RONALD L. KUIS, ESQUIRE
ATTORNEY - AT - LAW
12 SCENERY ROAD
PITTSBURGH, PENNSYLVANIA 15221
TELEPHONE 412/731-7246
TELECOPIER 412/731-3970

FOR SETTLEMENT, DEMAND, AND CLAIM PURPOSES ONLY

August 25, 1999

Mary Elizabeth Ward, Esq.
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P. O. Box 23986
Washington, D.C. 20026-3986

Via Certified Mail No. Z 449 254 459

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Via Certified Mail No. Z 449 254 458

Re: Demand and Claim Letter for CERCLA Response Costs
Demand and Claim Letter under the Federal Tort Claims Act
Lake Ontario Ordnance Works - Somerset Group, Inc.

Dear Ms. Ward and General Counsel:

On behalf of the Somerset Group, Inc. (the "Somerset Group"), John L. Syms ("Mr. Syms"), its President, and the immediate family of Mr. Syms (the "Syms Family") (collectively "Claimants"), this letter is a demand and claim against the United States of America for: (i) environmental response costs incurred under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607 and 9613; (ii) damages and losses arising under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 and/or New York common law; and (iii) other applicable claims; or in the alternative for inverse condemnation under the Fifth Amendment of the United States Constitution.

This letter sets forth the legal basis for this demand and claim; it also sets forth the monetary damages incurred by the Somerset Group, John Syms and the Syms Family, and the financial recovery sought from the United States. All damages and claims discussed in this letter arose on or about the Lake Ontario Ordnance Works ("LOOW") located within the Towns of Lewiston and Porter in Niagara County, New York, and the 132-acre portion of LOOW purchased in 1970 by the Somerset Group (the "Site"). LOOW and the Site are both presently the subject of an environmental investigation and remediation by the U.S. Army Corps of Engineers under the Formerly Utilized Sties Remedial Action Program ("FUSRAP").

9/15 Barczak Leithauer
Boglion Byrnes

I. Brief Statement of the Claims Against the United States

This is a complex legal matter with the involvement of more than one Federal agency or department. In such a complex matter, it is appropriate that the Department of Justice act as the Federal clearinghouse for the resolution of multiple claims against the United States of America.

Claims against the Nuclear Regulatory Commission under the FTCA are presented to the Office of the General Counsel pursuant to the requirements of 10 C.F.R. §14.15, which states in pertinent part: "A claimant shall mail or deliver the claim to the office of the employment of the NRC employee whose negligent or wrongful act or omission is alleged to have caused the loss or injury. If the office of employment is not known, the claimant shall file the claim with the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555."

Claims arising under CERCLA against any agency or department of the Federal government may properly be raised before the Environmental Defense Section ("EDS") of the U.S. Department of Justice. The EDS is responsible for the administrative resolution of environmental claims against the United States brought under the major pollution control statutes, including CERCLA.

Briefly stated, the claims against the United States, as described in this letter, have arisen on or about LOOW. LOOW is located in the northwestern corner of New York, approximately twenty miles north of Niagara Falls. Starting in 1942, LOOW has, at various times, been used by the War Department, Atomic Energy Commission, Nuclear Regulatory Commission, and various branches of the Department of Defense, as the site of numerous wartime and defense related activities. These activities have included: the storage and disposal of various types of radioactive waste, including the storage and disposal of radioactive waste produced in support of the Manhattan Project; a storage depot operated by the Army's Chemical Warfare Service; the disposal of radioactive waste from the experiments in human exposure to radiation conducted by the University of Rochester; the site of facilities for production of TNT and high performance jet/rocket engine fuel; production of boron-10 for the nation's nuclear program; a NIKE missile base; and miscellaneous operations of various military contractors operating in western New York, including National Lead Company of Ohio.

The above list of activities at LOOW is not meant to be all-inclusive. Along with the disposal of military waste at the near-by Love Canal and at the so-called Linde radioactive waste disposal site, the scope and magnitude of the environmental impact created by the Federal government in this region of western New York is substantial.

In 1970, pursuant to an introduction arranged by a representative of the U.S. General Services Administration, the Somerset Group purchased the Site. The Site comprises approximately 132 acres located directly within the former 2500-acre actively-used portion of the original 7500-acre LOOW site. Despite numerous contemporaneous documents confirming

extensive and dangerous levels of radioactive, explosive and other chemical environmental contamination (collectively referred to as "Environmental Contamination"), agents and employees of the United States consistently failed, either through ignorance or misrepresentation, to reveal the extent of Environmental Contamination on the Site to private party purchasers, including the Somerset Group.

By 1972, the Somerset Group's plan to develop the Site into the Lew-Port Industrial Park was underway, with several tenants and Mr. Syms' company, Unitool, occupying the Site. However, in 1972, suddenly and without prior warning, the New York Department of Health ("NYSDOH") issued an Order (the "NYSDOH Order"), effectively prohibiting the Somerset Group from undertaking any further construction on the Site or any subsurface excavation of the soil. The factual basis for the NYSDOH Order was the radioactive contamination at LOOW, which was attributable to various uranium processing and disposal activities at LOOW, including the Manhattan Project. NYSDOH apparently became aware of the radioactive contamination after its review of a radiological survey conducted by the Atomic Energy Commission, and discovered that the United States had recklessly and improperly sold highly contaminated property to a private party. With the issuance of the NYSDOH Order, Somerset Group had no choice but to abandon its immediate plans for developing an industrial park and, at the advise of counsel, discourage existing tenants from remaining on the Site. With all of its assets tied to the Site and improvements made on the Site, the inability to use and develop the Site led to bankruptcy proceedings for the Somerset Group in 1980.

After the issuance of the NYSDOH Order, Mr. Syms, as an officer of Somerset Group, personally tried to determine the exact nature and extent of the radioactive contamination on the Site. In response to Mr. Syms' efforts, the Department of Energy, Oak Ridge Operations, issued correspondence to the Somerset Group on December 29, 1986, attesting that the property of the Somerset Group was decontaminated and fit for industrial purposes. This document provided notice of a forthcoming "Certification of the Remedial Action" for the radioactive contamination. It was not until nearly six years later, on May 7, 1992, that the Department of Energy issued to the Somerset Group a "Certification of the Remedial Action," which attested to the suitability of the Site for industrial purposes. These documents were patently false. No mention was made of any other explosive or toxic contamination on and under the Site, which still left it totally unfit for industrial or any other purpose.

Today, nearly 13 years after the issuance of the first erroneous correspondence, the Army Corps of Engineers has been engaged and continues to be engaged in a multi-million dollar cleanup of LOOW. Comments from representatives of the Army Corps of Engineers at a recent March 2, 1999 public meeting revealed that Environmental Contamination at the Site is found on the soil surface, in the groundwater, and in the subsurface. Furthermore, the investigation and remediation activities are likely to continue for a number of years. At this public meeting, the Army Corps of Engineers revealed, for the first time, the existence of newly identified contaminants of unknown origin on the Site.

In a recent effort to find out the true extent and nature of contamination at the Site, a request for groundwater sampling and monitoring records was submitted to the Army of Corps of Engineers under the Federal Freedom of Information Act. For more than six months, the request was left unanswered. Despite repeated telephone calls and follow-up correspondence, the representatives of the Army Corps of Engineers simply refused to provide the requested information. When a response was finally obtained on July 26, 1999, the Army Corps of Engineers claimed that it had no information concerning groundwater monitoring data at the Site. This "no records" response was made by the Corps despite the existence of nine (9) groundwater monitoring wells installed on the Site by contractors for the Corps between November 1991 through January 1992. Today, almost 27 years since the initial NYSDOH Order was issued against the Somerset Group, there has been no meaningful effort by the various representatives of the Federal government to explain to the Somerset Group the complete nature and extent of the Environmental Contamination found on the Site. In fact, the available documents show a pattern of obfuscation and concealment to both the public and the Somerset Group concerning environmental conditions at LOOW.

As a direct result of the actions of the Federal government, the Somerset Group has suffered significant financial damages and losses to both person and property. These damages and losses, in large measure, caused the financial crisis that resulted in the reorganization arising out of the bankruptcy proceeding filed for the Somerset Group in 1980. As a result of this reorganization, and at the urging of the Bankruptcy Court, Somerset Group was required to divest itself of some of its property at LOOW (93 acres) to Service Corporation of America ("SCA"), which at that time and now operates an adjacent hazardous waste disposal facility through its successor, Chemical Waste Management. This land was valuable to SCA because it sought to discharge treated leachate through a discharge line that runs under the 93-acre parcel to the Niagara River. After this sale, Somerset Group was left with 39 acres of the Site (the "Somerset Group Property").

The damages and losses directly attributable to governmental actions continue today. Notwithstanding the ongoing remedial efforts of the Army Corps of Engineers (the efficacy of which is subject to debate), the Somerset Group Site has become a continuing financial burden to its owners, and remains a health risk to its employees and management. Due to the widespread and indiscriminate dumping of radioactive waste at LOOW, occupational exposure to radiation was documented by the New York Legislature in 1981. The employees of the Somerset Group and the Syms Family have for the last 29 years worked in areas immediately adjacent to the indiscriminate dumping of some of the most dangerous substances known to man.

