UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
Overcash Gravel and Grading	**)**	**Docket No. CWA-04-2004-4530**
Company, Inc.,	**)**	
	)	
Respondent	**)**	

ORDER DENYING RESPONDENT'S MOTION TO AMEND ANSWER

Respondent moves to amend its Answer to EPA's Administrative Complaint, filed pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). EPA opposes Respondent's motion on the grounds that allowing the Answer to be amended nine months after it was filed and only one week before the hearing in this matter would cause "undue delay and undue prejudice" to Complainant, and that in any case, such amendment would be "futile."

The present motion to amend is governed by 40 C.F.R § 22.15(e), which permits Respondent to amend its answer at this late date "upon motion granted by the Presiding Officer." The policy of "liberal amendment of pleadings," as adopted by federal courts pursuant to Fed. R. Civ. P. § 15(a), has been approved by the Environmental Appeals Board for administrative penalty enforcement proceedings. In re Lazarus, Inc., 7 E.A.D. 318, 333 (EAB 1997). However, amendments to pleadings will be denied when the result would be "undue prejudice to the opposing party." Foman v. Davis, 371 U.S. 178, 181-82 (1962). Despite this court's observance of such a liberal amendment standard, in the instant case, prejudice against Complainant outweighs this consideration. Respondent's motion to amend its Answer, therefore, is DENIED.

In its motion, Respondent specifically requests amendment of Paragraphs 14 and 15 of its Answer. In its Answer, Respondent admits the allegations of Paragraphs 14 and 15 of the Complaint "upon information and belief." Answer ¶¶ 14, 15. Respondent's amendments would transform these simple admissions into the following:

> 14. Respondent owned and/or operated a construction site known as Yates Mill Subdivision located on Pitts School Road, Concord, North Carolina (the "Facility"), however it is denied that Respondent discharged storm water into Rocky Creek, a "navigable water" as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
>
> 15. It is admitted that storm water naturally drains from the property in question into the branch, however it is denied that Respondent discharged pollutants into navigable waters

as alleged in the complaint.[1]

Respondent essentially has offered no argument as to why it should now be permitted to substitute an Amended Answer for its earlier admissions to the allegations in Paragraphs 14 and 15 of the Complaint. Accordingly, given the present circumstances of this case, Respondent's "eleventh hour" request to amend its Answer must fail, even when viewed under the standard allowing for the liberal amendments of pleadings.

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Carl C. Charneski
Administrative Law Judge

Issued: July 29, 2005
Washington, D.C.

[1]Respondent's proposed Amended Answer with respect to Paragraph 15 does not, in any event, appear responsive to the corresponding allegations in the Complaint.