

EXHIBIT D

In The Matter Of:

*THE CITY OF NEW YORK, ET AL v.
EXXON MOBIL CORPORATION, ET AL*

*VOLUME 36
September 23, 2009*

ORDER TO SHOW CAUSE

Original File 99NDCITF.txt, Pages 5599-5796 (198)

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[1] looked at a lot of things.

[2] **Q.** Sir, did you look at it different than air quality impact?

[3] **MR. BONGIORNO:** Your Honor, may he just be allowed to
[4] finish his answer? With any type of pauses, there is a new
[5] question.

[6] **THE COURT:** I haven't noticed any rudeness on the part
[7] of counsel.

[8] **MR. BONGIORNO:** I didn't mean to imply that, not at
[9] all.

[10] **THE COURT:** Maybe from time to time there has been
[11] some talking over, but it has been inadvertent and rare.

[12] **MR. BONGIORNO:** Absolutely.

[13] **THE COURT:** Anyway, were you not done?

[14] **THE WITNESS:** I have forgotten at this point, but I
[15] think I can answer the question he just asked.

[16] **THE COURT:** OK.

[17] **A.** If you asked were we looking at using any oxygenate in
[18] gasoline to achieve any air quality objectives other than those
[19] that were driving the oxygenate gasoline program, then the
[20] answer is no. We were trying to comply with the oxygenated
[21] gasoline program. And the environmental effects of that were
[22] what they were, because that program was specified.

[23] **Q.** Fair enough. Thanks for the clarification.

[24] In making the choice between ethanol and MTBE, the
[25] same applies; that is, you looked only at complying with the

[1] requirements nor the decisions with the 1995 requirements did
[2] you consider groundwater costs, did you?

[3] **A.** Those requirements weren't looking at groundwater costs.
[4] The --

[5] **Q.** And those were the only requirements you looked at?

[6] **A.** No. Because the handling of the gasoline was being looked
[7] at by our Supply and Marketing Department. I didn't look at
[8] anything necessarily associated with groundwater. From my
[9] perspective, MTBE was already in use, you know, in all the
[10] areas that we were planning on using it for the Clean Air Act
[11] requirement. So there wasn't a substantive change in gasoline
[12] in those areas.

[13] **Q.** Would you take a look at Tab 2, please, in the binder I
[14] gave you. This is PL477. It is in evidence. It is titled --
[15] Liz, if you could bring it up, please -- "Oxygenate Strategy
[16] Review," dated May 19, 1995.

[17] And we had used this before. The jury has seen it so
[18] I just want to touch on it briefly.

[19] If you go to the second page, you see that in 1994,
[20] Exxon was using -- had used 79,000 barrels per day of ethanol.

[21] Am I understanding that chart correctly?

[22] **A.** No. That has to be an industry number.

[23] **Q.** That is too much for --

[24] **A.** That is all the ethanol that was being made, as far as I
[25] know, and certainly that's true for the MTBE.

[1] regulatory requirements and not at health effects or
[2] environmental effects other than those, correct?

[3] **A.** We weren't looking at the difference in environmental
[4] effects you would get, for instance, if you burned gasoline
[5] with ethanol versus gasoline with MTBE, and there are some
[6] differences. But we weren't looking at those two differences,
[7] no. We were looking at adding the mandated amount of
[8] oxygenate.

[9] **Q.** And is the same true for the decision with respect to using
[10] an oxygenate to comply with the RFG requirements, that is, you
[11] looked solely to comply with the blending requirements imposed
[12] by law?

[13] **A.** No. There is actually a fine distinction there that makes
[14] the answer different for RFG, because in RFG you actually had
[15] to comply with calculated emissions requirements, and the
[16] oxygenate you used affected the calculated emissions
[17] requirements. So if you chose one oxygenate versus another,
[18] you might have to make a different reformulation to the
[19] gasoline.

[20] **Q.** Yes. You might have to formulate the gasoline differently,
[21] but your goal was simply to comply with what the regulations
[22] required for emissions, correct?

