

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of
Article 17 of the Environmental Conservation
Law of the State of New York (the "ECL"),
Article 27 of the ECL and
Article 71, Title 27 of the ECL, by

BARNEY MILLENS, and
B. MILLENS SONS, INC. d/b/a
B. MILLENS SCRAPYARD,

ORDER ON CONSENT
Index # W3-0817-98-08

Respondents.

WHEREAS,

1. Pursuant to Article 27, Title 1, of the ECL, the New York State Department of Environmental Conservation (the "Department") has jurisdiction over solid waste management including the collection, treatment and disposal of solid and hazardous waste.
2. The Department also has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. See e.g., ECL 3-0301-1.1
3. Respondents, Barney Millens and B. Millens Sons, Inc. d/b/a B. Millens Scrapyard, own and operate an automobile dismantling facility and scrapyard commonly known as 230 East Strand Street, Kingston, New York, County of Ulster, State of New York and upon information and belief recorded in the City of Kingston tax records as tax map numbers 510800 56-036-1-15, 510800 56-036-1-16 and 510800 56-036-1-17 (hereinafter collectively referred to as the "Site"). The Site is generally bounded by East Strand Street on the north, by North Street on the east, by rail road right-of-way on the south and by an extension line of Abruyn Street on the west. The Site is approximately 1.7 acres and a map depicting the Site location is attached as Exhibit "A," and
4. On or about July 11, 1996 Respondents, in the operation of the Site, are alleged to have allowed waste fluids from junk automobiles at the Site to be discharged onto the ground and into the waters of the State in violation of Section 17-0501 of the ECL. On or about July

11, 1996 Respondents are alleged to have knowingly and recklessly engaged in conduct which caused the release to the environment of a substance hazardous to public health, safety or the environment in violation of Section 71-2711 of the ECL. On or about July 12, 1996 Respondents are alleged to have failed to register a petroleum bulk storage tank of a capacity of 2,000 gallons with the Department of Environmental Conservation in violation of ECL Section 17-1009. Section 71-2703(2) of the ECL provides for a criminal penalty for violations of Article 27 of the ECL of not more than ten thousand dollars per day of violation and/or imprisonment for not more than 15 days. In addition, violations of Article 27 of the ECL are subject to civil penalties not to exceed five thousand dollars for each such violation and an additional penalty of not more than one thousand dollars for each day during which such violation continues pursuant to ECL 71-2703(1).

5. The Department and Respondents agree that the goals of this Order are for Respondents to (i) investigate and remediate the Site and (ii) establish a compliance schedule for the environmental investigation and remediation of the site owned and operated by the Respondents.

6. Respondents, having waived Respondents right to notice and hearing herein as provided by law, and having consented to the issuance and entry of this Notice and Order, agree to be bound by its terms, provisions and conditions. Respondents consent to and agree not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agree not to contest the validity of this Order or its terms.

NOW THEREFORE, HAVING CONSIDERED THIS MATTER AND BEING DULY ADVISED, IT IS ORDERED THAT:

I. Suspended Penalty. In respect to the violations described above there is assessed against Respondents a penalty of **THIRTY THOUSAND (\$30,000.00) DOLLARS** which is suspended upon the condition that Respondents remain in compliance with each term, provision and condition of this Order and Schedule of Compliance attached hereto. In the event that Respondents fail to comply with this Order, payment of the suspended penalty or such portion thereof that may be specified by the Department will be made by Respondents within 15 days after service upon Respondents of a notice of noncompliance demanding such payment. Service of such notice may be made by personal service or by certified mail return receipt requested or, if such service is refused or cannot be completed, by ordinary United States Postal Service mail. Service shall be at the Respondents address set forth in paragraph XV of this Order unless Respondents hereafter notify the Department in writing of a different address:

Neither the Department's demand for payment of a suspended penalty, nor the Respondents payment thereof, shall discharge Respondents from the obligation to comply with any obligation established under this Order.

II. **Schedule of Compliance.** Respondents shall strictly comply with the terms of this Order and with the attached Schedule of Compliance which is a part of this Order, including any report (s), plan (s), proposal(s) and other submissions made pursuant thereto. All such submissions are hereby deemed incorporated and made a part of this Order, upon approval by the Department if such approval is required, and shall be fully enforceable as part of this Order. All references herein to the terms "Order" shall be deemed to include the attached Schedule of Compliance.

