



February 10, 2015

Via FOIAonline

Freedom of Information Officer
Bureau of Industry and Security, Room 6622
U.S. Department of Commerce
Washington, DC 20230

RE: Freedom of Information Act Request – Documents Related to Applications, Communications, Guidance, and Actions by the Bureau of Industry and Security on the Definition of Crude Oil and Exporting Oil or Condensate

Dear FOIA Officer:

On behalf of Oil Change International and Sightline Institute, we hereby request access to the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) and the pertinent Department of Commerce regulations, 15 C.F.R. § 4.1 *et seq.*

The Requested Records

This FOIA request seeks information about the Bureau of Industry and Security’s (“BIS’s”) approvals, rulings, product classifications, guidance, and other actions concerning the definition of crude oil and exporting crude oil, condensate and or associated products as follows.

1. Recent press reports have indicated that BIS gave approval to two companies – Enterprise Products Partners LP and Pioneer Natural Resources Co. – to export condensate likely in the form of a product classification, letter ruling, or other indication that no export license would be required. *See, e.g.*, <http://www.bidnesstc.com/22261-rules-on-us-crude-oil-exports-relaxed/>; <https://www.energyvoice.com/oilandgas/62311/ban-us-oil-exports-seen-dying-one-ruling-time/>; <http://www.investorvillage.com/smbd.asp?mb=5028&mn=40107&pt=msg&mid=14068672>. Please provide us with the application, the BIS ruling, the export permit or product classification, communications between BIS, the companies and others outside the Department of Commerce, and any other records describing what was covered by the approval or other action and the basis for it.

2. Press reports also indicate that: (a) other companies have sought approval or other BIS action allowing exports of condensate or other crude oil products; and (b) that BIS may have put these applications on hold and may have asked applicants to provide additional information or respond to a series of questions. <http://fuelfix.com/blog/2014/10/14/exec-sees-west-texas-condensate-exports-soaring/>; <http://www.businessweek.com/news/2014-07-15/more-u-dot-s-dot-condensate-producers-seen-seeking-to-export>. Please provide records revealing the nature of the requests and the current status, including the applications, BIS responses, and all communications between BIS and the applicants.
3. Press reports indicate that BHP Billiton, and possibly other companies, have decided to start exporting what has been called slightly processed ultra-light oil without obtaining a ruling, product classification, or approval from BIS. <http://www.bloomberg.com/news/2014-11-13/condensate-exports-without-u-s-approval-seen-as-norm.html>; <http://fuelfix.com/blog/2014/11/04/bhp-billiton-to-export-condensate-overseas/>. Please produce all records indicating whether these companies sought BIS approval, any communication between BIS and BHP Billiton and other similarly situated companies with respect to such exports, and/or describing whether, and if so why, BIS believes such exports are permissible in light of the crude oil export ban.
4. On July 2, 2014, Senators Edward Markey (D., Mass.) and Robert Menendez (D., N.J.) sent a letter to Secretary of Commerce Penny Pritzker seeking information about the Enterprise and Pioneer rulings and crude oil exports, including whether BIS is deviating from its regulatory definitions of condensate as subject to the crude oil export ban. <http://petroglobalnews.com/2014/07/two-senators-want-details-about-export-rulings/>. Please produce any responses to this letter and to other inquiries from Members of Congress pertaining to BIS approvals of oil exports or to BIS interpretations of the definition of crude oil subject to the export ban.
5. On December 30, 2014, BIS posted on its website a document entitled, "FAQs – Crude Oil and Petroleum Products." <http://www.bis.doc.gov/index.php/policy-guidance/faqs?view=category&id=114#subcat171>. Please produce all records: (a) revealing the rationale for the interpretations in the FAQs; (b) describing or revealing the process used by BIS to develop the interpretations in the FAQs; (c) revealing whether BIS consulted with other federal agencies, including the Department of Energy, the Energy Information Administration and the Department of Interior, academics, and outside experts regarding the definition of crude oil and the issues addressed in the FAQs; (d) embodying all communications and meetings with oil companies, other private companies, trade groups, and nongovernmental organizations regarding the letter rulings, the definition of crude oil and the issues addressed in the FAQs; (e) revealing whether the interpretations embodied in the FAQs and other recent BIS actions would exempt anything other than condensate from the definition of crude oil; (f) indicating whether

BIS considers stabilizers to be or serve as crude distillation towers; and (g) responding to inquiries about this guidance and illustrating how it has been applied.