[23] **A.** Well, yes. We had to comply with the requirement to sell
[24] gasoline.

[25] **Q.** And neither the decision with respect to the 1992

[1] **Q.** So the MTBE figures and the ethanol figures are
[2] industry-wide?

[3] **A.** That would appear to be the case.

[4] **Q.** OK.

[5] **A.** I don't see any identification of whose document this is.

[6] **Q.** Let's go back to the first page.

[7] **A.** It has a date on it.

[8] **Q.** Yes. And it is stamped "Exxon proprietary," do you see
[9] that?

[10] **A.** Yes. Certainly this is an Exxon document. I was referring
[11] to who from an organizational perspective. I don't immediately
[12] recognize this as a document that I prepared. But ...

[13] **Q.** If you go to the page with the Bates number ending in 231,
[14] headed "Groundwater Issues With Oxygenates."

[15] Are you there with me?

[16] **A.** Yes, I see that.

[17] **Q.** It states: "U.S. Geological Service recently released
[18] report identifying MTBE as the second most common groundwater
[19] contaminant in their recent study."

[20] Do you see that?

[21] **A.** Yes, I see that.

[22] **Q.** Were you aware that by 1995 Exxon had knowledge that MTBE
[23] was being reported by the USGS as the second most common
[24] groundwater contaminant?

[25] **A.** I don't recall specifically knowing that at the time.

[1] Q. No, sir --
[2] A. That doesn't mean I didn't at the time but ...
[3] Q. You don't quarrel with this document reflecting that, do
[4] you?
[5] A. I can't -- I can't either affirm it or dispute it. It
[6] looks like an Exxon document, but from my own knowledge I can't
[7] tell you whether that was true or not.
[8] Q. Let's go forward to Tab 3, please. This is PL3074. And it
[9] is in evidence as well. And it is a document entitled, "EUSA
[10] Marketing Environmental Engineering MTBE Survey - Retail
[11] Stores." And it is in evidence.
[12] Do you recall this document?
[13] A. Not sitting here today, although I see that I should have
[14] received a copy of it.
[15] Q. I see. You are listed as a cc at the bottom of the page,
[16] correct?
[17] A. Yes. That's what I just referred to.
[18] Q. The last full sentence on this first page says: "We can
[19] discuss how best to summarize this year's MTBE survey results
[20] for the upcoming emerging product quality issues meeting with
[21] Bob Rich."
[22] Do you see that?
[23] A. Yes, I see that.
[24] Q. Who was Bob Rich at the time?
[25] A. He was one of the upper-level managers in Exxon Company

[1] on average in New York, correct?
[2] A. I can only tell you what this says. I don't have any
[3] independent recollection of this.
[4] Q. OK. All right. Well, we won't touch on all of the states.
[5] In fact, I think we will move on.
[6] Sir, do you have any recollection that by 1998, Exxon
[7] was aware of substantial MTBE contamination in states around
[8] the country; groundwater contamination I am talking about?
[9] A. It depends on your definition of "substantial." We were
[10] aware that there had been numerous places that MTBE had been
[11] spilled and detected.
[12] Q. Let's go to Tab 4. This is PL5562. It is in evidence.
[13] This is called "Emerging Product Quality Issues Meeting,
[14] May 12, 1998."
[15] You are one of the attendees, am I right?
[16] A. Yes, that's what it says.
[17] Q. And, Liz, if you could blow up the 12:30 to 1:10.
[18] It says: "Title: MTBE issues.
[19] Legislative/regulatory developments."
[20] And the discussion here is TRE. That's you, correct?
[21] A. That would be me, yes.
[22] Q. Do you remember giving this presentation?
[23] A. No, I don't.
[24] Q. Let me direct you to -- who generally were the attendees of
[25] the Emerging Product Quality Issues meeting? Was this a

