IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

State of Maine,
Petitioner,

v.

Nuclear Regulatory Commission,
Respondent.

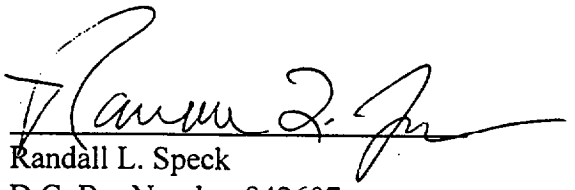
No. 00-1476

PETITION TO SET ASIDE THE NUCLEAR REGULATORY COMMISSION'S RULE CERTIFYING THE NAC-UMS SPENT NUCLEAR FUEL STORAGE SYSTEM

The State of Maine petitions the Court, pursuant to 28 U.S.C. § 2342(4) (1976), to set aside the Nuclear Regulatory Commission's ("NRC's") amendment to Part 72 of its regulations, 10 CFR § 72.214, adding the NAC Universal Storage System ("NAC-UMS") to the list of approved spent nuclear fuel storage casks. The final amendment to the rule was published on October 19, 2000, and becomes effective on November 20, 2000. 65 Fed. Reg. 62581 (October 19, 2000) (attached hereto). The amendment approving the use of the NAC-UMS dual-purpose storage/transport cask at commercial nuclear power plants under a general license violates the NRC's own requirements for spent fuel storage cask approval, 10 CFR § 72.236, and is arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law. Venue is appropriate in this Court pursuant to 28 U.S.C. § 2343.

Respectfully submitted,



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Counsel for the State of Maine

Date: November 9, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 2000, copies of the foregoing Petition to Set Aside the Nuclear Regulatory Commission's Rule Certifying the NAC-UMS Spent Nuclear Fuel Storage System were served by hand delivery upon the following:

John F. Cordes, Jr.
Solicitor, Office of General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North
Rockville, MD

Richard A. Meserve
Chairman
U.S. Nuclear Regulatory Commission
One White Flint North
Rockville, MD

David L. Meyer
Chief, Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
One White Flint North
Rockville, MD

Janet Reno
United States Attorney General
U.S. Department of Justice
810 Seventh Street, N.W.
Washington, D.C. 20531

James Kilbourne
Environmental Appellate Section
Department of Justice
Patrick Henry Building
601 D Street, N.W.
Room 8046
Washington, D.C. 20530

Further, I hereby certify that on this 9th day of November 2000. copies of the foregoing Petition to Set Aside the Nuclear Regulatory Commission's Rule Certifying the NAC-UMS Spent Nuclear Fuel Storage System were served by overnight Federal Express delivery upon the following parties who made comments to the proposed rule:

Thomas C. Thompson

Licensing & Competitive Assessment
NAC International, Inc.
655 Engineering Drive
Norcross, GA 30092

Fawn Shillinglaw
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Appleton, WI 54915

Honorable J.G. Rowland
Governor, State of Connecticut
State Capital
Hartford, Connecticut 06106

David C. Jones
NAC Nuclear Technology Users Group
526 South Church Street
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Charlotte, N.C. 28078

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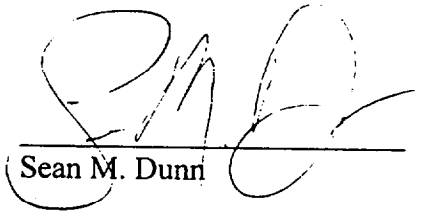
Mail Station 7602
P.O. Box 52034
Phoenix, AZ 85072



Sean M. Dunn

Syms v. Olin Corp., et al., No. 00-CV-732A (SR) (W.D. N.Y., filed Aug. 23, 2000)

United States District Court

WESTERN DISTRICT OF NEW YORK

JOHN SYMS, EILEEN SYMS, THE SOMERSET GROUP, INC., UNITOOL CORPORATION, LEW-PORT CONSTRUCTION CORPORATION, C&S MACHINERY CORPORATION, SYMS EQUIPMENT RENTAL CORPORATION and LEW-PORT ELECTRIC CORPORATION,

Plaintiffs,

V.

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

OLIN CORPORATION, UNITED STATES DEPARTMENT OF DEFENSE, WILLIAM COHEN, in his official capacity as SECRETARY OF DEFENSE, UNITED STATES DEPARTMENT OF THE ARMY, LOUIS CALDERA, in his official capacity as SECRETARY OF THE ARMY, UNITED STATES DEPARTMENT OF AIR FORCE, F. WHITTEN PETERS, in his official capacity as SECRETARY OF THE AIR FORCE, UNITED STATES NUCLEAR REGULATORY COMMISSION, RICHARD MESERVE, in his official capacity as CHAIRMAN of the UNITED STATES NUCLEAR REGULATORY COMMISSION, and THE UNITED STATES OF AMERICA,

TO: (Name and Address of Defendant)

Defendants.

United States Nuclear Regulatory Commission
Chairman Richard Meserve
11555 Rockville Pike
Rockville, Maryland 20852

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLA. 'S ATTORNEY (name and address)

KNAUF KOEGEL & SHAW, LLP, Linda R. Shaw, Esq. and Alan J. Knauf, Esq., of Counsel, 183 East Main Street, Suite 1250, Rochester, New York 14604, *Telephone: (716) 546-8430*

in answer to the complaint which is herewith served upon you, within **Sixty (60)** days after service of his summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK Rodney C. Early

DATE 8-23-00

JACQUELINE LAWRENCE

Y DEPUTY CLERK

AO 440 (Rev. 5/85) Summons in a Civil Action

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]	DATE
NAME OF SERVER	TITLE

Check one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served: _____

_____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____

☐ Returned unexecuted: _____

_____

_____

☐ Other (specify): _____

_____

_____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date *Signature of Server*

_____
Address of Server

1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN SYMS, EILEEN SYMS,
THE SOMERSET GROUP, INC.,
UNITOOL CORPORATION,
LEW-PORT CONSTRUCTION CORPORATION,
C&S MACHINERY CORPORATION,
SYMS EQUIPMENT RENTAL CORPORATION and
LEW-PORT ELECTRIC CORPORATION,

Plaintiffs,

vs.

OLIN CORPORATION,
UNITED STATES DEPARTMENT OF DEFENSE,
WILLIAM COHEN, in his official capacity as
SECRETARY OF DEFENSE
UNITED STATES DEPARTMENT OF THE ARMY
LOUIS CALDERA, in his official capacity as
SECRETARY OF THE ARMY
UNITED STATES DEPARTMENT OF AIR FORCE,
F. WHITTEN PETERS, in his official capacity as
SECRETARY OF THE AIR FORCE,
UNITED STATES NUCLEAR REGULATORY
COMMISSION,
RICHARD MESERVE, in his official capacity as
CHAIRMAN of the UNITED STATES NUCLEAR
REGULATORY COMMISSION, and
THE UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

Civil Action No.:
00-CV-732A(SR)

TRIAL BY JURY DEMANDED

Plaintiffs John Syms, Eileen Syms, The Somerset Group, Inc., Unitool Corporation, Lew-Port Construction Corporation, C&S Machinery Corporation, Syms Equipment Rental Corporation and Lew-Port Electric Corporation (collectively "Plaintiffs"), by their attorneys, Knauf, Koegel & Shaw LLP, for their Complaint, allege as follows:

INTRODUCTION

1. In this action, Plaintiffs seek, *inter alia*, (1) compensation for and reimbursement and/or contribution for necessary past and future environmental response costs that Plaintiffs have incurred or will incur in responding to the release or threatened release (the "Release") of

contamination (the "Contamination") on, at, under or emanating from or onto an approximately 39-acre tract of land located within the former Lake Ontario Ordnance Works ("LOOW"), known as Lew-Port Industrial Park, and owned by Plaintiff The Somerset Group, Inc. ("Somerset"), located at Balmer Road, Youngstown, New York 14174 (the "Site") together with an additional and adjacent 93-acre parcel of land originally owned by Somerset from approximately 1970 through 1980 (collectively the "Original Site"); (ii) compensation for Plaintiffs' damages, including but not limited to personal injuries, including emotional distress, property damages, business losses, and other damages, caused by the Contamination and/or the wrongful or tortious conduct of the defendants (the "Defendants") in this action, including the United States Department of Defense, William Cohen, in his official capacity as Secretary of Defense, United States Department of the Army, Louis Caldera, in his official capacity as Secretary of the Army, United States Department of Air Force, F. Whitten Peters, in his official capacity as Secretary of the Air Force, United States Nuclear Regulatory Commission, Richard Meserve, in his official capacity as Chairman of the United States Nuclear Regulatory Commission and the United States of America (the "Governmental Defendants"), and defendant Olin Corp. ("Olin"). with respect to the Site; (iii) a declaratory judgment for future response costs; (iv) an injunction requiring immediate investigation and cleanup of the Site by the defendants; and (v) medical monitoring of the Plaintiffs.

2. The Contamination on the Original Site, including the Site, consists of a variety of contaminants (the "Contaminants") from: (i) hazardous wastes, substances and residues ("Toxic Contaminants"), including but not limited to those substances identified in Exhibit "A" used by the Defendants in the manufacturing of rocket fuel at the Site; (ii) radioactive wastes, radioactive substances or radioactive residues, including high-level radioactive wastes ("Radioactive Contaminants"); (iii) explosive wastes, substances and residues ("Explosive Contaminants") that were either disposed, released or have migrated onto the Site, which have been found in samples on the Site; (iv) petroleum and petroleum-related substances (the "Petroleum Contaminants") that were either disposed, released, discharged or have migrated onto the Site, and (v) asbestos-containing

materials ("ACM Contaminants") that were disposed on the Site, some of which was removed in 1998 but most of which remain buried on Site.

3. Plaintiffs bring this action against all Defendants pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §9601, *et seq.*, the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§2201-2202, Civil Action for the Deprivation of Rights, 42 U.S.C. §1983, and various state law theories, including the New York State Navigation Law Article 12, New York State Environmental Conservation Law Articles 17, 27 and 37, and common law and equitable theories.

4. This Court has jurisdiction over the CERCLA claims pursuant to Section 113(b) of CERCLA, 42 U.S.C. §9613(b), and has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367. In addition, the DJA, 28 U.S.C. §2201, and CERCLA, 42 U.S.C. §9613(g)(2), authorize this Court to grant declaratory relief in this matter.

5. Venue is proper in this federal District Court pursuant to Section §113(b) of CERCLA, 42 U.S.C. §9613(b), since each of the Defendants may be found in the Western District of New York, and pursuant to 28 U.S.C. §1391, because the Site and the events related to the claims occurred within the Western District of New York.

6. Plaintiffs also bring this action against all the Government Defendants pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§2671-2680. This Court has jurisdiction under the FTCA pursuant to 28 U.S.C. §1346.

7. All Defendants are jointly and severally liable to Plaintiffs under CERCLA, various state law theories and common law and equitable theories, and the Government Defendants are jointly and severally liable pursuant to FTCA, because, *inter alia*, they owned and/or operated the Site starting in World War II, and/or arranged for the disposal or treatment of various hazardous substances and Contaminants leading to the Contamination of the Original Site, including the Site, and to the adjacent LOOW during that time period and for a number of years after the war until the Original Site, including the Site, was tortiously and negligently sold to private parties in 1966 despite

the Government Defendants' knowledge of the significant Contamination that now gives rise to the various claims in this action.

8. Plaintiffs have exhausted their administrative remedies pursuant to regulations under the FTCA by submitting a demand and claim to the United States Department of Justice ("DOJ") dated August 25, 1999. DOJ denied Plaintiffs' CERCLA claims in the demand and claim but passed its FTCA claims onto the Army Claims Service for consideration. The Army Claims Service did not respond for six months after receiving the claim, so therefore this claim is now ripe for adjudication by this Court.

PARTIES

9. Plaintiff Somerset is a New York corporation with offices at the Site and continues to do business by occupying and providing security for the Site.

10. Plaintiffs Unitool Corporation, Lew-Port Construction Corporation, C&S Machinery Corporation, Syms Equipment Rental Corporation and Lew-Port Electric Corporation, are New York corporations owned by Plaintiff John Syms, and are no longer in business as a direct result of the Contamination at the Site and at the adjacent LOOW.

11. Plaintiff John Syms is the owner of Somerset, and maintain offices at the Site.

12. Plaintiff Eileen Syms assists John Syms in the maintenance of Somerset on a day-to-day basis at the Site.

13. Formerly known as the Olin Mathieson Corporation, Defendant Olin Corporation ("Olin"), is a Virginia corporation with offices in Niagara Falls, New York. In the 1950s, Olin operated a rocket fuel manufacturing plant at the Site, and on a portion of the Original Site, known as Air Force Plant - 68 ("AFP-68").

14. Defendant the United States of America (the "United States"), acting through various departments, agencies, and instrumentalities, owned and/or operated the Site from approximately November 1941 through approximately 1965.

