

January 2007
No. 2

Environmental, Energy and Maritime Law

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Maine People's Alliance & Natural Resource Defense Council v. Mallinckrodt, Inc., No. 05-2331 (1st Cir. Dec. 22, 2006)

By R. Bruce Barze, Jr. and Thomas L. Casey, III

On December 22, 2006, the United States Court of Appeals for the First Circuit rendered a decision in *Maine People's Alliance & Natural Resource Defense Council v. Mallinckrodt, Inc.*, No. 05-2331 (1st Cir. Dec. 22, 2006), affirming the district court's interpretation of the citizen suit provision in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, and upholding the lower court's order directing the defendant, Mallinckrodt, to fund a study of the lower Penobscot River.

Mallinckrodt owned and operated a chlor-alkali plant (the "plant") located on the banks of the Penobscot River in Orrington, Maine from 1967 until 1982. From 1982 until the plant's closure in 2000, the plant was owned and operated by Hanlin Group, Inc. ("Hanlin") and HoltraChem Manufacturing Co. Throughout the period of its operation, the plant deposited tons of mercury-laden waste into the Penobscot River. While a number of other sources significantly contributed mercury to the Penobscot, the district court found that the plant had been "a dominant source" of mercury contamination.

In 1986, the Environmental Protection Agency ("EPA") filed an administrative action under RCRA against Hanlin based on the plant's mercury releases. That action ultimately resulted in an agreement for corrective measures between Hanlin and EPA. Hanlin subsequently sued Mallinckrodt for contribution. In 1991, Mallinckrodt and Hanlin entered into a settlement agreement under which Mallinckrodt agreed to pay a portion of the compliance costs imposed by the EPA agreement. A second enforcement action

initiated by EPA led to a 1993 consent decree that superseded the earlier agreement. Although Mallinckrodt was not a party to this second consent decree, Mallinckrodt paid its share of the compliance costs (pursuant to its settlement agreement with Hanlin) and participated in ongoing negotiations with government regulators. The 1993 consent decree called for site investigation, evaluation of possible corrective measures, and remediation. The district court ultimately found that Mallinckrodt made only minimal efforts to advance these goals and deliberately failed to engage in more vigorous efforts.

Due to the lack of progress being made to clean-up mercury contamination in the Penobscot River, the National Resources Defense Council (“NRDC”) and the Maine People’s Alliance (collectively, “Plaintiffs”) commenced a citizen suit under RCRA § 6972(a)(1)(B), alleging that mercury contamination downriver from the plant “may present an imminent and substantial endangerment to health or the environment.” Among other things, the Plaintiffs asked that Mallinckrodt be ordered to fund an “independent, comprehensive, scientific study to determine the precise nature and extent of the endangerment.”

After a nine-day bench trial, the district court found that mercury in the Penobscot was susceptible to being transformed by microscopic organisms into a highly-toxic organic form (known as methylmercury), present in high enough concentrations as to reasonably present an “imminent and substantial endangerment” to human health. The district court reasoned that RCRA’s “imminent and substantial endangerment” standard would be satisfied by a “reasonable medical concern for public health and a reasonable scientific concern for the environment.” The district court ultimately approved a plan which, if carried out, would require Mallinckrodt to spend around \$4,000,000 for laboratory analyses to learn whether mercury

contamination in the lower Penobscot adversely affects either human health or the environment, and if so, to devise a feasible remedial approach.

On appeal, Mallinckrodt argued: (1) the Plaintiffs lacked standing to bring suit; (2) the lower court set the bar too low for RCRA citizen suits; and (3) the district court abused its discretion in fashioning relief. The First Circuit rejected all three of Mallinckrodt’s arguments and affirmed the decision of the district court.

The First Circuit concluded that the Plaintiffs had standing to sue, even though their RCRA claims were based on “probabilistic” harm—“probabilistic harms are legally cognizable, and the district court made a supportable finding that a sufficient probability of harm exists to satisfy the Article III standing inquiry.” The Court rejected Mallinckrodt’s argument that Plaintiffs had failed to establish a “substantial probability that harm will occur,” necessary for standing. “[T]he [district] court had ample reason to conclude that Mallinckrodt has created a substantial probability of increased harm to the environment. That increased risk, in turn, rendered reasonable the actions of the plaintiffs’ members in abstaining from their desired enjoyment of the Penobscot.” The Court also rejected Mallinckrodt’s argument “that a grant of standing in this case would be tantamount to judicial usurpation of regulatory authority.” The Court concluded that “Congress has elected to create a cause of action for affected citizens notwithstanding the absence of any EPA-sponsored standard.” Therefore, a citizen could bring suit under RCRA even where EPA had made a policy judgment that a certain risk of harm was acceptable.

Turning to the merits, the First Circuit agreed with the district court’s interpretation of RCRA § 6972(a)(1)(B). As described by the Court, “that Section allows citizens to sue persons or firms whose handling of solid or hazardous waste ‘may present an imminent and substantial endangerment to health or the environment.’”

Relying on *United States v. Price*, 688 F.2d 204 (3d Cir. 1982), *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984), and RCRA's legislative history, the Court concluded that the language of Section 6972(a)(1)(B) should be interpreted broadly in construing the requisite degree of risk necessary to make a showing under that provision. In summary, the Court concluded that "the combination of the word 'may' with the word 'endanger,' both of which are probabilistic, leads us to conclude that a reasonable prospect of future harm is adequate to engage the gears of § [6972](a)(1)(B) so long as the threat is near-term and involves potentially serious harm."

Under the interpretation of Section 6972(a)(1)(b) adopted by the Court, the Court found that "the remainder of the liability inquiry falls neatly into place." Based on the district court's factual findings, "the plaintiffs established that the potential risk from mercury is serious and likely to be present here and now," properly supporting a conclusion that there may be an imminent and substantial endangerment to the lower Penobscot River. And, because the Court reviewed the district court's injunctive relief only for an abuse of discretion, "the anodyne chosen by the district court does not seem so vastly disproportionate to the threatened harm as to warrant, from the vantage point of a cold appellate record, a recalibration of the balance." The Court's unwillingness to alter the district court's injunctive relief was further supported by the fact that Mallinckrodt failed to "identif[y] any less burdensome, more cost-effective remedy that the court could have imposed to address the perceived environmental harm."