[1] U.S.A. I can't specify his particular title at this point in
[2] time.
[3] Q. Sir, can you recall whether there was any MTBE site surveys
[4] for any years earlier than 1998, as reflected in this document?
[5] A. I couldn't say, sitting here today.
[6] Q. This is the first, isn't it?
[7] A. No, I couldn't say it was the first. I don't know whether
[8] it was the first or not.
[9] Q. If you look -- let me direct your attention to the page
[10] with the Bates number ending in 18.
[11] And, Liz, if you could blow up from the top of the
[12] page to that highlighted portion. Thank you. It is a little
[13] tough to read.
[14] This is the "1998 MTBE Survey by State and Engineer."
[15] It says it is dated Thursday, April 23, 1998. And this is for
[16] New York State.
[17] The second question asks: "Approximately how many
[18] sites have been tested?" And the answer is "98."
[19] The third question is: "What concentrations do you
[20] find?" It says 50,000 to 100,000 parts per billion.
[21] And the fourth question is: "What concentration
[22] ranges do you find high end?" "Upper end" is the answer of 1
[23] million parts per billion has been seen in monitor wells."
[24] So in 1998, out of 98 sites tested, Exxon was finding
[25] concentrations ranging from 50,000 to 100,000 parts per billion

[1] management-level meeting?
[2] A. It wasn't a high-level management meeting. This was a
[3] group that met, I don't remember, maybe it was quarterly or
[4] twice a year, or something like that, to talk about any issues
[5] having to deal with product quality.
[6] Q. OK. I'm sorry, go head.
[7] A. I was going to say, I mean, there were a lot of
[8] developments. We were looking at reducing the sulfur in
[9] gasoline, we were looking at reducing the sulfur in diesel. So
[10] there were a whole lot of developments that were coming, not
[11] just oxygenates associated with that.
[12] Q. And yet the first session at the meeting had to do with
[13] MTBE, correct?
[14] A. Yes, that's what it says.
[15] Q. If we go to the second page of the document. Liz, if you
[16] could highlight the first bullet under "California." Actually,
[17] just that first sentence.
[18] "Concerns continue over MTBE contamination of
[19] surface/groundwater, much media interest."
[20] By 1998, Exxon was aware of concerns in California
[21] over MTBE contamination of surface and groundwater, correct?
[22] A. Yes.
[23] Q. OK. Let's go down to the next bullet, please, and
[24] highlight the first sentence and, actually, highlight the
[25] highlighted area.

[11] "WSPA has taken the lead in addressing California
 [12] industry issues."
 [13] What is WSPA?
 [14] A. It is an industry organization -- it is an organization of
 [15] the oil and gas industry. It is the Western States Petroleum
 [16] Association.
 [17] Q. And Exxon is a member of WSPA?
 [18] A. I believe we are.
 [19] Q. It says here that "WSPA has taken the lead in addressing
 [20] California industry issues. Supports legislative studies
 [21] underway. Opposes a ban unless studies based on sound science
 [22] suggest otherwise."
 [23] Do you see that?
 [24] A. Yes.
 [25] Q. Exxon in 1998 opposed the ban of MTBE, didn't it?
 [26] A. I'm trying to recall. It is a long time ago. I suspect we
 [27] probably opposed a ban at that point in time.
 [28] Q. Did Exxon ever support a ban of MTBE?
 [29] A. I don't recall.
 [30] Q. It didn't, did it?
 [31] A. Well, I don't recall that we ever supported a ban.
 [32] Q. Let's go down to the next highlighted paragraph and enlarge
 [33] that whole thing.
 [34] It says -- now, this is a report that you gave to the
 [35] group, correct?

[11] Q. Exxon, however, opposed a ban of MTBE at this time, right?
 [12] A. Again, I don't recall if we opposed the ban or kept silent
 [13] at this point in time.
 [14] Q. The last bullet: "Mobil publicly supporting WSPA position
 [15] but internally concerned about MTBE."
 [16] That's what you reported to Exxon, correct?
 [17] A. That's what it says here.
 [18] Q. Go to the next page.
 [19] Under "MTBE Release Incidents," go ahead and enlarge
 [20] that whole thing.
 [21] First listed is Santa Monica. "MTBE leaks in two well
 [22] fields have impacted over 70 percent of municipal water supply,
 [23] Mobil, Shell, and Chevron making initial payments of \$7 million
 [24] for water replacement and remediation."
 [25] So that's what you were reporting to this management
 [26] group in 1998?
 [27] A. That's what is on the page.
 [28] Q. And you go on then to report incidents also in North
 [29] Carolina, Philadelphia and Kansas, am I right?
 [30] A. Yes. Yes, there are four incidents listed here.
 [31] Q. OK. Let's go to the next page.
 [32] This is still part of your presentation, isn't it?
 [33] Let's enlarge the first part.
 [34] This is still part of your presentation?
 [35] A. It would appear to be, yes.

