

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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MAINE PEOPLE'S ALLIANCE and
NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Plaintiffs,

v.

HOLTRACHEM MANUFACTURING
COMPANY, L.L.C. and
MALLINCKRODT INC.,

Defendants.

Civil Action No.

INJUNCTIVE RELIEF SOUGHT

COMPLAINT

STATEMENT OF THE CASE

1. This is a citizen suit brought under section 7002(a)(1)(B) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), to require defendants to take all actions necessary to eliminate the imminent and substantial endangerment to health and the environment stemming from water discharges and air emissions of mercury to the Penobscot River from defendants' past and present operation of a chemical manufacturing facility in Orrington, Maine ("the Orrington facility" or "the facility").

2. Starting in 1967, defendants have operated the Orrington facility in such a way as to cause large amounts of hazardous waste, particularly mercury, to be deposited into the sediments of the Penobscot River and Penobscot Bay, into which the River discharges.

3. The sediments of the Penobscot River contain the highest reported mercury levels in the country. Mercury is extremely toxic to fish, wildlife, and humans, persisting in the aquatic environment and in organisms. The mercury from the Orrington facility accumulating in the sediments and entering the food web poses a continuing risk of serious harm to public health and the environment, including fish and wildlife associated with the Penobscot River and Penobscot Bay.

4. Plaintiffs are citizen groups whose members in the area and down-River of the Orrington facility are harmed by defendants' failure to abate the endangerment related to their past and present pollutant discharges. To redress this harm, plaintiffs seek injunctive relief, as provided by section 7002 of RCRA, 42 U.S.C. § 6972.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), and pursuant to 28 U.S.C. § 1331 (federal question). Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), authorizes citizens to bring suit "against any person . . . who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), empowers the Court to compel any person referred to in paragraph (1)(B) "to take such . . . action as may be necessary" to eliminate the endangerment.

6. On June 17, 1999, plaintiffs gave notice of the endangerment as required by section 7002(b)(2)(A) of RCRA, 42 U.S.C. § 6972(b)(2)(A), to the Administrator of the U.S. Environmental Protection Agency ("USEPA"), the State of Maine Department of

Environmental Protection ("Maine DEP"), and the defendants. The notice is appended hereto as Attachment 1.

7. In accordance with section 7002(b)(2)(A) of RCRA, 42 U.S.C. § 6972(b)(2)(A), more than ninety (90) days have passed since notice was served on USEPA, Maine DEP, and the defendants. USEPA has not taken any of the actions described in Section 7002(b)(2)(B)(i)-(iv) of RCRA, 42 U.S.C. § 6972(b)(2)(B)(i)-(iv). Maine DEP has not taken any of the actions described in Section 7002(b)(2)(C)(i)-(iii) of RCRA, 42 U.S.C. § 6972(b)(2)(C)(i)-(iii).

8. Venue is proper in this District pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), because it is the "district in which . . . the alleged endangerment may occur."

PARTIES

Plaintiffs

9. Plaintiff Maine People's Alliance ("MPA") is a statewide organization with over 16,000 members whose purpose is to empower low- and moderate-income leaders and members to develop strategies to influence public policy and to challenge social, political, and economic injustice throughout the state. MPA has worked to address toxics issues since 1984 and, in particular, has worked to address mercury contamination from the Orrington facility since 1987. MPA's headquarters are located at 27 State Street, Suite 44, Bangor, Maine 04401.

10. Plaintiff Natural Resources Defense Council, Inc. ("NRDC") is a national, not-for-profit membership corporation organized under the laws of the State of New York, with offices in New York, Washington, D.C., Los Angeles, and San Francisco.

Founded in 1970, NRDC has more than 400,000 members nationwide, including over 2,750 members who live in Maine. NRDC's staff of scientists, lawyers, and environmental specialists is dedicated to protecting public health and the environment through litigation, lobbying, and public education. NRDC has long been active in working to reduce the harmful effects of toxic chemicals, including mercury. NRDC's principal office is located at 40 West 20th Street, New York, New York 10011.

11. Individual members of MPA and NRDC live, work, and recreate in and around the Penobscot River and Penobscot Bay. Defendants' past and present discharges and emissions of pollutants from the facility, particularly mercury that has accumulated in the sediments and been taken up by organisms, and defendants' failure to eliminate the risk from mercury contamination, may present an imminent and substantial endangerment to the health of these individuals and to the environment in which they have an interest, as described more fully below in paragraphs 43-47.

