

Colonial Pipeline – What It Takes to Waive the Jones Act



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The closure of the Colonial Pipeline has given rise to discussions about whether the U.S. “Jones Act” should be waived to permit foreign tank vessels to transport refined petroleum products from the U.S. gulf coast to the U.S. east coast. The “Jones Act,” however, is not easy to waive and is rarely waived.

The “Jones Act” is a popular term for a set of laws which reserve U.S. domestic maritime commerce to qualified U.S.-flag vessels. Individual laws cover the transportation of “merchandise” and “passengers” between two “points in the United States” as well as dredging, fishing, salvage, and towing in U.S. waters. In most respects, these laws are a natural extension of national sovereignty since they reserve a type of U.S. interstate commerce to Americans complying with U.S. laws – something that applies to all forms of U.S. commerce.

These laws prevent the use of a foreign tank vessel to transport refined petroleum products from U.S. gulf coast refineries to marine terminals on the U.S. east coast to meet the need for such products while the pipeline is shut down. Because these domestic commerce reservations have ancient origins, they are referred to as “navigation laws” waivable under a separate law which grants authority to waive only when it is considered “necessary in the interest of national defense.” This phrase comes from the original waiver authority which was an Executive Order issued by Pres. Franklin Roosevelt a few days after Pearl Harbor.

In the “interest of national defense” is intended to be a high bar and it has proven to be so. The record is full of instances when the U.S. Government has denied waivers even when the facts were compelling because there was no national defense nexus. Waivers have been denied when the object was to respond to civil unrest, to ameliorate unavoidable cargo spoilage, when the costs were prohibitive, and because of unexpected vessel repairs.

Where the Jones Act has been waived is following hurricanes which occurred following Katrina, Rita, Sandy, Harvey, and Maria. In each instance, the waivers were for short periods of time and all, except one, was limited to petroleum products.

Since those waivers, Congress has tightened the waiver law such that no waiver can be issued unless the U.S. Maritime Administration first canvasses the market for available U.S.-flag vessels, undertakes steps to engage U.S. carriers, and determines that qualified U.S.-flag vessels cannot meet the need (which it must publish). MARAD must also notify Congress of any request to waive any navigation law and of the issuance of such a waiver.

Prior to January 1, 2021, it was possible for a waiver to be issued by the Secretary of Defense without application of these MARAD administered conditions. The Trump Administration utilized the DoD-issued waiver formulation with respect to hurricanes Harvey and Maria, but those conditions now also apply to DoD-issued waivers as a result of the National Defense Authorization Act for Fiscal Year 2021 enacted over Pres. Trump's veto.

A waiver for the transportation of refined petroleum products due to the shutdown of the Colonial Pipeline is therefore possible, but the standard in the law would have to be met, and MARAD would have to determine that qualified U.S.-flag vessels cannot meet the need after taking steps to ensure that U.S.-flag vessels can do what is needed during the shutdown.

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