6. Please produce records describing or elucidating the interpretations by BIS, including through letter rulings or commodity classifications, of the regulatory definition of crude oil and crude distillation tower, of whether condensate was defined as or treated as crude oil and of BIS considered to constitute processing through a crude distillation tower.
7. Press reports indicate that BIS has issued additional private letter rulings, including to Royal Dutch Shell, approving or indicating that condensate or ultra-light oil can be exported. http://www.wsj.com/articles/royal-dutch-shell-allowed-to-export-oil-from-u-s-1421232880?mod=WSJ_hp_LEFTWhatsNewsCollection&autologin=y; <http://www.eenews.net/energywire/stories/1060011142/print>. Please produce such approvals, records indicating such exports are permissible, or communications between BIS and others outside the agency about such exports.

Exemptions and Discretion to Release Records to Promote Public Right-to-Know

We are aware that the Department of Commerce has refused to release export permit information in the past, invoking Section 12(c) of the Export Administration Act of 1979, which states that: “Information obtained under this Act after June 30, 1980, may be withheld only to the extent permitted [b]y statute, except that information obtained for the purpose of, consideration of, or concerning, license applications under this Act shall be withheld from public disclosure unless the release of such information is to be determined by the Secretary to be in the national interest.” 50 U.S.C. App. 2411(c).

This statutory provision, however, does not authorize withholding of the requested records for two reasons. First, FOIA authorizes withholding pursuant to a statute that either leaves no discretion to the agency as to whether to withhold the specific information or refers to the particular types of records to be withheld. 5 U.S.C. § 552(b)(3). Courts have held that Section 12(c) of the Export Administration Act qualified as an Exemption 3 statute under the second test once it was amended to identify license applications as the types of records to be withheld. *See Lessner v. Department of Commerce*, 827 F.2d 1333 (9th Cir. 1987); *Durnan v. Department of Commerce*, 777 F. Supp. 965 (D.D.C. 1991). However, the Export Administration Act has expired and no other statute requires withholding and meets the requirements of FOIA Exemption 3. By Executive Order, the President has issued one-year extensions of the regulations promulgated to implement the Export Administration Act, *see* 79 Fed. Reg. 46,959 (Aug. 7, 2014), but that presidential extension cannot, consistent with the constitutional separation of powers and the plain language of FOIA Exemption 3, be an Exemption 3 withholding statute without some other clear congressional direction to withhold particular records from the public. *See Electronic Frontier Foundation v. Dept. of Commerce*, 2013 WL 3730096 (N.D. Cal. 2013) (distinguishing *Times Publishing Co. v. Dept. of Commerce*,

236 F.3d 1286 (11th Cir. 2001), and *Wisconsin Project on Nuclear Arms Control v. Dept. of Commerce*, 317 F.3d 275 (D.C. Cir. 2003), which relied on the statute authorizing the Presidential extensions to authorize withholding, because Congress subsequently enacted another statute extending Section 12(c) to, but not beyond, August 30, 2001, the Export Administration Modification & Clarification Act, Pub. L. No. 106-508 (Nov. 13, 2000)). Congress has not enacted a new statute covering export licenses and meeting Exemption 3's withholding requirements. Since FOIA generally and Exemption 3 specifically provide a legislative check on agency discretion to keep information from the public, it is imperative that Congress authorize withholdings by statute, rather than allow an agency or even the President to do so administratively. See *Department of Homeland Security v. MacLean*, No. 13-894 (U.S. Supreme Court Jan. 21, 2015) (where Congress sought to constrain federal agencies, only a legislative enactment, and not a regulation, qualifies as a "law" that can prohibit whistleblower disclosures).

