

ARTICLE

Jones Act Administrative Waivers

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I.	INTRODUCTION	318
II.	THE “JONES ACT”	319
	<i>A. Context of the Jones Act</i>	319
	<i>B. Jones Act Legislative History</i>	320
	<i>C. Jones Act as Interpreted</i>	322
III.	THE JONES ACT WAIVER LAW	325
	<i>A. Legislative History Prior to 1950</i>	325
	<i>B. Post-1950 Legislative History</i>	330
	<i>C. Current Law and Regulations</i>	333
IV.	APPLICATION OF THE JONES ACT WAIVER LAW	335
	<i>A. Agency Agreements</i>	335
	1. 1987 Strategic Petroleum Reserve Agreement	335
	2. 1990 Energy Agreement	336
	<i>B. Strategic Petroleum Reserve Waivers</i>	337
	<i>C. Hurricane Waivers</i>	340
	1. Hurricanes Katrina and Rita	340
	2. Hurricane Sandy	342
	3. Hurricanes Harvey, Irma and Maria	343
	<i>D. Exxon Valdez and Deepwater Horizon Waivers</i>	345
	<i>E. Individual Waivers</i>	347
	1. World War II	347
	2. Post-World War II Waiver Approvals	349
	3. Waiver Denials	352
	<i>F. Litigation</i>	354
V.	JONES ACT PENALTY MITIGATION	355
VI.	CONCLUSION	357

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I. INTRODUCTION

The “Jones Act” is the popular name for a set of federal laws that restrict U.S. domestic maritime commerce to U.S. citizen-owned and -operated, U.S.-built, U.S.-flagged vessels. The Jones Act received extensive media coverage in 2017, much of it critical,¹ because of Hurricanes Harvey, Irma, and Maria and the view that the Jones Act impeded disaster recovery. In fact, short-term administrative waivers of the Jones Act were granted after Hurricanes Harvey, Irma, and Maria as has become par for the course since Hurricane Katrina in 2005. Hurricane Maria in particular, which devastated Puerto Rico, has rekindled and intensified calls to modify or waive the Jones Act further either temporarily or permanently with regard to Puerto Rico.² The fact that these calls rarely attempt to make the case needed to obtain an administrative waiver of the Jones Act under existing law indicates that the Jones Act administrative waiver process is widely misunderstood.³

Here, we summarize the Jones Act and examine the law which permits administrative waivers of the Jones Act including how the law and practice have evolved since the first waiver authority was instituted in World War II. In that process, waivers of the Jones Act have evolved from war measures to encompass energy shortage or energy disruption situations during peacetime and particularly following major hurricanes or environmental disasters. The process has also evolved such that the availability or non-availability of Jones Act-qualified U.S.-flag vessels has become central to the waiver consideration process whereas it formerly was not an express consideration. Finally, because administrative waivers are exceptions rather than the rule, Jones Act penalty mitigation usually deserves review in any situation where a waiver is not forthcoming.

1. See, e.g., Jacob Fischler, *Puerto Rico Disaster Provides New Battleground for Shipping Law*, CQ NEWS, <http://plus.cq.com/doc/news-5190574?0> (last visited Oct. 6, 2017); Bloomberg Editorial Board, *Still Playing Politics with U.S. Ports—The Jones Act Survives Only Because of Narrow Commercial Interests*, BLOOMBERG VIEW (Dec. 19, 2017), <https://www.bloomberg.com/view/articles/2017-12-19/still-playing-politics-with-u-s-ports>.

2. Several bills were introduced in the U.S. Congress to either waive the Jones Act in whole or in part. See S. 1894, 115th Cong., 1st Sess. (2017) (co-sponsored by Senators John McCain and Mike Lee); H.R. 3852, 115th Cong., 1st Sess. (Sept. 27, 2017) (co-sponsored by Reps. Nydia Velázquez, José Serrano, Darren Soto and Luis Gutiérrez).

3. See, e.g., David A. Graham, *Is the Jones Act Waiver All Politics?*, ATLANTIC (Sept. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/09/jones-act-waiver-puerto-rico-trump/541398/>; Henry Grabar, *We’ll Know Congress Is Serious About Helping Puerto Rico if It Axes This Obscure Shipping Law*, SLATE (Sept. 25, 2017), <https://slate.com/business/2017/09/congress-should-waive-the-jones-act-to-help-puerto-rico.html>.

II. THE “JONES ACT”

A. *Context of the Jones Act*

The “Jones Act” can be a confusing term, since (1) it is not an “Act;” (2) it is a catch phrase covering more than one law; and (3) it can be used to reference more than one law by the same name.

The Jones Act, which is the subject of this Article, is section 27 of the Merchant Marine Act, 1920.⁴ That section is the cabotage law governing cargo movements between points in the United States. Cabotage was not the subject of the 1920 Merchant Marine Act as a whole. The balance of the 1920 Merchant Marine Act dealt with a variety of subjects focused especially on what to do with the fleet of vessels constructed in World War I, which were mostly no longer needed by the federal government, and how to foster a competitive U.S.-flag industry in the future.⁵

The “Jones” reference stems from the fact that the chief sponsor of the 1920 Merchant Marine Act was Sen. Wesley Livsey Jones, a Republican representing the State of Washington and then-Chairman of the Senate Commerce Committee.⁶ Sen. Jones indicated subsequently that the 1920 Merchant Marine Act “expresses the thought, desire, purpose and aim of the American people” “to lay the foundation of a policy that will build up and maintain an adequate American merchant marine in competition with the shipping of the world.”⁷

The other cabotage laws encompassed by the catch phrase relate to the transportation of passengers as well as towing, dredging, salvage, and fishing.⁸ All of these laws governing maritime activities within the

4. Act of June 5, 1920, ch. 250, 41 Stat. 988 (1920).

5. See, e.g., PAUL MAXWELL ZEIS, AMERICAN SHIPPING POLICY 115 (1938) (“By the summer of 1919 the emergency conditions created by the war were at an end The problem now was not one of acquisition, but one of disposal of the existing Government fleet.”); ANDREW GIBSON & ARTHUR DONOVAN, THE ABANDONED OCEAN: A HISTORY OF UNITED STATES MARITIME POLICY 119 (2000) (“By 1919 there was growing pressure to get the government out of the shipping business. . . . The legislation addressed many facets of maritime policy and sought to define a new basis for assuring the continued existence and vitality of the U.S. merchant marine.”).

6. See, e.g., ZEIS, *supra* note 5, at 115.

7. Wesley L. Jones, *The Merchant Marine Act of 1920*, IX PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 233 (1920-1922).

8. Passenger Vessel Services Act, ch. 421, § 8, 24 Stat. 79, 81 (1886) (codified as amended at 46 U.S.C. § 55103 (2012)); Towing Statute, ch. 324, 54 Stat. 304 (1940) (codified as amended at 46 U.S.C. §§ 55111, 55118); Dredging Act of 1906, ch. 2566, 34 Stat. 204 (1906) (codified as amended at 46 U.S.C. § 55109); 46 U.S.C. § 80104; 46 U.S.C. §§ 12102, 12113, 12116.

jurisdiction of the United States are often referred to as the “Jones Act” when referring to U.S. cabotage restrictions on U.S. maritime trade.

Then there are the other “Jones Acts.” Section 33 of the 1920 Merchant Marine Act, which governs claims made by seamen for personal injuries suffered in the course of their employment, is also popularly referred to as the “Jones Act” and confusingly so since it is merely another section of the same Act.⁹ There is also the “Jones Act,” enacted in 1917 and named after its chief sponsor, Rep. William Jones, which, among other things, conferred full U.S. citizenship on residents of Puerto Rico.¹⁰ In this Article, we will be referring to section 27 of the 1920 Merchant Marine Act, which applies to the transportation of “merchandise,” as the “Jones Act.”

B. Jones Act Legislative History

Section 27 of the 1920 Merchant Marine Act was a restatement of the cabotage law as it existed prior to 1920 and can be traced to the third Act of the Republic in 1789,¹¹ and more particularly to the Act of 1817.¹² The Act of 1817 prohibited the transportation of “goods, wares or merchandise” between “one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of a foreign power.”¹³ The Act of 1817 also imposed additional duties on vessels that were not crewed by Americans.¹⁴ At the time, U.S. registered vessels could have foreign crews other than the master of the vessel.¹⁵

The more direct predecessor to section 27 was a statute enacted in 1898.¹⁶ It prohibited the transportation of “merchandise” by water “from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States,”¹⁷ i.e., a U.S.-documented vessel.

The Act of 1898 was interpreted in 1913 by U.S. Attorney General George W. Wickersham so as not to apply to mixed water/land

9. Codified as amended at 46 U.S.C. § 30104.

10. Act of Mar. 2, 1917, ch. 145, § 5, 39 Stat. 951, 953 (1917).

11. Act of July 20, 1789, ch. 3, 1 Stat. 27 (1789).

12. Act of Mar. 1, 1817, ch. 31, § 4, 3 Stat. 351 (1817).

13. *Id.*

14. *Id.* § 5.

15. See John W. McConnell, Jr., *A Corporate ‘Citizen of the United States’ for Maritime Law Purposes*, 25 J. MAR. L. & COM. 159, 203 (1994).

16. Act of Feb. 17, 1898, ch. 26, 30 Stat. 248 (1898).

17. *Id.*

transportation.¹⁸ The proposed movement was from Seattle by vessel to Skagway, Alaska, and then by rail partly through Canada to Fairbanks, Alaska. Wickersham relied on the use of the word “voyage” in the Act of 1898 and the legislative history.¹⁹ That history indicated that the Act of 1898 was amended to add the words “any part of the voyage” to prevent vessels from departing Seattle for Vancouver where the cargo would be offloaded and then loaded on a foreign vessel for shipment to Alaska. Wickersham reasoned that “any part of the voyage” meant “any part of an ocean voyage” and so the law did not encompass the intended movement to Fairbanks partly by land. This ruling later became the chief impetus for the inclusion of section 27 in the 1920 Merchant Marine Act.²⁰

The legislative process for the 1920 Merchant Marine Act started in 1919 with Congressional hearings.²¹ The Senate Commerce Committee report, entitled “Establishment of an American Merchant Marine,” which reported the legislation favorably, indicated that the purpose of the legislation was “to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder.”²² Hence, the very first section of the 1920 Merchant Marine Act provides the statutory purpose of the U.S. merchant marine that remains largely the law today:

That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States²³

Section 27 did not play a central role in the congressional consideration of the 1920 Merchant Marine Act. As stated by Sen. Jones on the floor of the Senate, “[t]he only provisions contained in this bill with reference to that feature of the coastwise law is a provision to

18. Transportation of Merchandise from Seattle to Fairbanks, 30 Op. Att’y Gen. 3 (1913).

19. *Id.*

20. *Id.*

21. *Hearings on the Establishment of an American Merchant Marine Before the S. Comm. on Commerce*, 66th Cong. (June 10, 1919–Mar. 13, 1920).

22. S. REP. NO. 66-573, at 1 (1920) (Conf. Rep.).

23. Merchant Marine Act, 1920, ch. 250, § 1, 41 Stat. 988 (1920) (codified as amended at 46 U.S.C. § 50101 (2012)).

prevent its evasion,”²⁴ by which he was referring to the movements permitted by the Wickersham opinion.²⁵ Sen. Jones later stated that:

We do not deal in general in this bill with the coastwise laws. They are left just as they are; we have not attempted to interfere with them. One reason why we have placed a provision in this bill to prevent the evasion of the coastwise laws in Seattle is that we do not believe that we ought to favor or wink at or tolerate the evasion of our coastwise laws by foreign shipping. If our coastwise laws should be abolished, that subject should be taken up and should be taken up in a separate measure; but so long as the coastwise laws remain on the statute books as they are we ought to see that they are observed. That is what we do in connection with the coastwise laws in this bill. The bill deals primarily with our foreign ocean-going shipping in the foreign trade.²⁶

The prevention of evasion was accomplished with several changes to the Act of 1898. To ensure a reversal of the Wickersham opinion, the words “or by land and water” were added, “ports” was changed to “points,” and language was added to make it clear that such “points” included places in U.S. territories and possessions (Alaska was then a territory).²⁷

The Act of 1898 was also amended to add the words that vessels could only engage in the coastwise trade if they are “built in” the United States.²⁸ The legislative history does not reveal the purpose of the addition, but it has been argued that the words were added to assure U.S. shipyards that the temporary permission granted to foreign-built vessels to engage in the U.S. coastwise trade adopted as a war time measure would not become permanent.²⁹ Vessels that had received the benefit of that war-time provision were grandfathered in another section of the 1920 Merchant Marine Act.³⁰

C. *Jones Act as Interpreted*

Over time, the 1920 Merchant Marine Act has remained essentially unchanged, although a number of provisos have been added, some of

24. 59 CONG. REC. 6811 (May 10, 1920).

25. *Id.*

26. 59 CONG. REC. 6863 (May 11, 1920).

