

Kinder Morgan Takes Groundwater Case To High Court

By Juan Carlos Rodriguez

Law360 (September 5, 2018, 9:12 PM EDT) -- A Kinder Morgan Energy Partners LP subsidiary has asked the U.S. Supreme Court to review the Fourth Circuit's ruling that the Clean Water Act prohibits pollution to groundwater that's connected to other waterways, arguing states — not the federal government — have the authority to regulate such discharges.

The company said in its Aug. 28 petition for writ of certiorari the appeals court's **April conclusion** "squarely conflicts" with decisions from the Fifth and Seventh Circuits, several district courts, and the CWA's "text, structure, and history." It asked the high court to reverse the ruling, which revived environmental groups' lawsuit over a 2014 gasoline pipeline spill in South Carolina.

"The omission of 'groundwater' from the CWA's jurisdictional reach was no accident," Kinder Morgan said. "Congress expressly considered — and expressly rejected — numerous requests to expand the CWA to create federal authority to regulate groundwater precisely because of its 'hydrological connection' to navigable waters."

In a split panel decision, the Fourth Circuit reversed a lower court's dismissal of Upstate Forever and Savannah Riverkeeper's citizen suit against Plantation Pipe Line Co. Inc. for lack of standing. The majority opinion found, in an issue of first impression for the circuit, that the CWA prohibits the discharge of pollutants from a point source through groundwater that has a direct hydrological connection to navigable waters of the United States.

Kinder Morgan said in its petition that the Clean Water Act's permitting system is targeted at "a particular type of pollution to a specific type of water: the discharge of pollutants, meaning any addition of any pollutant to navigable waters from any point source."

The company noted the CWA defines point source as "a discernible, confined and discrete conveyance," such as pipes, ditches, wells, or other sources. It said groundwater does not qualify as such a source.

"For nonpoint-source pollution, including the pollution of soil and groundwater, the CWA respects our federal system by leaving the states with primary responsibility to develop appropriate regulatory programs tailored to local conditions," the company said.

The issue of whether the CWA permits federal regulation of groundwater is a hot question right now. The U.S. Environmental Protection Agency earlier this year **took comments** on the question of if and when it is appropriate to use the CWA to permit groundwater pollution discharges. And while the Ninth Circuit recently found similarly to the Fourth, that case is **being appealed** to the high court as well.

Frank S. Holleman III of the Southern Environmental Law Center, who represents the green groups in the case, said the high court shouldn't disturb the Fourth Circuit's ruling, because if it did, polluters could pull back pipes a short distance from a water's banks or bury their pipes to avoid CWA regulation.

"For over 40 years, the EPA and the lower courts have been interpreting the Clean Water Act in the same way the Fourth Circuit did," Holleman said Wednesday. "The EPA and the states have issued permits across the country that would be thrown into disarray if the act were interpreted not to protect the nation's waters from this kind of pollution."

And Shelley Robbins, Energy and State Policy Director at Upstate Forever, criticized Kinder Morgan for trying to "minimize their responsibility" for the spill.

"The pollution of surface water continues, the hydrologic connection is clear, and we trust that the courts will continue to allow the Clean Water Act to be implemented as intended by Congress when it was passed," she said Wednesday.

Kinder Morgan is represented by Paul D. Clement, Erin E. Murphy, C. Harker Rhodes IV and Lauren N. Beebe of Kirkland & Ellis LLP.

The environmental groups are represented by Frank S. Holleman III and Christopher K. DeScherer of the Southern Environmental Law Center.

Kinder Morgan Energy Partners LP v. Upstate Forever et al., number 18-268 in the Supreme Court of the United States.

--Additional reporting by Keith Goldberg. Editing by Kelly Duncan.