

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

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

Mallinckrodt LLC and United States Surgical Corporation (hereinafter “Mallinckrodt”) hereby appeal the ruling in Paragraph 1(B) of the Eleventh Procedural Order that allows into the record in this proceeding the so-called Phase I Report in the context of the U.S. District Court case of *Maine People’s Alliance v. HoltraChem Mfg. Co.*, No 1:00-cv-00069-GC (the “River Litigation”) as well as any related testimony.. Specifically, Mallinckrodt disagrees with the rationale behind this ruling that: (1) because the Phase I Report was cited in the Commissioner’s Order it is relevant and appropriate; and (2) that cross-examination can cure the fact that Mallinckrodt does not have access to the underlying data necessary to evaluate the results of this study.

ARGUMENT

Mallinckrodt disagrees with the notion that just because the Phase I Report was cited and relied upon in the Commissioner’s Order it is necessarily relevant and appropriate for this hearing. (*See* Eleventh Procedural Order, pg. 3.) As Mallinckrodt stated in its Motion to Strike Certain Pre-Filed Rebuttal Testimony Submitted by the Department of Environmental

Protection, ("DEP"), dated December 17, 2009 ("Motion to Strike" attached hereto as Exhibit A), the River Litigation is a completely separate legal case involving issues that are not directly relevant to this hearing before the Board. This hearing is meant to determine whether the remedy required by the Commissioner's Order is necessary to remediate the Site. This hearing is not meant to address whether methylation is occurring in the Penobscot River and whether the Penobscot River can be remediated.

Furthermore, as explained in Mallinckrodt's Motion to Strike, Mallinckrodt's access to the underlying data is important to its ability to examine the results of the Phase I Report and critical pieces of this data are currently not public. Therefore, although the Eleventh Procedural Order states that Mallinckrodt may cross-examine DEP witnesses on the fact that the underlying Phase I Report data is not currently public Mallinckrodt's inability to access this information underlying this study prevents it from fully probing the substantive results of the Phase I Report and the related testimony offered by the Department.

CONCLUSION

The Phase I Report is different than other studies that have been entered into the record in this case. It is the product of a ruling in a separate federal case, involving a different legal issue, and involves a different issue than that before the Board. Furthermore, the federal case and river one is still ongoing, and the underlying data supporting the results of the Phase I Report are currently not public.

Therefore, the Phase I Report, the update to the report, and any related testimony should be stricken from the record.

Dated at Portland, Maine this 5th day of January, 2010.

Respectfully submitted,



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