15. Defendant United States Department of Defense is an executive department of the

United States with offices in Washington, D.C., containing within it, among other agencies, the Department of the Army (which is the successor to the Department of War), including the Army Corps of Engineers ("ACOE"), the Department of the Navy, and the Joint Chiefs of Staff. (These various branches of the United States Department of Defense shall be collectively referred to as "DOD"). Defendant William Cohen is the Secretary of Defense, and is in charge of DOD. During World War II, the Department of War operated a trinitrotoluene ("TNT") production facility (the "TNT Plant")at the LOOW near the Site, and later DOD conducted other activities at LOOW resulting in Contamination.

16. Defendant United States Department of the Army (the "Army") is an executive department of the United States with offices in Washington D.C. Defendant Louis Caldera, the Secretary of the Army, is in charge of the environmental investigation and remediation of the LOOW, including the Original Site and the Site.

17. Defendant United States Air Force (the "Air Force") is an executive department of the United States with offices in Washington D.C. Defendant F. Whitten Peters, the Secretary of the Air Force, is in charge of the Air Force, which with Olin operated AFP-68 at the Original Site.

18. Defendant Nuclear Regulatory Commission ("NRC") is an agency of the United States with offices in Washington, D.C. and is the successor-in-interest to the Atomic Energy Commission ("AEC"). The AEC is the successor-in-interest to the Manhattan Engineering District (more commonly referred to as the "Manhattan Project") of ACOE, which arranged for disposal of Radioactive Contaminants at LOOW.

LOOW AND THE TNT PLANT

19. The site chosen for the first major federal project in the Niagara Region at the beginning of World War II was part of with the 20,000-acre "Model City" area originally optioned for purchase by Dr. Love of the Love Canal project in the 1890s.

20. In 1942, the Department of War purchased 7,500 acres in the Towns of Porter and

Lewiston, in Niagara County, New York, from 149 private land owners for the purpose of constructing and operating the ten-line TNT Plant. The 7,500-acre area became known as the LOOW. LOOW was located seven to eight miles north of Niagara Falls and just outside of historic Youngstown, New York.

21. Approximately 2,500 acres of LOOW was used by the Department of War for the construction and operation of the TNT Plant and other associated military operations. The remaining 5,000 acres were left undeveloped and acted primarily as a buffer zone from the adjoining residential areas.

22. The discharge of untreated TNT and associated Contaminants from the TNT Plant resulted in Contamination of sewer and waste pipelines (some of which are located under the Site and other portions of the Original Site) with TNT, and other Toxic and Explosive Contaminants.

THE MANHATTAN PROJECT WASTE

23. With the termination of TNT production in 1943, and the commencement of Manhattan Project research in early 1944, wastes from uranium processing operations associated with the Manhattan Project were disposed of at the LOOW.

24. According to DOE and AEC documents, LOOW became the principal repository of Radioactive Contaminants from operations such as the uranium processing operations of Linde Air Products Co. in Tonawanda, Electrometallurgical Co. in Niagara Falls, New York, National Lead of Ohio and General Electric Co. in Schenectady, New York.

25. After the War, most of the 5,000-acre buffer zone land was sold, allowing schools and other residential development to occur near the 2,500-acre LOOW.

26. In 1946, the AEC was established, and assumed the Manhattan Project's responsibility for the Radioactive Contaminants stored at LOOW.

27. The Radioactive Contaminants being shipped to LOOW for storage and/or disposal during and shortly after World War II included (*see* Exhibit "B"):

- 10,000 tons of Waste Code K-65 Radioactive Contaminants initially transported in drums, which remained along roadsides for months before being emptied into a water tower originally built to contain cooling water, not designed to store radioactive material;

- 8,227 tons of Waste Code L-30 Radioactive Contaminants (a sludge-type waste, in which radium was in equilibrium with uranium) stored in Bldg. 411, which was a water treatment building, not designed to store such material;

- 1,878 tons of Waste Code L-50 Radioactive Contaminants (also a sludge-type waste, in which radium was in equilibrium with uranium) were stored in Bldgs. 413-414 concrete tanks, not designed to store such material and which began leaking into a French drain that led to the Central Drainage Ditch beginning in 1949;

- 8,325 tons of Waste Code R-10 Radioactive Contaminants were stored outdoors in a pile;

- 150 tons of Waste Code R-10 iron cake Radioactive Contaminants were stored outdoors in a pile; and

- 1,400 drums of Waste Code F-32 Radioactive Contaminants were either stored outside or in an open pit.

28. The lax management during the Manhattan Project and by AEC of Radioactive Contaminants at LOOW resulted in the wide-spread Radioactive Contamination of the LOOW, including the Site and other portions of the Original Site.

OTHER ACTIVITIES RESULTING IN CONTAMINATION

29. During the 1950s, Olin operated AFP-68, a high performance fuel production facility at the Site and other portions of the Original Site on behalf of Defendant Air Force.

30. AFP-68 involved operations for the synthesis, recovery, purification, and/or storage of materials including boron, lithium, diborane, a variety of high-energy fuel mixtures, and other hazardous substances.

31. The operation of AFP-68 by Olin and the Air Force lead to Contamination of the Site and portions of the Original Site by the release of Toxic Contaminants and Explosive Contaminants.

32. In addition, DOD conducted numerous other activities at the LOOW, including the

Site and other portions of the Original Site, resulting in Contamination including, but not limited to, storage, management, disposal, and/or treatment of Toxic Contaminants, Radioactive Contaminants, Explosive Contaminants, Petroleum Contaminants and ACM Contaminants from the Army's Chemical Warfare Service.

33. As a result, a portion of LOOW was redesignated the Northeast Chemical Warfare Depot.

SALE OF PROPERTY AFTER WWII

34. Following World War II, the War Assets Administration was responsible for the sale of surplus defense property, including numerous government-owned ordnance plants. One of these plants was the LOOW.

35. With respect to the LOOW, marketing materials and facilities description documents were prepared touting the value and advantages of the buildings and underground pipelines for conversion into a state-of-the-art industrial park.

36. A 564-acre portion of LOOW (the "Fort Conti Property"), including the Original Site, was sold by the General Services Administration to the Fort Conti Corporation ("Fort Conti") in 1966.

37. Despite extensive documentation at the time revealing to Government Defendants known hazards of the Radioactive Contaminants and other Toxic and Explosive Contaminants on this property, including the Original Site, no notice or warning of this material defect was given to Fort Conti regarding the extensive and dangerous levels of Contamination prior to sale.

38. In fact, one internal letter dated October 14, 1966 suggests the ACOE concealed such knowledge in order to pass on liability for the Site. *See* Exhibit "C."

39. In 1969, the General Services Administration ("GSA"), despite having already sold the Fort Conti property, introduced Plaintiff John Syms (a GSA contractor at that time) to Fort Conti, and informed Mr. Syms that Fort Conti had a "good deal" on a parcel of property.

40. While Fort Conti had not developed the Fort Conti Property, it provided Mr. Syms with a copy of the marketing materials previously provided to Fort Conti describing the value of the property as $18 million, based on a GSA appraisal.

41. Based on the advice of the GSA, Somerset entered into negotiations with Fort Conti, and in 1970 and purchased the Original Site, being a 132-acre portion of the Fort Conti Property, which had the vast majority of the "valuable" buildings, utilities and pipelines.

42. By a deed from Fort Conti to Somerset, dated March 2, 1970, and recorded in the Niagara County Clerk's office at Liber 1503 of Deeds, Page 752, Fort Conti assigned all of its rights in the Original Site to Somerset.

43. Shortly after Plaintiffs purchased the Original Site, one of the Fort Conti partners, Joseph Phofl, owner of Remap, Inc., sold his 242-acre share of the remaining 432 acres of the Fort Conti Property to Chem-Trol Pollution Services, Inc. ("Chem-Trol"), later purchased by Service Corporation of America ("SCA"), predecessor of its current owner, Chemical Waste Management.

44. A deed restriction in the deed from the Government to Fort Conti, which was intended to run with the land to Fort Conti's successors and assigns (e.gs., Chem-Trol, Somerset), prohibited the use of the property for a "garbage dump" or to "deposit any refuse".

45. In purchasing the Original Site, Mr. Syms and Somerset relied on the deed restriction from the Government, which it believed increased the value of the Original Site by preventing the remainder of the adjacent Fort Conti property, and later the adjacent Chem-Trol property, from being utilized as a dump site. Despite the deed restriction, the Chem-Trol property was converted into one of the country's largest hazardous waste disposal landfill facilities several years later.

FRAUD BY THE GOVERNMENT DEFENDANTS

46. Agents and employees of the United States consistently failed, either through fraud, misrepresentation, or other intentional or negligent acts and omissions, to disclose the extent of Contamination impacting the portions of LOOW being marketed and sold to private party

purchasers, including Somerset.

47. Both the ACOE and the War Assets Administration realized the extent of Contamination from the TNT operations and chemical waste lines. AEC knew the hazards associated with the Radioactive Contaminants that were being improperly stored in miscellaneous buildings, a water silo and in drums on the ground near ditches and creeks on property immediately adjacent to the Fort Conti Property.

48. The Governmental Defendants intentionally, knowingly and fraudulently failed to disclose and misrepresented the material information to the public and private purchasers of the property.

49. GSA also did not reveal that friable ACM Contaminants, originating from above-ground pipe wrap insulation, transite panel walls and other ACM building materials associated with AFP-68 purchased by Somerset had been dismantled and buried on the Site adjacent to the building.

50. Despite efforts by ACOE in 1998 to remove some of the ACM Contaminants, significant quantities remain on the Site, and ACOE is unwilling to remove the remainder of this Contamination, the presence of which continues to prevent a proper subsurface environmental investigation of AFP-68 from proceeding.

51. AEC intentionally and knowingly misrepresented conditions at LOOW to health officials in the State of New York Department of Health ("NYSDOH").

52. On August 9, 1959, AEC's Manager of the Health and Safety Laboratory, Meril Eisenbaud, stated to the New York Health Commissioner, Dr. Herman Hilleboe that "relatively small quantities of radioactively contaminated materials have been stored at the Lake Ontario Storage Area since the early 1940s."

53. K-65 residue, a radioactive waste material produced in uranium processing during the Manhattan Project, was stored at LOOW in a bulging and leaking open top water silo that periodically had to be reinforced with braces to hold it together. According to recent admissions by ACOE scientists at Remedial Advisory Board public meetings, all of the nearby property owners and

residents were being exposed to airborne Radioactive Contaminants from the 1940s through approximately 1982, when this material was present in the silo.

54. Eisenbud also misrepresented to the NYSDOH that "[M]ost the [radioactive] material has been contained in drums or specially constructed storage facilities or stored in warehouses." In fact, none of the buildings containing Radioactive Contaminants, particularly the L-30 area, a former water tank, and the K-65 silo, a modified water tower, were "specially constructed" to hold anything radioactive. More importantly, 16 million pounds or more of this waste material (the R-10 residues) were stored in the open and were leaching radioactivity throughout LOOW and the surrounding community into surface water drainage ditches, creeks and eventually nearby Lake Ontario.

USE OF THE ORIGINAL SITE BY SOMERSET

55. Between 1970 and 1972, Somerset expended significant funds to rehabilitate the on-site buildings to create the Lew-Port Industrial Park. Despite claims by GSA that the buildings were sold in usable conditions, all of the major utilities had either been removed or were not in working order when The Somerset Group purchased the Original Site.

56. Somerset and Lew-Port Construction remodeled the various on-site buildings by replacing utilities in the 12 on-site buildings, including: electric conduit in the 12 buildings, installing new electric lines to the Site, heating systems, cooling systems, lighting, toilets, etc.

57. By 1972, Somerset and Unitool Corp., Syms largest corporation, had already moved into a building on the Site. In addition, a number of tenants representing a large rent flow occupied buildings on the Site.

THE NYSDOH ORDER

58. In 1972, without any prior warning, the NYSDOH imposed a summary abatement Order ("NYSDOH Order") on Plaintiffs, which was equivalent to an injunction, and effectively prohibited the Original Site from being "developed or used for industrial, commercial or residential

purposes" beyond the existing uses or undertaking any "intentional movement, displacement or excavation, by whatever means, of the soil," due to the presence of Radioactive Contaminants on the Original Site. A copy of the NYSDOH Order is annexed as Exhibit "D."

59. The NYSDOH Order also prevented the Plaintiffs from conducting any cleanup activities, since it provided that "no procedures for decontamination of said lands shall be undertaken by other than an official agency having jurisdiction or responsibility." At that time, the only agency granting statutory authority to conduct such decontamination activities was the AEC, pursuant to the Atomic Energy Act of 1954.

