

Sometimes there's no substitute for print.



Subscribe today for the hard copy edition of the Concord Monitor.

(603) 224-4287

Article published on June 05, 2008

Scope of gas case at issue

State sues, saying MTBE leaked into drinking water

By Chelsea Conaboy
Monitor staff

June 05, 2008

Lawyers with the attorney general's office as well as the 26 oil companies and refiners that the state is suing appeared in court yesterday to argue motions that could determine just how big New Hampshire's biggest-ever environmental case could be.

The state is suing producers of the gas additive methyl tertiary butyl ether, or MTBE, saying that the chemical seeped into thousands of drinking water supplies in the state and that the companies should pay for the cleanup.

The chemical was used starting in the 1990s to make gas burn cleaner and to comply with the Clean Air Act. It was banned from the state last year but persists in groundwater. The state has spent tens of millions of dollars cleaning up MTBE.

Yesterday, Merrimack County Superior Court was full of lawyers in dark suits, many of whom have been arguing MTBE cases across the country for years.

"I don't know if this is a meeting of the American Bar Association or the state of New Hampshire versus the Hess Corporation," said Judge Phillip Mangones as he entered the courtroom.

The motions he heard primarily focused on a dispute over the scope of the case.

The state wants the court to treat the contamination as one injury to the entire groundwater resource, with the state as its trustee, instead of having to review it on a site-by-site basis. It has alleged that the distribution of MTBE has caused a statewide public nuisance and that the product is defective.

Attorneys for the companies argue that the state has failed to connect the dots to show that the defendants are responsible for the contamination and that contamination is caused by individual spills, not by manufacturers. They want to see the state's files on how the contamination happened, where and when.

The state had moved to block those requests. But yesterday it proposed a compromise to hand over some - but not all - of those documents. The proposal was not received well by the defendants.

MTBE dissolves readily with water and can move quickly through the ground.

"It is noxious to taste and harmful to health and extraordinarily expensive to remove," said Vic Sher, a San Francisco-based attorney for the state. "It is unlike the other components of gasoline, and the defendants knew this and they promoted its use."

Sher said the companies knew that gas tanks inevitably leak and that the product would be released.

He proposed a hypothetical: If a person sells a tiger to a zoo, knowing the tiger is dangerous, it is not necessarily liable for damage. But the situation is different if a person sells a tiger to a zoo, knowing the latch on the tiger's cage is broken and representing the tiger as suitable for that cage, he said.

"Do I assume that that's a play on Exxon Mobil's advertising?" Mangones quipped, referring to the "Put a tiger in your tank" marketing launched in the 1960s.

Bruce Felmy, a Manchester lawyer representing Irving Oil, later said someone making a judgment on Sher's hypothetical also would want to

know where the cage was and who was responsible for repairing the latch.

Rick Wallace, an attorney from Washington, D.C., representing several defendants, including Shell and Chevron, said the state has not explained how the companies caused the contamination.

He said the judge may be wondering, "Why, given the large number of lawyers in this room . . . can't the defendants figure out what they're being sued for?"

He said the state has not said where, when or how damage to groundwater has occurred. He said he knows of cases where MTBE leaked into groundwater because a bulldozer dragged a blade through a pipe or because a delivery man fell asleep on the job.

"There may be severe breaks in the chain of causation between a manufacturer . . . and the impact that occurs when that gasoline is released and affects groundwater," Wallace said.

The state argued that copying hundreds of boxes of documents detailing the specific cases of contamination would be unnecessary and burdensome to state resources, costing close to \$500,000, a figure that lawyers for the defense said was inflated.

But, after a break yesterday, Matthew Pawa, a Massachusetts attorney for the state, proposed a compromise. He said the state would reproduce more than 300 of the 1,100 boxes of documents pertaining to MTBE cleanup at the Department of Environmental Services plus summary sheets from cleanup projects.

Pawa said the compromise was aimed at moving forward and avoiding "decades of discovery." He suggested that each side could pick two "bellwether" cases of contamination to investigate fully and return to the court to argue whether site-specific information should be allowed at trial.

Lawyers for the defense said that they hadn't had enough time to consider the proposal and that it likely wasn't enough.

"You have to know what happened, not just get a summary report of dates, times and detection levels," said Tony Bongiorno, a Boston attorney representing Exxon Mobil.

The lawyers also highlighted that the documents were public information. One said the state effectively conceded, in its offer, that site-specific information is relevant to the case.

Senior Assistant Attorney General Maureen Smith said after the hearing that it wasn't a concession, but a proposal for how the court could resolve the dispute. The state asked Mangones to defer its motion for a protective order to block discovery requests so it could negotiate a compromise for the defense.

The two sides also argued whether the defendants, if found liable for cleanup, could be reimbursed from money the state has set aside for cleaning up MTBE, which the companies help fund through a 1.5-cent tax on imported gasoline.

Mangones did not immediately make any rulings.

This article is: 0 days old.