

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
DOUG BLOSSOM,) **DOCKET NO. CWA-10-2002-0131**
)
Respondent.)

ORDER DENYING RESPONDENT’S MOTION FOR SITE VIEW

By a Motion for Site View dated April 28, 2004, and accompanying Affidavit in Support, Respondent requests that the Administrative Law Judge (“ALJ”) presiding over these proceedings make a “site view” of Respondent’s property. Respondent states the purpose of the site view as follows: “A view of the site is absolutely necessary for the [ALJ] to have a first-hand view of the site in question to put the alleged violation in context.” Motion for Site View at 1. Respondent’s Motion for Site View is accompanied by a “Motion for Leave to File Late Motion for Site View” (“Motion for Leave”) and accompanying Affidavit in Support.

The Complaint in this case was filed nearly two years ago on July 26, 2002. The hearing in this matter is scheduled to commence on May 3, 2004. Respondent submitted its Motion for Site View by facsimile on April 28, 2004, just 5 days before hearing. The Consolidated Rules of Practice at 40 CFR § 22.22(a)(1) provides, in essence, that if a party fails to provide to all parties any document, exhibit, witness name or summary of testimony at least 15 days prior to the hearing date, the presiding judge shall not admit it unless the party proffering it had good cause for failing to do so. Because the hearing in this matter is set for May 3, 2005, the applicable deadline for exchanging evidence was November 18, 2004. Respondent’s Motion is therefore untimely, being filed less than 15 days prior to commencement of the hearing. Respondent’s Motion for Leave argues that its Motion for Site View “was not made earlier because at the time the hearing was set ... the Respondent did not believe that enough snow would have melted by then for viewing to be meaningful.” Motion for Leave at 1-2. Complainant counters that:

Respondent ... could have filed its motion sooner, informing the [ALJ] 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 visit. At the very least, this would have allowed for the scope, procedural safeguards, and logistics to be worked out ahead of time.

Complainant’s Response at 4, n.1. Complainant’s argument is well taken. Further, the hearing in this case was Respondent has failed to state good cause for filing it’s Motion for Site View at

this late date. Respondent's Motion for Leave is therefore denied, and Respondent's Motion for Site View is denied for failure to meet the applicable deadline. Furthermore, Respondent's Motion for Site View is also denied on its merits.

The Consolidated Rules of Practice, 40 CFR Part 22, do not address "site views" by ALJs. Therefore, federal rules and decisions may be looked to for guidance. *In re Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2 (EAB 1994). In the case of *In re Barden Corp.*, CAA-1-2000-0070, EPA ALJ LEXIS 177 (Biro, J., Nov. 20, 2001), the ALJ looked to such federal guidance on the issue of a "site view," holding:

Courts have suggested procedural safeguards, such as both parties and a court reporter being present during the site view, and *limitations on the scope of the view*. EEOC v. Mercy Hospital and Medical Center, 709 F.2d 1195, 1200 (7th Cir. 1983); Southland Enterprises, Inc., 24 Cl. Ct. 596, 1991 U.S. Cl. Ct. LEXIS 573 (Dec. 9. 1991). The determinations 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. Mercy Hospital and Medical Center, 709 F.2d at 1200; 76 Am. Jur. 2d *Trial* § 1247, at 199. ... Regardless of the purpose, however, the following guidance from the Court of Appeals for the Seventh Circuit is appropriate to apply here:

... [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*.

Mercy Hospital and Medical Center, 709 F.2d at 1200 [(emphasis added)]. In the present matter, Complainant does not agree to the site view, and it does not appear to be absolutely necessary. Moreover, the hearing is scheduled to commence in a few days, yet the scope, procedural safeguards and logistics of a site view have not been determined, and there is no time to make arrangements. In addition, the value of a site view may be compromised after passage of time, where almost two years have elapsed since the violations were alleged to have occurred. Accordingly, the Respondent's Motion for View is DENIED.

Barden Corp. at 2-3 (emphasis added). Whether to grant a site view is within the discretion of the ALJ. See Northwestern National Casualty Co. v. Global Moving & Storage, Inc., 553 F.2d 320, 323 (6th Cir. 1976); 76 Am.Jur.2d *Trial* § 1247 at 199 (1975).

As in *Barden Corp.*, Respondent in the present case articulates a "familiarizing" purpose; agreement of counsel is not forthcoming (*see* Complainant's Response, filed April 29, 2004); the hearing is scheduled to commence in a few days, yet the scope, procedural safeguards and

logistics of a site view have not been determined, and there is no time to make arrangements;¹ and the value of a site view may well be compromised after passage of time, where *more than three years* have elapsed since the violations were alleged to have occurred. Further, a site view is not “absolutely necessary” in light of the Prehearing Exchanges of both parties containing numerous maps, aerial photographs, and surveys of the property;² photographs of the property;³ and a videotape of the property;⁴ as well as the numerous witnesses who are scheduled to testify as to the nature and description of the property.⁵

Accordingly, Respondent’s Motion for Site View is **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: April 30, 2004
Washington, D.C.

¹Respondent’s assurance that “[a]rrangements can be made by Respondent for the transportation of the [ALJ], attorneys for the parties, and the clerk/court reporter for such a visit” (Motion for Site View at 1) falls well short of “determining the scope, procedural safeguards and logistics of a site view.”

²See RX-1 through 4, 6, 7, 9 through 11, and 28; CX-19 through CX-23.

³See RX-16 through 20, and 30.

⁴RX-29.

⁵Respondent’s eye-witnesses to the property include Doug Blossom, Joseph Malatesta, Jeff Graham, Al Peterson, David Martin, Gus Wiley, Mitsy Blossom, Jeff Fox, Mike Tauriainen, Henry Knackstedt, Bob Clucas, and Jerry Johnson. Complainant’s eye-witnesses to the property include Phil North and Mark Kinney.