60. The NYSDOH Order was based on a review by NYSDOH of a Radiological Survey of the area conducted by the AEC, which revealed significant Radioactive Contaminants present at the LOOW and on the Original Site, including the Site, attributable to various uranium processing and waste storage activities of the Manhattan Project.

61. After review of the Radiological Survey, NYSDOH became aware of the significant Radioactive Contamination, and discovered that the United States had intentionally, knowingly, recklessly and tortiously sold contaminated property to a private party.

IMPACTS OF THE NYSDOH ORDER

62. The aftermath of the NYSDOH Order was devastating to the future of the Lew-Port Industrial Park and the Plaintiffs. Local Congressman Smith, who was also legal counsel to Plaintiffs, advised the Plaintiffs to dissuade their tenants from remaining at the Original Site because of the threat of exposure to Radioactive Contaminants.

63. Due to the NYSDOH Order, the Somerset Group had no choice but to abandon its immediate plans for developing the Lew-Port Industrial Park and, at the advice of counsel, discouraged existing tenants from remaining on the Original Site because of the threat of exposure to Radioactive Contaminants.

64. With all of its assets tied to the Original Site and improvements, and its inability to

use and develop the property, Plaintiffs immediately began to suffer substantial financial damages and losses, leading to the eventual bankruptcy of Somerset in 1980. These losses were directly attributable to the failure of the Governmental Defendants to fully and fairly notify the private purchasers of significant Contamination at LOOW, including the Original Site.

65. Mr. Syms, as an owner and officer of Somerset Group, did not sit idly by once the NYSDOH Order was issued. He immediately began to incur expenses traveling to Albany and Washington, D.C. to meet with key officials to try to resolve this matter. NYSDOH officials in Albany advised Mr. Syms that his problems were with the federal government. United States officials blamed Mr. Syms problems on NYSDOH.

66. In or around 1974, John Syms made a desperate attempt to convince the NYSDOH to modify its 1972 NYSDOH Order. NYSDOH finally agreed, and Plaintiffs were provided slightly more flexibility to utilize portions of the Site in a revised 1974 NYSDOH Order (the "Revised DOH Order"), a copy of which is attached as Exhibit "E." However, the Order was still restrictive and stated that Six Mile Creek and the Central Drainage Ditch, which intersected the Original Site, including the Site, were still contaminated above State levels.

67. Plaintiffs began to attract new prospective tenants to the Original Site under the more flexible terms of the Revised DOH Order.

68. Despite the Revised DOH Order, in late 1974, the Town of Lewiston decided to cut off water supply to the Original Site due to Contamination feared to be entering the water lines. With no water and sanitary sewer services to the Original Site, the prospect for any future use was becoming unlikely.

69. In addition, Chem-Trol began using the adjacent site for landfilling activities in 1974, thus diminishing prospective business opportunities on the Original Site.

70. Somerset continued to seek out appropriate business opportunities, but by 1980, Somerset was forced to declare bankruptcy when it missed a payment on its refinanced mortgage.

71. At the urging of the Bankruptcy Court, Somerset sold 93 acres of the Original Site

to SCA, which by this time was operating the adjacent hazardous waste landfill. After this sale, Somerset Group was left with its current 39-acre Site.

RADIOACTIVE CLEANUP IN THE 1980s

72. In the early 1980s, Plaintiffs were advised that a cleanup of the Radioactive Contamination was about to commence.

73. Beginning in or about 1982, the United States attempted to consolidate the Radioactive Contaminants that were formerly located throughout the 2,500 acre LOOW into a 191-acre area, referred to as the Niagara Falls Storage Site ("NFSS"), located approximately one half (½) mile upgradient from the Site, and connected to the Site by the LOOW Central Drainage Ditch.

74. The NFSS is located near the water silo where the K-65 residues were removed and slurried into an allegedly secure containment cell. In reality, the NFSS is a concrete basement of one of the former LOOW buildings. The basement was lined with one liner (two liners are typically used in landfills), Radioactive Contaminants were placed inside, the material was covered with approximately four feet of clay soil, and no leachate collection system was installed around the perimeter of the building.

75. Radioactive contaminated soils from portions of the Site, including the LOOW Central Drainage Ditch, were allegedly removed from the Site.

76. A federal contractor, Bechtel Engineering ("Bechtel"), was present on the Site in 1984 performing radioactive cleanup work. Bechtel cut the water lines on the Site because of continuing fear that Contamination was entering the water lines.

77. In response to request by Plaintiffs, on December 29, 1986, the Department of Energy, Oak Ridge Operations, issued correspondence to Somerset attesting that "the remedial action on your property was satisfactorily completed" and the "property is now in compliance with the standards and guidelines applicable to the remedial actions at the Niagara Falls Storage Site (NFSS)." The letter indicated that "a formal certification statement on your property will be

forwarded to you in the near future." A copy of the letter is annexed as Exhibit "F."

78. Nearly six years later, on May 7, 1992, DOE issued a "Certification of the Remedial Action," to Somerset. A copy of this Certification is attached as Exhibit "G." It is important to note that at this same time, an investigation of the Site was being conducted that was revealing other Contaminants on the Site.

79. Both the December 29, 1986 and May 7, 1992 documents were patently misleading. No mention was ever made of other Contamination on and under the Site, which more than likely precipitated the cutting of the Site's water lines leaving the Site totally unfit for industrial or other purposes. In addition, there was no comparison of the final cleanup levels to state cleanup standards.

RECENT INVESTIGATION ACTIVITIES

80. The NFSS is currently owned by the Department of Energy and is part of the Defense Environmental Restoration Program/ Formerly Used Defense Sites ("DERP/FUDS"). DERP/FUDS is administered by the ACOE, and is intended to decontaminate or otherwise control sites where residual radioactive materials remain from the nation's atomic energy program.

81. In 1988, pressure began to mount from Mr. Syms and others in the community to conduct a more thorough investigation of not only the Radioactive Contamination but other types of Contamination at the LOOW. Finally, press releases were issued announcing the commencement of a Remedial Investigation of the LOOW.

82. Although numerous historic studies of the LOOW, including the Site, were conducted between 1988 and 1998, only one study, the 1992 Preliminary Site Assessment Study, involved standard environmental surface or subsurface soil or groundwater sampling. However, that sampling was conducted on a 100-foot grid basis, which carefully avoided the areas of concern, and raw data results were not released to the public.

83. The 1992 Preliminary Site Assessment Study did reveal Contamination at the Site, but it appeared from the results that the Contamination was at relatively low levels, at least in soil.

However, nine permanent groundwater monitoring wells were installed at the Site in late 1991 for this 1992 Study. Raw data revealing the groundwater quality were not included in any of the reports provided to Plaintiffs.

84. Between 1992 and 1998, very little progress was made on the Site's investigation other than more studies of historic use. These studies revealed extensive potential sources of Contamination but no further sampling was conducted.

85. In October 1996, John Syms, on behalf of Somerset, signed a three year Right of Entry Agreement wherein the Government was required to provide Mr. Syms with copies of the final results and analysis of all sampling conducted at the Site, and if any damages were caused to the Site during any work, payment would be forthcoming as required by FTCA.

86. In 1998, a Phase I Remedial Investigation ("RI") was commenced. In the area around AFP-68, where Toxic and Explosive Contaminants had been released by Olin, the presence of extensive ACM Contaminants buried by the Government Defendants prevented the RI from proceeding in this location.

87. Any reports provided to Mr. Syms subsequent to the Phase I Investigation did not include data generated during this investigation as required by the 1996 Right of Entry Agreement.

88. An ACM Contaminants Removal project was commenced in 1998. According to the Plans and Specifications for the project, its primary purpose was to remove only the top six inches of soil containing ACM Contaminants despite field and other information suggesting a greater depth of ACM Contamination was present.

89. The contractors who performed the ACM Contaminants Removal project work destroyed property owned by the Plaintiffs on the Site, and ACOE and its contractors violated the Clean Air Act and other laws and regulations governing asbestos removal.

90. Mr. Syms advised the ACOE in writing of damages caused to the property after the completion of the project, which were not paid pursuant to the FTCA as required by the 1996 Right of Entry Agreement.

91. Plaintiffs have attempted to settle their claims in relation to the ACM Contaminants Removal project outside of this litigation, but have been unable to do so.

92. In March 1999, at the first public meeting on the status of the LOOW investigation, a brief summary of the results of the Phase I RI were provided, a copy of which is annexed as Exhibit "H". This summary of the results revealed for the first time to Plaintiffs the presence of Toxic and Explosive Contaminants, including lithium and RDX, in groundwater at the Site.

93. This data summary was also very surprising to Plaintiffs, since minimal groundwater sampling has been conducted on the Site.

94. This was the first time Contamination requiring remediation other than Radioactive Contamination was admitted by ACOE or revealed to be present on the Site.

95. At the meeting, an ACOE representative stated that the chemicals in the underground sewer and pipelines were "just at the explosive level."

96. At recent Restoration Advisory Board ("RAB") public meetings held on April 12 and July 12, 2000, scientists in charge of the NFSS have revealed startling new evidence that the NFSS is leaking Radioactive Contamination.

97. Since March 1999, ACOE has proceeded with further investigation of the LOOW. Plaintiffs have cooperated with the ongoing investigation activities, but remain concerned that the RI scope of work being implemented by the ACOE and its contractors leaves portions of the Site un-investigated or under investigated, and are also concerned about further time delays in remediation and ongoing damage to their property.

98. Recently, Plaintiffs began their own limited investigation of the Site, including the Central Drainage Ditch, due to the inadequacy of the work by the ACOE and its failure to disclose all relevant data.

CURRENT STATUS

99. The current status of the Site finds the ACOE involved in a protracted environmental investigation with no remediation or end in sight.

100. Cleanup activities have disrupted all attempts by Plaintiffs to profitably utilize the Site. Known and suspected environmental contamination, including the dangers attributable to the continued migration of Radioactive Contaminants onto the Site from the leaking NFSS, has deterred and will continue to make it impossible for tenants to utilize the Site.

101. Plaintiffs John Syms and Eileen Syms have, for decades, been exposed to all of the Contamination at the Site, creating a significant risk of future disease, necessitating future medical monitoring, and have seen their investment in the Site permanently destroyed by the actions of the Defendants.

102. Plaintiffs have endured numerous "investigations" of the Site over the last 28 years. Due to the improper actions of contractors, Plaintiffs have been required to spend all of their time securing the Site and monitoring and assisting Government contractors.

103. In June 2000, Plaintiffs in good faith entered into another Right of Entry Agreement ("ROE Agreement") with the Department of the Army to allow the ongoing Phase II RI to proceed on the Site. Pursuant to specific terms in the ROE Agreement, ACOE was required to either consider our comments (whether oral or written) and incorporate requested items into the RI scope of work or respond in writing to our comments with technical reasons and other reasons for not incorporating into the scope of work the item(s) requested. The ACOE has not responded to a June 6, 2000 comment letter sent to the ACOE in violation of the terms of the ROE Agreement and in violation of the National Contingency Plan.

104. Plaintiffs have expended countless hours and resources trying to resolve problems at the Site, and cannot wait any longer for Defendants to fix the problems they caused.

105. As a result of the Contamination, Plaintiffs have sustained damages including, but not limited to:

a. Loss of use of the Original Site and the Site;

b. Permanent loss of the value of the Original Site and the Site, including stigma loss;

c. Consequential damages to their businesses, including lost rents and profits;

d. Response costs, including costs of investigation and administrative oversight of remedial activities;

e. Loss of quality of life, including loss of a drinking water supply; and

f. Emotional distress to Plaintiffs John and Eileen Syms.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS UNDER CERCLA §107 FOR RESPONSE COSTS AND CONTRIBUTION, PLAINTIFFS ALLEGE AS FOLLOWS:

106. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "105" of this Complaint, as if set forth in this paragraph at length.

107. The Site and LOOW are "facilities" within the meaning of CERCLA §101(9), 42 U.S.C. §9601(9).

108. Each of the Defendants is a "person" as defined by CERCLA §101(21), 42 U.S.C. §9601(21).

109. Defendants DOD, Army, Air Force, and NRC are departments, agencies, and instrumentalities of the United States within the meaning of CERCLA §120(a)(1), 42 U.S.C. §9620(a)(1).

110. Defendants are persons who owned and/or operated the Site and LOOW at a time when hazardous substances were disposed of at the Site, within the meaning of CERCLA §107(a)(2), 42 U.S.C. §9607(a)(2).

111. Defendants are persons who arranged for disposal or treatment of hazardous substances at the Site and LOOW, within the meaning of CERCLA §107(a)(3), 42 U.S.C. §9607(a)(3).

112. There have been Releases by of hazardous substances from the Site and LOOW, within the meaning of CERCLA §107, 42 U.S.C. §9607.

113. Those Releases and additional Releases of hazardous substances have caused and will continue to cause the Plaintiffs to incur necessary costs of response within the meaning of CERCLA §107, 42 U.S.C. §9607.