27. Merchant Marine Act, 1920, ch. 250, § 27, 41 Stat. 988 (1920) (codified primarily as amended at 46 U.S.C. § 55102(b)). James Michener’s novel, *Alaska*, contains colorful descriptions of the Jones Act and its relationship to Alaska. See JAMES A. MICHENER, *ALASKA* 856-57 (1988).

28. § 27, 41 Stat. at 988.

29. See Mark D. Aspinwall, *Coastwise Trade Policy in the United States: Does it Make Sense Today?*, 18 J. MAR. L. & COM. 243, 248 (1987).

30. § 22, 41 Stat. at 997.

which have had the effect of narrowing the law³¹ and others of which have the effect of “waiving” the law.³² As it exists today, the Jones Act provides that “a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel” is a qualified U.S.-flag vessel.³³ A separate section provides that “the coastwise laws apply to the United States, including the island territories and possessions of the United States” with certain exceptions (such as the U.S. Virgin Islands).³⁴

Notably, the Jones Act contains no intrinsic waiver provision.³⁵ Nothing in the law provides that it may be waived for any reason. Nor does anything in the Jones Act indicate that an exception can be made. Only qualified U.S.-flag vessels may transport merchandise between points in the United States without exception within the immediate law.

Thus, the Jones Act has been interpreted to encompass even short movements of merchandise because of the “any part of the transportation” phrase. For example, Customs and Border Protection (CBP) determined in 2008 that the use of a foreign-built floating dry dock to transport vessel hulls approximately 100 yards between slips in a shipyard was a Jones Act movement and could not be accomplished with the foreign-built, and therefore not Jones Act-qualified, dry dock.³⁶

Similarly, CBP determined in 2012 and 2013 in two related rulings that the movement of a non-coastwise qualified vessel a short distance to reposition itself to install a topside on an offshore single point anchor reservoir (SPAR) would violate the Jones Act.³⁷ This would be the case, CBP determined, even though the topside would be transported to the SPAR from a U.S. port on a qualified U.S.-flag vessel to the non-coastwise qualified installation vessel. CBP, following previous rulings, determined that a foreign vessel can pivot on its central axis and not

31. For example, the Second Proviso added in 1956 provided that vessels once built in the United States could not be “rebuilt” abroad without losing their coastwise trading privileges. *See* 46 U.S.C. §§ 12101(A), 12132(B).

32. For example, a proviso enacted in 2002 provided an exemption for the use of non-coastwise qualified launch barges transporting offshore platform jackets under certain conditions. *See* Pub. L. No. 107-295, § 213, 116 Stat. 2064, 2099 (2002).

33. 46 U.S.C. § 55102(B).

34. *Id.* § 55101.

35. *See, e.g.*, U.S. Customs & Border Protection (CBP), Cust. Service Dec. 79-230 (1978) (“The only general authority to waive the provisions of the navigation laws (including the coastwise laws) is contained in the act of December 27, 1950 . . . [the Jones Act waiver law] which provides for waivers deemed necessary in the interest of national defense.”); CBP Cust. Service Dec. 80-186 (May 30, 1980).

36. CBP, HQ H032257 (Aug. 1, 2008).

37. CBP, HQ H225102 (Sept. 24, 2012); CBP, HQ H242466 (July 3, 2013).

violate the Jones Act, but once it moved off its central axis even a short distance, such a movement was a Jones Act violation.³⁸

These rulings, among other things, prompted the U.S. Coast Guard and the Bureau of Safety and Environmental Enforcement in the U.S. Department of Interior (BSEE) and interested private parties to write to CBP in 2015 to request that CBP consider safety in making Jones Act determinations.³⁹ The Coast Guard/BSEE letter pointed out that “highly specialized foreign-flag vessels” have “safely made hundreds of heavy lifts” at offshore construction sites and safety would be threatened by determinations that “will effectively render foreign flag vessels ineligible to participate in this activity.”⁴⁰ The letter went on to “request that CBP’s Jones Act determination take safety concerns into consideration due to the non-availability of U.S. flag vessels capable of completing these operations in a single or minimum number of lifts.”⁴¹

In CBP’s response to one trade association, CBP indicated that “[t]he strict language of the statute does not allow CBP to exercise discretion to take into account factors such as safety or commercial practicalities. The only discretion given under the Jones Act is to grant waivers pursuant to 46 U.S.C. § 501(b) [i.e., the Jones Act waiver law discussed below].”⁴²

The Jones Act situation is to be contrasted with the reservation to privately owned U.S.-flag vessels under the U.S. cargo preference laws. The Cargo Preference Act of 1954, for example, provides that the reservation to qualified vessels only applies “to the extent those vessels are available at fair and reasonable rates for commercial vessels of the United States.”⁴³ The import of these words is that the reservation does not apply if no qualified U.S.-flag vessels are physically available to transport the cargo and, even if physically available, the vessels must offer “fair and reasonable rates” for similar vessels.⁴⁴

Because this flexibility is absent from the Jones Act, and not even “safety or commercial practicalities” can be considered, there is often an

38. *Id.*

39. Letter from U.S. Coast Guard and the Bureau of Safety & Env’tl. Enf’t to Customs & Border Prot. (Sept. 1, 2015) (on file with authors).

40. *Id.*

41. *Id.*

42. Letter from Customs & Border Prot. to the Int’l Marine Contractors Ass’n (Nov. 12, 2015) (on file with authors). CBP denials of Jones Act waiver requests are to the same effect. *E.g.*, CBP, HQ 112237 (May 27, 1992) (CBP denying waiver request seeking to use foreign semi-submersible vessel to ensure safe transportation of replica vessels because the “activities in question are not related to national defense, but rather are commercial in nature.”).

43. 46 U.S.C. § 55305(B) (2012).

44. *Id.*

interest in whether and how the Jones Act can be waived or whether the penalties can be mitigated.⁴⁵ Waiver can occur administratively pursuant to the statute—46 U.S.C. § 501—referenced in the CBP letter, or it can occur by Act of Congress either with respect to a general activity—like the use of foreign launch barges⁴⁶—or with respect to specific, identified vessels.⁴⁷ Both types of legislative “waivers” and administrative waivers have occurred over time. Here, we explore administrative waivers of the Jones Act and, in the absence of a waiver, the possibilities of penalty mitigation pursuant to CBP authorities and guidance.

III. THE JONES ACT WAIVER LAW

As the application of the Jones Act has shown, there is no inherent authority in the Jones Act to waive the law. If the Jones Act applies to a vessel movement, then a qualified U.S.-flag vessel must be utilized regardless of cost, safety or other considerations.⁴⁸ There has been, however, more general waiver authority that encompasses the Jones Act since immediately after the attack on Pearl Harbor. That authority was focused from the beginning on national security.

A. *Legislative History Prior to 1950*

In the immediate aftermath of the entry of the United States into World War II, President Franklin D. Roosevelt signed Executive Order 8976 on December 12, 1941, entitled *Authorizing the Secretary of Commerce to Waive Compliance with the Navigation and Vessel Inspection Laws for War Purposes*.⁴⁹ The purpose of the 1941 Executive Order was “to further the successful prosecution of the war.”⁵⁰ The authority claimed for the Order was “authority vested in” the President “by the Constitution and Statutes of the United States as President of the United States and Commander-in-Chief of the Army and the Navy.”⁵¹ No authorizing statute was cited in the Order nor did the Order identify laws that could be waived.

The 1941 Executive Order set the pattern for the waiver law that exists today by bifurcating the waiver authority granted, at that time, to the Secretary of Commerce into two paths—waiver granted (1) “upon

45. *Id.*

46. *See* Pub. L. No. 107-295, § 213, 116 Stat. 2064, 2099 (2002).

47. *See, e.g., id.*, § 209, 116 Stat. at 2064, 2098.

48. *Id.*

49. Exec. Order No. 8976, 6 Fed. Reg. 6441-42 (Dec. 17, 1941).

50. *Id.*

51. *Id.*

request of the Secretary of Navy or the Secretary of War;” or (2) “upon such terms” as the Secretary of Commerce “may prescribe either upon his own initiative or upon the written recommendation of the head of any other Government agency.”⁵² In both instances, the purpose of the waiver had to be that it was “necessary in the conduct of the war.”⁵³ Also, in both instances, the waiver generally covered “navigation and vessel inspection laws.”⁵⁴

The purpose of the 1941 Executive Order was more fully explained in subsequent congressional deliberations leading to the Second War Powers Act.⁵⁵ In a written statement to the Senate Judiciary Committee, Francis Biddle, the Attorney General of the United States, stated:

Five days after the attack on Pearl Harbor ships needed to carry men and materials in the Pacific were faced with the necessity of complying with [certain navigation and inspection laws]. Acting under his constitutional power as Commander in Chief the President issued an Executive Order giving the Secretary of Commerce [the authority to waive the navigation and inspection laws]. Both the President and myself, however, were convinced of the advisability of obtaining legislation to this effect. I am certain that it is not necessary to explain, at length, the need for vessels transporting men and materials to sail without delay of any kind. In many cases delay will necessarily occur if vessels engaged in transportation are required to comply with all applicable provisions of the navigation and inspection laws. These laws are so many and so varied that it is impossible to foretell which of them may stand in the way of expeditious sailing.⁵⁶

The First War Powers Act, or War Powers Act of 1941, was enacted less than two weeks after the Pearl Harbor attack.⁵⁷ That Act gave the President broad power to prosecute the war including authority “to make such redistribution of functions among executive agencies as he may deem necessary.”⁵⁸ Invoking that broad power, President Roosevelt signed an executive order on February 28, 1942 transferring the functions of the Department of Commerce Bureau of Marine Inspection and Navigation, which had been granted the waiver authority only about two weeks earlier, to the Bureau of Customs in the U.S. Department of the Treasury.⁵⁹

52. *Id.*

53. *Id.*

54. *Id.*

55. Written Statement of Attorney General Biddle on the Second War Powers Bill, Statements in Executive Session on S. 2208, 77th Cong. (Jan. 19, 1942).

56. *Id.*

57. Pub. L. No. 354, 55 Stat. 838 (1941).

58. *Id.* § 1.

59. Exec. Order No. 9083 (Feb. 28, 1942), 7 Fed. Reg. 1609 (Mar. 3, 1942).

In that same executive order, certain marine plan approval, vessel inspection, and other authorities were transferred to the U.S. Coast Guard (then also part of the Treasury Department).⁶⁰ On February 28, 1942, President Roosevelt signed Executive Order 9083,⁶¹ which transferred the authority to waive compliance with the navigation and vessel inspection laws, which had been vested in the Secretary of Commerce pursuant to Executive Order No. 8973, to the Secretary of the Navy and the Secretary of the Treasury, each of which would exercise such authority with respect to functions transferred to the U.S. Coast Guard and the Bureau of Customs.⁶²

A month later, on March 27, 1942, that waiver authority was adjusted again in the Second War Powers Act,⁶³ giving the waiver authority to the head of each agency responsible for the navigation and vessel inspection laws:

SEC. 501. The head of each department or agency responsible for the administration of the navigation and vessel inspection laws is directed to waive compliance with such laws upon the request of the Secretary of the Navy or the Secretary of War to the extent deemed necessary in the conduct of the war by the officer making the request. The head of such department or agency is authorized to waive compliance with such laws to such extent and in such manner and upon such terms as he may prescribe 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 conduct of the war.⁶⁴

Again, as explained by Attorney General Biddle as the Second War Powers Act was being considered by Congress—

[t]he proposed bill follows the provisions of the Executive order and provides that the Secretary of Commerce shall waive such laws upon the request of the Secretary of War or the Secretary of the Navy, upon his own initiative, or upon recommendation of the head of any other agency that such action is necessary to the conduct of war.⁶⁵

The general formulation as to which agency is granting the waiver in section 501 has been carried forward to the present day as well as the continuation of the dual paths to waiver either upon request of a national security agency like the Department of the Navy or as initiated by the

60. *Id.*

61. Exec. Order No. 9083, 7 Fed. Reg. 1609 (Feb. 28, 1942).

62. *Id.* § 6.

63. Pub. L. No. 77-507, 56 Stat. 176 (1942).

64. *Id.*

65. *Id.*

agency responsible for navigation and inspection laws as the case may be.

