

Kinder Morgan Can't Fully Escape San Diego Fuel Spill Suit

By **Keith Goldberg**

Law360, New York (February 3, 2016, 4:55 PM ET) -- The city of San Diego can only sue for damages occurring within three years of filing its long-running suit against Kinder Morgan Inc. over leaking fuel tanks that polluted soil and groundwater beneath Qualcomm Stadium, a California federal judge ruled Tuesday, but he rejected the company's bid to nix all of the city's damages claims.

Affirming a series of tentative rulings made the previous week on Kinder Morgan's summary judgment motion, U.S. District Judge Michael M. Anello said both federal and state case law backed his conclusion that the city can only sue for damages from continuing nuisance and trespass claims that occurred within three years of filing its 2007 suit. The city's suit accuses the company of deliberately and recklessly delaying cleanup of the fuel plume beginning in 1998, when it acquired a company that owned property next to Qualcomm Stadium, home to the San Diego Chargers among other uses.

Judge Anello also said San Diego can't sue for damages stemming from the loss of use of an aquifer beneath the stadium because it hasn't provided any expert testimony to support those claims. However, the judge said the city could pursue damages stemming from a now-soured redevelopment plan for the property, as well as damages for the costs of restoring the property to its condition before the contamination.

"Kinder Morgan argues that restoration of the property to 'background' is unreasonable, as it is not the standard required by the applicable government agency, is technically infeasible, and is nearly double the value of the property itself," Judge Anello said in his decision. "The city asserts that the 'reasonableness' of its claim for restoration costs is a factual issue for the jury to decide. The court agrees. In California, the city's entitlement to restoration damages must be determined by a jury."

Some 300,000 gallons of petroleum products from the property, formerly owned by Santa Fe Pipeline Partners LP, leaked into the soil beneath Qualcomm Stadium over several decades, and the city says Kinder Morgan's attempts to remediate have been sporadic and ineffective, resulting in drinking water sources being rendered unusable and threatening public health.

The city initially indicated it was seeking more than \$160 million in damages during discovery in 2009, but in 2011 responded to Kinder Morgan interrogatories with new damages calculations that totaled more than \$300 million, according to the company's appeal response brief.

In November 2012, Judge Anello issued a tentative ruling finding that because San Diego lacks a viable water project, it cannot claim it was damaged if the company didn't clean up the fuel plume.

In January 2013, he issued a final order granting Kinder Morgan summary judgment on all claims in the first amended complaint, which also included claims of real estate and restoration damages, trespass, private nuisance, public nuisance, unfair competition, negligence and punitive damages.

Judge Anello rejected the city's bid to obtain nearly \$120 million in remediation damages after determining the expert testimony on which those damages relied was inadmissible.

However, the Ninth Circuit revived the suit in May, saying the judge erred in finding the city could not support its restoration damages theory by using a hypothetical, saying damages can be proved through estimates of a property's rental value based on hypothetical assumptions. The court also overturned the judge's finding that the city failed to show the aquifer could support a drinking water project.

Kinder Morgan on Wednesday applauded the court's decision to nix San Diego's water damages claims and limit the time period for its remaining claims.

"We are confident that the city will not be able to prove any of its remaining real estate damage claims against Kinder Morgan," the company said. "Other than the wasted legal fees and costs incurred by the city in pursuing this unnecessary lawsuit, the city has not spent any funds on clean up or otherwise suffered any loss resulting from the prior contamination."

A representative for the city couldn't be immediately reached for comment.

Kinder Morgan is represented by Steven M. Strauss, M. Ray Hartman III and Summer J. Wynn of Cooley LLP.

The plaintiffs are represented by Jan I. Goldsmith and Daniel F. Bamberg of the Office of the San Diego City Attorney and Rene P. Tatro and Steven R. Tekosky of Tatro Tekosky Sadwick LLP.

The case is California et al. v. Kinder Morgan Energy Partners LP et al., case number 3:07-cv-01883, in the U.S. District Court for the Southern District of California.

--Additional reporting by Brandon Lowery. Editing by Brian Baresch.