III. **Stipulated Penalties.**

A. In the event that Respondents fail to comply with any of the requirements established by this Order or the attached schedule of compliance, including the Investigation Work Plan and Investigation Report and Remedial Plan required by this Order, the following stipulated penalties shall be due and payable:

PERIOD OF NONCOMPLIANCE	PENALTY PER DAY
1st day through 10th day	\$ 250.00
11th day through 20th day	\$ 500.00
21st day through 30th day	\$ 1,000.00
each day thereafter	\$ 1,500.00

B. In the event that the Department determines that Respondents have violated any provision of this Order, the Department may serve upon the Respondents a notice of noncompliance which shall set forth the nature of the violation(s) and the calculation of penalties due. Respondents shall deliver the full penalty amount to the Department within ten (10) business days after receipt of such notice. Neither the Department's demand for payment of a stipulated penalty, nor Respondents' payment thereof, shall discharge Respondents from the obligation to comply with any obligation established under this Order. The assessment of penalties as set forth above shall not limit the Department's right to seek such other relief as may be authorized by law.

IV. **Failure to make penalty payment.**

A. In the event that the Respondents fail to pay any penalty due pursuant to this Order by the due date, this Order together with a notice of noncompliance specifying the amount due may be filed and enforced by the Department as a civil judgment for the total penalty amount set forth in the notice of noncompliance, in the State of New York and in any other jurisdiction in which Respondents may reside, do business or have any assets, without

the need for any further proceedings whatsoever.

B. With regard to any penalty due pursuant to this Order which is not paid by the specified date, Respondents shall be liable for and shall pay interest from the due date at the rate specified by the New York Civil Practice Law and Rules for interest on a judgment.

V. Submission of reports. Unless otherwise stated in this Order, all reports, submissions, and notices herein required shall be made pursuant to the Schedule of Compliance which is attached hereto and made a part of this Order. The Department reserves the right to change this provision upon notice to Respondents.

VI. Approval of submissions. All submissions required of Respondents pursuant to this Order and the Schedule of Compliance pertaining to a Remedial Plan or a Pollution Prevention Plan must be approved by a professional engineer licensed in the State of New York pursuant to Article 145 of the Education Law of the State of New York and bear his or her professional seal.

VII. Inspections. For the purpose of insuring compliance with this Order, and with applicable provisions of the ECL and regulations promulgated thereunder, representatives of this Department shall be permitted access to the site and to relevant records during reasonable hours, in order to inspect and/or perform such tests as may be deemed appropriate to determine the status of Respondents' compliance.

VIII. Split samples. The Department shall have the right to obtain for the purpose of comparative analysis split samples or duplicate samples, at the Department's option, of all substances and materials sampled by Respondents pursuant to this Order.

IX. Notice of work. Respondents shall provide notice to the Department of any excavating, drilling, sampling, construction or start-up of equipment to be conducted pursuant to the terms of this Order at least five (5) business days in advance of such activities.

X. Other approvals. Respondents shall be obligated to obtain whatever permits, easements, rights of entry, approvals or authorizations that may be necessary in order to carry out its obligations under this Order. This Order shall not relieve the Respondents of the obligation to comply with any other laws, rules, or regulations of the State of New York or any other governmental authority which are applicable to Respondents' activities, nor preclude or limit such enforcement action as may be authorized by law for any such violation.

XI. Filing Notice. Within 30 days after the effective date of this Order, Respondents shall file a notice of this Order in a form set forth in Exhibit "D" with the real property transfer records (Deeds) of the Ulster County Clerk's Office, for the purpose of

providing Notice of this Order to all potential future purchasers, and shall within 30 days thereafter provide to the Department a copy of such Notice as filed showing the liber and page number at which the Notice was filed and the date of the filing. Upon completion of the work provided for in the work plan and certification by a professional engineer licensed in the State of New York pursuant to Article 145 of the Education Law of the State of New York bearing his or her professional seal that the work has been completed, Respondents may file a Notice of Completion of the work in the form set forth as Exhibit "E" in the real property transfer records (Deeds) of the Ulster County Clerk's Office. Respondents shall provide the Department with thirty days advance written notice by certified mail return receipt requested of their intent to file the "Notice of Completion" with the Ulster County Clerk.

