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8 UNITED STATES DISTRICT COURT
9 FOR THE WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 SIGHTLINE INSTITUTE,) No.
12)
13 Plaintiff,) COMPLAINT FOR DECLARATORY
14) AND INJUNCTIVE RELIEF
15 v.)
16 UNITED STATES BUREAU OF INDUSTRY) Freedom of Information Act
17 AND SECURITY,)
18 Defendant.)
19)

17 INTRODUCTION

18
19 1. This action alleges violations of the Freedom of Information Act (“FOIA”), 5
20 U.S.C. § 552 *et. seq.* In recent decisions, Defendant, the U.S. Bureau of Industry and Security
21 (“BIS”) has weakened the effective ban on exports of U.S. crude oil. Plaintiff, Sightline Institute
22 (“Sightline”), filed a FOIA request seeking pertinent records to enable it to analyze the basis and
23 impact of these decisions and disseminate the information to the public. BIS is unlawfully
24 withholding the information sought by Sightline. BIS failed to comply with FOIA’s statutory
25 deadlines by failing to respond to Sightline’s FOIA request within the time required by law.
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27 COMPLAINT FOR DECLARATORY
28 AND INJUNCTIVE RELIEF

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1 Sightline seeks declaratory relief that BIS has no basis for withholding the request records and
2 injunctive relief directing BIS to promptly provide Sightline with the requested material.

3 JURISDICTION AND VENUE

4 2. This Court has jurisdiction to enjoin the withholding and order the production of
5 withheld records pursuant to 5 U.S.C. § 552(a)(4)(B).

6 3. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) because
7 Sightline, which made the FOIA request, has its principal place of business in Seattle,
8 Washington.

9 4. Declaratory relief is appropriate under 28 U.S.C. § 2201.

10 PARTIES

11 5. Sightline Institute is a nonprofit research and communications center in Seattle,
12 Washington, with a mission of making the Northwest a global model of sustainability—strong
13 communities, a green economy, and a healthy environment. Founded in 1993, Sightline has
14 emerged as a regional leader in the sustainability movement, with a particular focus on the
15 intersection between environmental issues, such as fossil fuel development, and social justice
16 issues. The organization publishes scores of reports, articles, and other analyses on
17 environmental and sustainability topics each year, including many on developments in oil, gas,
18 and coal production, transport, and consumption. The organization is routinely called upon to
19 brief and educate federal and state policymakers, and Sightline staff are frequently quoted in the
20 media and invited to present and speak at various conferences and events.

21 6. BIS is a federal agency in the U.S. Department of Commerce. BIS is a licensing,
22 regulatory, and enforcement agency that is charged with issuing and enforcing the Export
23 Administration Regulations, among other things. 15 C.F.R. § 730.1. BIS also implements the
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1 general ban on crude oil exports and issues licenses, where permitted, for exports of crude oil
2 from the United States. 15 C.F.R. § 754.2. BIS is in possession and control of the records
3 sought by Sightline.

4 STATEMENT OF FACTS

5 I. BIS ADMINISTRATION OF THE CRUDE OIL EXPORT BAN

6 7. The Energy Policy and Conservation Act of 1975 (“EPCA”), spurred by the
7 1970s Arab oil embargo, directed the President to promulgate a rule banning the export of crude
8 oil produced in the United States. 42 U.S.C. § 6212(b)(1). EPCA permitted the President to
9 create specific exemptions based on the purpose of the export, the class of seller or purchaser, or
10 the country of origin or destination. *Id.* § 6212(b)(1).

11 8. BIS is the federal agency that administers the crude oil export ban. BIS has
12 promulgated regulations codifying the crude oil export ban, along with the presidential and
13 statutory exemptions to it, and established licensing requirements for those exports that are
14 permitted. 15 C.F.R. § 754.2.

15 9. Under the crude oil export regulations, domestic refined oil and petroleum
16 products may generally be exported without a permit. It is the regulatory definition of “crude
17 oil” that differentiates between crude oil subject to the ban and refined oil and petroleum
18 products that can be exported without a permit.

