

423/90

C. Branagh / D. Brazell

R1/FS
OSWEGO Co.

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Development and Implementation of a
Remedial Investigation/Feasibility
Study pursuant to Article 27, Title 13,
of the Environmental Conservation Law
(the "ECL") of the State of New York
by

ORDER
ON
CONSENT

INDEX # A7-0227-90-04
Site # 738029

MILLER BREWING COMPANY,
CONTAINER DIVISION,

Respondent.

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites".

2. Miller Brewing Company is a corporation organized and existing under the laws of the State of Wisconsin and is authorized to do business in the State of New York. Miller Brewing Company has a Container Division (the "Respondent"), which operates a canmaking facility in the Town of Volney, Oswego County (the "Site"). The Miller Container facility is located approximately 1200 feet southeast of the Fulton,

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New York municipal boundary, approximately 1000 feet northeast of the Oswego River and approximately 900 feet south of New York State Route 481.

3. Respondent formerly had in use a spill containment tank installed near the northwest corner of its facility ("the Spill Area"), which was found at the time of its excavation in the Spring of 1986 to have been leaking.

4. Laboratory analyses of ground water samples from monitoring wells installed at the Site detected the presence of methylene chloride, 1,1-dichloroethylene, 1,1-dichloroethane, 1,1,1-trichloroethane ("TCA"), 1,1,2,2-tetrachloroethylene, and other contaminants. A contaminant plume from the former spill containment tank was identified in the aquifer at the Site.

5. Respondent and the Department executed Order on Consent # A701118704 effective January 22, 1988, pursuant to which Respondent implemented an interim remedial program intended to treat ground water at the Site to acceptable levels. The interim remedial program included the installation of three ground water recovery wells and the treatment of contaminated ground water by an air stripper. The program also required the periodic monitoring of the monitoring wells on the Site to assess the effectiveness of the interim remedial program. A map of the Site with monitoring wells included is attached as Appendix "A."

6. Effective December 1, 1987, the City of Fulton (the "City") issued to the Respondent a wastewater discharge permit

(the "permit") pursuant to which the Respondent was allowed to discharge water from the air stripper operation into the City's publicly owned treatment works. The City required the Respondent, as one of the conditions of the permit, to sample Fulton Municipal Well Number 2 ("Municipal Well Number 2") immediately prior to the start-up of the remedial program and monthly thereafter.

7. Operation of the ground water recovery system formally began on June 27, 1988.

8. The following occurrences provide additional information about the contaminated aquifer:

(1) Spill Containment Tank Plume. In October 1988, ground water monitoring well number 8D began showing TCA contamination. Monitoring well number 13D began showing consistent TCA contamination in March of 1989. This raised the concern that the tank contaminant plume ("Plume 1") was not being contained by the ground water remedial system.

(2) Monitoring Well 14D. Contaminant levels at monitoring well 14D began to increase in March of 1988. The contaminant level increased more sharply in the Fall of 1989. This suggested the existence of a second contaminant plume ("Plume 2").

(3) Municipal Well Number 2. During the period from March 1988 to October 1988, TCA was detected in the municipal well in 6 of the 8 monthly samples with 3 ug/l being the highest

level of TCA detected. TCA was thereafter not detected until August 1989. Since August 1989, TCA has been detected in the well on a consistent basis.

9. TCA contamination has been consistently found at Municipal Well Number 2 since August of 1989. The Department alleges that the Site is the source of TCA contamination at Municipal Well Number 2.

10. The Site is an inactive hazardous waste disposal site, as that term is defined at ECL Section 27-1301(2) and has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 738029. The Department has classified the Site as a Classification "2" pursuant to ECL Section 27-1305(4)(b), having found that the Site presents a "significant threat to the public health or environment - action required."

11. Pursuant to ECL Section 27-1313(3)(a), whenever the Commissioner of Environmental Conservation (the "Commissioner") "finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the Order."