The Second War Powers Act was largely repealed on March 31, 1947 via the enactment of the First Decontrol Act of 1947.⁶⁶ The First Decontrol Act provided that “all emergency controls and war powers” should be “removed except in certain limited instances” and that further exercises of such powers should “be granted by restrictive, specific legislation.”⁶⁷

Among such specific legislation was a 1947 Joint Resolution passed by Congress on the same day authorizing the Commandant of the Coast Guard “to waive compliance with the navigation and vessel-inspection laws administered by the Coast Guard to the extent and in such manner and upon such terms as may be deemed necessary by him in the orderly reconversion of the merchant marine from wartime to peacetime operations.”⁶⁸ The Joint Resolution was also narrowed later in 1947 to withdraw the Commandant’s authority “to grant waivers for the employment of alien seamen” except in certain instances.⁶⁹

The plain focus of the 1947 Joint Resolution was on vessel safety and inspection waivers issued by the Coast Guard.⁷⁰ The types of waivers being granted to ensure “orderly reconversion of the merchant marine” related to load lines, wartime passenger vessel compliance with peacetime safety standards and similar matters.⁷¹ In fact, when the 1947 Joint Resolution was renewed in 1948 it was referred to as a “waiver of safety laws” and there was no mention of the Jones Act or similar navigation restrictions.⁷²

The Joint Resolution authority expired by its own terms on April 1, 1948, and was subsequently extended to March 1, 1949,⁷³ and thereafter until January 15, 1951.⁷⁴ In effect, the Jones Act waiver authority that was first instituted in the 1941 Executive Order lapsed since the Jones

66. Pub. L. No. 80-29, 61 Stat. 34 (1947).

67. *Id.* § 2.

68. Pub. L. No. 80-27, 61 Stat. 33 (1947).

69. Pub. L. No. 80-293, 61 Stat. 685 (1947).

70. *See* S. REP. NO. 80-856 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1090.

71. *Id.*, 1948 U.S.C.C.A.N. at 1100-01.

72. *Id.* The Jones Act Waiver Law has retained its wider scope covering safety, inspection and other laws as indicated in 1987 in connection with the documentation of eleven Kuwaiti tank vessels and the associated waiver of vessel manning requirements. *See Nat’l Marine Eng’g’s Beneficial Ass’n v. Burnley*, 684 F. Supp. 6 (D.D.C. 1988).

73. Pub. L. No. 80-423, 62 Stat. 38 (1948).

74. Pub. L. No. 81-591, 64 Stat. 308 (1950).

Act was not directly encompassed by the authority granted the Coast Guard constrained by the “orderly conversion” authority limitation.⁷⁵

The initiation of hostilities in the Korean peninsula in 1950 occasioned renewed focus on war power authorities. Accordingly, the Department of the Navy urged the Secretary of the Treasury on August 9, 1950, to reinstitute the broad waiver authority that had existed in World War II via the 1941 Executive Order and section 501 of the Second War Powers Act.⁷⁶ The Treasury Department transmitted draft legislation to the U.S. Congress on September 12, 1950.⁷⁷ That transmittal indicated that “[e]xperience has demonstrated, however, that compliance with many of the navigation and vessel-inspection laws is inappropriate during periods of military operations, and that the transportation of personnel and cargo by ship during such periods may be greatly expedited by the waiver of certain of such laws.”⁷⁸ The letter noted that the existing Coast Guard authority was inadequate as it was limited to effecting “the orderly reconversion of the merchant marine from wartime to peacetime operations.”⁷⁹ The Senate Report accompanying the legislation indicated that “[t]he movement of troops and supplies to Korea makes urgent the need for this legislation.”⁸⁰

The waiver authority that became law in December 1950 repealed the limited Coast Guard waiver authority and indicated that the new authority could terminate by joint resolution of Congress at a time “the President may designate” rather than having a pre-determined sunset date.⁸¹ As enacted, the law provided:

That the head of each department or agency responsible for the administration of the navigation and vessel-inspection laws is directed to waive compliance with such laws upon the request of the Secretary of Defense to the extent deemed necessary in the interest of national defense by the Secretary of Defense. The head of such department or agency is authorized to waive compliance with such laws to such extent and in such manner and upon such terms as he may prescribe, 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.⁸²

75. *Id.*

76. *See* S. REP. NO. 81-2630 (1950), *reprinted in* 1950 U.S.C.C.A.N. 4234.

77. *See* H. REP. NO. 81-3120 (1950).

78. *Id.*

79. *Id.*

80. *Id.*

81. Pub. L. No. 81-891, 64 Stat. 1120 (1950).

82. *Id.*

The only change of substance from the Second War Powers Act was to substitute “necessary in the interest of national defense” for “necessary in the conduct of the war.” Thus, although the law apparently contemplated that it would be terminated by joint resolution or by the President when the Korean hostilities ended, the new authority was written generically enough to outlast the war—which it in fact has to the present day.

B. Post-1950 Legislative History

The Jones Act waiver law was unchanged from 1950 to 2006. Prior to October 6, 2006, the Jones Act waiver law appeared in the appendix to Title 46 of the U.S. Code.⁸³ As part of the recodification of Title 46, the Jones Act waiver law was codified as section 501.⁸⁴ Although the intention of the recodification was not to change law,⁸⁵ the phraseology of the Jones Act waiver law was changed.

In particular, the law used to provide that navigation and vessel-inspection laws could be waived by the “head of each department or agency responsible for the administration of the navigation and vessel-inspection laws” “upon his own initiative or upon written recommendation of the head of any other Government agency” “whenever he deems that such action is necessary in the interest of national defense.”⁸⁶ That phraseology was changed in 2006 to indicate that the “head of an agency responsible for the administration of the navigation or vessel-inspection laws” could waive such laws when such head “considers it necessary in the interest of national defense”—without the phrase “upon his own initiative or upon recommendation.”⁸⁷

The Jones Act waiver law was further changed in 2008 to take into account agency memoranda of agreement that had been entered into that required a U.S. Maritime Administration (MARAD) determination, whether qualified U.S.-flag vessels were available before a waiver of the Jones Act could issue.⁸⁸ Those agreements are described below in Section IV.A “Agency Agreements.”

As indicated in the legislative history, the law change “would amend 46 U.S.C. 501 to apply the terms of the existing MOA [Memorandum of

83. *Found at* 46 U.S.C. app. note prec. § 1 (2012).

84. 46 U.S.C. § 501.

85. Pub. L. No. 109-304, § 2(b), 120 Stat. 1485 (2006) (“In the codification of laws by this Act, the intent is to conform to the understood policy, intent, and purpose of the Congress in the original enactments”).

86. Act of Dec. 27, 1950, ch. 1155, 64 Stat. 1120 (1950).

87. Pub. L. No. 109-304, § 4, 120 Stat. 1485, 1490 (2006).

88. Pub. L. No. 110-417, § 3510, 122 Stat. 4356, 4769 (2008).

Agreement] to all waiver requests originating outside the DOD.”⁸⁹ U.S. Department of Defense (DoD) waiver requests—a distinction that later became important with the 2017 hurricanes—would not require a MARAD vessel availability determination.⁹⁰ The legislative history further indicated that the change was “consistent with the stated U.S. policy, to encourage and aid in the development and maintenance of a U.S. merchant marine as necessary for the national defense.”⁹¹

Subsequent changes to the Jones Act waiver law were spurred in large measure by a group of waivers granted in connection with the sale of crude oil from the Strategic Petroleum Reserve (SPR) in June 2011 discussed below in Section IV.B “Strategic Petroleum Reserve.” Both the Consolidated and Further Continuing Appropriations Act, 2012 enacted in November 2011,⁹² and the Consolidated Appropriations Act, 2012 enacted in December 2011,⁹³ restricted the ability of the government to grant SPR-related Jones Act waivers for fiscal year 2012 (ended September 30, 2012). The first one of those Acts prohibited the use of funds for the making of a—

determination of the nonavailability of qualified United States flag capacity for purposes of 46 U.S.C. § 501(b) for the transportation of crude oil distributed from the Strategic Petroleum Reserve unless, as part of that determination the Secretary of Transportation, after consultation with representatives from the United States flag maritime industry, provides to the Secretary of Homeland Security a list of United States flag vessels with single or collective capacity that may be capable of providing the requested transportation services and a written justification for not using such United States flag vessels.⁹⁴

This measure was aimed in part at a complaint from the Jones Act community that SPR oil was sold in lot sizes that may have been beyond the capacity of single qualified U.S.-flag vessels, but not in excess of vessels collectively.⁹⁵

The second fiscal year 2012 appropriations act expanded on the concept by prohibiting the use of funds provided under that Act for the issuance of any further SPR waiver under 46 U.S.C. § 501(b) until inter-

89. S. REP. NO. 110-457 (2008).

90. *Id.*

91. *Id.*

92. Pub. L. No. 112-55, § 170, 125 Stat. 552, 666 (2011).

93. Pub. L. No. 112-74, § 529, 125 Stat. 786, 974 (2011).

94. Pub. L. No. 112-55, § 170, 125 Stat. at 666-67.

95. *See, e.g.*, Testimony of Thomas Allegretti, President, The American Waterways Operators, Before the U.S. House Transp. and Infrastructure Comm’s. Coast Guard and Maritime Transp. Subcomm. (June 27, 2012).

government consultations and consultations with “representatives from the United States flag maritime industry” occurred and the Secretary of the Department of Homeland Security (DHS) took “adequate measures to ensure use of United States flag vessels.”⁹⁶ That Act also required the Secretary of DHS to notify certain congressional committees within forty-eight hours of any request to waive “navigation and vessel-inspection laws pursuant to 46 U.S.C. § 501(b).”⁹⁷ Notably, no restriction was placed on the issuance of any waiver requested by the Secretary of Defense under 46 U.S.C. § 501(a).

Virtually the same language has been included for every single fiscal year since that time at least through fiscal year 2017 (ended September 30, 2017).⁹⁸ The most recent requirement provides as follows:

Notwithstanding any other provision of law, none of the funds provided in this or any other Act shall be used to approve a waiver of the navigation and vessel-inspection laws pursuant to 46 U.S.C. 501(b) for the transportation of crude oil distributed from and to the Strategic Petroleum Reserve until the Secretary of Homeland Security, after consultation with the Secretaries of the Departments of Energy and Transportation and representatives from the United States flag maritime industry, takes adequate measures to ensure the use of United States flag vessels: *Provided*, That the Secretary shall notify the Committees on Appropriations of the Senate and the House of Representatives, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives within 2 business days of any request for waivers of navigation and vessel-inspection laws pursuant to 46 U.S.C. 501(b) and the disposition of such requests.⁹⁹

In addition, permanent and more general changes were made to the Jones Act waiver law at the end of 2012 and early 2013 along the lines of the SPR restrictions. The law was amended to delineate the Maritime Administrator’s obligations when making a determination on U.S.-flag vessel non-availability under 46 U.S.C. § 501(b).¹⁰⁰ Specifically, the Administrator must (1) identify, for each determination, any actions that could be taken to enable qualified U.S.-flag capacity to meet national defense requirements; (2) provide notice of each determination to the Secretary of Transportation and the head of the agency for which the

96. Pub. L. No. 112-74, § 529, 125 Stat. 786, 974 (2011).

97. *Id.*

98. Pub. L. No. 113-6, § 527, 127 Stat. 198, 371 (2013); Pub. L. No. 113-76, § 527, 128 Stat. 5, 274 (2014); Pub. L. No. 114-4, § 525, 129 Stat. 39, 66 (2015); Pub. L. No. 114-113, § 525, 129 Stat. 2242, 2516 (2015); Pub. L. No. 115-31, § 207, 131 Stat. 135, 412 (2017).

99. Pub. L. No. 115-31, § 207, 131 Stat. 135, 412 (2017).

100. Pub. L. No. 112-213, § 301, 126 Stat. 1540, 1562 (2012).

determination is made; and (3) publish each determination on the Department of Transportation website within forty-eight hours of the notice of the determination is provided to the Secretary of Transportation.¹⁰¹

The law was also amended to require that notice be provided to Congress (specifically the House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation) of any requests for waiver not later than forty-eight hours after receiving such request and of the issuance of any waiver not later than forty-eight hours after such issuance.¹⁰² Additionally, each agency head is required to provide an explanation of the reasons the waiver is necessary and the reasons actions that could be taken to enable qualified U.S. flag capacity to meet national defense requirements are not feasible.¹⁰³ The statute was further amended on January 2, 2013, to add the House and Senate Committees on Armed Services to the list of congressional committees requiring notice of any request for a waiver and of the issuance of any such waiver.¹⁰⁴

C. *Current Law and Regulations*

Aside from the special waiver requirements applicable to SPR sales, the Jones Act waiver law has remained stable since early 2013 and continues to be bifurcated, as originally set forth in the 1941 Executive Order, between waiver requests made by a defense agency (now the Secretary Defense) and other waiver requests. With respect to DoD waiver requests, covered by 46 U.S.C. § 501(a), those requests “shall” be granted by the head of the agency “responsible for the administration of the navigation or vessel-inspection laws” without any determinations relating to U.S.-flag vessel availability.¹⁰⁵ With these requests, the Secretary of Defense makes the judgment call as to whether a waiver is “in the interest of national defense.”¹⁰⁶ With respect to all other requests under 46 U.S.C. § 501(b), whether they originate from a government agency or a member of the public, MARAD must make a vessel non-

101. *Id.*

102. *Id.*

103. *Id.*

104. Pub. L. No. 112-239, § 3512, 126 Stat. 1632, 2227 (2013). Congress has also enacted into law a special Jones Act waiver procedure administered by the U.S. Maritime Administration applicable to small foreign-built passenger vessels authorized to carry no more than twelve passengers. Pub. L. No. 105-383, §§ 502-504, 112 Stat. 3411, 3445-46 (1998), codified at 46 U.S.C. § 12121(B) (2012).

