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I Don't Want My MTBE: GOP Protects Fuel Additive Manufacturers Despite Drinking Water Contamination

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Profits over Public Health: GOP Maneuvers to Protect Petroleum Industry

House Republicans have secured language in omnibus energy legislation (H.R. 6, “The Energy Policy Act of 2005”) designed to provide liability protection for manufacturers of the gasoline additive methyl tertiary butyl ether (MTBE), which is a known drinking water contaminant. The language bars attempts to deem fuel containing MTBE as “defective,” which would eliminate essential legal grounds for current and future lawsuits, thwarting attempts to hold manufacturers accountable for environmental contamination and running counter to the decades-old principle that the polluter must pay for the cost of cleanup.

At least 157 lawsuits have been filed against MTBE producers in 17 states, including California, Connecticut, Illinois, Maine, Massachusetts, New York, and North Carolina.¹ The waiver is retroactive to September 5, 2003; if enacted, it would nullify a slew of lawsuits filed since then (many in anticipation of the new law), including one by the State of New Hampshire. Disturbingly, many representatives appear to be siding with Big Oil over the interests of their own constituents: a review by the Environmental Working Group (EWG) found that 100 representatives—98 Republicans and two Democrats—with MTBE contamination in their districts voted *against* a motion offered by Rep. Lois Capps (D-Ca.) to strike the MTBE liability waiver from the energy bill.² The motion was based on the fact that the Congressional Budget Office found the MTBE liability waiver to be an unfunded mandate for local and state governments, which is illegal under the Unfunded Mandate Reform Act of 1995. The motion failed by a vote of 219 to 213.

Along with his fellow Texas Republican and House conferee Joe Barton (R-Tex.), Majority Leader Tom DeLay spearheaded the effort during the 108th Congress to include the liability waiver in the energy bill, and the two have continued to insist on its inclusion in the most recent version of the energy bill, passed by the 109th House on April 21. DeLay’s former colleague W.J. “Billy” Tauzin—erstwhile representative from Louisiana, now the head of PhRMA, the pharmaceutical industry’s lobby group—was instrumental in edifying the liability waiver’s place in the energy bill as co-chairman of the House-Senate energy conference committee in the 108th Congress.

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Tauzin, DeLay, and Barton have all been heavily influenced by the petroleum industry, which is the subject of lawsuits over MTBE contamination of water supplies. The oil and gas industry was one of Tauzin's top campaign contributors, and DeLay's district is home to MTBE manufacturers, as is Barton's. Barton took \$224,398 from oil and gas interests in the most recent election cycle, more than he accepted from any other industry. DeLay's third-largest contributor in the 2003-2004 election cycle was the oil and gas industry, padding his campaign coffers with \$143,425.

The liability waiver is above and beyond the authorization of \$2 billion in grants to MTBE manufacturers to aid in the phase-out of the product [§ 1503(c)(D)]. This massive giveaway is entirely unwarranted, especially since the petrochemical industry lobbied for the Clean Air Act amendments that mandated oxygenate additives to gasoline, thereby creating a market for MTBE, which is derived from a byproduct of gasoline refining that had theretofore been a liability for the industry. All the while, these oil companies were well aware of the potential hazards of MTBE; now they are being rewarded twofold for their negligence and malfeasance.³

And although the bill includes a prohibition on the use of MTBE after 2014, the measure is ineffectual since state governors can authorize the use of MTBE in their respective states and the U.S. President may unilaterally declare the ban null and void anytime before June 30, 2014 (§ 1504 and § 1505).

What is MTBE and why is it used?

MTBE is one of many possible gasoline additives used to decrease ozone-related emissions (such as carbon monoxide) from automobiles, as required by the 1990 amendments to the Clean Air Act. The compound was embraced by petroleum producers for its low cost and facile production relative to other potential additives, such as ethanol. MTBE is a volatile organic compound (VOC) made from methanol, which is derived mostly from natural gas. It is highly water soluble, which enables it to move easily through soil into groundwater. One of the primary paths by which the contaminant has entered into groundwater is through leaks in gasoline tanks stored underground. MTBE is also listed as a hazardous air pollutant in the Clean Air Act.

Hazards of MTBE

The U.S. Environmental Protection Agency (EPA) has identified MTBE as a potential human carcinogen. The Agency has also placed the compound on its "Drinking Water Contaminant Candidate List," which lists unregulated substances of concern that may be subject to regulation upon further study.⁴

Since the surge in the use of MTBE as a gasoline additive, negative health effects from exposure have been reported in Alaska, Montana, Wisconsin, and New Jersey, among other places. Victims have reported such immediate symptoms as headaches, vertigo, nausea, coughing, and irritation of the eyes, nose, and throat. When present at significant levels in drinking water, MTBE produces a foul taste and odor much like that of turpentine, rendering the water undrinkable.