12. The Department and Respondent agree that the goal of this Order is the development and implementation by Respondent of a Remedial Investigation/Feasibility Study for the Site which will include investigation of Plume 1 and Plume 2. A remedial program, if determined necessary, will be addressed in a subsequent Order.

13. Respondent, having waived its right to a hearing herein, has consented to the issuance of this Order without any adjudication of fact or law and agrees to be bound by its terms. Respondent's consent to and compliance with this Order does not constitute, and shall not be construed as, an admission of liability of any kind or an admission by Respondent of law or fact or of the applicability of any law to conditions at the Site.

14. It is further understood and agreed that the Department will not require Respondent to undertake remedial activity attributable to contamination with respect to which Respondent is not a responsible party.

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

I. Respondent shall retain professional consultants, contractors and laboratories acceptable to the Department to perform the technical, engineering and analytical obligations required by this Order. The experience, capabilities and

qualifications of the firms or individuals selected by Respondent shall be submitted within 30 days after the effective date of this Order.

II. Within 30 days of the effective date of this Order, Respondent shall submit to the Department a Work Plan for a Remedial Investigation/Feasibility Study ("RI/FS").

The Work Plan shall address all elements of a Remedial Investigation/Feasibility Study as set forth in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Sections 9601 et seq. ("CERCLA"), as amended, the National Contingency Plan ("NCP") then in effect and the USEPA guidance document entitled "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," dated October 1988, and any subsequent revisions thereto and appropriate technical and administrative guidelines. In addition, the Work Plan shall include:

A. A chronological description of the anticipated RI/FS activities together with an anticipated schedule for the performance of these activities.

B. A Sampling and Analysis Plan which shall include:

1. A quality assurance project plan that describes the quality assurance and quality control protocols necessary to achieve the initial data quality objectives.

2. A field sampling plan that defines the

sampling and data gathering methods in a manner consistent with the "Compendium of Superfund Field Operations Method" (EPA/540/P-87/001, OSWER Directive 9355.0-14, December 1987) as supplemented by the Department.

C. A health and safety plan for the protection of persons at and in the vicinity of the Site during the performance of the Remedial Investigation which shall be prepared in accordance with 29 C.F.R. Section 1910 by a certified health and safety professional.

D. A citizen participation plan which is prepared in a manner consistent with the Department's publication "New York State Inactive Hazardous Waste Site Citizen Participation Plan."

In preparing the RI/FS work plan, the Respondent may vary the requirements set forth in Paragraph II of the Order to reflect the work performed at the Site to date, provided there exists a technical basis for the variance consistent with CERCLA, the NCP, and appropriate technical and administrative guidelines.

III. The Department shall notify Respondent in writing of its approval or disapproval of the Work Plan. If the Department approves the Work Plan, Respondent shall perform the RI/FS in accordance with it.

If the Department disapproves the Work Plan, the Department shall notify Respondent in writing of the

Department's specific objections. Within 45 days after receipt of notice of disapproval, Respondent shall address the Department's specific comments and submit a revised Work Plan.

The Department shall notify Respondent in writing of its approval or disapproval of the revised Work Plan. If the Department approves the revised Work Plan, Respondent shall perform the RI/FS in accordance with the Work Plan.

If the Department disapproves the Revised Work Plan, Respondent shall be in violation of this of this Order unless it has invoked, within 15 days of receipt of the disapproval, the dispute resolution mechanism set forth in Paragraph X.

The approved Work Plan shall be attached as Appendix "B" and incorporated into this Order.