Defendants

12. Defendant HoltraChem Manufacturing Company, L.L.C. ("HoltraChem") is a privately-held company that owns two chlor-alkali plants – the Orrington facility, and a similar plant in North Carolina. HoltraChem has owned and operated the Orrington facility since 1994.

13. Defendant Mallinckrodt Inc. ("Mallinckrodt") is a New York corporation with headquarters located at 675 McDonnell Boulevard, St. Louis, Missouri 63134. Mallinckrodt's predecessor corporation, International Minerals and Chemical Corporation ("IMC") owned and operated the Orrington facility from 1967 to 1982. On information and belief, IMC changed its name to IMCERA Group Inc. in 1992, then

changed its name to Mallinckrodt Group Inc. in 1994 and to Mallinckrodt Inc. in 1997. This complaint will refer to all of the corporate entities described in this paragraph as "Mallinckrodt."

14. From 1982 to 1994, the facility was owned and operated by LCP Chemicals and Plastics, Inc., which changed its name to Hanlin Group, Inc. ("Hanlin") in 1988. In 1991, Hanlin and its related companies filed a voluntary bankruptcy petition pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq., in the Bankruptcy Court for the District of New Jersey. Hanlin is not a defendant in this action.

THE FACTS

The Facility

15. The Orrington facility is located on a 240-acre site on the banks of the Penobscot River ("the site"). Built in 1967, the facility manufactures chemicals, including chlorine gas and caustic soda, for the paper industry and other industrial customers. The facility is one of only about a dozen chlor-alkali plants in the United States that still uses mercury in its manufacturing process. Most chlor-alkali plants, including HoltraChem's North Carolina facility, have converted to a membrane-cell technology that does not use mercury.

16. The chlor-alkali process used at the Orrington facility begins with a concentrated brine passed over a bed of liquid elemental mercury that acts as a conductor as the brine is exposed to an electrical charge. During this process, the brine becomes contaminated with mercury, some of which is removed as a waste product in the form of a brine sludge.

Mercury Discharges and Emissions from the Facility

17. Between 1967 and approximately 1970, Mallinckrodt discharged untreated wastewater and brine sludges, including mercury, from the facility directly into the Penobscot River. Between approximately 1970 and 1982, Mallinckrodt deposited mercury-bearing brine sludges from the facility into five on-site, unlined landfills, which contain an estimated thirteen tons of mercury sludge. Mercury from these landfills has leaked and otherwise been released into the surrounding environment, including soils, groundwater, and surface waters that drain or discharge into the Penobscot River. Between 1967 and 1982, Mallinckrodt also operated the facility in such a way as to release many thousands of pounds of mercury into the air through unpermitted emissions, some of which has been deposited into the Penobscot River.

18. HoltraChem has been the owner and operator of the Orrington facility since 1994. In addition to its relatively small permitted discharges of mercury to the Penobscot River, HoltraChem has had numerous documented, unpermitted spills and discharges of mercury-bearing wastes from the facility and the site. Mercury from these unpermitted spills has been discharged, both directly and indirectly, into the Penobscot River. Under HoltraChem's ownership, mercury has also continued to be released to the Penobscot River from the landfills, soils, and waters on the site. HoltraChem has also released, and continues to release, hundreds of pounds annually of unpermitted mercury emissions from the facility into the air, some of which has been deposited into the Penobscot River.

Prior Enforcement History

19. The facility has been subject to a number of federal and state environmental enforcement activities since approximately 1970 that address some releases of pollutants from the site to the immediate environment. None of these enforcement activities addresses or remedies the long-term, down-River effects of persistent mercury pollution from the facility that are the target of this action. Significant government enforcement actions relevant to mercury releases from the Orrington facility are described briefly below.

(1) RCRA Corrective Action

20. In 1993, this Court entered a Consent Decree between USEPA and Hanlin. United States of America v. Hanlin Group, Inc., Civil Action No. 91-0188-B (D. Maine) ("EPA Consent Decree"). Under the EPA Consent Decree and pursuant to section 3008(h) of RCRA, 42 U.S.C. § 6928(h), Hanlin agreed to a Corrective Action at the site ("RCRA Corrective Action"). The RCRA Corrective Action requires a Site Investigation, a Corrective Measures Study to determine actions necessary to prevent further harmful releases of pollutants from the site, and, as required, site stabilization measures.

