

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the  
Development and Implementation  
of a Remedial Program for an  
Inactive Hazardous Waste Disposal  
Site, Under Article 27, Title 13,  
and Article 71, Title 27 of the  
Environmental Conservation Law  
of the State of New York by

ORDER  
ON  
CONSENT

INDEX #A7-0322-9411  
SITE # 7-38-029

MILLER BREWING COMPANY,  
Respondent.

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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." This Order is issued pursuant to the Department's authority under, inter alia, ECL Article 27, Title 13 and ECL 3-0301.

2. A. Miller Brewing Company (the "Respondent") 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. The Container Division of Miller Brewing Company formerly operated a can making facility in the Town of Volney, Oswego County (the "Site"). The Site was sold to the Reynolds Metals Company, effective November 1, 1993. The Site is located approximately 1200 feet southeast of the Fulton, New York municipal boundary, approximately 1000 feet northeast of the Oswego River and approximately 900 feet south of New York State Route 481. A City of Fulton ("the City") municipal drinking water wellfield is located hydrogeologically downgradient of the facility.

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

C. A soil gas survey conducted during 1990 defined two potential areas of additional contamination: an area at the north corner of the facility and an area at the south corner of the facility, both of which were formerly used for drum storage. An investigation of these areas showed a moderate level of contamination at the south corner of the facility located on the Site.

D. In April of 1991, a second spill area was identified within the facility during the excavation of a sump. Respondent investigated this area as part of the Remedial Investigation ("RI").

E. Laboratory analyses of ground water samples from monitoring wells installed at the Site have detected the presence of methylene chloride, 1,1-dichloroethylene, 1,1-dichloroethane, 1,1,1-trichloroethane ("TCA"), tetrachloroethylene and other contaminants.

F. A contaminant plume from the former spill containment tank was identified in the aquifer at the Site. TCA and other contaminants identified at the Site have been detected at the municipal water well field. Respondent pumped two municipal drinking water wells, Kellar Well Number 2 ("K-2") and Municipal Well Number 2 ("M-2"), to the Oswego River from April of 1990 until June of 1992 when levels of contaminants in the two wells began to increase. In June 1992, the water then went into the municipal water treatment system.

G. A third municipal drinking well, Kellar Well Number 1 ("K-1"), provides the City with approximately one-third of its total water supply. Sampling at K-1 has shown sporadic contamination by volatile organics.

H. The Department alleges that Respondent is a responsible party with respect to contamination migrating toward and detected at K-1, K-2 and M-2.

I. Respondent and the Department executed Order on Consent #A701118704, effective January 22, 1988, (the "1988 IRM Order"), pursuant to which Respondent implemented an interim remedial measures 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 treatment of the 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.

J. Respondent and the Department executed an Amendment to Order on Consent #A701118704, effective March 29, 1990, (the "Amendment"), pursuant to which Respondent implemented an Interim Remedial Measures Program which included the pumping of M-2 into the Oswego River.

K. Respondent and the Department executed Order on Consent #A702659106, effective August 12, 1991 (the "1991 IRM Order"), pursuant to which Respondent implemented an Interim Remedial Program in which Respondent obtained the necessary

design and construction approvals from both the City of Fulton and the New York State Department of Health to construct a long term ground water treatment system making use of air stripper technology to treat water pumped from the wells K-1, K-2 and M-2 before such water is introduced into the City's drinking water supply. Upon substantial completion, ownership of this facility was transferred to the City of Fulton and under paragraph VIII of the 1991 IRM Order, the Respondent agreed to be responsible for the "additional costs" (as defined in paragraph VIII) required for the City's operation and maintenance of the Treatment System until the obligation is terminated in accordance with Paragraph XVII of the 1991 IRM Order. All terms of the 1991 IRM Order remain in full force and effect.

L. Pursuant to paragraph XXIX of the 1991 IRM Order, upon the effective date of said Order, all terms and conditions of the Amendment, except paragraph XIV (the provision requiring Respondent to indemnify the Department and hold it harmless), terminated.

M. Respondent and the Department executed a Remedial Investigation/Feasibility Study ("RI/FS") Order on Consent #A7-0227-90-04 (the "RI/FS Order"), effective April 23, 1990, pursuant to which, Respondent performed an RI/FS for the Site.

