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Clovis wins \$22 million against Shell Oil over toxic drinking water



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The City of Clovis won its more than three-month civil trial against the chemical manufacturing giant Shell Oil Company over the cleanup of a toxic chemical found in drinking-water wells around the city of 108,000 people.

The chemical is 1, 2, 3-Trichloropropene, or TCP, which is a waste product from making plastic. TCP was in farm fumigants last used in the 1980s, which were injected into the ground to kill tiny worms called nematodes. A jury awarded the city nearly \$22 million, finding that the Clovis residents were harmed by the design of the fumigant, that Shell did not prove the benefits of its product outweighed the risks and that those risks were known at the time it was sold.

Clean-water advocates say the unregulated chemical, which has been linked to cancer and liver and kidney damage in animals, has been in wells throughout the region for decades. TCP is considered unsafe to drink over a lifetime at levels lower than what can currently be detected. It was added to the state's list of chemicals known to cause cancer in 1999.

Clovis argued that Shell acted intentionally and maliciously by including TCP in its fumigant and failing to warn people about its harms. Shell argued that Clovis water is safe to drink, that its product helped California agriculture and that its labels adequately warned of risks.

TCP is most prevalent in Valley water, especially in Fresno, Kern and Tulare counties, but is also found elsewhere in the state, including Los Angeles County. The Clovis case is one of at least 40 legal actions filed against Shell and Dow Chemical Company in California since the mid-2000s.

The California Department of Public Health has a goal of keeping TCP to 0.7 parts per trillion, which is 1,000 times lower than the limit set for many other chemicals. The goal is intended to limit the lifetime cancer risk to one in a million people.

A recent effort to regulate the chemical is underway. State officials in July proposed a drinking water standard that would require water systems to start removing TCP from tap water by 2018. The State Water Resources Control Board proposed a limit of 5 ppt – the lowest level detectable by certified filtration methods. The limit would pose a cancer risk of less than 1 in 143,000 people and filtration could cost more than \$34 million annually statewide.

Clovis' arguments

The Clovis lawsuit was originally filed in 2005. The city sued Shell, Dow, Occidental Petroleum Corporation and Wilbur-Ellis Company. According to the complaint, the city first detected TCP in its water supplies three years before filing the lawsuit.

Clovis attorney David Wolfe said the city settled with Dow for \$7.5 million and with Occidental for \$300,000. He said the case against Wilbur-Ellis was dismissed. Of the total, nearly \$3 million went to legal fees and other costs.

The city sought more than \$70 million in damages from Shell to treat contaminated water, secure alternative water supplies and remove the TCP from 10 of its 40 wells. The complaint states that the chemical companies disposed of TCP by adding it to their pesticides. It says TCP is an unnecessary ingredient that has no effect on nematodes.

Clovis' attorney, Duane Miller of Sacramento, said the highest amount of TCP ever detected in the city's wells was 32 ppt in 2002. He said the contaminant has spread out as the city added more water capacity.

The complaint alleged that the chemical companies knew or should have known that TCP is a hazardous waste that should be disposed of properly. Instead, the complaint states, the companies mixed the chemical in other products to avoid disposal costs. It goes on to say that the chemical companies then told people to apply products containing TCP to agricultural fields, where they knew or should have known that it "would inevitably contaminate groundwater."

The complaint also states that the companies failed to provide sufficient warnings about risks of groundwater contamination, and didn't test TCP as thoroughly as they could have "in order to avoid discovering evidence of TCP's harmful effects on the environment and human health."

"It's not the city's fault that TCP is in its wells," Miller told jurors. "And it is the city's responsibility to protect its citizens."

Shell's arguments

Clovis argued Shell's fumigant was the most popular on the market and contained more TCP than Dow's product. Shell argued farmers had many fumigant choices and that Clovis' science was flawed.

Shell attorney Cal Burnton told jurors that Clovis residents have not been harmed by the TCP in their water. Burnton argued that TCP has never been declared a human carcinogen; scientific studies show it caused cancer in laboratory animals including rats. So when Miller linked TCP to cancer, Burnton said, "that's fear mongering."

Burnton said the public health goal of 0.7 ppt is a conservative factor that regulators based on a mathematical equation rather than scientific toxicity data. He said the amounts of TCP in Clovis' water are too minuscule to cause harm. If Clovis' wells were so contaminated, Burnton said, the city would have removed them from service or labeled them as safe for non-potable use only. He said the city has 17 water treatment tanks but has never used them for TCP.

Burnton argued Shell's fumigant was not used in Clovis to the extent that Miller claimed. And he said rates of TCP in Clovis water are decreasing.

Tracie Renfroe, another attorney for Shell, argued that the remaining TCP in Clovis' water is most likely from Dow's product because it was applied in later years – and to more acres in Clovis – than Shell's product.

Renfroe said the benefits of the product outweighed the risks known at the time, otherwise the federal Environmental Protection Agency wouldn't have approved its use.

She also said there was sufficient warning. The labels warned of kidney and liver damage but not cancer because the animal studies weren't done until 1985, she said. Labels also didn't warn about groundwater risks because she said no one recognized that was possible until 1983.

"Shell could not warn of what it did not know," she said.

Other cases

Miller is also representing Fresno in its case against the chemical companies. Miller represented the city of Redlands in San Bernardino County – the only other California city to go to trial over TCP. Redlands lost its \$46 million claim against Shell in 2010.

Several other cases have settled but most are still in process. Wolfe, the Clovis city attorney, said the city took its case to trial because Shell wasn't willing to settle. He said Shell finally submitted an offer last Thursday. The City Council contemplated the offer in a closed session on Monday.

Todd Robins, a San Francisco attorney who represents most of the smaller Valley communities between Manteca and Arvin, said 30 or so are in limbo waiting for the courts to schedule them. Robins consolidated four Fresno County cases – Del Rey, Parlier, Reedley Kingsburg – and may add another, which are moving toward possible resolution within the next year. Grouping cases has helped move them quicker, he said.

Robins said that in most cases, communities can't afford to remove wells with TCP from service. "Because we're in a terrible drought, you can't just walk away from a productive well," he said, adding that some communities have TCP in every well. "Where communities can afford, based on their supply system, they have minimized the use of a well, pending treatment. But often there's not enough water to allow that to happen."

A substantial part of Shell's defense against Clovis hinged on the fact that the drinking water standard for TCP has not yet been set. Had the regulation process taken place a year ago, Robins said, "perhaps this case would not have needed to be tried."

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