21. The EPA Consent Decree incorporated an agreement between Hanlin and Mallinckrodt under which Mallinckrodt assumed responsibility for a portion of the RCRA Corrective Action.

22. When HoltraChem acquired the Orrington facility in 1994, it assumed Hanlin's responsibilities under the EPA Consent Decree governing the RCRA Corrective Action.

23. Pursuant to the RCRA Corrective Action, defendants filed a Site Investigation Report in December 1995. In March 1997, USEPA and Maine DEP provided comments indicating the need for additional data to complete the site investigation. In December 1998, defendants submitted a superseding Site Investigation Report, prepared by Camp Dresser & McKee, a consultant hired by defendants ("CDM Report").

24. The CDM Report revealed extraordinarily high levels of mercury in Penobscot River sediments immediately adjacent to the facility. Nonetheless, the CDM Report concluded that there were "no human health or ecological risks associated with current sediment contamination in the cove area [immediately adjacent to the facility] of the Penobscot River."

25. The CDM Report did not consider any risks associated with sediment contamination down-River of the facility. Defendants' consultant did not sample sediments down-River. As stated in the report, "[t]he human health and ecological risk assessment were focused on the HoltraChem site and immediate vicinity."

(2) State Administrative Order

26. In December 1997, HoltraChem and Maine DEP entered into an administrative Consent Agreement and Enforcement Order to resolve numerous illegal leaks, seeps, and spills of mercury-contaminated wastes to the site and to the Penobscot River, as well as related violations of state hazardous waste laws ("State Administrative Order"). Under the State Administrative Order, Maine DEP ordered HoltraChem to comply fully with state environmental laws, pay penalties, implement

dozens of corrective measures to prevent mercury releases from the site, and engage in some remedial actions that overlap with those required by the EPA Consent Decree.

(3) State Consent Decree

27. Following another major unpermitted discharge of mercury-contaminated brines to the Penobscot River in February 1998, Maine DEP filed a state court complaint against HoltraChem, asking the court, among other things, to enforce the State Administrative Order. In March 1998, the court action was settled by a Consent Decree and Order ("State Consent Decree"). The State Consent Decree reiterated the requirements of the State Administrative Order, and required HoltraChem to hire an Environmental Monitor, conduct and implement the results of a spill risk analysis and prevention assessment, and conduct a thorough overhaul of the facility's environmental management systems and practices.

The Hazards of Mercury

28. The effects of mercury in aquatic systems have been extensively studied. Mercury is a highly toxic metal that is known to have harmful effects on fish, wildlife, and humans. When elemental mercury enters water and sediments, microbial activity can transform it to the extremely toxic form of methyl mercury. The methylation process is influenced by a number of environmental factors, including available dissolved oxygen, acidity, and sediment type. Once methylated, mercury compounds are not readily demethylated.

29. Methyl mercury is known for its ability to pass through biological membranes, its high chemical stability and persistence in the environment, its slow excretion from animals and humans, its tendency to concentrate in individual organisms

that take it up from the environment ("bioconcentration"), and its capacity to increase in concentration as it moves through the food web ("biomagnification").

30. Mercury at relatively low levels is a potent neurotoxin in fish, wildlife, and humans. It has been shown to cause behavioral abnormalities, serious physiological problems, reproductive disorders, and birth defects.

31. Humans are particularly susceptible to harm from ingesting mercury contained in fish and shellfish. Once in the body, mercury attacks the brain and nerves, pancreas, immune systems, and kidneys. Symptoms of exposure include numbness and tingling, problems with walking and talking, vision and hearing impairment, weakness and irritability, and, in significantly high doses, mortality. Mercury can remain in the body for months before it is gradually excreted, and the harm it causes, particularly to the brain and nervous system, can progress for years after the initial exposure.

32. Small children and fetuses are especially sensitive to mercury's effects on their developing central nervous systems. Exposure can lead to problems with walking, talking, vision, and cognitive brain function. Mercury easily crosses the placenta and concentrates in fetal blood at levels 30 times higher than in the blood of the mother.