IV. In accordance with the time schedule contained in the approved Work Plan, Respondent shall perform the Remedial Investigation and submit the status reports and other deliverables (as defined in the Work Plan) and a Remedial Investigation Report ("the Report"). During the performance of the Remedial Investigation work on-site, Respondent shall have on-site a full-time representative who is qualified to inspect the work. The Report shall include all data generated and all other information obtained during the Remedial Investigation and shall provide all of the assessments and evaluations set forth in CERCLA, the NCP then in effect, and in the guidance documents

referenced herein, and identify any additional data that must be collected. The Report shall be prepared and certified by an engineer licensed to practice by the State of New York, who may be an employee of Respondent, or an individual or member of a firm which is authorized to offer engineering services in accordance with Article 145 of the New York State Education Law who shall certify that all activities that comprised the Remedial Investigation were performed in full accordance with the approved Work Plan.

V. After receipt of the Report, the Department shall determine if the Remedial Investigation was conducted and the Report prepared in accordance with the Work Plan and this Order, and shall notify Respondent in writing of its approval or disapproval of the Report.

If the Department disapproves the Report, the Department shall notify Respondent in writing of the Department's objections. Respondent shall address the Department's specific comments and submit a revised Report and/or reperform or supplement the Remedial Investigation and submit a revised Report. The period of time within which the Report must be revised or the Remedial Investigation reperformed or supplemented shall be specified by the Department in its notice of disapproval and such period shall provide Respondent adequate time to perform the additional tasks in accordance with customary practices and procedures.

The Department shall notify the Respondent in writing of its approval or disapproval of the revised Report and any reperfomed or supplemental work.

If the Department disapproves the Revised Report, Respondent shall be in violation of this Order unless it has invoked, within 15 days of receipt of the disapproval, the dispute resolution mechanism set forth in Paragraph X.

The approved Report shall be attached as Appendix "C" and incorporated into this Order.

VI. The Department reserves the right to require a modification and/or an amplification and expansion of the Remedial Investigation and Report by Respondent (the "additional work") if the Department determines, as a result of reviewing the data generated by the Remedial Investigation or as a result of reviewing any other data or facts, that, in accordance with generally accepted scientific principles and practices, further work is necessary in order to satisfy the goals of this Order.

Upon written receipt of the Department's demand for the additional work, the Respondent shall proceed with the additional work in accordance with a mutually agreed schedule unless, within 15 days after receipt of the demand, it objects to the Department in writing and invokes the dispute resolution procedures set forth in Paragraph X.

VII. If at any time Respondent believes, on the basis of

information obtained in the course of the Remedial Investigation or any other information developed subsequent to the effective date of this Order, that Respondent is not a responsible party with respect to contamination, it shall notify the Department and request a modification to the scope of its obligations under this Order in accordance with Paragraph XXII of this Order.

VIII. Within 90 days after receipt of the Department's approval of the Report, Respondent shall submit a Feasibility Study evaluating on-Site and off-Site remedial actions to eliminate, to the maximum extent practicable, all health and environmental hazards and potential hazards attributable to the Site. The Feasibility Study shall be prepared and certified by an engineer licensed to practice by the State of New York, and approved by the Department, who may be an employee of Respondent, or an individual or member of a firm which is authorized to offer engineering services in accordance with Article 145 of the New York State Education Law.

The Feasibility Study shall be performed in a manner that is consistent with CERCLA, the NCP then in effect, the USEPA draft guidance document entitled "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," dated October 1988, and any subsequent revisions thereto, and appropriate technical and administrative guidelines.

IX. After receipt of the Feasibility Study, the Department

shall determine if the Feasibility Study was prepared in accordance with this Order, and shall provide written notification of its approval or disapproval.

If the Department disapproves the Feasibility Study, the Department shall notify Respondent in writing of the Department's specific objections. Within 45 days after receipt of notice of disapproval, Respondent shall address the Department's specific comments and submit a revised Feasibility Study.

After receipt of the revised Feasibility Study, the Department shall notify Respondent in writing of its approval or disapproval of the revised Feasibility Study.

If the Department disapproves the Revised Feasibility Study, Respondent shall be in violation of this Order unless it has invoked, within 15 days of receipt of the disapproval, the dispute resolution mechanism set forth in Paragraph X.