N. The Respondent has submitted and the Department has approved a RI Report date July 1993, a RI Report Addendum dated July 1994, and a FS dated July 1994.

O. The Department affirms that Respondent has fulfilled its obligations under and imposed by the RI/FS Consent Order with the exception of any obligation to reimburse the Department for expenses pursuant to Paragraph XI of the RI/FS Order.

3. The Department alleges that the Site is an inactive hazardous waste disposal site, as that term is defined at ECL 27-1301.2, and presents a significant threat to the public health or environment. The Site has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 7-38-029. The Department has classified the Site as a Classification "2" pursuant to ECL 27-1305.4.b.

4. A. Pursuant to ECL 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."

B. Any person under order pursuant to ECL 27-1313.3.a has a duty imposed by ECL Article 27, Title 13 to carry out the remedial program committed to under order. ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

C. 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.i.

5. Following a period of public comment, the Department selected a final remedial alternative for the Site in a Record of Decision ("ROD") issued on March 20, 1995. The ROD, attached to this Order as Appendix "A," is incorporated as an enforceable part of this Order.

6. The Department and Respondent agree that the goals of this Order are for Respondent to (i) develop and implement, in accordance with the ROD, an inactive hazardous waste disposal site remedial program ("Remedial Program") for the Site that shall include design and implementation, and operation, maintenance and monitoring of the selected remedial alternative; and (ii) reimburse the State's administrative costs to the extent set forth in this Order.

7. Respondent, having waived its right to a hearing herein as provided by law, has consented to the issuance and entry of this Order without any adjudication of fact or law and agrees to be bound by its terms. Respondent consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agrees not to contest the validity of this Order or 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.

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

I. Remedial Design Contents

A. Within 120 days after the effective date of this Order, Respondent shall submit to the Department a remedial design to implement the remedial alternative for the Site selected by the Department in the ROD (the "Remedial

Design"). The Remedial Design shall be prepared by and have the signature and seal of a professional engineer who shall certify that the Remedial Design was prepared in accordance with this Order.

B. The Remedial Design shall include the following:

(1) A detailed description of the remedial objectives and the means by which each element of the selected remedial alternative will be implemented to achieve those objectives, including, but not limited to:

a. the construction and operation of any structures;

b. the collection, destruction, treatment, and/or disposal of hazardous wastes and substances and their constituents and degradation products, and of any soil or other materials contaminated thereby;

c. the collection, destruction, treatment, and/or disposal of contaminated ground water, leachate, and air;

d. physical security and posting of the Site;

e. quality control and quality assurance procedures and protocols to be applied during implementation of the Remedial Construction; and

f. monitoring which integrates needs which are present on-Site and off-Site during implementation of the Department-selected remedial alternative;

(2) "Biddable Quality" documents for the Remedial Design including, but not limited to, documents and specifications prepared, signed, and sealed by a professional engineer. These plans shall satisfy all applicable local, state and federal laws, rules and regulations;

(3) A time schedule to implement the Remedial Design;

(4) The parameters, conditions, procedures, and protocols to determine the effectiveness of the Remedial Design, including a schedule for periodic sampling of ground water monitoring wells on-Site and off-Site;

(5) A description of operation, maintenance, and monitoring activities to be undertaken after the

Department has approved construction of the Remedial Design, including the number of years during which such activities will be performed (where appropriate) and a specific description of the criteria to be used to decide when an operation of the remedy may be discontinued;

(6) A contingency plan to be implemented if any element of the Remedial Design fails to achieve any of the objectives set forth in Section 6.0: REMEDIATION GOALS of the ROD;

(7) A health and safety plan for the protection of persons at and in the vicinity of the Site during construction and after completion of construction. This plan shall be prepared in accordance with 29 CFR 1910 by a certified health and safety professional; and

(8) A citizen participation plan which incorporates appropriate activities outlined in the Department's publication, "New York State Inactive Hazardous Waste Citizen Participation Plan," dated August 30, 1988, and any subsequent revisions thereto, and 6 NYCRR Part 375.

## II. Remedial Construction

A. Respondent shall commence construction of the Department-approved Remedial Design in accordance with the schedule set forth within the Department-approved Remedial Design.