114. The response costs which the Plaintiffs have incurred and will continue to incur are necessary and consistent with the National Contingency Plan (the "NCP").

115. Defendants are jointly and severally liable under CERCLA §107, 42 U.S.C. §9607 for all environmental response costs that the Plaintiffs have incurred and will continue to incur in the future, consistent with the NCP, in responding to the Releases of hazardous substances at LOW and the Site, including administrative oversight, and costs of a health assessment, including individual medical monitoring, to evaluate the exposure to hazardous substances by Plaintiffs in connection with the release or threatened release of hazardous substances at the Site.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR CONTRIBUTION UNDER CERCLA §113, PLAINTIFFS ALLEGE AS FOLLOWS:

116. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "115" of this Complaint, as if set forth in this paragraph at length.

117. Pursuant to CERCLA, §113(f)(1), 42 U.S.C. § 9613(f)(1), Defendants should contribute their equitable share of Plaintiffs' response costs, including all costs of removal or remedial action, and other necessary costs of response incurred by Plaintiffs.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS UNDER DJA, 28 U.S.C. §§ 2201-2202, PLAINTIFFS ALLEGE AS FOLLOWS:

118. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "117" of this Complaint, as if set forth in this paragraph at length.

119. This Court has the power to render declaratory relief under 28 U.S.C. § 2201 and under CERCLA §113(g)(2), 42 U.S.C. § 9613(g)(2).

120. This Court should declare that Defendants are liable under CERCLA for necessary

response costs consistent with the NCP that Plaintiffs will incur in responding to the Releases of hazardous substances alleged above.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST ALL GOVERNMENT DEFENDANTS FOR THE DENIAL OF DUE PROCESS AND CIVIL RIGHTS VIOLATIONS, PLAINTIFFS ALLEGE AS FOLLOWS:

121. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "120" of this Complaint, as if set forth in this paragraph at length.

122. The Government Defendants denied Plaintiffs their due process constitutional rights by misrepresenting and failing to disclose material information, including raw data revealing the Contamination, to Plaintiffs and the State of New York Departments of Health and Department of Environmental Conservation, for the last 30 years and conspiring to violate New York State law by utilizing federal or other standards, criteria and guidance to determine compliance but informing the State of New York Departments of Health and Department of Environmental Conservation that it was complying with more stringent New York State standards, criteria and guidance, thus preventing independent action by State agencies.

123. This denial of due process led to the interference with Plaintiffs' use and enjoyment of their property rights under color of state law, and constituted a violation of Plaintiffs' civil rights actionable under 42 U.S.C. §1983.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS UNDER NYS NAVIGATION LAW SECTION 181(5), PLAINTIFFS ALLEGE AS FOLLOWS:

124. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "123" of this Complaint, as if set forth in this paragraph at length.

125. This Court has supplemental jurisdiction over this Fourth and the following Causes of Action, pursuant to 28 U.S.C. §1367, because they arise out of the same facts and circumstances as the First, Second, Third and Fourth Causes of Action of this Complaint.

126. Venue is appropriate for this action in the Western District of New York, pursuant

to 28 U.S.C. §1391, because the Site and a substantial part of the events related to the claims occurred within the Western District of New York.

127. This and the remaining causes of action are brought against the Government Defendants pursuant to FTCA.

128. Defendants have discharged petroleum, resulting in Contamination (the "Petroleum Contamination") of the Site.

129. Defendants did not have a permit from the United States, New York State, or any other governmental authority which allowed the petroleum discharges, and they were therefore prohibited by New York State Navigation Law §173.

130. Pursuant to New York State Navigation Law §181(5), defendants are strictly liable for the investigation, remediation, cleanup, and removal of the Petroleum Contamination, and all of Plaintiff's associated direct and indirect damages, and Defendants are responsible for conducting any remedial activities that may be necessary as a result of Petroleum Contamination.

AS AND FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR INDEMNIFICATION OR CONTRIBUTION AND A DECLARATORY JUDGMENT UNDER NYS NAVIGATION LAW ARTICLE 12, PLAINTIFFS ALLEGE AS FOLLOWS:

131. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "130" of this Complaint, as if set forth in this paragraph at length.

132. Pursuant to New York State Navigation Law Article 12, including Navigation Law §176(8), Defendants are liable to indemnify or make contribution to Plaintiffs for its past and future costs of investigation, remediation, cleanup and removal, and response, and are responsible for investigation, remediation, cleanup and removal of, and response to the Petroleum Contamination.

AS AND FOR A SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS UNDER NYS ENVIRONMENTAL CONSERVATION LAW ("ECL") ARTICLE 37, PLAINTIFFS ALLEGE AS FOLLOWS:

133. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "132" of this

Complaint, as if set forth in this paragraph at length.

134. Some or all of the Contaminants are hazardous substances, pursuant to ECL Article 37.

135. Defendants stored and/or released Contamination at or from the Site in contravention of rules and regulations promulgated pursuant to ECL Articles 17, 27 and 37.

136. Pursuant to Article 37, Defendants are strictly liable for all of the damages to Plaintiffs proximately caused by the Contamination, and to remediate such Contamination.

AS AND FOR A EIGHTH CAUSE OF ACTION FOR FRAUD AGAINST THE GOVERNMENT DEFENDANTS, PLAINTIFFS ALLEGE AS FOLLOWS:

137. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "136" of this Complaint, as if set forth in this paragraph at length.

138. The Government Defendants have engaged in fraud and misrepresentation resulting in the sales of highly-contaminated property at LOOW to private persons, including Plaintiffs, and the continuing use of the Site by Plaintiffs.

139. Defendants had a duty to give Plaintiffs, their predecessor-in-interest Fort Conti, and the general public correct information about the Contamination, since this information has a material effect on the value and use of the Site and the rest of the Original Site.

140. Instead, the Government Defendants affirmatively represented to Fort Conti and Plaintiffs that the Original Site was safe, clean and suitable for use.

141. Defendants knew of the Contamination existing on the LOOW property sold to private parties, and intentionally or unreasonable failed to disclose material information concerning the Contamination existing on the Fort Conti Property at the time of sale. They intentionally and knowingly withheld all such relevant information.

142. The Government Defendants, by reason of their fraud and misrepresentations, are liable for damages to the Plaintiffs proximately caused by the Contamination, and to remediate the

Contamination.

AS AND FOR AN NINTH CAUSE OF ACTION FOR NEGLIGENCE AGAINST ALL DEFENDANTS PLAINTIFFS ALLEGE AS FOLLOWS:

143. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "142" of this Complaint, as if set forth in this paragraph at length.

144. Defendants owed a duty of care to Plaintiffs with regard to their use, ownership, and/or operation of the Site.

145. Defendants knew or should have known that their conduct could result in the Contamination of the Original Site, including the Site.

146. Defendants acted unreasonably and negligently in causing the Releases, failing to take reasonable precautions necessary to avoid the Releases, failing to disclose material defects prior to selling the Fort Conti Property or purchase by Plaintiffs of the Original Site, failing to comply with its own regulations when it sold the Fort Conti Property, and more recently during Site investigation and remediation activities.

147. Ongoing environmental investigation and remediation of the Site by ACOE constitute a continuing nuisance by preventing Plaintiffs from making any productive use of the Site, and interferes with their right to quiet enjoyment of their land.

148. These acts and omissions were the direct and proximate cause of the damages to Plaintiffs.

149. Defendants, by reason of their negligence, are liable for damages to the Plaintiffs proximately caused by the Contamination, and to remediate the Contamination.

AS AND FOR A TENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR STRICT LIABILITY, PLAINTIFFS ALLEGE AS FOLLOWS:

150. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "149" of this Complaint, as if set forth in this paragraph at length.

151. The generation and disposal of the Contaminants was an abnormally hazardous

activity.

152. Defendants, by engaging in abnormally hazardous activities, are strictly liable without regard to fault for all of the damages to Plaintiffs proximately caused by the Contamination, and to remediate the Contamination.

AS AND FOR A ELEVENTH CAUSE OF ACTION FOR PUBLIC NUISANCE AGAINST ALL DEFENDANTS, PLAINTIFFS ALLEGE AS FOLLOWS:

153. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "152" of this Complaint, as if set forth in this paragraph at length.

154. Defendants, including their officers, agents, servants, and/or employees, by causing the Contamination, allowing some or all of the Releases to take place, and failing to cleanup and remove the Contamination, have interfered with the exercise of rights common to all, including the groundwater, surface water and the environment through conduits, such as the Central Drainage Ditch and other ditches which lead to Lake Ontario, in a manner such as to interfere with use by the public of these public places.

155. Defendants, by reason of this public nuisance, are liable for all of the damages to Plaintiffs and the Site proximately caused by the Contamination, and to remediate the Contamination.

AS AND FOR AN TWELFTH CAUSE OF ACTION FOR PRIVATE NUISANCE AGAINST THE GOVERNMENT DEFENDANTS, PLAINTIFFS ALLEGE AS FOLLOWS:

156. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "155" of this Complaint, as if set forth in this paragraph at length.

157. The Government Defendants, by their acts or omissions, or the acts or omissions of their agents or employees on areas of LOOW off the Site, caused an unreasonable and substantial interference with Plaintiffs' right to use and enjoy the Site.

158. That interference was intentional, negligent and reckless.

159. The Government Defendants, by reason of this private nuisance, are liable for all of

the damages to Plaintiffs proximately caused by the Contamination, and to remediate the Contamination.

AS AND FOR A THIRTEENTH CAUSE OF ACTION AGAINST THE GOVERNMENTAL DEFENDANTS FOR TRESPASS, PLAINTIFFS ALLEGE AS FOLLOWS:

160. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "159" of this Complaint, as if set forth in this paragraph at length.

161. Radioactive Contamination located on the Site originated from the intentional disposal by the Governmental Defendants of Radioactive Contaminants at the various radioactive waste storage locations at the LOOW (*see* Exhibit "B") and the NFSS.

162. The migration of the radioactivity from former waste storage location at the LOOW and NFSS to the Site was the inevitable, direct and foreseeable results of the Governmental Defendants' intentional acts or omissions, or the acts or omissions of their agents or employees.

163. Defendants, by their acts and omissions, or the acts or omissions of their agents or employees, have interfered with the rights of Plaintiffs to exclusive possession of the Site, and threaten to do so in the future.

164. Defendants, by reason of this trespass, are liable for all the damages to Plaintiffs proximately caused by the Contamination, and to remediate the Contamination.

AS AND FOR A FOURTEENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR EQUITABLE OR IMPLIED INDEMNIFICATION OR CONTRIBUTION, PLAINTIFFS ALLEGE AS FOLLOWS:

165. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "164" of this Complaint, as if set forth in this paragraph at length.

166. Plaintiffs have discharged, in whole or in part, the duty imposed by law on Defendants to investigate, prevent, clean up, or ensure against the Contamination of the Site, and this duty, in all fairness and equity, should be discharged by defendants, including their officers, agents, servants and/or employees.

167. Plaintiffs, upon receipt of the DOH Order preventing use of the Original Site due to Radioactive Contamination, secured the Original Site from public access, incurred investigation costs, and lost business opportunities and since that time have conducted additional investigation and response activities.

168. Defendants, including their officers, agents, servants and/or employees, should equitably indemnify Plaintiffs, or contribute their equitable share of, the past and future costs of investigation, cleanup, remediation, removal and responses to the Contamination.

AS AND FOR A FIFTEENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR RESTITUTION, PLAINTIFFS ALLEGE AS FOLLOWS:

169. Plaintiffs repeat and reallege the allegations of paragraphs "1" through "168" of this Complaint, as if set forth in this paragraph at length.

170. Plaintiffs have taken immediate action necessary to protect the public health and the environment, and has fulfilled, in whole or in part, a duty actually owed by Defendants.

171. It would be against equity and good conscience to not require Defendants to conduct immediate cleanup of the Site and compensate Plaintiffs for all past and future costs and losses based on their inability to enjoy the use of, or work on, the Site and the Original Site free of any Contamination. Otherwise, Defendants would be unjustly enriched.

172. Therefore, Defendants should make restitution to Plaintiffs for some or all of its expenses, costs, and damages.

WHEREFORE, Plaintiffs request that this Court enter judgment in favor of Plaintiffs, and against the Defendants for: (1) all damages, response costs, and medical monitoring costs in the amount of approximately $25,000,0000, with interest; (2) declare that the Defendants are responsible to reimburse Plaintiffs for their future response costs; (3) an injunction requiring immediate investigation and cleanup of the Site and all of LOOW by the Defendants; (4) Plaintiffs' costs, disbursements and attorneys' fees; and (5) such other and further relief as this Court deems just and proper.

Dated: August 23, 2000

Linda R. Shaw, Esq.