19 10. Under BIS’s regulation, “crude oil” is defined as: “a mixture of hydrocarbons
20 that existed in liquid phase in underground reservoirs and remains liquid at atmospheric pressure
21 after passing through surface separating facilities and which has not been processed through a
22 crude oil distillation tower. Included are reconstituted crude petroleum and lease condensate and
23 liquid hydrocarbons produced from tar sands, gilsonite, and oil shale. Drip gases are also
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1 included, but topped crude oil, residual oil, and other finished and unfinished oils are excluded.”
2 15 C.F.R. § 754.2(a).

3 11. Condensate is an especially light form of crude oil. BIS regulations explicitly
4 define condensate as falling within the definition of crude oil, making it subject to the crude
5 export ban. *Id.*

6 12. In recent years, unconventional oil drilling has produced a surge in domestic oil
7 production, including from wells that produce large amounts of condensate.

8 13. Due to these developments, the oil industry has advocated for a repeal of the
9 crude export ban, or alternatively for new exceptions or other avenues to allow additional
10 exports. These efforts include attempts to allow the export of condensate. In July 2014, BIS
11 issued private letter rulings to two companies – Enterprise Products Partners LP and Pioneer
12 Natural Resources Co. – indicating that their lease condensate could be redefined and exported
13 as refined petroleum. These letter rulings have never been released to the public.

14 14. On December 30, 2014, BIS posted frequently asked questions (“FAQs”) and
15 answers on its website. The FAQs include a new definition of what constitutes “crude oil” and
16 processing “through a crude distillation tower.” “FAQs – Crude Oil and Petroleum Products.”
17 <http://www.bis.doc.gov/index.php/policy-guidance/faqs?view=category&id=114#subcat171>.
18 BIS did not seek public comment or conduct formal rulemaking under the Administrative
19 Procedure Act in developing these new definitions.

20 15. BIS’s December 30, 2014 FAQs confirm that lease condensate is defined as crude
21 oil under the BIS regulations, but then state that “lease condensate that has been processed
22 through a crude distillation tower is not crude oil but a petroleum product.” *Id.* The FAQs offer
23 a definition of distillation as “the process of separating a mixture of components according to
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1 their differences in boiling points.” According to the FAQs, more than *de minimis* processing (or
2 what it calls “material processing”) would be required in order to qualify as being processed
3 through a distillation tower, and certain technologies, such as flash drums and separators, would
4 not suffice. *Id.* The FAQs identify several factors that BIS will consider in determining whether
5 a product has been “processed through a crude oil distillation tower.” *Id.*

6 16. The new definitions could significantly increase crude exports. News reports
7 indicate that exports of condensate have already increased in 2015.

8 17. The new definitions will be applied largely outside of public processes. For
9 example, some companies will likely choose to self-certify exports, meaning they will not obtain
10 a letter ruling, commodity classification, or other permission from BIS prior to the export. To
11 the extent that companies do inquire about the legality of their proposed export, BIS will likely
12 apply the new FAQ definitions in secret reviews of applications from prospective exporters or
13 through secret responses to inquiries about whether an export license is required. Many of the
14 details of the new definitions will be fleshed out in those secret reviews or exchanges.

16 II. SIGHTLINE’S FOIA REQUEST

17 18. In order to evaluate and better understand BIS’s changes to the crude export ban,
18 on February 10, 2015, Sightline submitted a FOIA request to BIS seeking records related to the
19 new developments regarding condensate and the new definition of processing through a
20 distillation tower. Specifically, Sightline requested that BIS disclose:

- 21 1. Recent press reports have indicated that BIS gave approval to two companies –
22 Enterprise Products Partners LP and Pioneer Natural Resources Co. – to export
23 condensate likely in the form of a product classification, letter ruling, or other indication
24 that no export license would be required. *See, e.g.*, <http://www.bidnesstc.com/22261-rules-on-us-crude-oil-exports-relaxed/>;
25 <https://www.energyvoice.com/oilandgas/62311/ban-us-oil-exports-seen-dying-one-ruling-time/>;
26 <http://www.investorvillage.com/smbd.asp?mb=5028&mn=40107&pt=msg&mid=140686>

1 72. Please provide us with the application, the BIS ruling, the export permit or product
2 classification, communications between BIS, the companies and others outside the
3 Department of Commerce, and any other records describing what was covered by the
4 approval or other action and the basis for it.

