

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Development and Implementation
of a Preliminary Site Assessment for an
Inactive Hazardous Waste
Disposal Site, Under Article 27,
Title 13 and Article 3,
Title 3 of the Environmental
Conservation Law of the State
of New York by

ORDER
ON
CONSENT

INDEX # A7-0315-94-04

GAF CORPORATION,
Respondent.

Site Code #704011

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of and has authority to investigate inactive hazardous waste disposal sites pursuant to Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites."

2. GAF CORPORATION ("Respondent") owns a two-acre parcel area in the City of Binghamton, Broome County ("the Site") and has owned the parcel since 1975. The site is now an abandoned paved parking lot in a mixed commercial and residential neighborhood. The Department alleges that solids and liquids from the production of photographic materials were disposed of at this site. The Department alleges that the suspect principal toxic waste at this site is silver,

cadmium, and various solvents.

3. The Site has been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site Number 704011. The Department has given the Site a "2a" classification, a temporary classification which indicates that investigation is required to determine whether disposal in fact took place at the Site and whether conditions at the Site constitute a significant threat to the public health or the environment as a result of such hazardous waste disposal.

4. The Department and Respondent agree that the goals of this Order are (i) the implementation of the Preliminary Site Assessment ("PSA", attached as Exhibit A to this Order) by Respondent which will gather data to enable the Department to characterize hazardous substances and hazardous wastes which are or may be present at the Site and to enable the Department to determine whether such wastes constitute a significant threat to public health or the environment necessitating remediation; and (ii) the reimbursement of the State's reasonable oversight and administrative costs.

5. Respondent, having waived its right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order, 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.

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

I. Within 30 days after the effective date of this Order, Respondent shall submit to the Department:

A. A brief history and description of the Site; including the nature of operations (past and present) at the Site; the names and addresses of current and previous Site owners and operators; the types, quantities, physical state, location, methods and dates of any generation, storage, and disposal, including spillage, of all hazardous wastes at the Site; and a description of current Site security (e.g., fencing, posting).

B. A concise summary of information held by Respondent and its attorneys and consultants with respect to all persons responsible for such disposal of hazardous wastes, including but not limited to names, addresses, dates of disposal and any proof linking each such person responsible with hazardous wastes identified pursuant to subparagraph I.A;

C. A comprehensive list and copies of all existing relevant reports with titles, authors and subject matter, as well as a description of the results of all previous investigations of the Site and areas in the vicinity of the Site, including copies of all available topographic and property surveys, engineering studies and aerial photographs within Respondent's custody or control; and

D. An 8.5 inch by 11 inch portion of a United States Geological Survey topographic map of the Site which contains the name of the quadrangle and an arrow indicating the orientation of a northern compass point.

II. Preliminary Site Assessment Contents and Submittals

A. (1) Respondent has submitted to the Department and, contingent upon Respondent's execution of this Order, the Department has approved, a detailed work plan for the implementation of a Preliminary Site Assessment ("PSA Work Plan") at the Site (Exhibit A).

(2) The PSA Work Plan describes the methods and procedures to be used in implementing a PSA.

B. (1) The PSA Work Plan includes, but will not necessarily be limited to, the following:

a. A chronological description of the five anticipated PSA task activities together with a schedule for the performance of these activities.

b. A Sampling and Analysis Plan that includes:

(i) A description of appropriate quality control/quality assurance deliverables.

(ii) A field sampling plan that defines 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.

(iii) All the substantive investigative tasks to be performed to obtain the necessary data to comply with this Order.

c. An appropriate health and safety protocol to

protect persons at and in the vicinity of the Site during the performance of the PSA which shall be prepared in accordance with 29 C.F.R. 1910 and all other applicable standards by a certified health and safety professional. Supplemental items shall be added to this plan by Respondent as necessary to ensure the health and safety of all persons at or in the vicinity of the Site during the performance of any work pursuant to this Order.

(2) The PSA Work Plan also shall satisfy the requirements for Phase II investigations identified in Division of Hazardous Waste Remediation Technical and Administrative Guidance Memoranda 4007 and 4008 and other appropriate Department technical and administrative guidelines that shall have been developed as of the time of submission of the PSA Work Plan.

III. Performance and Reporting of PSA

A. Within 30 days after the effective date of this Order, Respondent shall commence the PSA.

B. Respondent shall perform the PSA in accordance with the Department-approved PSA Work Plan.

C. During the performance of PSA field work, Respondent shall have on-Site a full-time representative who is qualified to supervise the work done.