Second, the prong of Exemption 3 that has previously been invoked for Section 12(c) of the Export Administration Act authorizes withholding only of matters "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Section 12(c) specifically identifies license applications as the only type of matters that may be withheld. It appears, however, that Enterprise Products Partners and Pioneer Natural Resources, and likely other companies, did not seek a license. Instead, they sought a product classification or other BIS ruling confirming that they did not need such a license. By its terms, therefore, Section 12(c) does not compel withholding of records pertaining to the rulings issued to Enterprise Products, Pioneer Natural Resources, or others since they neither applied for nor obtained a license. Nor can Section 12(c) authorize the withholding of records pertaining to the FAQ guidance or responses to senatorial inquiries, which similarly do not concern license applications. When BIS is deciding whether to issue an export license, it is typically balancing national security, foreign policy, international obligations, and economic interests. In contrast, it appears that BIS assessed whether Enterprise Products Partners and Pioneer Natural Resources were processing crude oil in a way that converts it from crude oil, subject to the crude oil export ban, into a refined product that may be exported without a license.

For these reasons, no Exemption 3 statute encompasses the requested records. And Section 12(c) of the Export Administration Act cannot be invoked to shield these records from disclosure. In the absence of an applicable Exemption 3 statute, BIS may still invoke other FOIA exemptions if, for example, the applications contain some confidential business information. BIS must, however, segregate information that may properly be withheld and disclose the remainder of the records.

Not only must FOIA exemptions be narrowly construed, but this request raises a fundamental public right to know the basis for federal agency decision-making. While it is possible that some of the submitted information or aspects of the BIS determination may relate to

confidential business information, the ruling itself and the rationale are matters of public policy that are not exempt from disclosure.

There has been extensive speculation about the meaning of the BIS rulings in the media and among industry players, elected officials, and the public. Competing headlines illustrate the speculation: “US Ruling Loosens Four-Decade Ban on Oil Exports,” “Ban on Oil Exports Seen Dying One Ruling at a Time,” “Game Changer or Symbolic Move?” and “Did the Commerce Condensate Export Rulings Mean Nothing?” The public has a right to know whether the BIS rulings reflect a relaxation of the crude oil export ban and portend more to come or whether they apply only to very particular refining processes.

BIS regulations define crude oil subject to the export ban to include “lease condensate” and oil, “which has not been processed through a crude oil distillation tower.” 15 C.F.R. § 754.2. The public has a right to know whether BIS has deviated from or modified these parameters. In fact, Senators Markey and Menendez suggest that BIS lacks authority to approve the export of condensate without Presidential findings, that doing so is consistent with the national interest and the purposes underlying the ban, and without revising the regulations through public notice and comment.

By keeping the Enterprise Products, Pioneer Natural Resources, and potentially other similar rulings secret, BIS is keeping the public in the dark. Meanwhile, the companies that obtained the approvals are moving forward and the lawyer for one of the companies is able to capitalize on his knowledge of the basis for the rulings by representing other companies seeking similar approvals. It is antithetical to FOIA and principles of democracy and agency accountability to allow agencies to issue secret rulings on matters of public policy. Indeed, FOIA’s affirmative disclosure provisions direct federal agencies to make available to the public statements of policy and interpretations formulated by the agency. 5 U.S.C. § 552(a)(1)(D) & (a)(2)(B).

The release of the December 30, 2014, FAQs provides some information about the basis for the private letter rulings and other determinations being made by BIS. However, that guidance leaves many questions unanswered. It identifies factors BIS will consider in determining whether crude oil has been sufficiently processed through a distillation tower to be considered a petroleum product that needs no export permit. However, the guidance states that the articulated factors “are not intended to be categorical or exhaustive.” BIS indicates that it will consider commodity classification applications based on their particular circumstances. This means the standards governing whether the crude oil export ban applies are being developed by BIS as it responds to inquiries and handles applications for commodity classifications.

We believe BIS has a legal obligation to disclose the recent rulings under these affirmative FOIA disclosure provisions. To compel disclosure of both the rulings and the other requested records, we are filing this request. If BIS believes some exemptions apply to the

requested records, which we believe would extend only to discrete information contained in the records at best, we ask the Secretary to exercise its discretion to disclose the records in its discretion. Such discretion exists in Section 12(c) of the Export Administration Act in the event it applies. In addition, President Obama has directed federal agencies to administer FOIA to err on the side of openness. *See* Memorandum for the Heads of Executive Departments and Agencies Re: Transparency and Open Government (Jan. 21, 2009). To implement this transparency directive, Attorney General Holder issued guidance to federal agencies, which provides:

an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

FOIA Mem. For Heads of Executive Branch Departments and Agencies from Attorney General Holder (Mar. 19, 2009), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

Given the over-riding public interest in understanding the recent actions excepting certain crude oil from the export ban, BIS and the Department should release the requested information.