In addition to the personnel exposure to hazardous substances, the financial harm to the Somerset Group is evident by the dramatic diminution of property value seen at the Site. In 1979, the Somerset Group commissioned a partial real estate appraisal of three buildings on approximately 5 acres of the remaining 39-acre Somerset Group Property. This pre-CERCLA appraisal estimated the value of this particular property to be approximately $1.6 million,

assuming some maintenance to buildings already on the Site, and resolution of the restrictions placed on land use by the State of New York. Unfortunately, the Site is valueless today, and in fact, constitutes a continuing liability to the owner. No financial institution would consider the Site as a security interest for a loan, and no buyer would consider acquiring the Site because of the Site's Environmental Contamination, and the stigma of LOOW.

The historical background concerning these claims and the history of LOOW is described in more detail in the sections that follow. This historical background was derived, in large part, from two primary sources: (i) *The Federal Connection: A History of U.S. Military Involvement in the Toxic Contamination of Love Canal and the Niagara Frontier Region*, Volumes I and II, dated January 29, 1981, prepared by the New York State Assembly Task Force of Toxic Substances ("*The Federal Connection*"),and (ii) *History Search Report Lake Ontario Ordnance Works (LOOW) Niagara County, New York (Draft)*, dated December 1997, prepared by EA Engineering, Science, and Technology, Inc. on behalf of the U.S. Army Corps of Engineers, Baltimore District (the "*History Search Report*"). Volume II of *The Federal Connection* contains copies of many of the archival documents used in developing the historical background of LOOW. Copies of both primary source documents are provided under separate cover to the Department of Justice. In addition, key documents, including real estate deeds, the 1979 real estate appraisal, and other legal documents are attached as Appendices to this letter. Other relevant archival documents obtained through public sources are available for review by the Department of Justice at the offices of the Somerset Group.

While the ensuing recitation of the history of LOOW, the Site, and the Somerset Group provides a background to the claims discussed in this letter, the real story is much more personal. For almost 29 years, John Syms and his family have been wrongfully harmed, either directly or indirectly, by the actions of the Federal government. Financial losses directly as a result of Environmental Contamination attributable to activities of the Federal government have devastated a once-thriving family business. The hollow promises of remedial actions by the Army Corps of Engineers to correct decades' old contamination will not compensate for the lost business opportunities, unreimbursed expenses, future medical monitoring, corporate overhead and personnel expenses directly related to the Environmental Contamination, along with diminished property values. Moreover, the misrepresentations and inaccuracies made by representatives of the Federal government have forced Mr. Syms and the Somerset Group to contemplate the only remaining option to correct past wrongs: legal action against the United States of America.

II. History of LOOW and the Somerset Group

A. Early History of TNT Production Operations

In 1942, the War Department acquired approximately 7,500 acres in the Towns of Lewiston and Porter, New York, as the site of a newly-constructed TNT production facility. On this property, designated as the Lake Ontario Ordnance Works, the War Department constructed

six TNT production lines, a power plant, hospital, fire department, and over 500 support structures. These facilities were constructed on approximately 2,500 acres of the original 7,500-acre LOOW reservation, with the remaining 5,000 acres designated as a so-called "buffer zone" from the adjacent residential communities. TNT production commenced at LOOW on October 16, 1942, and concluded somewhat abruptly on July 31, 1943, apparently because of an overcapacity of domestic TNT production. Total investment by the War Department in the TNT plant at LOOW is estimated to be approximately $27 million.

B. Private Party Real Estate Transactions and Radioactive Waste Storage at LOOW After the Termination of TNT Operations

Numerous real property dispositions occurred in the LOOW buffer zone shortly after the termination of the TNT production and the end of World War II. In the buffer zone, property was sold by the government to a variety of private concerns, including private residential areas, farms, churches, a trout hatchery, the Lew-Port High School and School District Complex, and others. The Shrine of Fatima, operated by the Barnbite Fathers, is located on the northern corner of the former LOOW 5,000-acre buffer zone.

Within the actively-used 2,500-acre LOOW property dedicated for TNT manufacture and other military operations, attempts were made by the War Assets Administration, and later the General Services Administration, to sell the property to private concerns, but these attempts were initially unsuccessful. Internal documents were prepared warning that residential development should not encroach upon the active portion of LOOW, due to the explosive nature of the TNT chemicals remaining in the underground wastewater sewer lines. Nevertheless, continuing attempts were made to dispose of the property.

Subsequent to the initial failure to sell the property to private concerns, additional military and atomic energy activities were conducted at the LOOW site. Air Force Plant 68 was constructed and operated for a short period of time on the Site for the production of high-performance fuels. In addition, the Army's Chemical Warfare Service obtained approximately 860 acres known as the "igloo area." The "igloo area" was used as a storage site for ordnance and chemical warfare materials. After the storage operations of the Army's Chemical Warfare Service were terminated, the Atomic Energy Commission used the igloos for the temporary storage of uranium processing residues. The igloo area is located immediately adjacent to the Site.

Within the area previously used for the production of TNT, numerous real estate transactions have occurred:

> The Somerset Property presently consists of approximately 39 acres and is located in the west-central portion of the former LOOW TNT production area (Figure 3-1f). Subsequent to the closing of LOOW, an approximately 1,500 acre parcel was

> acquired by the AEC for the storage of radioactive waste. The Somerset Property was a part of that AEC acreage. The AEC parcel was declared excess and transferred to the GSA in 1955. During GSA ownership, the land was used by the Air Force and Navy for production of high energy fuels (See Section 3.1.5). The GSA sold a 775-acre parcel containing the current Somerset Property to the Fort Conti Corporation in 1966 (Figure 3-1c). Approximately **[132]** acres of the **[564]**-acre parcel was sold to the Somerset Group in 1970 (Figure 3-1d).[1] The Somerset Group sold the parcel to CWM [Chemical Waste Management] in 1980, reserving from the sale 39 acres for development of the Lew-Port Industrial Park (Figure 3-1e-f).

History Search Report, page 3-16.

Attached as Appendix A is a copy of the deed transferring 564 acres of the LOOW site to the Fort Conti Corporation. Attached as Appendix B is a copy of the deed transferring 132 acres of the Fort Conti parcel to the Somerset Group.

The previous excerpt from the *History Search Report* is somewhat misleading. During the Somerset Group's bankruptcy proceedings in 1979, there was a vigorous attempt by the Somerset Group to dispose of all of the Site. However, because of the Environmental Contamination, the only interested buyer was SCA. Moreover, SCA's interest in the Site was limited to that portion on which other improvements were located, most importantly a discharge line through which treated leachate could flow to the Niagara River. Although Mr. Syms continued in his efforts to develop the Lew-Port Industrial Park on the remainder of his property, these efforts proved futile because of the environmental issues arising from prior government activities.

In the mid-1940s, approximately 1,500 acres in the southern portion of the former TNT operations were transferred to the Atomic Energy Commission for the storage of radioactive materials generated during the development of the atomic bomb. According to the *History Search Report*: "Most of the 1,500 acres were used for the storage of radioactive materials. However, from the 1950s to 1980s, radioactive materials that were formerly located throughout the 1,500 acre property were consolidated into a 191-acre area." Page 3-4. The 191-acre area is sometimes referred to as the Niagara Falls Storage Site ("NFSS"). The NFSS is currently owned by the Department of Energy and is part of FUSRAP. FUSRAP is administered by the Army Corps of Engineers, and is intended to decontaminate or otherwise control sites where residual radioactive materials remain from the nation's atomic energy program. The Site is immediately adjacent to

---

[1] The *History Research Report* indicates that Somerset Group purchased 159 acres out of the Fort Conti's 775 acres. This is incorrect. According to the deeds, Somerset Group only purchased 132 acres out of Fort Conti's 564 acres.

the NFSS.

C. Contamination Resulting from TNT Operations

Although TNT production was relatively brief, significant contamination of buildings, grounds and underground sewer lines resulted from these operations. Documents obtained by representatives of the New York State Assembly indicate that the red and yellow-colored trade wastes produced in TNT manufacture were treated by dilution with water, and then discharged in the plant sewer system, from the sewer system into an open surface drainage ditch which led to Four Mile Creek, and ultimately to Lake Ontario. As a result of the discharge of the untreated trade wastes, the sewer lines, some of which presently underlie the 132-acre Site, are contaminated with TNT and other toxic residues. Ongoing investigation of these sewer lines by the Army Corps of Engineers suggests that the TNT residues have migrated into the chemical waste lines that underlie the remaining 39-acre Somerset Group Property. Shortly after the termination of TNT operations, both the Army Corps of Engineers and the War Assets Administration recognized the extent of contamination from the TNT operations. A press release from the War Assets Administration in July 1948 explained that local roads were temporarily restricted due to the "definite" presence of "sizable pieces of TNT" in the area "south of Balmer Road and east of Lutts Road." The area so designated by the War Assets Administration is the location of the Site now owned by the Somerset Group. The press release continued:

> While two attempts have been made to decontaminate these areas, nevertheless fresh rains and erosion continue to expose more TNT. The area is particularly dangerous in that the TNT is waste, and impure TNT and is more explosive than pure TNT.

The Federal Connection, page 195.

In evaluating the impact of the contaminated sewer system, the War Assets Administration concluded:

> Below grade extensive pipe (iron) lines interlace these areas [the TNT production areas] and can never be fully decontaminated or safely removed except at considerable cost.

Id.

