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JUN 6 2003

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

v.)

PCB 99-92

HARTZ CONSTRUCTION CO., INC.,)
an Illinois corporation,)

(Enforcement - Land)

Respondent.)

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 6th day of June, 2003, I filed with the Clerk of the Illinois Pollution Control Board a Stipulation and Proposal for Settlement and a Motion to Request Relief From Hearing Requirement, copies of which are attached hereto and hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN

Attorney General of the
State of Illinois

By: Rebecca A. Burlingham

REBECCA A. BURLINGHAM
Senior Assistant Attorney General
Environmental Bureau
100 W. Randolph St., 11th Fl.
Chicago, Illinois 60601
(312) 814-3776

Date: June 6, 2003

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

Johnine J. Brown
Brown Environmental Law Group, P.C.
836 West Ancona
Chicago, Illinois 60622

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
11th Floor
Chicago, Illinois 60601

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STATE OF ILLINOIS
Pollution Control Board

MOTION TO REQUEST RELIEF
FROM HEARING REQUIREMENT

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and requests relief from the hearing requirement in the above-captioned matter. In support thereof, the Complainant states as follows:

1. On December 29, 199, a Complaint was filed with the Pollution Control Board ("Board") in this matter. On June 6, 2003, a Stipulation and Proposal for Settlement was filed with the Board.

2. Section 31(c)(2) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31(c)(2), effective August 1, 1996, allows the parties in certain enforcement cases to request relief from the mandatory hearing requirement where the parties have submitted to the Board a stipulation and proposal for settlement. Section 31(c)(2) provides:

Notwithstanding the provisions of subdivision (1) of this subsection (c), whenever a complaint has been filed on behalf of the Agency or by the People of the State of Illinois, the parties may file with the Board a stipulation and proposal for settlement accompanied by a request for relief from the requirement of a hearing pursuant to subdivision (1). Unless the Board, in its discretion, concludes that a hearing will be held, the Board shall cause notice of the stipulation,

proposal and request for relief to be published and sent in the same manner as is required for hearing pursuant to subdivision (1) of this subsection. The notice shall include a statement that any person may file a written demand for hearing within 21 days after receiving the notice. If any person files a timely written demand for hearing, the Board shall deny the request for relief from a hearing and shall hold a hearing in accordance with the provisions of subdivision (1).

3. No hearing is currently scheduled in the instant case.

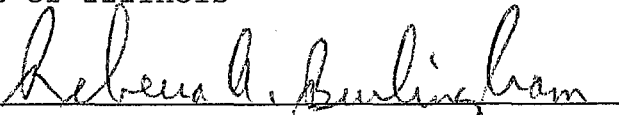
4. The Complainant requests the relief conferred by Section 31(c)(2) of the Act.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, requests relief from the requirement of a hearing pursuant to 415 ILCS 5/31(c)(2), effective August 1, 1996.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the
State of Illinois

By:


REBECCA A. BURLINGHAM
Senior Assistant Attorney General

Environmental Bureau
188 W. Randolph St., 20th Fl.
Chicago, Illinois 60601
(312) 814-3776

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STIPULATION AND PROPOSAL FOR SETTLEMENT

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, on her own motion, and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"), and Respondent, HARTZ CONSTRUCTION CO., INC. ("Hartz"), by its attorney, do hereby submit this Stipulation and Proposal for Settlement ("Agreement" or "Stipulation"). The parties agree that the Complainant's statement of facts contained herein is agreed to only for the purposes of settlement. The parties further state that neither the fact that a party has entered into this stipulation, nor any of the facts stipulated herein, shall be admissible into evidence, or used for any purpose in this, or any other proceeding, except to enforce the terms hereof, by the parties to this agreement.

Notwithstanding the previous sentence, this Stipulation, and any Illinois Pollution Control Board ("Board") order accepting same, may be used as evidence of a past adjudicated violation of the Act as alleged herein, pursuant to Section 42(h) of the Illinois

Environmental Protection Act ("Act"), 415 ILCS 5/42(h) (2002), in determining appropriate civil penalties for any future violations of the Act. This Stipulation shall be null and void unless the Board approves and disposes of this matter on each and every one of the terms and conditions of the settlement set forth herein.

I.