XII. Conveyance. In the event that Respondents propose to convey the whole or any part of its interest or ownership in the Site during the period of time in which this Order is pending and the work required to be performed at the Site pursuant to the approved Work Plans has not been completed, Respondents shall, not less than 30 days prior to the consummation of such proposed conveyance, notify the Department in writing of the identity of the transferee and of the nature and date of the proposed conveyance. Respondents shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order.

XIII. Reservation of rights.

A. Notwithstanding any inconsistent paragraph of this Order, or any inconsistent provisions of law, the Department hereby explicitly reserves all rights available to it pursuant to Section 71-0301 of the ECL.

B. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's civil, criminal, or administrative rights or authorities.

C. Nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement power, either at common law or as granted pursuant to statute or regulation.

D. The Commissioner may, at any time, make a determination pursuant to Title 13 of Article 27 of the ECL as to whether the Site constitutes a significant threat to the environment and whether Respondents shall be required to undertake an inactive hazardous waste disposal site remedial program. Any such determination shall be provided to Respondents in writing. In the event such determination is made, the Department shall have the right to take such enforcement or other action as may be authorized by law, and to require appropriate modifications in any Closure Plan for the Site. The Respondents shall have the right to challenge such action, to the extent otherwise permitted by law.

XIV. Other remedies. A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

(1) any legal, administrative or equitable rights, claims, actions, suits, causes of action or demands whatsoever that the Department may have against anyone other than Respondents;

(2) the Department's right to enforce the Order administratively or at law or in equity, the terms provisions and conditions of this Order against Respondents, their directors, officers, employees, servants, agents, successors, and assigns in the event that Respondents shall be in breach of the provisions hereof,

(3) the Department's right to bring any action, administratively or at law or in equity against Respondents, their directors, officers, employees, agents, successors and assigns which the Department could otherwise maintain with respect to areas or resources that may have been affected or contaminated as a result of the release or migration of wastes from the Site or from areas in the vicinity of the Site, or to require that Respondents take such additional measures as may be necessary for the protection of public health or the environment, including interim remedial measures;

(4) the Department's rights to commence any action or proceeding relating to or arising out of any disposal of hazardous wastes at the Site, as those wastes are defined by applicable regulation; or

(5) the Respondents' right to challenge any such action by the Department, whether by administrative hearing or otherwise, to the extent otherwise permitted by law.

B. Respondents shall indemnify and hold the Department, the State of New York and their representatives harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondents and/or any of Respondents' directors, officers, employees, servants, agents, successors and assigns.

XV. Communications.

A. All written communications required by this Order shall be transmitted by United States Postal Service, by private courier service, or hand delivered as follows:

Copies of Communications from Respondents shall be sent to:

Joseph Marcogliese, P.E.
NYS DEC
200 White Plains Road - 5th Floor
Tarrytown, NY 10591-5805

Edward F. Devine
NYS DEC
Division of Environmental Enforcement
200 White Plains Road - 5th Floor
Tarrytown, NY 10591-5805

B. Communication to be made from the Department to Respondents shall be sent to :

Barney Millens
B. Millens Sons Inc.
c/o B. Millens Scrapyard
290 East Strand Street
Kingston, NY 12402

Stroock & Stroock & Lavan, LLP
180 Maiden Lane
New York, NY 10038-4982
Attention: Donald Gabey, Esq. & Martin S. Baker, Esq.

C. The Department and Respondents reserve the right to designate additional or different addresses for communication or written notice to the other.

XVI. Force majeure. Respondents shall not be in default of compliance with this Order to the extent that Respondents may be unable to comply with any provision of this Order because of the action of a national or local government body or court, an act of God, war, strike, riot or catastrophe as to any of which the negligence or willful misconduct on the part of Respondents was not a proximate cause. Respondents shall provide notice to the Department in writing immediately upon obtaining knowledge of such event, and shall

request an appropriate modification to this Order. Relief under this clause shall not be available to Respondents, with regard to a particular event, if Respondents fail to provide timely notice of such event. The Respondents shall have the burden of proving entitlement to relief under this clause, by clear and convincing evidence.

XVII. Modification.

A. If, for any reason, Respondents desire that any provision of this Order be changed, Respondents shall make timely written application therefore to the Department setting forth reasonable grounds for the relief sought, together with any supporting documentation tending to establish such grounds. Such request shall be made as soon as reasonably possible after Respondents learn of the grounds for such relief. Where, as may be determined by the Department, a request for a modification is made in a timely fashion and is properly supported and justified in light of all the circumstances, including Respondents' compliance history and the potential environmental consequences of such modification, the Department agrees that such relief will not be unreasonably denied. The granting of a requested modification may be conditioned upon Respondents' acceptance of additional terms, such as payment of penalties and/or curtailment of operation.