In fact, numerous governmental examinations conducted since the 1940s reveal the existence of the residual contamination. However, no notice of this contamination was made to the various purchasers of property at LOOW, and no data revealing the levels of contamination have been revealed with the exception of the very recent surface soil data showing exceedances for hazardous substances. The New York Assembly examined this issue of notice of TNT

contamination, and concluded that the institutional knowledge of such contamination was lost or, perhaps, conveniently misplaced. The Task Force on Toxic Substances stated as follows:

> The site's subsequent disposal history, a veritable legal mosaic, contains no references, warnings or covenants concerning the site's previous uses and residual contamination. When AEC transferred the bulk of its site at LOOW to [the General Services Administration] in 1955, no hint was given as to any TNT contamination problems. In 1955-1956, GSA transferred 560 acres of the former AEC property at the LOOW to the Navy and Air Force for use as Air Force Plant 68. The plot included the areas of the former TNT plant described in earlier government documents as heavily contaminated. No warning or restrictions on the use of the property were given at this time; similarly, in the early sixties, when Air Force Plant 68 was declared excess and transferred back to GSA, notice of contamination was not provided.

The Federal Connection, pages 209-210. The bulk of the acreage associated with the operations of the former Air Force Plant 68 is located on the Site.

In 1998, the U.S. Army Corps of Engineers partially remediated asbestos contaminated materials throughout the Site at the cost of approximately $1 million. For calendar year 1999 and beyond, the U.S. Army Corps of Engineers has proposed additional remediation of the contaminated sewer lines under the Site, and acknowledged that additional friable asbestos remains on the Site. This issue of remediating buried TNT waste pipelines was initially evaluated in 1995 by Acres International:

> In 1995, an Engineering Evaluation/Cost Analysis (EE/CA) for removal actions on CWM and the Somerset Group property was produced by Acres International for USACE-Kansas City. The buried TNT waste pipelines were identified for removal in the analysis as part of Operable Unit (OU) 1. The EE/CA recommended that lines containing visible TNT be removed and the TNT be destroyed through open flaming or detonation. Contaminated sediments were recommended for biotreatment. The remaining excavated materials were recommended for appropriate landfill disposal.

History Search Report, page 4-20.

Although a more complete investigation of the underground lines identified above has just recently begun, and a definite scope of work is being developed, the management of the Somerset Group has not been informed of the specific evacuation and remediation plans. The expectation is that excavation and removal of the contaminated sewer lines will dominate all other site activities. In fact, the Army Corps of Engineers intends to dig three extensive trenches, commencing as early as this week, to begin the process of locating the various chemical waste

lines. In addition, the Army Corps of Engineers has indicated that the remedial plan for the removed explosive material is open detonation of the recovered TNT. However, it does not appear that any consideration has been given to the possible toxic effect of the mixture of TNT and the other chemicals in the lines.

The disruption and danger associated with this investigation and cleanup operation has two immediate effects. First, the remedial work creates the necessity that the management personnel at the Somerset Group, specifically John Syms, provide oversight to the activities of the Army Corps of Engineers and its contractors, while at the same time running risk of placing these individuals in harm's way. This oversight represents an internal corporate cost of environmental response which is recoverable from the United States under the National Contingency Plan, 40 C.F.R. Part 300. Second, the excavation, treatment and disposal activities associated with the removal of the contaminated sewer lines continue the long history of disruption to the productive use of the Site. Since the issuance of the NYSDOH Order in 1972, the Somerset Group has been unsuccessful in finding a productive use for the Site.

At a public meeting held on March 2, 1999, the Project Manager for the Army Corps of Engineers, Ray Pilon, estimated that approximately $1.5 million would be spent in 1999 at the Site for environmental remedial activities. These activities have not been articulated in a work plan for review and approval by the management of the Somerset Group, but it is understood that the work will involve substantial, prolonged disruption to any other activities that might otherwise take place on the Somerset Group Property. Given the explosive and toxic nature of the unstable TNT residues and other chemicals in the lines under this site, it would seem appropriate that the Army Corps of Engineers would suggest that Mr. Syms leave the Site for the duration of the cleanup activities.

However, no such proposal has been made and, in fact, the Army Corps of Engineers continues to rely on Mr. Syms for historical information concerning LOOW. This reliance by the Army Corps of Engineers on the personal knowledge of Mr. Syms continues a pattern of interaction between Mr. Syms and the Army Corps of Engineers that began in 1987 with the beginning of the FUSRAP program. Since 1987, Mr. Syms has acted as unpaid consultant to the Army Corps of Engineers and its contractors, providing extensive advice and counsel on the historical activities at LOOW.

D. Radioactive Waste Storage and Disposal at LOOW

Sometime in the mid-1940's, approximately 1,500 acres of LOOW were transferred to the U.S. Army Corps of Engineers Manhattan Engineering Division ("MED"). The MED subsequently became the Atomic Energy Commission, then the Energy Research and Development Administration, and finally the Department of Energy. In February 1944, MED was responsible for the Manhattan Project, and it was initially granted the use of a large concrete water tower, water tanks, and surrounding acreage at LOOW. First, this property was used to

store the radioactive sludges generated from the uranium ore processing performed by Linde Air Products in nearby Tonawanda, New York. The wastes, code-named L-30 and L-50, were taken to LOOW from the Tonawanda refinery by truck. These were sludge-type materials in which radium concentrations were in equilibrium with uranium concentrations due to processing and the relative rates of radioactive decay. Evidence indicates that the L-30 and L-50 wastes were stored in concrete water tanks located in the water treatment buildings. In addition, a radioactive waste designated R-10 was also brought to LOOW for storage that was accomplished by open dumping without cover adjacent to the central drainage ditch or attempt to control surface runoff. Finally, K-65 and F-32 radioactive waste were brought to LOOW for disposal. The following is a listing of the radioactive wastes brought to LOOW before the end of the war:

Waste	Location	Tonnage
L-30	Bldg. 411	8,227
L-50	Bldgs. 413-414	1,878
R-10	Outdoors	8,325
R-10 (iron cake)	Outdoors	150
F-32	Outdoors	1,400 barrels
K-65	Water tower and outdoors	>10,000 (est.)

The Federal Connection, page 221

Some, if not all of the radioactive waste listed above still remains at the LOOW facility consolidated into a subsurface concrete pre-existing building foundation located in a floodplain. Groundwater flows North from the NFSS toward Lake Ontario and in the direction of the Somerset Group Site. Furthermore, the location of the storage areas for these materials is immediately adjacent to and to the south of the Somerset Group Site. This physical proximity is significant, because the so-called "Central Drainage Ditch" runs immediately adjacent to the radioactive waste storage areas (including the open storage areas for R-10 materials). The Central Drainage Ditch proceeds a short distance from the radioactive waste storage area directly through the Site. The Central Drainage Ditch has been the subject of numerous investigations. Despite the 1992 Certification of the Remedial Action, which suggests that the ditch was remediated, results of investigations have revealed the presence of contamination emanating from the former Boron-10 facility.

> In 1969, AEC performed sampling of the Central Drainage Ditch to evaluate whether potential leaching from the Boron 10 plant Building 401 waste water lagoon had impacted surface water. Three surface water locations were sampled during several events in 1969 (a map showing the sample locations was not available). The first location was sampled where the Central Drainage Ditch flowed beneath the perimeter fence. Presumably, the perimeter fence was located in the vicinity of N Street. The second location station was sampled where the

> ditch crossed under Balmer Road, approximately 5,000 downstream of the lagoon. The third location was sampled approximately 4 miles form the Building 401 lagoon, where the ditch crossed under Route 93 (Youngstown-Lockport Road). Results from surface water samples collected from the Central Drainage Ditch downstream of the Boron 10 Plant Building 401 wastewater lagoon confirmed that leaching was taking place.

History Search Report, page 4-60.

In addition, a radioactive fission product, cesium, was found in this area; its presence is suspected to be from the materials originating at the General Electric Knolls Atomic Power Laboratory.

E. Post-War Storage of Radioactive Materials at LOOW

The Atomic Energy Commission was established in 1946, and the functions of the Manhattan Engineering District were transferred to its control, including the responsibility for the management of radioactive wastes stored at LOOW. According to the New York Assembly Task Force on Toxic Substances:

> During the 1940s and early 1950s, LOOW became a principal depository for radioactive waste from the Eastern U.S., and although some of the waste and contaminated scrap has since been removed to other locations, its effects remain even to the present day. Besides the additional waste which was imported to the site, such as F-32 and K-65, uranium rods and billets were stored temporarily at the site, as LOOW became a holding area for the AEC's rolling operations at Lockport and Lackawanna. . . . Also, after the war the Linde refinery in Tonawanda was decommissioned, and the contaminated portions of the plant were taken to LOOW. Other contaminated metal, concrete, ceramics and lumber from wartime and postwar operations were shipped to LOOW from St. Louis, Mo.; Canonsburg, Pa.; Cleveland, Ohio; Deepwater, N.J.; and Winchester, Mass.

The Federal Connection, page 224.

Even by the standards of the 1950s, the management and handling of these various radioactive wastes must be considered as extremely lax. For instance, the F-32 originated in Middlesex, New Jersey, and nearly 1,400 barrels were shipped to LOOW. Pursuant to AEC directives, the F-32 sludge was to be stored in an empty concrete reservoir adjacent to the L-30 tank. However, documentation suggests that this radioactive waste, contained in barrels, was stored in open unprotected areas located immediately adjacent to the Site.

F. Somerset Group, John Syms, and the Syms Family

John Syms is the sole owner of the Somerset Group. During the 1960s, Mr. Syms was closely involved with the U.S. Department of Defense in a number of projects related to national defense activities. On the basis of this experience, Mr. Syms started a business responsive to specific national defense needs. In 1967 Mr. Syms started a tool-manufacturing business, Unitool, Inc., which did business in North Tonawanda, New York. Unitool produced various hand-tools, using innovative plastic materials resistant to hostile environments, for a variety of defense and space applications.