The approved Feasibility Study shall be attached as Appendix "D" and incorporated into this Order.

X. At the request of Respondent, a dispute concerning the terms of a revised submittal, the appropriateness of additional work (Paragraph VI) or the reimbursement of administrative costs (Paragraph XI) shall be referred to the Commissioner for resolution. The Commissioner shall, within 30 days, notify Respondent of his decision or appoint an

Administrative Law Judge ("ALJ") to conduct an evidentiary hearing to resolve the dispute as set forth herein. The taking of evidence shall be concluded as soon as practicable after the ALJ's appointment.

In all proceedings hereunder:

(1) The parties shall be the Department and the Respondent.

(2) Notice shall be provided to the other party by the party requesting resolution of the dispute.

(3) The burden of going forward to prove that the revised submittal satisfies the requirements of this Order, additional work is not required, or the Department's administrative costs are inconsistent with the NCP shall be on the Respondent.

(4) The ALJ shall have all powers conferred by 6 NYCRR 622.12.

(5) All proceedings conducted hereunder shall be stenographically recorded. The Respondent shall arrange, at the Respondent's expense, for an expedited stenographic transcript to be made as soon as practicable, but in no event later than 30 working days, after the conclusion of the proceeding, and for the original and two copies of the transcript to be delivered to the ALJ.

(6) The ALJ shall prepare, within 45 working days after receipt of the transcript of the proceeding, a written

summary of the documentation and testimony received during the proceeding, and a recommended decision. The summary and recommended decision shall be hand carried to the Department's representative and sent by certified mail, return receipt requested, and another copy by express mail to Respondent.

(7) The ALJ's recommended decision shall become the final determination of the Commissioner unless, within 10 working days from receipt of the recommended decision, either the Respondent or the Department objects in writing. Any objections shall be submitted in writing to the ALJ with a copy sent by express mail, telecopier, or hand-delivery to the other party, which shall serve and file in the same manner its response, if any, within 10 working days of receipt of the objections. Upon receipt of the objections and any response, the ALJ shall refer the matter to the Commissioner for final determination.

(8) The final determination of the Commissioner shall be made as soon as practicable after receipt by him of the recommended decision by the ALJ.

(9) The Respondent may, within 30 days of the final determination of the Commissioner, seek judicial review of such determination. If the Respondent fails to seek judicial review within the time period set forth herein, it shall comply with the final determination of the Commissioner, failing which

it shall be in violation of this Order.

(10) During the pendency of the dispute resolution process, Respondent shall continue to perform the work required under the terms of the Order except for those specific items which are the subject of the dispute resolution procedures.

XI. Within 360 days of the effective date of this Order, or 30 days after receipt of an invoice from the Department, whichever is later, Respondent shall pay to the Department, for the period beginning January 1, 1990, a sum of money which shall represent reimbursement for the Department's expenses including, but not limited to, direct labor, overhead, travel, analytical costs and contractor costs incurred by the State of New York for negotiating this Order, reviewing and revising submittals made pursuant to this Order, overseeing activities conducted by the Respondent pursuant to this Order, and collecting and analyzing samples taken pursuant to this Order. Subsequent payments shall be made on an annual basis, within 30 days after receipt of an invoice from the Department, during the period in which Respondent performs any activities under this Order. Such payment shall be by certified check payable to the Department of Environmental Conservation. Payment shall be sent to the Director of Environmental Enforcement, NYSDEC, 50 Wolf Road, Albany, New York 12233. The Department shall itemize costs incurred. Itemization of costs

shall include an accounting of personal services indicating the employee name, title, biweekly salary and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. This information shall be documented by the Department's quarterly reports of Direct Personal Service. The Department's approved fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (supplies and materials, travel, contractual) and shall be documented by the New York State Office of the State Comptroller's quarterly expenditure reports. Respondent can object to any portion of the costs as being inconsistent with this Order or the NCP and any such disagreement shall be subject to the dispute resolution procedures set forth in Paragraph X. Respondent's obligation, under this Paragraph, for the initial payment and each of the subsequent annual payments shall be limited to a maximum of \$50,000 for each payment.