MTBE contamination is widespread. The EPA estimates that MTBE is used in about 87% of gasoline in the United States, and about half of the states that test groundwater for MTBE have reported finding it most of the time.⁵ From data collected in the early- to mid-1990s, the U.S. Geological Survey (USGS) found MTBE in about 27% of shallow wells sampled in urban areas.⁶ In 12 states in the Northeast and Mid-Atlantic Regions, MTBE was detected in 9% of the community water systems.⁷ A more recent review by the EWG reported that MTBE has been found in 1,861 tap water systems in 29 states, serving a population of as many as 45 million people.⁸

How would this legislation affect victims of MTBE contamination?

The energy bill includes a measure that states: “[N]o renewable fuel, as defined by...the Clean Air Act, or [MTBE]...shall be deemed a defective product...” (§ 1502). The result of such a statute would be to virtually absolve MTBE producers from liability for cleanup of contaminated sites and other damages incurred from MTBE, thereby shifting the burden onto taxpayers, water utility ratepayers, and other parties not directly responsible for the pollution. Cases from New York to California concerning MTBE pollution have relied on the “defective product” line of attack to prosecute companies for their negligence and force them to pay for the cost of cleanup. For example, in a court case involving twelve producers and distributors of MTBE, a jury in California found that defendant Shell Oil Company “acted with malice in selling gasoline containing MTBE that was defective in design” because customers were not warned of the product’s risks. (The defendants eventually agreed to settlement totaling over \$69 million.)⁹ The State of New Hampshire has alleged similar “wanton, malicious and oppressive conduct” in a lawsuit against twenty-two MTBE producers.¹⁰ And the city of Dinuba, California won a settlement agreement worth \$6.4 million that requires several oil companies clean up the city’s MTBE-contaminated groundwater.

The language in the energy bill, if passed into law, would be, in effect, an enormous subsidy to the petroleum industry in the form of foregone cleanup costs. A study conducted for the City of Santa Monica by a California environmental engineering firm estimated that a nationwide cleanup of MTBE from drinking water wells would cost at least \$29 billion, a cost that could be incurred by struggling states and municipalities if the MTBE liability waiver becomes law.

The U.S. Conference of Mayors has passed a resolution officially opposing the Congressional attempt to relieve MTBE producers from liability for pollution, and fourteen state attorneys general have written the U.S. Senate urging the same.¹¹ Moreover, at least fourteen states have instituted partial or complete bans on the use of MTBE, and more states are pursuing its phase-out.

¹ Environmental Working Group, “Communities That Have Filed MTBE Lawsuits Against Oil Companies,” May 18, 2005 <<http://www.ewg.org/reports/oilandwater/lawsuits.php>>.

² Environmental Working Group, “Did your representative vote for Rep. Capps’ motion to strike Tom DeLay’s MTBE polluter immunity provision from the Energy Bill?” May 2005 <<http://www.ewg.org/reports/lapdog/index2.php?party=R&orderby=member>>.

³ Environmental Working Group, “MTBE: What the Oil Companies Knew and When They Knew It,” <<http://www.ewg.org/reports/withknowledge/index.php>>.

⁴ U.S. Environmental Protection Agency, *Methyl Tertiary Butyl Ether (MTBE)*, Oct. 2, 2003, <<http://www.epa.gov/mtbe/>>.

⁵ John Stephenson, "MTBE Contamination from Underground Storage Tanks," before the Subcommittee on Environment and Hazardous Materials, Committee on Energy and Commerce, House of Representatives. Washington, D.C., May 21, 2002. [Stephenson referred to unspecified EPA data]

⁶ Paul J. Squillace, et. al., "A Preliminary Assessment of the Occurrence and Possible Sources of MTBE in Ground Water of the United States, 1993-94," U.S. Geological Survey Open-File Report 95-456.

⁷ Stephen J. Grady and George D. Casey, *Occurrence and Distribution of Methyl Tert-Butyl Ether and Ether Volatile Organic Compounds in Drinking Water in the Northeast and Mid-Atlantic Regions of the United States, 1993-98*, U.S. Geological Survey Water-Resources Investigations Report, WRIR 00-4228. 2001.

⁸ Environmental Working Group, "MTBE contamination is soaring," 2005 <<http://www.ewg.org/reports/oilandwater/part2.php>>.

⁹ South Tahoe Public Utility District v. Atlantic Richfield Company, et. al., *National Jury Verdict Reporter*. Superior Court of San Francisco County, California, Aug. 5, 2002.

¹⁰ State of New Hampshire v. Amerada Hess Corporation, et. al., Writ of Summons, New Hampshire Superior Court of Merrimack County, Sept. 30, 2003.

¹¹ Signatories to the letter were attorneys general from California, New York, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, Rhode Island, Vermont, Washington, and Wisconsin.