In 1969, additional floor-space was required to allow for expansion of the Unitool product lines. A representative of the General Services Administration advised Mr. Syms that industrial property was available at LOOW for expansion of the Unitool operations. Based on the introductions arranged by the General Services Administration to members of the Fort Conti Corporation, Mr. Syms decided to purchase, on behalf of the Somerset Group, 132 acres of the former LOOW site from the Fort Conti Corporation. The total purchase price was $160,000. Mr. Syms began the process of moving the Unitool operations to LOOW, and the transaction closed on March 2, 1970.

Between 1970 and 1972, Unitool operations commenced at the Site along with a number of tenant operations. Appendix C includes sales brochures and other commercial literature concerning the Unitool operations.

In 1972, at a time when the Unitool operations were fully transferred from North Tonawanda and were commencing at full capacity at the Site, the Somerset Group was served with the NYSDOH Order. A copy of the NYSDOH Order and a supplement (the "Supplemental NYSDOH Order") issued by NYSDOH in 1974 is attached as Appendix D. The NYSDOH Order asserted that the radioactive contamination found at the Site constituted a hazard to public health and the environment. In order to contain the contamination and to prevent its further release to the environment, the Order imposed numerous prohibitions on the use of the Site. In particular, no subsurface excavations or disturbance of any kind was permitted. Subject to minor modifications set forth in Supplemental NYSDOH Order, which allowed industrial activity to continue but only slab on grade construction. The NYSDOH Order, and its restrictions, remains in place today.

Mr. Syms' plans for the Site included the development of the Lew-Port Industrial Park, a plan which included demolition of buildings already existing on the Site. With the issuance of the NYSDOH Order, no demolition or new construction could occur. Tenants that had committed to occupying the Site were unable to proceed with their own plans for development. Appendix E is a copy of promotional material prepared by Mr. Syms in support of the Lew-Port Industrial Park. Included in Appendix F are leases and correspondence with a variety of parties

that had expressed substantial and sincere interest in possible tenancy at the proposed Lew-Port Industrial Park. These parties included Saftronics Ltd., Ohio Body Mfg. Co., Alcan Aluminum Corporation, Jezebel Limited, and Cait (USA) Fireplace Limited. All of these business opportunities were lost due to the Site's Environmental Contamination.

The practical effect of the NYSDOH Order was to prevent any development of the Site. Mr. Syms was advised by legal counsel to discourage the few tenants already at the Site from remaining on the property for fear of injury to persons because of exposure to radioactive materials revealed by the Order. The documentation provided in the *The Federal Connection* and the *History Search Report* both highlight the real possibility of excessive exposure to workers from radioactive substances disposed of at LOOW. In fact, occupational exposure studies were performed to assess exposure of workers to radioactive materials stored or disposed of at LOOW. Although the documentation appears to be incomplete, it is clear that actions were taken by the Federal government to reduce worker exposure to radiation at LOOW. *See The Federal Connection* at page 171.

Mr. Syms lost not only his business, but also hope of turning the property into an operational industrial park. The development work in-progress at LOOW by the Somerset Group to accommodate the Unitool operations was disrupted by the issuance of the 1972 NYSDOH Order, with the result that the Unitool business floundered and eventually dissolved. Prior to the issuance of this Order, the Somerset Group had invested in excess of $1,000,000 in improvements to its property at LOOW. These improvements were undertaken with the expectation that the property could be put to some useful purpose. Unfortunately, the 1972 NYSDOH Order effectively eliminated any possibility of finding that productive use.

Since 1972, Mr. Syms has sought to obtain redress from the United States for the various legal claims that have arisen at LOOW. These efforts have led Mr. Syms to Washington, D.C., to Albany, New York, and repeatedly to the various offices of the Army Corps of Engineers. While the Army Corps of Engineers is slowly proceeding with remedial activities on property of the Somerset Group, these remedial activities do not represent resolution of legal claims against the United States. Nor do these remedial activities compensate either Mr. Syms or the Somerset Group for the losses and damages incurred because of the environmental contamination attributable to government operations at LOOW. These claims are described in more detail in the discussion that follows.

III. Threshold Issues

This demand and claim is founded on statutory and judicial precedents holding that the departments and agencies of the United States of America may be liable under CERCLA for environmental response costs in circumstances similar, if not identical, to those found at the Somerset Group property. Unless this demand and claim letter is promptly addressed by the U.S. Department of Justice, the Somerset Group is prepared to initiate a legal action against both the

U.S. Department of Defense and William Cohen, Secretary of Defense, in his official capacity, and the U.S. Nuclear Regulatory Commission and Carl J. Paperiello, in his official capacity as Director of the Office of Nuclear Material Safety and Safeguards, pursuant to CERCLA, FTCA, and the Declaratory Judgment Act, 28 U.S.C. §§2201-2202. Jurisdiction and venue in the Federal District Court for the Western District of New York is established under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b).

This demand and claim are also founded under the liability provisions of the FTCA. Under this law, actions are allowed against the United States for damages for injuries caused by the tortious conduct of government employees or agents acting within the scope of their employment, to the same extent that a private person would be liable under state law. The FTCA provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment for punitive damages.

28 U.S.C. §2674.

Therefore, liability and damages are determined by the law of the State where the tortious act was committed, subject to the limits on prejudgment interest and punitive damages. *See Hatahley v. United States*, 351 U.S. 173 (1956). Exclusive jurisdiction over such cases is in the federal district courts, 28 U.S.C. §1346. Under 28 U.S.C. §2672, the administrative adjustment of claims for money damages for torts occurring in the same manner as those provided for in section 1346(b).

Under the administrative claims settlement section of the FTCA, 28 U.S.C. §2672, the U.S. Department of Defense and the U.S. Nuclear Regulatory Commission may settle claims and make final awards for money damages asserted against the United States for property damage, personal injury, or death caused by the negligent or wrongful act or omission for which the government bears responsibility. An administrative claim may be settled only after consultation with the Department of Justice when in the opinion of the Secretary of the Department of Defense, the claim involves "a new precedent or point of law..." Because of the complex nature of the facts surrounding the government's operations at LOOW involving multiples agencies and departments of the Federal government, it is appropriate that the Department of Justice act as the Federal government's point of contact for determining the government's liability.

IV. CERCLA Liability

A. Elements of a Private Action

Under CERCLA §107, 42 U.S.C. §9607, in order to prevail on a private cost recovery action:

> a plaintiff must prove: (1) that the site in question is a "facility" as defined in §9601(9); (2) that the defendant is a responsible person under §9607(a); (3) that a release or a threatened release of a hazardous substance has incurred; and (4) that the release or threatened release has caused the plaintiff to incur response costs.

Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989); *see also U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993). In this case, Claimants have satisfied all of these elements. There is no doubt that LOOW is a "facility," since it is a "site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." CERCLA §101(9), 42 U.S.C. §9601(9). The other elements have also been satisfied, as explained below.

B. Release or Threatened Release of Hazardous Substances

In order for there to be a "release," and hence in order to establish a necessary element of CERCLA liability, "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing... (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)" must have occurred "into the environment," CERCLA §101(22), 42 U.S.C. §9601(22), or such a "release" must be "threatened." The term "environment" is broadly defined, and proof that a hazardous substance is present in the soil, water or air establishes that a release occurred into the environment. CERCLA §101(8), 42 U.S.C. §9601(8).

The *History Search Report* summarizes the numerous environmental investigations performed at LOOW over the last 40 years. There is vast information that a wide variety of "hazardous substances,"as defined by CERCLA §101(14), 42 U.S.C. §9601(14), have been released by government operations on the Site. A summary describing certain releases is found on page 4-56: "Elevated levels of PAH, PCB, pesticides, and heavy metals which exceed background in site surface soil samples." Page 4-56 of the *History Research Report* continues: "Suspected asbestos-containing materials were found throughout the former AFP-68 area, on properties currently owned by the Somerset Group and CWM." However, despite numerous historic site use studies of the property, detailed technical information on site contamination has still not been made available for Mr. Syms' review, or still does not exist.

For example, attached as Appendix G is a copy of handout materials presented by the U.S. Army Corps of Engineers at a public meeting held in Youngstown, New York on March 2, 1999. This handout information reveals groundwater contamination identified by the Army Corps of Engineers at the Site to include lithium and RDX. These contaminants are "hazardous substances," as that term is defined in CERCLA. It is relevant to the discussion of legal claims that follow that the identification of lithium and RDX as components of groundwater contamination were not known to Claimants or the general public prior to the public meeting of May 2, 1999.

C. FOIA Request to the U.S. Army Corps of Engineers

Attached as Appendix H is the correspondence between representatives of the Somerset Group and the Army Corps of Engineers concerning a request for records under the Federal Freedom of Information Act, seeking the results of groundwater monitoring conducted at the Site. Nine (9) groundwater monitoring wells were installed on the Site between November 1991 and January 1992. Installation was performed by contractors for the Army Corps of Engineers. These groundwater monitoring wells are designated as follows: MWS-1D; MWS-1I; MWS-2I; MWS-2D; MWS-3I; MWS-3D; MWS-3S; MWS-4I; and MWS-4D. For each of these groundwater monitoring wells, a brass nameplate is permanently installed in the concrete footer securing the well casing. The brass nameplate identifies the well name and number, latitude and longitude, elevation above mean sea level, and the date of installation. According to the brass nameplate information, all groundwater monitoring wells on the Site were installed in January 1992.

