UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
ROGER BARBER, d/b/a	**)**	**DOCKET NO. CWA-05-2005-0004**
BARBER TRUCKING	**)**	
	)	
RESPONDENT	**)**	

ORDER ON COMPLAINANT'S MOTION TO STRIKE PORTIONS OF RESPONDENT'S ANSWER AND TO DEEM FACTUAL ALLEGATIONS ADMITTED OR, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE ANSWER; ORDER GRANTING AMENDMENT OF THE COMPLAINT

This civil administrative penalty proceeding arises under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). 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 ("Rules of Practice"), 40 C.F.R. part 22.

The U.S. Environmental Protection Agency, Region V ("the Region" or "Complainant") filed and served the "Complaint," dated April 28, 2005, on Roger Barber d/b/a/ Barber Trucking ("Respondent"). The Region alleges violations of Section 405(e) of the Clean Water Act, 33 U.S.C. § 1345(e), and of 40 C.F.R. part 503, "Standards for the Use or Disposal of Sewage Sludge." Respondent, who is a *pro se* litigant in this matter, filed its Written Answer and Request for Hearing ("Answer"), which is dated June 1, 2005.

On July 7, 2005, the Region filed a Motion to Strike Portions of Respondent's Answer and to Deem Factual Allegations Admitted or, in the Alternative, Motion for a More Definite Answer ("Motion to Strike"). The Region correctly points out that in the Answer, in response to the Complaint's Paragraphs 16, 17, 36, 37, 39, 40, 43, 50, 51, 59-67, 69, 70, 73, 74, 77, and 78, Respondent does not assert lack of knowledge but responds to each of those paragraphs merely by stating, "Neither admit or deny allegations." Motion to Strike at 3. The Region also challenges the Answer as being unresponsive to Paragraph 38 of the Complaint, which alleges the number of loads of domestic septage/sewage sludge Respondent applied to the Site in question from May 2000 to mid-April 2002. Motion to Strike at 3. The Answer's response to Paragraph 38 states, "After I was told to stop dumping by the health department on April 11, 2002, I stopped dumping."

The Region contends that because Respondent failed to clearly and directly admit, deny, or explain each of the material factual allegations contained in Paragraphs 16, 17, 36, 37-39, 40, 43, 50, 51, 59-67, 69, 70, 73, 74, 77, and 78 of the Complaint, each of the factual allegations should be deemed admitted pursuant to Sections 22.15(b) and (d) of the Rules of Practice, 40 C.F.R. §§ 22.15(b), (d). Motion to Strike at 3-4. In the alternative, the Region moves for an order requiring Respondent to submit an answer in compliance with Section 22.15(b). Motion to Strike at 4.

Respondent's Response for a More Definite Answer, dated July 11, 2005, provides amended responses to those portions of the Answer challenged by the Region.[1] While some of the amended responses lend abundant clarity to Respondent's position, other amended responses call for some interpretation.

Section 22.15 of the Rules of Practice provides that an answer "shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge." 40 C.F.R. § 22.15(b). "Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied." *Id.* "The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested." *Id.* "Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." 40 C.F.R. § 22.15(d).

With regard to the purpose of Section 22.15, it is "designed to facilitate the proceeding by requiring particularity as to those facts which Respondent intends to challenge." *In re Landfill, Inc.*, RCRA (3008) Appeal No. 86-8, 3 E.A.D. 461, 466 (CJO 1990). "Any material factual allegations which are not 'clearly and directly' admitted, denied, or explained are deemed to be admitted." *Id.* "If Respondent has no knowledge of a particular factual allegation, he must specifically so state for it to be deemed denied; otherwise, it is deemed admitted." *Id.* "This system allows all facts which are not seriously disputed to be established through the pleadings, and focuses the hearing on the remaining specifically disputed facts." *Id.* However, the Rules of Practice do not require a respondent to reply to allegations that call for legal conclusions. *In re Coast Wood Preserving, Inc.*, Docket No. EPCRA-9-2000-0001, 2001 EPA ALJ LEXIS 28, at *20, (ALJ, June 28, 2001)[2]; *Coast Wood, supra*, 2001 EPA ALJ LEXIS 40, at *7 (July 31, 2001); *see* 40 C.F.R. § 22.15.

As a general principle, "administrative pleadings are liberally construed and easily amended." *In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 7 E.A.D. 318, 334 (EAB

[1] Respondent's Response for a More Definite Answer is really just an amended answer. Accordingly, I am treating Respondent's Response for a More Definite Answer as a motion to amend the Answer, and I hereby grant that motion.

[2] ALJ cases may be found on the internet, such as at: http://www.epa.gov/oalj.

1997).[3] The objective of pleading is to facilitate a decision based on the merits of a controversy. *Id.* at 333-34. Regarding motions to strike, such motions "are the appropriate remedy for the elimination of impertinent or redundant matter in any pleading, and are the primary procedure for objecting to an insufficient defense." *In re Dearborn Refining Co.,* Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *6 (ALJ, Jan. 3, 2003). However, "motions to strike are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." *Id.* at *7 (internal quotation marks omitted).