XII. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondent and the Department shall also have the right to take its own samples. The Department shall provide Respondent with the analytical results of any such samples, after the Department's receipt of Respondent's results.

XIII. Respondent shall provide notice to the Department at

least 5 working days in advance of any field activities to be conducted pursuant to this Order.

XIV. Respondent shall obtain whatever permits, easements, rights-of-way, rights-of-entry, approvals or authorizations are necessary in order to perform its obligations pursuant to this Order. If the Respondent's good faith efforts are unsuccessful in obtaining any required authorizations, the Department may exercise its authority under the ECL in an effort to assist the Respondent in obtaining the necessary authorizations.

XV. Respondent shall permit any duly designated employee, consultant, contractor or agent of the Department or the Department of Health to enter upon the Site or areas in the vicinity of the Site which may be under the control of Respondent for purposes of inspection, sampling and testing and to assure Respondent's compliance with this Order.

XVI. Respondent shall not suffer any penalty under this Order, or be subject to any proceeding or actions for any remedy or relief, if it cannot comply with any requirements hereof because of an act of God, war, riot, or other condition as to which negligence or willful misconduct on the part of Respondent was not a proximate cause, provided however that Respondent shall immediately notify the Department in writing when it obtains knowledge of any such condition and request an appropriate extension or modification of the terms of this Order.

XVII. The failure of the Respondent to comply with any term of this Order shall constitute a violation of this Order and the ECL.

XVIII. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting, any of the Department's rights, including, but not limited to:

A. the Department's right to bring any action or proceeding against anyone other than Respondent, its directors, officers, employees, servants, agents, successors and assigns;

B. the Department's right to enforce this Order against Respondent, its directors, officers, employees, servants, agents, successors and assigns in the event that Respondent shall fail to satisfy any of the terms hereof;

C. the Department's right to bring any action or proceeding against Respondent, its directors, officers, employees, servants, agents, successors and assigns with respect to claims for natural resource damages as a result of the release or threatened release of hazardous wastes or constituents at or from the Site or areas in the vicinity of the Site;

D. the Department's right to bring any action or proceeding against Respondent, its directors, officers, employees, servants, agents, successors and assigns with respect to hazardous wastes that are present at the Site or that have

migrated from the Site and present a significant threat to human health or the environment; and

E. the Department's right to bring any action or proceeding against Respondent for the purpose of recovering any unreimbursed costs incurred after January 1, 1990 by the State of New York in negotiating this Order, reviewing and revising submittals made pursuant to this Order, overseeing activities conducted by the Respondent pursuant to this Order, and collecting and analyzing samples taken pursuant to this Order.

XIX. This Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

XX. Respondent shall indemnify and hold the Department, the State of New York, and their representatives and employees 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 to the extent that Respondent, its contractors or agents are liable under applicable law.

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

XXII. If Respondent desires that any provision of this Order be changed, it shall make timely written application to the Commissioner, setting forth reasonable grounds for the relief

sought. A copy of such written application shall be delivered or mailed to:

Richard Brazell, P.E., New York State Department of Environmental Conservation, Region 7 Headquarters, 615 Erie Boulevard West, Syracuse , New York 13204.

If the Commissioner has not responded to Respondent's written application within 60 days of the Department's receipt of such application, the Department shall, on or before the 65th day, notify Respondent in writing of the reason for the Commissioner's delay and inform Respondent of the approximate date by which the Commissioner is expected to respond.

XXIII. Within 30 days after the effective date of this Order, Respondent shall file a Declaration of Covenants and Restrictions with the Oswego County Clerk to give all parties who may acquire any interest in the Site notice of this Order.

