

**EXHIBIT A**

**STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION**

UNITED STATES SURGICAL	)	
CORPORATION and	)	
MALLINCKRODT LLC	)	
	)	
CONCERNING A CHLOR-ALKALI	)	MALLINCKRODT'S MOTION TO STRIKE
MANUFACTURING FACILITY IN	)	CERTAIN PRE-FILED REBUTTAL
ORRINGTON, PENOBSCOT COUNTY,	)	TESTIMONY SUBMITTED BY THE
MAINE	)	DEPARTMENT OF ENVIRONMENTAL
	)	PROTECTION
	)	
PROCEEDING UNDER 38 M.R.S.A.	)	
§ 1365, UNCONTROLLED HAZARDOUS	)	
SUBSTANCE SITES LAW	)	

Pursuant to Paragraph 5 of the Board's Ninth Procedural Order, Mallinckrodt hereby moves to strike certain portions of various witnesses' prefiled written testimony submitted by the Department of Environmental Protection on December 11, 2009. As described below, Mallinckrodt objects to certain portions of the DEP's rebuttal testimony that: (1) relies upon a Federal District Court ordered study that is not complete and the underlying data is not public; (2) is new and beyond the scope of Mallinckrodt's prefiled testimony; (3) is repetitious; (4) is so broad and vague that meaningful response is not possible in the scope of this hearing; and (5) is beyond the scope of a DEP witness's expertise. Notwithstanding these objections, Mallinckrodt reserves the right to supplement these objections and motion to strike.

**I. GENERAL OBJECTIONS TO DEPARTMENT'S PRE-FILED TESTIMONY**

**A. The Department Relies Upon a Study for Which the Underlying Data is Unavailable to Mallinckrodt**

The rebuttal testimony of several of DEP's witnesses relies upon a report regarding the first phase of a study of the Penobscot River (the "Phase I Report") conducted by a panel of scientists (the "River Study Panel") pursuant to rulings in the U.S. District Court in *Maine*

*People's Alliance v. HoltraChem Mfg. Co.*, No. 1:00-cv-00069-GC (the "River Litigation"). The River Litigation is a completely separate legal case involving issues that are not directly relevant to the issues at hand in this appeal to the Board – *e.g.*, whether the DEP's Dig and Haul remedy is "necessary."

In particular, a state administrative board appeal proceeding is not the appropriate forum to probe and evaluate the preliminary findings of the Federal District Court-appointed River Study Panel. Furthermore, the study of the Penobscot River is not yet complete, and the underlying data that supports the Phase I Report is currently not public.<sup>1</sup> Without access to such information, Mallinckrodt's experts cannot meaningfully evaluate the results of this report. Moreover, Mallinckrodt cannot fully cross examine DEP's witnesses on the findings of this report or their related testimony without such data. Therefore, the Board should strike the Phase I Report from the record as well as any rebuttal testimony related to this report.

In particular, the rebuttal testimony of Ms. Ladner and Mr. Mower extensively cite to the Phase I Report. On pages 8 through 15 of her rebuttal testimony, Ms. Ladner recites several passages of the Phase I Report as allegedly supporting her conclusion that mercury concentrations in the Lower Penobscot river are elevated. Mr. Mower actually goes into an evaluation of the Phase I Report, specifically citing it on pages 3, 5, 8, and 10 of his rebuttal testimony. The DEP also designates the Phase I Report and several sections of the Phase I Report as exhibits in this case. See Exhibits C-1053 through C-1064, C-1066 through C-1070, C-1072 through C-1076 and C-1078 through C-1079 (containing specific pages from the Update to the Phase I Report); Exhibits C-1065, C-1071, C-1077 (referencing the Phase I Report).

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<sup>1</sup> Since the underlying data and sampling information for the Phase I Report currently are not public, Mallinckrodt assumes that the DEP does not have this information. If, however, the DEP has such information, Mallinckrodt requests that the DEP produce that information to Mallinckrodt as soon as possible.