JURISDICTION

The Board has jurisdiction of the subject matter herein and of the parties consenting hereto pursuant to the Act, 415 ILCS 5/1 et seq. (2002).

II.

AUTHORIZATION

The undersigned representatives for each party certify that they are fully authorized by the party whom they represent to enter into the terms and conditions of this Stipulation and to legally bind them to it.

III.

APPLICABILITY

This Stipulation shall apply to, and be binding upon, the Complainant and Respondent, and any officer, agent, employee or servant of Respondent, as well as the Respondent's successors and assigns. The Respondent shall not raise as a defense to any

enforcement action taken pursuant to this settlement the failure of its officers, directors, agents, servants or employees to take such action as shall be required to comply with the provisions of this settlement.

IV.

STATEMENT OF FACTS

1. The Illinois EPA is an administrative agency of the State of Illinois, created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2002), and is charged, *inter alia*, with the duty of enforcing the Act.

2. Respondent Hartz, at all times relevant to the Complaint in this matter, was and is an Illinois corporation.

3. Hartz, at all times relevant to the Complaint in this matter, owned and/or operated and exercised control over the property known as the Eagle Ridge subdivision ("Property" or "Site"). The Property consists of seventy-seven (77) acres of land and is generally bounded by 107th Street on the north, the Illinois Harbor Belt railroad track and 109th Street on the south, Central Avenue on the west, and the Wolfe Wildlife Refuge on the east, in Oak Lawn, Cook County, Illinois.

V.

VIOLATIONS

The Complaint alleges the following violation:

OPEN DUMPING - Violation of Section 21(a) of the Act, 415 ILCS 5/21(a) (2002)

VI.

NATURE OF RESPONDENT'S OPERATIONS

Before 1986, the Property was used for the disposal of debris from the 1967 tornado and possibly other materials.

Sometime after Hartz purchased the Property in 1986, Hartz began constructing a residential subdivision on the Site called Eagle Ridge. Hartz's construction activities included excavating areas for sewers and foundations, and constructing streets throughout the subdivision.

VII.

EXPLANATION OF HARTZ' COMPLIANCE EFFORTS

1. In early 1994, during the construction of Phases 3, 4 and 5, Hartz discovered buried materials which the Illinois EPA alleges were waste upon excavation. The alleged waste included construction and demolition debris, such as bricks, broken concrete, stone, dirt, rock, sand, chunks of wood, reclaimed asphalt pavement, gypsum, plaster, paper, landscape waste, tarry soils, scrap metal, a metal drum, and a battery casing.

2. On August 11, 1994, the Illinois EPA sent a letter to Hartz setting out the Illinois EPA's position regarding the proper management of alleged waste found at the Site, which the Illinois EPA viewed as special wastes requiring off-site disposal. On August 29, 1994, Hartz responded to the August 11, 1994 letter by setting out its position that most of the materials it found were not special wastes and did not threaten health or the environment, and further proposing that it was possible to segregate wastes and suspect soils requiring off-site disposal from uncontaminated construction and demolition materials.

3. On November 22, 1994, Hartz provided the Illinois EPA with a proposal for the management of the alleged waste it found at the Site.

4. On November 15, 1995, the Illinois EPA sent a Pre-Enforcement Conference letter to Hartz setting forth the alleged violations. On December 13, 1995, a Pre-Enforcement Conference was held between the Illinois EPA and Hartz.

5. On January 26, 1996, the Illinois EPA sent a Pre-Enforcement Conference Follow-Up Letter requesting Hartz to submit a response with respect to the alleged violations, and provide a proposal for their resolution.

6. On February 1, 1996, Hartz provided the Illinois EPA its response to the Pre-Enforcement Conference Follow-Up Letter. The response again denied that Hartz had caused or allowed open dumping, explained the actions it was taking to use or dispose of the alleged

waste, and proposed a protocol therefor.

7. Hartz tested ten (10) soil borings in October 1999. Hartz asserts that the results showed that the soils were not hazardous; that Hartz segregated usable from non-usable materials; that about ten cubic yards of metal scrap was collected and taken to a salvage yard, and a metal drum and a battery casing were taken to an off-site landfill; and that the uncontaminated construction and demolition debris were used as road base.

VIII.

FUTURE PLANS OF COMPLIANCE

1. Hartz in the future shall comply with all requirements of the Act, 415 ILCS 5/1 et seq. (2002), and the Board Regulations, 35 Ill. Adm. Code Subtitles A through H.