Although counsel for the Army Corps of Engineers agreed, on January 26, 1999, to provide copies of the most recent monitoring results for groundwater monitoring wells located on the Somerset Group property, no further information was released by the Corps until July 26, 1999. Under correspondence issued on that date, the Corps denies that it was responsible for the installation of the groundwater monitoring wells on the Somerset Group Site. However, documentation provided by the Corps at the public meeting of March 2, 1999, discussed above and included in Appendix G, specifically identifies groundwater contaminants on the Site. It is not clear where the information presented at a public meeting came from, if not from the groundwater monitoring wells installed by the Corps on the Site. Furthermore, documentation from the contractor responsible for the well installation in January 1992 makes it clear that the Army Corps of Engineers was responsible for the decision to install wells and their subsequent monitoring.

Unfortunately, this response by the Army Corps of Engineers to a valid request for records under the Freedom of Information Act represents another instance of a pattern of misinformation or lack of openness concerning the Environmental Contamination on the Site. Mr. Syms will testify that past practices of the Army Corps of Engineers failed to provide relevant information when requested or pursuant to prior promises and commitments.

D. Liability of The United States as a Responsible Party

Under CERCLA §107(a), 42 U.S.C. §9607(a), responsible parties liable under CERCLA include: "(1) the owner and operator of a vessel or a facility," and "(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of..." Clearly, as the title owner to LOOW at the time of disposal of hazardous substances at the facility, and the actual operator of the facility at such times, the United States is an "owner" and "operator" classified as a "responsible party" liable under CERCLA. In addition, the United States would also be liable because it "arranged for disposal or treatment" at LOOW, and transported hazardous substances to the facility for disposal. CERCLA §107(a)(3,4), 42 U.S.C. §9607(a)(3,4).

The doctrine of sovereign immunity is not a bar to a CERCLA action against the United States. Section 120(a)(1) of CERCLA defines the term "person" to include the United States government, and courts have consistently held that the United States may be sued as a "person" under CERCLA. No evidence is available to suggest that either the Atomic Energy Commission or the Department of Defense acted in merely a "regulatory" manner that would argue against the waiver of sovereign immunity.

The term "owner or operator" has been broadly construed to impose liability on the United States in situations where its control over a site was not as clear as in this case. For instance, in *FMC Corporation v. United States Department of Commerce et al.*, 786 F. Supp. 471 (E.D. Pa. 1992), FMC Corporation brought a CERCLA private cost recovery action against the United States, seeking to recover costs incurred in the cleanup of a synthetic fiber manufacturing facility. The facility had been used to produce synthetic material for the United States during World War II. FMC argued that the actions of the War Production Board (the predecessor in interest to the Department of Commerce) during the period of 1941-1945 rendered the United States liable for the cleanup as an owner or operator within the meaning of Section 107 of CERCLA. The court refused to grant the motion to dismiss filed by the United States, finding that the degree of involvement by the United States in the operation of the facility could render the United States liable for environmental response costs under CERCLA:

> Given this degree of control, and <u>given the fact that the wastes would not have been created if not for the government's activities</u>, the government is liable as an operator [under CERCLA].

Id. at 996 [emphasis added]. The court's holding in FMC also suggests that the government's ownership of certain equipment at the synthetic fiber manufacturing facility contributed to the conclusion that the United States was an owner or operator under CERCLA. The lower court's decision was later upheld by the Third Circuit, *en banc*, in *FMC v. Department of Commerce*, 29 F.3d 833 (3rd. Cir. 1993). Similarly, the United States has been found to be a responsible party at disposal sites that have received waste materials from the military. *See e.g. Key Tronic*

v. United States, No. C-89-694-JLQ (E.D. Wash. Aug 9. 1990), *rev'd* 984 F.2d 1025 (9th Cir. 1993), *mod.* 511 U.S. 809, 114 S.Ct. 1960 (1994).

The present case is much stronger than cases like *FMC*, where the government controlled a privately-owned facility. Here, the Federal government was the actual owner of title to LOOW, and actively operated it at the time of disposal of the hazardous substances that caused the Environmental Contamination.

The Federal courts have also addressed the issue of allocation of CERCLA response costs to the United States. For example, in *Price v. United States Navy*, 818 F. Supp. 1326 (S.D. Cal. 1992), the court found that in the mid-1930's, the Navy transported paints containing lead, copper, and zinc, as well as asbestos gaskets, to a disposal site. Later, the disposal site was developed for other purposes, and the present owner was unaware of the earlier disposal activities. The court allocated 95% of the resulting environmental response costs to the Navy, the party responsible for the generation and transportation of the hazardous substances. The remaining 5% was allocated to other responsible parties, including 1% to a prior owner of the disposal site. Although the court reduced the net award because of a state reimbursement program, the allocation of CERCLA responsibility to the Navy was unaffected. *See Price v. United States Navy*, 39 F.3d 1011 (9th Cir. 1994). *See also Gopher Oil Co. v. Union Oil Co. of California*, 757 F.Supp. 988 (D. Minn. 1990), *aff'd in relevant part*, 955 F.2d 519 (8th Cir. 1992) (100% of past and future costs to former site owner where present owner did not materially contribute to the contamination and did not have specific knowledge until investigations five years after purchase). Likewise, in this case we expect that 100% of the liability would be assigned to the United States.

A review of the precedents under *FMC*, *Price* and *Key Tronic* demonstrate that these holdings are neither isolated nor unusual. Rather, the Federal courts have consistently found the United States liable for environmental response costs in situations similar to those found at LOOW and the Site, and would do so in this case.

E. Response Costs Incurred By Claimants

Mr. Syms has estimated that since 1972, the date of issuance of the NYSDOH Order, he has personally devoted a large portion of his professional life to the resolution of environmental issues arising at the Site. In addition, various members of the Syms Family, including Mr. Syms' wife and children, have performed work at the Site; this work varied and the degree to which the work related to the Site's Environmental Contamination also varied. The Somerset Group installed security fencing at the Site in the mid-1970s in response to the NYSDOH Order, and it also maintained a facility security force until the time of the bankruptcy proceedings in 1979.

The extent of Mr. Syms' personal oversight of the environmental matters at the Site is reflected by the near continuous contact that Mr. Syms has had with the representatives of the

Army Corps of Engineers and its contractors. Mr. Syms will testify that he has been the object of repeated visits from the representatives of the Army Corps of Engineers and its contractors since 1987. Presumably, the time sheets and other work records maintained by the Army Corps of Engineers will confirm the extent and duration of Mr. Syms' involvement with the Corps. The reason for these visits and consultations is, in large part, due to the almost encyclopedic knowledge that Mr. Syms has amassed concerning the manufacturing operations conducted by the government at LOOW.

During the 1970s, and prior to the bankruptcy proceedings of 1980, Mr. Syms travelled extensively in an attempt to determine the types of operations that had been conducted at LOOW. Although his research yielded incomplete results, he was able to obtain as-built drawings for a number of operations conducted at LOOW. Much of this information was turned over to contractors previously working for the Army Corps of Engineers. Today, the Army Corps of Engineers and its contractors continue to request information, which Mr. Syms has, in large part, already turned over to the Federal government. The persistence of the representatives of the Army Corps of Engineers in their solicitations for information from Mr. Syms is clear evidence of the time and effort Mr. Syms has expended in the administrative oversight of conditions at the Site.

This type of administrative oversight, as provided by Mr. Syms, his family, and the employees of the Somerset Group, has consistently been found by the courts to constitute a recoverable cost under CERCLA. *See Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564 (10th Cir. 1996); *Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co.*, 936 F. Supp. 1250 (E.D.Va. 1996); *Town of New Windsor v. Tesa Tuck, Inc.*, 935 F. Supp. 317 (S.D.N.Y. 1996). For example, in *T & E Industries, Inc. v. Safety Light Corp.*, 680 F.Supp. 696, 706 (D.N.J. 1988), the court found that time spent by the president of the plaintiff's corporation on "monitoring, evaluating, and minimizing the radiation problem" was a "necessary cost of response" which was recoverable under CERCLA and found that "CERCLA on its face, entitles a private entity to recover the same type of costs that the government is entitled to recover." In much the same manner that the U.S. Environmental Protection Agency seeks to recover its administrative oversight costs at CERCLA sites, Claimants now seeks recovery of these comparable costs from the United States. Moreover, they also seek prejudgment interest for environmental response costs incurred and recoverable under CERCLA.

As an estimate of the corporate oversight costs and other direct costs incurred by the Somerset Group, it is relevant first to review Mr. Syms' professional background and educational history. As a teenager and originally a citizen of Great Britain, Mr. Syms volunteered for duty in the Burma Theater, and served there with the British armed forces during World War II. Upon his return to Great Britain, Mr. Syms attended the London Polytechnic Institute located in London, England from 1951 until 1955. Mr. Syms, as a private citizen, then became involved in a variety of industrial defense activities both in the United Kingdom and in the United States, eventually emigrating to the United States in 1962. His involvement with the domestic defense

industry included a wide variety of projects, but eventually led to the establishment by Mr. Syms of Unitool as a supplier of hardware to both the National Aeronautic and Space Administration ("NASA") and the U.S. Department of Defense, as well as to non-governmental customers. Mr. Syms' position as a manager and director of significant industrial activities is clearly established by the record of his significant accomplishment both in the United States and the United Kingdom.