- 5 2. Press reports also indicate that: (a) other companies have sought approval or other BIS
6 action allowing exports of condensate or other crude oil products; and (b) that BIS may
7 have put these applications on hold and may have asked applicants to provide additional
8 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
9 records revealing the nature of the requests and the current status, including the
10 applications, BIS responses, and all communications between BIS and the applicants.
- 11 3. Press reports indicate that BHP Billiton and possibly other companies have decided to
12 start exporting what has been called slightly processed ultra-light oil without obtaining a
13 ruling, product classification, or approval from BIS.
14 <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
15 sought BIS approval, any communication between BIS and BHP Billiton and other
16 similarly situated companies with respect to such exports, and/or describing whether and
17 if so why BIS believes such exports are permissible in light of the crude oil export ban.
- 18 4. On July 2, 2014, Senators Edward Markey (D., Mass.) and Robert Menendez (D., N.J.)
19 sent a letter to Secretary of Commerce Penny Pritzker seeking information about the
20 Enterprise and Pioneer rulings and crude oil exports, including whether BIS is deviating
21 from its regulatory definitions of condensate as subject to the crude oil export ban.
22 <http://petroglobalnews.com/2014/07/two-senators-want-details-about-export-rulings/>.
23 Please produce any responses to this letter and to other inquiries from Members of
24 Congress pertaining to BIS approvals of oil exports or to BIS interpretations of the
25 definition of crude oil subject to the export ban.
- 26 5. On December 30, 2014, BIS posted on its website a document entitled “FAQs – Crude
27 Oil and Petroleum Products.” <http://www.bis.doc.gov/index.php/policy-guidance/faqs?view=category&id=114#subcat171>. Please produce all records: (a)
28 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

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

3 6. Please produce records describing or elucidating the interpretations by BIS, including
4 through letter rulings or commodity classifications, of the regulatory definition of crude
5 oil and crude distillation tower, of whether condensate was defined as or treated as crude
6 oil and of BIS considered to constitute processing through a crude distillation tower.

7 7. Press reports indicate that BIS has issued additional private letter rulings, including to
8 Royal Dutch Shell, approving or indicating that condensate or ultra-light oil can be
9 exported. [http://www.wsj.com/articles/royal-dutch-shell-allowed-to-export-oil-from-u-s-
10 1421232880?mod=WSJ_hp_LEFTWhatsNewsCollection&autologin=y;](http://www.wsj.com/articles/royal-dutch-shell-allowed-to-export-oil-from-u-s-1421232880?mod=WSJ_hp_LEFTWhatsNewsCollection&autologin=y)
11 <http://www.eenews.net/energywire/stories/1060011142/print>. Please produce such
12 approvals, records indicating such exports are permissible, or communications between
13 BIS and others outside the agency about such exports.

14 19. On February 19, 2015, Sightline's counsel received a form email from
15 efoiarequest@bis.doc.gov, granting Sightline's request for a fee waiver.

16 20. Sightline's counsel has had two phone conversations with BIS's FOIA officer,
17 Jennifer Kuo, seeking a response to the request, but these conversations did not result in a
18 response.

19 21. In a form letter dated June 11, 2015, BIS acknowledged receipt of Sightline's
20 FOIA request and assigned it tracking number DOC-BIS-2015-000669. There has been no other
21 communication from BIS regarding this FOIA request.

22 22. BIS has failed to release any requested records or substantively respond to
23 Sightline's FOIA request.

24 LEGAL BACKGROUND

25 I. FOIA

26 23. FOIA creates a statutory right of public access to agency records by requiring that
27 federal agencies make records available to any person upon request, unless the records are
28 subject to a statutory exemption or exclusion. 5 U.S.C. § 552(a)(3)(A).