105. Pub. L. No. 112-239, § 3512, 126 Stat. at 1632, 2227.

106. *Id.*

availability determination and provide notice to Congress.¹⁰⁷ The agency charged with “administration of the navigation or vessel-inspection laws” makes the judgment call as to whether the waiver is “in the interest of national defense.”¹⁰⁸

The agency charged with administering navigation laws is CBP, which is part of DHS.¹⁰⁹ As Jones Act waiver requests are encompassed under “navigation laws,” the Secretary of the DHS issues Jones Act waivers requested by DoD or issues Jones Act waivers in response to other requests.

Neither CBP nor DHS have promulgated regulations governing the Jones Act waiver process or standard of review.¹¹⁰ In practice, this has led to ad hoc processing of Jones Act waiver requests pursuant to informal guidance. On occasion, specific guidance was created for specific situations, as occurred after the explosion of the *Deepwater Horizon* in 2010 and described below in Section IV.D “Exxon Valdez and Deepwater Horizon Waivers.” Separate specific guidance exists for Strategic Petroleum Reserve sales described below in Section IV.B “Strategic Petroleum Reserve.” The more general current guidance provides that waiver requests should be submitted to a particular office at CBP and should “include the purpose for which waiver is sought, port(s) involved, and estimated period of time for which the waiver is sought.”¹¹¹ In connection with the 2017 hurricanes, CBP posted on its website additional information that should be included in a waiver request including: details regarding the cargo, proposed shipping date and required delivery date, the names of the shipper and consignee, and the ports of embarkation and debarkation.¹¹²

107. *Id.*

108. *Id.*

109. The Bureau of Customs was re-designated as the United States Customs Service by the Department of the Treasury in 1973, and the functions of that Customs Service were transferred to DHS in 2003. 31 U.S.C. § 308; 19 C.F.R. pt. 0, App. (2017). The transferred functions of the Customs Service were transferred to CBP. See 6 U.S.C. § 542 (reorganization plan of Nov. 25, 2002).

110. In contrast, the U.S. Coast Guard has regulations governing requests to waive vessel inspection and navigation laws subject to its purview. See 33 C.F.R. § 19.01; 46 C.F.R. § 6.01.

111. U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: COASTWISE TRADE MERCHANDISE 9 (Jan. 2009), <https://www.cbp.gov/sites/default/files/documents/CoastwiseTradeMerchandise%20ICP.pdf>.

112. *Jones Act Waiver Request*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/trade/jones-act-waiver-request> (last visited Dec. 7, 2017).

IV. APPLICATION OF THE JONES ACT WAIVER LAW

Much regarding the application of the Jones Act waiver law is hidden from the public. CBP does not routinely publish Jones Act waiver approvals, although a number have in fact been published in the *Federal Register*. Since late 2012, the law has required the Secretary of Transportation to publish on its website vessel non-availability determinations relating to Jones Act waiver requests under 46 U.S.C. § 501(b).¹¹³ No such publication has yet occurred—which would indicate that no waiver requests have been seriously considered since late 2012 such that a U.S.-flag non-availability finding would have to be posted (after Hurricane Sandy). The waivers as described below with respect to the 2017 hurricanes, all were granted pursuant to 46 U.S.C. § 501(a) and so no MARAD vessel availability determination was made in connection with those waivers. In addition to individual waivers and hurricane waivers, there have been several significant inter-agency agreements governing Jones Act waivers. We take those agreements and the waiver history, such as it is, in turn.

A. Agency Agreements

Two inter-agency agreements were entered into in 1987 and 1990 primarily focused on waivers that might be necessary in the event of an energy shortage or disruption. Those agreements established the inclusion of MARAD in the waiver consideration process and the principle that a U.S. energy shortage or U.S. energy disruption could be considered a reason sufficient to satisfy the “national defense interest” standard.

1. 1987 Strategic Petroleum Reserve Agreement

The U.S. Customs Service (as it was then called), MARAD, and the U.S. Department of Energy (DOE) agreed in October 1987 to provide a consultative process among the agencies for the consideration of the issuance of any Jones Act waiver in the event of a drawdown from the Strategic Petroleum Reserve.¹¹⁴ The 1987 Agreement was intended “to ensure the unimpeded distribution of crude oil from the Strategy

113. *Id.*

114. Agreement Among the U.S. Customs Service of the Department of the Treasury, Maritime Administration of the Department of Transportation and the Department of Energy Concerning Drawdown of the Strategic Petroleum Reserve (Oct. 16, 1987). The 1987 Agreement was executed on behalf of MARAD by Elaine Chao, then Deputy Maritime Administration and who became U.S. Secretary of Transportation on January 31, 2017.

Petroleum Reserve (SPR) during a severe energy supply interruption, and to the extent such action is necessary in the interest of national defense” while complying with the Jones Act waiver law.¹¹⁵

This may have been the first express coupling of a potential domestic energy disruption with the “national defense” justification necessary under the Jones Act waiver law. The 1987 Agreement is also notable because it set forth for the first time that we are aware of the process of canvassing the U.S.-flag Jones Act market and making that an essential ingredient in whether a waiver should be issued. That concept, as described above, has found its way both into annual appropriations acts with regard to SPR sales and generally in the Jones Act waiver law.¹¹⁶ In that connection, the 1987 Agreement also provided that MARAD could determine vessel suitability for a proposed movement based on “single or collective” capacity so long as the “vessel or vessels so determined must be able to load crude oil in a safe manner without significant detriment to loading schedules.”¹¹⁷

2. 1990 Energy Agreement

The 1987 Agreement was followed by a more general waiver consultative process agreement executed in July 1990, which was intended to cover “case-by-case waivers of the Jones Act during a period of actual or imminent shortage of energy supplies, when such waivers may be necessary to help mitigate shortage and are deemed necessary in the interest of the national defense.”¹¹⁸ The 1990 Agreement, like the 1987 Agreement, also sets tight time limits for assessing whether qualified Jones Act vessels are available. As with the 1987 Agreement, MARAD was charged with determining whether U.S.-flag Jones Act qualified vessels are available in connection with the consideration of whether a waiver should issue. New and noteworthy, is that the 1990 Agreement provided an express order of preference for vessels if no U.S.-flag Jones Act qualified vessels were available with first preference going to non-Jones Act qualified U.S.-flag vessels ahead of foreign-flag vessels.¹¹⁹ It is not clear whether this preference has ever been meaningfully applied.

115. *Id.*

116. *Id.*

117. *Id.*

118. Agreement Among the U.S. Customs Service of the Dep’t of the Treasury, the Maritime Administration of the Dep’t of Transp. and the Dep’t of Energy to Expedite Requests for Waivers of the Jones Act During Periods of Actual or Imminent Shortages of Energy (July 1990), 25 SHIP. REG. REP. 1042 (1990).

119. *Id.*

B. Strategic Petroleum Reserve Waivers

The Strategic Petroleum Reserve or SPR was created in the Energy Policy and Conservation Act of 1975 in response to the 1973 OPEC oil embargo and is managed by DOE.¹²⁰ The SPR is an emergency source of oil meant to replace net U.S. imports for a specified period of time. Since oil sold from the SPR effectively had to be consumed within the United States by law prior to 2015,¹²¹ any oil transported by vessel would be covered by the Jones Act and have to be transported by qualified U.S.-flag vessels.

DOE's practice through the publication of "Standard Sales Provisions" has been to notify all potential purchasers of SPR crude oil that they must comply with the Jones Act (along with compliance with other laws such as export restrictions).¹²² The current Standard Sales Provisions similarly require compliance with the Jones Act unless a waiver is obtained—in effect, by following the procedures laid out in 1987 SPR Agreement.¹²³ Among the items that must be submitted for such a waiver is "documentary evidence of good faith effort to obtain [a] suitable U.S.-flag vessel and responses received from that effort."¹²⁴ No specific showing of why a waiver meets the "national defense" interest standard is required. However, the Standard Sales Provisions state that "if there are shown to be 'Jones Act' vessels available and in a position to meet the loading dates required, no waivers may be approved."¹²⁵

Despite these admonitions and requirements, Jones Act waivers have been issued in connection with SPR sales or drawdowns. According to DOE, general waivers of the Jones Act were issued in 1991¹²⁶ and 2005 in connection with SPR sales.¹²⁷ Waivers of the Jones

120. 42 U.S.C. § 6201 (2012).

121. See Pub. L. No. 114-113, Div. O, § 101, 129 Stat. 2242, 2987 (2015) (repeal of 1973 crude oil export ban).

122. *E.g.*, Sale of Strategic Reserve Petroleum; Standard Sale Provisions, 48 Fed. Reg. 27,482, 27,489 (June 15, 1983) (to be codified at 10 C.F.R. Part 625).

123. 10 C.F.R. Part 625 (2017).

124. *Id.* (Standard Sales Provisions Item C.7).

125. *Id.*

126. See CBP, Cust. Services Dec. 91-9 (Feb. 22, 1991) ("[T]he President, pursuant to a memorandum dated January 16, 1991, has authorized the Secretary of Energy to draw down and distribute the SPR, and directed the Secretary of the Treasury to waive compliance with the coastwise laws for the transportation of SPR oil during this drawdown.").

127. U.S. DEP'T OF ENERGY, STRATEGIC PETROLEUM RESERVE ANNUAL REPORT FOR CALENDAR YEAR 2011, at 2 (Dec. 2012). MARAD indicated that the "perception that such vessels may not be available led to foreign-flag waivers in the past, sometimes without appropriately considering the availability of U.S. vessels. The 2011 SPR release was the first time an effort was even made to integrate consideration for Jones Act U.S.-flag vessel availability in the process." MARAD, 2013 ANNUAL REPORT 15 (2013).

Act in connection with an SPR sale became especially controversial in 2011.

Disruptions to crude oil production in Libya prompted the International Energy Agency members to announce an agreement on June 23, 2011, to release crude oil from their stockpiles over a thirty-day period.¹²⁸ DOE announced on the same day that it would offer for sale 30 million barrels of crude oil as its share of that agreed action, and a Notice of Sale was released on June 24.¹²⁹ At first, the Obama Administration proposed that there be a general waiver of the Jones Act for all of the oil to be distributed—as had apparently occurred in 1991 and 2005.¹³⁰ However, the Administration quickly reversed course in favor of case-by-case waivers.¹³¹ During the pre-bid briefing, however, DOE indicated that the oil would be sold in 500,000 barrel increments and that bidders would not be required to divide lots to accommodate the Jones Act market.¹³²

As there were few, if any, qualified and available U.S.-flag vessels with sufficient capacity to carry 500,000 barrels in a single voyage, waivers of the Jones Act were issued as a matter of course to any winning bidder leading to the issuance of almost fifty individual waivers.¹³³ According to the waivers, DOE determined that “petroleum availability is crucial to economic security and the national defense” and DoD had no objection to the issuance of waivers provided that MARAD determined that no qualified U.S.-flag “capacity” was available—which MARAD provided in each instance.¹³⁴

The Jones Act community strenuously opposed this result. The American Maritime Partnership, the primary trade association advancing Jones Act interests, stated in a congressional hearing in June 2012 that the “American maritime industry” was “deeply distressed by the 2011

128. *IEA Makes 60 Million Barrels of Oil Available to Market to Offset Libyan Disruption*, INT’L ENERGY AGENCY (June 23, 2011), <https://www.iea.org/newsroom/news/2011/june/iea-makes-60-million-barrels-of-oil-available-to-market-to-offset-libyan-disrupt.html>.

129. *Summary of 2011 SPR Sale*, DEP’T ENERGY, <https://www.energy.gov/fe/summary-2011-spr-sale> (last visited Dec. 22, 2017).

130. *Id.*

131. See, e.g., Tom Doggett, *White House Drops Plan to Let Foreign Vessels Move SPR Oil*, REUTERS (June 24, 2011), <https://af.reuters.com/article/energyOilNews/idAFN1E75N0P520110624>.

132. See Sayeh Tavangar, *DOE Offers More Details on SPR Auction*, PLATT’S ENERGY WEEKLY, INSIDE ENERGY EXTRA, June 28, 2011 (on file with authors).

133. See *A Review of Vessels Used to Carry Strategic Petroleum Reserve Drawdowns, Before the Subcomm. on Coast Guard & Maritime Transp., H. Comm. on Transp. & Infra.*, 112th Cong. 90 (June 27, 2012).