KNAUF KOEGEL & SHAW, LLP
Attorneys for Plaintiffs
Alan J. Knauf, Esq. of Counsel and
Linda R. Shaw, Esq., of Counsel
183 East Main Street, Suite 1250
Rochester, New York 14604
Telephone: (716) 546-8430

TO: *Defendant*, Olin Corporation
501 Merritt Seven
Norwalk, Connecticut 06856-4500

Agent for Service of Process
Olin Corporation
c/o CT Corporation Systems
111 8th Avenue
13th Floor
New York, N.Y. 10011

Defendant, United States Department of Defense,

Office of General Counsel
1600 Defense Pentagon
Room 3C975
Washington, DC 20301-1600

William Cohen, in his official capacity as
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1000 Defense Pentagon
Washington, DC 20301-1000

Defendant, United States Department of the Army,

Chief, Army Litigation Division
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Suite 400
Arlington, VA 22203-1837

The Hon. Louis Caldera, in his official capacity
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101 Army Pentagon
Washington, DC 20310

Defendant, United States Department of Air Force,

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1501 Wilson Blvd.
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Arlington, Virginia 22209

F. Whitten Peters, in his official capacity as
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SAF/OS
1670 Air Force Pentagon
Washington, DC 20330-1670

Defendant, United States Nuclear Regulatory Commission,

Office of General Counsel
11555 Rockville Pike
Rockville, Maryland 20852

Chairman Richard Meserve
11555 Rockville Pike
Rockville, Maryland 20852

Defendant, The United States of America,

The Hon. Janet Reno, Esquire
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4545
Washington, DC 20530-0001

Denise O'Donnell, Esquire
United States Attorney, Western District
138 Delaware Avenue
Buffalo, New York 14202

VERIFICATION

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

John L. Syms, being duly sworn, deposes and says that I am a Plaintiff in this proceeding, I have read the attached **Complaint**, and know its contents; it is true to my knowledge except as to the matters stated to be alleged upon information and belief, and as to such matters I believe them to be true.

JOHN L. SYMS

Sworn to before me this
23 day of August, 2000.

Notary Public

\\Linda\c\Clients\WWII_Syms\Symcomp4.wpd

LINDA R. SHAW
Notary Public, State of New York
No. 02SH6043577
Qualified in Monroe County
Commission Expires June 19, 2002

EXHIBIT "A"

COMPOUNDS ASSOCIATED WITH AIR FORCE PLANT NO. 68
HIGH ENERGY FUELS PRODUCTION
(Identified on site plans and as-built drawings)

aluminum chloride
aluminum hydroxide
asbestos
boron
calcium carbonate
calcium chloride
calcium hydroxide
calcium metaborate
carbon
carbon dioxide
carbon monoxide
chlorine
decaborane
diborane
diethyl ether
dispersion oil
ethyl chloride
Fuel Oil No. 2
hydrazine compounds
hydrogen
hydrogen chloride
isopropyl chloride
lithium
lithium chloride

oxygen
pentaborane
pentane
potassium chloride
propane
silicon tetrachloride
sodium borohydride
sodium chloride
sodium hyrdroxide

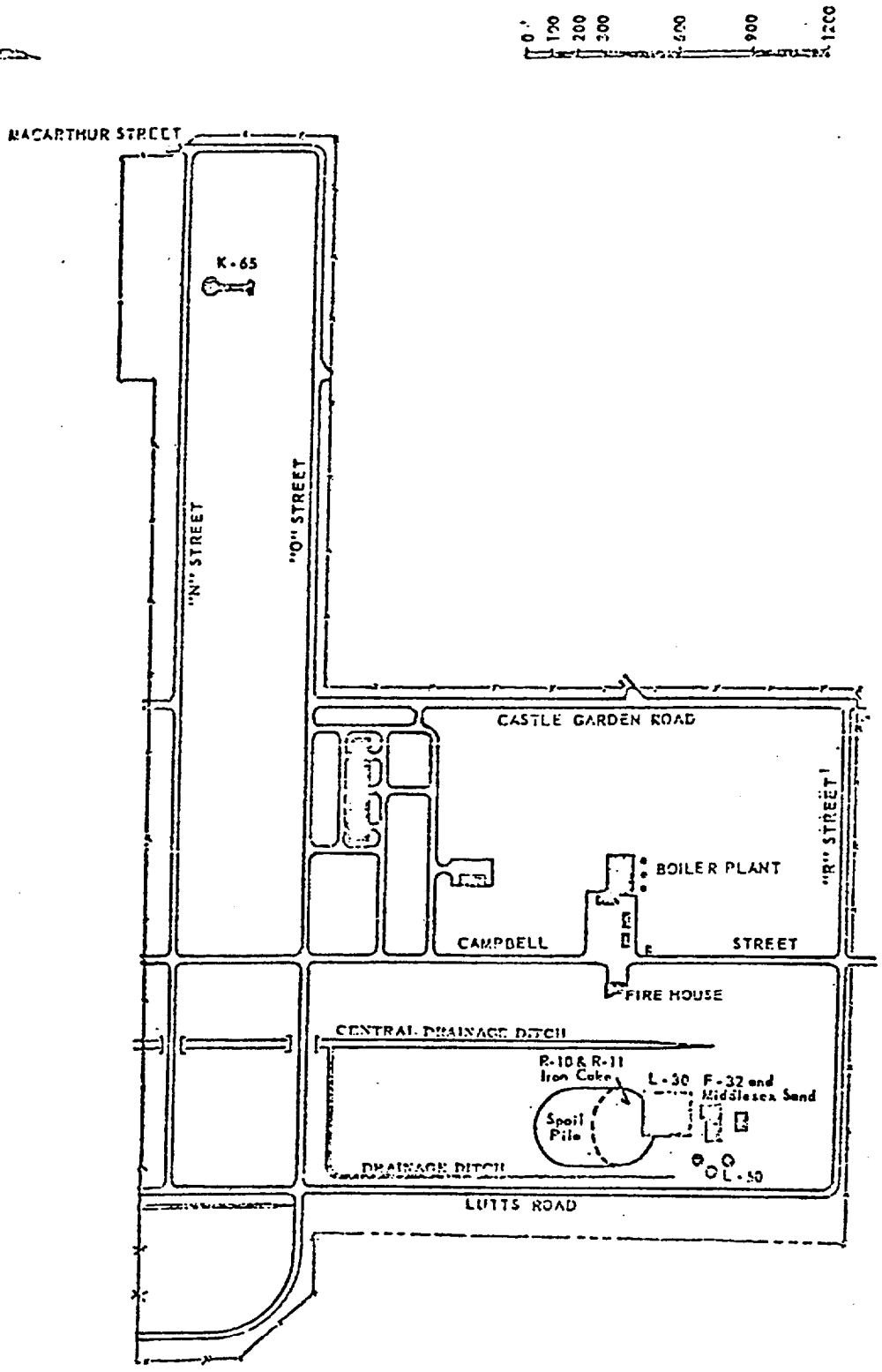

FIGURE 11 - Radioactive Waste Storage Locations
(Source: Department of Energy 1977)

DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
111 EAST 16th STREET
NEW YORK, N. Y. 10003

NANRE-M
Lake Ontario Storage Area, Lewiston, New York

14 October 1966

Mr. R. N. Miller
Director, Supply Division
United States Atomic Energy Commission
Oak Ridge Operations Office
Post Office Box E
Oak Ridge, Tennessee 37831

Dear Mr. Miller:

Reference is made to Report of Excess Real Property, Standard Form 118, WND-40, dated 26 May 1955, and Correction Reports thereto pertaining to the above named installation.

Inclosed, in duplicate, is copy of letter dated 13 September 1966 from General Services Administration with attached copies of Quitclaim Deed dated 28 July 1966 from the United States of America to Fort Conti Corp., effecting disposal, among others, of 564.74 acres of land and improvements thereon at referenced installation, subject to reservations therein delineated. Information is furnished that the reservations identified in the deed as easements Nos. 1 and 2 were reserved for the Atomic Energy Commission and easements Nos. 3 and 4 were reserved for the Department of the Air Force for use of Air Force Plant No. 38. The total cost to the Government of the said land and improvements is $541,539.41.

The aforesaid deed may serve as a voucher to cancel accountability for the affected property.

Sincerely yours,

1 Incl (in dupe)
Cy GSA ltr dtd 30 June 66 w/att

MAURICE LUCTIG
Chief, Real Estate Division

Cy furn: w/cy incl
Mgr, USAEC, NY Opns Ofc - Attn: Mr. J. A. Hoffnagel
Cdr, Space Systems Div., AFSC - Attn: SSKI/Crowder
Cdr, Aeronautical Systems Div., USAF - Attn: ASNEFP
Chf, RSA, DCASO - Attn: DCRB-DRCFC
DCASO, c/o Bell Aerosystems Co. - Attn: Mr. Charles Hall
Mr. Alfred R. Stafford, Bell Aerosystems Co.
Cdr, Rochester Contr. Mgt. Dist. - Attn: RMRRM
OCE - Attn: ENGRE-PR
JAG - Attn: Lands Division
Hq, USAF - Attn: AF Real Est Agency

STATE OF NEW YORK : DEPARTMENT OF HEALTH

IN THE MATTER :

OF :

CERTAIN PROPERTY OF THE FORT CONTI CORPORATION LOCATED IN THE TOWN OF LEWISTON, NIAGARA COUNTY, STATE OF NEW YORK. :

O R D E R

WHEREAS, the Commissioner of Health of the State of New York is directed by the Public Health Law to take cognizance of the interests of health and life of the People of the State, and of all matters pertaining thereto as to exercise the functions, powers and duties of the Department of Health prescribed by law and is directed to enforce the Public Health Law and the State Sanitary Code; and

WHEREAS, Section 16.18 of the State Sanitary Code provides:

"(a) The department may, by rule, regulation or order, impose upon any person possessing a radiation source such requirements, in addition to those set forth in this Part, as it deems appropriate or necessary to protect the public health and safety and to minimize danger to life and property from radiation hazards."; and

WHEREAS, investigation by the Commissioner of Health of the State of New York and those acting by and on his behalf has disclosed hazardous radioactive emissions from the soil of certain lands located in the Town of Lewiston, Niagara County, New York, and owned by or in the possession and the control of the Fort Conti Corporation, which said lands were formerly owned by the United States Atomic Energy Commission and used by it, among other things, as a storage area for radioactive materials; and

WHEREAS, the Department of Health has a responsibility concurrent with that possessed by other officials, agencies having jurisdiction or responsibility to protect the public health and safety and to minimize dangers to life and property from radiation hazards emanating from said lands; and

WHEREAS, it appears necessary to impose reasonable restrictions on the development and use of said lands for the purpose of protecting the public health and safety and to minimize danger to life and property from radiation hazards existing thereon;

NOW BY VIRTUE OF THE AUTHORITY VESTED IN ME by the Public Health Law, the rules and regulations promulgated pursuant thereto and the State Sanitary Code,

IT IS HEREBY ORDERED:

I. THAT the aforesaid lands owned by or under the control of the Fort Conti Corporation consisting of approximately six hundred fourteen (614) acres situate on or at that certain site now or formerly under the jurisdiction and control of the United States Atomic Energy Commission and now or formerly known as the Lake Ontario Storage Area located in the Town of Lewiston, County of Niagara and State of New York, shall not be developed or used for industrial, commercial or residential purposes, except that any use thereof existing at the time of the issuance of this Order shall be and hereby is allowed to continue and to be maintained provided, however, that such existing use shall not be expanded or broadened from and after the time of the issuance of this Order.

II. THAT the aforesaid lands may, however, otherwise be used for recreational purposes provided that the owner thereof take adequate and necessary precautions to assure that no person shall be permitted to make greater than an intermittent and occasional recreational use of said lands in order to minimize exposure of such person to radioactive hazards emanating therefrom.

III. THAT any deliberate or intentional movement, displacement or excavation, by whatever means, of the soil of said lands is hereby prohibited unless otherwise expressly permitted after the submission to and approval by the Commissioner of Health, or his

authorized representative, of acceptable plans therefor, except that any official agency having jurisdiction or responsibility, whether State or Federal, shall not be subject to such prohibition.

IV. THAT before the owner thereof shall make any sale, transfer or conveyance of said lands, he shall give to the Commissioner of Health, or his authorized representative, not less than five (5) days prior written notice of such proposed sale, transfer or conveyance.

V. THAT the aforesaid restrictions shall continue in full force and effect until such time as the Commissioner of Health, or his authorized representative, shall determine that radioactive emissions from said lands have been reduced to levels deemed acceptably safe to him and that irrespective of any procedures for decontamination of said lands which may be undertaken by any official agency, whether State or Federal, the Commissioner of Health, or his authorized representative, may require further decontamination procedures to be undertaken for the purpose of achieving levels of radioactivity deemed acceptably safe by him, or his authorized representative, before the aforesaid restrictions are terminated.

