Long-Awaited Pollution Trial Ready to Start

LYNNE TUOHY,Associated Press

CONCORD, N.H. (AP) — Nearly a decade after it was first brought, a lawsuit accusing two oil giants of widespread groundwater contamination in New Hampshire is expected to present jurors with the most complex and time-consuming trial in state history.

The products liability case against ExxonMobil and Citgo will be tried beginning in mid-January in a federal courtroom — on loan to the state — because it would undermine the rights of criminal defendants to a speedy trial if it tied up one of the three courtrooms in Merrimack Superior Court, officials said.

The state sued 26 oil companies and subsidiaries in 2003, claiming the gasoline additive MTBE, methyl tertiary butyl ether, caused groundwater contamination in a state where 60 percent of the population relies on private wells for drinking water.

New Hampshire is seeking more than $700 million in damages to test and monitor every private well and public drinking water system in the state and to cover cleanup costs where needed, according to court documents.

New Hampshire is the only state to have reached the trial stage in a lawsuit over MTBE.

Other lawsuits have been brought by municipalities, water districts or individual well owners, and most filed in the past decade have ended in settlements. New York City in 2009 won a $105 million federal jury verdict against ExxonMobil for MTBE contamination of city wells; that verdict has been appealed.

MTBE had been used in gasoline since the 1970s to increase octane and reduce smog-causing emissions. While it was credited with cutting air pollution, it was found in the late 1990s to contaminate drinking water when gasoline is spilled or leaks into surface or groundwater.

The U.S. Environmental Protection Agency had classified it as a "possible human carcinogen." New Hampshire banned its use in 2007.

All the sued oil companies but ExxonMobil, based in Irving, Texas, and Citgo, based in Houston and owned by Venezuela, have reached settlement agreements with the state. Just last month, Shell Oil Co. and Sunoco Inc. agreed to pay the state a total of $35 million.

When the lawsuit was originally filed, then-Attorney General Peter Heed said MTBE contamination had caused an "unprecedented environmental problem." Heed said MTBE "has been associated with adverse health consequences and can render water unpalatable."

The case was tied up in federal courts for years on jurisdiction issues before being sent back to state court.

Lawyers for the defendants claim that they are not liable and that MTBE functioned as it should. They also stress that they have cleaned up their own sites and that contamination elsewhere was caused by third parties who have not been sued.

"They haven't suffered the injury they claim they did," Attorney James Quinn, who represents ExxonMobil, said during a pretrial hearing in November. He said pre-existing contaminants — including iron, radon and E. coli — could unfairly drive up damages.

Attorney Jessica Grant, representing the state at the same pretrial hearing, said the case is about whether the oil companies designed a defective product, failed to warn consumers of the dangers of MTBE "and ignored their own experts who said don't use MTBE."

Court officials in October sent out a 22-page juror questionnaire to 500 potential jurors. The questionnaire asked them whether they felt oil companies valued profits over safety and whether the companies don't fully disclose the dangers associated with their products.

After paring out those who get their drinking water from a well and those with hardships or deep biases, lawyers this month chose 12 jurors and four alternates who were told to report to U.S. District Court in Concord on Jan. 14. They have been told to expect a four-month trial.

"Everybody who sits on this case is going to be inconvenienced," Judge Peter Fauver told prospective jurors during jury selection. "We will do everything we can to minimize the impact."

More than 50,000 exhibits have been marked for identification, and there are upward of 100 lawyers on record in the case. The witness list numbers 230.

Court officials had to improvise a special docketing system because of the sheer number of participants and documents involved. It is one of only a handful of state court cases that has gone fully electronic, with all motions and orders being emailed.

Chief clerk Bill McGraw noted that the only other case that comes close to it in complexity is a school funding challenge of the 1990s, "and that pales in comparison to this."

"It's been a unique experience," McGraw said.

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