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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
)
DOUG BLOSSOM)
)
Clam Gulch, Alaska,)
)
)
_____)

Docket No. CWA-10-2002-0131

COMPLAINANT'S RESPONSE TO
RESPONDENT'S MOTION FOR SITE VIEW

On April 28, 2004, Respondent filed a motion requesting that the presiding officer conduct a site view of Respondent's property. Respondent has failed to cite any regulatory authority, statutory authority, or case law to support its position. Instead, Respondent merely asserts that "[a] view of the site is absolutely necessary for the Administrative Law Judge to have a first-hand view of the site in question to put the alleged violations in context." Respondent's Motion for Site View at 1. Because a site view is not necessary for the presiding officer to determine any of the main issues in this case, and is inconsistent with the standard for granting a site view as established by the federal courts, Complainant opposes Respondent's Motion for Site View.

ARGUMENT

The Consolidated Rules of Practice, 40 C.F.R. Part 22, do not address site views by a presiding judge. Therefore, Federal court practice may be looked to for guidance. The United States Court of Appeals for the 7th Circuit has noted that the determination as to whether to grant a site view, and which procedural safeguards to implement, depend on the purpose: whether the site visit is evidentiary in nature, or merely to familiarize the judge with the object of the subject of the case, to better understand and weigh the testimony and evidence submitted at trial. See EEOC v. Mercy Hospital and Medical Center, 709, F.2d 1195, 1200 (7th Cir. 1983). The 7th Circuit stated:

. . . [A] district court should be extremely cautious in conducting a view in a bench trial, and such should be a rare rather than a common practice. In each instance, agreement of counsel should be sought, and if such is not forthcoming, the court should reconsider and not go forward unless conducting the view appears to be absolutely necessary.

Id. In this matter, a site visit is hardly necessary.

There is little to be gleaned from a site view over three years after the alleged violation occurred in this matter. Resolving the main issues in this case: 1) whether the area in question is a wetland; 2) whether the wetland is jurisdictional; and, 3) whether the silviculture exemption applies will not be aided by a site visit by the presiding officer.

Determining whether the area where the violation occurred is a wetland should be determined based on the expert testimony of EPA's witnesses trained in the area of wetland identification and delineation. The presiding officer's observations of the site will not aid her in

making this determination. Furthermore, numerous photographs have been filed as part of both Complainant and Respondent's prehearing exchanges. See, e.g., Complaint's Exhibits 5 (10 photos), 8 (5 photos), 9 (2 photos), 10 (5 photos), 11 (2 photos), 19 (4 aerial photos), and Respondent's Exhibits 9-11 (aerial photos of property), 17-20 (photos of site), 30 (6 photos). In addition, Respondent has submitted a videotape as part of its prehearing exchange showing the area in question. See Respondent's Exhibit 29.

Similarly, determining whether the wetland is one over which EPA has jurisdiction would not be aided by a site view. Again, the presiding officer's determination with respect to the hydrologic connection between the wetlands and Cook Inlet should be based on the testimony of Complainant's and Respondent's witnesses. Both parties have listed witnesses who will discuss the flow of water across Respondent's property. See e.g. proposed testimony of Complainant's witnesses Phil North and Peter Stokely, and Respondent's witness, Mr. Mike Tauriainen as described in Prehearing Exchanges.

Finally, a site view, over three years after the alleged violation occurred, would not facilitate whether Respondent can establish that the silviculture exemption applies in this case. Again, Respondent has listed witnesses as part of its Prehearing Exchange, (e.g. Mr. Blossom, Mr. Cluckas) who will testify regarding Mr. Blossom's history of alleged silviculture activity on his property.

In In re: The Barden Corporation, Respondent submitted a motion for site view 12 days before the hearing was scheduled to being. See In re: The Barden Corporation, No. CAA-1-2000-0070, 2001 EPA ALJ LEXIS 177, at *1 (Order on Respondent's Motion for a View and on

Complainant's Motion to Supplement Prehearing Exchange and Request for Official Notice, Biro, Nov. 20, 2001). The presiding officer rejected that motion, noting among other things, that the motion was filed after the deadline for filing prehearing motions. See id. at *3. In addition, the presiding officer noted that although the hearing was scheduled to begin in a few days, the scope, procedural safeguards and logistics of a site view had not been determined, and that the value of a site view may be compromised where almost two years have elapsed since the violations were alleged to have occurred. See id. at *6.

The same reasons for denying the site view in Barden exist in this case. As in Barden, Respondent's motion is not timely, as it has been filed only five days before the hearing is scheduled to begin.¹ Considering that Complainant's counsel and out-of state witness are all leaving on either April 30th and May 1st to fly to Alaska, this leaves virtually no time to determine the scope, procedural safeguards, and logistics of a site view. In addition, as in Barden, over three years have elapsed since the alleged violation in this matter. Both parties have listed witnesses to testify about their observations at or around the time of the violation, and both parties have submitted numerous photographs showing Respondent's property at the time of the violations and in the years subsequent to the alleged violations.

Finally, Complainant questions Respondent's assertion that there should be no need for a

¹ Respondent's argument that it did not file this motion for a site visit until five days before the hearing because in most years the property would still be covered in snow in early May is unconvincing. See Respondent's Motion for Site Visit at 1-2. Respondent certainly could have filed its motion sooner, informing the presiding officer and EPA that although in most years Respondent expects that a site visit by early May would not be possible, that if circumstances occur where a site visit is possible, Respondent requests a site visit. At the very least, this would have allowed for the scope, procedural safeguards, and logistics to be worked out ahead of time.

continuance of the hearing even allocating half a day for a site view. See Respondent's Motion for Site View at 2. Respondent has listed 14 witnesses as part of its Prehearing Exchange and Supplement to its Prehearing Exchange. It is Complainant's understanding that Respondent still intends to call 13 of them. Allocating half a day for a site view would make it even less likely these proceedings could be completed during the week of May 3rd.

CONCLUSION

Based on the reasons described above, a site view is far from being "absolutely necessary" for determining any of the main issues in this case, and Complainant opposes Respondent's Motion for Site View.

Respectfully submitted this 29TH day of April, 2004.

A handwritten signature in blue ink, appearing to read "Jeffrey Kopf", written over a horizontal line.

Jeffrey Kopf
Mark A. Ryan
Assistant Regional Counsels
EPA, Region 10

CERTIFICATE OF SERVICE

In the Matter of Doug Blossom, No. CWA-10-2002-0131, I hereby certify that a copy of Complainant's RESPONSE TO RESPONDENT'S MOTION FOR SITE VIEW was sent to the following persons in the manner specified on the date below:

Original and true and correct copy of each document by hand delivery:

Carol Kennedy, Regional Hearing Clerk
US EPA, Region 10
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

A true and correct copy of each document by fax and Pouch mail to:

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

A true and correct copy of each document by fax and first class mail to:

Arthur S. Robinson, Attorney at Law
Robinson & Beiswenger
35401 Kenai Spur Highway
Soldotna, AK 99669

Dated: April 29, 2004

Melissa L. Whitaker
U.S. Environmental Protection Agency