

Calif. Agency Kicks Off Trial Seeking \$136M For Lead Cleanup

By **Gina Kim**

Law360 (May 11, 2022, 10:02 PM EDT) -- The California Department of Toxic Substances Control opened a bench trial Wednesday seeking more than \$136 million for the cleanup of a former battery recycling facility, contending that the plant carried lead emitted from nearly a century of operations up to two miles away.

Wednesday kicked off the first phase of the bench trial before U.S. District Judge Stephen V. Wilson, who will determine the geographic extent of lead contamination from the plant in Vernon, California, and the defendant companies' cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act.

Matthew K. Edling of Sher Edling LLP, representing the DTSC, said in opening statements that the state's expert witness, environmental engineer Allen Medine, will testify that his review of lead emissions data shows that the Vernon Plant is by far the biggest contributor for lead emissions in the primary investigation area.

The court will hear that soil patterns, prevailing winds and background levels — the amount of lead that would hypothetically be in the soil if the Vernon Plant never existed — show that lead contamination from the plant traveled onto residential properties at least 1.7 miles away, and that other secondary lead smelters from the plant contaminated areas two miles from the site, Edling told the court.

"Dr. Medine will also testify soil lead concentrations in that preliminary investigation area are significantly higher than other comparable urban neighborhoods in Los Angeles," Edling said. "He will also testify that lead-based paint, leaded gas and other sources can't plausibly explain elevated lead concentrations in the preliminary investigation area."

Medine will reference three separate studies of the background levels of lead in the Vernon area and testify how that helped him determine that the preliminary investigation area's soil concentrations were higher than the background level in each of those studies, Edling said.

"Now all of these other sources, whether it's paint or gas, they're already included in background levels and included in other urban neighborhoods in Los Angeles," Edling told the judge. "Therefore you'll hear testimony from Dr. Medine that they can't explain why the preliminary investigation area's soil concentration is so much higher."

The court will hear that for any comparable neighborhood in Los Angeles, there is no other plausible source of the elevated lead levels than the Vernon Plant, Edling added.

But in his opening statement, Eric L. Klein of Beveridge & Diamond PC, counsel for co-defendant Clarios LLC, a battery manufacturer, denied that the plant contributed any detectable amounts of lead beyond half a mile away, or that it contributed to any levels of lead that migrated to residential neighborhoods.

The findings of high levels of lead found in the preliminary investigation area near the plant also don't take into account other sources such as leaded gasoline, leaded paint and another smelter site in the city of Commerce, Klein added.

"The court should note that while defendants have given the court a way to define the compensable cleanup area on a map by establishing a half-mile contamination radius around Vernon, the state has not done that," Klein said. "They just provided contradictory statements."

Another chief dispute in the case is the decreasing gradient of lead levels around the plant, Klein said.

Both sides' experts focus on how much lead decreases as they move further away from the plant. While the state's expert Medine saw evidence that lead decreases a few miles away, the defendants' expert Walter Shields saw lead levels that decreased sharply within half a mile before reaching residential areas, Klein argued.

Medine used unreliable statistical technology "and cherry-picked way more than half the data that exists here," Klein said. "We expect the state to call this separating the signal from the noise, but it's not. It's just removing data inconvenient for their theory, and it's bad science."

Wednesday's bench trial stems from a suit DTSC launched in December 2020 against NL Industries and several other companies that DTSC says are liable for transporting hazardous substances to the site for treatment or disposal, alleging that as former owners and operators of the site, they are partially responsible for the contamination and must contribute to the mounting cleanup costs under CERCLA.

The defendants in the action are NL Industries, Gould Electronics Inc., Kinsbursky Bros. Supply Inc., Trojan Battery Co., Ramcar Batteries, Clarios LLC, Quemetco Inc., International Metals Ekco and Oregon Tool Inc.

In 2015, battery maker Exide Technologies agreed to shut down the plant, which had been in operation for more than 90 years. Exide **filed for Chapter 11** in May 2020.

Medine was the first witness to take the stand, and testified under cross-examination from Gould Industries' attorney Nicholas J. Secco of Benesch Friedlander Coplan & Aronoff that there are a number of industrial sources that emitted lead that are closer to residential neighborhoods than the Vernon Plant, like the Continental Can Company, which was a metal smelting operation. But Medine said he didn't believe the Continental Can was a significant source of lead emission in the area.

Secco pointed to a map of the area surrounding the Vernon Plant that showed that lead concentrations began decreasing further away from the plant, and began increasing when it got to the residential areas, which implies that the concentration levels could've come from sources other than the plant.

Secco asked why Medine eliminated "tens of thousands of data points" from the DTSC's soil sample data from the preliminary investigation area in his analysis when he determined Vernon Plant was the predominant source for lead emission.

Medine said he wanted to exclude potentially "confounding" influences of other lead sources, and got rid of samples collected from residences' side yards, gardens and driplines — or the area in immediate vicinity of a building — public schools and parks. Medine said he focused only on samples from front and backyards of homes and eliminated samples irrelevant to his analysis.

On redirect, DTSC's counsel Thomas M. Sims of Nidel & Nace PLLC asked Medine why he chose to focus on the front and backyard soil samples.

"I was trying to reduce potential impacts from leaded gasoline, as well as the dripline effect that could include leaded paint impacts," Medine explained. The samples from the front and backyards are the most representative data points since they are the most impacted by the sources of lead coming from the Vernon Plant, Medine added.

Medine testified he also used guidance from the U.S. Environmental Protection Agency regarding the development and use of background data at Superfund sites in his analysis to determine the extent of lead contamination, as well as the boundaries for the areas of investigation and areas for cleanup.

"Is your evaluation of background data an important component for your opinion that the Vernon Plant is the predominant source of elevated lead levels in the preliminary investigation area?" Sims asked.

"Yes," Medine replied.

Testimony resumes Thursday morning.

The DTSC is represented by Sarah E. Morrison, Timothy E. Sullivan, Aarti S. Kewalramani, Elizabeth B. Rumsey, and Kate Hammond of the California Department of Justice; Matthew K. Edling, Adam M. Shapiro, and Yumehiko Hoshijima of Sher Edling LLP; Christopher T. Nidel and Thomas M. Sims of Nidel and Nace PLLC.

Gould Electronics is represented by Krista M. Enns, Lily A. North and Nicholas J. Secco of Benesch Friedlander Coplan and Aronoff.

Clarios LLC is represented by Eric L. Klein, Gary J. Smith and Bina R. Reddy of Beveridge & Diamond PC.

NL Industries is represented by Joel L. Herz of the Law Offices Of Joel L. Herz, and Kenneth A. Ehrlich of Elkins Kalt Weintraub Reuben Gartside LLP.

The case is California Department of Toxic Substances Control v. NL Industries Inc. et al, case number 2:20-cv-11293, in the U.S. District Court for the Central District of California.

--Editing by Alanna Weissman.