What then is the monetary value of Mr. Syms' time and efforts, and the time and efforts of others in the Somerset Group, in the investigation of environmental matters and the administration of environmental response activities at the Site? As an estimate, Mr. Syms has asserted that approximately 50% of his professional time over the last 27 years has been devoted to addressing environmental concerns at the Site. Assuming that a professional expends approximately 2,000 hours per year in occupational activities, then Mr. Syms has spent approximately 27,000 hours over the last 27 years in matters related to Environmental Contamination at the Site. Assuming further a conservatively adjusted weighted average of $50 per hour as a billing rate for Mr. Syms' professional time, this computes to administrative oversight costs for Mr. Syms alone of $1,350,000. Adding the time and effort of the other members of the Syms Family, along with the salaries of the former security personnel and other personnel of the Somerset Group, the cost of installing a security fence around the Site, prejudgment interest allowed under CERCLA, and miscellaneous expenses associated with travel by Mr. Syms in researching past operations at LOOW, the overall administrative oversight and direct response costs are estimated to be between $2,000,000 and $3,000,000.

Because the FUSRAP work is ongoing at the Site, the running of the statute of limitations under CERCLA has not yet been triggered. If the three-year time limit under CERCLA §113(g)(2), 42 U.S.C. §9613(g)(2) applied, it would not begin to run until the cleanup was completed, and the final report was done. *Nutrasweet Co. v. X-L Engineering Corp.*, 926 F. Supp. 767 (N.D.Ill. 1996); *United States v. Chromatex, Inc.*, 832 F. Supp. 900 (MD. Pa. 1993). Moreover, the three-year time limit for contribution actions under CERCLA §113(g)(3), 42 U.S.C. §9613(g)(23) has not yet begun to run, since none of the "triggering events listed in that section will occur unless a potentially responsible party (PRP) incurs its cleanup costs pursuant to §106 or §107 civil action by the government." *Sun Co. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997), *cert. den'd* 118 S.Ct. 1045 (1998).

V. Common Law Claims

A. Tort Claims

The liability of the United States in this matter takes various forms found under the tort law of the State of New York, as permitted under the Federal Tort Claims Act. Exceptions to liability for the Federal government under FTCA do not apply. For example, in *Redland Soccer Club, Inc. et al. v. U.S. Department of Army*, 55 F.3d 827 (3rd Cir. 1995), plaintiffs who had

visited or worked at a public park that was previously used by the Army as a landfill filed personal injury and medical monitoring claims for exposure to contaminants. The court denied the Army's motion to dismiss, holding that the suit was not precluded under the "discretionary" exclusion under the FTCA. The Ninth Circuit has previously rejected the government's argument that everything the government does in carrying out the nuclear weapons program falls within the discretionary function exception under the Federal Tort Claims Act. *See Prescott v. United States*, 973 F.2d 696 (9th Cir. 1992). For more conventional defense activities, such as World War II ordnance, TNT, and discontinued high energy jet fuel production, no discretionary or national security exception would apply to obviate the liability of the Federal government.

Thus, the United States is subject to tort liability under New York law with respect to its acts and omissions at LOOW. Although a claimant is not required to set forth the legal theories in its claim, this letter will delineate several common law causes of action available to Claimants, including nuisance, trespass, negligence, and strict liability.

Claimants are entitled to bring a private nuisance claim, since the Federal government substantially and unreasonable interfered with the use and/or enjoyment of the Somerset Group Property, and the ongoing and future remediation activities prevent them from making productive use of the property. *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977); *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996); *CARE v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1993). In addition, they also have a claim for public nuisance, since the Environmental Contamination "offend[s], interfere[s] with or cause[s] damage to the public in the exercise of rights common to all... in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons." *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994).

"Under New York law, trespass is the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. den'd*, 495 U.S. 947, 110 S.Ct. 2206 (1990). Thus, trespass includes the unintentional (but inevitable) consequences of an intentional act of disposing of contaminants. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996); *CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995). The Somerset Group has a claim for trespass against the Federal government, since it wrongfully invaded their property by intentionally releasing and discharging hazardous substances. The presence of these substances in the soil and ground water of the Site constitutes a continuing trespass and an unauthorized invasion of the Somerset Group Property.

Under New York law, a landowner is held to the standard of a "reasonable man in

maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). Where unreasonable conduct results in damage due to environmental contamination, a claim for negligence lies. *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 670, 624 N.Y.S.2d 610, 612 (2d Dep't 1995), *mot. den'd* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995); *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *mod.* 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991). Claimants can sue for negligence against the Federal government for breaching its duty not to pollute groundwater, and surface and subsurface soils. The Federal government failed to take reasonable care in handling hazardous materials, and its acts and omissions were the proximate cause of the Environmental Contamination on the Site.

Intentional deceit with respect to environmental conditions on a property constitutes fraud. *Keywell v. Weinstein*, 33 F.3d 159 (2d Cir. 1994); *Kaddo v. King Service Inc.*, 250 A.D.2d 948, 673 N.Y.S.2d 235 (3d Dep't 1998). In addition, under New York law, the owner of property has an affirmative duty to reveal the presence of environmental or other problems that have a material impact on value. *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 674 (1st Dep't 1991) (duty to disclose haunted house's reputation); *Young v. Keith*, 112 A.D.2d 625, 492 N.Y.S.2d 489 (3d Dep't 1985) (obligation to disclose faulty water and sewer systems); *Roth v. Leach*, 5 TXLR 641 (Sup. Ct. Wayne Co. 1990, Parenti, J.) (obligation to disclose buried hazardous wastes); *195 Broadway Co. v. 195 Broadway Corp.* N.Y.L.J., April 15, 1988, p. 6, col. 4 (Sup. Ct. N.Y. Co. 1988) (duty to reveal presence of asbestos in building); *Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 470 N.Y.S.2d 431 (2d Dep't 1984) (obligation to reveal buried drums).

Somerset Group and Mr. Syms are also entitled to bring a claim for fraud, since the Federal government sold the property to Fort Conti without disclosing the nature or extent of Environmental Contamination, and provided Syms with false, inaccurate and contradictory information regarding the status of contamination on his property. To this day, even after several requests, including the recent request for records under the Freedom of Information Act, the Army Corps of Engineers has failed to provide test results from wells it installed in December 1991 through January 1992 and sampled on the Site.

Under New York law, common law strict liability applies to "generation and disposal of chemical wastes." *State v. Schenectady Chemical, Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971 (Sup. Ct. Rensselaer Co. 1983), *mod.* 103 A.D.2d 33, 37, 479 N.Y.S.2d 1010, 1013 (3d Dep't 1989); *State v. Monarch Chemicals*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). While strict liability claims are generally not allowed to be brought against the Federal government, in this instance Somerset Group and Mr. Syms may be entitled to raise a claim for strict liability against the United States for engaging in ultrahazardous activities, including the production of TNT and storage on hazardous chemicals, on the Site and on the property adjacent to the Site, since the actions by

the Federal government have been so egregious.

Finally, Claimants are also entitled to relief under equitable theories such as restitution. New York courts recognize claims for restitution where a defendant should, in fairness, be held accountable for the cleanup of environmental contamination. *New York v. SCA Services*, 754 F. Supp. 995 (S.D.N.Y. 1991); *State of New York v. Almy Brothers, Inc.*, 866 F.Supp. 668 (N.D.N.Y. 1994); *State v. Schenectady Chemicals Inc.*, 117 Misc.2d 960, 966-67, 459 N.Y.S.2d 971, 977 (Sup. Ct. Rensselaer Co. 1983), *mod.* 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dep't 1984); *City of New York v. Lead Industries Association, Inc.*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996), *later opn.* 241 A.D.2d 387, 660 N.Y.S.2d 422 (1997)

B. Inverse Condemnation Claims

Claims for inverse condemnation under the Fifth Amendment to the United States Constitution may be considered an alternative theory of recovery for the damages discussed in the immediately preceding paragraphs.

The Site is the sole remaining asset of the Somerset Group. Even assuming that the property could be used for some productive purpose, the ongoing cleanup activities on the Site severely restrict and, in some cases, prohibit any productive use of the existing building and land. The Site, along with the adjoining parcels, is subject to ongoing cleanup under the FUSRAP program. At the most recent public meeting, the Army Corps of Engineers made it clear that these cleanup activities will continue for a number of years.

The Fifth Amendment to the United States Constitution provides that no "private property be taken for public use, without just compensation." Therefore, if the Federal government takes property for public health, safety, or welfare, it generally must compensate the owner for its fair value.

The common law has expanded this constitutional principle to create a legal right of action. If the government takes an action which so adversely affects a property owner's use and enjoyment of his or her property that the value significantly diminishes, the property owner can recover damages by bringing an action against the government for inverse condemnation. *U.S. v. Causby*, 323 U.S. 256 (1946) (inverse condemnation due to airplane flyover); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982) (use of no more than 1½ cu. ft.). Environmental pollution by the government is actionable as inverse condemnation. *See, e.g, Clark v. United States*, 8 Ct.Cl. 649 (Ct. Cl. 1985) (contaminated groundwater); *City of Walla Walla v. Conkey*, 492 P.2d 589 (Wash. 1971) (odors from pollution form sewer plant). Inverse condemnation includes not only "physical" takings, but also "regulatory" takings when government regulations deprive a landowner of the use of his or her land. *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S.Ct. 2886 (1992). In this case, the Environmental Contamination of the Site, as well as the interference with use of the Site by

remedial activities, constitute an actionable taking.

