UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
THE BARDEN CORPORATION,	**)**	**Docket No. CAA-1-2000-0070**
	)	
Respondent	**)**	

ORDER ON RESPONDENT'S MOTION FOR A VIEW AND ON COMPLAINANT'S MOTION TO SUPPLEMENT PREHEARING EXCHANGE AND REQUEST FOR OFFICIAL NOTICE

I. Motion for a View

The hearing in this matter is scheduled to commence on November 27, 2001. On November 15, 2001, Respondent, The Barden Corporation (Barden) submitted a Motion for a View (Motion), requesting the Presiding Judge to view Respondent's facility, which houses the vapor degreasers which are the subject of the violations alleged in this matter. Respondent asserts that such viewing will be helpful to the trier of fact "in determining material factual issues," and in "placing the alleged violations in the context of Barden's overall compliance as well as evidencing Barden's commitment to protecting the environment." Respondent adds that its "strong investment in environmental protection and monitoring equipment and its current state of compliance with detailed and complex environmental regulations are relevant issues."

Complainant, in its Opposition to the Motion, asserts first that Respondent failed to meet the deadline for prehearing exchange. Complainant points out the requirement of 40 C.F.R. § 22.22(a)(1), which 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. Complainant asserts that November 13, 2001 was the applicable deadline for exchanging evidence, and that Respondent's Motion was therefore untimely, being filed less than 15 days prior to commencement of the hearing. Complainant asserts further that Respondent failed to provide any justification for failing to inform Complainant by that date of its intention to put a view of the facility into evidence.

Second, Complainant asserts that a viewing of the facility would constitute evidence that is irrelevant, immaterial and of little probative value. Complainant argues that a view of the facility as it exists today, and its current compliance status, would not shed light on the alleged violations, which are claimed to have occurred in the late 1990's. Third, Complainant points out that conducting a view will likely require continuation of the hearing.

In its Reply, Respondent argues that a site view is not subject to the requirements of 40 C.F.R. § 22.22(a)(1). As to logistics, Respondent asserts that a site view will require less than four hours, including travel time, and that a view in advance of testimony may reduce the amount of time required at trial, streamlining the testimony and the Presiding Judge's understanding of the testimony. As to the purpose of the view, Respondent argues that a view provides a physical context for the location and size of each of the vapor degreasers, and will provide a clearer understanding of the issues and evidence presented at trial. Respondent argues further that a view is relevant as to Count 2, whether Respondent properly posted operating requirements on or near the degreasers at issue, but that the locations of the postings on the date in question can be pointed out by testimony at hearing.

The due date for prehearing motions, set forth in the Order Scheduling Hearing, expired on September 28, 2001. Respondent offers no justification for failure to file its Motion earlier. Respondent's Motion is therefore denied for failure to meet that deadline.

Furthermore, the Respondent's Motion is also denied on its merits. The Consolidated Rules of Practice, 40 C.F.R. part 22, applicable to this proceeding, do not address site views by a presiding judge. Therefore, Federal court practice may be looked to for guidance. A trial judge may, in his discretion, view the premises or objects which are the subject of litigation. *Northwestern National Casualty Co., v. Global Moving & Storage, Inc.,* 533 F.2d 320, 323 (6th Cir. 1976); 76 Am. Jur.2d *Trial* § 1247, at 199 (1975). It has been held that the "mere fact that the appearance of the site had changed since the relevant events did not, without more, establish that allowing a view was an abuse of discretion." *Northwestern,* 533 F.2d at 323. The court may consider, in exercising its discretion, such factors as orderliness of the trial, whether the trier of fact would be confused or misled, whether a view would be time-consuming or logistically difficult, and whether cross-examination would be permitted regarding the details of the scene. *United States v. Crochiere,* 129 F.3d 233 (1st Cir. 1997), *cert. denied,* 523 U.S. 1048 (1998)(jury view of crime scene). 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.

