and numbered with Arabic numerals (e.g., Complainant's Ex. 1); and

(C) a statement as to its views as to the appropriate place of hearing and estimate of the time needed to present its direct case. See Sections 22.21(d) and 22.19(d) of the Rules. Also, state if translation services are necessary in regard to the testimony of any anticipated witness(es), and, if so, state the language to be translated.

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

(A) a copy of any report(s) of the inspection on February 27, 2007 of the Respondent's Facility, referenced in Paragraph 7 of the Complaint;

(B) a copy of any documents in support of the allegations in Paragraphs 6, 12, 21, 23, 29, 32, and 38 of the Complaint;

(C) a narrative statement explaining in detail the factual bases for the allegations in Paragraphs 12 and 23 of the Complaint that approximately 3,000 pounds of ammonia were released from the Maryland Distribution Center beginning at or before 3:30 a.m. on November 24, 2005, and that Respondent knew or should have known of the release in an amount equal to or greater than the RQ of 100 pounds by 6:00 a.m. on November 24;

(D) a narrative statement, and a copy of any documents in support, explaining in detail the factual bases for the allegation in Paragraph 57 of the Complaint that Respondent had 6,000 pounds of ammonia present at the Facility since at least 2003;

(E) a narrative statement, and a copy of any documents, photographs, diagrams or facility maps in support, describing in detail the location(s) and containment of the alleged maximum storage quantities of sulfuric acid and lead at the Facility, as referenced in Paragraphs 62 and 65 of the Complaint, and responding to Respondent's assertions in Paragraphs 62 and 65 of the Answer that lead and sulfuric acid were located at its Facility in vehicle batteries, and responding to Respondent's denials in Paragraphs 62, 65, 84, 88, 92, 96 and 100 of the Answer;

(F) a narrative statement, and a copy of any documents in support, describing in

detail the factual bases for the allegations in Paragraph 66 of the Complaint;

(G) a copy of any "penalty policy" other than EPA's Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("ERP") upon which Complainant has relied upon, or intends to rely upon, in consideration of the proposed penalty assessments; and

(H) a statement regarding whether the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. § 3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case.

3. The Respondent shall also submit the following as part of its Prehearing Exchange:

(A) a copy of any documents, notes, and photographs in support of Respondent's assertions in Paragraphs 12, 13, 15, 16, 17, and 18 of the Answer;

(B) a narrative statement of which of the exemptions listed in Paragraphs 52 and 80 of the Answer Respondent is claiming in defense against allegations in the Complaint, and a copy of any documents in support of such defense;

(C) a copy of any documents in support of the assertions in Paragraphs 62 and 65 of the Answer that at most times since 2003, lead and sulfuric acid have been located at the Facility in vehicle batteries in total quantities of about 19,000 and 2,250 pounds, respectively;

(D) if Respondent takes the position that it is unable to pay the proposed penalty, a copy of any and all documents it intends to rely upon in support of such position; and

(E) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any other grounds, a copy of any and all documents it intends to rely upon in support of such position;

4. Complainant shall submit as part of its Rebuttal Prehearing Exchange a statement and/or any documents in response to Respondent's Prehearing Exchange submittals as to provisions 3(A) through 3(E) above.

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

March 28, 2008	-	Complainant's Initial Prehearing Exchange
April 18, 2008	-	Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
April 30, 2008	-	Complainant's Rebuttal Prehearing Exchange

Section 22.19(a) of the Rules of Practice 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 should thoughtfully prepare its prehearing exchange. Any supplements to prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

The Complaint herein gave the Respondent notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act (APA), 5 U.S.C. § 554. In their Answer to the Complaint, the Respondents requested such a hearing. In this regard, Section 554(c)(2) of the APA sets out that a hearing be conducted under Section 556 of the APA. Section 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, the Respondent has the right to defend against the Complainant's charges by way of direct evidence, rebuttal evidence or through cross-examination of the Complainant's witness. Respondents are entitled to elect any or all three means to pursue its defenses. If the Respondents intend to elect only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of the Complainant's witnesses, can result in the entry of a default judgment against it.** The 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 TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR ON AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES. 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.**

Prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, if sent by mail, shall be addressed as follows:

The Honorable Susan L. Biro,
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Hand-delivered packages transported by Federal Express or any delivery service which x-rays their packages as part of their routine security procedures, may be delivered directly to the Offices of the Administrative Law Judges at 1099 14th Street, N.W., Suite 350, Washington, D.C. 20005.

Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 or my staff attorney, Lisa Knight, Esquire at (202) 564-6291. The facsimile number is (202) 565-0044.

If any party wishes to receive, by e-mail or by facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, this party shall submit a request for expedited courtesy copies by letter addressed to Maria Whiting-Beale, Legal Staff Assistant, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Mail Code 1900 L, 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460. The letter shall include the case docket number, the e-mail address or facsimile number to which the copies are to be sent, and a statement as to whether the party requests: (A) expedited courtesy copies of the initial decision and/or any orders on motion for accelerated decision or dismissal, or (B) expedited courtesy copies of 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.

Prior to filing any motion, the moving party is directed to contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion. The motion shall then state the position of the other party or parties. The mere consent of the other parties to the relief sought does not assure that the motion will be granted and no reliance should be placed on the granting of an unopposed motion. Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the other 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 fifteen-day response period for motions with an additional five days added thereto if the pleading is served by mail. Motions not filed in a timely manner may not be considered.

Furthermore, upon the filing of a motion, a response to a motion, or a reply to a motion, a

party may submit a written request for an oral argument on the motion, pursuant to 40 C.F.R. § 22.16(d). Included in the request for oral argument shall be a statement as to the proposed appropriate location(s) for the argument to take place. The Office of Administrative Law Judges recently acquired access to the state of the art videoconferencing capabilities, and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and monetary 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.

If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20 (a), it shall be filed **within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**

Susan L. Biro
Chief Administrative Law Judge

Dated: February 15, 2008
Washington, D.C.

In the Matter of Domino's Pizza, L.L.C., Respondent
Docket Nos. CERC-03-2007-0302 & EPCRA-03-2007-0302

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **Prehearing Order,** dated February 15, 2008 was sent this day in the following manner to the addressees listed below:

Original and One Copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA - Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by pouch mail to:

James F. Van Orden, Esquire
Assistant Regional Counsel (3RC42)
U.S. EPA - Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by regular mail to:

Robert G. Smith, Esquire
Venable LLP
2 Hopkins Plaza, 18th Floor
Baltimore, MD 21201

M. Lisa Knight
Senior Staff Attorney

Dated: February 15, 2008