Message

From: Conover, Dave [Dave_Conover@kindermorgan.com]
Sent: 5/8/2018 9:32:46 PM
To: Wheeler, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=17a1669ef5b54fba8cb457845308787e-Wheeler, An]
Subject: FW: Upstate Forever v. Kinder Morgan

Dear Andrew: First, congratulations on successfully navigating the confirmation process. Glad you are there. Second, I wanted to make you aware of a 4th Circuit decision that has implications for WOTUS and the reach of the Clean Water Act, though it is at odds with several other precedents. Summary from our in-house counsel is below. We'd be pleased to discuss possibility of an amicus whenever it might be appropriate. Best wishes, Dave

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The United States Court of Appeals for the Fourth Circuit recently reversed a trial court decision and reinstated a Clean Water Act ("CWA") citizen suit brought by Upstate Forever and the Savanah River Keeper ("Plaintiffs"). Many key facts were not disputed. An affiliate of Kinder Morgan had a rupture in a pipeline that released gasoline into soil and groundwater. The pipeline was repaired in just a few days, so by the time Plaintiffs sued – two years after the incident - the pipeline was no longer leaking, but gasoline from the one-time incident was allegedly migrating to surface waters via ground water. Plaintiffs asserted that they could still bring a CWA citizen suit because gasoline was reaching surface waters that were under CWA jurisdiction. The majority opinion stated that the case required the Court to decide if citizens can bring a CWA citizen suit "when the source of the pollution, the pipeline, is no longer releasing the pollutant, but the pollutant allegedly is passing a short distance through the earth via ground water and is being discharged into surface waterways." In particular, the court found that the CWA's language does not require that a point source continue to release a pollutant to meet the "ongoing" or "continuous" element of a citizen suit; it requires only that "there be an ongoing 'addition…to navigable waters" regardless of whether a defendant's conduct causing the violation is ongoing.

One of the appellate judges disagreed and dissented. The dissent stated the only identifiable point source at issue, the pipeline, "has been repaired and is not currently adding any pollutants into navigable waters, thus negating a necessary element of a continuing CWA violation." The dissent also stated that ongoing ground water migration from a spill site does not amount to a CWA violation and cannot support a citizen suit. According to the dissent, "a point source must currently be involved in the discharging activity by adding, conveying, transporting, or introducing pollutants to the navigable waters" to support an ongoing CWA violation.

On April 26, 2018, Kinder Morgan filed a petition seeking en banc review of the decision. If our petition is denied, we will have 90 days from the date of denial to file a Petition for Cert. to SCOTUS. Given the dissent and the amicus briefs submitted in support of Kinder Morgan, this case may be a strong candidate for review by SCOTUS.

We understand EPA has issued a Request for Comments on Clean Water Act ("CWA" or "the Act") Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7126 (Feb. 20, 2018). However, this case need not be decided on the hydrologic connection issue. Instead, as the dissent pointed out, a point source must currently be involved in the discharging activity for CWA jurisdiction to attach. To hold otherwise is a fundamental shift in CWA enforcement authority from the States and EPA to citizen's suits. It is important to note that the State of South Carolina has not only the primary authority to regulate nonpoint source and groundwater pollution, but it is actually exercising that authority and is aggressively overseeing the remediation of the spill. As is, the Fourth Circuit's decision will allow any citizen's group to override remedial decisions and approvals made by the State. Congress intended citizen's suits to be an adjunct to a lack of State or Federal enforcement, not supplant such oversight. Additionally, SCOTUS expressly ruled that unless the discharge of a pollutant is ongoing at the time a citizen's suit complaint is filed, any violation is wholly in the past. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).* Numerous courts have held that the mere continuing residual effects resulting from a discharge or migration of residual contamination from previous releases are not equivalent to a continuing discharge. *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392 (5th Cir. 1985); see also *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d

1133, 1140 (10th Cir. 2005); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998), *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120-21 (E.D.N.Y. 2001); *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995).

As such, we believe it is important for EPA to protects its CWA jurisdiction and assert that when a point source is no longer actively discharging that this past violation, while continuing to be subject to State and Federal enforcement authority, is not subject to citizen's suits under the CWA. Thus, we recommend EPA filing an amicus-curiae supporting Kinder Morgan's Petition for Cert if filed.

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