

## Strategic Petroleum Reserve Jones Act Waivers



MARCH 31, 2022

The Biden Administration announced on March 31, 2022 that it would put on average of one million barrels of crude oil per day from the Strategic Petroleum Reserve on the market starting in May and continuing for six months. This would be the largest release in the history of the SPR particularly when combined with a recent sale of 30 million barrels. There have also been informal indications that Jones Act waiver requests will be expedited in connection with the transportation of the crude oil.

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 crude oil from marine terminals connected to SPR storage sites to other U.S. marine terminals unless waived. The Jones Act has been waived on many occasions in the past in connection with SPR sales, including, notably in 2011 when the minimum lot size set by the Department of Energy precluded the use of many U.S.-flag vessels and dozens of waivers were issued. In several instances prior to 2011, the Jones Act SPR waivers were blanket waivers.

Since 2011, however, the Jones Act waiver law has been considerably tightened. Both then and now, a waiver must be “necessary in the interest of national defense.” In 2011, however, there was no requirement, as there is now, that a finding by the U.S. Maritime Administration that no U.S.-flag vessel is available be made prior to the issuance of a waiver. That finding must also be made public. Moreover, since January 1, 2021, waivers other than those needed to “address an immediate adverse effect on military operations” are initially limited to 10 days extendable to a maximum of 45 days. No waiver has been made public since early 2021 which has met all these conditions.

When the Energy Department issued a sale notice for 30 million barrels on March 2, 2022, the notice indicated that no blanket waiver would be issued and that only individual waivers could be granted. Applications had to be submitted to U.S. Customs and Border Protection which indicates on its web site the detailed information needed to process a waiver request including the MARAD predicate finding that no qualified U.S.-flag vessel is available to

meet the transportation requirement. MARAD did not post any notice on its web site as required by law making such a finding in connection with that SPR sale which indicates that no waiver was granted.

Jones Act waivers have historically been issued in the past on a “where there is a will, there is a way” basis – although that was before the waiver law was tightened over time and particularly in 2021. The recent announcement that waivers will be expedited will test that new law in the upcoming weeks.

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