2. Hartz shall cease and desist from future violations of the Act and Board regulations, including but not limited to the section of the Act that was the subject matter of the Complaint, as outlined in Section V. of this Stipulation.

IX.

IMPACT ON THE PUBLIC RESULTING FROM ALLEGED NON-COMPLIANCE

Section 33(c) of the Act, 415 ILCS 5/33(c) (2002), provides as follows:

In making its order and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including,

but not limited to:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the questions of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance.

In response to these factors the parties state as follows:

1. There is no known injury resulting from Hartz's acts and omissions as alleged in the Complaint.

2. The Property, and the residential subdivision located thereon, that are the subject of the Complaint have social and economic value.

3. The Property, and the residential subdivision located thereon, that are the subject of the Complaint are suitable to the area in which they are located.

4. Complainant does not seek the removal of the alleged waste. The materials used as roadbed have been capped by the paved streets. The likelihood that residents will be exposed to the wastes through direct contact or through the drinking water is

minimal because of the pavement cap and because the subdivision obtains its water from Lake Michigan.

5. See paragraph 4, above.

X.

CONSIDERATION OF SECTION 42(h) FACTORS

Section 42(h) of the Act, 415 ILCS 5/42(h)(2002), provides as follows:

In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;
4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act;

and

5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

In response to these factors the parties state as follows:

1. The Illinois EPA first observed the alleged wastes at the Site on June 10, 1994. By late 1999, Hartz reported that it had sent about ten cubic yards of metal scrap to a salvage yard and disposed of off site at a permitted facility a metal drum and a battery casing as reported to the Illinois EPA on November 12, 1999. Although there were no known injuries resulting from the alleged violations, the Illinois EPA believes that the alleged wastes could have threatened human health and the environment if improperly managed or if left where they were found at the Site.

2. Complainant asserts that Hartz did not demonstrate diligence in returning to compliance because all of the alleged wastes were not removed from the Site. At some time after the alleged wastes were excavated at the Eagle Ridge subdivision, Hartz claimed that it recycled the metal scrap at a salvage yard, and disposed of the metal drum and battery casings at an off-site disposal facility, but the remaining material was used on site as road base. The remaining materials that were excavated were not disposed of off site. Hartz asserts that it did demonstrate diligence in returning to compliance during construction of Phases 3, 4 and 5 of Eagle Ridge. It has stated that it segregated

suspected materials from the remaining materials and tested soil in 1994 and 1999.

3. Complainant asserts that Hartz has realized an economic benefit by disposing of the alleged wastes on site under the new streets in the subdivision. Hartz asserts that it was forced to incur the costs of staff time, environmental consultants, laboratories and attorneys in responding to the Illinois EPA's investigation. Some of the cost was offset by being able to use some of the found materials (alleged wastes) as road base in lieu of soil brought in from off site. Based upon conflicting characterizations and a lack of information about the alleged waste present at the Site, Complainant is unable to calculate with reasonable certainty the economic benefit realized.

4. The parties believe that a civil penalty of Thirty-One Thousand Five Hundred Dollars (\$31,500.00) is appropriate in view of the civil penalty provisions cited above.

5. There have been no adjudicated violations of the Act by Hartz.

XI.

CEASE AND DESIST

Hartz shall cease and desist from future violations of the Act and Board Regulations, including but not limited to those sections of the Act that were the subject matter of the Complaint as outlined in Section V of this Stipulation.

XII.

TERMS OF SETTLEMENT

1. Hartz denies the violations alleged in the Complaint filed in this matter and referenced herein but wishes to settle the case to avoid the cost, time and uncertainty of further litigation.

