

SPOTLIGHT REPORT

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Keystone Legislation Faces Insurmountable Hurdles

What's Happening: On Tuesday night, BHP Billiton announced it had signed a contract to export 650,000 barrels of lightly processed condensate without prior approval from the federal government. This is the first crude oil to be independently exported from the United States without first receiving a private letter ruling from the Department of Commerce.

Why It Matters: Commerce's Bureau of Industry and Security (BIS) issued two separate private letter rulings earlier this year that allowed Pioneer Natural Resources and Enterprise Products Partners to begin exporting lease condensate (condensate that comes directly from the well) that had been lightly processed in stabilizers with distillation towers that stabilize crude oil for transport. Private letter rulings are not permits to export. Rather, they provide guidance on the legal method to export a specific commodity. As the rulings apply to the commodity rather than the specific company that is issued a letter, any other company that follows the guidelines in the letter can also export that same commodity. However, as the letters are by their very nature private, other companies have – until now – not attempted to do so. BHP Billiton's decision to export processed condensate without its own private letter ruling is unlikely to be the last, and a condensate export expansion could partially mitigate the pain oil producers are currently experiencing due to the precipitous drop in the price of oil, particularly in the Eagle Ford Shale where the oil often contains significant levels of condensate and many producers already have in place the necessary distillation towers. Nonetheless, the international price of oil and the relatively small market for condensates present limiting factors to the amount of oil we could see exported in this manner.

What's Next: While many sources have been framing this latest crude export step as a crack in the dam holding back crude exports, we believe it would be more accurate to describe it as one more turn in the valve releasing the pressure. The Commerce Department maintains that allowing lightly processed condensate is not a change in oil export policy and it has made no move to expand that policy to crude oil itself. Additionally, the White House has expressed little interest in actively addressing the ban, preferring to put the onus on Congress to change the law that bans exports.

Meanwhile, Congress has so far not made significant progress on any oil export legislation. The topic received little lip service last year and many members whose states and districts are not oil-heavy have been reluctant to address the ban, fearing a backlash if gasoline prices subsequently go up. But with Congress now controlled by the Republicans, the party's free market ethos will increase chatter about lifting the ban and should lead to legislation at least being considered, albeit more slowly than many in the industry hope. We do not believe such legislation will pass both chambers though due to political concerns over the perception of a linkage between exports and gasoline prices and, even if it did, President Obama will be unlikely to sign it based on environmental concerns. But the Obama administration will likely at least implicitly support increased condensate exports as they would alleviate some of the pressure to address the broader export ban issue.

The Department of Commerce and the Condensate Question

Since Pioneer and Enterprise received their private letter rulings, over a dozen other companies have filed with Commerce requesting letters confirming that they can export condensate. However, Commerce paused the letter process at the end of July to develop still as yet unreleased formal and open guidance to which all potential exporters would have access.

BIS, the bureau within the Department of Commerce that covers oil exports, is not particularly well equipped to handle this issue. The bureau typically focuses on defense and security, with a much greater expertise in weapons technology than energy. *The Wall Street Journal* reports that, during meetings leading up to the original private letter rulings, at least one Commerce official had to ask oil executives how to spell "condensate." And BIS also seemed to not be aware of how provocative their decision would be. White House Counselor John Podesta told reporters that the White House had been surprised to hear about Commerce's issuance of the private letter rulings, meaning BIS had not consulted higher up the line before making their decision.

Once faced with far more attention than officials had expected, Commerce stepped back to clarify and solidify internal policy. While many in the industry have been hopeful that this pause would lead to wider exports, clarification has taken longer than the industry expected and is unlikely to lead to widening exports beyond the processed condensate ruling already made.

Based on this extended consideration process, BIS could still reverse the rulings it made in the private letters, although we think that is very unlikely. The condensate exports actually serve as a useful pressure release valve, letting some exports

proceed without forcing the administration to make any formal policy shift regarding the export ban.

For their part, BHP Billiton is confident that they are not about to come out on the wrong side of the law, having said, “We took the necessary time to thoroughly examine the issues involved and ensure the processed condensate was eligible for export.”

