UNITED STATES OF AMERICA
DISTRICT OF MAINE

MAINE PEOPLE'S ALLIANCE and NATURAL RESOURCES DEFENSE COUNCIL, INC.,	)	
Plaintiffs	)	
v.	)	Civil No. 00-69-B-C
HOLTRACHEM MANUFACTURING COMPANY L.L.C. and MALLINCKRODT INC.,	)	
Defendants	)	

Recommended Decision on Mallinckrodt's Motion for Summary Judgment on the Basis of Laches

In defense of this action, Mallinckrodt, Inc. has filed three separate motions on its defenses that are potentially dispositive of this action. One of these is a motion for summary judgment premised on the doctrine of laches. (Docket No. 50.) The plaintiffs have filed a global response to the three motions. (Docket Nos. 55 & 56.) I recommend that the court **DENY** the motion seeking judgment on the basis of laches.

Overview of Dispute

The Maine People's Alliance (MPA) and the Natural Resources Defense Council, Inc.(NRDC) have brought this citizen suit under 42 U.S.C. § 6972(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA). The moving defendant Mallinckrodt Inc. formally owned and operated a chemical manufacturing facility in Orrington, Maine. The plaintiffs assert that mercury-containing water discharge and air emissions from this facility has contaminated the Penobscot River, creating an imminent and substantial

endangerment to the health and environment. They seek injunctive relief, in the form of an order requiring that the defendants undertake a scientific study of mercury contamination in the Penobscot River and develop and implement a remediation plan.

Also relevant to this motion is the fact that Mallinckrodt is involved in an ongoing regulatory process with the Environmental Protection Agency (EPA) and the Maine Department of Environmental Protection (MDEP) that is addressing mercury contamination stemming from the Orrington plant. Though it is anticipated that this process will generate a remediation plan, to date there have been no finalized "media protection standards" generated from this undertaking.

Discussion

In this motion for summary judgment Mallinckrodt argues that plaintiffs' RCRA claim is barred by the equitable doctrine of laches because the plaintiffs have waited too long to bring this court action. The plaintiffs argue that Mallinckrodt has not made a sufficient showing that the doctrine should apply.

A. Summary Judgment Standard

Mallinckrodt is entitled to a favorable summary judgment order only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Pursuant to Local Rule 56, the record is not an open book. I limit my consideration of record materials in accordance with the parties' statements of material facts. D. Me. Loc. R. 56 ("The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate

statement of facts."). In practice, the summary judgment factual record consists solely of those factual statements offered by the parties in their statements of material facts that are both material to the dispute and supported by citation to the record. I view all facts in the light most favorable to MPA and NRDC and give them the benefit of all reasonable inferences in their favor. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000).

With respect to this summary judgment motion by Mallinckrodt, the material facts, as advanced by Mallinckrodt, are not disputed by the plaintiffs. Consequently, dispensing with this motion does not require the extensive fishing expedition in the converging rivers of disputed and non-disputed material facts that is the normal recreation of a court addressing a motion for summary judgment.

B. The Laches Doctrine in Environmental Suits

The First Circuit articulates the laches doctrine as having two prongs: a party's delay in bringing suit must have been "'(1) unreasonable, and (2) resulted in prejudice to the opposing party.'" Iglesias v. Mutual Life Ins. Co. N.Y., 156 F.3d 237, 243 (1st Cir. 1998) (quoting K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 911 (1st Cir.1989)); accord Murphy v. Timberlane Reg'l School Dist., 973 F.2d 13, 16 (1st Cir. 1992); see also Benoit v. Panthaky, 780 F.2d 336, 339 (3d Cir. 1985) (laches requires "'(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense'").

Mallinckrodt bears the laboring oar here. As in all summary judgment motions the "moving party must clearly establish that there is no genuine issue of material fact" as to the laches defense. FMC Corp. v. Spurlin, 596 F.Supp. 609, 615 (W.D. Pa. 1984); see

also Gonzalez-Gonzalez v. United States, 257 F.3d 31, 38 (1st Cir. 2001) (laches is an affirmative defense and "the burden of proving it rests with its proponent").

