

## San Diego Can't Appeal Kinder Morgan Fuel Spill Suit Limit

By **Hannah Sheehan**

*Law360, New York (March 14, 2016, 11:04 PM ET)* -- A California federal judge on Friday tentatively denied the city of San Diego's bid to appeal a recent ruling preventing the city from suing for damages that occurred more than three years after it filed suit over polluted soil and groundwater beneath Qualcomm Stadium.

In advance of a Monday afternoon hearing, U.S. District Judge Michael M. Anello tentatively rejected San Diego's motion to amend and certify for interlocutory appeal his Feb. 2 order in the city's dispute with pipeline company Kinder Morgan Inc., saying California state law leaves little to debate.

"The controlling law in California on the limitation of damages in continuing trespass and nuisance cases is not unclear," Judge Anello said. "California law limits available damages in continuing trespass and nuisance cases involving real property to the three-year period immediately preceding the commencement of an action to recover those damages."

Rene P. Tatro of Tatro Tekosky Sadwick LLP, an attorney for the state, which is also a plaintiff in the case, told Law360 on Monday that following the hearing, Judge Anello took the matter under submission and said his goal was to issue a final order within 10 days.

The city's suit accuses Kinder Morgan 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, the home of the San Diego Chargers.

Last month, Judge Anello concluded that the city can only sue for damages from continuing nuisance and trespass claims that occurred within three years of filing its 2007 suit, affirming a series of tentative rulings made on Kinder Morgan's summary judgment motion.

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.

Some 300,000 gallons of petroleum products from the property, formerly owned by Santa Fe Pipeline Partners LP, leaked into the soil beneath the 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 since 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.

Counsel for Kinder Morgan did not immediately respond Monday to a request for comment. A representative for the San Diego city attorney's office declined 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 Lowrey and Keith Goldberg. Editing by Aaron Pelc.