B. Respondent shall implement the Remedial Design in accordance with the Department-approved Remedial Design.

C. (1) During the implementation of all construction activities identified in the Remedial Design, Respondent shall have on-Site a full-time representative who is qualified to supervise the work done.

(2) The on-Site air stripper system, which is required to be operated under the terms of the 1988 IRM Order, shall continue in operation during the installation of the new ground water collection system and treatment facility. The contractor performing the Remedial Construction shall, at a pre determined point in the construction process established in its construction schedule, discontinue the use of the existing air stripper system to enable the contractor to complete the remedial construction. Upon the discontinuance of use of the air stripper system, all terms and conditions of the IRM Order, except paragraph X (the provision requiring Respondent to indemnify the Department and hold it harmless), shall terminate.

D. Within 90 days after completion of the construction activities identified in the Department-approved Remedial Design, Respondent shall submit to the Department a detailed post-remedial operation and maintenance plan ("O&M Plan"), "as-built" drawings and a final engineering report (each including all changes made to the Remedial Design during construction), and a certification that the Remedial Design was implemented and that all construction activities were completed in accordance with the Department-approved Remedial Design and were personally witnessed by him or her or by a person under his or her direct supervision. The O&M Plan, "as-built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

E. Upon the Department's approval of the O&M Plan, Respondent shall implement the O&M Plan in accordance with the requirements of the Department-approved O&M Plan.

F. After receipt of the "as-built" drawings, final engineering report, and certification that all construction activities have been completed in compliance with the Department-approved Remedial Design, the Department shall notify Respondent in writing of its acceptance and approval of such drawings, report, and certification.

G. Prior to its acceptance and approval of the engineer's certification that construction was completed in accordance with the approved Remedial Design, the Department may require the Respondent to modify the Remedial Design and Construction if the Department determines that such modification is necessary due to:

(1) environmental conditions on-Site or off-Site which are related to the presence of hazardous wastes at the Site and were unknown to the Department at the time of its approval of the Remedial Investigation Report Addendum, or

(2) information received, in whole or in part, after the Department's approval of the Remedial Investigation Report Addendum, where such unknown environmental conditions or such information indicates that the Remedial Program is not protective of human health or the environment.

H. In the event the Department determines that a modification under subparagraph II.G is required, it shall advise the Respondent in writing and set forth (i) the basis for its determination made under subparagraph II.G and (ii) the scope of the modification which the Department wants to be implemented. The Respondent may challenge the Department's

determination under the dispute resolution provisions of this Order in subparagraph IV.B. within 30 days after its receipt of the Department's written determination by service of a statement, setting forth the basis of its disagreement.

I. In the event Respondent is required to modify the Remedial Design and Construction in accordance with the terms of this Order, it shall perform the work in accordance with a reasonable time schedule which the Department, after consultation with Respondent, shall prescribe. The Department's review of the Respondent's submittals shall be subject to the provisions of subparagraphs IV A and B.

### III. Progress Reports

#### A. Remedial Construction.

During the period of Remedial Construction, Respondent shall submit to the parties identified in Subparagraph XI.B in the numbers specified therein copies of written monthly progress reports that:

(1) describe the actions which have been taken toward implementation of the remedial alternative selected in the ROD during the previous month;

(2) include all results of sampling and tests and all other data received or generated by Respondent or Respondent's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent;

(3) identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous month;

(4) describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next month and provide other information relating to the progress of the Remedial Construction at the Site;

(5) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for the Remedial Construction, and efforts made to mitigate those delays or anticipated delays; and

(6) include modifications to the Remedial Design that Respondent has proposed to the Department or that the Department has approved.

Respondent shall submit these progress reports to the Department by the tenth day of every month beginning with the first full month after Remedial Construction has begun



following the effective date of this Order until the Department approves the engineer's certification.

Respondent also shall allow the Department to attend, and shall provide the Department at least seven days advance notice of, any of the following: job progress meetings, the substantial completion meeting and inspection and the final completion meeting and inspection.

