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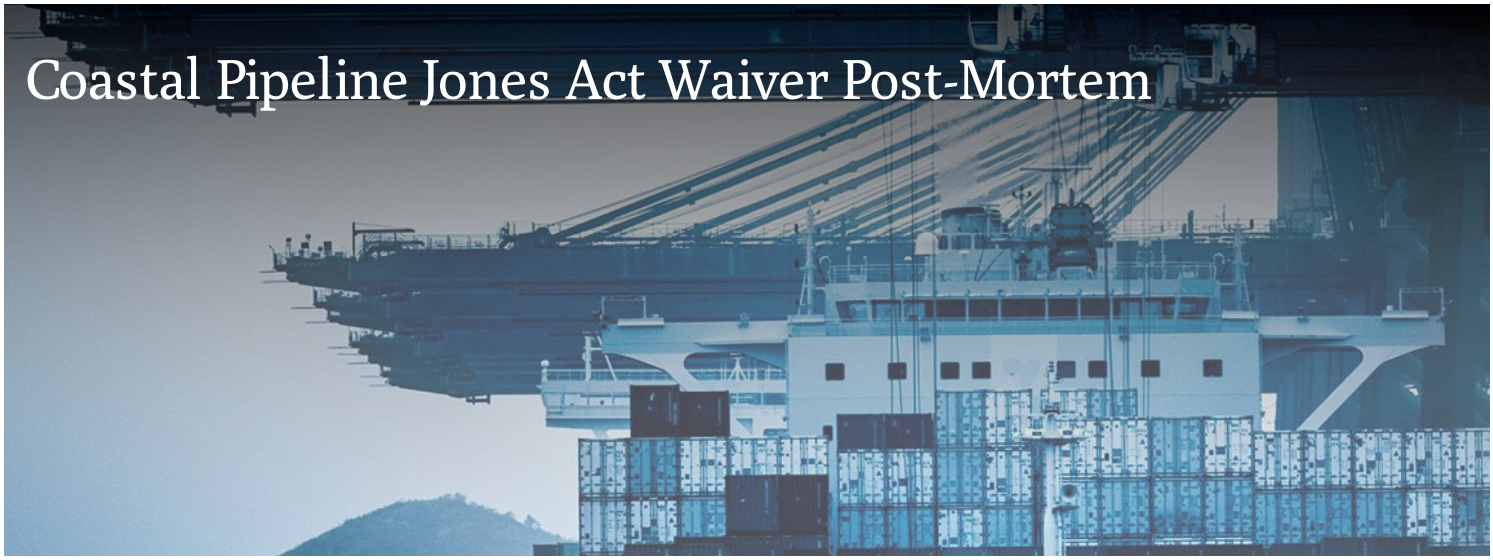

Coastal Pipeline Jones Act Waiver Post-Mortem

MAY 21, 2021

Following the closure of the Colonial Pipeline, two requests for Jones Act waivers were issued by the U.S. Department of Homeland Security on or about May 12 and May 13. DHS is an appropriate agency to issue such waivers because under the law it is "responsible for the administration of the navigation law" and the Jones Act is such a "law." Although neither waiver was released to the public, what is available illuminates at least part of the waiver process.

The law which grants authority to waive navigation laws requires that waivers may only be issued if it is "necessary in the interest of national defense." The DHS statements announcing the waivers claim that the waivers meet this standard, but no explanation was provided, and no reasons were given. Those statements also omit the word "necessary" and assert that the waivers are "in the interest of national defense."

This is par for the course with Jones Act waivers. Previous waivers have not provided any reasoning supporting the bald determination that the waiver is in the "interest of national defense." Prior waivers have in fact been issued to alleviate pending regional fuel shortages, but the U.S. Government has never elucidated how such a shortage makes it "necessary" and meets the national defense standard. Unless actual waiver documents contain such reasoning and they are made public, the connection between fuel shortages and national defense will remain implicit.

The waiver law also provides that a waiver can only be issued after the U.S. Maritime Administrator has issued a "determination" "of the non-availability of qualified United States flag capacity to meet national defense requirements." MARAD did in fact issue two letters relating to the waivers in which it indicated that the shipment requirements stated by the waiver requestors, which were refinery interests, could not be met by qualified U.S.-flag vessels. Neither determination, however, indicates what "national defense requirement" could only be met by foreign vessels. MARAD's statements that only foreign vessels could meet the stated shipping dates does not answer the question as to whether such dates are meaningful in terms of national defense requirements.

The waiver law also requires MARAD for each non-availability determination to "identify any actions that could be taken to enable qualified United States flag capacity to meet national defense requirements." Not having identified the nature of the "national defense requirements" which needed to be met, the MARAD letters also do not "identify" the actions that could be taken to meet those requirements with qualified U.S.-flag vessels.

Finally, the waiver law requires the DHS to notify certain Congressional committees of any waiver and such notice must indicate the “reasons the waiver is necessary” and the reasons that no actions could be taken to meet those requirements with qualified U.S.-flag vessels. Should those committees choose to make those DHS notices public, further information regarding when Jones Act waivers are appropriate may become available.

2 Min Read

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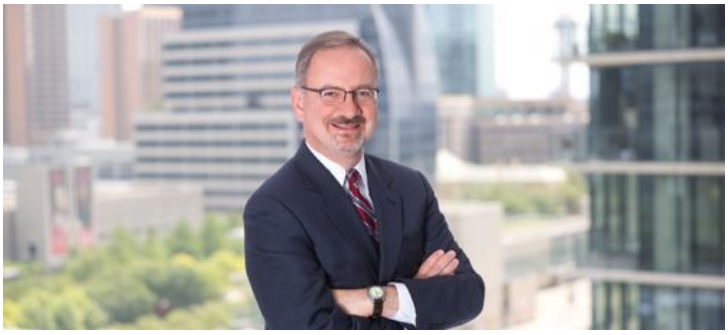

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