134. Letters from Sec. Janet Napolitano to various requesters from July 8, 2011 to September 9, 2011.

draw down.”¹³⁵ The American Waterways Operators, for example, were quoted as saying that “all the profit from movement of oil has gone to foreign shippers and crewmen, and that’s galling.”¹³⁶ For its part, DOE defended the decision on the basis the process was necessary to ensure “expeditious drawdown of the Strategic Petroleum Reserve” in order to comply with the U.S. commitment to the rest of the international community.¹³⁷

To a large extent the changes in the Jones Act waiver law both direct and indirect via appropriations acts stem from these almost fifty individual waivers. For example, the appropriations measures have required a determination that a transportation need cannot be met by “collective” action, which appears intended to prevent Jones Act waivers being granted via lot or cargo size conditions.¹³⁸ Arguably, this requirement already existed prior to the appropriations acts via the 1987 SPR Agreement which requires MARAD to consider “single or collective” vessel capacity.¹³⁹ Similarly, MARAD was given a prominent role under the Jones Act waiver law as amended in 2012 to determine whether U.S.-flag vessels are available including a requirement that MARAD “identify any actions that could be taken to enable qualified United States flag capacity to meet national defense requirements.”¹⁴⁰ The use of the word “capacity” may imply the need to consider whether multiple vessels or voyages can satisfy a need stated to require only a single vessel or voyage.

At the same time, current SPR Standard Sales Provisions and the practice with regard to SPR drawdowns appears to have diluted the “national defense interest” requirement. Those Sales Provisions do not require a “national defense” showing and focus largely on whether there are U.S.-flag vessels available to meet the stated need.¹⁴¹ The implication is that a waiver will issue with respect to every SPR sale or drawdown if there is no U.S.-flag vessel available. The changes since 2011 have strengthened the process with regard to determining whether a U.S.-flag vessel is available by increasing MARAD’s role and making it a more public process. But those changes do not appear to have changed the

135. *Id.* at 2 (testimony of T. Allegretti on behalf of The American Maritime Partnership).

136. John Broder, *Oil Reserves Sidestep U.S. Vessels*, N.Y. TIMES (Aug. 23, 2011), <https://www.nytimes.com/2011/08/24/business/oil-reserves-sidestep-us-vessels.html>.

137. U.S. DEP’T OF ENERGY, *supra* note 127, at 2.

138. *See, e.g.*, Pub. L. No. 112-55, § 170, 125 Stat. at 666-67 (2011).

139. *Id.*

140. 46 U.S.C. § 501(b)(2) (2012).

141. *Id.*

implication of past practice and the SPR Standard Sales Provisions that an SPR sale or drawdown is *ipso facto* a “national defense interest.”

C. Hurricane Waivers

Hurricanes were not always synonymous with Jones Act waivers. Prior to Hurricane Katrina in 2005, we can discover no record of a general waiver being granted after a hurricane. Katrina changed that dynamic.

1. Hurricanes Katrina and Rita

Perhaps because Katrina caused substantial destruction and disruption to the U.S. energy industry, the U.S. Government almost immediately received requests for waivers of the Jones Act. The storm made landfall in Louisiana on August 29, and President Bush on September 1 announced a number of measures would be taken including a temporary Jones Act waiver (the “Katrina waiver”) because “there are currently not enough American ships to move the oil and gasoline where it’s needed.”¹⁴² The Secretary of DHS then issued a waiver “for the transportation of petroleum and refined petroleum products for the period until 12:01 am, September 19, 2005” as well as for crude oil to be released from the SPR.¹⁴³

The Katrina waiver, which set a pattern for subsequent hurricane Jones Act waivers, expressly connected energy disruptions and energy shortages with national defense.¹⁴⁴ The DHS Secretary found that “lost production, refining and transportation capacity has resulted in threatened rationing and unavailability of gasoline, jet fuel and other refined products, and threatens the Nation’s economic and national security.”¹⁴⁵ There was no indication in public announcements or otherwise that the procedures set forth in the 1990 inter-agency energy agreement had been followed before the waiver was issued other than the President’s statement that “there are currently not enough American ships to move the oil and gasoline where it’s needed.”¹⁴⁶

The Jones Act community’s reaction was at first not to oppose this period-of-time general waiver. The American Maritime Partnership (then

142. Remarks of President George W. Bush Following a Meeting with Former President H. W. Bush and Former President William J. Clinton (Sept. 1, 2005).

143. U.S. Dep’t of Homeland Security, Waiver of Compliance with Navigation and Inspection Laws, 70 Fed. Reg. 53,236 (Sept. 7, 2005).

144. *Id.*

145. *Id.*

146. *Id.*

called the Maritime Cabotage Task Force or MCTF) issued a statement on September 2 stating “we respect the President’s decision in light of the unusual and temporary circumstance caused by the downed pipelines and the dimensions of human tragedy” although the “industry normally opposes coastwise waivers because of the robust capacity of the domestic fleet.”¹⁴⁷ By September 15, the industry was urging the government not to extend the existing waiver or issue a new waiver because “there is now excess U.S. flag vessel capacity available to transport refined petroleum products out of the Gulf region.”¹⁴⁸

A second, similar waiver of the Jones Act was issued following Hurricane Rita which made landfall on September 24, 2005. On September 26, 2005, President Bush indicated that “[w]e will continue that waiver”¹⁴⁹ and later that day the Secretary of DHS issued another Jones Act waiver for the transportation of petroleum and petroleum products until October 24.¹⁵⁰ In this instance, MCTF opposed the issuance of the waiver from the outset and urged DHS to follow the 1990 inter-agency energy agreement for the issuance of case-by-case waivers.¹⁵¹

In an attempt to expand the waivers, a group of agricultural trade associations submitted a request to waive the Jones Act for the remainder of 2005 for the transportation of agricultural commodities and products.¹⁵² The MCTF opposed the request and urged the U.S. Government to “resist any effort to turn case-by-case waivers . . . to meet defined threats to U.S. national security into broader legislative grants intended primarily to further the economic self interests of those making the request.”¹⁵³ The Secretary of Agriculture indicated that there was adequate U.S.-flag capacity, and no agricultural waiver was issued.¹⁵⁴

147. Statement of P. Grill, Chairman, Maritime Cabotage Task Force, Regarding the President’s Decision to Temporarily Waive Certain Elements of the Jones Act (Sept. 2, 2005).

148. Letter from P. Grill, Chairman, Mar. Cabotage Task Force, to Sec. Michael Chertoff (Sept. 15, 2005).

149. Remarks by President George W. Bush on Energy Supply (Sept. 26, 2005).

150. U.S. Dep’t of Homeland Security, Waiver of Compliance with Navigation and Inspection Laws, 70 Fed. Reg. 57,611 (Oct. 3, 2005).

151. See *Administration Issues Second Jones Act Waiver After Hurricane Rita*, AWO Letter 2 (Sept. 30, 2005).

152. Letter to President George W. Bush from Agric. Retailers Ass’n (Sept. 20, 2005), *in* INSIDE U.S. TRADE, Sept. 23, 2005, at 6.

153. Letter from Philip Grill, Chairman, Mar. Cabotage Task Force, to Senators Ted Stevens and Daniel K. Inouye (Sept. 21, 2005).

154. See *Johans Signals Opposition to Jones Act Waiver for Farm Goods*, INSIDE U.S. TRADE, Sept. 23, 2005, at 6.

2. Hurricane Sandy

Hurricane waivers did not come up again until Hurricane Sandy struck on October 29, 2012. Again, a waiver relating to a potential energy shortage was issued on November 2, but the process was considerably changed from Hurricanes Katrina and Rita.¹⁵⁵ Although the Hurricane Sandy process was more akin to the 1990 Agreement process, it was still criticized in a 2014 National Petroleum Council report: “There is no clear, publicly known, process for DHS to issue industry-wide regulatory relief The lack of a clear process and defined criteria is likely one of the reasons for delays in issuance of needed regulatory relief.”¹⁵⁶

At first the waiver was limited to “petroleum products.”¹⁵⁷ On November 3, that was expanded to cover “feedstocks, blending components, and additives used to produce fuels.”¹⁵⁸

Unlike 2005, MARAD was expressly consulted and it indicated that it “canvassed executives of the U.S. maritime industry” and as a result “found that no U.S.-flag coastwise qualified tank vessels are open for booking at the necessary locations and within the required period for this carriage.”¹⁵⁹ The waiver also indicated that both DOE and DoD had been consulted.¹⁶⁰ DOE indicated that “petroleum availability is crucial to economic security and the national defense” and that Hurricane Sandy had caused severe damage to mid-Atlantic region refining and distribution centers.¹⁶¹ DoD concurred and indicated that a waiver was necessary in the interest of national defense.

The waiver also provided that a condition of the waiver was that notice had to be provided to MARAD within twenty-four hours after loading including the name of the vessel utilized, the loading port and date, the cargo carried and the anticipated discharge port.¹⁶² Another notice was required seventy-two hours after discharge. Ultimately, eleven vessels took advantage of the Hurricane Sandy waiver to deliver

155. NAT’L PETROLEUM COUNCIL, ENHANCING EMERGENCY PREPAREDNESS FOR NATURAL DISASTERS 61 (Dec. 18, 2014).

156. *Id.*

157. U.S. DEP’T OF HOMELAND SEC., WAIVER OF COMPLIANCE WITH NAVIGATION LAWS (Nov. 2, 2012).

158. Press Release, DHS Announces Expansion of Temporary, Blanket Jones Act Waiver, U.S. DEP’T HOMELAND SECURITY (Nov. 3, 2012), <https://www.dhs.gov/news/2012/11/03/dhs-announces-expansion-temporary-blanket-jones-act-waiver>.

159. U.S. DEP’T OF HOMELAND SEC., *supra* note 157.

160. *Id.*

161. *Id.*

162. *Id.*

2.7 million barrels of fuel from the U.S. Gulf coast to the U.S. Northeast.¹⁶³

3. Hurricanes Harvey, Irma and Maria

The arrival of Hurricane Harvey on August 27, 2017, re-initiated consideration of the need for a general Jones Act waiver. At least one company sought a general thirty-day waiver by letter dated September 2¹⁶⁴ and another company sought an individual waiver to provide crude oil to a refinery in Louisiana.¹⁶⁵ A general seven-day waiver was issued on September 8 and, for the first time with respect to a hurricane waiver, on request of the Secretary of Defense in accordance with 46 U.S.C. § 501(a).¹⁶⁶ Thus, none of the Jones Act vessel non-availability provisions included in the Jones Act waiver law after 2012 were applicable and none were invoked.

At first the waiver was limited to “refined petroleum products” shipped from four states to three states and Puerto Rico but was expanded on September 11 to apply to products from eleven states to six states and Puerto Rico.¹⁶⁷ Following the issuance of the waiver, CBP posted guidance on its website requesting that certain information be provided for each vessel utilizing the waiver and advice on vessel entrance and cargo clearance for such vessels.¹⁶⁸

When Hurricane Maria hit Puerto Rico, the Trump Administration at first indicated that no waiver was needed.¹⁶⁹ President Trump stated that “[w]e have a lot of shippers, a lot of people that work in the shipping industry that don’t want the Jones Act lifted” and that “we have a lot of

163. U.S. DEP’T OF ENERGY, OFFICE OF ELEC. DELIVERY & ENERGY RELIABILITY, COMPARING THE IMPACTS OF NORTHEAST HURRICANES ON ENERGY INFRASTRUCTURE 30 (Apr. 2013).

164. Letter from SeaRiver Mar. Inc. to U.S. Customs & Border Prot. (Sept. 2, 2017).

165. See Catherine Ngai, *U.S. Phillips 66 Requests Jones Act Waiver After Harvey*, REUTERS (Sept. 3, 2017), <https://www.reuters.com/article/us-storm-harvey-phillips66/u-s-phillips-66-requests-jones-act-waiver-after-harvey-idUSKCN1BE12O>; Brian Scheid, *Phillips 66 Withdrawing US Jones Act Request: Spokesman*, S&P GLOBAL PLATTS (Sept. 7, 2017), <https://www.spglobal.com/platts/en/market-insights/latest-news/shipping/090717-phillips-66-withdrawing-us-jones-act-request-spokesman>.

166. U.S. DEP’T OF HOMELAND SEC., WAIVER OF COMPLIANCE WITH NAVIGATION LAWS (Sept. 8, 2017); Letter from the Under Sec’y of Def. to U.S. Customs & Border Prot. (Sept. 8, 2017).

