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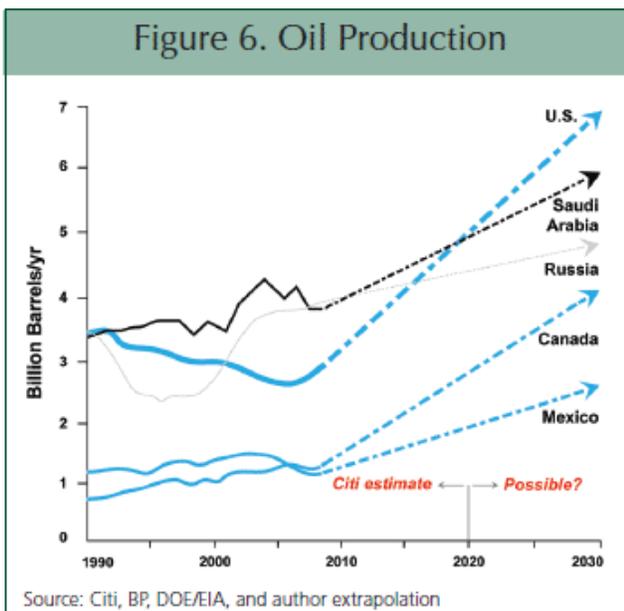
Age of Abundance: The Legal and Political Implications of Crude Oil Exports

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The prospect of realizing the full market driven potential of crude oil exports from the US is already confronting a plethora of difficult, though not insurmountable, challenges. Those opposed to any energy development in the United States and advocates against a market based approach to allocating energy resources are conditioning public opinion to treat oil as strictly a domestic resource, different from virtually every other good produced in the United States. Opposition groups - from environmental advocates to certain industrial interests and the national security community - all have clear incentives to prevent US oil exports. Given that export of crude oil already is one of the US's most regulated export activities, requiring multiple overlapping government approvals and permits, the opposition has many avenues to engage, advocate, and agitate to prevent exports from happening.

Market Fundamentals Support US Crude Oil Exports

The energy production boom, combined with new stringent fuel efficiency and renewable fuel regulations, in the United States has quickly flipped decades-long market fundamentals and is changing the characterization of the US energy picture from one of scarcity to one of surplus. As Mark Mills of the Manhattan Institute put it, "What's obvious now is that the United States is on track to become the world's largest producer of oil. No one would have talked this way 10 years ago ... even three years ago they were wringing their hands because we were going to run out of the stuff."



For crude oil, what once seemed impossible – the US being a significant oil exporter – is already on the cusp of becoming reality due both to increased supply and projected declining demand because of fuel efficiency standards and increased renewable fuel requirements under the Renewable Fuel Standard.

With no signs of this growth trend ending over the next decade, the growing continental surplus of hydrocarbons points to North America effectively becoming the new Middle East by the next decade; a growing hydrocarbon net exporting center.

The boom in US production of NGLs and ultra-light oil grades from shale formations around the country has caused a fundamental supply mismatch with the US refinery fleet, which is geared to process heavier grades of crude. The US market of refinery feedstock is increasingly over-supplied with light/sweet crude which has led to large stranded volumes in Cushing, OK and depressed the price of the benchmark crude oil West Texas Intermediate (WTI). The U.S. is expected to pump 9 million barrels of light, sweet crude a day in 2020, almost double the 4.6 million barrels a day in 2011, according to Turner, Mason & Co. Meanwhile, America's capacity to refine that kind of oil is expected to increase only slightly to 8 million barrels a day from the current level of 7.7 million barrels a day. Meanwhile, demand is anticipated to fundamentally change as well, with increased fuel efficiency standards being implemented through 2025 and increased requirements from blending renewable, cellulosic, and advanced biofuels which, because of the burdensome regulatory requirements, can actually create a disincentive for production of refined fuels in the United States

Given this reality it makes perfect sense that the US should engage in international oil trade, and swaps, to optimize the feedstock running through the domestic refinery system and ensure a fully efficient market for a valuable United States product.

Government Must Approve Oil Exports

Due to current US law, crude oil is one of the most heavily regulated export goods aside from military equipment. To export crude oil, the federal government must authorize the sale of the commodity abroad, the infrastructure necessary to transport the oil, and, often in conjunction with state officials, must conduct specific analyses required by major federal environmental statutes. The statutes impinging on crude oil exports include the Coastal Zone Management Act, the Energy Policy and Conservation Act, the Mineral Leasing Act, the Outer Continental Shelf Lands Act Amendments, and the Naval Petroleum Reserves Production Act. Additionally, the Clean Air Act, Clean Water Act, Endangered Species Act, Marine Mammal Protection Act, National Environmental Policy Act, National Historic and Preservation Act, and the Rivers and Harbors Act could be implicated in licensing decisions, and could be used by oil export opponents (e.g., environmental NGOs) to potentially delay or even block crude exports. To the extent further infrastructure is needed to transport oil to export terminals, or to build export terminals themselves, there is no doubt that opponents will seize a litany of environmental and regulatory laws to raise objections to what is already an expensive and lengthy approval process both before regulatory agencies and the courts.