Commerce Unlikely to Lift Crude Export Ban

Enterprise allowed Jacob Dweck, the leading partner at Sutherland Asbill & Brennan who represented Enterprise on their application for exports, to describe the contents of the rulings at the Energy Information Administration’s 2014 Energy Conference this past summer and he has described them in other lectures since then as well.

Dweck has said that in his legal opinion, the private letter rulings do not apply to WTI crude oil that has been processed through a distillation tower, as Enterprise only discussed condensate with BIS. He noted that another company theoretically could apply to export processed WTI crude oil in the same way as lease condensate and that it would not be illogical for BIS to extend its decision from condensate to crude, but that BIS would have to issue a separate ruling for that. After the sudden attention BIS received from its minimal condensate ruling, we believe it is highly unlikely they would take a step that would unilaterally narrow the crude export ban beyond condensates.

Dweck also suggested that BIS has the option under the law to also change the definition of crude to not include lease condensate. However, this would require an official rulemaking, which legally requires that the rule be open to public comment. It would be unlikely that the administration would want to open itself to that level of environmental fallout.

For now, Dweck explains that the crude oil that is covered by the Commerce rulings must meet all of four criteria:

- “Processed from lease condensate feedstock
- Processed through a distillation tower to remove gaseous and liquid natural gas liquids
- Segregated from other non-exportable, unprocessed crude
- Suitable as petrochemical feedstock or for other non-refining uses in addition to further refining”

[A copy of Dweck’s slides from the EIA conference can be viewed here.](#)

What's on Tap in The GOP-led Congress

To date, Congress has had an uneven response to the movement pushing to lift the ban on crude oil exports.

Supporters of the ban have been led by Senator Lisa Murkowski (R-AK), who is now poised to take the chair of the powerful Senate Energy and Natural Resources Committee in January. While Murkowski had originally called on the administration to lift the oil export ban, in September she told reporters that falling oil and gasoline prices mean it may be timely for Congress to lift the oil export ban itself in 2015.

But to move that bill to the Senate floor, she would need to achieve bipartisan support. Murkowski is well known for reaching across the aisle, and if her Ranking Member on the Committee remains current Chair Mary Landrieu (D-LA), who represents an energy producing state and is a strong supporter of oil exports, then Murkowski will likely have the support she needs to push the bill.

However, Landrieu is in a very tight runoff race that will not be decided until December 6th, and if she loses, environmentalist Senator Maria Cantwell (D-WA) will be ranking member on the committee. Cantwell can be expected to throw as many roadblocks as possible in the way of any bill that facilitates exports. The leading oil trade organization, the American Petroleum Institute, will be backing Landrieu rather than her Republican opponent in the runoff election, in large part to hold off Cantwell.

Republicans in the House have expressed more support for a bill than those in the Senate. House Energy and Commerce Committee Chair Fred Upton (R-MI) has said that he believes the House will put forward a bill on this topic next Congress, but it is unlikely to be a rushed process. He has previously said that Congress will “need to ask a lot of questions” about what a bill would look like and he compared it to the slow and steady process the House used when passing an LNG export bill earlier this year. That bill took over six months to move from committee to the House floor, despite regular calls for it to be a fast moving response to the Ukraine crisis.

And some Republicans simply remain unconvinced. As recently as this past September, Energy and Commerce’s Subcommittee on Energy and Power Chair Ed Whitfield (R-KY), who would be key to any export law, said, “I’ve been reading a number of articles recently from some quite knowledgeable people who are of the opinion that the shale oil discovery may not be quite the bonanza that we expect it to be ... And so because of the direct link between oil and gasoline prices — and that’s always a hot political topic here in the U.S. — anything about oil exports is going to be a little bit more dicey an issue.” Nonetheless, Whitfield noted that his subcommittee intends to hold a number of hearings to learn about oil exports and they plan to get to the bottom of the issue.

In short, while we expect some GOP members of Congress to go so far next year as to introduce legislation to lift the crude export ban, we do not believe such legislation will pass both chambers and, even if it did, President Obama would unlikely sign it. But we expect that the Obama administration will at least implicitly support increased condensate exports as they would alleviate some of the pressure to address the broader export ban issue.