VI. THAT no procedures for decontamination of said lands shall be undertaken by other than an official agency having jurisdiction or responsibility, either State or Federal, or its agents, servants or employees, unless application for approval of acceptable plans therefor shall first have been made to and such plans approved by the Commissioner of Health or his authorized representative.

VII. THAT more particularly, the lands affected by this order are those certain lands reputedly owned by the Port Conti

Corporation adjoining those certain lands reputedly owned by Monroe W. Frank on the south and those certain lands reputedly owned by the Somerset Group, Inc. on the west.

HOLLIS S. INGRAHAM, M.D.
Commissioner of Health
of the State of New York

DATED: Albany, New York
April 27, 1972

TO: FORT CONTI CORPORATION (Reputed Owner)
c/o McMahon & Crotty, Esqs.
1028 Liberty Bank Bldg.
Buffalo, N. Y.

CHEM-TROL POLLUTION SERVICES, INC. (Reputed Tenant)
1 Niagara Square
Buffalo, N.Y.

UNITROL CORP. (Reputed Tenant)
c/o Hortense Mound
116 John Street
New York, N.Y.

C & S MACHINERY, INC. (Reputed Tenant)
c/o Edward Messing
1 Niagara Power Bldg.
North Tonawanda, N.Y.

LEW-PORT ELECTRIC, INC. (Reputed Tenant)
c/o Edward Messing
1 Niagara Power Bldg.
North Tonawanda, N.Y.

LEW-PORT CONSTRUCTION CORP. (Reputed Tenant)
c/o Edward Messing
1 Niagara Power Bldg.
North Tonawanda, N.Y.

JOSEPH J. PFOHL (Possible Grantee of Fort Conti Corp.)
503 North Forest Road
Buffalo, New York

Remap Inc. (Possible Grantee of Fort Conti Corp.)
5833 Main Street
Williamsville, New York

Attn: Mr. Joseph Pfohl

STATE OF NEW YORK : DEPARTMENT OF HEALTH

- X

IN THE MATTER :

OF :

CERTAIN PROPERTY OF THE SOMERSET GROUP, INC., LOCATED IN THE TOWN OF LEWISTON, NIAGARA COUNTY, STATE OF NEW YORK :

- X

SUPPLEMENTARY ORDER

WHEREAS, the Commissioner of Health of the State of New York or those acting by and on his behalf did, heretofore, discover the existence of hazardous radioactive emissions from the soil of certain lands located in the Town of Lewiston, County of Niagara and State of New York and owned by or in the possession and control of the Somerset Group, Inc., which said lands were formerly owned by the United States Atomic Energy Commission and used by it, among other things, as a storage area for radioactive materials; and

WHEREAS, the Commissioner of Health of the State of New York is directed by the Public Health Law to take cognizance of the interests of health and life of the people of the State, and of all matters pertaining thereto and to exercise the functions, powers and duties of the Department of Health prescribed by law and is directed to enforce the Public Health Law and the State Sanitary Code; and

WHEREAS, section 16.18 of the State Sanitary Code provides:

"(a) the department may, by rule, regulation or order, impose upon any person possessing a radiation source such requirement, in addition to those set forth in this Part, as it deems appropriate or necessary to protect the public health and safety and to minimize danger to life and property from radiation hazards."; and

WHEREAS, by virtue of the authority vested in the Commissioner of Health of the State of New York, an order dated April 27, 1972 made by said Commissioner directed because of the existence of said hazardous radioactive emissions therefrom that certain lands owned by or under

the possession and control of the Somerset Group, Inc., consisting of approximately one hundred thirty-three (133) acres situate on or at that certain site now or formerly under the jurisdiction and control of the United States Atomic Energy Commission and now or formerly known as the Lake Ontario Storage Area located in the Town of Lewiston, County of Niagara and State of New York, be restricted in the development and use thereof, except for certain specified permitted uses, until such time as said Commissioner should determine that radioactive emissions from said lands had been reduced to levels deemed acceptably safe to him; and

WHEREAS, the United States Atomic Energy Commission has removed certain contaminated soil from said lands and reduced radioactive emissions to levels acceptable to said Commissioner except for Six Mile Creek and a certain drainage ditch intersecting said lands; and

WHEREAS, said drainage ditch and Six Mile Creek are specifically designated and delineated in green ink upon a certain survey map of part of lot 13, T-15, K-9, Town of Porter, and part of lot 21, T-14, R-9, Town of Lewiston, County of Niagara, made by Rene A. Sauvageau and bearing date February 23, 1970 and revised dates respectively of March 9, 1970 and April 18, 1970, and hereto annexed and marked Exhibit "1";

NOW, BY VIRTUE OF THE AURTHORITY VESTED IN ME by the Public Health Law, the rules and regulations promulgated pursuant thereto and the State Sanitary Code, it appearing to my satisfaction that radioactive emissions from said lands have been reduced to levels that are acceptably safe, except for the areas thereof hereinbefore described,

IT IS HEREBY ORDERED:

1. THAT the aforesaid lands owned by or in the possession and control of the Somerset Group, Inc., consisting of approximately one hundred thrity-three (133) acres situate on or at that certain site now or formerly under the jurisdiction and control of the United States Atomic Energy Commission and now or formerly known as the Lake Ontario Storage Area located in the Town of Lewiston, County of Niagara and

State of New York may be used for any lawful use or purposes upon the conditions, as more particularly described upon Exhibit "1" hereto annexed, that all new buildings shall be of slab construction and shall have no basements; that no schools, hospitals, private homes or residential buildings shall be constructed on said site; that no buildings shall be erected in or over the main Drainage Ditch designated, marked and delineated in green ink upon the said Exhibit "1"; and further, that no buildings shall be constructed in or over Six Mile Creek which is designated, marked and delineated in green ink upon said Exhibit "1".

II. THAT no portion or part of the aforesaid lands owned by or in the possession and control of the Somerset Group, Inc., together with all existing structures thereon and all new structures which may hereafter be constructed thereon, shall be sold without the prior written approval of the State Commissioner of Health; that any such deed conveying same shall contain covenants running with the land and binding the grantee, his heirs, assigns and successors in interest; that said convenants shall prohibit construction of new buildings of other than slab construction, prohibit use of a new building as a school, hospital, private home or residential building, limit existing buildings to then existing uses, and prohibit construction of new buildings in or over the aforesaid Main Drainage Ditch or Six Mile Creek; that said restrictions shall remain and be in full force and effect until terminated or modified by the State Commissioner of Health, and that a declaration of restrictions containing the aforementioned restrictions shall be filed or registered in the county clerk's office.

III. THAT the provisions of numbered paragraph II through VII of my prior Order dated April 27, 1972 shall, as to the Drainage Ditch and Six Mile Creek as marked, designated, and delineated in green ink upon the annexed Exhibit "1", be continued in full force and effect.

DATED: Albany, New York
1974

HOLLIS S. INGRAHAM, M. D.
Commissioner of Health
of the State of New York

By: _____
ROBERT P. WHALEN, M. D.

TO: Somerset Group, Inc.
Town of Lewiston
Niagara County, New York

Department of Energy
Oak Ridge Operations
P. O. Box E
Oak Ridge, Tennessee 37831

S 19

REC JAN 8 87

December 29, 1986

Somerset Group, Inc.
Lew-Port Industrial Park
Balmer Road
Youngstown, New York 14174

Dear Sir:

NFSS POST-REMEDIAL ACTION REPORT 1983-84

I am pleased to inform you that the results of the post-remedial action radiological surveys have been verified and that remedial action on your property has been satisfactorily completed. The property is now in compliance with the standards and guidelines applicable to the remedial actions at the Niagara Falls Storage Site (NFSS). The data supporting the determination are in the enclosed post-remedial action report. This report also describes the radiological surveys and remedial actions conducted on your property and other properties in your area on which appropriate remedial activities were conducted.

A formal certification statement on your property will be forwarded to you in the near future.

Thank you for your cooperation, and if there are any questions, contact me or Mr. Bob Bowles of my staff at (615) 576-4451.

Sincerely,

Lowell E. Campbell

for S. W. Ahrends, Director
Technical Services Division

CE-53:Bowles

Enclosure

Department of Energy
Field Office, Oak Ridge
P.O. Box 2001
Oak Ridge, Tennessee 37831—8723

May 7, 1992

Mr. John Sims
Somerset Group, Inc.
Lew-Port Industrial Park
Balmer Road
Youngstown, New York 14174

Dear Mr. Sims:

CERTIFICATION OF THE REMEDIAL ACTION PERFORMED AT THE NIAGARA FALLS STORAGE SITE VICINITY PROPERTIES FROM 1983 THROUGH 1986

The Department of Energy (DOE) has completed radiological surveys and taken remedial actions to decontaminate the properties in the vicinity of the DOE-owned Niagara Falls Storage Site (NFSS) in Lewiston, New York. These vicinity properties had been contaminated by radioactive materials that had originally been stored at NFSS.

The final step in this decontamination effort is to certify that these properties are in compliance with applicable decontamination criteria and standards. This certification of compliance provides assurance that future use of the property will result in no radiological exposure above DOE criteria and standards established to protect members of the general public or site occupants. Enclosed you will find a certification statement for the properties owned by the Somerset Group, Inc.

When completed, a formal certification docket will be placed in the Lewiston library. This docket will summarize all actions taken to bring the NFSS vicinity properties into compliance with DOE criteria and standards, and will provide references to all pertinent documents.

If you have any questions, please contact Mr. Ronald Kirk at (615) 576-7477.

Sincerely,

Lester K. Price, Director
Former Sites Restoration Division

EW-93:Kirk

nclosure

STATEMENT OF CERTIFICATION: NIAGARA FALLS STORAGE SITE
VICINITY PROPERTIES ASSOCIATED WITH THE
FORMER MED/AEC OPERATIONS

The U.S. Department of Energy, Oak Ridge Operations Office, Former Sites Restoration Division, has reviewed and analyzed the radiological data obtained following remedial action at Niagara Falls Storage Site vicinity properties that were contaminated by material similar to that stored at the former Lake Ontario Ordnance Works in Lewiston, New York. Based on this analysis of all data collected, the Department of Energy (DOE) certifies that the following property is in compliance with DOE decontamination criteria and standards.

Properties owned by Somerset Group, Inc., including:

- A portion of Property A as described in the deed, liber 1503, page 752.

  A portion of Property D as described in the deed, liber 1503, page 752.

  A portion of Property T as described in the deed, liber 1503, page 752.

  A portion of Property U as described in the deed, liber 1503, page 752.

  A portion of Property V as described in the deed, liber 1503, page 752.

  A portion of Lot 13 along the Central Drainage Ditch as described in the deed, liber 1503, page 752.

This certification of compliance provides assurance that future use of these properties will result in no radiological exposure above applicable guidelines established to protect members of the general public or site occupants.

By: w. L. K. Price Date: 2/26/91

L. K. Price, Director
Former Sites Restoration Division
Oak Ridge Operations Office
U.S. Department of Energy

AREAS PROPOSED FOR NO FURTHER ACTION OR FURTHER INVESTIGATION BASED ON RESULTS OF THE 1998 PHASE 1 REMEDIAL INVESTIGATION

COMPONENT	CONSTITUENTS OF CONCERN	AREA OF INVESTIGATION	NO FURTHER ACTION RECOMMENDED UNDER DERP-FUDS PROGRAM REMEDIAL INVESTIGATION*	FURTHER REMEDIAL INVESTIGATION RECOMMENDED UNDER DERP-FUDS PROGRAM
1 (CWM Chemical Services, Inc.)	Soil: PAHs, Benzene, TNT, TCE, Pesticides	Nitration Houses		X
		Area C		X
		Area North of C		X
		Waterline Construction Area (WCA) 2	X	
		WCA 3	X	
	Groundwater: Boron, TCE, TNT TCA, RDX, 4-amino-2,6-dinitrotoluene	WCA 4		X
		Trash Pit		X
		Vicinity Property G		X
		Air Force Plant 68 (AFP-68) Process Area 2		X
		AFP-68 Process Area 4		X
		AFP-68 Process Area 7		X
		AFP-68 Process Area 8	X	
		AFP-68 Process Area 10		X
		AFP-68 Process Area 11	X	
		AFP-68 Process Area 14	X	
		AFP-68 Process Area 16	X	
		AFP-68 Process Area 18S	X	
		AFP-68 Process Area 20		X
		AFP-68 Process Area 22		X
		AFP-68 Process Area 24	X	
		Navy Interim Production Pilot Plant (IPPP)		X
2 (Somerset Group)	Groundwater: Lithium, RDX	Ground Scar	X	
		AFP-68 T1 and T2		X
		AFP-68 T3	X	
		AFP-68 Process Area 3		X
		AFP-68 Process Area 5		X
		AFP-68 Process Area 18N		X
		Process Area 30A		X
3 (Town of Lewiston)	Soil: PAHs Groundwater: Boron, Lithium	Wastewater Treatment Plant (WWTP)		X
		WWTP Vicinity Shops		X
5 (U.S. Government-Niagara Falls Storage Site)	Soil: PAHs	Acid Contamination Area		X
		Shop Area South O Street		X
	Groundwater: Lithium, TCE	WWTP Vicinity Shops		X
6 (Modern Disposal Services, Inc.)		Former LOOW Incinerator		X
7 (Sludge)	Sludge: Pesticides, Explosives	Former LOOW Underground Lines		X
8 (Wastewater)		Former LOOW Underground Lines		X
9 (Surface Water and Sediment)	Surface Water: Hydrazine, Boron, Lithium	Four Mile Creek Drainage		X
		Six Mile Creek	X	
		Twelve Mile Creek		X

* DERP-FUDS = Defense Environmental Restoration Program-Formerly Used Defense Sites.