167. U.S. DEP’T OF HOMELAND SEC., WAIVER OF COMPLIANCE WITH NAVIGATION LAWS (Sept. 11, 2017).

168. U.S. Customs & Border Prot., Cargo Systems Messaging Service Nos. 17-000562 and 17-000563 (Sept. 12, 2017).

169. *Id.*

ships out there right now.”¹⁷⁰ In the end, a general waiver was issued on September 28, 2017, again under 46 U.S.C. § 501(a).¹⁷¹ The only reason given by DHS for the waiver was that Puerto Rico has suffered “widespread damage to its infrastructure.”¹⁷² Although the period of the waiver was short (ten days), the scope was broad. For the first time in connection with hurricane Jones Act waivers, the waiver extended beyond petroleum to cover “all products.”¹⁷³

The Trump Administration was widely criticized for the time it took to issue a waiver after the impact of the hurricane and for not extending the waiver when it expired.¹⁷⁴ The American Maritime Partnership responded with a number of releases and documents including a November 19, 2017, press release entitled *Domestic Maritime Industry Sets the Record Straight on Importance of the Jones Act to Puerto Rico Recovery*.¹⁷⁵

In addition, the Coast Guard Subcommittee of the U.S. House Transportation and Infrastructure Committee held a hearing on October 3 to evaluate whether there was adequate Jones Act fleet capacity to serve Puerto Rico’s needs.¹⁷⁶ Chairman Duncan Hunter pledged support for the Jones Act and indicated,¹⁷⁷ as did MARAD,¹⁷⁸ that any slowness in getting supplies into Puerto Rico was due to “backlogged” ports, not lack of Jones Act vessels.

170. Melanie Zanona, *Trump Considers Shipping Waiver for Puerto Rico Aid*, HILL (Sept. 27, 2017), <http://thehill.com/policy/transportation/352791-trump-considers-shipping-waiver-for-puerto-rico-aid>.

171. U.S. DEP’T OF HOMELAND SEC., WAIVER OF COMPLIANCE WITH NAVIGATION LAWS (Sept. 28, 2017).

172. *Id.*

173. *Id.*

174. *E.g.*, Alex Daugherty, *The Jones Act Waiver Was Supposed to Help Puerto Rico. So Where Are the Ships?*, MIAMI HERALD (Oct. 6, 2017), <https://www.miamiherald.com/news/politics-government/article177532316.html>. *But see* Drew Broach, *U.S. Rep. Garret Graves, R-Baton Rouge, Dings President Donald Trump for Waiving the Jones Act to Let Foreign Vessels Deliver Hurricane Relief to Puerto Rico*, TIMES-PICAYUNE (Oct. 1, 2017), https://www.nola.com/national_politics/2017/09/puerto_rico_jones_act_trump_ga.html.

175. Press Release, Domestic Maritime Partnership Industry Sets the Record Straight on the Importance of the Jones Act to Puerto Rico Recovery, AM. MAR. PARTNERSHIP (Nov. 19, 2017), <https://www.americanmaritimepartnership.com/press-releases/domestic-maritime-industry-sets-record-straight-importance-jones-act-puerto-rico-recovery/>.

176. *Building a 21st Century Infrastructure for America: Coast Guard Stakeholders’ Perspectives and Jones Act Fleet Capabilities: Hearing Before the Subcomm. on Coast Guard & Mar. Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. (Oct. 3, 2017).

177. *Id.* (statement of Duncan Hunter).

178. *Building a 21st Century Infrastructure for America: Coast Guard Stakeholders’ Perspectives and Jones Act Fleet Capabilities: Staff Summary of Subject Matter, Hearing Before the Subcomm. on Coast Guard and Mar. Transp., H. Comm. on Transp. & Infrastructure*, 115th Cong. 6 (Oct. 3, 2017).

D. Exxon Valdez and Deepwater Horizon Waivers

The two largest oil spills in U.S. history stemming from the grounding of the *Exxon Valdez* in 1989 and the explosion of the *Deepwater Horizon* in 2010 both led to Jones Act waivers, although for different reasons.

The *Exxon Valdez* grounding and oil spill in 1989 occasioned the issuance of waivers for foreign-flag vessels to engage in oil spill recovery. Unlike the later *Deepwater Horizon* experience, the spill occurred in U.S. territorial waters which meant that oil skimmed from the surface and returned to a U.S. port had to be transported in a qualified U.S.-flag vessel under CBP interpretations.¹⁷⁹ Moreover, the law permitting special waivers for certain foreign spill response vessels had not yet been enacted.¹⁸⁰ Waivers were issued on April 14, 1989, and April 17, 1989, with respect to specific named vessels.¹⁸¹ The initial waiver indicated that although DoD “sees no demonstration of a direct impact upon that Department,” the Treasury Department noted that DoD posed no objection to the waiver.¹⁸² The Treasury Department concluded that a waiver was “in the interest of national defense” “[i]n view of the critical nature of the situation.”¹⁸³ During the period, MARAD was active in publicly assessing the availability of qualified Jones Act vessels.¹⁸⁴

The explosion of the mobile offshore drilling unit *Deepwater Horizon* on April 20, 2010, led to publicity regarding the application of the Jones Act to spill response.¹⁸⁵ Among other things, there was some confusion as to whether recovery of oil on the surface that had arisen from a well on the U.S. outer continental shelf—versus skimmed in U.S. territorial waters to which the coastwise laws apply—and brought back to a U.S. port was a Jones Act-covered activity.¹⁸⁶ The situation was also

179. See, e.g., CBP, HQ 111372 (Mar. 20, 1991) (use of German oil skimmer in U.S. territorial waters returning oil to a U.S. port required the issuance of a Jones Act waiver).

180. See 46 U.S.C. § 55113 (2012).

181. E.g., *Exxon Shipping Co.—Letters Granting Waiver of Coastwise Laws*, 25 SHIPPING REG. REP. 105, 106 (1989).

182. *Id.*

183. *Id.*

184. Maritime Administration, Request for Information on Availability of U.S. Vessels for Alaska Clean-up Operations, 54 Fed. Reg. 15,297 (Apr. 17, 1989); Maritime Administration, Request for Information on Availability of U.S. Vessels for Alaska Clean-up Operations, 54 Fed. Reg. 18,625 (May 1, 1989).

185. See Joseph M. Conley, *The Jones Act: Its Effect on the Response to the 2010 BP Deepwater Horizon Oil Spill and Its Relevance in International Law*, 11 WASH. U. GLOBAL STUD. L. REV. 151 (2012).

186. See, e.g., CBP, HQ 113465 (June 22, 1995) (oil skimming in U.S. territorial waters, *i.e.*, within three nautical miles of the coast, constitutes “lading” of cargo such that if the skimmed

confused by the fact that there is a separate law permitting foreign oil spill recovery vessels to operate in U.S. waters provided certain requirements are met.¹⁸⁷

The Obama Administration came under public pressure to waive the Jones Act to ensure that there would be sufficient oil spill response capacity with many of the critics failing to distinguish the responses to Hurricanes Katrina and Rita (where the waivers were needed to address energy supply disruptions) to the spill incident (where no waiver was needed to permit foreign vessels to engage in spill recovery).¹⁸⁸ In that connection, former Governor Sarah Palin stated on June 11 that “there needs to be waiving of the Jones Act so that we could have had many, many days ago, weeks ago, some help with skimmers from elsewhere It’s amazing to me and to so many others that though President Bush had been able to waive Jones Act provisions for Katrina, President Obama hasn’t thought to do that yet?”¹⁸⁹

In response, Adm. Thad Allen, the National Incident Commander, announced on June 15 he had directed the Coast Guard Federal On-Scene Coordinator, CBP and MARAD “to ensure any Jones Act waiver requests receive urgent attention and processing.”¹⁹⁰ In this announcement, Adm. Allen noted that fifteen non-U.S.-flag vessels were already involved in the spill response.¹⁹¹ Notably, Adm. Allen did not indicate in the press release how the national defense interest requirement would be handled for spill response requests.

Although no skimmer response vessel waivers were needed, Jones Act waivers were in fact issued in connection with the spill. As explained by Adm. Allen in subsequent congressional testimony, waivers were issued with respect to seven vessels “engaged in source control operations in the event they were forced to alter operations in a manner

oil is discharged in a U.S. port, a Jones Act qualified vessel must be used); CBP, HQ 111372 (Mar. 20, 1991).

187. 46 U.S.C. § 55113 (2012).

188. *See, e.g.*, SEN. JAMES M. INHOFE, RANKING MEMBER, S. COMM. ON ENVIRONMENT & PUBLIC WORKS, FAILURE OF LEADERSHIP: PRESIDENT OBAMA AND THE FLAWED FEDERAL RESPONSE TO THE BP DISASTER 12-15 (Aug. 2010).

189. *Oil Spill, Foreign Help and the Jones Act*, FACTCHECK.ORG (last updated July 1, 2010) (“In reality, the Jones Act has yet to be an issue in the response efforts.”).

190. Press Release, Deepwater Horizon Incident Joint Info. Ctr., Admiral Allen Provides Guidance to Ensure Expedited Jones Act Waiver Processing Should It Be Needed (June 15, 2010). MARAD indicates that a Memorandum of Agreement among MARAD, Coast Guard, the Environmental Protection Agency, and the Department of State was also developed to expedite “Jones Act exemptions for oil-spill-response vessels that did not already qualify” on the foreign spill recovery law. MARAD, 2010 & 2011 ANNUAL REPORT 34 (2011).

191. *Id.*

that might implicate the Jones Act.”¹⁹² Adm. Allen also noted that those requests were acted upon by DHS within ten days of receipt, no Jones Act waiver request was denied and concluded that “the Jones Act had no impact on response operations.”¹⁹³

E. Individual Waivers

As already indicated, publicly available information regarding Jones Act waivers since some time in the 1970s is sporadic. Early waivers were apparently all published in the *Federal Register* or in a CBP publication like Customs Services Decisions. At some point, that practice ceased and many waivers never appear in the public domain. Waiver denials are easier to come by as they tend to be reported in CBP’s publicly accessible data base of rulings, the Customs Rulings Online Search System or CROSS.

1. World War II

The earliest Jones Act waiver that we were able to locate based on the 1941 Executive Order or the War Powers Acts was issued on March 31, 1942.¹⁹⁴ That waiver issued by the Secretary of the Treasury granted coastwise trading privileges to any foreign-flag vessel chartered or acquired by the U.S. Maritime Commission or the War Shipping Administration “when operated by the War Shipping Administration directly or through agents or while chartered or leased by either of such agencies to any persons.”¹⁹⁵ This waiver, like other World War II waivers, was justified as being “necessary in the conduct of the war.”¹⁹⁶ Waivers

192. *Hearing on Improving Oil Spill Prevention and Response, Restoring Jobs, and Ensuring Our Energy Security: Recommendations from the Nat’l Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Before the Subcomm. on Coast Guard and Maritime Transp., House Transp. & Infrastructure Comm.*, 112th Cong. 19 (statement of Admiral Thad W. Allen, U.S. Coast Guard (ret.)).

193. *Id.*; NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 142-43 (2011) (“Non-public Coast Guard documents” indicate the waivers were granted June 29, 2010, June 30, 2010, and July 9, 2010).

194. T.D. 50592 (Mar. 31, 1942), Coastwise Laws Waived to the Extent Necessary to Permit Certain Vessels to Engage in the Coastwise or Intercoastal Trade While Under Foreign Flag, 7 Fed. Reg. 2581 (Apr. 3, 1942).

195. *Id.*

196. *Id.*

varying this theme were issued throughout the war¹⁹⁷ and were all expressly rescinded in 1945.¹⁹⁸

Other examples of Jones Act waivers issued during World War II include: (1) an April 28, 1942, waiver permitting Canadian vessels to transport civilians and contractor equipment and supplies from the continental United States to Alaska to assist with road construction;¹⁹⁹ (2) a May 29, 1942, waiver to permit Canadian vessels to transport iron ore between U.S. ports;²⁰⁰ and (3) a February 5, 1943, waiver to permit non-U.S.-flag vessels to engage in the trade to and from Puerto Rico from the U.S. Atlantic or Gulf coasts under certain conditions.²⁰¹ The Puerto Rico waiver prohibited transshipment and required, among other things, that all cargoes be approved by the U.S. War Shipping Administration.²⁰²

At least one Jones Act waiver was issued after World War II had concluded but was still granted on the basis that it was “necessary in the conduct of the war.”²⁰³ That waiver was issued September 30, 1946, to permit Canadian vessels to carry passengers between Skagway and other points in Alaska for the last three months of 1946.²⁰⁴

During the war, waivers of inspection and safety requirements were also issued.²⁰⁵ A general waiver of all “navigation and vessel inspection laws administered by the United States Coast Guard” was issued on

197. *See, e.g., id.*

198. Order of the Secretary of the Treasury, 10 Fed. Reg. 6431-6433 (June 1, 1945); Waiver of Certain Navigation Laws Rescinded in Whole or in Part, 10 Fed. Reg. 14,497-98 (Nov. 28, 1945).

199. T.D. 50621 (Apr. 27, 1942), Coastwise Laws Waived to the Extent Necessary to Permit Transportation of Civilians Engaged in Construction of Roads and Equipment, Materials, and Supplies of Contractors Engaged in Construction of those Roads from Points in Continental United States to Points in Alaska, 7 Fed. Reg. 3127 (Apr. 29, 1942).