#### B. Groundwater Monitoring

Following the termination of the 1988 IRM Order under subparagraph II.C.(2), the Respondent shall continue to perform the groundwater sampling and analysis program required under the 1988 IRM Order during the remainder of the period of Remedial Construction. The period of Remedial Construction shall end on the date of the Respondent's receipt of the Department's written acceptance and approval of the "as-built" drawings, the final engineering report, and certification that the Remedial Construction was completed in accordance with the Department-approved Remedial Design. Respondent shall submit the results of the analyses on a monthly basis to Michael DiPietro, the Department's Project Manager, at the address set forth in Paragraph XI of this Order.

#### C. Operation and Maintenance

In accordance with the O&M plan, Respondent shall submit such reports as required, including, all results of sampling and tests and all other data received or generated by Respondent or Respondent's contractors or agents since the previous report, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondent.

### IV. Review of Submittals

A. (1) The Department shall review each of the submittals Respondent makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal, except for the submittal discussed in Subparagraph I.B.7. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

(2) a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall

specify the reasons for its disapproval. Within 30 days, or such longer period of time as may be agreed to in writing by the Department, after receiving written notice that Respondent's submittal has been disapproved, Respondent shall make a revised submittal to the Department that addresses all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order unless Respondent invokes the dispute resolution procedures set forth in subparagraph IV.B of this Order. If Respondent does not invoke dispute resolution procedures, the Department may take any action or pursue whatever rights it has pursuant to any provision of statutory or common law. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. (1) If the Department disapproves a revised submittal pursuant to subparagraph IV.A.(2), or if Respondent fails to challenge a Department determination under subparagraphs II.H. or IV.C.(1), or if Respondent fails to reimburse the State's expenses pursuant to paragraph VII, Respondent shall be in violation of this Order unless, within 30 days of receipt of the Department's notice of disapproval, demand for modification, or invoice, Respondent serves on the Department's Director of Hazardous Waste Remediation ("the Director") a written statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis or opinion supporting its position, and all supporting documentation on which Respondent relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position, including supporting documentation no later than ten business (10) days after receipt of Respondent's Statement of Position. These time periods for exchange of Statements of Position may be shortened upon mutual agreement of the parties.

(2) Respondent shall be available to meet with the Director and the Department within ten business (10) days of Respondent's receipt of the Department's Statement of Position (the "meeting").

(3) An administrative record of any dispute under this paragraph shall be maintained by the Department. The record shall include the Statement of Position of each party and any relevant information, including any relevant documentation submitted by either party up to and including the time of the meeting pursuant to subparagraph IV.B.(2).

The record shall be available for review of all parties and the public.

(4) In review by the Director of any dispute pursued under this paragraph, Respondents shall have the burden of establishing by a preponderance of the evidence that there is no rational basis for the Department's position based upon the entire administrative record.

(5) Upon review of the administrative record as developed pursuant to subparagraph IV.B.(3), the Director shall issue a final decision and order resolving the dispute. Respondent shall comply with such final decision and order, unless within 30 days of receipt of such final decision and order, Respondent commences an action under Article 78 of the Civil Practice Law and Rules of New York (CPLR) challenging such final decision and order. The period of time within which Respondent must comply with the Director's final decision and order, shall be specified by the Director in his final decision and order.

(6) If Respondent commences an action under Article 78 of the CPLR, Respondent shall revise the submittal, undertake the required modification, or reimburse the State's expenses in accordance with the court's decision in this matter.

(7) a. After receipt of the revised submittal or work plan to implement the Department-demanded modification, the Department shall notify the Respondent in writing of its approval or disapproval. If the revised submittal or work plan to implement the Department-demanded modification fails to comply with the Director's final decision and order (or, if applicable, the court's decision) and the Department disapproves the revised submittal or the work plan to implement the Department-demanded modification for that reason, the Respondent shall be in violation of this Order and the ECL.

b. If Respondent fails to comply with a final decision and order of the Director (or, if applicable the court's decision) requiring Respondent to reimburse the State's expenses, Respondent shall be in violation of this Order and the ECL.

