

Congress debates liability of gasoline additive that helps clean air but fouls water

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WASHINGTON (AP) - A gasoline additive once lauded for cleaning up the air is being phased out because it's also contaminating drinking water. Now its producers want Congress to protect them against what could be billions of dollars in cleanup costs.

A proposal being debated as part of a broad energy bill would give MTBE manufacturers, including major oil companies and refiners, immunity from claims that the product is fouling drinking water supplies in dozens of states.

And they have powerful congressional Republicans on their side, including Majority Leader Tom Delay of Texas, where most MTBE is made, who insist the liability waiver be part of an energy bill moving toward completion in Congress. If the MTBE makers win, critics say Congress would jeopardize a growing string of lawsuits - the latest filed Monday by the state of New Hampshire against 22 oil companies - that want the oil companies to pay for removing MTBE from drinking water supplies across the country.

Some estimates of the total cost of cleaning up MTBE pollution and installing safeguards against future contamination have reached \$29 billion, according to mayors and water system operators who are fighting the liability waiver.

But its supporters, including Rep. Billy Tauzin, R-La., who heads the House energy talks, argue that the government forced the industry to use the gasoline additive when in 1990 it required that gasoline contain 2 percent oxygen to improve air quality. MTBE is an oxygenate.

It's only right that MTBE manufacturers be protected for a product "mandated by federal law," argues Rep. Joe Barton, R-Texas, a former oil company engineer who also is a key player in the energy talks.

But lawyers involved in more than a dozen MTBE-related lawsuits argue that Congress never required that MTBE be used, only that an oxygenate be added, and that it likely would have required ethanol if MTBE's water-pollution problems had been made clear.

"The manufacturers knew when they were putting MTBE in that it had qualities that could get into the water supply and even at low levels make it undrinkable because of taste and odor," says Steven Wolens, a Dallas attorney involved in MTBE lawsuits in a half dozen states.

He said oil companies for years used MTBE as an octane booster and preferred the petroleum-based additive, over rival corn-based ethanol, to meet the oxygen requirement. "There's nothing where Congress said you have to put MTBE in there," said Wolens.

The MTBE manufacturers argue that lawmakers knew that aside from ethanol, MTBE was the only oxygenate available and that the Environmental Protection Agency through most of the 1990s lauded its use to cut air pollution. Not until 1999 did the EPA focus on the water issue and call for MTBE's phaseout, they say. Since then, at least 17 states have moved to ban or curtail its use.

"The government, including EPA and Congress, were well aware of the water quality impact potential associated with MTBE," says Scott Segal, a lawyer representing MTBE manufacturers, but created a situation that required its use.

Segal dismissed complaints that the proposed product liability waiver, jeopardizes lawsuits seeking compensation for water contamination. "If you can demonstrate that someone is responsible for a leak or spill of fuel containing MTBE you can still proceed to court," argues Segal.

"This is saying you can't sue the manufacturer," responds Wolens, the Dallas attorney. "You can sue the little mom and pop gas station (operator) who has no money at all and really has clean hands in the whole thing."

Water system operators and many mayors say they're worried cities and utility ratepayers will be left with the costs. "Billions of dollars in cleanup costs and untold impacts to local water supplies are at stake," said Tom Curtis, deputy executive director of the American Water Works Association.

"If this (waiver) won't affect lawsuits, why are they pushing so hard to get it," says Robert Gordon, a New York attorney involved in MTBE contamination lawsuits on Long Island, N.Y.

The answer, he says, rests in a California case concluded last year in South Lake Tahoe.

A jury heard testimony from oil company executives that the industry knew in the 1980s - but never warned people - that MTBE would adhere to water and unlike other gasoline components, would be difficult to contain once it entered water supplies.

As a result, the jury concluded that MTBE was a "defective product" and that its manufacturers, not just those responsible for gasoline leaks, were responsible for South Lake Tahoe's MTBE-laced drinking water. Four oil companies agreed to pay \$69 million.

"They would have never settled if it were not for the defective product theory," says Dennis Cocking, a spokesman for the South Tahoe Public Utility District. "The hammer that forced their settlement was they knew they had been found liable for malice and they were looking at huge damages."

Since the South Lake Tahoe case, officials in Santa Barbara, have reached agreement with several oil companies for payment of at least \$230 million stemming from MTBE pollution.

In recent weeks there has been a rush of lawsuits as cities and water districts try to head off possible action in Congress on the waiver issue.

[Fresno Bee Editorial](#)

Paying for pollution

New development must pay for cleaning up the emissions it causes.

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The Valley's air district begins a very important process today when it starts to work on a new rule addressing the pollution that afflicts us in the wake of development. It is absolutely critical that whatever rule emerges from this debate be effective.

Emissions from vehicles are the No. 1 source of the filth in the air we breathe here. Reducing those emissions will be the most difficult part of our fight for cleaner air.

Development is inextricably linked to increased air pollution. Building suburbs ever-farther from city centers, dotting the landscape with one shopping center and strip mall after another, putting essential services at ever-increasing distances from those who need them -- all these things add up to fouler air.

The rule and its fees are mandated by SB 709, just signed by the governor.

Such fees are not new. Stockton and Turlock are among the cities that already charge a small fee for air quality purposes. But a patchwork of fee structures -- or an absence of fees in some locales -- is not an answer to a regional problem.

The building industry has signaled no opposition to the concept, though they will of course have plenty to say about the exact nature of the new rule -- as they should.

There are some potentially knotty problems to address. Some expect a new rule with its fees would have little or no impact on residential development, but could hit hardest on commercial

and retail projects. Other see a burden on smaller, rural communities, where it is feared the fee might preclude the development of needed commercial services.

There are ways to finesse those problems, though. For instance, fees might be lowered or waived in areas where new development is regarded as desirable.

The San Joaquin Valley Air Pollution Control District will meet today in Modesto, Wednesday in Fresno and Thursday in Bakersfield to kick off the process, and hopes to put the new rule in place in July 2004. We should all support this effort.