

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

UNITED STATES SURGICAL)	
CORPORATION and)	
MALLINCKRODT LLC)	
)	
CONCERNING A CHLOR-ALKALI)	
MANUFACTURING FACILITY IN)	APPELLANTS' APPEAL OF EIGHTH
ORRINGTON, PENOBSCOT COUNTY,)	PROCEDURAL ORDER
MAINE)	
)	
PROCEEDING UNDER 38 M.R.S.A.)	
§ 1365, UNCONTROLLED HAZARDOUS)	
SUBSTANCE SITES LAW)	

Mallinckrodt LLC and United States Surgical Corporation¹ appeal or request clarification of the Presiding Officer's Eighth Procedural Order on the following four grounds.

1. The Order Misstates the Statutory Elements that the Commissioner Must Prove to Sustain the Uncontrolled Sites Order at Issue in this Matter.

The Eighth Procedural Order, at pages 2-3, states that:

...the Commissioner has the burden of persuading the Board that the statutory elements of the Uncontrolled Sites Law are met, namely that:

1. "Hazardous substances are or were handled or otherwise came to be located" at a specific location,
2. The hazardous substances at the location "may create a danger to the public health, to the safety or (sic) any person or to the environment,"
3. The ordered remedial action is "necessary to terminate or mitigate the danger or likelihood of danger," and
4. The persons to whom the order is directed are "responsible parties."

This paraphrasing of Section 1365(1) of the Uncontrolled Sites Law omits critical language that is part of the Commissioner's burden of proof concerning the elements of liability under Section 1365(1). In particular, Section 1365(1)(B) only allows the Commissioner to issue

¹ Mallinckrodt LLC and United States Surgical Corporation are referred to as Mallinckrodt for the sake of simplicity.

an administrative order to a responsible party “dealing with the hazardous substances.”² That statutory language (which, importantly, is in the present tense -- clearly indicating that there needs to be current, active management of the substances) is not included in or referred to in the Presiding Officer’s recitation of the elements of the statute for which the Commissioner has the burden of proof. Mallinckrodt has previously raised this issue (*See* Appellant’s Motion to Dismiss for Failure to Pursue Clean-up in Superior Court (June 15, 2009) at pages 3-5) and reiterates and incorporates those arguments here. Mallinckrodt therefore objects to and appeals the Eighth Procedural Order’s description of the elements for which the Commissioner has the burden of proof.

2. The Order Incorrectly Allows the Commissioner to Introduce New Information as a Post Hoc Rationalization of the Basis for His Order.

The Eighth Procedural Order, at pages 3-4, would allow the Commissioner to introduce evidence that was not available to him at the time the Uncontrolled Sites Order was issued in this case. The plain language of the statute, at 38 M.R.S.A. 1365(4), requires that “the Commissioner shall first establish the basis for the order.” In this context of the appeal, the Uncontrolled Sites Order at issue here is a static document. The findings of fact and conclusions of law allegedly supporting the issuance of that Order were made the day it was issued. That is the basis of the Order, not efforts that have been undertaken or information developed since that time. The statute is clear on this point and mere passage of time does not allow for post-hoc rationalization. The Commissioner must establish the basis for his order based upon what was in front of him at the time it was issued.

² 38 M.R.S.A Sec. 1365(1)(B) states:

I. Investigation. Upon finding, after investigation, that a location at which hazardous substances are or were handled or otherwise came to be located may create a danger to the public health, to the safety of any person or to the environment, the commissioner may: ...

B. Order any responsible party dealing with the hazardous substances to cease immediately or to prevent that activity and to take any action necessary to terminate or mitigate the danger or likelihood of danger; ...

3. The Eighth Procedural Order Misstates the Scope of the Commissioner's Administrative Order Authority under the Uncontrolled Sites Law.

The Presiding Officer's Eighth Procedural Order, in its discussion at the top of page 4 regarding "Ruling on Record" states in the context of the information that the Board will consider that "...the Board would be remiss in its statutory duty to ensure that adequate measures are taken to promptly abate, clean-up or mitigate threats posed by uncontrolled hazardous substance sites if it categorically limited any of the parties to the evidence that existed at a point in time that has long since passed." (Emphasis added.) While the Attorney General may file suit under Section 1365(5) of the Uncontrolled Sites Law to compel cleanup,³ the phrase "clean-up" is not within the administrative order authority granted the Commissioner under Section 1365(1)(B) of the Uncontrolled Sites Law. *See* Fn.2, above. *See also* Appellant's Motion to Dismiss for Failure to Pursue Clean-up in Superior Court (June 15, 2009) at pages 2-3, incorporated herein by reference. To the extent that the Eighth Procedural Order's language purports to make a decision on the scope of the Commissioner's administrative order authority under the Uncontrolled Sites Law, Mallinckrodt objects to and appeals that issue.

4. The Order Incorrectly Limits The Scope of the Cross-Examination of Witnesses, in Contradiction to Prior Ruling in Fifth Procedural Order.

The Eighth Procedural Order admonishes (at page 5) that:

[w]ith respect to the Commissioner's concerns regarding state agency witnesses, the parties are reminded that questions related to alleged political pressure and bias in the Commissioner's decision-making process are not relevant to the Board's proceeding and will not be allowed.

That text cites (in a footnote) to Section 2, page 2 of the Fourth Procedural Order as authority for that position.

³ 38 M.R.S.A Sec. 1365(5) states:

"5. Civil action. The Attorney General may file suit in Superior Court to compel any responsible party to abate, clean up or mitigate threats or hazards posed or potentially posed by the uncontrolled site."

On this point, however, the Fourth Procedural Order was clarified by the Fifth Procedural Order. In particular, that clarification states that

...the ruling [regarding political pressure and bias] does not prevent the parties, including Mallinckrodt, from challenging a witness' credibility on cross examination. It should be understood that the parties retain the right as part of any cross examination to ask questions that relate to the credibility of the witness and therefore the reliability of the testimony offered by that specific witness for inclusion in the Board's record.

See Fifth Procedural Order at Section 1(A)(1), page 2. Hence, the language in the Eighth Procedural Order on this point should be modified to make it consistent with the Fifth Procedural Order's ruling on this point or should be stricken.

CONCLUSION

For the foregoing reasons, Mallinckrodt respectfully requests that the Board modify the Eighth Procedural Order to address the issues identified above.

Dated at Portland, Maine this 13th day of October, 2009.

Respectfully submitted,

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