

U.S. Supreme Court refuses to hear Exxon MTBE appeal | New Hampshire

By DAVE SOLOMON

New Hampshire Union Leader

ExxonMobil has run out of options, and will soon have to pay New Hampshire more than \$236 million to settle charges of water contamination brought more than a decade ago.

The U.S. Supreme Court on Monday refused to hear an appeal by the energy giant, which asked the high court to overturn the unanimous verdict of a Merrimack County Superior Court jury, upheld by the state Supreme Court.

That puts to rest a case that has been working its way through the courts since 2003, when the New Hampshire Attorney General, with help from the Sher-Leff Environmental Law Group in California, sued 22 major oil companies for adding MTBE to New Hampshire's gasoline.

The lawsuit claimed the oil companies knew the highly toxic ether compound would contaminate the state's drinking water supplies, but used it for years anyway before switching over to ethanol as a gasoline additive to reduce toxic emissions.

Over the years, all the defendants except ExxonMobil settled out of court for a combined \$136 million. The ExxonMobil case went to trial in January 2013 in Concord.

After a three-month trial – the longest in state history – the jury took less than two hours to find that ExxonMobil was negligent.

Attorneys for the oil company had argued that it was under a mandate from the EPA to reduce emissions through the use of additives, and that the dangers to drinking water were not widely known at the time.

Gov. Maggie Hassan on March 31 signed into law a bill, SB 380, creating a drinking water and groundwater trust fund, and an advisory commission to make sure the settlement money is properly spent.

In addition to the \$236 million verdict, the lower courts previously ruled the state is entitled to “pre-judgment interest” now approaching \$100 million.

That doesn't mean the newly created clean water fund is going to get a \$336 million deposit, despite SB

380. Outside attorney fees will consume some of that money, while existing state law requires that 10 percent of every legal settlement worth more than \$1 million go into the state's Rainy Day Fund.

Rainy Day Fund boosted

While its common for outside law firms to take as much as 33 percent in such cases, Senior Assistant Attorney General K. Allen Brooks says the state worked out a "ratcheted" scale with Sher-Leff (now known as SL Environmental), meaning the law firm's percentage goes down as the settlement dollars go up.

"We estimate it'll be around 14 percent," said Brooks, "which is reasonable considering they took the risk and fronted \$10 million to \$11 million in cost."

Senate President Chuck Morse, R-Salem, estimates the net gain to the state rainy day fund at about \$30 million.

After the lawyers and the rainy day fund get their slice, the balance — somewhere around \$270 million — will be added to the approximately \$80 million that remains from the out-of-court settlements with Citgo and other companies to create a very robust clean water war chest.

"This decision upholds what we previously described as the most significant environmental victory in the history of the state," said Attorney General Joe Foster. "The funds recovered will help ensure access to safe and dependable drinking water to thousands of New Hampshire residents."

Money from the clean water fund will be used to identify and clean-up MTBE contamination where it still exists, and create systems to protect public and private water supplies against future contamination.

"The fund will play a major role in providing safe, clean drinking water for all our citizens for many years to come," said Tom Burack, commissioner of environmental services.

Lawsuit called baseless

ExxonMobil asked the U.S. Supreme Court to find it had been treated unfairly in New Hampshire state courts, and was being exploited to help balance the state budget, but the eight justices declined to take the case without comment on Monday.

ExxonMobil spokesperson Todd Spittler said the company will continue to defend itself against claims regarding the use of MBTE in reformulated gasoline.

“These MTBE lawsuits lack any firm basis because energy companies are being held liable for blending oxygenates into gasoline as required by law, not for actually spilling gasoline,” said Spittler. “MTBE contamination occurred because someone spilled gasoline, not because it was added to gasoline produced in a refinery in another state.”

Lawyers for the state argued at trial that oil companies had a choice of oxygenates, but went with MTBE because of its low cost as a by-product of the gasoline manufacturing process.

dsolomon@unionleader.com

