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Dow Chemical, Others Must Face 24 Contaminated Water Suits

By **Mike Curley**

Law360 (June 5, 2020, 5:05 PM EDT) -- A New York federal judge has ruled that Dow Chemical Co., Ferro Corp. and Vulcan Materials Corp. must face claims from two dozen New York water authorities and municipalities alleging they allowed a toxic chemical to get into their groundwater.

In an order filed Thursday, U.S. District Judge Nina Gershon told the companies that the plaintiffs' claims that 1,4-dioxane is fungible and that therefore the chemicals made by each defendant are chemically indistinguishable from those made by the others does not undermine other factual pleadings that the three companies allowed the chemical to contaminate water supplies.

In a motion to dismiss, the three companies argued that the reference to fungibility distinguishes these cases from another, separate suit over the chemical that had previously been dismissed, saying that because 1,4-dioxane could not be chemically traced to a specific defendant, the plaintiffs failed to establish that any of the companies caused it to leak into water supplies.

Judge Gershon, however, rejected this argument, saying the plaintiffs have said they will use multiple lines of evidence to establish causation and that the complaint successfully pleads that the companies marketed, sold or distributed their products in the plaintiffs' areas and knew or should have known that use of the products would lead to contamination.

In the suits, the water districts and towns allege their drinking water wells are contaminated with 1,4-dioxane, which is used in various industrial and commercial products like cleaners and shampoo, that migrated into groundwater from the companies' facilities.

The Bethpage Water District, one of the 24 plaintiffs, which serves about 33,000 residents and businesses in Nassau County, New York, divided its Resource Conservation and Recovery Act claims in its **March 2019 complaint** against The Dow Chemical Co., Ferro Corp. and Vulcan Materials Co., which it claims manufactured, distributed, sold and promoted 1,4-dioxane-containing products, and Northrop Grumman Corp. and Northrop Grumman Systems Corp., which it says disposed of substances containing the chemical. Northrop has since been dismissed from the suits.

In Thursday's order, Judge Gershon also rejected the three companies' argument that the actions of unnamed third-party actors contributed to the harm alleged by the plaintiffs, saying such contribution does not necessarily undermine the companies' liability, nor would it break the chain of causation between the companies' purported actions and the plaintiffs' claimed harm.

Judge Gershon declined to rule on the companies' objections to the plaintiffs' alternative theories of harm, saying there is no need to dismiss those theories when the plaintiffs have successfully pleaded direct, substantial causation and their complaint does not depend on the alternative theories.

"We are pleased that Judge Gershon agrees that these cases, brought by 24 Long Island public water providers, should move forward," Katie H. Jones of Sher Edling LLP, representing the plaintiffs, told Law360 on Friday. "These lawsuits are all about accountability, protecting public health and ensuring that the companies responsible for the contamination pay the costs of removing this toxic chemical from drinking water."

Paul J. Napoli of Napoli Shkolnik PLLC, representing Hicksville Water District in a related case not included in the order, told Law360 that he approved of the judge's decision.

"Our client is one of many water districts across Long Island which has sued manufacturers and distributors of this toxic chemical that has contaminated their public drinking water supply wells," he said. "The water suppliers are now saddled with the high costs of testing, monitoring, and installing special water filtration systems that remove 1,4-Dioxane to protect the public health."

A spokesperson for Dow said the suits are without merit.

"Rather than go after the companies on Long Island directly responsible for the contamination, the water suppliers brought this suit against Dow even though Dow did not conduct any operations on Long Island that are a source of contamination," the spokesperson said. "There are no human studies showing that dioxane causes harm at the low levels at issue in these lawsuits. It is important to note that the water suppliers have consistently stated the drinking water is safe."

Representatives for the other companies could not immediately be reached for comment Friday.

The plaintiffs are represented by Matthew K. Edling, Victor M. Sher, Stephanie D. Biehl, Katie H. Jones and Nicole Teixeira of Sher Edling LLP.

Dow Chemical is represented by Joel Alan Blanchet and Andrew P. Devine of Phillips Lytle LLP and Kevin T. Van Wart and Nater R. Boulos of Kirkland & Ellis LLP.

Ferro is represented by Robb W. Patryk and Faranak Sharon Tabatabai of Hughes Hubbard & Reed LLP.

Vulcan is represented by Stephen C. Dillard and Felice B. Galant of Norton Rose Fulbright US LLP.

The case the order was issued under is Locust Valley Water District v. The Dow Chemical Co. et al., number 2:19-cv-02490, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Cara Salvatore and Juan Carlos Rodriguez. Editing by Alanna Weissman.

Update: This story has been updated with comment from Dow Chemical.