XXIV. In the event Respondent proposes to convey the whole or any part of its ownership interest in the Site, Respondent shall, not fewer than 60 days prior to the proposed conveyance, notify the Department in writing of the identity of the transferee and of the nature and date of the proposed conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order.

XXV. All written communications required by this Order shall be transmitted by United States Postal Service, by private

courier service, or hand delivered as follows:

A. Communication from Respondent shall be made as follows:

1. Division of Environmental Enforcement New York State Department of Environmental Conservation 50 Wolf Road Albany, New York 12233, Attention: David Markell, Esq., Director.

2. Division of Hazardous Waste Remediation New York State Department of Environmental Conservation 50 Wolf Road Albany, New York 12233, Attention: Michael J. O'Toole, Jr., P.E., Director.

3. New York State Department of Environmental Conservation, Region 7 Headquarters, 615 Erie Boulevard West, Syracuse, New York 13204, Attention: Richard Brazell, P.E.

4. Bureau of Environmental Exposure Investigation, New York State Department of Health, 2 University Place Albany, New York 12203, Attention: Ronald Tramontano, Director.

5. Division of Environmental Enforcement, Albany Field Unit, Room 415, New York State Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233, Attention: Dolores A. Tuohy, Esq.

6. New York State Department of Health, 677 South Salina Street, Syracuse, New York 13202, Attention: Ronald Heerkens.

B. Communication to be made from the Department to the Respondent shall be made as follows:

1. Miller Brewing Company, Legal Department, 3939 West Highland Boulevard, Milwaukee, Wisconsin, 53208, Attention: Garrett W. Reich, Esq.

2. Miller Brewing Company, Corporate Engineering, 3939 West Highland Boulevard, Milwaukee, Wisconsin, 53208, Attention: Thomas N. Swett, P.E.

3. Miller Brewing Company Container Division, P.O. Box 400, Fulton, New York 13069, Attention: Larry Messina.

4. Bond, Schoeneck and King, One Lincoln Center, Syracuse, New York 13202, Attention: Barry R. Kogut, Esq.

C. Copies of work plans and reports shall be submitted as follows:

1. One copy to the Director, Division of Environmental Enforcement.

2. One copy to the Director, Division of Hazardous Waste Remediation.

3. Two copies to the Director, Bureau of Environmental Exposure Investigation.

4. One copy to Albany Field Unit.

5. Five copies to Region 7 office.

XXVI. The terms of this Order shall be deemed to bind the signatories thereto and their respective officers, directors,

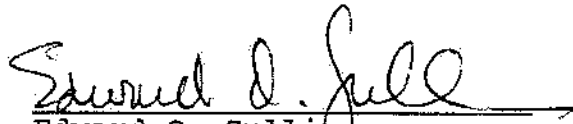
agents, servants, employees, successors and assigns. Nothing herein shall be construed to bind any other entity.

XXVII. No terms, conditions, understandings or agreements purporting to modify or vary the terms hereof shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestions or comments by the Department regarding reports, proposals, plans, specifications, schedules or any other submittals shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.

DATED: *Albany*, New York
April 23, 1990

THOMAS C. JORLING
Commissioner
New York State Department
of Environmental Conservation

BY:


Edward O. Sullivan
Deputy Commissioner

CONSENT BY RESPONDENT

Respondent hereby, without any admission of law or fact, consents to the issuing and entering of this Order, waives its right to a hearing herein as provided by law, and agrees to be bound by this Order.



By: Daniel P. Dockery
(TYPE NAME OF SIGNER)

Title: Assistant Secretary

Date: April 12, 1990

STATE OF WISCONSIN)
) s.s.:
COUNTY OF MILWAUKEE)

On this 12th day of April, 19 90, before me personally came Daniel P. Dockery, to me known, who being duly sworn, did depose and say that he resides in Brookfield, Wisconsin; that he is the Assistant Secretary of the Miller Brewing Company corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and that he signed his name thereto by like order.


Notary Public

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