Mercury in the Penobscot River-Bay System

(1) Pre-existing Data

33. Studies reveal mercury levels in Penobscot River sediments to be higher than any reported in the country. In 1997, the Maine Legislature directed the state's Land and Water Resources Council to prepare a report on mercury levels in Maine's environment, which was presented to the Joint Standing Committee on Natural

Resources in January 1998 ("Mercury in Maine" or "the report"). According to the report, mercury concentrations in sediments below about 0.14 parts per million ("ppm") are considered to be background levels that are unlikely to have adverse effects on the aquatic or human environment. "As concentrations approach and exceed 0.71 ppm, the probability of more severe biological impacts becomes more likely." Mercury in Maine, Appendix A at 17. The National Oceanic and Atmospheric Administration has reported a "lowest effect level" at 0.15 ppm, and a "severe effect level" at 1.3 ppm.

34. Sediment sampling performed by defendants in the vicinity of the Orrington facility in connection with the RCRA Corrective Action reveals mercury levels in Upper Penobscot River sediments to average 17.6 ppm, including one sample at 460 ppm. Mercury in Maine, Appendix A at 18. The report, in presenting a figure of mercury concentrations in aquatic sediments in Maine, stated that "[t]he Upper Penobscot [where the facility is located] is so atypical that it dwarfed the rest of the data and could not be included." Id. The other three "areas of concern" in the state, by comparison, had average sediment mercury levels of 2.2 ppm, 0.71 ppm, and 0.42 ppm, respectively. Id.

35. Sediment mercury levels in the vicinity of the Orrington facility are, on average, 100 times greater than background levels and, at maximum, over 1000 times greater than those levels.

36. Neither the RCRA Corrective Action nor related state actions have required defendants to determine how much mercury is contained in Penobscot River sediments at any significant distance from the Orrington facility.

(2) Livingston Data

37. In October 1999, plaintiffs commissioned Dr. Robert J. Livingston, Director of the Center for Aquatic Research and Resource Management at Florida State University, to conduct an independent, preliminary study of mercury in sediments of the Penobscot River-Bay system ("Livingston study"). The Livingston study sampled sediments at eighteen stations, from about three miles upstream of the facility to the upper part of Penobscot Bay just north of Fort Pownall, over twenty river miles below the facility.

38. The Livingston study found mean sediment mercury concentrations at all but four stations to exceed the 0.71 level at which the State reported an increased probability of severe biological impacts.

39. When adjusted for organic carbon content, the results of the Livingston study indicate that mercury levels are highest in sediments near the Orrington facility, with generally decreasing (but still high) values both up-River and down-River. The pattern of distribution of mercury contamination implicates the facility as a dominant source of the sediment contamination.

40. The Livingston study found levels of sediment mercury in Upper Penobscot Bay that indicate that Penobscot Bay is a depositional area for mercury moving down-River from the Orrington facility.

41. The Livingston study also measured mercury concentrations in blue mussels at one station in upper Penobscot Bay. The mussels averaged 0.56 ppm of mercury. According to Mercury in Maine, mussels containing mercury in excess of 0.48 ppm are considered to have elevated concentrations, where adverse effects would be expected

in the birds and mammals consuming the mussels. Mercury in Maine, Appendix A at 16. The Maine standard is twice the 0.24 ppm that a national study determined to be a "high" value for mercury in mussels. Id. at 17. The Livingston biological data are consistent with data collected by Maine DEP that indicate elevated levels of mercury in such organisms as bivalves, lobsters, and cormorants in the Penobscot estuary.

42. The sediment data from the Livingston study are generally consistent with pre-existing sediment mercury data from the Penobscot River. Taken together, these data, along with studies of other estuaries, indicate that discharges from the Orrington facility are responsible for both the extremely high concentrations of mercury in the sediments of the Penobscot River and the high concentrations of mercury in the sediments of upper Penobscot Bay. The contaminated sediments themselves are a continuing source of mercury to the Penobscot River-Bay system and would continue to supply mercury to that system even if there were no further discharges of mercury from the Orrington site.

Harm to Plaintiffs from Mercury in the Sediments

43. Individual members of plaintiff organizations live, work, and/or recreate along the Penobscot River and in Penobscot Bay. Existing levels of mercury in the sediments impair these members' interests in two ways. First, the mercury poses a direct risk to the health of these members, particularly through the ingestion of contaminated fish and shellfish. Second, mercury in the sediments impairs these individuals' interest in the environment through injury to the Penobscot River-Bay ecosystem.

