

SQM Again Beats Calif. City's \$30M Tainted Water Suit At Trial

By **Daniel Siegal**

Law360 (May 17, 2018, 7:39 PM EDT) -- A California federal jury on Thursday rejected the city of Pomona's claim that mining company SQM's North American unit owes it \$30 million to remedy groundwater contaminated by perchlorate allegedly originating from SQM fertilizer, handing SQM a second victory after the Ninth Circuit vacated a prior trial win.

Pomona, a city of 150,000 on the eastern edge of Los Angeles County, had argued at trial that SQM North America Corp. sold perchlorate-bearing nitrate fertilizer to Pomona's citrus growers decades ago, and that this fertilizer was the source of the perchlorate contamination that required the city to build a new water treatment plant in 2012.

During Wednesday's closing arguments, Bob Smith of Lewis Brisbois Bisgaard & Smith LLP, representing SQM, said the truth was there simply isn't the evidence that SQM fertilizer was ever used by Pomona farmers, nor that the perchlorate in its groundwater got there via fertilizer.

After beginning deliberations on Wednesday afternoon, the jury on Thursday morning delivered a verdict entirely in SQM's favor, according to an entry of judgment filed Thursday.

Smith told Law360 on Thursday that in finding for the defense, the jury had held that the benefits of SQM's fertilizer in the 1930s and '40s outweighed the risks of the product.

"The client and my team are both delighted, but not surprised, by the verdict. It was a tough fight against a very able adversary that was very well represented," he said.

Pomona attorney Richard Head of SL Environmental Law Group PC, however, told Law360 that the jury had found in the city's favor on the first three questions posed to it, finding that SQM had sold perchlorate-containing fertilizer in Pomona and caused the city's water contamination, and were given a faulty jury instruction that led them in the wrong direction on the risk-benefit question.

Head said that U.S. District Judge Gary Klausner had granted SQM's request to modify the standard district court product liability jury instructions and add an instruction telling the jury to evaluate the benefits of the fertilizer against the risks as they were known "at the time of sale," even though this went against clear precedent for product liability claims in California.

"The law in California is very clear: It's not whether or not the harm was known at the time it was used, but whether the benefits of the perchlorate outweighs the harms as we now know them to be," he said.

Head said the city is considering its options going forward, including appeal.

"We commend the jury for the work they did," he added. "It's unfortunate this flaw in the instruction caused this kind of an outcome."

Thursday's verdict was the second time SQM defeated the city's allegations at trial, coming nearly three years after a prior jury found in its favor — a judgment that was later overturned by the Ninth Circuit.

Pomona filed suit in state court in 2010, alleging that SQM, the U.S. subsidiary of Chilean chemical giant Sociedad Quimica y Minera SA, is liable for the perchlorate contamination that required the city to build an \$8 million water treatment plant. Perchlorate is a toxic derivation of perchloric acid, a compound often used in making rocket fuel.

In June 2015, a California federal jury found for SQM, but the Ninth Circuit reversed that verdict, finding that Judge Klausner had committed an abuse of discretion in denying the city's motion to update expert Neil Sturchio's report, resulting in the exclusion of any testimony about post-2011 developments in his research.

During Wednesday's closings, Kenneth Sansone of SL Environmental Law Group PC, representing Pomona, argued that Sturchio's method for analyzing perchlorate isotopes indicated that perchlorate from from the Atacama Desert in Chile — the source of SQM's fertilizer — contained a "unique signature" that was not shared by synthetic perchlorates or perchlorates from other areas of the world. This same unique signature was found by Sturchio in samples of Pomona's water, Sansone said.

Sansone asked the jury to award the city roughly \$30 million in damages for the cost of past treatment, as well as the cost of treating the water for the additional 40 years the contamination is expected to last.

Smith, in his closing, countered that during the years at issue, the U.S. was in a wartime posture, and nitrate fertilizer like SQM's was reserved by law for use in armaments first and "high-value" crops like vegetables second — not for the "luxury" that is fresh citrus. Instead, citrus farmers at that time would have continued using what they had previously used for fertilizer: manure.

"The idea that Pomona farmers would have changed their habits doesn't make sense," he said.

Smith also told the jury that the city's claim is barred by the statute of limitations because Pomona documents revealed it was treating the contamination in 2005 and had spent money to address the contamination in 2007, rendering the 2010 suit too late.

The city of Pomona is represented by Seth D. Mansergh, Kenneth A. Sansone and Richard W. Head of SL Environmental Law Group PC, and Andrew L. Jared of Alvarez-Glasman & Colvin.

SQM is represented by R. Gaylord Smith, Michael K. Johnson and L. John Nelson IV of Lewis Brisbois Bisgaard & Smith LLP.

The case is City of Pomona v. SQM North America Corp., case number 2:11-cv-00167, in the U.S. District Court for the Central District of California.

--Additional reporting by Joyce Hanson. Editing by Catherine Sum.

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