Compensation sought by the Somerset Group is not limited to the value of the property taken by the Federal government. Federal courts generally follow the principle that just compensation should place the property owner in as good a position pecuniarily as he would have been in had the taking not occurred. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S.Ct. 1854 (1979). The claim for inverse condemnation includes damages related to the "use" of the property. Somerset Group has suffered from the loss of business opportunities due to the misrepresentation of property conditions by the agents of the United States. Mr. Syms originally acquired the property at LOOW because of the urging of representatives of the General Services Administration. If Unitool and the Somerset Group had acquired property without environmental impairments, both businesses would have enjoyed potentially lucrative opportunities, particularly considering the initial success of the Lew-Port Industrial Park, which had attracted a number of tenants to the site. However, the 1972 NYSDOH Order effectively precluded both enterprises from achieving any business goals. Documentation is attached as Appendix F identifying a number of the business opportunities lost to the Somerset Group because of Environmental Conditions on the Site.

With the assumption that Environmental Conditions on the Site did not detract from property value, the Somerset Group commissioned an appraisal of the Site in 1979. Appendix I includes a real estate appraisal of the Site, performed by Grant Appraisal and Research Corporation, dated July 9, 1979. The appraisal estimated the value of property to be approximately $1.6 million dollars, assuming some maintenance to buildings already on the Site and resolution of the restrictions placed on land uses by the State of New York. Mr. Syms has conservatively estimated that the potential profit from tenants and business opportunities lost because of Environmental Conditions on the Site range from $5 to $10 million. Therefore, total estimated value of the claim for inverse condemnation ranges from $6.6 to $11.6 million, plus interest. 40 U.S.C. §258a.

C. Compensation for Tort Claims

In New York, a property owner is entitled to "damages for diminution in the fair market value of their real property allegedly caused by contamination from hazardous substances." *Henning v. Rando Machine Corp.*, 207 A.D.2d 106, 620 N.Y.S.2d 867 (4th Dep't 1994); *Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998). Permanent property damages include loss due to stigma that remains even after a property is cleaned up. *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997); *In Re Paoli Railroad Yard PCB Litigation,* 35 F.3d 717 (3d Cir. 1994); *Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998); *Scheg v. Agway, Inc.*, 229 A.D.2d 963, 645 N.Y.S.2d 687 (4th Dep't 1996); *see also Criscuola v. Power Authority of State of New York*, 81 N.Y.2d 649, 602 N.Y.S.2d 588 (1993); *Commerce Holding Corp. v. Board of Assessors of the Town of Babylon,* 88 N.Y.2d 724, 649 N.Y.S.2d 932 (1996). Temporary damages should also be awarded for loss of use of property until a cleanup is

completed, measured by the "decrease in the rental value during pendency of the injury" until cleanup was complete. *Putnam v. State of New York,* 223 A.D.2d 872, 636 N.Y.S.2d 473 (3rd Dep't 1996). Other economic damages resulting from contamination are also recoverable, including lost profits and additional business expenses, *Syracuse Cablesystems, Inc. v. Niagara Mohawk Power Co.*, 173 A.D.2d 138, 578 N.Y.S.2d 770 (4th Dep't 1991), and the cost of measures taken to avoid damages from the contamination. *Leicht v. Town of Newburgh Water District*, 213 A.D.2d 604, 624 N.Y.S.2d 506 (2d Dep't 1995).

In this case, the Somerset Group and Mr. Syms are entitled to money damages for diminution in property value, loss of rental income, lost profits, and necessary expenses, since the Federal government contaminated the Site with hazardous substances thereby depriving them of all beneficial use of the Somerset Group Property, including the opportunity to turn the property into an operational industrial park after the Somerset Group invested substantial amounts of money for improvements on the Site. Furthermore, even if the Site is eventually cleaned up, stigma damages should be awarded due to the public's awareness of the Environmental Contamination at and around the Site and its fear of possible resulting health risks.

In cases of environmental contamination, damages are available for "loss of quality of life," including damages for "'inconveniences, aggravation, and unnecessary expenditures of time and effort... as well as other disruption in [plaintiffs'] lives.'" *Ayers v. Jackson Township,* 525 A.2d 287 (N.J. 1987); *see also* 42 *Proof of Facts 2d* 247 §7; *CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995). This includes the disruption caused to businesspeople for commercial property. *Scribner v. Summers*, CIV No. 6094L (W.D.N.Y. 1996), *mod.* 138 F.3d 471 (2d Cir. 1998). Other claims include the right to sue for emotional distress arising out of the reasonable fear of contracting such a disease. *Gerardi v. Nuclear Utility Services*, 149 Misc.2d 657, 566 N.Y.S.2d 1002 (Sup. Ct. Westchester Co. 1991), and medical monitoring to guard against the possibility of future disease. *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't 1984); *Gibbs v. E.I. DuPont De Nemours & Co., Inc.*, 1995 WL 60788 (W.D.N.Y. 1995); *Patton v. General Signal*, 984 F.Supp. 666 (W.D.N.Y. 1997).

In this case, Mr. Syms and the Syms Family are entitled to recover money damages for future medical monitoring to address the significant risk of future diseases from exposure to radioactive materials over the years, as well as damages for emotional distress and loss of quality of life due to the uncertainty and fear of the effects of the exposure of radioactive materials, and for the aggravation caused by the Army Corps of Engineers' continuous badgering of Mr. Syms for information regarding the Site.

Although the calculation of tort damages may sometimes be considered subjective, there are hard facts that aid in the assessment of tort damages recoverable by Claimants. For twenty-seven years, Mr. Syms and the Syms Family have dealt with Site problems, all of which are directly attributable to the Federal government. A partial list of the problems associated with

Environmental Contamination include: maintaining site security and security fences; the inability to install utility lines or any subsurface structure; discouraging existing tenants from continued site presence; dealing with the near constant inquiries from governmental representatives; and the frustration of lost business opportunities and declining real estate assets. By any reasonable standard, this is an extraordinary demonstration of patience and perseverance on the part of Mr. Syms and the Syms Family. In trying to work with the representatives of the Federal government, Mr. Syms has seen bureaucratic delays and budgetary constraints thwart efforts to remediate the Site. The frustration and mental duress that this history has caused, over an extended period of time, constitutes damages that are recoverable from the United States.

Perhaps even more important is the documented history of fraud and misrepresentation by the Federal government. *The Federal Connection* on pages 209 and 210 provides the briefest of summaries of the failures of the Federal government to fully and fairly characterize the extent of contamination at LOOW. At this time, it is impossible to know whether these failures to state material facts associated with the sale of contaminated property arose because of either ignorance, neglect, or an intent to deceive. Whatever the reasoning may have been, the result remains the same: The Federal government was responsible for property transfers without notice to buyers of known contamination. Failure to disclose material facts in the sale of property is the legal foundation for claims under both common law fraud and misrepresentation, and such failure lies at the heart of the instant claims against the United States.

Finally, the pattern of activities at LOOW over more than 50 years defeats any argument of mitigation or national defense that might otherwise be available to the United States. The *History Search Report* describes a vast number of military related projects, with multiple Federal departments and agencies, involved in almost mind-boggling array of inherently dangerous activities. If the United States had limited its involvement at LOOW to only one project, then it might be argued that a specific project was critical to national defense. Alternatively, it is possible that the government's institutional knowledge associated with a single project's impact on the environment might have become lost or otherwise unavailable. Neither of these defenses to liability is now available to the United States because of the long history of environmental impact from numerous military projects covering many decades.

The question must then be asked: How, in good conscience, could representatives of the Federal government sell highly contaminated property to private citizens? To this question, while there may be no good answer, judicial precedents and the statutes of the United States do provide for relief.

We have estimated damages from these tort claims to range from $5 to 10 million. The recent jury award of $36.7 million arising from damages to citizens living adjacent to the Babcock & Wilcox uranium processing facility in Apollo, Pennsylvania, suggests that the stated range of tort damages is conservative.

D. Statute of Limitations for Tort Claims

Since we anticipate that the United States may try to raise a statute of limitations issue, we will address it head-on to demonstrate that Claimants are timely. The tortious causes of action against the government accrue under the FTCA when the plaintiffs knows, or in the exercise of reasonable diligence should have known, that he is injured and the cause of the injury. *United States v. Kubrick*, 444 U.S. 111, 120, 100 S.Ct. 352, 358 (1979). The issue then becomes whether "the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause" in order to allow the presentation of the claim to the appropriate federal agency within the two-year time limit under FTCA. *Barrett v. United States*, 689 F.2d 324 (2d Cir.1982), *cert. den'd* 462 U.S. 1131, 103 S.Ct. 3111 (1983). However, "[a] claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim." *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998).

For example, in *Barrett*, where decedent's estate brought a claim under the FTCA on behalf of their father who had been involuntarily injected with an untested mescaline derivative drug which later was determined to have been the cause of his death. The "diligence-discovery" rule applied since "critical facts concerning causation were not known and probably not discoverable until the Army made its disclosure"many years after the father's death and critical facts about causation were in control of the government and difficult to obtain. 689 F.2d at 329.

The best that can be said for this defense is that a problem related to "hazardous radiation emissions" was made known to the Somerset Group through the 1972 NYSDOH Order. However, not only were Claimants unaware of the nature and extent of radioactive contamination of the Somerset Group Property, or whether it was actually contaminated, but this problem was supposedly remedied as confirmed by the Department of Energy's "Certification of the Remedial Action" issued on May 7, 1992. Only recently did Claimants discover that the Certificate may be erroneous.