The River Litigation is a completely separate legal case involving a different issue than the one before the Board. The main issue before the Board is whether the Dig and Haul alternative that was Ordered by the DEP is necessary to protect human health and the environment. All of the remedial alternatives before the Board including the DEP's dig and haul remedy are designed to prevent *future* discharges of mercury to the Penobscot River. None of the remedial alternatives before the Board or the provisions of the DEP's Order are meant to address *historic* discharges to the Penobscot River and remediation of the river.<sup>2</sup> That is the subject of the River Litigation. The extent of harm to the Penobscot River from historic discharges and the need for a remediation plan for the Penobscot River, which is the subject of the Phase I Report, is not directly relevant to the proceeding before the Board.

Furthermore, although the Phase I Report itself is public, the overall study of the river is not complete, and the underlying data supporting the Phase I Report currently are not public. In the River Litigation, Mallinckrodt has requested that this underlying data be produced to the parties; the Court, however, has ruled that the issue of information disclosure does not have to be addressed until the full study is complete and discovery commences prior to a potential evidentiary hearing in the River Litigation. *See* Exhibit A (May 14, 2009, Memorandum and Order of Special Master Calkins).

The underlying data for the Phase I Report is important to meaningfully evaluate the findings of that report, to understand the report's interpretation and analysis of the data, as well as to determine the validity of the data. Among other things, Mallinckrodt currently does not have access to the written sampling protocols (which describe the number and location of samples as well as the sampling methods used), the field notes (which contain the date, time,

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<sup>2</sup> Although all four remedial alternatives address contamination in the Southern Cove area, the remedial alternatives do not otherwise contain remedial measures for the Penobscot River nor are the alternatives designed to otherwise address historic mercury contribution the Penobscot River.

location, weather conditions, and other observations about the samples), or the laboratory analytical packages (which contain test methods, time, dates and other information). In order for Mallinckrodt to evaluate the findings of the Phase I Report and respond to DEP witness testimony in this proceeding, it will need this information. Without such underlying data Mallinckrodt cannot meaningfully evaluate the findings, probe the results and cross-examine the DEP witnesses on their conclusions based upon the Phase I Report.

In addition to the fact that such report is the subject of a separate legal proceeding, Dr. Keenan's prefiled direct and rebuttal testimony did not cite to or reference the Phase I Report. He specifically did not reference the report because the underlying data is currently unavailable and neither Dr. Keenan nor anyone else outside of the River Study Panel (including the DEP) can fully and meaningfully evaluate the results of the study at this time.

The Phase I Report is not directly relevant to the remedy selection issue before the Board and is unnecessary to the DEP's case. Furthermore, the study is not yet complete and the underlying data for the Phase I Report is not yet public. This is not the appropriate forum to have an evidentiary hearing regarding the Phase I Report. Therefore, the DEP should not be permitted to use this study or any of its findings until the supporting data for the Phase I report is accessible to Mallinckrodt. For these reasons, the Presiding Officer should strike the Phase I Report (Exhibit C-3021) and any related testimony and exhibits from the record.<sup>3</sup>

**B. The Town of Orrington's Position Regarding the Remedy and DEP's Permitting of a CAMU**

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<sup>3</sup> If the Board nonetheless allows the introduction of the Phase I Report as evidence in this hearing as well as testimony on the report and associated cross-examination, it will essentially be holding an evidentiary hearing on the findings of the first phase of a not yet completed Federal court-ordered study. In the event that the Board does decide to allow this report and accompanying testimony to become part of this proceeding, a subpoena to the River Study Panel may be necessary to obtain all of the underlying data and information collected and to provide such information to the parties in this proceeding. It may also be necessary to stay this proceeding until such information can be obtained and evaluated.

DEP inappropriately raises a new issue for the first time in Mr. Littell's rebuttal testimony. In particular, he states that it is Mallinckrodt's responsibility to secure permission from the Town of Orrington to perform its desired remedial alternative. (Littell 2009, ¶¶ 35-36). Substantively, it is unclear what Mr. Littell is referring to or what authority he is relying upon for such a statement. The Uncontrolled Hazardous Substances Site Law, 38 M.R.S.A. §1361 *et seq.*, is the controlling statute and does not require the permission of a landowner for the performance of corrective action activity that the Commissioner or the Board orders as "necessary."