[11] A. It appears to be, yes.
 [12] Q. Yes. "WSPA consensus position overlays some divergent
 [13] views. Tosco wrote to CARB" --
 [14] That's the California Air Resources Board, correct?
 [15] A. Yes.
 [16] Q. -- "October 1997 requesting 'decisive action immediately'
 [17] to begin moving away from MTBE, continues to make similar
 [18] public statements. Recently announced six-month pilot use of
 [19] ethanol in SF Bay area."
 [20] And you were reporting to Exxon that Tosco at least
 [21] was supporting aggressive action to move away from MTBE,
 [22] correct?
 [23] A. That's what this says.
 [24] Q. And this was in 1998, correct?
 [25] A. Yes, that's the date on the front page.
 [26] Q. The next bullet says: "Chevron (December 1997) publicly
 [27] acknowledged 'legitimate environmental concern about MTBE,'
 [28] asked California regulators to 'explore options for reducing or
 [29] eliminating MTBE altogether."
 [30] Do you see that?
 [31] A. Yes, I see that.
 [32] Q. You were reporting that that's what Chevron had asked for
 [33] the previous December, correct?
 [34] A. That's what this says.

[11] Q. API, that's the American Petroleum Institute, correct?
 [12] A. Yes.
 [13] Q. You reported "Downstream committee" --
 [14] Remind the jury of what the downstream committee is.
 [15] A. That's a group in API that is primarily composed of
 [16] refiners.
 [17] Q. "The downstream committee supports WSPA's MTBE position,
 [18] currently taking low profile to avoid provoking opposition."
 [19] That is what you reported then?
 [20] A. That's what it says.
 [21] Q. Now, Exxon, if we go down the page -- just enlarge that
 [22] last bullet.
 [23] You reported that "Exxon was initial scoping of
 [24] scenarios for eliminating MTBE from Baton Rouge and Baytown
 [25] refineries completed."
 [26] So in 1998, Exxon had completed an exit strategy from
 [27] MTBE for those two refineries, correct?
 [28] A. I would state that somewhat differently. I mean, this says
 [29] initial scoping scenarios and this is for the manufacturer.
 [30] One of the things that became clear is when we studied
 [31] the removal of MTBE was that we couldn't do it in most areas
 [32] unless the rest of the industry changed as well, because we did
 [33] not have the proprietary distribution system to make a
 [34] unilateral decision on oxygenate.
 [35] Q. You were doing an initial scoping of scenarios to eliminate

[1] A. Yes, I am.
[2] Q. And that in fact those stations were not undertaking the
[3] same upgrade and investigations measures that you just
[4] described that Exxon was taking?
[5] A. I can't say what they were or were not.
[6] Q. Let's go to Tab 7, please. This is PL3136.
[7] This is an e-mail from Buford Lewis to several
[8] addressees. And you are cc'ed on it, correct?
[9] A. Yes, that is what is shown here.
[10] Q. And this is dated -- I just had it -- May 19, 2000. Am I
[11] right?
[12] THE COURT: It is on the screen. It is easy to see
[13] the date.
[14] THE WITNESS: I'm sorry. I was looking for the date
[15] and I didn't see it. Thank you.
[16] A. Yes. That's the date on it, yes.
[17] Q. The second sentence says: "We are very interested in the
[18] preferred options for us as we pull MTBE."
[19] Do you see that?
[20] A. Yes, I see that.
[21] Q. Now, you would be pulling -- "you" being Exxon would be
[22] pulling MTBE in response to anticipated bans, correct?
[23] A. That would be my guess. I have to -- I would have to take
[24] a look at this to make sure I put it in context.
[25] Q. Let's go to the next tab, please. This is PL3999.