B. This Order may be modified by the Department pursuant to the criteria and procedures set forth at ECL Section 70-0115 and 6 NYCRR Section 621.13.

C. No change or modification to this Order shall be made or be effective as may be specifically set forth in subparagraph (A) and (B) above.

D. Unless otherwise agreed upon in writing, this Order shall be deemed to be immediately modified upon any relevant change in the Environmental Conservation Law or regulation promulgated thereunder.

XVIII. Full Settlement.

A. The Department shall not institute an action or proceeding for penalties on account of the violations described above for as long as Respondents adhere to and fully comply with the terms, provisions, and conditions of this Order. Any failure by Respondents to comply with the terms of this Order may subject Respondents to further enforcement actions for violations alleged herein. Compliance with this Order shall not excuse nor be a defense to charges of any violations of the ECL or any regulation or permit issued thereunder which may occur subsequent to the date of this Order.

B. Respondents waive their right to contest, in any hearing or judicial action or otherwise, any allegation by the Department of the facts alleged herein or that the conduct described in this Order occurred and as alleged herein.

XIX. Failure to comply. Respondents' failure to comply with any term of this Order constitutes a violation of this Order and the ECL in addition to other sanctions as may be imposed by a court of competent jurisdiction.

XX. Default. The failure of Respondents to comply fully and in a timely fashion with any provision of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification or approval issued to the Respondents by the Department.

XXI. Entire Agreement. The provisions hereof shall constitute the complete and entire Order between Respondents and the Department concerning the site. No term, condition, understanding, or agreement purporting to modify or vary any term of this Order shall be binding. No informal advice, guidance, suggestions, or comments by the Department regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall be construed as relieving Respondents of its obligation to obtain such formal approval as may be required by this Order.

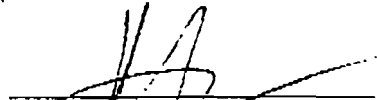
XXII. Binding effect. The provisions of this Order shall be deemed to bind the Respondents, its officers, directors, agents, employees, contractors, successors and assigns, and all persons, firms and corporations acting under or for it, including, without limitation, any subsequent operator of the Site who may carry on activities now conducted by Respondents at the Site or any interest therein.

XXIII. Authority. The individual signatories to this Order represent that they have authority to bind the respective parties by execution of this Order.

XXIV. Effective date. The effective date of this Order shall be the date this Order is signed by the Commissioner or his designee.

Dated : New Paltz, New York

September 25, 1998



Marc Moran
Regional Director
Region 3
New York State Department of Environmental Conservation

CONSENT BY RESPONDENT

Barney Millens

Respondent hereby consents to the issuing and entering of the foregoing Order, waives his right to a hearing herein as provided by law, and agrees to be bound by the provisions, terms, and conditions contained herein.


Barney Millens

STATE OF NEW YORK)
) s.s:
COUNTY OF Ulster)

On this 18 day of ~~August~~ ^{September} 1998, before me personally came Barney Millens, to me known, who, being by me duly sworn, did depose and say that he is the Respondent described in the foregoing instrument, and that he signed his name hereto.


Notary Public

BLAS W. SUARDY
Notary Public, State of New York
Reg. No. 01SU6010666
Qualified in Ulster County
Commission Expires July 20, 2000

In the Matter of
Barney Millens and B. Millens Sons, Inc. d/b/a B. Millens Scrapyard
Order on Consent
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COMPLIANCE SCHEDULE