Furthermore, Mr. Littell's invocation of the need for the Town of Orrington's permission is at odds with the Town's silence on its own local regulations. In its Sixth Procedural Order, the Board ruled that the Town had until September 3, 2009 to "identify any local ordinances which [it] believes should be considered by the Board regarding remedy selection." (Sixth Procedural Order, pgs. 2, 3). This deadline passed without any submittal by the Town of Orrington, and the DE itself has cited no such local ordinances that apply.

Mr. Littell's testimony is also objectionable because it is direct testimony, not rebuttal testimony. The deadline for filing direct testimony was October 22, 2009, almost two weeks ago. There are no Mallinckrodt witnesses that address this issue in their prefiled direct testimony. Therefore, Mr. Littell's testimony on this issue (Littell 2009, ¶¶ 35-36) should be stricken from the record as it is outside the scope of rebuttal testimony. See Procedures Document, Section 8.C.

Ms. Ladner also raises a brand new issue and argument for the first time in her rebuttal testimony. She states that the "CDM Alternative and the Consolidation Alternative both require the creation of a new unpermittable onsite landfill." (Ladner 2009, pg.34). This is entirely new

information neither included in her prefiled direct testimony, nor in the testimony of any other witness.

Ms. Ladner's rebuttal testimony is also at odds with her pre-filed testimony in which she describes the briefing paper that she developed for the Commissioner recommending Option 3 – the excavation of all the landfills and the construction of a new landfill onsite. (Ladner 2009 pre-filed testimony, pg. 44). That is essentially the very same remedy she now claims is “unpermittable.” Tellingly, the Department's comments on the Corrective Measures Study and Field Investigation Report never mentioned a concern that an on-site consolidation remedy would not be “permittable.” (See Exhibit M-0129). Ms. Ladner's attempt to provide new and unsupported direct testimony in the context of rebuttal testimony is inappropriate and must be struck.

**C. Repetitious Witnesses Addressing Mercury Deposition**

It is unnecessary and unduly repetitions to have seven DEP witnesses all address the prefiled direct testimony of Russell Keenan; the Board should strike these witnesses' repetitive testimony. Under the *ad hoc* rules governing this proceeding, the Chair may, in her discretion, strike portions of testimony that constitute unduly repetitious evidence. *See* Paragraph 8 of the Procedures Document incorporating 5 M.R.S. § 9057(2) (“[a]gencies may exclude irrelevant or unduly repetitious evidence”). Among the seven Department witnesses who respond to the prefiled direct testimony of Dr. Keenan, there are at least four areas of unnecessary redundancy leading to unduly repetitious testimony, as follows.

First, Mr. Hyland, Mr. Littell, Mr. Miller and Mr. Graham all testify to regional and Maine-specific mercury reduction efforts that have been undertaken. This testimony is objectionable because it is unduly repetitious and it does not directly respond to the direct

testimony of Dr. Keenan. Dr. Keenan did not testify as to whether efforts are or are not being made to reduce mercury contributions to the environment.

Second, the testimonies of Ms. Ladner, Mr. Littell, Mr. Miller and Mr. Graham all purport to respond to the testimony submitted by Dr. Keenan regarding the mercury contribution by the former HoltraChem facility to the Penobscot River relative to the atmospheric contribution of mercury to the Penobscot River. The testimony of these four witnesses, besides being redundant, is objectionable in two ways. As an initial matter, it is new information that is not rebuttal to testimony presented by Dr. Keenan. Dr. Keenan provided context about the *current* level of mercury flux to the river compared to the overall contribution from atmospheric deposition. Levels of mercury in the river, as testified to by these Department witnesses, do not indicate the current level of flux from the Site, but, rather, go to the past contributions from the former HoltraChem Site – a point not raised by Dr. Keenan. Further, these witnesses improperly rely on the historical contributions of mercury based on the River Study. For reasons discussed elsewhere in this motion, testimony regarding the River Study is objectionable because it addresses historical contribution rather than current contribution, and the underlying data have not been provided for review and analysis to the parties.