[1] effective year end 2002."
[2] That's what you wrote to him, correct?
[3] A. Yes, that's what it says.
[4] Q. In fact, the ban in California was extended to 2003,
[5] correct?
[6] A. It was delayed one year out of fear of supply issues.
[7] Q. So as of 2000, despite knowing that MTBE was being banned
[8] because of groundwater contamination in states around the
[9] country, MTBE had no plan -- I'm sorry, Exxon had no plan
[10] voluntarily to move away from it, correct?
[11] A. This says we had no plans at that time to move away. I
[12] couldn't necessarily agree with the first part that you
[13] predicated that question with.
[14] Q. That is, about there being bans around the country?
[15] A. No, about what was driving the bans. There may have been
[16] other drivers for the bans as well.
[17] Q. There were other drivers to the bans --
[18] A. I said there may have been.
[19] Q. Besides groundwater contamination?
[20] You are speculating, right, sir?
[21] A. No. I'm saying I can't personally agree with the first
[22] statement that you made from my own knowledge.
[23] Q. OK. Let's go to -- give me just a second here.
[24] (Pause)
[25] let's go to the next tab, which is Tab 9. And I hope

[1] This is a memo from Buford Lewis again to Brian
[2] Harney, and you are cc'ed on it with others, correct?
[3] A. Yes, that is what is shown.
[4] Q. In 2000, Exxon had already merged with Mobil to form
[5] ExxonMobil, correct?
[6] A. Yes, this is after the merger.
[7] Q. So these are internal ExxonMobil e-mails, correct?
[8] A. Yes.
[9] Q. Now, the second e-mail in the chain is from you to
[10] Mr. Harney. "Subject: Byproduct ethers."
[11] And the first two sentences read: "At this point" --
[12] so that would be in December 2000, correct?
[13] A. Yes.
[14] Q. In fact, December 14, 2000?
[15] A. Well, no, I'm sorry. I'm trying to look at the -- the date
[16] on my original memo, can you lower that? OK. Yes, that date
[17] is December 14th of 2000. I'm sorry, there is another memo in
[18] the book under that tab that was confusing me.
[19] Q. This is Tab 8 --
[20] A. I'll ignore the book and pay attention to the screen.
[21] Q. I'm sorry if we have a mispagination. I apologize.
[22] Anyway, you wrote: "At this point, Americas Refining
[23] has no plans to voluntarily eliminate MTBE or other ethers from
[24] domestic gasoline production. Rather, elimination is expected
[25] to be driven by legal requirements, such as California's ban

[1] I have the right document there for you. It should be "USGC
[2] MTBE Phase Out Assessment." Is that what you have?
[3] A. Yes.
[4] Q. And this is PL631.
[5] MR. SHER: It is in evidence, your Honor.
[6] Q. Referring to the second page, the very first line says:
[7] "MTBE removal from mogas would be costly for XOM."
[8] "Mogas" is motor gasoline, correct?
[9] A. Yes, that's a shorthand term we use.
[10] Q. And "XOM" is ExxonMobil.
[11] A. Yes.
[12] Q. So this document is saying that MTBE removal from gasoline
[13] would be costly to ExxonMobil?
[14] A. Yes.
[15] Q. And the next line says: It would have an impact --
[16] removing MTBE from motor gasoline would have an impact of
[17] around 50 to \$100 million a year, correct?
[18] MR. BONGIORNO: Your Honor, that is not what the
[19] document says. He can read it, I agree. But he is
[20] paraphrasing, arguing; I'm not sure.
[21] MR. SHER: No, it says --
[22] THE COURT: Stick to the text.
[23] MR. SHER: Sure.
[24] Q. "Total USGC margin impact three refineries estimated at 50
[25] to \$100 million per year primarily due to octane loss,"