Request for a Fee Waiver

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 4.11.

Oil Change International is a research, communication, and advocacy organization focused on exposing the true costs of fossil fuels and facilitating the coming transition towards clean energy. Sightline Institute is a research and communication organization focused on the Pacific Northwest, particularly the region's changing energy economy. Both are non-profit organizations, which have no commercial interest in the requested records. Their sole interest in obtaining the request records is to analyze the information and disseminate it to the public.

Oil Change International and Sightline Institute are news media requesters that actively gather information on oil issues, including the crude oil export ban, turn raw information into reports and expert analysis and disseminate the information and analysis to the public. Accordingly, only duplication costs could be charged for this request.

We ask for a full fee waiver because “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of these operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(iii). As discussed above, this request concerns a matter of over-riding

public importance. The public has a right to know how BIS is interpreting and applying the crude oil export ban in its recent secret rulings. Daylighting this information will contribute greatly to public understanding of the operations of BIS on this public policy matter.

Both requesters have the expertise to analyze the requested records and the ability to disseminate the information and its analysis to the public. Oil Change International is the only environmental NGO in the United States focused exclusively on the oil, gas and coal industries. Its research, communications and campaign staff has each spent a large part of their careers studying, analyzing and publishing information on these key players in the U.S. and global economy. The organization publishes dozens of reports annually examining every aspect of these industries from environmental risks to subsidies and investor risk. No other organization has greater collective expertise on the issues Oil Change International works on.

Oil Change International staff are frequently quoted in the media and invited to present and speak at various conferences and events. *E.g.*, <http://www.loe.org/shows/segments.html?programID=14-P13-00013&segmentID=3>. Its staff were consulted by the Government Accountability Office for its recent report on lifting the crude oil export ban. <http://www.gao.gov/assets/670/666274.pdf>. Oil Change International has issued reports on attempts to lift the crude oil export ban. *E.g.*, *Lifting the Ban, Cooking the Climate: The Climate Impact of Lifting the Crude Oil Export Ban* (March 2014), available at <http://priceofoil.org/2014/03/03/lifting-ban-cooking-climate/>; *Should it Stay or Should it Go? The Case Against U.S. Crude Oil Exports* (Oct. 2013), available at http://priceofoil.org/content/uploads/2013/10/OCI_Stay_or_Go_FINAL.pdf. Oil Change International informs hundreds of thousands of people through its website and social media. Its reports are downloaded by the thousands. It regularly emails over 105,000 subscribers, most of whom are in the United States. It is followed by over 5,000 people on Twitter and over 42,000 on Facebook, achieving a Facebook 'reach' in the hundreds of thousands.

Sightline Institute plays a prominent role in informing the public about oil, gas and coal developments in the Northwest and around North America. Sightline staff have spent a large part of their careers studying, analyzing and publishing information on these key players in the U.S. energy economy. The organization publishes scores of reports, articles, and other analyses on these issues each year. Sightline's reports are downloaded by the thousands, and it regularly emails over 12,000 subscribers, most of whom are in the United States. The organization is routinely called upon by federal and state policymakers, and Sightline staff are frequently quoted in the media and invited to present and speak at various conferences and events. In 2014, Sightline was quoted or cited in more than 303 news media accounts of energy issues. Sightline Institute informs hundreds of thousands of people through its website and social media. It is followed by over 7,100 people on Twitter and nearly 4,000 users on Facebook, achieving a Facebook 'reach' in the hundreds of thousands.

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Please do not hesitate to call me to clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at (206) 343-7340 ext. 1032.

Sincerely,

A handwritten signature in black ink that reads "Patti Goldman". The signature is written in a cursive, flowing style.

Patti Goldman
Attorney for Oil Change International and
Sightline Institute