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Maritime

Jones Act Waiver Granted in Response to Hurricanes Harvey and Irma

Action Item: On September 8, 2017, Acting Secretary of the Department of Homeland Security (“DHS”) Elaine Duke granted a seven-day waiver of the Jones Act in the interest of national defense. The waiver was issued to facilitate the movement of refined petroleum products to be shipped from New York, Pennsylvania, Texas, and Louisiana to South Carolina, Georgia, Florida, and Puerto Rico. Notably, this waiver applies to covered merchandise laded on board a vessel within the seven-day period of the waiver, and interested parties should be aware of the restrictions attendant to this waiver. The actual Jones waiver can be found [here](#).

Key Points about the Waiver

The September 8, 2017, Jones Act waiver applies only to certain commodities—specifically, “refined petroleum products, including gasoline, diesel, and jet fuel.” This provision has created some market uncertainty on the issue of whether all refined products are covered, or only the three specifically listed. It appears that the key federal agencies involved in crafting the waiver are aware of this issue and may provide more clarification on whether non-listed refined products (e.g., kerosene, heating oil, various gasoline blendstocks) are within the waiver’s scope. In any event, however, it is clear that crude oil and other non-refined products are excluded.

Geographically, the waiver extends only to specific origin and destination states. The Jones Act is waived only for refined products shipments from New York, Pennsylvania, Texas, and Louisiana to South Carolina, Georgia, Florida, and Puerto Rico. Curiously, New Jersey (a significant refining state) was excluded from the list of authorized origin states, although it appears that this omission may be under further consideration. The state-specific restrictions appear to apply to the vessel transportation; there is no legal bar on shipping cargo via pipeline from an unapproved state to an approved load port (e.g., from New Jersey to New York) for loading on a vessel there. While the U.S. Virgin Islands were badly impacted by Irma, they are excluded from the scope of the Jones Act and therefore not within the waiver’s scope.

With regard to the duration of the waiver, it is in effect “for a 7-day period, commencing immediately” upon its issuance, which according to DHS was about 3 p.m. EDT on Friday, September 8, 2017. The waiver “applies to covered merchandise laded on board a vessel within the 7 day period of the waiver.” Accordingly, it appears that cargo that has cleared a ship’s loading manifold by 3 p.m. on Friday, September 15, can take advantage of the waiver, even if the ship hasn’t yet gotten underway.

Jones Act

The Coastwise Merchandise Statute (commonly known as the Jones Act), restricts U.S. domestic trade by water to qualified U.S.-flag vessels constructed in the United States and owned and operated by U.S. citizens, otherwise known as “coastwise” vessels. 46 U.S.C. §55102. In catastrophic natural disasters, U.S. regions may experience fuel supply shortages, creating an immediate need to import fuel or divert foreign-flag vessels that loaded fuel in the United States. As a result of such disasters, coastwise-qualified vessels may not be available on a timely basis to resupply critical cargo and fuel to affected regions in support of the energy demands that are integral to national defense. Such a need generally occurs during a post-storm surge to counter supply chain disruptions and rebuild storm-affected regions. Therefore, because coastwise-qualified vessels may not be available to meet this additional demand, actions are necessary for national defense and the general economic well-being of the United States. The federal government therefore must evaluate other options.

Waivers

As we reported in a previous [2014 article](#), waiving the Jones Act restrictions on a temporary basis and allowing foreign-flag vessels to temporarily serve on otherwise prohibited U.S. trading routes may help solve critical needs. In fact, the Secretary of Defense or the U.S. Department of Homeland Security are authorized to waive Jones Act restrictions “in the interest of national defense.”

The first type of waiver is one requested by the Secretary of Defense. 46 U.S.C. 501(a). The law states that the Secretary of Homeland Security shall waive the Jones Act “upon the request of the Secretary of Defense to the extent deemed necessary in the interest of national defense by the Secretary of Defense.” Thus, such waivers are granted automatically to the extent the Secretary of Defense considers it necessary in the interest of national defense. Historically, these waivers have been granted to address an immediate need of the Department of Defense (“DOD”).

The second type of waiver may be granted at the discretion of Secretary of DHS. The Secretary may waive the Jones Act “either upon his own initiative or upon the written recommendation of the head of any other Government agency, whenever he deems that such action is necessary in the interest of national defense.” Such a waiver is therefore discretionary and may only be granted if the Administrator of the Maritime Administration (“MARAD”) first determines that no qualified U.S.-flag vessels are available. To determine if there are U.S.-flag vessels available to meet the

needs, MARAD surveys the maritime industry to evaluate the capability and availability of coastwise vessels to meet the needs of the requested transportation. CBP also coordinates with other interested agencies, such as the U.S. Coast Guard, the DOD, and the U.S. Department of Energy (“DOE”).

In this case, DHS issued the waiver at the request of DOD, with the concurrence of the DOE, under the authority of 46 U.S.C. 501(a). The recent losses in U.S. petroleum supply capability following Hurricanes Harvey and Irma justified the short-term Jones Act waiver. While Jones Act waivers are controversial, the use of waivers for cases involving natural disasters typically caused by hurricanes have historically been deemed necessary in the interest of our national defense in order to expedite recovery.

This current waiver reiterates the view that foreign-flag vessels operating under a Jones Act waiver can serve the national defense needs of the United States. Indeed, with regard to Hurricane Irma, this appears to be the first time a waiver was issued before a hurricane actually struck the United States mainland. It also raises the question of whether additional waivers may be necessary to ensure energy supply to the United States and support national defense.

The government will review the situation after seven days and reassess the need to continue the waiver. Stakeholders are cautioned, however, that this current waiver is not an unlimited blanket waiver for all domestic operations. Rather, consideration must be given to the limitations on the location of lading as the waiver narrowly applies to those petroleum products laden in New York, Pennsylvania, Texas, and Louisiana and delivered to South Carolina, Georgia, Florida, and Puerto Rico.

2017 Hurricane Season

The United States is only halfway through what NOAA forecasters predicted to be an “above average” year for large hurricanes. Texas is still recovering in the wake of Hurricane Harvey, which significantly impacted both energy production in the Gulf of Mexico and onshore refineries. Florida was hit by Hurricane Irma just 16 days later starting on Sunday, September 10, 2017, and officials are only now starting to assess the damage. The Atlantic hurricane season runs until the end of November, and this hurricane season is offering a stark reminder of the need to ensure a reliable supply of petroleum products when such catastrophes strike.

For example, Hurricane Harvey halted approximately 27 percent of U.S. refinery processing capacity, and the storm's impact lingers as gas prices climb across the country with the national gas price average 27 cents more expensive. Hurricane Irma produced devastating impact to the northeast Caribbean region leaving as many as one million people in Puerto Rico without power. The impending impact of Irma on the Southeast United States remains to be seen.

Conclusions and Recommendations

Stakeholders should review this waiver and determine if they can provide product to the Southeastern United States to help with the hurricane relief effort. In addition, stakeholders should be aware of the limited window and circumstances in which this current waiver allows transportation of petroleum products, and should continue to monitor the aftermath of Hurricanes Harvey and Irma for any time extensions of the current waiver. Furthermore, stakeholders seeking a separate Jones Act waiver request should include the purpose for which waiver is sought, port or ports involved, and estimated period of time for which the waiver is sought.

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