

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)
)
ROADWAY SURFACING, INC.) **Docket No. CWA-05-2002-0004**
)
Respondent.)

**ORDER ON MOTION TO STRIKE
RESPONDENT'S PRE-HEARING EXCHANGE**

The above-titled case involves essentially the same set of alleged facts as in the case of *In the Matter of Anthony I. Forster*, CWA-05-2002-0005 (“*Forster*”). Both cases allege that there was a discharge of pollutants into navigable waters, in violation of the Clean Water Act, although the instant case alleges that Roadway Surfacing, Inc. (“*Roadway*”) filled navigable waters at the direction of Anthony Forster whereas the other case alleges that Forster “caused or allowed” the filling of those navigable waters. Complainant has also admitted that the violations alleged “. . . in each of these cases arise out of the same factual basis . . .”.¹

By Order of the Chief Administrative Law Judge, on July 22, 2002, the instant case was transferred from Judge Charneski to the undersigned, who already is presiding over the *Forster* case. That “Order of Redesignation” was executed in order to promote efficiency in ruling on a motion to consolidate the *Forster* and *Roadway* cases and to permit a joint hearing to be conducted.²

On May 29, 2002, Complainant filed its Motion to Strike Roadway’s prehearing exchange. In that Motion, Complainant points to deficiencies in Roadway’s prehearing exchange, including a lack of detailed answers. In the alternative to striking the exchange, Complainant would have Roadway file a more detailed prehearing exchange. Roadway did not file a response to the Motion.

Judge Charneski’s prehearing order in *Roadway* called, *inter alia*, for the parties to list witnesses intended to be called along with a narrative summary of their expected testimony. Although Roadway filed a prehearing exchange, its “narratives” provided little information as to

¹ “Response of the Administrator’s Delegated Complainant to Respondent’s Motion to Consolidate for Hearing” at 1.

² By a separate order, issued today, the *Forster* and *Roadway* cases have been consolidated.

the testimony expected from its witnesses. For instance, as to one of the fact witnesses, Roadway's prehearing exchange states: "Lyle Eng will testify that he is an employee of Respondent. He will testify as to the work done on the subject premises." Similarly, for two expert witnesses it identifies, Roadway only informs that "Wayne Swenson or Carl Hetfeld are land surveyors who will testify as to the condition of the property when surveyed by them." These responses do not constitute a sufficient narrative summary of the witnesses' expected testimony and consequently they fail to fulfill the spirit of the prehearing exchange process which, in this respect, is to inform each side of the essence of the expected testimony. *See In the Matter of Cello-foil Products*, 1998 WL 219903 (E.P.A), February 18, 1998, *NLRB v. Croft Metals, Inc.*, 1979 WL 4853 (5th Cir.), January 5, 1979, *Mandelbaum v. Commissioner of I.R.S.* , 1990 WL 57560 (U.S. Tax Ct.) May 7, 1990. In contrast to Roadway's terse prehearing exchange, EPA's response to the prehearing order and Respondent Forster's response in the prehearing exchange for the matter consolidated today, provide the type of informative narratives describing the testimony expected from its listed witnesses.³

Because the prehearing exchange does not meet the informational requirements of the prehearing order, the Court directs that Respondent Roadway file a supplemental response which provides a narrative summary of the witnesses' expected testimony within ten (10)days of this Order.

So ordered.

William B. Moran
United States Administrative Law Judge

Dated: September 18, 2002
Washington, D.C.

³Forster and Roadway are represented by different legal counsel from distinct law firms.