Third, the rebuttal testimonies submitted by Ms. Ladner, Mr. Littell, and Mr. Mower all address the same issue regarding the level of mercury in the Penobscot River relative to other water bodies. Such testimony is unduly repetitious and should be limited to one Department witness.

Fourth, Ms. Ladner and Mr. Smith both address the risk of harm to human health posed by the Site. While Mr. Smith has expertise in the area of human health risk assessment, Ms. Ladner does not possess such expertise. Therefore the testimony of Ms. Ladner regarding the

risk to human health should be stricken because it is unduly repetitious and it is presented a testifying witness without the appropriate expertise in the area.

## **II. OBJECTIONS TO SPECIFIC WITNESS TESTIMONY**

### **A. Mark Hyland**

Mr. Hyland provides rebuttal testimony that is new and does not rebut any of Mallinckrodt's prefiled testimony. In particular, in Paragraph 14 of Mr. Hyland's testimony he testifies that facilities in the State have gone bankrupt before a remedy has been completed and that Mallinckrodt could go bankrupt as well. Mr. Hyland does not state what Mallinckrodt testimony, if any, he is rebutting nor does he state why he is presenting such testimony. Moreover, it is not apparent what such testimony would in fact rebut. Mallinckrodt has not stated in its prefiled testimony or otherwise that it would not implement some form of financial assurance. Mr. Hyland's testimony is not rebuttal and should be stricken from the record. For those same reasons just stated, Ms. Ladner's reference to bankruptcy on page 25 of her rebuttal testimony must also be struck.

Similarly, in Paragraph 3 of Mr. Hyland's rebuttal testimony he purports to articulate Maine's policy on mercury and then identifies various programs that have been implemented to reduce mercury. This testimony does not rebut any of Mallinckrodt's witnesses' testimony and should be stricken from the record.

### **B. Testimony of Deborah Stahler**

Deb Stahler presents rebuttal testimony to Blaine Buck. Unlike Blaine Buck, however, who has extensive experience developing properties, Mr. Stahler is a chemist with the DEP (See Resume at Exhibit C-327). Ms. Stahler does not appear to have any experience that would

qualify her to discuss redevelopment projects or provide rebuttal testimony to Mr. Buck's testimony. In fact, Ms. Stahler does not even state in her rebuttal testimony any qualifications she has in the redevelopment area. Ms. Stahler's opinion testimony should therefore be stricken from the record.

**C. David P. Littell**

Paragraph 3 of Mr. Littell's rebuttal testimony asserts that Maine's policy is to eliminate sources of mercury in the state. This is not rebuttal testimony to any of Mallinckrodt's witnesses' testimony, it is outside the scope of rebuttal testimony, and should be stricken from the record. In Paragraphs 12 through 18 of his prefiled rebuttal testimony, Mr. Littell predicts a decrease in global Greenhouse gas emissions which will result in the reduction of mercury in the global mercury cycle that in turn will result in fewer mercury emissions to the Penobscot River. Although Mr. Littell is apparently attempting to rebut Dr. Keenan's testimony regarding the impacts of airborne mercury deposition on the Penobscot River, Mr. Littell's response is so broad and hypothetical that it is misleading to the Board and prejudicial to Mallinckrodt. Further, Mr. Littell is not an expert on the interaction between measures to reduce global climate change and mercury emissions, and whether measures to reduce climate change will also reduce global mercury emissions to an extent that mercury will no longer be elevated in the Penobscot River. (See Resume, Exhibit C-201). Therefore, Mr. Littell's testimony on this subject in Paragraphs 12 through 18 should be stricken from the record.

**III. CONCLUSION**

In conclusion, DEP rebuttal testimony and exhibits have been introduced that rely upon a Federal Court ordered study that is not complete and the underlying data is not public, present

new testimony that is not responsive to Mallinckrodt's prefiled testimony, is repetitive, and is beyond the scope of DEP witnesses' expertise. Therefore, the portions of the rebuttal testimonies and related exhibits outlined above of Mr. Littell, Ms. Ladner, Mr. Mower, Mr. Hyland, Mr. Miller, Ms. Stahler and Mr. Graham should be stricken from the record.

Dated at Portland, Maine this 17<sup>th</sup> day of December, 2009.

Respectfully submitted,



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