National Whistleblower Center v. NRC, No. 00-422
(Supreme Ct., petition for writ of certiorari filed Sept. 13, 2000)

No. 00-422

In the Supreme Court of the United States

NATIONAL WHISTLEBLOWER CENTER, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KAREN D. CYR
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JOHN F. CORDES, JR.
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E. LEO SLAGGIE
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(202) 514-2217

QUESTION PRESENTED

Whether the Nuclear Regulatory Commission erred in denying petitioner's application to intervene in a nuclear power plant license renewal proceeding, when petitioner had notice of the rules governing such proceedings and failed to meet the twice-extended deadline for filing its contentions.

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In the Supreme Court of the United States

No. 00-422

NATIONAL WHISTLEBLOWER CENTER, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The April 11, 2000, opinion of the court of appeals (Pet. App. 1a-19a) is reported at 208 F.3d 256. The vacated November 12, 1999, opinion of the court of appeals (Pet. App. 24a-46a) is unreported. The final decision of the Nuclear Regulatory Commission (Pet. App. 47a-76a) is reported at 48 N.R.C. 325.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2000. A petition for rehearing was denied on June 15, 2000. The petition for a writ of certiorari was filed on September 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent United States Nuclear Regulatory Commission (NRC or Commission) is responsible for, among other matters, maintaining a regulatory program governing the safe construction and operation of commercial nuclear power reactors in this country. To accomplish its mission, the Commission issues licenses, rules, and orders covering various safety and environmental subjects. This action arose out of an application by the Baltimore Gas & Electric Company[1] to renew its NRC-issued licenses to operate the Calvert Cliffs nuclear power plant in Maryland.

1. The Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, embodied Congress's resolve to let the private sector play the lead role in providing energy from nuclear fission for commercial and other non-military uses. To further this goal in a manner protective of public health and safety and the common defense and security, Section 103 of the Act, 42 U.S.C. 2133, establishes licensing requirements for commercial nuclear reactors. Pursuant to subsection 103(c), reactor licenses are "issued for a specified period * * * depending on the type of activity to be licensed." For licenses to operate nuclear reactors, Congress established 40 years as the maximum allowable period. Section 103(c) further provides that operating licenses "may be renewed upon the expiration of such period." The statutory 40-year period does not govern plants (such as Calvert Cliffs) that are licensed for "research

[1] Baltimore Gas and Electric Company was a party-respondent before the court of appeals. Subsequently, as a result of a corporate reorganization, Calvert Cliffs Nuclear Power Plant, Inc., became owner and operator of the Calvert Cliffs nuclear power plant, and is a respondent in this Court.

and development." 42 U.S.C. 2134. But an NRC rule imposes the same 40-year limit on operating licenses for such plants. See 10 C.F.R. 50.51(a).

In 1982, the NRC staff convened a workshop to identify and resolve issues related to plant aging. The issues to be addressed included, among others, the timing for resolution of policy, technical, and procedural issues, the earliest and final dates that would be appropriate for filing an application to renew a license, and procedural changes that would be necessary to consider renewal applications. See 51 Fed. Reg. 40,334 (1986). The Commission ultimately decided to proceed by rulemaking and published an Advance Notice of Proposed Rulemaking seeking public comment on an NRC publication, "Regulatory Options for Nuclear Plant License Renewal," NUREG-1317. See 53 Fed. Reg. 32,919 (1988).

After conducting numerous public conferences, meetings, and workshops with interested parties, the NRC issued a proposed rule. See 55 Fed. Reg. 29,043 (1990). In 1991, the Commission published a final rule providing procedures and standards for license renewals. See 56 Fed. Reg. 64,943 (1991), codified as 10 C.F.R. Pt. 54. Four years later, after another rulemaking proceeding, the Commission modified its rule in some respects. See 60 Fed. Reg. 22,461 (1995). The final rule provided that licensees could seek renewal up to 20 years before license expiration. See 56 Fed. Reg. at 64,963. This lead time recognized that public utility licensees would need 10 to 14 years to plan and build replacement power plants in the event that the NRC refused to renew a license for a currently operating nuclear plant. *Ibid.*

The Commission's License Renewal Rule requires notice in the Federal Register of the opportunity for a

hearing on an application for license renewal. 10 C.F.R. 54.27. The license renewal hearing is a formal adjudication conducted before a three-judge Atomic Safety and Licensing Board, and is governed by the Commission's rules of practice, 10 C.F.R. Pt. 2, Subpt. G. See 10 C.F.R. 2.105, 2.700. In view of the anticipated large number of license renewal applications, and in response to recent experience and criticism of its procedures from Congress (see H.R. Rep. No. 581, 105th Cong., 2d Sess. 135 (1998)), the Commission issued a policy statement in July 1998, announcing its intention to modify procedures for license renewal hearings. See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 N.R.C. 18 (1998), *reprinted at* 63 Fed. Reg. 41,872 (1998).

The Commission's policy statement observed that "the opportunity for hearing should be a meaningful one." 63 Fed. Reg. at 41,873. But it recognized that "applicants for a license are also entitled to a prompt resolution of disputes concerning their applications." *Ibid.* Accordingly, the Commission encouraged hearing boards and officers to use "current rules and policies" as a "means to achieve a prompt and fair resolution of proceedings," and to "establish schedules for promptly deciding the issues * * *, with due regard to the complexity of the contested issues and the interests of the parties." *Ibid.* To accomplish those objectives, the policy statement stated that requests for extensions of time should be granted only "when warranted by unavoidable and extreme circumstances." *Id.* at 41,874.[2]

[2] The policy statement also addressed the requisite contentions of those seeking NRC hearings. 63 Fed. Reg. at 41,874. The Commission explained that in earlier cases and in a 1989 rulemaking it had made clear that to obtain a hearing potential interveners must support their contentions with specificity, and could not rest on mere conclusory assertions. See *ibid.* (citing 10 C.F.R. 2.714(b)(2)(iii)). At the same time, however, the Commission stated that the "factual support necessary" to show that a genuine dispute exists "need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." *Id.* at 41,874 n.1.

2. a. In April 1998, Baltimore Gas & Electric Company asked the NRC to renew its current licenses to operate the Calvert Cliffs nuclear power plant. Pet. App. 4a, 47a. The Commission promptly published notice of the application and, in July 1998, published notice of an opportunity for third parties to intervene and seek a formal hearing on the renewal application. *Id.* at 4a-5a, 49a. Only one potential intervener, petitioner, sought a hearing. The petition to intervene was filed shortly after the NRC issued its policy statement specifying that extensions would be allowed only in "unavoidable and extreme circumstances." *Id.* at 6a.

b. In August 1998, the Commission referred petitioner's hearing request to the NRC's Licensing Board. Pet. App. 6a, 49a. The referral order gave the Board a proposed schedule with a goal of resolving the Calvert Cliffs proceeding within about two and one half years, outlined a number of case management tools it expected the Board to employ—including a directive not to grant extensions of time "absent unavoidable and extreme circumstances"—and called attention to the Commission's recent policy statement on expediting cases. *Id.* at 6a, 115a-122a. The Licensing Board immediately issued an initial prehearing order giving petitioner three weeks, until September 11, 1998, to file the required contentions detailing its concerns. *Id.* at 6a, 50a. The order stated that any extension requests should be

submitted at least three business days prior to the due date and "demonstrate 'unavoidable and extreme circumstances.'" *Id.* at 6a.

Petitioner filed a series of motions with the Board and the Commission, arguing that the Commission's policy statement, referral order, and hearing schedule unfairly restricted the time to frame its contentions. Pet. App. 6a-8a, 50a-51a. In particular, petitioner argued that requests for extensions should be governed by the "good cause" standard set forth in 10 C.F.R. 2.711(a). Pet. App. 7a. The Commission found the challenged procedural orders well within the agency's power to manage its own docket and denied petitioner's motions. In particular, the Commission concluded that the unavoidable-and-extreme circumstances standard "simply gives content . . . to [the] rule's general 'good cause' standard." *Ibid.* (quoting NRC order). The Licensing Board denied petitioner's request for an extension of time, finding that petitioner had failed to demonstrate unavoidable and extreme circumstances warranting an extension. *Ibid.*

Petitioner did not file any contentions on September 11, 1998—the deadline for doing so. Instead, it filed a petition with the Commission objecting to the denial of its request for extension and arguing that the deadline should be September 30, 1998. While standing by the extreme-and-unavoidable-circumstances standard, the Commission nevertheless agreed to give petitioner an extension until September 30 to file the requisite contentions. Pet. App. 94a-97a, 103a-114a. The Board subsequently gave petitioner an additional extension of one day, until October 1, 1998, in recognition of a religious holiday. *Id.* at 8a, 51a. The October 1 deadline came and went with no contentions filed. *Id.* at 8a, 51a. On October 13, 1998, petitioner filed two late contentions relying on references to NRC staff inquiries to Baltimore Gas and Electric Company. *Id.* at 9a, 52a. The Board dismissed the petition to intervene on the grounds that petitioner failed "to establish cause" for an extension and failed to show that it met the standard for late-filed contentions. *Id.* at 9a, 77a-93a.

c. On administrative appeal, the Commission affirmed. Pet. App. 47a-76a. The Commission found that petitioner had "had more than five months [from the filing of the license renewal application] within which to prepare contentions, yet it offered no meaningful explanation of the grounds for its opposition" to the Calvert Cliffs license renewal. *Id.* at 59a. In response to petitioner's argument that it should have received additional time under the Commission's "good cause" standard, the Commission indicated that it considered its "construction of 'good cause' to require a showing of 'unavoidable and extreme circumstances' * * * a reasonable means of avoiding undue delay in this important license renewal proceeding." *Id.* at 58a. The Commission further found that petitioner's "complete failure to provide specific information about its concerns precluded any finding that 'good cause,' in a meaningful sense, justified [petitioner's] requested extensions of time." *Id.* at 59a. The Commission also agreed that petitioner's contentions were insufficient. *Id.* at 69a-73a.

3. a. Petitioner filed a petition for review of the Commission's order with the District of Columbia Circuit. A divided panel of the court of appeals (Pet. App. 24a-46a) held that the Commission's unavoidable-and-extreme circumstances standard "is effectively an amendment of the Commission's regulations made without notice and comment required by the Administrative Procedure Act." *Id.* at 25a. The panel vacated

the Commission's decision and remanded for consideration of "whether [petitioner] had 'good cause' for an extension of time to file contentions." *Id.* at 46a. Ten days later, however, the court of appeals (*id.* at 20a-23a) on its own motion vacated the divided panel decision and set the case for further briefing and rehearing.