200. T.D. 50643 (May 29, 1942), Waiver of Entrance and Clearance Laws, 7 Fed. Reg. 4184 (June 2, 1942).

201. T.D. 50811 (Feb. 5, 1943), Transportation of Merchandise Between Puerto Rico and U.S. in Foreign Registry Vessels, 8 Fed. Reg. 1757 (Feb. 9, 1943). A two-month waiver was also issued on May 30, 1945, permitting Canadian vessels to transport merchandise between southeastern Alaskan ports and Canadian ports of cargoes originally from or destined to the continental United States. Treas. Dec. 51243, Order of the Secretary of the Treasury, 10 Fed. Reg. 6433 (June 1, 1945).

202. T.D. 50811 (Feb. 5, 1943), Transportation of Merchandise Between Puerto Rico and U.S. in Foreign Registry Vessels, 8 Fed. Reg. 1757 (Feb. 9, 1943).

203. Treas. Dec. 51540 (Sept. 30, 1946), Waiver of Coastwise Laws for Canadian Vessels, 11 Fed. Reg. 11,355 (Oct. 4, 1946).

204. *Id.*

205. The waiver law has also been used to waive U.S. citizenship requirements. *See Nat'l Marine Eng'rs' Beneficial Ass'n v. Burnley*, 684 F. Supp. 6, 8 (D.D.C. 1988).

March 6, 1942, and revised during the war.²⁰⁶ At first the waiver applied to “any vessel engaged in any business in which the Navy Department has an interest” and could be invoked by any Commandant of a Naval District. This was later made broader to cover all vessels engaged in the war effort and were issued directly by the Secretary of the Navy.²⁰⁷ More specific inspection and safety waivers were also issued.²⁰⁸

2. Post-World War II Waiver Approvals

A number of Jones Act waivers were issued after World War II into the 1970s as noticed in the *Federal Register* or which appear in CBP publications such as *Treasury Decisions*.²⁰⁹ Waivers were issued, for example, in the 1950s to permit vessels operated by Pacific Micronesia Lines, Inc. to operate freely among the Trust Territory of the Pacific Islands and to take cargoes to and from the United States to those islands.²¹⁰ Highly specific Jones Act waivers were issued in situations including: (1) the towing by a Canadian tug on a single voyage in New York state;²¹¹ (2) short term waivers for two foreign-flag vessels under charter to the Military Sea Transportation Service (later the Military Sealift Command);²¹² (3) a waiver to permit the transportation of molten sulphur for a defined period in the U.S. coastwise trade;²¹³ (4) the use of a U.S.-built tank vessel that had lost its Jones Act trading privileges because it had been registered foreign;²¹⁴ (5) use of a Canadian dredge in the “St. Lawrence Seaway Project” in 1954;²¹⁵ and (6) a single voyage movement of liquefied natural gas from Alaska to the continental United

206. Order Waiving Compliance with the Navigation and Vessel Inspection Laws, 7 Fed. Reg. 2477 (Mar. 6, 1942); *see, e.g.*, 7 Fed. Reg. 7979 (Oct. 8, 1942).

207. Vessels Engaged in Business Connected with the Conduct of the War, 7 Fed. Reg. 7979 (Oct. 8, 1942).

208. *E.g.*, 7 Fed. Reg. 2477 (Mar. 31, 1942) (waiver of requirement to place licenses under glass to avoid loss in case of shipwreck); 10 Fed. Reg. 14,497 (Nov. 28, 1945) (measurement and load lines).

209. There were also safety and inspection waivers after World War II. *E.g.*, 21 Fed. Reg. 10,254 (Dec. 18, 1956) (waiving load line requirements for deeper loading of coastwise tank vessels) (canceled on May 7, 1957, 22 Fed. Reg. 3199).

210. *E.g.*, Waivers of Navigation and Vessel Inspections Laws and Regulations, 19 Fed. Reg. 4952 (Aug. 6, 1954).

211. T.D. 53817, Waiver of Coastwise Towing Laws, 20 Fed. Reg. 4151 (June 14, 1955).

212. T.D. 55787, 97 Treas. Dec. 721 (Dec. 18, 1962).

213. T.D. 55856, 98 Treas. Dec. 269 (Mar. 15, 1963).

214. *See* Request for Waiver of Laws, 35 Fed. Reg. 6664 (Apr. 23, 1970).

215. T.D. 53668, 89 Treas. Dec. 351 (Nov. 15, 1954). A number of similar waivers were issued in connection with the construction of the St. Lawrence Seaway. *E.g.*, T.D. 54128, 91 Treas. Dec. 238 (July 6, 1956); T.D. 54203, 91 Treas. Dec. 342 (Sept. 26, 1956).

States.²¹⁶ In each instance, the only justification offered without embellishment was that it was “in the interest of national defense.”²¹⁷ None of these waivers indicated that MARAD or its predecessor had weighed in on U.S.-flag availability.

Other than the hurricane and SPR waivers, only seven single voyage Jones Act waivers were granted from 1997 to 2017 according to a February 2018 U.S. Government response to a Freedom of Information Act request²¹⁸: (1) use of a U.S.-flag foreign-built vessel in the Ready Reserve Force for a “sea deployment readiness exercise” in 1998; (2) use of a foreign-flag vessel apparently for similar exercise in 1999; (3) use of foreign-flag “mini-bulk” vessels in connection with a salvage operation by a foreign-flag jack-up crane barge to clear a vessel which ran aground in San Juan, Puerto Rico in 1999;²¹⁹ (4) another apparent use of a U.S.-flag foreign-built vessel in the Ready Reserve Force for some operation in 2000; (5) on September 28, 2005, to permit the use of a foreign-flag heavy lift vessel to transport a radar system from Texas to Hawaii;²²⁰ (6) on February 27, 2006, to transport helicopters from Washington State to Alaska,²²¹ and (7) use of a dry dock owned by a U.S. company with a foreign parent to more and launch a vessel in 2011. In addition, Jones Act waivers were granted (1) in 2005 in the aftermath of Hurricane Katrina for the shuttling of crude oil between U.S. Gulf of Mexico production platforms;²²² (2) on June 27, 2006, to permit the use of a

216. See Phillips Petroleum Co., Emergency Natural Gas Act of 1977, Emergency Order, 42 Fed. Reg. 12,480 (Mar. 4, 1977). There are also many other waivers in the early decades after World War II, including: T.D. 54100, 91 Treas. Dec. 141 (June 1, 1956); T.D. 54251, 91 Treas. Dec. 414 (Nov. 23, 1956).

217. *Id.*

218. Letter from Lisa L. Burley to Constantine G. Papavizas (Feb. 22, 2018) (the waiver approvals were substantially redacted by the U.S. Government) (on file with authors). Waivers earlier than 1997 include a waiver granted in 1982 to permit a foreign launch barge to transport a platform jacket from Texas to a point on the U.S. outer continental shelf because no qualified U.S.-flag vessels were available. See Complaint at 9, Furie Operating Alaska, LLC v. DHS (D. Alaska 2012) (No. 12-cv-00158). A waiver request was also submitted in 1991 for the use of a molten sulphur carrier in the U.S. Gulf of Mexico pending construction of a replacement vessel. Letter from Rene L. Latiolais to Nicholas F. Brady, U.S. Sec’y of the Treasury (May 8, 1991) (on file with authors). Ultimately, that waiver was granted by Act of Congress. Pub. L. No. 102-100, § 3, 105 Stat. 491 (1991) (relating to the *Nordic Louisiana*).

219. This waiver was also reported by MARAD in its *2000 Annual Report* where MARAD indicated that a waiver was granted for “the salvage of a vessel blocking the entrance to San Juan harbor.” MARAD, 2000 ANNUAL REPORT 35 (July 2001).

220. Letter from Michael T. Schmitz, CBP, to Kenneth J. Krieg, DoD (Sept. 28, 2005) (on file with authors without redactions).

221. Letter from Sandra L. Bell, CBP, to Kenneth J. Krieg, DoD (Feb. 27, 2006) (on file with authors without redactions).

222. *BP Secures Jones Act Waiver Extension for Shuttle Ops*, LLOYD’S LIST, Oct. 26, 2005 (on file with authors).

foreign heavy lift vessel to transport a jack-up rig from Texas to Alaska;²²³ and (3) in December 2011 to permit a Russian-flag ice class tanker to transport gasoline from Dutch Harbor, Alaska, to Nome, Alaska.²²⁴ According to public reports, Nome faced a fuel crises because a fuel barge scheduled to arrive in the fall did not arrive. This last 2006 waiver approval was granted to Escopeta Oil Company, LLC, which later gained some notoriety. In the waiver approval, DHS indicated that the rig to be transported was needed in Alaska for the exploration and development of dwindling natural gas resources in Cook Inlet, that the rig was too large to be transported through the Panama Canal (thereby necessitating the use of a heavy lift vessel), and that the waiver request had the support of Senators Ted Stevens and Frank Murkowski and Congressman Don Young, i.e., Alaska's entire congressional delegation.²²⁵

Escopeta's arrangements fell through in 2006 and it was not until 2010 that Escopeta was again in a position to transport a jack-up rig from Texas to Alaska (in this instance, the *Spartan 151*).²²⁶ Escopeta then requested that DHS reconfirm the waiver.²²⁷ Subsequently, CBP informed Escopeta that the waiver was no longer valid and it would need a new waiver.²²⁸ Escopeta then sought a new waiver, which was denied in March 2011 based on MARAD's determination that a U.S.-flag vessel was available.²²⁹ Believing that MARAD was in error, Escopeta proceeded with the shipment and was then fined by CBP in the original amount of \$15 million even though MARAD subsequently determined that in fact there was no qualified U.S.-flag vessel to undertake the transportation.²³⁰ Escopeta (having transferred its interests to Furie Operating Alaska, LLC) then sued the U.S. Government in the U.S. District Court for Alaska.²³¹ Ultimately, and as also described below in Part V, "Jones Act Penalty Mitigation," Furie and the U.S. Government

223. Letter from Michael Chertoff, DHS, to Jeanne M. Grasso (June 27, 2006) (on file with authors without redactions).

224. *Homeland Security Grants Waiver of Jones Act for Nome Fuel Delivery*, ALASKA BUS. (Dec. 30, 2011), <http://www.akbizmag.com/Alaska-Business-Monthly/December-2011/Homeland-Security-grants-waiver-of-Jones-Act-for-Nome-fuel-delivery/>.

225. *Id.*

226. *See* Furie Operating Alaska, LLC v. DHS, 2014 AMC 1116, 1117 (D. Alaska 2014).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Furie Operating Alaska, LLC v. DHS, 2015 AMC 1966 (D. Alaska 2015).

settled for the amount of \$10 million.²³² This is likely the largest Jones Act fine ever paid.²³³

3. Waiver Denials

Possibly the first publicly reported Jones Act waiver denial appeared in 1979. In that instance the request was to transport motor fuel antiknock compound from the continental United States to Puerto Rico. The Department of Commerce (then including MARAD) objected to the waiver and DoD did not indicate “a significant adverse impact on our national defense,” and so no waiver was granted.²³⁴

A similar thing happened in 1989 when Jones Act waiver requests were submitted for shipments of propane from the U.S. Gulf Coast to the U.S. East Coast and shipments of heating fuel from Puerto Rico to New York.²³⁵ This was during the period when the 1990 Agreement was executed.²³⁶

MARAD recommended against the heating fuel requests because there were qualified U.S.-flag vessels available for the movements but did not stand in the way of the movements of propane because DOE determined that there is “an emergency shortage of propane in the northeastern United States, which cannot be remedied by any means other than ocean transport” and no suitable Jones Act vessels to undertake the movements.²³⁷ And so a Jones Act waiver was issued for the movement of propane.²³⁸

Since 1989, CBP’s public database contains numerous denials of Jones Act waiver requests. These usually take the form of a request to confirm that a vessel movement is not covered by the Jones Act and, in the alternative, a request for a waiver if the movement is so covered.²³⁹ In virtually every instance CBP has determined that there is an insufficient national defense interest. In so doing, CBP has indicated that a Jones Act

232. Press Release, U.S. Dep’t of Justice, Alaska Oil Company Agrees to Pay \$10 Million in Penalties to Settle Federal Claims for Violating the Jones Act (Apr. 4, 2017), <https://www.justice.gov/usao-ak/pr/alaska-oil-company-agrees-pay-10-million-penalties-settle-federal-claims-violating-jones>.

233. *Id.*

234. *Carrier Control: Use of Foreign Vessels to Transport Motor Fuel Antiknock Compound*, 14 CUST. B. & DEC. 727 (Customs), 1979 WL 36181 (Mar. 15, 1979).

235. See *MARAD Letter to U.S. Customs Service—Jones Act Waivers* (Dec. 27, 1989), 25 SHIPP. REG. REP. 651 (1989).

236. *Id.*

237. *Id.*

238. *U.S. Department of Treasury Letter to Bay State Gas Co.—Jones Act Waiver*, 25 SHIPP. REG. REP. 644 (Dec. 28, 1989).

