

THE EERIE SIMILARITIES BETWEEN THE GULF SPILL IN 2010 AND HURRICANE MARIA IN PUERTO RICO 7 YEARS LATER: HOW THE FACTS ABOUT THE JONES ACT GOT THROWN OVERBOARD

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THE MASSIVE PUBLIC ATTENTION FOCUSED ON THE JONES ACT [1] IN PUERTO RICO IMMEDIATELY AFTER HURRICANE MARIA WAS EERILY ANALOGOUS TO THE PUBLIC SPOTLIGHT ON THE LAW DURING THE DEEPWATER HORIZON OIL SPILL (THE "GULF SPILL") IN THE SPRING OF 2010. IN BOTH CASES, THE JONES ACT WAS ALMOST IMMEDIATELY SINGLED OUT FOR PUBLIC CRITICISM AS AN IMPEDIMENT TO THE RECOVERY EFFORTS. IN BOTH CASES, MANY OF THE CRITICISMS REFLECTED A MATERIAL MISUNDERSTANDING OF THE MECHANICS OF THE JONES ACT AND THE OPERATIONAL RHYTHMS OF THE DOMESTIC MARITIME INDUSTRY. IN BOTH CASES, OPPONENTS USED THE JONES ACT AS A POLITICAL TOOL TO ATTACK THE SITTING PRESIDENT, CRITICIZING HIM FOR NOT WAIVING THE JONES ACT TO ASSIST WITH THE RELIEF EFFORT. AND, IN BOTH CASES, AT THE END OF THE DAY, IT WAS CLEAR THAT THE JONES ACT HAD BEEN FALSELY ACCUSED—THAT IS, THAT THE LAW HAD IN NO WAY IMPEDED THE RECOVERY EFFORTS.

One lesson is abundantly clear: in the middle of a national emergency, political crisis, humanitarian disaster, and media circus, the facts sometimes get left by the wayside. Or, as RADM Mark Buzby, Administrator of the U.S. Maritime Administration, said recently, the true story about Jones Act shipping after Hurricane Maria was "obliterated by a barrage of false narratives and uninformed reporting."

THE JONES ACT AND ITS WAIVER PROVISION

The Jones Act is a foundational law of the American maritime industry. Like many other nations, America's coastwise laws have long been in place to support its domestic maritime industry. Under the Jones Act, any merchandise transported between two points in the United States, to which the coastwise laws apply, must be

transported by American-made, American-flagged, American-owned, and American-crewed vessels. These requirements are in place to meet U.S. economic and national security policy objectives.

The requirements of the Jones Act can be administratively waived under certain circumstances, such as natural disasters, although the number of waivers since the waiver provision was adopted in 1950 is very modest. There are two types of temporary administrative waivers, including where the Secretary of Defense deems it "necessary in the interest of national defense." [2] An additional type of administrative waiver can be issued by the Department of Homeland Security, but only if there is a finding by the Maritime Administrator that (1) there is insufficient capacity on Jones Act vessels to meet national defense requirements and (2) the waiver is necessary in the interest of national defense. [3] Ultimately, the administrative waiver provision "has been used sparingly by the Executive Branch, and most commonly to respond to instances of natural disasters or national emergencies." [4]

THE 2010 GULF SPILL

Between April 20 and September 19, 2010, the BP Deepwater Horizon oil rig leaked about 5 million barrels of oil into waters off the U.S. Gulf Coast, despite a massive effort to contain the spill. Almost immediately, "[t]he U.S. federal government and President Obama received heavy criticism from politicians and the media for a seemingly slow response to the disaster." [5] One prominent allegation was that the failure to waive the Jones Act was keeping out foreign skimming vessels that otherwise would have been able to assist with clean-up efforts. Criticisms came from major media sources, Republican legislators, and other longtime critics of the Jones Act like Geert Visser, the consul general for the Netherlands in Houston.

In the end, the critics were wrong. Responding to the criticism, U.S. Coast Guard Admiral Thad Allen, National Incident Commander, and his team prepared "specific guidance to ensure accelerated processing of requests for Jones Act waivers should they be received as part of the BP oil spill response." [6] Admiral Allen later testified that "there was a misperception that the Jones Act impeded the use of foreign vessels for Deepwater Horizon response operations. In reality, the Jones Act had no impact on response operations." [7] In January 2011, a fact-checking organization associated with the University of Pennsylvania found that "the Jones Act has yet to be an issue in response efforts." [8] And, ultimately, the *National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling*, a respected bipartisan presidential commission formed after the spill, completely exonerated the Jones Act from any blame for impeding clean-up efforts, noting that "the Act does not block foreign vessels from loading and unloading oil more than three miles off the coast." [9] While hundreds of U.S.-flagged vessels were skimming oil inside of that three mile limit, no offer of foreign-flagged assistance was declined due to the Jones Act. [10] Ultimately, rather than impeding the cleanup, the Jones Act fleet played a major role in assisting in the recovery effort.

