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N.H. preps for MTBE showdown

State sues companies over additive cleanup

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For the Monitor

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The state's biggest-ever environmental case fills 17 folders at the Merrimack County Superior Court. It names 26 defendants, mostly multinational companies represented by about three dozen attorneys from across the country. It focuses not on a specific incident in which pollution occurred but rather the contamination over time of the state's groundwater. All of it.

The case is huge, physically and otherwise, with big implications for New Hampshire. The state has spent tens of millions of dollars cleaning up methyl tertiary butyl ether, or MTBE, a chemical added to gasoline to make it burn cleaner.

The attorney general's office is suing producers of MTBE and gasoline containing MTBE, saying they should foot the bill for cleaning the thousands of wells and drinking water supplies across the state into which the chemical has seeped, in some cases making the water undrinkable.

On June 4, the two parties - the state on one side and, on the other, companies such as Shell, Hess, BP, Chevron, Texaco, ConocoPhillips, Citgo, Exxon Mobil and Irving - will be in court for a hearing on a series of motions that will determine just how big this case should be.

The companies have said the state's case is deliberately broad, that the state is avoiding having to prove that MTBE caused specific damage. They've asked the court to dismiss charges or force the state to be more explicit about how MTBE got into the groundwater.

The state's complaint "does not say specifically where, how, when or why the alleged impact may have occurred," said one defense document filed last week.

The state has argued that litigating a case that looks at each and every site where contamination occurred would take "approximately forever." The companies have asked for copies of more than 2.75 million pages of site-specific information in more than 1,100 boxes at the Department of Environmental Services. The pages would take \$495,000 and 4,000 hours to copy, according to court filings. Depositions could take decades.

The state has asked for a protective order against "burdensome" requests.

Senior Assistant Attorney General Maureen Smith said they are unnecessary. The state isn't looking to recoup specific damages for specific sites. It's a public case, filed on behalf of all of the state's residents, she said.

"The state seeks full restoration of its groundwater," she said. "The state did not have MTBE in the groundwater before the manufacturers added it to their gasoline products, and we think the water should be restored to a pre-MTBE condition."

Water contaminated with MTBE can smell strongly like turpentine. The Environmental Protection Agency has said the chemical is a "potential human carcinogen," though there's not enough evidence to be sure.

The statewide scope of this case, which could go to trial at the end of next year at the earliest, makes it unique. Smith called the legal strategy - alleging a statewide public nuisance - "cutting edge." In her 16 years in the attorney general's office, there has never been another environmental case like it.

Most cases across the country have come from counties, cities, water utilities or individuals and have cited specific places of contamination. New York's Suffolk County used a series of "focus wells."

Rick Wallace, a Washington, D.C.-based attorney representing Shell and Chevron, said New Mexico is the only other state that has sought statewide remediation. That case didn't have a chance to play out in court. It was rolled into a settlement earlier this month in which a group of oil companies, including Wallace's clients, agreed to pay more than 550 plaintiffs from 17 states a total of \$423 million to clean up MTBE.

The cost of contamination

Smith said pursuing damages from MTBE manufacturers requires a unique approach because it is a unique contaminant.

The federal government approved MTBE as a fuel additive in the late 1970s. Its use became much more common after Congress in 1990 established a program requiring congested areas of the country to use gasoline blended with an oxygenate to make it burn cleaner. It did not stipulate which oxygenate to use, though most refiners chose MTBE.

The state alleges that they chose it because it was cheapest. Oil companies say it was the only oxygenate of which there was an adequate supply. That's an issue likely to be debated in court.

In 1995, New Hampshire opted into the air quality program, requiring oxygenate-added gas to be used in the southern four counties of the state, though the state has said the same gas was distributed throughout New Hampshire.

In 2001, after MTBE was discovered in drinking water supplies, the state asked to be released from the program. Two years later, it filed the lawsuit.

The state later sued the cities of Dover and Portsmouth, which had filed their own lawsuits against the oil companies. The state Supreme Court agreed with the attorney general's office that its claims superceded those of the cities. The court said the state has a sovereign authority to bring the case on behalf of all residents.