The following points illustrate the many different agencies, statutes, and issues exporters would likely confront when seeking approval to sell crude oil abroad:

- The Department of Commerce's Bureau of Industry and Safety (BIS) review of oil export applications is limited to the "national interest" findings found in several federal statutes,

including the Mineral Leasing Act (1920), the Outer Continental Shelf Lands Act amendments (1978), the Naval Petroleum Reserve s Production Act (1976), and the Energy Policy and Conservation Act (1975). The BIS review is limited to ensuring that the export transaction described in the license application falls squarely within one of those existing findings.

- The BIS divides export applications into two categories: those receiving a “presumption of approval,” if they meet specific criteria (e.g., for consumption and use in Canada), and those reviewed on a case-by-case basis to determine whether they are consistent with the “national interest” and conform to the purposes of the Energy and Policy Conservation Act. Applications to BIS are currently opaque – there is no publicly available docket or queue of export permits.
- EPA (with states) must conduct air quality analysis and issue air quality pre-construction and operating permits. EPA also reviews all EISs prepared by other agencies for concerns and critiques. Any disturbance of “waters of the United States”—an amorphous term EPA has encompassed to apply to most relevant streams and tributaries—will require permits in coordination with the Army Corps of Engineers and the EPA.
- Department of Interior (with state historic preservation agencies) is required to conduct analysis ensuring historic sites are protected, address Indian tribal issues, and grant permits and licenses for access across federal lands.
- The Fish and Wildlife Service and National Marine Fisheries Service could be required to assist agencies in determining potential impacts on endangered/threatened species.
- States have a very important role under the Coastal Zone Management Act (CZMA). Since an oil export terminal, almost by definition, needs to be located within a state’s coastal zone, a hostile governor can use the CZMA to block the proposed energy activity on grounds it is not consistent with the state’s coastal zone management plan. (If a governor, under the CZMA, objects to a project on consistency grounds, the Secretary of Commerce can override the objection only if the activity in question is “consistent with the objectives or purposes [of the CZMA], or is necessary in the interest of national security”.)

Additionally, there are two overarching issues that, by themselves, could seriously delay export projects. First, NEPA applies to all major federal actions that significantly affect the environment. Issuing permits of for export facilities are almost certainly to be deemed a major federal action, thereby triggering NEPA review. The White House Council on Environmental Quality (CEQ) oversees and enforces NEPA for the Executive Branch. CEQ has issued draft guidance addressing how federal agencies should consider greenhouse emissions, their impacts on global climate change, and the resulting environmental effects, when analyzing major federal actions under NEPA. There are also proactive ways to streamline this process that can be presented to CEQ.

A central problem arises in drawing reasonable and practical limits around such an analysis. The environmental community is on record demanding that NEPA GHG analysis consider the upstream and downstream emissions flowing from fossil fuel export projects—a view that, if incorporated by CEQ into its final guidance, would undoubtedly mean greater delays and a dramatic spike in NEPA litigation that could alone threaten projects, regardless of the ultimate outcome, due to delays that could extend for years, in some cases going beyond the critical timeframes necessary for financing projects.

Second, when it comes to litigation, activist groups have utilized—and no doubt will continue to utilize—citizen suit provisions under numerous federal statutes to delay or block export projects. Activist groups can pursue lawsuits under the Clean Air Act, the Clean Water Act, the Endangered Species Act, NEPA, the Resource Conservation and Recovery Act, and the Administrative Procedure Act, a catch-all law that allows such groups to challenge most federal decisions. Whether these lawsuits have merit is beside the point: environmental groups know that, under various federal laws, they can “have their day” in court, a “day” that can tie up projects and permits for years.

The Predominant Narrative

Requesting authorization from the US government to export energy in almost any form runs counter to the dominant energy narrative in the US for over 40 years. This is especially true for crude oil. Ever since the 1973 “oil crisis” US citizens have believed that our need to import oil has been one of our greatest strategic weaknesses and a detriment to our economy. The reality of US oil scarcity for decades has guided energy policy, and much of our foreign policy, as the country struggled to maintain the inward flow of critical energy resources. For 40 years the reality of oil scarcity drove a narrative that was featured prominently everywhere, from media headlines to movie screens.

