

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

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

ORDER

The U.S. Environmental Protection Agency (“EPA”) has filed a Motion To Include Additional Exhibits And Witnesses. EPA seeks to amend its previously submitted Prehearing Exchange by adding Exhibit 20 (digital photographs), Exhibit 21 (County Sedimentation Inspection Reports and Notices of Violation), and Exhibit 22 (Rainfall Records). In addition, complainant seeks to add Douglas Miller to its witness list. Mr. Miller has been identified as a Regional Engineer with the Land Quality Section of the North Carolina Department of Environmental Resources.

Overcash Gravel and Grading Company, Inc. (“Overcash”) objects to EPA’s motion, except as it pertains to Exhibit 20. In that regard, Overcash does not object to Exhibit 20 “provided a proper foundation is given at the time the photos are introduced in evidence, provided the photos are otherwise relevant to the issues, and provided they are only used to illustrate admissible testimony.” Opp. at 1.¹ As explained below, EPA’s motion is **Granted**.

With respect to Exhibit 22, “U.S. Geological Survey (U.S.G.S.) rainfall records of the Concord Regional Airport and the Odell Elementary School,” respondent submits that “[f]irst hand testimony of the scattered showers and rainfall at the location in question is available and is the best evidence.” Opp. at 1. Respondent’s argument is unpersuasive. At this early stage, it would appear that the U.S.G.S. rainfall data is not only relevant to the issues in this case, but it may well be the “best evidence” of rainfall in the affected area.

¹ The parties are reminded that the listing of exhibits in an informational Prehearing Exchange submission does not mean that the exhibits are automatically a part of the record in this matter. The exhibits must formally be admitted into evidence.

Exhibit 21 and the expected testimony of Douglas Miller address respondent's past actions at construction sites not at issue in this proceeding. EPA states that this exhibit and expected testimony are "material and probative as to determining the scope and seriousness of Respondent's history of violations," and its "history of noncompliance with the Clean Water Act." Mot. at 2-3. In opposition, Overcash argues that this information is "not relevant, material, and probative" to the issues to be tried here. Moreover, it submits that this information is prejudicial and its admission into the record will substantially increase the time needed to try this case. Opp. at 1-2.

While respondent's objections are well-taken, EPA may amend its Prehearing Exchange to include Exhibit 21 and list Douglas Miller as a witness, but only for the very limited purpose articulated by the Environmental Appeals Board in *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 547; 1988 EPA App. LEXIS 82, 58 (EAB 1998) (notification can serve as evidence of respondent's knowledge of prohibited conduct).²

Carl C. Charneski
Administrative Law Judge

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

² It is expected that the parties can reach stipulations insofar as Exhibit 21 and the testimony of Miller are concerned.