Wells tested in 2005 and 2006 during a U.S. Geological Survey study found MTBE in 18 percent of public wells and 9.1 percent of private wells in the state, though mostly at low levels. In the most populated areas of Rockingham County, MTBE was in 48 percent of the private wells that were sampled.

The Legislature banned the use of MTBE beginning in January 2007. Most companies discontinued its use before that, however, substituting ethanol.

Yet, new cases of contamination continue to pop up. Last year, 15 more public wells were found with the chemical. One of those wells, at a Tilton restaurant that has since closed, was above the health standard of 13 parts per billion.

State officials say MTBE is pervasive and persistent. It does not easily break down.

"The bugs don't like it," said Fred McGarry of the Waste Management Bureau. "It's like Brussels sprouts compared to meat and potatoes."

Because it dissolves readily with water, McGarry said, MTBE moves more easily through the ground than other components of gasoline.

"You can't just keep it in a little pocket around a leak," he said.

The state continues to pay past cleanup costs. In February, March and April, it paid \$150,015 in claims from a fund earmarked solely for cleanup of ethers, primarily MTBE. At the end of April, there were 46 pending claims for \$154,220 from that fund.

Costs for cleanup at each site can vary widely, from a few hundred dollars to more than a million.

The state recently reimbursed \$690 to a company that did testing for a Belmont water utility over three years. On the other end of the spectrum, it paid \$1.15 million in 2003 for the extension of a water line to a Salem neighborhood where 105 of 149 wells were contaminated. Twelve of those contained levels above the 13-parts-per-billion health standard. There was no gas station nearby, McGarry said.

Money for MTBE cleanup has come from various funds earmarked for dealing with oil and gas spills, so it's unclear just how much the state has spent so far. About \$10.7 million has been used from a fund created specifically to deal with MTBE. But state experts say the number could be much higher.

A question of liability

Oil companies knew, or should have known, the damage MTBE could cause, but promoted it "as environmentally sound," according to court documents filed by the state.

Oil companies have said that their product was not intended for release into the ground and that those people who release it - and the states that regulate its use - are liable for the effect.

"The spiller really should pay," said Peter Sacripanti, a New York attorney representing Exxon Mobil. "If that spiller is Exxon, by the way, they should pay. The mere fact that we manufactured a product that had MTBE in it should not create liability."

Exxon Mobil did not agree to the recent multi-state settlement.

"Exxon used a product that actually helped clean the air," Sacripanti said. "The mere use of the product should not create liability for Exxon."

Wallace, the attorney for Chevron and Shell, echoed his statements.

"It has to be a case about spills," he said. "MTBE, when used as intended, serves exactly the purpose that it was meant to serve. It made engines run cleanly and reduced air emissions."

But the state argues that tracing MTBE to a specific spiller is impossible in some cases because of the way the chemical moves through the ground. Plus, gas stations aren't the only sites where gasoline gets into the ground. It leaks from the normal use of snowmobiles and lawnmowers and at car repair shops. The highest level of contamination, about 12,000 parts per billion, was found in a well at an Epping junkyard.

McGarry said MTBE can even vaporize through tiny cracks in a tank that would be considered compliant and then combine with groundwater.

"The bottom line is that it's a product problem," Smith said.

The state is pursuing all of the companies that brought MTBE into New Hampshire for a similar reason, according to court documents: It's hard to trace a molecule of MTBE back to its manufacturer.

Vic Sher, a San Francisco attorney working with the state, said MTBE cases are part of a wave of suits that involve chemicals, including some used in dry cleaning and agriculture, that cause environmental harm even if used properly.

"The users of the chemicals are just doing things the way they always do things, or they're following instructions from the manufacturers," he said.

New Hampshire's case reflects another trend, Sher said: public agencies as environmental watchdogs.

"These (cases) are not brought by the Sierra Club," he said. "They are brought by cities and counties and states."

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