2. Hartz shall pay a civil penalty of Thirty-One Thousand Five Hundred Dollars (\$31,500.00) into the Illinois Environmental Protection Trust Fund within thirty (30) days from the date the Board adopts a final opinion and order approving this Stipulation. Payment shall be made by certified check or money order, payable to the Illinois Environmental Protection Agency, designated to the Illinois Environmental Protection Trust Fund, and shall be sent by first class mail to:

Illinois Environmental Protection Agency
Fiscal Services Section
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794

A copy of the check shall be sent to:

Rebecca A. Burlingham
Senior Assistant Attorney General
Environmental Bureau
100 West Randolph Street, 11th Floor
Chicago, IL 60601

Hartz shall write the case caption and number, and its Federal Employer Identification Number ("FEIN") upon the certified check or money order. *36-2540336*

3. For purposes of payment and collection, Hartz may be reached at the following address:

Hartz Construction Co., Inc.
8595 West 95th Street
Palos Hills, IL 60465-5030

4. Pursuant to Section 42(g) of the Act, 415 ILCS 5/42(g) (2002), interest shall accrue on any amount not paid within the time period prescribed herein, at the maximum rate allowable under Section 1003(a) of the Illinois Income Tax Act, 35 ILCS 5/1003(a) (2002).

a. Interest on unpaid amounts shall begin to accrue from the date the penalty is due and continue to accrue to the date payment is received.

b. Where partial payment is made on any payment amount that is due, such partial payment shall be first applied to any interest on unpaid amounts then owing.

c. All interest on amounts owed the Complainant, shall be paid by certified check payable to the Treasurer of the State of Illinois for deposit in the Environmental Protection Trust Fund and delivered in the same manner as described in Section XI.2. herein.

XIII.

COMPLIANCE WITH OTHER LAWS AND REGULATIONS

This Stipulation in no way affects Hartz's responsibility to comply with any federal, state or local laws and regulations.

XIV.

RELEASE FROM LIABILITY

In consideration of Hartz's payment of a \$31,500.00 civil penalty and its commitment to refrain from further violations of the Act and the Board Regulations, upon receipt by Complainant of the payment required by Section XI of this Stipulation, the Complainant releases, waives and discharges Hartz from any further liability or penalties for the alleged violations that were the subject matter of the Complaint herein. However, nothing in this Stipulation shall be construed as a waiver by Complainant of the right to redress future violations or obtain penalties with respect thereto.

WHEREFORE, Complainant and Respondent request that the Board adopt and accept the foregoing Stipulation and Proposal for Settlement as written.

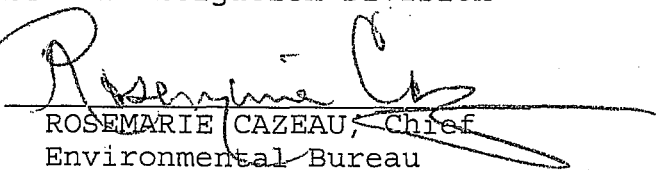
AGREED:

FOR THE COMPLAINANT:

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

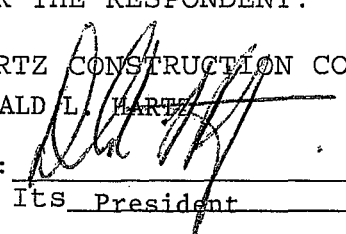
By: 

ROSEMARIE CAZEAU, Chief
Environmental Bureau
Assistant Attorney General

Dated: 5/16/03

FOR THE RESPONDENT:

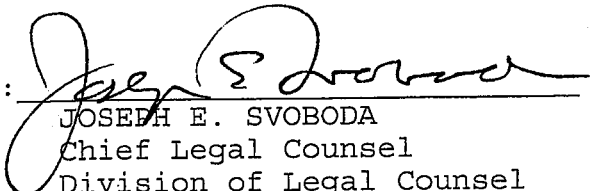
HARTZ CONSTRUCTION CO., INC.
DONALD L. HARTZ

By: 

Its President

Dated: 5-30-03

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

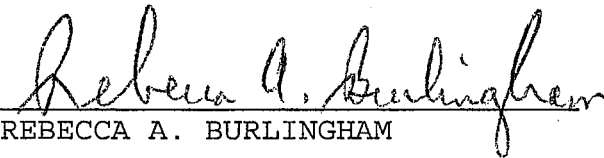
By: 

JOSEPH E. SVOBODA
Chief Legal Counsel
Division of Legal Counsel

Dated: 5-7-03

CERTIFICATE OF SERVICE

I, REBECCA A. BURLINGHAM, an Assistant Attorney General in this case, do certify that I caused to be served this 6th day of June, 2003, the foregoing Stipulation and Proposal for Settlement, Motion to Request Relief From Hearing Requirement and Notice of Filing upon the persons listed on said Notice by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.


REBECCA A. BURLINGHAM