239. *Id.*

waiver “cannot be issued solely for economic reasons,”²⁴⁰ simply because there is a “private economic benefit”²⁴¹ or where the interest expressed is solely “commercial in nature.”²⁴² Moreover, CBP has indicated that the burden of showing a national defense interest is a “very difficult [burden] to sustain”²⁴³ and there must be a showing of an “immediate and adverse impact to the national defense.”²⁴⁴

Thus, CBP has not granted Jones Act waivers in each of the following situations: (1) necessity to have late cargo loaded in Virginia to be discharged in Texas and flown to South Korea to prevent substantial project disruption;²⁴⁵ (2) shortage of storage in Alaska and qualified Jones Act vessels to respond to an unusually large harvest of Alaskan crab;²⁴⁶ (3) transport of the replicas of the *Nina*, *Pinta*, and *Santa Maria* from Massachusetts to California via foreign-flag heavy lift vessel where there was no qualified U.S.-flag vessel of that type;²⁴⁷ (4) shipment from Maryland to Liberia disrupted by civil unrest diverted to Texas;²⁴⁸ (5) shipment of containers located in the U.S. Virgin Islands of U.S. origin to Puerto Rico because loss of electricity in the USVI in the aftermath of Hurricane Marilyn would lead to cargo spoilage;²⁴⁹ (6) vessel loaded to summer load line had to discharge port cargo picked up in the United States in another U.S. port to make winter load line due to two hurricanes and mechanical problems causing departure delays;²⁵⁰ and (7) temporary unloading in a U.S. port to undertake a rudder repair and then relading for delivery to the original U.S. destination port.²⁵¹ In at least a couple of the situations, CBP has noted the harshness of the result and indicated that penalties for a Jones Act violation might be mitigated,²⁵² as discussed below in Part V, “Jones Act Penalty Mitigation.”

Other Jones Act waiver denials have appeared only in the press or other sources.²⁵³ For example in 2002, a U.S. West Coast labor dispute

240. CBP, HQ 111930 (Oct. 8, 1991).

241. CBP, HQ 112520 (Nov. 20, 1992).

242. CBP, HQ 112237 (May 27, 1992).

243. 1997 WL 333288 (Customs), C.S.D. 97-2 (May 12, 1997).

244. CBP, HQ 115613 (Mar. 6, 2002).

245. CBP, HQ 111930 (Oct. 8, 1991).

246. CBP, HQ 112085 (Mar. 10, 1992).

247. CBP, HQ 112237 (May 27, 1992).

248. CBP, HQ 112520 (Nov. 20, 1992).

249. CBP, HQ 113569 (May 21, 1995).

250. CBP, HQ H044170 (Nov. 19, 2008).

251. *Id.*

252. *E.g.*, CBP, HQ 111930 (Oct. 8, 1991).

253. *See, e.g.*, Corey Kilgannon & Marc Santora, *40,000 Tons of New Jersey Salt, Stuck in Maine*, N.Y. TIMES (Feb. 14, 2014), <https://www.nytimes.com/2014/02/19/nyregion/rock-salt->

resulted in substantial cargo disruptions. The National Industrial Transportation League sought a waiver claiming a national defense impact “because of significant congestion and confusion.”²⁵⁴ The Jones Act community asserted that West Coast situation “does not rise to the national defense standard” of the waiver authority and a waiver ultimately was not issued.²⁵⁵

F. *Litigation*

The Jones Act waiver law has rarely been the subject of litigation.²⁵⁶ We are aware of only three cases where the issuance of a waiver or the non-issuance of a waiver under the law was challenged in court: (1) a 1988 case involving crew nationality requirements waived in connection with the reflagging of Kuwaiti tank vessels during the Iraq-Iran War;²⁵⁷ (2) the Escopeta-Furie case mentioned above and described below in Part V, “Jones Act Penalty Mitigation;”²⁵⁸ and (3) a 2017 case in which the lack of a longer or more expansive waiver for Puerto Rico following Hurricane Maria was challenged.²⁵⁹ Only the second two involve the Jones Act.

In the case filed in 2017, the plaintiffs allege that the failure of DHS to waive the Jones Act further with respect to Puerto Rico violates their constitutional rights.²⁶⁰ The district court denied the plaintiffs emergency relief on December 8, 2017, noting that the decision to grant or deny a Jones Act waiver “is committed to executive judgment” and plaintiffs do not allege “executive misconduct” sufficient to give rise to a constitutional claim likely to succeed on the merits.²⁶¹ As of the writing of this Article, a U.S. government motion to dismiss was being considered by the court. Other actions claiming that the Jones Act violates the U.S. Constitution have been dismissed in Hawaii.²⁶²

bound-for-new-jersey-is-held-up-by-decades-old-maritime-law.html (waiver sought to move road salt from Maine to New Jersey).

254. Chris Dupin, *Domestic Shipping Opposes Jones Act Waiver*, J. OF COM., Oct. 31, 2002 (on file with authors).

255. *Id.*

256. *See* Furie Operating Alaska, LLC v. DHS, 2015 AMC 1966 (D. Alaska 2015) (“Furie fails to cite an example where a waiver decision under § 501(b) has been reviewed by a court.”).

257. Nat’l Marine Eng’rs’ Beneficial Ass’n v. Burnley, 684 F. Supp. 6 (D.D.C. 1988).

258. *Id.*

259. Carmenelisa Perez-Kudzma v. United States, Civil Action No. 17-11877 (D. Mass.) (complaint filed Oct. 2, 2017).

260. *Id.*

261. *Id.* (Op. & Order, Dec. 8, 2017).

262. Novak v. United States, No. 12-00638, 2013 WL 1817802 (D. Haw. Apr. 26, 2013); Kauai Kunana Dairy Inc. v. United States, No. 09-00473, 2009 WL 4668744 (D. Haw. Dec. 8, 2009).

V. JONES ACT PENALTY MITIGATION

As has been mentioned by CBP in connection with certain waiver requests, penalty remission or mitigation is sometimes a viable alternative to obtaining a Jones Act waiver.²⁶³ However, as with the Jones Act waiver law, the circumstances under which mitigation is likely to be granted are narrow.

The third act of the U.S. Government in 1789 was to enact the original predecessor to the Jones Act.²⁶⁴ The fifth act established fines and penalties potentially subjecting merchandise to forfeiture with respect to customs duties in general and also established the Customs Service, CBP's predecessor.²⁶⁵ It was not until 1797, however, that the authority to grant relief from such penalties was vested in the Secretary of the Treasury to be eventually delegated to the Customs Service, now CBP.²⁶⁶ Present law authorizes remission or mitigation of fines, penalties or forfeitures, if such were incurred: "without willful negligence or without any intention on the part of the petitioner to . . . violate the law" or there are "mitigating circumstances" sufficient to justify such remission or mitigation.²⁶⁷

The lack of intention or presence of mitigating circumstances is fleshed out with respect to potential Jones Act violations in CBP's regulations and in industry guidance—but first CBP reminds industry that the Jones Act is strict.²⁶⁸ CBP states that the coastwise laws "are strictly applied by Customs, as intended by Congress" and that the "unavailability of a coastwise-qualified vessel is NOT a mitigating factor in a case where commercial expediency has been found."²⁶⁹ Moreover, when there are no extenuating circumstances, "the violation will be considered to have been committed for commercial expediency (even where no monetary gain is realized by the violator)."²⁷⁰

The CBP regulations limit those extenuating circumstances—despite the broader formulation in the authorizing statute—to where "the

263. *E.g.*, CBP, HQ 113569 (May 21, 1995) ("In light of the conditions [following Hurricane Marilyn] currently existing at the port of St. Thomas, we are requesting that penalties not be assessed when the vessels arrive at the port of San Juan, Puerto Rico.").

264. Act of July 20, 1789, ch. 3, 1 Stat. 27 (1789).

265. Act of July 31, 1789, ch. 5, 1 Stat. 29 (1789).

266. Act of March 3, 1797, ch. 13, 4 Stat. 506 (1797).

267. 19 U.S.C. § 1618 (2012).

268. *Id.*

269. U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: MITIGATION GUIDELINES: FINES, PENALTIES, FORFEITURES AND LIQUIDATED DAMAGES 183-85 (Feb. 2004) [hereinafter CBP MITIGATION GUIDELINES] (emphasis in original).

270. *Id.* at 185.

violation occurred as a direct result of an arrival of the transporting vessel in distress.²⁷¹ CBP's informal industry guidance goes further to add as a reason for remission where there might be some other "humanitarian concern."²⁷² CBP provides the example of a violation occurring in connection with a life threatening injury to a vessel crew member.

Reduction of the penalty amount is possible under less extenuating circumstances. CBP's industry guidance indicates that "[m]itigation normally will be accomplished at the 10 percent level for a first violation that is not aggravated."²⁷³ Aggravating factors include violations that are deliberate as evidenced, for example, after being informed by CBP that the movement would constitute a Jones Act violation.²⁷⁴ Moreover, CBP reserves the right—even in a non-aggravated first violation—to recover as a fine an amount sufficient to "offset any economic gain that inured to the violator as a result of the violation."²⁷⁵ However, even in the event of "commercial expediency," "customs may mitigate the penalty to an amount between 35 and 50 percent of that assessed."²⁷⁶

The foregoing factors are illustrated in the case of transportation of the jack-up drill rig the *Spartan 151* from the U.S. Gulf of Mexico to Cook Inlet, Alaska, in 2011 for Escopeta Oil Company, LLC.²⁷⁷ As described above, Escopeta originally received a Jones Act waiver in 2006, which DHS did not renew in 2011, and Escopeta proceeded with the movement of the rig while awaiting CBP's final response in the waiver process.²⁷⁸

Prior to authorizing the towing of the rig from Canada to Alaska (having been delivered to Canada from Texas via a foreign-flag heavy lift vessel), Furie alleged that it had been assured by CBP that a mitigation recommendation would be made.²⁷⁹ The mitigation factors, according to Furie, were that the original denial of the waiver was based on the erroneous information that a Jones Act-eligible vessel could perform the movement, the movement was a first time violation, Furie had cooperated with CBP during the review process and even CBP acknowledged that the rig was needed in Alaska to help address potential

271. 19 C.F.R. § 171.11(c) (2017).

272. CBP MITIGATION GUIDELINES, *supra* note 269, at 186.

273. *Id.* at 185.

274. *Id.*

275. *Id.*

276. *Id.* at 38.

277. *See* Furie Operating Alaska, LLC v. DHS, 2015 AMC 1966 (D. Alaska 2015).

278. *Id.* at 1968-69.

279. *Id.*

energy shortages.²⁸⁰ Furie then authorized the towing for the remainder of the transportation to Alaska (via a Jones Act qualified U.S.-flag tug) and was informed by CBP that the fine would not, in fact, be mitigated in part because Furie proceeded knowing that no waiver would be forthcoming.²⁸¹

Although a final decision was never reached in the subsequent lawsuit by Furie against CBP, the court determined in granting a partial motion to dismiss that “a Jones Act waiver under § 501(b) is one that is committed to the Secretary’s discretion by law.”²⁸² The court rejected Furie’s argument that Jones Act waiver decisions were “more economic than military” and that many prior waivers could not be justified in terms of national defense.²⁸³ Finally, the court rejected Furie’s claims that the mitigation process was arbitrary and capricious because of the failure to honor what Furie considered was a prior commitment to mitigate the penalty.²⁸⁴ The court rested its rejection on the broad discretionary language in the statute authorizing mitigation and on long-standing precedent indicating that penalty mitigation decisions were exempt from judicial review because they are committed to agency discretion.²⁸⁵ After further proceedings, Escopeta’s successor-in-interest, Furie Operating Alaska, LLC, ultimately agreed to pay \$10 million of the original \$15 million fine and the case was dismissed.²⁸⁶

VI. CONCLUSION

The Jones Act can only be waived pursuant to the 1950 waiver law as amended over time. Since 1950, the Jones Act waiver process has been both expanded and narrowed. It has been expanded from a pure war time measure to encompass energy shortages and other economic circumstances such as oil spills and the sale of Strategic Petroleum Reserve oil. It has been narrowed by making it clear that a waiver should only issue, at least when requested by any person other than DoD, only if there is no qualified Jones Act U.S.-flag vessel available.

280. *Id.* Prior to the conclusion of the CBP administrative process, a CBP official at one point indicated that a recommendation would be made to have the penalty mitigated to \$6.9 million, which was 15 percent of the value of the merchandise transported (the *Spartan 151*) as understood by CBP at the time (later revised) based on mitigating and aggravating factors identified. *See* Complaint at 25, *Furie Operating Alaska, LLC v. DHS* (D. Alaska 2012) (No. 12-cv-00158).

281. *Furie*, 2015 AMC at 1968-69.

282. *Id.*

283. *Id.* at 1972-73.

284. *Id.* at 1973.

285. *Id.* at 1973-74.

286. Press Release, *supra* note 232.