1 24. President Obama has issued a FOIA memorandum directing that FOIA “should be
2 administered with a clear presumption: In the face of doubt, openness prevails.” Freedom of
3 Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

4 25. FOIA contains strict deadlines for responding to requests. FOIA requires an
5 agency to issue a final determination resolving an information request within twenty business
6 days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

7 26. The FOIA allows an agency to extend its determination deadline by ten business
8 days only when “unusual circumstances” exist and when the agency notifies a requester in
9 writing. 5 U.S.C. § 552(a)(6)(B). In limited circumstances, the FOIA allows an agency to
10 impose an “unusual circumstances” decision extension beyond ten business days when certain
11 conditions are satisfied:
12

13 With respect to a request for which a written notice [purports to apply the
14 “unusual circumstances” extension beyond 10 business days], the agency shall
15 notify the person making the request if the request cannot be processed within the
16 time limit specified in that clause and shall provide the person an opportunity to
17 limit the scope of the request so that it may be processed within that time limit or
18 an opportunity to arrange with the agency an alternative time frame for processing
19 the request or a modified request. To aid the requester, each agency shall make
20 available its FOIA Public Liaison, who shall assist in the resolution of any
21 disputes between the requester and the agency.

22 5 U.S.C. § 552(a)(6)(B)(ii).

23 27. Under FOIA, an agency’s failure to comply with the Act’s deadlines constitutes a
24 constructive denial of the request, and the requester’s administrative remedies are deemed
25 exhausted for purposes of litigation. 5 U.S.C. § 552(a)(6)(C)(i).

26 28. FOIA compels the release of the requested records, unless they fall within one of
27 FOIA’s nine narrowly tailored exemptions. 5 U.S.C. § 552(b)(1)-(9). Exemption 3 authorizes
28 withholding pursuant to a statute that either leaves no discretion to the agency as to whether to

1 withhold specific information or refers to particular types of records to be withheld. 5 U.S.C. §
2 552(b)(3). Another FOIA exemption allows nondisclosure of confidential business information.
3 5 U.S.C. § 552(b)(4).

4 29. The agency bears the burden of proving that one of the exemptions applies. 5
5 U.S.C. § 552(a)(4)(B). Even if some information is exempt from disclosure, “[a]ny reasonably
6 segregable portion of a record shall be provided to any person requesting such record after
7 deletion of the portions which are exempt” 5 U.S.C. § 552(b).

8 II. THE EXPORT ADMINISTRATION ACT OF 1979

9 30. The Export Administration Act of 1979 (“EAA”) provided authority for the
10 federal government to regulate U.S. exports. 50 App. U.S.C.A. § 2401, *et seq.* The EAA has
11 lapsed many times, and expired most recently on August 20, 2001. 50 App. U.S.C.A. § 2419.
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13 31. The EAA included a provision which authorized withholding of information used
14 in export license applications. This provision, found in section 12(c) of the EAA, stated:

15 “Information obtained under this Act after June 30, 1980, may be withheld only to the extent
16 permitted [b]y statute, except that information obtained for the purpose of, consideration of, or
17 concerning, license applications under this Act shall be withheld from public disclosure unless
18 the release of such information is to be determined by the Secretary to be in the national
19 interest.” 50 U.S.C. App. 2411(c).

20 32. Courts have held that Section 12(c) of the EAA qualified as a FOIA “Exemption 3
21 statute,” meaning that while the EAA was in effect, records obtained for license applications
22 under the EAA could have been withheld on the grounds that they were protected from release
23 by a mandatory withholding federal statute. *See Lessner v. Department of*
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1 *Commerce*, 827 F.2d 1333 (9th Cir. 1987); *Durnan v. Department of Commerce*, 777 F. Supp.
2 965 (D.D.C. 1991).

3 33. After expiration of the EAA, successive Presidents have issued Executive Orders
4 purporting to grant one –year extensions of the regulations promulgated to implement the EAA,
5 the Export Administration Regulations. *See* 79 Fed. Reg. 46,959 (Aug. 7, 2014).

6 34. Congress ratified the presidential extensions of the Export Administration
7 Regulations up to, but not beyond, August 20, 2001. Export Administration Modification &
8 Clarification Act, Pub. L. No. 106-508 (Nov. 13, 2000).

9 CAUSE OF ACTION

10 VIOLATION OF THE FREEDOM OF INFORMATION ACT

11 1. The allegations made in all preceding paragraphs are realleged and incorporated
12 by this reference.

13 2. BIS is an agency under FOIA. It has possession and control of the requested
14 records.