(8) a. The invocation of formal dispute resolution procedures under paragraph IV.B. shall suspend and toll only those obligations under this Order which are in dispute or necessarily dependent on resolution of the matter(s) in dispute. Respondent's filing of a petition for review under Article 78 of the CPLR shall not stay or excuse performance of work or timely transmission of submittals with

respect to the disputed issues, except by agreement of the Department or by order of the court upon Respondent's application. Respondent shall have the burden of establishing before the court the necessity or appropriateness of such stay or excuse by a preponderance of the evidence that Respondent's position should prevail.

b. The invocation of the procedures stated in this paragraph shall constitute an election of remedies by the Respondent, and such election of this remedy shall constitute a waiver of any and all other remedies which may otherwise be available to Respondent regarding the issue in dispute.

(9) Nothing in this Order shall be construed to allow any dispute by Respondent regarding the validity of the ROD's provisions.

C. (1) Prior to the Department's final approval of the as-built plans, Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts received after the date of the ROD, that further work is necessary to attain the remedial objectives identified in the ROD. The Respondent may challenge the Department's determination that further work is necessary by service of the required written statement in accordance with subparagraph IV.B of this Order within 30 days after its receipt of the Department's written determination.

(2) In the event the Respondent is required to modify and/or amplify and expand a submittal under subparagraph IV.C.(1), the Department's review of the submittal shall be subject to the provisions of subparagraphs IV.A & B of this Order.

#### V. Compliance

A. Respondent's failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

B. Respondent shall not suffer any penalty under this Order or be subject to any proceeding or action if it cannot comply with any requirement hereof because of war, riot, or other condition as to which negligence or willful misconduct on the part of Respondent was not a proximate cause. Respondent shall, within five business days of when it obtains knowledge of any such condition, notify the Department in writing. Respondent shall include in such notice the measures taken and to be taken by Respondent to prevent or minimize any delays and shall request an appropriate extension

or modification of this Order. Failure to give such notice within such five business day period constitutes a waiver of any claim that a delay is not subject to penalties. Respondent shall have the burden of proving that an event is a defense to compliance with this Order.

Increased costs or expenses of any work to be performed under this Order, the financial inability of Respondent to perform such work and the failure of Respondent to make complete and timely application for any required approval or permit do not constitute conditions or events warranting the relief set forth in subparagraph V.B.

#### VI. Entry upon Site

Respondent hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Respondent by any duly designated employee, consultant, contractor, or agent of the Department or any State agency for purposes of inspection, sampling, and testing and to ensure Respondent's compliance with this Order. The Department recognizes that at the time this Order is issued, Respondent does not own or operate the Site. Respondent agrees that it will not prevent the Department from entering, for the purposes described in this Paragraph, those areas of the Site or the adjacent properties to which Respondent has been granted access.

#### VII. Payment of State Costs

A. Respondent shall pay to the Department a sum of money which shall represent reimbursement for the State's expenses including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for work related to the Site from March 9, 1995, as well as for reviewing and revising submittals made pursuant to this Order, overseeing activities conducted pursuant to this Order, collecting and analyzing samples, and administrative costs associated with this Order.

B. Such payment shall be made by check payable to the Department of Environmental Conservation within 30 days of receipt of an itemized invoice from the Department. Payment shall be sent to the Bureau of Program Management, Division of Hazardous Waste Remediation, N.Y.S.D.E.C., 50 Wolf Road, Albany, NY 12233-7010.

C. Itemization of the 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 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 (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports. Respondent may request an appointment to review supporting documentation within 30 days of receipt of an itemized invoice from the Department. Payment of such invoice shall be made within 30 days of the review of supporting documentation.

D. Respondent can object to any portion of the costs as being inconsistent with this Order or the NCP or the result of clerical errors and any such disagreement shall be subject to the dispute resolution procedures set forth in Paragraph IV (B) of this Order. Respondent's obligation under this Paragraph shall be limited as follows: (i) a maximum of \$100,000.00 for the first 24 months of the design and construction phase which began on March 9, 1995 (T&A Code B550), and (ii) \$5,000.00 per year for the O&M phase. (If the design and construction phase exceeds 24 months, there will be no limitation on additional costs for that phase.) Notwithstanding anything in this Order to the contrary, in the event the Respondent exercises its right to review the supporting documentation for an invoice, its right to seek dispute resolution shall be extended until 20 days after the date of review.