Chief Judge Edwards, who had joined the initial panel decision, concurred in rehearing because he "fear[ed] that the original (now vacated) majority opinion fails to address some critical issues in this case." Pet. App. 21a. As he explained, "[t]hese issues were not the focus of the arguments during the first hearing before the court, so it is unsurprising that they were lost in our haste to issue an opinion before our colleague, Judge Wald, departed from the court." *Ibid.*[3] Chief Judge Edwards thought these issues "too important to ignore once uncovered." *Ibid.* And "[a]fter considering this matter further," he concluded that there is "good reason" to believe that the initial panel was "mistaken" in its view that the Commission acted pursuant to a substantive rule requiring notice and comment rulemaking. *Ibid.*

b. Following rehearing, the court of appeals (Pet. App. 1a-19a) denied the petition for review, holding that the Commission properly denied intervention on the ground that petitioner "failed to submit the required contentions within the prescribed deadline." *Id.* at 4a. The court of appeals stated at the outset that almost all of petitioner's arguments are "plainly meritless." *Id.* at 10a. The sole issue warranting discussion was the claim that "the NRC erred in adopting and

[3] Judge Wald authored the initial panel decision in this case, but shortly thereafter departed from the court.

applying an 'unavoidable and extreme circumstances' test, in lieu of a 'good cause' test, to assess requests for extensions of time." *Ibid.* The court rejected that claim too, however, because it concluded that "the Commission was fully justified in adopting the disputed test and, also, because [petitioner] suffered no prejudice in the Commission's application of the new standard." *Ibid.*

The court concluded that petitioner was "simply wrong" in claiming that the Commission lacked the authority to adopt the "unavoidable and extreme circumstances" test as an adjudicatory rule. Pet. App. 11a. On this issue, the court stated that it was "in complete accord with the Seventh Circuit's position that the NRC possesses the authority 'to change its procedures on a case-by-case basis with timely notice to the parties involved.'" *Ibid.* (quoting *City of West Chicago* v. *NRC*, 701 F.2d 632, 647 (7th Cir. 1983)). The court pointed out that there can be "no claim here that [petitioner] lacked timely notice of the new 'unavoidable and extreme circumstances' standard," since the Commission announced its intent to adopt the standard in its August 1998 policy statement, and petitioner "received express notice that the new standard would be applied in the Calvert Cliffs proceeding" in the prehearing order. *Ibid.*

Next, the court of appeals rejected the argument that adoption of the unavoidable-and-extreme-circumstances standard required notice and comment rulemaking. Pet. App. 12a-14a. The standard "embodies a procedural rule." *Id.* at 12a. As the court explained, "[t]he disputed agency action * * * merely altered a standard for the enforcement of filing deadlines; it did not purport to regulate or limit [petitioner's] substantive rights." *Ibid.* Such "agency housekeeping rules"

often reflect "a judgment about what mechanics and processes are most efficient," but "[t]his does not convert a procedural rule into a substantive one." *Ibid.* (quoting *JEM Broad. Co.* v. *FCC*, 22 F.3d 320, 327-328 (D.C. Cir. 1994)). As a procedural step, the NRC may "require[] parties who failed to meet otherwise reasonable deadlines to demonstrate compelling reasons before they could obtain any extensions of time beyond prescribed deadlines." *Id.* at 13a.

The "only remaining question" was whether the NRC's "new procedural standard" satisfies arbitrary and capricious review under the APA, and the court of appeals held that the standard "easily survives [such] review." Pet. App. 14a-15a. As the court explained, the "new procedural standard did not significantly or unreasonably change the regime pursuant to which requests for extensions of time are judged," but "merely refine[d] an existing procedural standard." *Id.* at 14a. Moreover, petitioner failed to show "detrimental reliance in this case," because it "had no basis upon which to assume that * * * deadlines automatically would be waived upon request pursuant to the old good cause standard." *Id.* at 14a-15a. In addition, the Commission "fully explained the need for expedited case processing" in its policy statement. *Id.* at 15a.

Finally, the court emphasized that petitioner "has offered absolutely nothing to show how the promulgation of the new rule, even if, arguendo, in error, resulted in prejudice or other cognizable harm to them." Pet. App. 16a. The Commission granted petitioner two extensions of time; yet when the twice-extended deadline (October 1, 1998) elapsed, petitioner failed to file the requisite contentions or anything supporting another extension of time. *Id.* at 17a. Accordingly, the court concluded that "[t]here can be no doubt that, on the record before us, [petitioner] suffered no prejudicial error when the Commission adopted the new 'unavoidable and extreme circumstances' standard." *Id.* at 19a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with the decision of any other court of appeals. Petitioner was given ample opportunity to intervene in the license renewal proceeding in this case, and failed to do so of its own volition. The court of appeals carefully considered petitioner's arguments and properly found not only that the Commission acted lawfully under the APA, but also that petitioner suffered no prejudice as a result of the agency actions about which it now complains. Review by this Court is not warranted.

1. Petitioner claims (Pet. 11) that this case presents "the following important question: whether the [APA]'s adjudication provisions apply to nuclear safety proceedings conducted under Section 189(a) of the Atomic Energy Act?"[4] The "adjudication provisions" referred to by petitioner are those governing formal, "on the record" agency hearings set forth in 5 U.S.C.

[4] This question subsumes the first two questions presented in the petition. See Pet. i. There is no dispute that as a general matter the APA applies to the NRC; the Atomic Energy Act (AEA), 42 U.S.C. 2231, so provides. The basic question raised by petitioner here is whether NRC license renewal proceedings are governed by the formal hearing requirements of the APA. Contrary to the suggestion of petitioner (Pet. 11, 14), this issue does not resemble the one decided in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). In *Vermont Yankee*, the Court held that the courts may not impose on administrative agencies procedural requirements that go beyond statutory demands; in this case, by contrast, the court of appeals gave effect to the agency's own procedural rules (which were consistent with statutory requirements).

554, 556, and 557. See Pet. 11, 13, 17-25. The court of appeals' decision in this case does not mention let alone purport to decide the "important" APA issue framed by petitioner in this Court, and that is not surprising.

In license renewal proceedings for nuclear power plants, the Commission follows the formal adjudicatory procedures set forth in Subpart G of Part 2 of its rules of practice. See 10 C.F.R. 2.105, 2.700; *Philadelphia Newspapers, Inc.* v. *NRC*, 727 F.2d 1195, 1202-1203 (D.C. Cir. 1984). Significantly, the Subpart G rules—which governed the proceeding in this case—provide for a formal hearing with all the protections, and then some (such as the right to pre-hearing discovery, which is not guaranteed by the APA), of a formal, APA-"on the record" hearing. Compare 10 C.F.R. 2.700-2.788 with 5 U.S.C. 554, 556-557. See also *Union of Concerned Scientists* v. *NRC*, 735 F.2d 1437, 1444-1445 n.12 (D.C. Cir. 1984) (NRC "regulations governing licensing proceedings provide for hearing procedures that comport with or even surpass those required by the APA for 'on the record' adjudication.").

Because the NRC's Subpart G rules are at least as protective as those governing "on the record" adjudications under the APA, the District of Columbia Circuit has specifically declined in the past to decide whether the APA's formal adjudication requirements govern NRC licensing proceedings. See *Nuclear Info. & Res. Serv.* v. *NRC*, 969 F.2d 1169, 1180 (D.C. Cir. 1992) (en banc); *Union of Concerned Scientists* v. *NRC*, 920 F.2d 50, 53 (D.C. Cir. 1990).[5] And in this case, the court of

[5] Petitioner suggests (Pet. 11) that the state of the law is in "disarray" on this issue. See Pet. 18-22. That is not so. Neither the court of appeals below nor any other decision cited by petitioner specifically addresses the question whether the APA's formal hearing requirements apply to nuclear power plant license renewal proceedings. In *City of West Chicago* v. *NRC*, 701 F.2d at 641-645, the Seventh Circuit held that the APA's formal hearing requirements are not applicable in a materials license proceeding. There is no contrary decision. Petitioner quibbles with statements in various District of Columbia Circuit decisions discussing the application of the APA in NRC proceedings. But none of those decisions squarely decided the APA issue petitioner presents here; they do not conflict with the decision below (which did not discuss that issue); and any intra-circuit tension that may exist between statements in the opinions cited by petitioner may be resolved by the District of Columbia Circuit—in a case actually presenting the APA issue petitioner seeks to raise.

appeals did not even mention that here-academic issue.[6] This Court typically does not consider questions that

[6] Petitioner (Pet. 13, 18, 23-25) attempts to ground its APA argument in a footnote in the Commission's final decision. See Pet. App. 60a-61a n.4. The footnote responded to petitioner's complaint that the Commission violated the APA by not taking into account the "convenience and necessity of the parties." 5 U.S.C. 554(b). The Commission stated that it did "not doubt our obligation to treat all parties to our proceedings fairly," but emphasized that its case management initiatives had not "prejudiced [petitioner's] right to participate meaningfully" in the Calvert Cliffs adjudication. Pet. App. 60a n.4. In addition, the Commission stated that, "as a formal matter, one of the APA provisions cited by [petitioner] (5 U.S.C. §554(b)) applies only to agency proceedings required by statute to be 'on the record,'" and that "[t]he Commission's position * * * is that NRC licensing proceedings are not governed by APA requirements for formal on-the-record adjudications, except in particular situations where Congress has so mandated." *Ibid.* In reiterating its position on this issue, the Commission was simply ensuring that its use of formal procedures for license renewal proceedings—which meet or exceed those followed under the APA—would not be deemed as an abandonment of its prior position that neither the APA nor the AEA requires it to conduct an "on the record" hearing. In any event, as discussed, the court of appeals did not address the validity of the

were not addressed or decided below. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (The Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below."). There is no reason to make an exception here.

2. The court of appeals did address the question whether the Commission properly applied its unavoidable-and-extreme-circumstances standard in this case, but that factbound contention does not warrant certiorari either. Petitioner's principal claim (Pet. 15-16) is that the Commission should have assessed petitioner's extension requests under the "good cause" standard rather than the "unavoidable and extreme circumstances" standard. The court of appeals correctly held that the Commission permissibly applied the latter standard and that, in any event, petitioner did not suffer any "prejudice or other cognizable harm" (Pet. App. 16a) as a result of the application of that standard.[7]

As the court of appeals stressed, the NRC, like other agencies, possesses the discretion to modify its procedural rules, so long as it provides "timely notice" of rule

Commission's position on this issue, or delve into the meaning of the footnote in the agency decision on which petitioner now relies.

[7] Even if the Commission improperly applied the unavoidable-and-extreme-circumstances test it properly rejected petitioner's application for failure to meet specificity requirements in stating its contentions. See Pet. App. 69a-73a; *id.* at 59a ("[T]hroughout this proceeding, [petitioner] has provided the Board and the Commission only the scantiest of details regarding its health-and-safety or environmental concerns."). That provides an additional reason for denying review. See note 2, *supra*.

changes. Pet. App. 11a. The courts of appeals are "in complete accord" on this point. *Ibid.* (citing *City of West Chicago* v. *NRC*, 701 F.2d at 647). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. at 544 (a "very basic tenet of administrative law [is] that agencies should be free to fashion their own rules of procedure"); *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) ("It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."). And the Commission plainly provided interested parties—including petitioner—timely notice of the unavoidable-and-extreme-circumstances standard, both in the August 1998 policy statement and its scheduling order for the Calvert Cliffs license renewal proceeding. See Pet App. 11a.

The court of appeals also correctly stated that the APA's notice-and-comment rulemaking requirements do not apply to procedural rules. See 5 U.S.C. 553(b)(3)(A); *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993). Furthermore the court correctly found that the Commission acted lawfully in taking steps to expedite nuclear power plant license renewal proceedings. The Commission's new extension-of-time standard lies well within the "wide latitude an agency has in designing its own proceedings." Pet. App. 15a (citing *Vermont Yankee*, 435 U.S. at 524-525). And the Commission provided ample explanation for adopting this new standard and, more generally, attempting to improve and streamline the procedures governing license renewal proceedings. See *id.* at 53a-54a.

Moreover, application of the unavoidable-and-extreme-circumstances standard did not prejudice petitioner. Pet. App. 16a-19a. See 5 U.S.C. 706 ("[D]ue account shall be taken of the rule of prejudicial error."). As the court of appeals pointed out, petitioner received "two extensions of time in which to file contentions" (Pet. App. 19a), and when the deadline for contentions (as extended) ultimately arrived, petitioner filed neither contentions nor an additional supported request for extending the deadline—a third time. *Id.* at 17a. Instead of an extension-of-time motion, petitioner filed a "Motion to Vacate and Re-schedule the Pre-Hearing Conference" that invoked a supposed right to delay contention-filing until after Baltimore Gas & Electric Company answered then-pending inquiries from the NRC staff. But, as the court of appeals explained, "[i]t is clear that, under prevailing law" petitioner was not entitled to any pre-contention "discovery." *Ibid.*

In short, petitioner cannot plausibly attribute its failure to file timely and adequate contentions to the challenged extension standard, and petitioner has provided no reason why it is necessary for this Court to review the court of appeals' factbound determination that prejudice was lacking in this case.

3. The NRC has broad discretion to ensure that its adjudications move along promptly and efficiently from the perspective of all interested parties, and to administer those procedures as it deems appropriate in individual proceedings. Here, the Commission acted reasonably—and with notice to all—in its effort to manage and schedule the Calvert Cliffs license renewal proceeding. Its actions, moreover, resulted in no "prejudice or other cognizable harm" to petitioner. Pet. App. 16a. Despite early availability of the license renewal application (more than two months prior to the

formal hearing notice), advance warning of the Commission's determination to resolve license renewal cases expeditiously and to allow extensions of time only in "unavoidable and extreme" circumstances, and an agency scheduling order that coupled with extensions of time gave petitioner at least 75 days after the hearing notice for specifying any safety or environmental concerns (*id.* at 13a, 63a), petitioner failed to present a single particularized complaint. In these circumstances, the court of appeals correctly determined that petitioner's intervention request was properly denied by the Commission, and further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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