

Kinder Morgan Gets Tentative OK To Exit Fuel Spill Suit

By **Gavin Broady**

Law360, New York (November 30, 2012, 2:21 PM ET) -- A California federal judge on Thursday tentatively released Kinder Morgan Energy Partners LP from several claims brought by the city of San Diego alleging the company failed to clean up a fuel plume that contaminated soil and groundwater beneath Qualcomm Stadium.

In advance of hearings scheduled for Friday, U.S. District Judge Michael M. Anello issued a tentative ruling finding that because San Diego lacks a viable water project, it cannot claim it was damaged from the company's alleged failure to clean up the fuel plume that contaminated 166 acres of soil and groundwater, including the plot on which the San Diego Chargers' stadium sits.

"The city did not have any active water supply wells and did not contemplate developing a groundwater supply project until well after the subsurface contamination plume was discovered," Judge Anello said. "The court finds that to comply with the general tenet that damages cannot be speculative, contingent, or merely possible, the city must establish that it had a viable water project that it someday could have built."

Judge Anello also tentatively tossed the city's claims of real estate and restoration damages, trespass, private nuisance, public nuisance, unfair competition, negligence and punitive damages.

San Diego filed suit in August 2007, accusing Kinder Morgan of deliberately and recklessly delaying cleanup of the fuel plume beginning in 1998, when it acquired a company that owned a property adjacent to the stadium.

Some 300,000 gallons of petroleum products from that property, formerly owned by Santa Fe Pipeline Partners LP, leaked into the soil beneath the stadium over several decades, and 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 said.

The court tentatively dismissed San Diego's attempts to collect real estate damages after finding that its theory of damages under wrongful occupation was flawed, as it applies only to eminent domain proceedings and is not applicable in the instant suit.

Judge Anello tentatively booted the city's bid to obtain nearly \$126 million in remediation damages after determining the expert testimony on which those damages relied was inadmissible, calling expert witness Ray Forrester's testimony "personal, subjective opinion that the city should have its

expectations met, not [based] on any legal authority or scientific principle,” according to the ruling.

Judge Anello also addressed the city’s claims of private nuisance and trespass in his tentative ruling, finding that San Diego had failed to establish through evidence that those claims were “continuing” and not time-barred.

As to the city’s public nuisance claims, Judge Anello also tentatively granted judgment in favor of Kinder Morgan after finding that the city had failed to establish that the plume affected a substantial number of people at the same time, as required.

While San Diego argued that it was “ludicrous to assert that no one in San Diego was aware of contamination under the stadium,” Judge Anello noted that being aware of contamination is not synonymous with being affected by it, and claimed that none of the myriad events held at the stadium over the years were postponed or canceled due to the contamination or the public’s awareness of it.

Finally, Judge Anello tentatively dismissed claims of negligence against Kinder Morgan after finding that the city had failed to present sufficient evidence of causation between the petroleum release and any harm to the city, likewise booted San Diego’s bid for punitive damages, and granted Kinder Morgan judgment on section 17200 unfair competition claims as time-barred.

Attorneys for San Diego and Kinder Morgan were not immediately available for comment Tuesday afternoon.

San Diego is represented by Daniel Bamberg of the city attorney’s office as well as by Rene Pierre Tatro and Steven Tekosky of Tatro Tekosky Sadwick LLP.

Kinder Morgan is represented by Steve Strauss and Summer Wynn of Cooley LLP, Gregory Broderick of Downey Brand LLP as well as by M. Ray Hartman, Michael Tracy and Amber Holderness of DLA Piper.

The case is People of the State of 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 Jake Simpson. Editing by Eydie Cubarrubia.