#### VIII. Department Reservation of Rights

A. 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.

B. If, after review, the Department accepts and approves the engineer's certification that construction of the Remedial Program was completed in accordance with the approved Remedial Design, such acceptance and approval shall constitute a full and complete satisfaction and release of each and every claim, demand, remedy or action whatsoever against Respondent, its successors and assigns, which the Department has or may have pursuant to Article 27, Title 13 of the ECL relative to or arising from the disposal of hazardous wastes at the Site. Such release and satisfaction, however, does not extend to, nor include the following: the implementation of a contingency plan required pursuant to Paragraph I.B.6; Respondent's indemnification obligations under the provisions of paragraph IX of this Order; Respondent's obligations for the future Operation and Maintenance of the Site under subparagraph II.E.

of this Order; the Respondent's obligation for reimbursement of State expenditures at the Site under paragraph VII of this Order; and any Natural Resource Damage claims that may arise. The Department specifically reserves all of its rights concerning, and any such release and satisfaction shall not extend to, any investigation or remediation the Department deems necessary due to:

(1) environmental conditions on-Site or off-Site which are related to the disposal of hazardous waste at the Site and were unknown to the Department at the time of its approval of the Remedial Investigation Report Addendum; or

(2) information received, in whole or in part, after the Department's approval of the Remedial Investigation Report Addendum, which indicates that the Remedial Program is not protective of human health or the environment. The Department shall notify the Respondent in writing of its receipt of such information and its basis for determining that the Remedial Program is not protective of human health and the environment.

This release shall inure only to the benefit of the Respondent, its successors and assigns, with respect to the aforesaid matter.

Nothing herein shall be construed as affecting in any way, legal or equitable rights, claims or any causes of action that the Department may have against anyone other than Respondent, its successors and assigns.

C. Nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

#### IX. Indemnification

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 by Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns. Respondent shall not indemnify the Department or the State of New York for gross negligence or willful misconduct on the part of the State of New York, the Department or their representatives and employees.

#### X. Public Notice

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

XI. 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:

Communication from Respondent shall be sent to:

Michael DiPietro, Project Manager  
Division of Hazardous Waste Remediation  
New York State Department of  
Environmental Conservation  
50 Wolf Road  
Albany, New York 12233-7010

with copies to:

- (1) Director, Bureau of Environmental  
Exposure Investigation  
New York State Department of Health  
2 University Place  
Albany, New York 12203
- (2) Daniel J. Palm, Ph.D., Regional Director  
Region 7 Headquarters  
New York State Department of  
Environmental Conservation  
615 Erie Boulevard West  
Syracuse, New York 13204-2400
- (3) Ronald Heerkens, Regional Toxics  
Coordinator  
New York State Department of Health  
217 South Salina Street  
Syracuse, New York 13202-3592
- (4) Rosalie K. Rusinko, Esq.  
Eastern Field Unit  
Division of Environmental Enforcement  
New York State Department of  
Environmental Conservation  
200 White Plains Road, 5th Floor  
Tarrytown, N.Y. 10591



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

- (1) Four copies (one unbound) to Michael DiPietro, Project Manager, Division of Hazardous Waste Remediation.
- (2) Two copies to the Director, Bureau of Environmental Exposure Investigation.
- (3) One copy to , Regional Director, Region 7.
- (4) One copy to Rosalie K. Rusinko, Field Unit Case Attorney.

C. Within 30 days after its approval of the drawings and submittals described in subparagraph II. D of this Order, Respondent shall submit one microfilm copy (16 millimeter roll film M type cartridge) of such Department-approved drawings and submittals, as well as all other Department-approved submittals. Such submissions shall be made to Michael DiPietro.

D. Communication to be made from the Department to Respondent shall be sent to:

- (1) Daniel A. Barthold  
Director, Environmental and Energy  
Miller Brewing Company  
3939 West Highland Boulevard  
Milwaukee, Wisconsin 53208
- (2) Barry R. Kogut, Esq.  
Bond, Schoeneck and King, LLP  
One Lincoln Center  
Syracuse, N.Y. 13202

E. The Department and Respondent reserve the right to designate additional or different addressees for communication or written notice to the other.

## XII. Miscellaneous

A. All activities and submittals required by this Order shall address both on-Site and off-Site contamination resulting from the disposal of hazardous wastes at the Site.

B. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and third party data validators 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 to the Department 10 days prior to their performance of any work required under this Order or within 10 days after the effective date of this Order. The Department's approval of these firms or individuals shall be obtained before the start of any activities for which Respondent and such firms or individuals will be responsible unless otherwise provided by the Department. The responsibility for the performance of the professionals retained by Respondent shall rest solely with Respondent.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondent. The Department also shall have the right to take its own samples and the Respondent shall have the right to obtain split samples or duplicate samples of all substances and materials sampled by the Department. Respondent and the Department shall make available to each other the results of all sampling and/or tests or other data generated by Respondent or the Department with respect to implementation of this Order. Respondent shall submit these results in accordance with paragraph III of this Order and the Department shall submit its results to Respondent.

D. Respondent shall notify the Department at least 10 working days in advance of any field activities to be conducted pursuant to this Order.

E. (1) Respondent shall use its best efforts to obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondent's obligations under this Order. Respondent shall promptly notify the Department in the event of Respondent's inability to obtain such authorizations on a timely basis. In the event Respondent is unable to obtain the necessary authorizations required to perform its obligations under this Order, the Department may, consistent with its legal authority, assist in obtaining all such authorizations Respondent was unable to obtain despite its best efforts, or which Respondent could not obtain without unreasonable terms or conditions. Respondent shall reimburse the Department, in accordance with the procedures in paragraph VII, for all costs incurred by the Department in obtaining access, including, but not limited to, attorneys fees; however, these costs will not be subject to the limitation set forth in subparagraph VII.D. If Respondent cannot obtain such authorizations on a timely basis, the time for performance of any obligation dependent upon such authorization shall be appropriately extended and the Order appropriately modified.

(2) Notwithstanding anything in this subparagraph XII.E to the contrary, Respondent shall not be required to obtain State or local permits for certain work conducted under this Order consistent with the criteria set forth in 6 NYCRR 375-1.7 and the Department's "Division Technical and Administrative Guidance Memorandum: Permitting Jurisdiction Over Inactive Hazardous Waste Site Remediation - O & D Memo 94-04 [Supersedes TAGM 4040]," dated March 21, 1994. Under the foregoing authority, the Respondent shall be required to meet the substantive requirements for air and wastewater discharge permits; however, the Respondent shall not be required to obtain such permits in connection with the Remedial Program to be undertaken in accordance with the terms and conditions of this Order.

F. The terms of this Order shall be deemed to bind the signatories hereto and their respective successors and assigns. Nothing herein shall be constituted to bind any other entity. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondent's responsibilities under this Order. Respondent's officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Order in the performance of their designated duties on behalf of Respondent.

G. Respondent shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person representing Respondent with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Order upon performance in conformity with the terms of this Order. Respondent or Respondent's contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. Respondent shall nonetheless be responsible for ensuring that Respondent's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

H. All references to "professional engineer" in this Order are to an individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law. If such individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York in accordance with Article 145 of the New York State Education Law.

I. All references to "days" in this Order are to calendar days unless otherwise specified.

J. The section headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

K. (1) No term, condition, understanding, or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Order.

(2) If Respondent desires that any provision of this Order be changed, Respondent shall make timely written application, signed by Respondent, to the Commissioner, setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Rosalie K. Rusinko, Esq. and to Michael DiPietro, P.E.. The Department shall not arbitrarily withhold consent to the requested change and shall promptly respond to the request. Notwithstanding the foregoing, change orders in the field can be approved by the Department's project manager.

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

DATED: 12/11 , New York  
, 1995

Michael D. Zagata  
Commissioner  
New York State Department  
of Environmental Conservation

By:

  
Michael J. O'Toole, Jr.

CONSENT BY RESPONDENT

MILLER BREWING COMPANY

Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.

By: *David W. Reich*

Title: *Associate General Counsel*

Date: *11/27/95*

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

On this *27<sup>th</sup>* day of *November* 19*95*, before me personally came *David W. Reich*, to me known, who being duly sworn, did depose and say that he resides in that he is the *Associate General Counsel* of *Miller Brewing Company* the 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.

*Dorothy J. Lauer*  
Notary Public

*My Commission expires 12/17/95*