15 3. Sightline submitted a FOIA request to BIS on February 10, 2015.

16 4. BIS has failed to provide a substantive response to Sightline’s FOIA request. It
17 has released no records and has merely provided a tracking number and a decision granting the
18 request for a fee waiver.

19 5. The deadline for issuing a final determination of Sightline’s FOIA request elapsed
20 on or about March 11, 2015. BIS has not invoked the FOIA provision allowing an extension due
21 to “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(ii). There are no “unusual circumstances”
22 within the meaning of 5 U.S.C. § 552(a)(6)(B)(ii) that would justify the long delay in responding
23 to Sightline’s FOIA request. BIS has violated FOIA and Sightline’s rights by failing to respond
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1 to Sightline's FOIA request by the deadline imposed by the FOIA. 5 U.S.C. §§ 552(a)(6)(A)(i),
2 (B). Sightline has fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§
3 552(a)(6)(A), (a)(6)(C).

4 6. BIS has violated Sightline's rights under FOIA by unlawfully withholding
5 information responsive to Sightline's FOIA request.

6 7. BIS has a duty to release any and all portions of records that are not subject to a
7 FOIA exemption. To the extent that BIS claims the application of any FOIA exemptions, BIS
8 has a duty to substantiate those claims and meet its burden of proof regarding the application of
9 any such exemptions. BIS has failed to prove that the requested records fall within any FOIA
10 exemptions. Even if BIS can prove that some portions of the requested records contain
11 confidential business information and can be withheld on that basis, it must release all segregable
12 portions of the requested records.

13 8. In responding to previous FOIA requests, BIS has refused to release export
14 license information on the grounds that Section 12(c) of the EAA authorizes withholding such
15 documents pursuant to FOIA Exemption 3. The EAA no longer qualifies as a FOIA Exemption
16 3 statute because it has expired. No other statute authorizes withholding of these documents.
17 The presidential extensions of the EAA's regulations constitute neither executive nor legislative
18 action. The presidential extensions are not federal statutes and do not meet the requirements of
19 FOIA Exemption 3. *See Electronic Frontier Foundation v. Dept. of Commerce*, 2013 WL
20 3730096 (N.D. Cal. 2013) (distinguishing *Times Publishing Co. v. Dept. of Commerce*, 236 F.3d
21 1286 (11th Cir. 2001), and *Wisconsin Project on Nuclear Arms Control v. Dept. of Commerce*,
22 317 F.3d 275 (D.C. Cir. 2003), which relied on the statute authorizing the Presidential extensions
23 to authorize withholding, because Congress subsequently enacted another statute extending
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1 Section 12(c) to, but not beyond, August 30, 2001, the Export Administration Modification &
2 Clarification Act, Pub. L. No. 106-508 (Nov. 13, 2000)).

3 9. Section 12(c) of the EAA authorized withholding only of license applications and
4 records. While it is possible that Enterprise Products Partners or Pioneer Natural Resources filed
5 license applications, BIS has determined that licenses will not be required to export some
6 condensate. BIS records pertaining to such exports fall outside the plain terms of section 12(c)
7 of the EAA. Even if Section 12(c) of the EAA remained in effect, it could not insulate the bulk
8 of the requested records from disclosure.

9 10. Sightline is seeking records that explain the full basis for the recent BIS
10 determinations regarding condensate exports and the definitions of crude oil and processing. BIS
11 has released some information through its FAQs, but many questions remain unanswered. The
12 public has a right to know the full basis for the new BIS definitions and interpretations.

14 REQUEST FOR RELIEF

15 WHEREFORE, Sightline prays that this Court:

16 1. Declare that BIS failed to make a timely determination on Sightline's information
17 request in violation of FOIA, 5 U.S.C. § 552(a)(6)(A)(i), that Sightline has fully exhausted all
18 administrative remedies required by FOIA, 5 U.S.C. §§ 552(a)(6)(A), (a)(6)(C), and that this
19 Court has jurisdiction to hear this case. 5 U.S.C. § 552(a)(4)(B).

20 2. Declare that the EAA does not qualify as a FOIA Exemption 3 statute and does
21 not authorize the withholding of any of the records sought by Sightline.