44. Some of plaintiffs' members consume fish and shellfish from Penobscot River and Penobscot Bay that are contaminated with mercury from the facility. As described in paragraphs 28-32 above, exposure to mercury through ingestion creates a grave health risk, particularly to children and fetuses. Although the state of Maine has issued a statewide fish consumption warning because of mercury contamination, many residents of Maine are unaware of the warning and/or its contents. Others are aware of the warning but do not observe its recommendations. Some of plaintiffs' members who may be aware of the warning consume mercury-contaminated fish and shellfish as part of a subsistence diet, because it is an inexpensive source of protein. Members of plaintiff organizations who visit Maine as tourists or seasonal visitors are even less likely than Maine residents to be aware of the fish consumption warning.

45. The elevated levels of mercury in Penobscot River/Bay sediments may also pose a health risk to plaintiffs' members through other routes of exposure. Members who recreate in the River and the Bay may come into direct contact with contaminated sediments and/or waters contaminated by the sediments, resulting in mercury exposures that create a danger of harm to those individuals' health and well-being.

46. Mercury from the facility in Penobscot River/Bay sediments impairs the interests that plaintiffs' members have in the environment endangered by that mercury. For example, studies show that mercury in the Penobscot River/Bay system is taken up by birds, including eagles, loons, and cormorants, with consequent harm or risk of harm to their reproductive and survival capabilities. Individual members of plaintiffs are birdwatchers whose interests in this activity are impaired by the effects of mercury from the facility. Similarly, the interests of plaintiffs' members who refrain from eating

mercury-contaminated fish and shellfish that they would otherwise enjoy from the Penobscot River and Penobscot Bay are harmed. In these and other ways in which mercury contamination from the facility impairs the use and enjoyment of Penobscot River/Bay resources, the environmental, aesthetic, recreational, and other interests of plaintiffs' members are impaired.

47. Without an order from this Court, plaintiffs' members will continue to suffer harm to their health, environmental, aesthetic, recreational, and other interests from defendants' failure to abate the hazards posed by mercury released from the Orrington facility to the sediments of Penobscot River and Penobscot Bay. An injunction ordering defendants to eliminate the endangerment will redress plaintiffs' injuries.

CLAIM FOR RELIEF

48. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 47.

49. Pursuant to 42 U.S.C. § 6903(15), each defendant is a "person" subject to the citizen suit provisions of RCRA, 42 U.S.C. § 6972.

50. Each defendant has contributed and/or is contributing to the past and/or present handling and/or storage and/or treatment and/or transportation and/or disposal of solid and/or hazardous waste which may present an imminent and substantial endangerment to health and/or the environment within the meaning of section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B).

51. Plaintiffs' interests are being harmed and will continue to be harmed by the endangerment and by defendants' failure to abate the endangerment, unless the Court grants the relief sought herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter a judgment:

1. Declaring that there exists or may exist an imminent and substantial endangerment to public health and to the environment caused by defendants' past and/or present handling, storage, treatment, transportation, and/or disposal of solid and/or hazardous waste with respect to discharges and emissions of mercury from the Orrington facility into the Penobscot River and Penobscot Bay;

2. Ordering defendants to take all such actions as may be necessary to eliminate any such endangerment, including:

(a) funding an independent, comprehensive, scientific study to determine the precise nature and extent of the endangerment, including a detailed examination of the fate and transport of mercury from the facility to the sediments of the Penobscot River and Penobscot Bay, and from the sediments into biological systems (including, without limitation, methylation processes, routes of exposure, mercury levels in affected organisms, and toxic effects);

(b) funding an independent, comprehensive, scientific study, based on the results of the study described in subparagraph (a) above, of appropriate, effective, environmentally-sound means to eliminate the endangerment; and

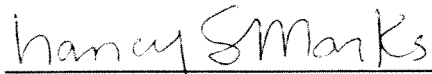
(c) developing and implementing an appropriate and effective remediation plan, based on the studies described in subparagraphs (a) and (b) above;

3. Ordering defendants to pay plaintiffs' reasonable attorneys' fees, expert witness fees, and costs incurred in prosecuting this action; and

4. Ordering such other relief as the Court may deem just and proper.

Dated: April 5, 2000

Respectfully submitted,



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