Although I agree with Mallinckrodt that the defense of laches is available to a RCRA defendant, I agree with the plaintiffs that laches is a disfavored defense in environmental cases. This is undoubtedly true as a general proposition cited most often in National Environmental Protection Act (NEPA) cases, see, e.g., Daingerfield Island Protective Soc'y v. Lujan, 920 F.2d 32, 37-38 (D.C. Cir. 1990); Concerned Citizens on I-190 v. Sec'y of Transp., 641 F.2d 1, 7-8 (1st Cir. 1981) (citing Jones v. Lynn, 477 F.2d 885, 892 (1st Cir. 1973)); Coalition for Canyon Pres. v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1337-38 (10th Cir. 1982), but also vis-à-vis other environmental acts, see Nat'l Wildlife Fed'n v.Burford, 835 F.2d 305, 318 (D.C. Cir. 1987)(Federal Land Policy and Management Act, parenthetical observation of disfavor); Bays' Legal Fund v. Browner, 828 F.Supp. 102, 107 n.11 (D. Mass. 1993) (National Environmental Policy Act, Marine Mammal Protection Act, and the Endangered Species Act). I cannot see any principled reason to conclude that this disfavor would not inhere in RCRA actions. This RCRA action, like other actions initiated under other federal environmental laws, requires recognition that these two plaintiffs, MPA and NRDC, are not the only victims of the alleged environmental harm. See, e.g., Daingerfield Island Protective Soc'y, 920 F.2d at 37-38; Concerned Citizens on I-190, 641 F.3d at 7-8; Jicarilla Apache Tribe, 687 F.2d at 1338; Bays' Legal Fund, 828 F.Supp at 107 n.11. And, RCRA, like NEPA, is environmental legislation and, as with an action under NEPA, the doctrine of laches ought not be used to undercut the congressionally-fashioned environmental policy of RCRA. See, e.g., Dangerfield Island

Protective Soc'y, 920 F.2d at 37-38; Concerned Citizens on I-190, 641 F.3d at 7-8; Jicarilla Apache Tribe, 687 F.2d at 1338; Bays' Legal Fund, 828 F.Supp at 107 n.11.

1. Delay

Mallinckrodt asserts the following factual predicate for its contention that the plaintiffs unreasonably delayed filing this suit. Richard Judd, who has had longstanding membership and professional affiliations with the plaintiff organizations, first became aware of mercury contamination from the Orrington facility thirteen or fourteen years ago, yet the notice of intent to sue in this action was not given until June 1999. (Laches Mot. Summ. J. at 3, 8; Reply to Pls.' Opp'n to Laches Mot. Summ. J. at 16.) Judd was aware that Mallinckrodt was the former owner and operator of the facility. (Laches Mot. Summ. J. at 3; Reply to Pls.' Opp'n to Laches Mot. Summ. J. at 16.) Judd has claimed for some time that his recreational use of the Penboscot River has been degraded, that he will not eat fish from the river, and that he has been concerned for the osprey and eagles that consume this fish. (Reply to Pls.' Opp'n to Laches Mot. Summ. J. at 16.) With respect to the ongoing EPA/MDEP process, plaintiff MPA was actively involved in the agency review and public meetings, and exposed to involved government personnel and relevant documents for years prior to filing this suit. (Laches Mot. Summ. J. at 11; Reply to Pls.' Opp'n to Laches Mot. Summ. J. at 16.)

Based on these facts, facts that are not disputed by the plaintiffs, Mallinckrodt argues that the plaintiffs' delay is unreasonable because they were aware of "each of the facts serving as the basis of this lawsuit for the past thirteen years." (Laches Mot. Summ. J. at 11.) Allowing fourteen years to pass while they were aware of and involved with the Orrington facility mercury concerns is a per se, Mallinckrodt seems to contend,

unreasonable delay. (Id. at 10 -11.) Such a delay cannot be justified especially since both plaintiff-organizations have access to legal counsel. (Id. at 11.) "Precisely because of their involvement with the [state and federal regulatory] agencies since as early as 1987 regarding the site," Mallinckrodt maintains, "Plaintiffs should have been aware that decisions were being made that would impact the River and should have come forward earlier with the lawsuit." (Reply to Pls.' Opp'n to Laches Mot. Summ. J. at 16-17.)

Though Mallinckrodt insists that the plaintiffs' ignorance of their legal rights is not an excuse for delay, I do not take the plaintiffs to be arguing that they were ignorant of their right to file suit. Rather, they explain that their involvement in the regulatory process and public hearings was an attempt to achieve their goals short of filing suit. (Pls.' Opp'n to Laches Summ. J. at 40.) "These activities constitute responsive, responsible actions, not undue delay," the plaintiffs state, and a court action instituted early on could have been attacked as premature. (Id.) They also explain that, whether or not they have access to legal counsel, undertaking court action is an "enormous undertaking." (Id.)

I agree with the plaintiffs that their awareness that evidence was being weighed by the EPA and the MDEP that could lead to decisions being made, did not mean that the "reasonable" thing for them to do was to not delay and to file suit twelve, nine, or six years ago. Counter to Mallinckrodt's contention, the reasonableness of the plaintiffs' delay cannot be so gauged; oftentimes it is more reasonable to delay court action to ascertain whether the regulatory process will produce a result that satisfies the potential RCRA's plaintiff's environmental concerns, thereby mooting the need for court action.