Today, thanks to massive leaps in innovation by the energy industry, the reality has changed: the US is now a province of increasing oil abundance. The US Energy Information Administration’s latest forecast from February 2013 found that domestic oil production is projected to increase from 6.89 million bbl/d in November 2012 to 8.15 million bbl/day in December 2014 – an astounding increase of over 1 million bbl/d in just two years. And geologic and economic reports are nearly unanimous in predicting that this abundance is only expected to increase in the decades ahead. The new reality is potentially great news for the industry and for the US; however, it is now at odds with the prevailing narrative about oil which has been ingrained over 40 years. This presents a problem for would-be oil exporters. Public sentiment still views oil as an extremely scarce resource to be protected and kept at home. A poll conducted in March 2013 found that energy prices are the most important issue facing the country with 85.2% of respondents saying they were extremely or very concerned about energy prices (YP Network poll released March 17, 2013).

Also consider the views captured at a recent Bloomberg Oil Forum. According to a poll of participants, which included energy traders, analysts, and energy professionals, more than 60 percent predicted the U.S. won’t allow companies to export crude oil within the next ten years. “Thirty-four out of 82 traders, analysts and energy professionals attending the forum in London, or 41 percent, said the U.S. would never allow exports, while 22 percent said only after 2023,” Bloomberg reported. “The U.S. will condone exports within the next five years, according to 13 percent of those polled, while the remaining 23 percent suggested sometime between 2018 and 2023.”

For the government to treat oil exports rationally – the same way it treats the exports of other commodities from corn to automobiles – the national narrative about oil needs to be changed.

Opposition to Oil Exports

The opposition to the oil industry in the US is well known. It should also be well known that some environmental NGOs will oppose US oil exports with the same virulence that they oppose drilling in ANWR, or hydraulic fracturing. The Sierra Club's "Beyond Oil" campaign certainly extends to stopping the proposed export of these resources. Sierra Club, and many similar ENGOs, has already written the playbook they will use to prevent oil exports. As explained above, their strategy will likely include, among other things, attempting to force a years-long programmatic Environmental Impact Statement (EIS) for crude oil export approvals, which would require extensive analysis of the environmental effects of all the upstream and downstream activities (oil exploration and production, rail traffic, pipeline construction, etc.) connected to exporting crude.

Even though ENGOs are pursuing a world without any GHG-emitting fuels, they will surely be joined in their opposition to oil exports by organizations and industries that have a vested interest in keeping these resources in the US. Certain consumers of crude oil may not want to compete on an international free market, and instead may seek to artificially keep prices depressed in the United States. Misguided consumer advocates, concerned about the high price of gasoline, are almost certain to oppose oil exports. These groups may also be joined by some members of the national security community who have spent entire careers pursuing reliable sources of crude oil for the US market and military. While the strange bedfellows of industrial oil users, national security officials, consumer advocates, and ENGOs are unlikely allies, it is clear that their interests - to stop oil exports - will be aligned and coordinated on this issue.

The opponents also have willing partners on Capitol Hill in the Chairman of the Senate Energy and Natural Resources Committee, Ron Wyden, and the Ranking Member of the House Natural Resources Committee, Ed Markey. In fact, Representatives Ed Markey and Rush Holt recently introduced legislation to place a moratorium on all US oil and natural gas exports. What's more, some pro-free trade and pro-energy policymakers argue that "oil is different" when it comes to exports.

While there is certainly strong opposition to oil exports in Congress, there are few vocal advocates. Many traditionally pro-oil and free market members and constituencies do not reject the idea of allowing US oil exports, but they are reluctant, at present, to speak against the decades-long refrain, from Democrats and Republicans, calling for US "energy independence." As they see it, with the U.S. poised to become the world's leading oil producer, the notion that oil, or a portion of it, would be exported runs counter to "energy independence," which has been a primary—and indeed popular—goal of U.S. energy policy for decades.

Explaining the Value of Energy Exports

As outlined, the approval of US oil exports faces strong headwinds. Forty years of the oil scarcity narrative, combined with highly motivated and effective opponents, mean that approval by the US government—that is, by the multitude of departments and agencies responsible for issuing studies,

permits and authorizations--is far from certain. What is needed to combat opponents and to change the narrative is an explanation of why oil exports are good for the United States and its citizens. This means explaining - at both the national and local levels – the benefits of free trade, the positive impacts on jobs and economic growth, the contributions to government revenues, the geopolitical influence that would accrue to the US by exporting oil, and the inevitable surplus being driven by environmental regulations that perversely could result in reduced production absent such exports. Perhaps most important, it must be stressed that, when it comes to exports, oil is just like any other important commodity—whether it be cars, corn, or chemicals.