D. Respondent shall prepare a PSA Report that shall:

(1) include all data generated and all other information obtained during the PSA;

(2) provide all of the assessments and evaluations set forth

in the guidance documents referred to in Subparagraph II.B(2);

(3) identify any additional data that must be collected; and

(4) include a certification by the individual or firm with primary responsibility for the day to day performance of the PSA that all activities that comprised the PSA were performed in full accordance with the approved PSA Work Plan.

IV. Progress Reports

Respondent shall submit to the parties identified in subparagraph XI.B in the numbers specified therein copies of written monthly progress reports that:

(i) describe the actions which have been taken toward achieving compliance with this Order during the previous month;

(ii) include a summary of 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;

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

(iv) 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 at the Site;

(v) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Respondent's obligations under the Order, and efforts made to mitigate those delays or anticipated delays;

(vi) include any modifications to any work plans that Respondent has proposed to the Department or that the Department has approved; and

(vii) describe all activities undertaken to meet applicable Citizen Participation requirements as specified by the Department consistent with 6 NYCRR §375-1.5(a).

Respondent shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Order.

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

V. 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. The PSA Work Plan attached as Exhibit A and 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 after receiving written notice that Respondent's submittal has been

disapproved, Respondent shall make a revised submittal to the Department that addresses and resolves 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 may be deemed in violation of this Order within 90 days of receipt of the revised submittal and the Department may take any action or pursue whatever rights it has pursuant to any provision of statutory or common law, unless Respondent requests an opportunity to respond to the Department's objections pursuant to the Dispute Resolution paragraph, *infra*. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. The Department may require Respondent to modify and/or amplify and expand a submittal 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, that further work is necessary to complete the PSA required by this Order.

C. DISPUTE RESOLUTION: If the Department disapproves a revised submittal, Respondent shall be in violation of this Order unless, within 10 days of receipt of the Department's notice of disapproval, Respondent requests to meet with the Director of the Division of Hazardous Waste Remediation ("the Director") in order to discuss the Department's objections and Respondent is

available to meet within a reasonable time thereafter. At this meeting, Respondent shall be given an opportunity to present its responses to the Department's objections, and the Director shall have the authority to modify and/or withdraw such objections. Respondent shall revise the submittal in accordance with the Department's specific comments, as may be modified by the Director and except for those which have been withdrawn by the Director, and shall submit a revised submittal. The period of time within which the submittal must be revised as specified by the Department in its notice of disapproval shall control unless the Director revises the time frame during or after the meeting.

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

If the revised submittal fails to address the Department's specific comments, as modified, and the Department disapproves the revised submittal for this reason, Respondent shall be in violation of this Order and the ECL.

The invocation of the procedures stated in this Paragraph shall constitute an election of remedies by 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.

VI. Penalties/Force Majeure

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

B. Respondent shall not be deemed in violation of this Order and

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 Act of God, war, riot, or because of any condition or event entirely beyond the control of Respondent or its agent or agents carrying out Respondent's obligations under this Order. Respondent shall, within 10 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 ten day period may, at the Department's discretion, constitute a waiver of any claim that a delay is not a violation of this Order. The Department's exercise of any such discretion shall not be made the subject of any Judicial review by Respondent or its agents, successors or assigns. Respondent shall have the burden of proving that an event is a defense to compliance with this Order pursuant to this subparagraph.

VII. 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.

VIII. Payment of State Costs

Within 60 days after receipt of an itemized invoice from the

Department, Respondent shall pay to the Department a sum of money which shall represent reimbursement for the State's reasonable expenses consistent with CERCLA, the NCP and the Department's authority under ECL §37-1305 and §97-b of the State Finance Law, 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 performed at the Site to date, as well as for negotiating this Order, 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. Such payment shall be made by certified check payable to the Department of Environmental Conservation. 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.

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. Approved agency 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 the New York State Office of the State Comptroller's quarterly expenditure reports.

IX. 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 rights including, but not limited to nor exemplified by, the following:

1. the Department's right to bring any action or proceeding against anyone other than Respondent;
2. the Department's right to enforce this Order or any violation thereof against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns;
3. the Department's right to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to claims for natural resources damages as a result of the release or threatened release of hazardous substances or constituents at or from the Site or areas in the vicinity of the Site;
4. the Department's right to bring any action or proceeding against Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns with respect to hazardous substances that are present at the Site or that have migrated from the Site;
5. the Department's right to bring any criminal action against the Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors, and assigns;
6. the Department's right to require Respondent and/or any

of Respondent's directors, officers, employees, servants, agents, successors, and assigns to develop and implement IRMs for the Site; and

7. the Department's right to gather information and enter and inspect property and premises.