Respondent in its Reply appears to modify its proposed purpose of the site view from an evidentiary purpose to a familiarizing purpose. 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. 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.**

II. Complainant's Motion to Supplement Prehearing Its Exchange

On November 13, 2001, Complainant submitted a Motion to Supplement its Prehearing Exchange and Request for Official Notice (Motion to Supplement). Complainant did not state therein whether Respondent objected to the relief requested, and a response to the Motion to Supplement has not been received from Respondent. In that the time for filing a response under 40 C.F.R. § 22.16(b) will not expire until the hearing commences, the Motion to Supplement will be ruled upon herein. If Respondent deems it necessary, Respondent may move for reconsideration of the ruling at the hearing.

Complainant moves to supplement its Prehearing Exchange with seven additional documents. Complainant filed its Motion to Supplement less than fifteen days prior to the hearing date. The Consolidated Rules of Practice provide, at 40 C.F.R. § 22.22(a):

> If . . a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged . . . to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

Complainant apparently assumes that the 15 day time period "expires" on the Federal holiday, November 12, or preceding weekend, and thus under 40 C.F.R. § 22.7(a) the time period is "extended to include the next business day." Arguably, because the time period in Section 22.22(a) runs *back* in time from the date of hearing, the time period does not "expire" -- meaning "come to an end" or terminate -- on the weekend or Federal holiday. However, Respondent did not object to Complainant's proposal to file its Motion to Supplement, either in the prehearing conference or in any written opposition. Considering the nature of the documents in Complainant's Supplement to its Prehearing Exchange, there appears to be no prejudice to Respondent in granting Complainant's Motion to Supplement.

Accordingly, Complainant's Motion to Supplement its Prehearing Exchange is **GRANTED.**

III. Request for Official Notice

Complainant requests the Presiding Judge to take official notice of Federal and state regulations, including two letters which were incorporated by reference in the Federal regulations. Complainant provides copies of these regulations, and the two letters as Prehearing Exchange Exhibits 27 and 28.[1] Complainant cites to 40 C.F.R. § 22.22(f), providing that official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge of the Agency. In turn, Complainant cites to Federal Rule of Evidence 201(b), which provides in pertinent part that a judicially noticed fact "must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Complainant states that the two letters can be accessed by contacting the State of Connecticut Department of Environmental Protection, or EPA Region 1 Air Program Branch.

Courts have held that published regulations are not generally governed by Federal Rule of Evidence 201, as the scope of Rule 201 states that it governs only judicial notice of adjudicative facts. *United States v. Wolny*, 133 F.3d 758 (10th Cir. 1998); *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001). However, some courts have allowed judicial notice of regulations; the Tenth Circuit has explained, "A matter of law can be judicially noticed as a matter of fact; *i.e.*, the court can look to the law not as a rule governing the case before it but as a social fact with evidential consequences." *City of Wichita v. United States Gypsum Co.*, 72 F.3d 1491, 1496 (10th Cir. 1996).

Whether Complainant is relying on the Federal and state regulations as matters of fact, or whether Complainant relies on the Federal and state regulations as the laws governing this proceeding, is of no consequence, as they are published and capable of determination by resort to readily available legal research tools, and are not subject to dispute. The two letters are apparently accessible and capable of verification as stated by Complainant, from government sources.

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[1] The Complainant's Motion refers to the two letters included in Exhibit 27 as being from the "Connecticut Department of Environmental Protection Agency." The letters attached to Prehearing Exchange Exhibit 27 are actually from the "*State of Connecticut Department of Environmental Protection*." Further the Motion states one of the two letters is dated "September 12, 1989." The Prehearing Exchange contains a letter dated September 12, 19*91*. It is assumed that the Motion, written in haste, merely contains scriveners errors, and that the documents contained in the Prehearing Exchange are those as to which Official Notice is being asked to be taken.

Accordingly, Complainant's Request for Official Notice is **GRANTED.**

Susan L. Biro
Chief Administrative Law Judge

Dated: November 20, 2001
Washington, D.C.