The history of LOOW is, to say the least, muddled and unclear. The *History Search Report* commissioned by the Army Corps of Engineers in December 1997 is overflowing with reference to waste disposal and operational activities that are known through anecdotal recollection and hearsay, but without adequate documentation. Where did the fissions products come from that were found at LOOW on property adjacent to the Site? It is almost inconceivable to imagine that highly radioactive material from spent or reprocessed nuclear fuel was somehow released at LOOW. It is even more inconceivable to imagine that there is no documentation to quantify the extent of the release. There are other equally bizarre and chilling aspects to the history of LOOW, but for purposes of this discussion the immediate concern is this -- while the Site lies near the center of the former LOOW operations, and the full extent of the Environmental Contamination at the Site is still not known. Thus, to say that Claimants should have acted earlier is to suggest that they should have brought a claim based upon "a mere hunch, hint, suspicion, or rumor."

In addition, the problems of non-radioactive Environmental Contamination of soil and groundwater are discrete issues. *Bimbo v. Chromalloy American Corp.*, 226 A.D.2d 812, 640 N.Y.S.2d 623 (3d Dep't 1996) (well contamination may not put a landowner on notice to soil and shallow groundwater contamination). It was not until the public meeting on March 2, 1999, when, for the first time, the Army Corps of Engineers revealed actual contamination of the groundwater at the Site, including lithium and RDX. Thus, even if Claimants had knowledge of one aspect of the Environmental Contamination -- such as soil contamination with radioactive materials – that would not constitute knowledge of the "critical facts" related to other problems – such as groundwater contamination with non-radioactive or radioactive materials.

Nonetheless, each of the claims is timely since, despite their continuing efforts over many years, Somerset Group and Mr. Syms have still not discovered the true extent of the harm caused by the Environmental Contamination, mainly due to the misrepresentation, false information, and lack of information provided by the various government agencies over the years. Mr. Syms has diligently tried to obtain data concerning the contamination on his property and the possibility of legal claims ever since the NYSDOH Order was originally issued in 1972. Until the Army Corps of Engineers' public meeting held in Youngstown, New York, on March 2, 1999, Mr. Syms was not aware of actual groundwater contamination under the Site. Despite the Army Corps of Engineers revelation of groundwater contamination, he has still been unable to obtain any specific data which would reveal the levels of such contamination. To this day, Somerset Group and Mr. Syms have only a suspicion of the full extent of substances contaminating the Site. Thus, the "critical facts" were not previously available to Claimants.

However, even if Claimants did know all of the "critical facts" with respect to both radioactive and non-radioactive Environmental Contamination of both soil and groundwater at an early date, the tortious claims raised by the Somerset Group maintain their viability. The State of New York generally recognizes the doctrine of "continuing torts," so that the statute of limitations for a continuing trespass (*e.g.* residual contamination from government projects) recommences each day the tort continues. In *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993), the New York Court of Appeals held that the continuing tort doctrine was abridged only to the extent the statute of limitations under New York CPLR §214-c[2] applied to damage claims for latent contamination, and not claims not governed by that statute, such as equitable claims. However, since the federal law governs the statute of limitations under FTCA, rather than New York CPLR §214-c, *Beckley v. United States*, 1995 WL 590658 (S.D.N.Y.

---

[2] Even if the state statute of limitations applied, CPLR §214-c would itself be preempted by CERCLA §309, 42 U.S.C. §9658, pursuant to which the statute of limitations does not begin to run until "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *See Kowalski v. Goodyear Tire & Rubber Co.*, 841 F.Supp. 104 (W.D.N.Y. 1994).

1995), the doctrine of continuing torts applies, so that Claimants' claims reaccrue each day the Environmental Contamination remains in place.

In addition, even if the "critical facts" creating a cause of action against the United States were revealed to Claimants at an early date, later correspondence from the United States contradict and eradicate the factual basis for those "critical facts." Attached as Appendix J is correspondence from the Department of Energy, Oak Ridge Operations, issued to the Somerset Group on December 29, 1986, attesting that the property of the Somerset Group was decontaminated and fit for industrial purposes. This document was patently false, as was the so-called "Certification of the Remedial Action" subsequently issued by the Department of Energy to the Somerset Group on May 7, 1992, which again attested to the suitability of the Site for industrial purposes.

In *Bartleson v. U.S.*, 96 F.3d 1270 (9th Cir.1996), property owners brought nuisance claims under the FTCA alleging diminution in property values due to stigma caused by past shelling and uncertainty of future shelling and the possible presence of unexploded shells on their properties. The court found plaintiffs' claims were timely even though they were aware of shells hitting their properties for over two years before filing their claims, since they had received contradictory assurances from the government regarding the abatement over several years. The same reasoning applies in this case.

Moreover, the statute of limitations does not begin to run when if the government concealed its negligent acts so that the plaintiff was unaware of their existence, so "that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir.1982), *cert. den'd* 462 U.S. 1131, 103 S.Ct. 3111 (1983)[*quoting Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C.Cir. 1977)]. The pattern of concealment and fraud in this case prevented Claimants from previously gaining the critical facts necessary to make a claim. Today, nearly 13 years after the issuance of the first erroneous correspondence, the Army Corps of Engineers has been engaged and continues to be engaged in a multi-million dollar cleanup of the Site. Based on comments from representatives of the Army Corps of Engineers at the March 2, 1999, public meeting, Environmental Contamination at the Site is found on the soil surface, in the groundwater, and in the subsurface, and the ongoing cleanup activities are likely to continue for a number of years. At this public meeting, the Army Corps of Engineers revealed, for the first time, the existence of newly identified contaminants of unknown origin on the Site, and thus enabled Claimants to make this claim.

VII. Settlement of CERCLA, Inverse Condemnation, and Tort Claims

In CERCLA and other similar litigation with complicated facts, the Federal courts have relied on equitable arguments to assign liability. The facts supporting the United States' liability

include: the design and startup of a dedicated TNT facility at the outset of World War II; the shipment of government waste materials to the Lake Ontario Ordnance Works for processing, treatment and disposal; and the supervision and control exerted by government officials during various times at the Facility. It is apparent that the United States has a significant responsibility in the cleanup of the Facility; this responsibility is made evident by the ongoing efforts of the U.S. Army Corps of Engineers to cleanup the site.

In a good faith attempt to settle these claims without resorting to litigation, Claimants will give due consideration to an offer to settle these claims if that offer conforms with equitable considerations implicit in CERCLA judicial precedents and the FTCA. It is impossible, however, at this time, to suggest a damage assessment without first resolving the other issues that would arise in negotiating a comprehensive settlement agreement. These issues include, but are not limited to: indemnification; waiver of future rights of contribution; reacquisition of the property by the United States; medical monitoring; and reopeners for future contingencies. While Claimants are prepared to immediately address these issues, it should be made clear that damages are real and ongoing.

The prior discussion identifies claims ranging from $13.6 to $24.6 million. Irrespective of the settlement terms and conditions, the monetary damages are valid and must be addressed by the Federal government.

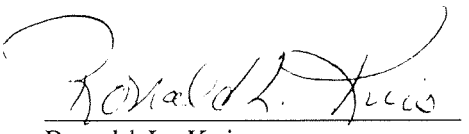
IX. Discovery of Additional Archival Records

Finally, the research to obtain archival records is ongoing and any additional documents that may be obtained in the future and that are relevant to the Federal government's liability at the Site will be made immediately available to the Department of Justice.

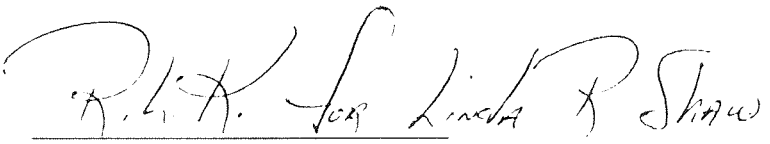
This letter is provided for settlement, demand, and claim purposes only and may not be used as an admission against the interests of the Syms family, the Somerset Group, its employees, or management in any subsequent legal or administrative proceeding.

We look forward to hearing from you in order to begin discussions to resolve the Federal government's liability in this matter. If you have any further questions, please do not hesitate to call either Ronald Kuis at (412) 731-7246 or Linda Shaw at (716) 546-8430.

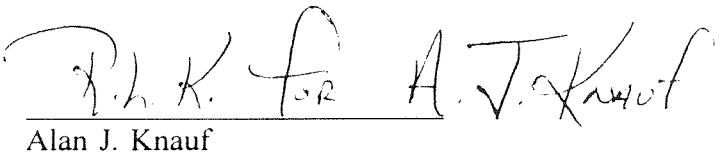
Respectfully submitted,



Ronald L. Kuis



Linda R. Shaw
Knauf Craig Koegel & Shaw, LLP



Alan J. Knauf
Knauf Craig Koegel & Shaw, LLP

RLK/LRS/sbg

Enclosures

cc: Mr. John Syms, w/encls.

APPENDICES

Appendix A	Deed transferring 775 acres of the LOOW site from the United States of America to the Fort Conti Corporation
Appendix B	Deed transferring 159 acres of the Fort Conti parcel to the Somerset Group
Appendix C	Sales brochures and other commercial literature concerning the Unitool operations at Niagara Falls and LOOW, New York
Appendix D	Injunction and a supplemental injunction issued by the New York Department of Health in 1972 and 1974, respectively
Appendix E	Promotional material prepared by John Syms in support of the Lew-Port Industrial Park
Appendix F	Leases and correspondence relating to potential tenants at the Lew-Port Industrial Park
Appendix G	Handout materials presented by the U.S. Army Corps of Engineers at a public meeting held in Youngstown, New York on March 2, 1999
Appendix H	Correspondence with the Army Corps of Engineers concerning request for records under the Federal Freedom of Information Act
Appendix I	Real Estate Appraisal for the property of the Somerset Group
Appendix J	Correspondence from the Department of Energy to the Somerset Group concerning the "Certification of Remedial Action"