In fact Mallinckrodt's argument on this score seriously undercuts its unreasonable delay showing. The plaintiffs' extended active engagement in the Orrington plant's regulatory process and public debate at all times leading up to the suit demonstrates their diligence in seeking a remedy. See Sancho v. Serralles, 106 F.2d 125, 128 (1st Cir. 1939). For the same reason it cannot be maintained that they acquiesced to Mallinckrodt's environmental conduct. Jamesbury Corp. v. Worcester Valve Corp., 443 F.2d 205, 210 (1st Cir. 1971) ("Laches requires not only a passage of time but also acquiescence in the alleged wrong by the tardy plaintiff."); accord Sancho, 106 F.2d at 128; see also K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 911-12 (1st Cir.1989) (discussing unreasonable delay).[1]

It seems clear that Mallinckrodt has not made a sufficient showing that the plaintiffs' delay was unreasonable. But even if it was able to meet the first prong of the laches defense, I conclude that Mallinckrodt falls short on the prejudice prong.

2. Prejudice

Mallinckrodt's prejudice argument is in essence that this suit will interfere with the regulatory process involving the EPA and the MDEP that has been ongoing for several years. Mallinckrodt anticipates that this process will soon generate finalized preliminary media protection standards for the Orrington plant, the Penobscot River adjacent to the plant, and the Lower Penobscot River. (Laches Mot. Summ. J. at 4-8, 11-12.) In the defendant's view, injunctive relief in the form of a court-ordered study would prejudice Mallinckrodt because it would be additional to and may conflict with its

[1] I also note that there is no evidence of bad faith on the part of the plaintiffs with respect to the timing of the filing of this action. The plaintiffs claim that patience with and ultimate dissatisfaction with the EPA/MDEP process determined the timing of this action. Nowhere as part of this motion does Mallinckrodt assert facts that would support a conclusion that the plaintiffs have timed this action in the hopes of high-jacking the EPA/MDEP guided process.

anticipated obligations under the media study. (Laches Mot. Summ. J. at 12; Reply to Pls.' Opp'n toLaches Mot. Summ. J. at 17.) It suggests that a study stemming from this action might undermine the standards upon which the EPA/MDEP remedial standards are to be based, by reopening all the decisions that the EPA and MDEP have made in the corrective action process underway. (Id. at 18.) This prejudice would flow directly from the plaintiffs' inaction. (Id.)

One of the flaws with Mallinckrodt's prejudice argument is this final proposition. Even assuming there may be the potential that this court's injunctive relief may in some way come in friction with Mallinckrodt's obligations under the media standards or "undermine" the parallel EPA/MDEP process (Laches Summ. J. at 12-13), this does not demonstrate that the delay in filing this suit is the cause of this "prejudice." Murphy, 973 F.2d at 17 ("The laches doctrine may be invoked only where the prejudice to the defendant flows from the plaintiff's delay.").

Turning to factors that inform the inquiry into the existence of "prejudice," with respect to prejudice vis-à-vis defending this suit, Mallinckdrot has advanced no claims that the delay has disadvantaged it in this action. See Giese v. Pierce Chem. Co., 29 F.Supp.2d 33, 38 (D. Mass. 1998) (applying laches in patent infringement case, stating, "Evidentiary prejudice consists of harm to the defendant's ability to present a full and fair defense on the merits by reason of loss of records, the death of witnesses, or the fading of memories."). Nor can it be said on the case as argued by Mallinckrodt that it has experienced a financial loss as a result of the plaintiffs waiting so long to file suit. See Giese, 29 F. Supp. 2d at 38. Mallinckrodt has not asserted in this motion that there was work initiated on the down river contamination prior to the notice of intent in this suit,

see Concerned Citizens on I-190, 641 F.2d at 8, or that it has expended sums of money during the period of repose and that this suit might contravene those expenditures, see Daingerfield Island Protective Soc'y, 920 F.2d at 38-39. Nor does Mallinckrodt assert that at the time this suit was initiated there was final EPA/MDEP decisions made vis-à-vis the disputed areas. See Concerned Citizens on I-190, 641 F.2d at 8.

Mallinckrodt's prejudice argument seems to be entirely prospective, a concern for the woes that may befall it should the plaintiffs be successful in obtaining injunctive relief. Though it may have implications for this case at a different juncture or with respect to a different legal doctrine, the fact that Mallinckrodt feels like it is close to closure with EPA and MDEP on finalizing standards and that this action may subject it to additional or overlapping obligations is not, standing alone, decisive for purposes of the laches doctrine.

Conclusion

For these reasons I conclude that Mallinckrodt had not met its burden as the movant for summary judgment and the proponent of a laches defense. I recommend that the court **DENY** its motion for summary judgment premised on the doctrine of laches.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Margaret J. Kravchuk
United States Magistrate Judge

December 14 , 2001.

BANGOR COMPLX

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-69

MAINE PEOPLE'S ALLIA, et al v. HOLTRACHEM MFG CO, et al Filed: 04/10/00

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Demand: $0,000 Nature of Suit: 893

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Dkt# in other court: None

Cause: 42:6901 Resource & Recovery Act

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