

LITIGATION AND EMERGING CONTAMINANTS

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ABSTRACT: Water supplies have been increasingly impacted by emerging contamination, causing great concern among water entities and other parties relying on those impacted sources for beneficial use. Federal and State regulators have been limited in their ability to aggressively pursue enforcement action in light of limited financial and technological resources to force the polluters to abate and control the spread of contamination. Amidst increasing demand and growing populations, water purveyors have grown increasingly concerned about this absence of aggressive enforcement, as the potential loss of groundwater supplies to emerging contamination threatens to exacerbate the scarcity of available water resources. Several water purveyors responded to the threat posed by emerging contaminants by proactively investigating the extent of the contamination, identifying the likely sources of contamination, and developing a plan to remediate the contaminant plumes. However, because it may cost many millions of dollars to implement abatement and clean-up plans, in many instances, the only viable means to implement those plans involved the pursuit of cost recovery actions against the polluters.

Through the use of litigation, regulatory agency pressure, and the use of government funds, water entities have employed a variety of mechanisms to address emerging contamination in their water supplies. By actively pursuing these polluters to contribute to the clean-up costs, these agencies have obtained funds necessary to abate the contamination and restore adversely impacted water sources to beneficial use. Examples of litigation involving emerging contaminants include:

Baldwin Park Operable Unit

The Baldwin Park Operable Unit (“BPOU”) is part of a Superfund site in the San Gabriel Valley of California. The BPOU litigation was one of the first Superfund disputes to address liability for perchlorate contamination. Other chemicals of concern included: NDMA, 1-4 dioxine and VOCs. The cost recovery actions initiated by the water agencies resulted in a landmark settlement funding the construction of multi-million dollar treatment facilities and restoring the beneficial use of critically needed water supplies.

Santa Clarita Groundwater Litigation

Water Agencies in Santa Clarita obtained the first published court ruling establishing that perchlorate polluters are liable for response costs under CERCLA. The decision is reported at 272 F.Supp.2d 1053 (2003). The decision involved the former Whittaker Bermite facility (“Whittaker”) in Santa Clarita, California. Whittaker engaged in the manufacture of various explosive products containing perchlorate. Among other things, Whittaker produced 9,600 lbs/week in Sidewinder and Chaparral Missiles and spin rockets, 900 lbs/week in explosives, and 800 - 1,000 lbs/week of burned propellant waste.

Following the court’s decision, the parties to this litigation entered into an interim settlement agreement and are in the process of negotiating a final settlement to address the contamination. The parties have agreed in principle to a remedy that will, *inter alia*, pump offsite wells to hydraulically contain perchlorate-impacted groundwater, treat the extracted groundwater using an ion exchange treatment methodology, and enable delivery of the treated water to local domestic water supply service areas.

South El Monte Litigation

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In the South El Monte litigation, a number of water purveyors sued the industrial defendants for polluting the local groundwater basin with perchlorate. The South El Monte Operable Unit is located within the Main San Gabriel Groundwater Basin in California. The Basin is the source of water for over a million people.

The perchlorate polluters are attempting to shift liability to certain water entities and have filed third party claims against those water entities. These industrial defendants allege that the water agencies imported Colorado River water to recharge the groundwater basin, and that perchlorate in the Colorado River water caused or contributed to the perchlorate contamination in the area. The water agencies responded by filing motions to dismiss the third party claims. These motions are pending before the United States District Court in the Central District of California.

North Hollywood Operable Unit

After the discovery of volatile organic compounds in California's San Fernando Valley, the responsible parties entered into a Consent Decree with EPA. Treatment facilities were constructed within various locations, including the North Hollywood Operable Unit. Chromium contamination has now been discovered in this operable unit, threatening a shut down of the treatment facilities and the loss of an important drinking water resource. The impacted parties are currently considering a variety of strategies to address the problems posed by this emerging contaminant, including litigation, modifications to the Consent Decree, the use of alternative technologies, and government funding. The Los Angeles Regional Water Quality Control Board has issued multiple clean-up and abatement orders to various responsible parties.