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City of Pomona Wins Retrial in \$32 Million Groundwater Contamination Case

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The Ninth Circuit Court of Appeals overturned a jury verdict and ordered a new trial of the City of Pomona's \$32 million groundwater contamination lawsuit against SQM North America Corp. (SQM), a mining company that for decades sold nitrate fertilizer to local citrus farmers that contained perchlorate as an impurity. Perchlorate is especially harmful to children, so the State of California limits how much can be in drinking water. Pomona built a state-of-the-art treatment facility to ensure it delivers safe drinking water to its residents. Pomona aims to make SQM pay for that facility instead of Pomona's taxpayers.

Pomona prevailed on both issues on appeal: the trial court's improper limitation of the testimony of Pomona's key expert and its failure to evaluate the reliability of one of SQM's main experts.

Andrew Jared, the Assistant City Attorney for the City of Pomona, praised the efforts of the City's attorneys at SL Environmental Law Group. "SL Environmental Law Group has done a great job and has been very tenacious in representing the City's interests in making sure that the polluters rather than the taxpayers pay to remove the contamination from drinking water. SL Environmental Law Group has handled two successful appeals and a trial and will handle the retrial in this case. We are pleased with the court's ruling."

Litigation Background and *Pomona I*

This was Pomona's second successful appeal to the Ninth Circuit in this case.

In 2010, Pomona sued SQM in California state court to recover costs the City incurred or will incur to remove perchlorate from its drinking water. SQM removed the case to federal court in the Central District of California in January 2011. The case was initially set for trial in January 2012, but when the District Court granted SQM's motion to exclude Pomona's key witness, Dr.

Neil Sturchio, a leading expert in perchlorate isotope analysis, the case was dismissed to allow an appeal of that decision. The Ninth Circuit held that the District Court erred in excluding Dr. Sturchio's testimony.

At the first hearing on remand to the trial court in January 2015, Pomona requested to update Dr. Sturchio's expert report to include perchlorate isotope research conducted and data acquired during the three years the case was on appeal in *Pomona I*. The updated information included a fourfold expansion in the perchlorate isotope database and research and analysis done by other independent laboratories. The additional information provided further support for Dr. Sturchio's conclusion that about 90% of the perchlorate in Pomona's groundwater bore the same unique isotopic fingerprint as the perchlorate in SQM's fertilizer.

The District Court refused to allow Dr. Sturchio to update his report, concluding in late March 2015 that allowing the update would delay trial, which the Court had set for June 2, 2015, and that the information to be included in the updated report was not "material." The District Court then limited Dr. Sturchio's trial testimony to the state of the science as it existed in 2011.

At the same time, the District Court allowed SQM's hydrology expert Dr. Richard Laton to speculate without any factual support about hundreds of potential alternative sources of the perchlorate contamination, notwithstanding that those sources had a different isotopic fingerprint, were not known to have spilled perchlorate, let alone in sufficient quantities, or were geographically too remote to have caused the contamination. Together these rulings skewed the evidence and led the jury to find that SQM's fertilizer was not a substantial cause of the perchlorate contamination of Pomona's groundwater.

The Ninth Circuit Found the District Court Abused its Discretion in Ruling on Expert Testimony

The Ninth Circuit held the trial court erred both when it limited Dr. Sturchio's testimony and when it failed to perform a *Daubert* gatekeeping analysis of Dr. Laton's opinions.

The Ninth Circuit found the trial court's rationale for limiting Dr. Sturchio's testimony was "illogical." Significantly, it was "illogical" for it to conclude that the update was not "material" because the update addressed the two main criticisms SQM lobbed at Dr. Sturchio's perchlorate isotope analysis – "that it had not been reproduced by other laboratories and that his reference database was too small." Because the trial court limited Dr. Sturchio's 2015 trial testimony to facts in his 2011 report, SQM was able to repeat these criticisms to the jury.

The Ninth Circuit saw the injustice of the trial court's ruling: "These criticisms of Dr. Sturchio were accurate in 2011. By 2015, however, these characterizations of Dr. Sturchio's research were false, and counsel making them had to know they were false, based on the evidence SQM successfully kept from the jury." The Ninth Circuit recognized that "the level of support for [Dr. Sturchio's] conclusions was critical and it was important that his proffered testimony be accurate and reflect the current state of knowledge in the scientific community."

Pomona's appeal also challenged the District Court's failure to analyze whether SQM's causation expert satisfied the U.S. Supreme Court's requirements for expert testimony set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). SQM's expert hydrologist Dr. Laton submitted an expert report stating that the perchlorate in Pomona's groundwater could have come from hundreds of other sources. Pomona moved to exclude such testimony under

Daubert because it lacked factual support, was mere speculation, and was not based on a proper methodology. The trial court denied the motion with no analysis or explanation.

The Ninth Circuit agreed with Pomona that the trial court's unexplained denial of Pomona's motion to exclude Dr. Laton's testimony was an abuse of discretion under Ninth Circuit precedent.

The Ninth Circuit found that both errors, especially when considered together, were prejudicial to Pomona. "Dr. Laton was a key player in what the district court aptly described as 'a battle of the experts.' Therefore, the erroneous inclusion of Dr. Laton's testimony, combined with the erroneous partial exclusion of Dr. Sturchio's testimony, was prejudicial."

On remand, the District Court is required to "make findings regarding the scientific reliability of Dr. Laton's proposed opinions." Additionally, it must "allow Dr. Sturchio to update his expert report and testify to the state of stable isotope research up to the present."

Alexander Leff, the principal of SL Environmental Law Group, was pleased with the Ninth Circuit's recognition of the importance of reliable, up-to-date scientific evidence in groundwater contamination cases. "Scientific studies are increasingly showing that groundwater contamination is a pervasive and growing problem in this country. Polluters often try to keep the best science out of court. We are delighted the Ninth Circuit agreed with us that the jury should not have been kept from hearing the truth." Mr. Leff is grateful for the appellate expertise provided by Susannah Weaver of Donahue & Goldberg LLP, who handled the oral argument for Pomona.

About SL Environmental Law Group PC

SL Environmental Law Group is the leading law firm representing states, municipalities, and water utilities in groundwater contamination litigation. SL Environmental Law Group distinguishes itself by successfully taking cases to trial and through appeals, often against the nation's largest corporations. For example, it was lead counsel for the State of New Hampshire, for which it won a \$236 million jury verdict, and for the City of New York, for which it won a \$105 million jury verdict. Both jury verdicts were confirmed on multiple appeals, including to the U.S. Supreme Court.

SL Environmental Law Group has represented more than 30 public entity and utility clients in drinking water contamination cases. Its experience includes helping clients address contamination from perchlorate, 1,2,3-trichloropropane (TCP), perfluorinated compounds (such as PFOA and PFAS), and other toxic chemicals that are contaminating our nation's water supplies.

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