1. Pollution Prevention Plan. Upon execution of this Order, Respondents will undertake a comprehensive Pollution Prevention Plan for the Site. The Pollution Prevention Plan will include the handling and management of fluids and waste at the Site pursuant to the Environmental Conservation Law and the Automobile Recyclers Association, *Storm Water Guidance Manual*, dated September 1996. Pursuant to Paragraph II of this Order, within One Hundred and Eighty (180) days of the effective date of this Order, the Pollution Prevention Plan shall be submitted to the Department of Environmental Conservation, 200 White Plains Road, 5th Floor, Tarrytown, NY 10591, attention: Joseph Marcogliese, P.E. Review and approval shall be pursuant to paragraph 5 below.
2. Compliance. Within 90 days from the effective date of this Order Respondents shall identify all hazardous wastes at the Site pursuant to 6 NYCRR Part 371. Thereafter, Respondent shall remove all hazardous wastes from the Site with 90 days from the date the Department identifies said hazardous wastes in accordance with applicable state and federal regulation unless said wastes are managed in accordance with applicable state and federal regulations. Furthermore, Respondents will immediately institute and implement company policies and procedures designed to insure compliance with the Environmental Conservation Law.
3. Investigative Work Plan proposal. Respondents have submitted an Investigative Work Plan dated February 5, 1998. The Plan, as amended on February 18, 1998, and memorialized in the Department's letter of February 20, 1998, has been approved and attached to this Order as Exhibit "B." The Investigative Work Plan proposes the methods of examining the Site to identify the extent and source of soil and/or groundwater contamination. The proposal includes topographical considerations, monitoring well locations and specifications, soil and water sampling procedures, sample testing procedures, and an implementation schedule.
4. Investigative Report and Remedial Plan. Pursuant to Paragraph II of this Order, within One Hundred and Twenty (120) days of the effective date of this Order, Respondents shall submit to the Department an Investigative Report and Remedial Plan, as specified in Exhibit "B". The Investigative Report and Remedial Plan shall be attached to this Order as Exhibit "C". The Investigative Report will define the extent, degree and source of onsite contamination and determine the location and extent of any offsite contamination caused by present or past industrial activities. The Remedial Plan will address the removal of any contamination existing at the Site and will include the location of contaminated soil and/or groundwater; method of soil and/or groundwater recovery and treatment; method of disposal of contaminated soils if required; point of discharge of treated groundwater if required, and schedule of implementation. The Remedial

Plan will also include, if appropriate, plans and specifications for handling and storage of parts containing fluids, storage of waste fluid containers, and construction of impervious and protected pads and containment areas suitable for vehicle dismantling. Review and approval of the Investigative Report and Remedial Plan shall be pursuant to paragraph 5 below.

(i) The Respondents may submit a Phase "A" Report which will consist of a Summary Memorandum inclusive of all Phase "A" laboratory data that are generated from those services specified as Phase "A" in the approved Workplan. The Phase A Report will include, if warranted, specific recommendations to modify the remaining field investigative services, defined in the Workplan as Phase "B". The Department will provide to the Respondents a written response accepting or rejecting (in part or in whole) the recommended modifications to Phase "B" contained in the Phase A Report.

(ii) If the Phase "A" submittal is approved, the Work Plan would be considered modified and the Report required in Paragraph 4 of the Schedule of Compliance completed pursuant to the modified Phase "B" Work Plan. If the Phase "A" submittal is not approved, the full report required by Paragraph 4 of the Schedule of Compliance shall be completed pursuant to the approved Work Plan.

(iii) The Phase "A" Report must be submitted within 50 days of the effective date of the Order. A submittal later than 50 days will not be accepted nor considered by the Department and will result in the requirement that Phase "B" work will be completed without modification. The Department will review the Phase A Report in a timely manner and will respond in writing. The review process shall be conducted pursuant to Paragraph 5 herein and the time from submittal of the Phase "A" report to the date the Department notifies the Respondent of the approval or disapproval, shall not be considered as time accrued towards the 120 day period for completion of the final report required in Paragraph 4 of the Schedule of Compliance.

5. Notification of approval/disapproval of Submittals pursuant to paragraphs 1 and 4. After the Department's receipt of the Report/Plan required by paragraphs 1 and 4, the Department shall notify Respondents, in writing, of its approval or disapproval of the Report/Plans. If the Department approves the respective Report/Plan as proposed, Respondents shall implement it in accordance with its schedule and terms, as approved. If the Department disapproves the respective proposed Report/Plan, Respondents shall submit a Revised Proposed Report/Plan in accordance with the Department's objections within 30 days after Respondents receive written notice of disapproval. After the Department's receipt of Respondents' respective Revised Proposed Report/Plan, the Department shall notify the Respondents, in writing, of its approval or disapproval. If the Department approves the Revised Proposed Report/Plan, Respondents shall implement it in accordance with its schedule and terms, as approved. If the Department disapproves the respective Revised Proposal, the Respondents shall be in violation of this Order. The Proposed Report/Plan or revised Proposed Report/Plan, as approved, shall be deemed incorporated and made a part of this Order.