In the Response to the Motion to Strike, Respondent has now modified its answers so as to provide sufficient answers to many of the allegations cited in the Motion to Strike. Specifically, Respondent now admits the allegations in Paragraphs 16, 17, 36, 37, 39, 40, 43, and 59-67 of the Complaint.[4] *See* Respondent's Response for a More Definite Answer.

However, in response to several of the allegations, Respondent does not directly answer the allegations. Instead, Respondent answers, "Respondent was following guide lines and instructions supplied by the Brown County Health Department and the Southwestern District of the Ohio EPA which did not include instructions showing this requirement." Respondent employs this tactic or similar responses to Paragraphs 38, 50, 51, 69, 70, 73, 74, 77, and 78 of the Complaint. Among those paragraphs and those cited by the Region in its Motion to Strike, the Region makes factual allegations in some paragraphs whereas in others the Region's allegations call for legal conclusions. The portions of the Complaint that call for legal conclusions are Paragraphs 51, 70, 74, and 78. For instance, Paragraph 70 states,

> Respondent violated Section 405(e) of the CWA, 33 U.S.C. § 1345(e), by applying 1092 loads of domestic septage to the Site after the annual application rate was exceeded as specified by 40 C.F.R. § 503.12(c), and by failing to develop, and maintain for five years, information on the nitrogen requirement for the vegetation grown on the Site during the time he was applying domestic septage to the Site, as required by 40 C.F.R. § 503.17(b)(4).

As discussed above, Respondent is not required to respond to allegations calling for legal conclusions. Therefore, it is not necessary for me to evaluate the sufficiency of Respondent's answers to Paragraphs 51, 70, 74, and 78.

However, Paragraphs 38, 50, 69, 73, and 77 of the Complaint state factual allegations. For instance, Paragraph 69 states the following factual allegation:

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[3] Besides being printed in published volumes, the Environmental Appeals Board's ("EAB") cases are also available via the internet, such as at: http://www.epa.gov/eab.

[4] Respondent admits the allegations in Paragraph 36 with a slight variation.

> At the time Respondent was applying domestic septage [to] the Site, Respondent did not develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the site during a 365 day period.

As noted above, Respondent answers Paragraphs 50, 69, 73, and 77 by stating that the Respondent followed the guidelines supplied to it and that those guidelines did not include instructions showing this requirement. Respondent's answers to the allegations, liberally construed, may be read multiple ways: as either admitting that Respondent did not develop and retain the information and then explaining why Respondent did not do so; or as an argument that Respondent was not required to develop and retain the information and therefore the Region's allegation is irrelevant, even though Respondent may have insufficient knowledge to answer the allegation.[5] As such, Respondent's amended answers to Paragraph 50, 69, 73, and 77 are ambiguous and must be clarified. A purpose of the pleading process is to clarify which facts are in dispute, and the Region is entitled to a clear and direct answer to its factual allegations. Furthermore, Respondent's amended answer to Paragraph 38, which states, "No septage/sewage was unloaded after Mid- April 2002 when [the] health department informed respondent to stop dumping," is nonresponsive to the Region's question as to the number of truck loads of domestic septage/sewage sludge Respondent applied to the property on dates as early as May 2000.

Accordingly, unless Respondent files more definite answers to the factual allegations in Paragraphs 38, 50, 69, 73, and 77 – stating whether Respondent admits, denies, or has insufficient knowledge to answer those factual allegations – those allegations will be deemed admitted,. If Respondent chooses to file more definite answers to those allegations, those additional answers shall be filed within twenty (20) days from this order's date of service. This, of course, does not mean that Respondent cannot explain its defenses.

Regardless of whether Respondent chooses to file more definite answers, I will *not* strike the answers. It is well established that striking an answer is a harsh remedy and the goal of the pleading process is to get to the merits of the case. The answers as they now stand explain Respondent's point of view in this case, and Respondent appears to have made those answers in good faith. Moreover, being that this case is in its early stages, it is not yet clear whether Respondent's explanation is impertinent or redundant to these proceedings.

Finally, I observe that the Region has filed a Motion to Amend Complaint By Interlineation Instanter and File Documentation of Public Notice ("Motion to Amend

[5] I note that elsewhere in its amended answers, Respondent explicitly admits several allegations. In contrast, Respondent chooses to express its "following-the-guidelines-supplied-to-it" explanation with regards to other factual allegations without making any explicit admission.

Complaint"). The Region moves to amend the Complaint, which is dated April 28, 2005, and states under the heading "Notice to the State and Public" that "U.S. EPA contemporaneously with the issuance of this Complaint, caused a public notice to be published in a local newspaper regarding this action." Motion to Amend Complaint brings to this Tribunal's attention that the public notice was not published until June 9, 2005. Accordingly, the Region moves to amend the above-quoted language regarding the notice to read that the Region "will cause" a public notice to be published rather than "caused." Respondent has not filed any opposition to the amendment. The Region's proposed amendment is more akin to a ministerial modification rather than interlineation.[6] As a general principle, "administrative pleadings are liberally construed and easily amended." *Lazarus,* 7 E.A.D. 318, 334 (EAB 1997). Accordingly, amendment of the Complaint is GRANTED.

Dated: August 25, 2005
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge

[6] The term "interlineation" means: "The act of writing something between the lines of an earlier writing." Black's Law Dictionary (8th ed. 2004).