

History of MTBE and Liability Fairness

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The product liability fairness provision would not affect a company's legal responsibility to clean up a gasoline spill.

The comprehensive energy legislation now before Congress must address a major threat facing the companies that produce, distribute and sell the nation's gasoline: "defective product" lawsuits that seek to retroactively punish gasoline manufacturers simply for using the EPA-approved fuel additive MTBE. These claims would punish defendants for manufacturing, distributing and selling the very gasoline that Congress required more than a decade ago.

Any industry that acts, as mandated by the federal government, to meet a societal need – in this case, cleaner air and improved health – should not later be victimized for doing what the government required it to do.

The energy bill, H.R. 6, approved by the House of Representatives in the last Congress, included a narrowly tailored provision that would apply only to "defective product" claims based on the mere use of MTBE. This "liability fairness" provision simply and fairly recognizes that Congress mandated the use of oxygenates in certain gasoline, including MTBE, and therefore that the mere presence of MTBE in gasoline should not make it a "defective" product. The product liability fairness provision would not affect, in any way, a company's legal responsibility to clean up

a gasoline spill or release that the company caused.

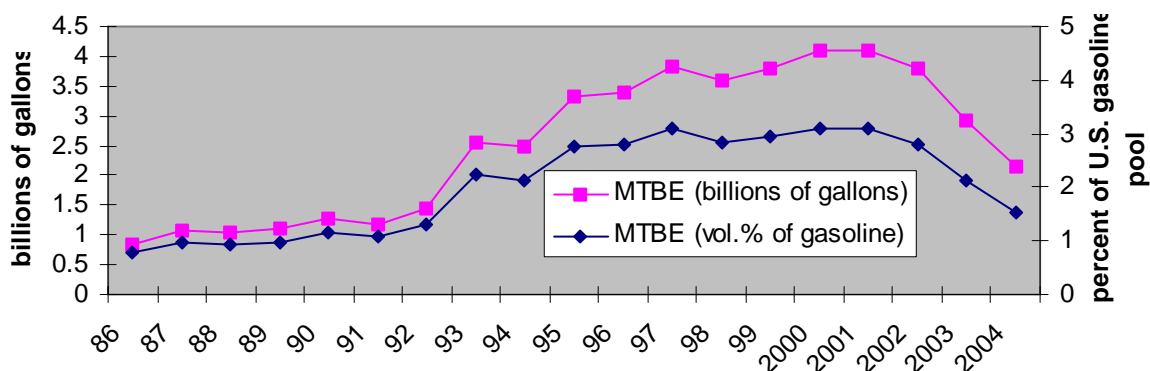
The product liability fairness provision is part of a package of fuels changes that will allow U.S. refiners to meet consumer demand more efficiently, reduce the use of MTBE nationally – rather than through individual and uncoordinated state actions – and will provide continued incentives for the use of ethanol and other renewable fuels. The purpose of this paper is to provide comprehensive background information about MTBE and the need for product liability fairness.

MTBE use over time

EPA approved MTBE as a fuel additive in 1979. By 1990, MTBE was present in about 25 percent of the gasoline in use nationally¹. As the chart below illustrates, the use of MTBE in gasoline increased significantly with the 1990 Clean Air Act Amendments (CAAA), which mandated the use of winter oxygenated fuel (Oxy-Fuel) and reformulated gasoline (RFG) beginning in November 1992 and January 1995, respectively. The use of MTBE in gasoline increased from approximately 1.4 billion gallons in 1992 to a peak of roughly 4.0 billion gallons in 2000, with both the Oxy-Fuel and RFG programs in full swing.

MTBE Use in U.S. gasoline, 1986 - 2004

(Sources: 1986-1991, DeWitt; 1992 - 2004, EIA/DOE)





History of MTBE (cont)

What did the federal government know about MTBE and groundwater before 1990?

Some claim that Congress and EPA authorized the use of MTBE as a gasoline oxygenate because oil refiners hid from government officials risks to groundwater from MTBE releases. However, the facts demonstrate otherwise².

EPA was involved in MTBE contamination incidents as early as 1980 (Rockaway, NJ) and 1981 (Jacksonville, MD). In November 1986, at a conference cosponsored by API and the National Water Well Association (and attended by hundreds of ground water professionals from industry, consulting groups and regulatory agencies) a well-publicized paper regarding underground storage tank (UST) releases and MTBE impacts to groundwater was presented³. On January 22, 1988, EPA added MTBE to its first Drinking Water Priority List, "[b]ecause of the potential for widespread contamination." Two months later (March 1988), EPA issued its final MTBE testing rule and stated that, "EPA has an additional concern about MTBE contamination of ground water." The agency also noted that MTBE is relatively water soluble compared to other gasoline components.

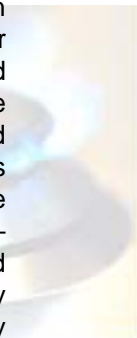
In summary, the facts firmly establish that EPA understood the risks of gasoline spills, and the potential threat that MTBE posed to groundwater if gasoline was spilled, well before the CAAA of 1990.

Why did Congress effectively mandate MTBE when it amended the Clean Air Act?

In 1990, when Congress imposed the federal Oxy-fuel and RFG oxygen requirements in cities with the worst air quality, the authors of the legislation and others acknowledged, on the floor of the House and Senate, that MTBE would have to be used in significant quantities to meet this federal requirement⁴. There were two oxygenates available for RFG – MTBE and ethanol. Both were approved for use by EPA, but the ethanol industry was in its infancy and unable to supply adequate volumes to meet the demand for RFG. Since there was insufficient ethanol to meet overall RFG demand, Congress understood that the industry had no choice but to use MTBE or break the law. The record is clear, Congress knew when it passed the CAAA that it effectively was mandating the use of MTBE.

