

MAY 2018
VOL. 18-5

PRATT'S

ENERGY LAW

REPORT



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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

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Editorial Office
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After Flurry of Hurricane Waivers, Calls for Coastwise Changes Recede

*By Matthew J. Thomas, Jonathan K. Waldron, and Jeanne M. Grasso**

After Hurricanes Harvey, Irma, and Maria, the Department of Homeland Security issued waivers allowing carriage of cargo by non-coastwise qualified vessels in the Gulf region and to and from Puerto Rico. The authors of this article discuss the controversy surrounding these waivers, the implications to the Jones Act, and the future of such waivers.

In September 2017, in response to Hurricanes Harvey, Irma, and Maria, the Department of Homeland Security (“DHS”) issued a series of widely publicized waivers allowing carriage of cargo by non-coastwise qualified vessels in the Gulf region and to and from Puerto Rico. Public interest in the Jones Act spiked in mid-September, and some members of Congress introduced legislation for longer-term relief, particularly for Puerto Rico. Although controversial, the waivers for the most part seemed to achieve their intended goal, allowing for additional capacity to be available to move certain critical cargoes, particularly in the energy and other bulk sectors.

As discussed in more detail below, the way the waivers were granted was relatively unique in the context of hurricanes, and some controversy arose with regard to the Puerto Rico waiver. The waivers, however, expired as planned with no significant fanfare or controversy, and broader political and public interest in the Jones Act subsided after a flurry of activity.

JONES ACT WAIVER STANDARD

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 at least 75 percent by U.S. citizens, otherwise known as “coastwise” vessels.¹ In catastrophic natural disasters, U.S. regions may experience shortages or supply disruptions in food, fuel, or other essential cargoes. Additional maritime capacity can be needed to

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¹ 46 U.S.C. § 55102.

address these conditions, and coastwise qualified vessels may not be available to meet this additional demand. In such cases, waivers of the Jones Act can be necessary for national defense and the general economic well-being of the United States.

Under the applicable navigation laws, there are two types of Jones Act waivers, both of which require a showing that the waiver is needed “in the interest of national defense.” The first type of waiver is one requested by the Secretary of Defense.² 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 that the Secretary of Defense considers it necessary in the interest of national defense—a Type I Waiver. 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 the Secretary of the 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 coastwise vessels are available—a Type II Waiver. To determine if there are coastwise 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. U.S. Customs and Border Protection also coordinates with other interested agencies, such as the U.S. Coast Guard, DOD, and U.S. Department of Energy.

FALL 2017 WAIVERS REQUESTED BY THE DOD

The fall of 2017 saw an unprecedented flurry of waiver activity:

- On September 8, 2017, Acting DHS Secretary Elaine Duke granted a seven-day waiver of the Jones Act in the interest of national defense, in response to disruption caused by Hurricanes Irma and Harvey to the U.S. Gulf Coast and Florida. 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. This waiver applied to covered merchandise laded on board a vessel within the seven-day period of the waiver.
- On September 12, 2017, the DHS issued a new Jones Act waiver for

² 46 U.S.C. 501(a).

refined products, effectively broadening and extending the earlier waiver by an additional seven days, to run through September 22, 2017. This second Jones Act waiver also expanded the number of states to which the waiver applied, covering the movement of refined petroleum products, including gasoline, diesel, and jet fuel, shipped from New York, New Jersey, Delaware, Maryland, Pennsylvania, New Mexico, Texas, Louisiana, Mississippi, Alabama, and Arkansas to Florida, Georgia, South Carolina, North Carolina, Virginia, West Virginia, and Puerto Rico.

- On September 28, 2017, the DHS issued a Jones Act waiver in response to Hurricane Maria, to facilitate movement of all products to be shipped from U.S. coastwise points to Puerto Rico. The waiver applied to merchandise laded on board a vessel within the 10-day period of the waiver and delivered by October 18, 2017.

All of these waivers were requested directly by the DOD—a Type I Waiver as described under the Jones Act Waiver Standard section above. Of these, the Puerto Rico waivers proved the most controversial—criticized by the public for coming too long after the storm, but also critiqued by Jones Act interests for being unnecessary, given that breakdowns in Puerto Rico's intermodal infrastructure in inland logistics stood as a bottleneck to any additional containerized volumes reaching the port. In hindsight, it appears that arguments on all sides had at least some merit: it appears from anecdotal reports that the waivers had relatively little impact in expediting the flow of containerized cargoes to users in Puerto Rico, but did prove to be useful in aiding the flow of some bulk commodities (*i.e.*, tanker and dry bulk cargoes) to replenish lagging fuel and food stores with U.S.-sourced commodities.

CONGRESSIONAL ACTION ON THE JONES ACT

In the wake of these hurricanes, a handful of House of Representatives members (including Reps. Palmer, Velázquez, Biggs, and Brat) in October introduced the Puerto Rico Humanitarian Relief Act, H. R. 3966, which would have implemented a five-year waiver for Puerto Rico. On the Senate side, longtime Jones Act critic Senator John McCain in September introduced S. 1894, a bill to exempt Puerto Rico from the coastwise laws, attracting Senators Lee, Lankford, and Flake as co-sponsors. Neither measure, however, moved forward in terms of attracting co-sponsors or committee attention. The lack of legislative momentum was not surprising; according to Google Trends, the public interest in the Jones Act that spiked in mid-September had abated back to negligible levels by Halloween.

CONCLUSION

While the spotlight clearly has moved off the Jones Act for now, the issue of waivers surely will recur with future emergencies. One can only hope that the DHS and MARAD will take the opportunity to gather and examine the data from shipments made under the 2017 waivers, identify lessons learned, and use it as a basis to better support policy decisions in the future regarding the issuance, timing, and tailoring of waivers. One particular feature of these waivers that might come under further review was that the DOD made the waiver requests, essentially bypassing MARAD's role to review available Jones Act capability before a waiver was granted.