

June 15, 2009

VIA HAND DELIVERY & E-MAIL

Susan Lessard, Chair
c/o Terry Hanson
Board of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

Re: Former HoltraChem Manufacturing Site, Orrington, Maine – Mallinckrodt's Appeal of Second Procedural Order and Comments on Intervention

Dear Ms. Lessard:

Appellants Mallinckrodt LLC and United States Surgical Corporation (collectively "Mallinckrodt" or "Appellants") hereby submit comments on the petitions for intervention in this matter filed by the Town of Orrington, Maine Peoples Alliance and Heather Foster. Mallinckrodt also appeals, in part, the Second Procedural Order (May 29, 2009) on the following grounds:

First, Mallinckrodt objects to any action by the Board in connection with this appeal unless and until the Board has completed a rulemaking to adopt rules of practice as required by the Maine Administrative Procedures Act ("APA"), 5 M.R.S.A. § 8051. Section 8051 of the APA contains a nondiscretionary mandate requiring agencies such as the Department to adopt rules of practice for adjudicatory proceedings, including for Mallinckrodt's appeal pursuant to 38 M.R.S.A. § 1365(4). Mallinckrodt appeals Paragraph 3 of the Second Procedural Order to the extent that it contemplates a proceeding governed solely by the broad outlines of the APA, without rules of practice.

Second, Mallinckrodt objects to the Commissioner's authority and jurisdiction to issue the Order that is the subject of this appeal. This is a threshold issue that should be addressed before the Board considers intervention and other matters. The Uncontrolled Hazardous Substance Site Act (the "Act") requires the Commissioner to pursue actions for a "clean up," which is clearly required by the Order, in Superior Court pursuant to Section 1365(5) of the statute. The Commissioner may not require a "clean up" by means of a compliance order under Section 1365(1)(B) of the Act.

Third, Mallinckrodt objects to any action by the Board concerning intervention unless and until the Board has completed a rulemaking for intervention as required by 38 M.R.S.A. §

345-A(2-A) and 5 M.R.S.A. § 8051. Section 345-A(2-A) requires that “the Board shall adopt rules that define the procedures and scope of participation for intervenors.” Section 8051 more generally requires adoption of rules of practice for adjudicatory proceedings by state agencies, and such rules typically address intervention. The Board has no rules for intervention applicable to Section 1365(4) appeals. In the absence of rules, it would be error for the Board to create an *ad hoc* intervention process, rule on intervention petitions, or allow intervenors into this appeal.

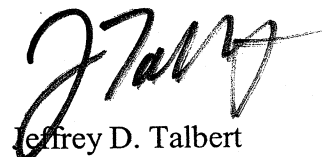
Finally, Mallinckrodt has no objection to the specific deadlines contained in Paragraphs 4 and 5 of the Second Procedural Order. Mallinckrodt’s objections go to fundamental issues addressed by or implicit in the Order.

Mallinckrodt’s specific grounds for appeal of the Second Procedural Order and comments on the petitions for intervention are more particularly stated in the following documents enclosed herewith:

1. Appellants’ Motion to Dismiss Compliance Order or, in the Alternative, Stay Proceeding For Failure to Adopt Rules of Practice in Violation of the Maine Administrative Procedures Act;
2. Appellants’ Motion to Dismiss for Failure to Pursue Cleanup in Superior Court; and
3. Appellants’ Memorandum Regarding Intervention and Petitions for Leave to Intervene of Town of Orrington, Maine People’s Alliance and Heather Foster.

Thank you for considering Mallinckrodt’s position on these matters.

Very truly yours,



Jeffrey D. Talbert

JDT/
Enclosures

cc: Jan McClintock, AAG
Cindy Bertocci, BEP
Peter LaFond, AAG
Patricia H. Duft
David B. Van Slyke
Sigmund D. Schutz