MTBE and health concerns.

There have been a number of recent comprehensive reviews of MTBE carcinogenicity. The three bodies recognized as authoritative on the issue of carcinogenicity – the National Toxicology Program (2000)⁵, the International Agency for Research on Cancer (1999)⁶, and the World Health Organization (1999)⁷ – have all concluded that MTBE should not be classified as a probable or known human carcinogen. The European Union (2002)⁸ has reached a similar conclusion: "In view of the lacking of limited relevance of the (animal cancer research) findings for man, and the low potency demonstrated in animal studies, human cancer risk is presumed to be low."



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History of MTBE (cont)

The polluter still pays under liability fairness.

Liability fairness would not prevent any claim, against any party, for causing MTBE contamination. Any person who spilled gasoline – including gasoline reformulated with MTBE – into the environment would continue to be legally responsible for cleaning up that contamination. Simply put, “polluter pays” continues to apply under liability fairness.

The only types of claims that liability fairness would prevent are those that would declare gasoline reformulated with MTBE a “defective product” so that persons who merely made, distributed or sold such gasoline could be held liable even if they did nothing to cause contamination. It would not bar any claim against a person actually responsible for causing environmental contamination.

Responsible parties are cleaning up.

Some have mischaracterized liability fairness as a “massive unfunded mandate” on communities and taxpayers. This charge simply is false. The specter of local government, ratepayers and taxpayers having to fund MTBE cleanup has never been true, and will not be true if liability fairness is passed.

Today, responsible parties pay for the vast majority of MTBE cleanups, and they will continue to do so under liability fairness. According to EPA, over 95 percent of UST cleanups are paid for by the parties responsible for the release⁹. In the rare instance where a responsible party cannot be identified or no longer exists, insurance and state cleanup funds will continue to pay for remediation, as they have for decades. And in the even rarer circumstance where insurance or state funds are unavailable, the Energy Bill provides public water suppliers with

more than \$1 billion from the federal Leaking Underground Storage Tank (“LUST”) Fund so that they can address the few MTBE impacted wells where the person responsible for the release cannot be identified.

There is no MTBE crisis.

According to the most recent (January 2005) data from the U.S. Environmental Protection Agency¹⁰, only 0.4% (16 of 3776) of all public water systems in the United States have MTBE impacts that conceivably might require corrective action. The U.S. Geological Survey in 2002¹¹ found similar results (0.2%). In fact, the number of reported detections is significantly less than for other contaminants and hardly supportive of the trial lawyer’s mischaracterization of a national crisis.

Conclusion

If U.S. petroleum companies are not protected against defective product liability litigation, this breach of faith by government can have disastrous consequences. Unlimited, unrestrained defective product lawsuits create massive uncertainty, discourage investment and threaten jobs. Trial lawyers are marketing these cases to municipalities and water districts. Congress has the opportunity to address this egregious abuse of our nation’s legal system by approving liability fairness in comprehensive energy legislation.

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History of MTBE (con't)

FOOTNOTES

¹ <http://www.epa.gov/otaq/consumer/rfgnew.txt>.

² Highlights of EPA's pre-1990 knowledge about MTBE solubility and other issues are available at <http://api-ep.api.org/training/index.cfm?bitmask=002006005000000000>

³ 1986, Garrett, Peter, Moreau, Marcel, and Lowry, J.D., *MTBE as a ground water contaminant*, in Conference on Petroleum Hydrocarbons and Organic Chemicals in Ground Water—Prevention, Detection, and Restoration; Houston, TX, November 12-14, 1986, [Proceedings]: Dublin, OH, National Water Well Association, p. 227-238.

⁴ For statements by members of Congress, and Senate and House Committee Report References to MTBE see <http://api-ep.api.org/training/index.cfm?bitmask=002006005000000000>.

⁵ 2000. National Toxicology Program. The 9th Report on Carcinogens (RoC) May 2000. <http://www.niehs.nih.gov/oc/news/9thROC.htm>.

⁶ 1999. IARC: International Agency for Research on Cancer, <http://www.iarc.fr>. (October, 1999), Monograph Volume 73. See: METHYL tert-BUTYL ETHER (p. 339).

⁷ 1999. World Health Organization. International Programme On Chemical Safety (IPCS), "Environmental Health Criteria 206: Methyl *tertiary*-butyl ether."

⁸ 2002 - European Union. MTBE Risk Assessment (EINECS-No.: 216-653-1), TERT-BUTYL METHYL ETHER: Summary Risk Assessment Report, http://ecb.jrc.it/DOCUMENTS/Existing-Chemicals/RISK_ASSESSMENT/REPORT/mtbereport313.pdf.

⁹ 1999. Congressional Research Service report: *Leaking Underground Storage Tank Cleanup Issues* <http://www.ncseonline.org/NLE/CRSreports/Waste/waste-18.cfm?&CFID=2800971&CFTOKEN=17777154> Report #97-471, updated February 17, 1999.

¹⁰ EPA Unregulated Contaminant Monitoring Rule database, Dec. 2004, <http://www.epa.gov/safewater/data/ucmrgetdata.html>.

¹¹ Grady, S.J., 2003, National survey of methyl *tert*-butyl ether and other volatile organic compounds in drinking-water sources: Results of the random survey: U.S. Geological Survey Water-Resources Investigations, Report WRIR 02-4079, 85 p.