HURRICANE MARIA

Hurricane Maria reached Puerto Rico's shore on September 20, 2017, and resulted in massive devastation on the island. President Trump's administration issued a short-term waiver under 46 U.S.C. § 501(a) on September 28, 2017, in response to a request by the governor of Puerto Rico. However, criticism of President Trump and his handling of the disaster, including his failure to waive the Jones Act earlier, began almost immediately.

Similar to the Deepwater Horizon crisis, critics argued that the Jones Act was impeding the delivery of relief cargoes to Puerto Rico. However, it was soon proven that getting the goods to the island was not the problem. Instead, the goods were piling up at Puerto Rico's ports because the inland infrastructure necessary to deliver the goods from the ports to the people was completely destroyed. [11] The U.S. Coast Guard recognized this problem when they noted in a Marine Safety Information Bulletin that "the sheer number and size of vessels [from around the nation] entering the [Puerto Rico and the U.S. Virgin Islands] have led to congestion and logistical issues which may result in the delay of recovery activities." [12] Similarly, congressional leaders who studied the issue recognized that a short-term waiver had no effect on the provision of goods in Puerto Rico, since "supplies have been getting to the island and have been backlogged at the ports, due to the devastation of logistics on the land." [13]

In fact, the Jones Act fleet has delivered over 79,000 containers of commercial and relief cargo to Puerto Rico thus far. [14] Jones Act carriers added nine vessels to regular service in the mainland-Puerto Rico trade, bringing the total number of vessels in regular trade to 25. [15] These carriers also leased extra warehouse space, purchased or leased additional 53-foot containers, and organized donations, with the intent of helping the recovery effort. These carriers have been serving Puerto Rico for decades and have the infrastructure and ability to quickly provide service to Puerto Rico to meet near-term and long-term rebuilding needs. The Federal Emergency Management Agency has called the Puerto Rico relief effort "the largest sea-bridge operation of federal disaster aid in FEMA history." [16]

CONCLUSION

In times of crisis, such as the Deepwater Horizon spill or Hurricane Maria, the facts sometimes get ignored in the chaos and confusion. During two of the largest disasters of the last decade, the Jones Act has been unfairly blamed for preventing the quick provision of necessary support. Yet in both situations, as the facts now show, the American domestic maritime industry was an integral part of the recovery effort.

[1] 46 U.S.C. § 55102.

[2] 46 U.S.C. § 501(a).

[3] 46 U.S.C. § 501(b).

[4] STAFF OF H. TRANSP. & INFRASTRUCTURE COMM. SUBCOMM. ON THE COAST GUARD & MAR. TRANSP., 115TH CONG., BACKGROUND PAPER FOR HEARING ON "THE STATE OF THE U.S.-FLAG MARITIME INDUSTRY" 4 (Comm. Print 2018).

[5] Joseph M. Conley, *The Jones Act: Its Effect on the U.S. Response to the 2010 BP Deepwater Horizon Oil Spill and its Relevance in International Law*, 11 WASH. U. GLOBAL STUD. L. REV. 1 (2012).

[6] *Thad Allen Sets Up Accelerated Jones Act Waiver Process*, MARINELOG (Jun. 15, 2010), available at <http://m.marinelog.com/DOCS/NEWSMMIX/2010jun00152.html>.

[7] *Hearing on Improving Oil Spill Prevention and Response, Restoring Jobs, and Ensuring Our Energy Security: Recommendations from the National Commission on the BP Deepwater Horizon Spill and Offshore Drilling Before*

the Subcomm. on Coast Guard & Mar. Transp. Of the H. Comm. on Transp. & Infrastructure, 112th Cong. 1st session (2011) (statement of Ret. Admiral Thad W. Allen).

[8] FactCheck.org, *Oil Spill, Foreign Help and the Jones Act*, 1 (Jun. 23, 2010), available at <https://www.factcheck.org/2010/06/oil-spill-foreign-help-and-the-jones-act/>.

[9] NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 143 (2011).

[10] Department of Homeland Security, *Deepwater Horizon Oil Spill Response: Jones Act Fact Sheet 1-2* (July 6, 2010).

[11] Patrick Gillespie, Rafael Romo, and Maria Santana, *Puerto Rico Aid is Trapped in Thousands of Shipping Containers*, CNN (Sept. 28, 2017).

[12] Seventh Coast Guard District, *Marine Safety Information Bulletin 027-17* (Oct. 17, 2017).

[13] Chairman Duncan Hunter (R-CA), *Hearing on Building a 21st Century Infrastructure for America: Coast Guard Stakeholders' Perspectives and Jones Act Fleet Capabilities* (Oct. 3, 2017),

[14] Hurricane Maria Update #18 (Jan. 12, 2018).

[15] American Maritime Partnership, *Fact Sheet: Domestic Maritime Industry Dedicated to Puerto Rico* (Nov. 17, 2017).

[16] Federal Emergency Management Agency, *Historic Federal Response to Puerto Rico* (Nov. 8, 2017), available at <https://www.fema.gov/disaster/updates/hurricane-maria-news-graphics-and-social-media>.

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