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

X. 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 in tort or contract 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.

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. Communication from Respondent shall be sent to:

1. Charles Branagh
Region 7 Hazardous Waste Engineer
New York State Department of Environmental
Conservation
615 Erie Blvd. West
Syracuse, New York 13204

2. Director, Bureau of Environmental
Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203
3. Ralph Manna, Jr.
Regional Director, Region 7
New York State Department of Environmental
Conservation
615 Erie Blvd. West
Syracuse, New York 13204
4. Earl Barcomb
Division of Hazardous Waste Remediation
New York State Department of Environmental
Conservation
50 Wolf Road
Albany, New York 12233-7010
5. Mary Nyiri, Esq.
Central Field Unit
New York State Department of Environmental
Conservation
50 Wolf Road
Albany, New York 12233-5501

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

1. Four copies (one unbound) to Charles Branagh
Division of Hazardous Waste Remediation
2. Two copies to the Director, Bureau of

Environmental Exposure Investigation.

3. One copy to Ralph Manna, Jr., Regional Director Region 7.
4. One copy to Earl Barcomb, Division of Hazardous Waste Remediation
5. One copy to Mary Nyiri, Esq.

C. Communication to be made from the Department to the Respondent shall be sent to: Neil A. Kaye, P.E., GAF Corporation, 1361 Alps Road, Wayne, New Jersey, 07430.

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

XII. Miscellaneous

A. Nothing in this Order shall prejudice investigating and addressing, consistent with applicable Federal and State law, regulations and guidance, both onsite and offsite contamination resulting from the disposal of hazardous wastes at the Site, whether during the course of activities conducted by Respondent or the Department for the production and completion of a remedial investigation and feasibility study for this Site.

B. Respondent shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and 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 within 15 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 the Respondent and such firms or individuals will be responsible. The responsibility for the performance of the professionals retained by Respondent shall rest solely with Respondent. Notwithstanding the provisions of this paragraph, the Department hereby accepts Malcolm Pirnie, Inc. as Respondent's contractor for conduct of the activities required by this Order.

C. Respondent is not required to submit to the Department any interpretation, opinions or any attorney work product related to the submittals made pursuant to this Order for which a privilege is claimed pursuant to Article 31 of the New York State Civil Practice Laws and Rules. In the event Respondent asserts that any information is so privileged, Respondent shall describe the information and the nature of the privilege asserted with sufficient particularity to place the Department on notice of the basis of Respondent's claim.

D. 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 also shall have the right to take its own samples. Respondent shall make available to the Department the results of all sampling and/or tests or other data generated by Respondent with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

E. Respondent shall provide the Department reasonable advanced notice of any field activities to be conducted pursuant to this Order.

F. Respondent shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondent's obligations under this Order.

G. Respondent and Respondent's successors, and assigns shall be bound by this Order. 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, its agents, successors and assigns shall be obliged to comply with the relevant provisions of this Order in the performance of their designated duties on behalf of Respondent.

H. Respondent shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person working on behalf of 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.

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) The terms of this Order shall constitute the complete and entire Order between Respondent 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 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, unless confirmed in writing between the Parties.

(2) If Respondent desires that any provision of this Order be changed, Respondent shall make timely written application, signed by the Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Wm. G. Little and Charles Branagh at the above addresses.

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

DATED: *Albany*, New York
May 25, 1994

LANGDON MARSH
Acting Commissioner
New York State Department
of Environmental Conservation

By: *Ann H. DeBarbieri*
Ann H. DeBarbieri
Deputy Commissioner

CONSENT BY RESPONDENT

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

By: Murray S. Sherman

Name/Title (Type): Murray S. Sherman, VP-Technology

Date: 4/28/94

STATE OF NEW YORK)

) s.s.:

COUNTY OF)

On this 28th day of April, 1994, before me personally came Murray S. Sherman, to me known, who being duly sworn, did depose and say that he/she resides in West Orange, NJ; that he/she is the Vice President - Technology of GAF Corporation, the corporation described in and which executed the foregoing instrument; that he/she 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/she signed his/her name thereto by like order.

[Signature]
Notary Public

MICHAEL D. SCOTT
AN ATTORNEY-AT-LAW
OF NEW JERSEY