



Committee on Transportation and Infrastructure  
U.S. House of Representatives  
Washington, DC 20515

Peter A. DeFazio  
Chairman

Sam Graves  
Ranking Member

Katherine W. Dedrick, Staff Director

Jack Ruddy, Republican Staff Director

October 21, 2022

The Honorable Alejandro Mayorkas  
Secretary of Homeland Security  
U.S. Department of Homeland Security  
2707 Martin Luther King Jr, Ave SE  
Washington, D.C. 20258

The Honorable Pete Buttigieg  
Secretary of Transportation  
U.S. Department of Transportation  
1200 New Jersey Ave SE  
Washington, D.C. 20590

Dear Secretary Mayorkas and Secretary Buttigieg:

We write to express our concerns and disappointment with your recent decision to grant Jones Act waivers for the delivery of fuel to Puerto Rico including to allow the delivery of diesel that was sourced from the mainland United States by British Petroleum Products North America (BPPNA) to Puerto Rico on a foreign vessel on September 28, 2022.<sup>1</sup> We concur with the Maritime Administration (MARAD) that consideration of a waiver while a vessel is already underway is “novel and problematic”<sup>2</sup> and would like to better understand the reasoning for your decision to issue a waiver for a company that appeared to be gaming the Jones Act waiver process.

Administrative waivers of the Jones Act are constrained purposefully by Congress to rare cases where such a waiver is “necessary in the interest of national defense.”<sup>3</sup> Even in those cases

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<sup>1</sup> U.S. Department of Homeland Security, Office of Public Affairs, Statement by Secretary Mayorkas on the Approval of a Jones Act Waiver for Puerto Rico (September 28, 2022). The name of the company was included in the U.S. vessel availability determination letter (see footnote 2).

<sup>2</sup> U.S. Maritime Administration, U.S. vessel availability determination letter (September 28, 2022), available at <https://www.maritime.dot.gov/sites/marad.dot.gov/files/2022-09/Determination%2028%20September%202022.pdf>. The “novel and problematic language” was included in a subsequent U.S. vessel availability determination letter, for a shipment of liquefied natural gas to Puerto Rico requested by Naturgy Aprovevisionamientos S.A. on October 15, 2022. See U.S. Maritime Administration, U.S. vessel availability determination letter (October 16, 2022), available at [Determination - October 16 2022.pdf \(dot.gov\)](#).

<sup>3</sup> 46 U.S.C. 501(b)(1). From the very beginning, the waiver statute (64 Stat. 1120, passed December 27, 1950) included the same “necessary in the interest of national defense” language. The statute was enacted for true national defense purposes in 1950 because “[m]ilitary operations in Korea have made necessary the immediate water transportation of large numbers of military personnel and large quantities of strategic materiel by privately owned vessels of the United States subject to the navigation and vessel-inspection laws. Experience 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.” U.S. Senate, S. Rpt. No. 2360 (November 27, 1950). The legislative history of the original statute thus focuses entirely on an immediate national defense interest, which has been loosened significantly throughout the years. In the most recent Jones Act waiver, the Department of Energy founded that “preventing potential power disruption

where you may consider a waiver based on a national defense determination, you are required to consider other information, including the availability of U.S.-flag vessels to move the cargo in question.<sup>4</sup> The requirement to consider the availability of U.S.-flag vessels exists to ensure that U.S.-flag vessels and companies are not disadvantaged by foreign companies, who are employing foreign workers and largely operating outside of U.S. laws. Moreover, the question of availability was not intended to be answered in retrospect; the statute is intended to be a prospective evaluation to give U.S.-flag ships the first opportunity to move the goods, without the need to waive the law.

We do not understand how the Department of Homeland Security (DHS), either independently or acting through MARAD, made a retroactive determination that no U.S.-flag vessels could have performed the move for which the waiver was granted—and did so on the day the waiver was granted. Therefore, please provide the Committee with written answers to the following questions within two weeks.

1. MARAD determined vessels could have been available to load diesel from Texas City, Texas to Guayanilla, San Juan, and/or Yabocoa, Puerto Rico on September 15, 2022.<sup>5</sup> How was it possible for DHS to issue a waiver when the statute only permits waivers “following a determination by [MARAD] ... of the *non-availability* of qualified United States flag capacity”?
2. What was the legal justification for performing a *retroactive* vessel availability assessment and determination, particularly when the statute clearly states that in making availability determinations that MARAD “shall ... identify any actions that could be taken to enable qualified United States flag capacity to meet national defense requirements”<sup>6</sup>?
3. In the days immediately prior to the issuance of the waiver, federal agencies were reporting that there were adequate fuel supplies available on the island, with distribution inland being the predominant issue.<sup>7</sup> Why was there a discrepancy between the agency reports and your “assessment” that fuel was needed on the island that was referenced in your statement approving the waiver? Please provide that assessment.
4. We are concerned that this waiver was sought to take advantage of the vulnerable people of Puerto Rico. Some have described this waiver as an example of disaster arbitrage, where foreign operators make windfall profits by requesting a waiver without passing on the savings to the consumer, when normally the vessels delivering American cargoes to American ports would need to follow American laws, such as tax and labor laws.<sup>8</sup> Has DHS considered the possibility that this waiver was requested for disaster arbitrage purposes?

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due to generation inadequacy” was the national defense interest at stake. U.S. Customs and Border Protection, Notification to Congress (October 16, 2022).

<sup>4</sup> 46 U.S.C. 501(b)(1).

<sup>5</sup> U.S. Maritime Administration, U.S. vessel availability determination letter (September 28, 2022), available at <https://www.maritime.dot.gov/sites/marad.dot.gov/files/2022-09/Determination%2028%20September%202022.pdf>.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> See, e.g., Expresiones de la comisionada residente, Jenniffer González Colón (September 27, 2022) (email to mailing list) (stating that “[a]t each and every meeting, I have been assured by federal agencies, including the Department of Energy, FEMA and the Corps of Engineers that there is an adequate supply of fuel on the Island that is available to consumers and that subsequent delivery is planned of more fuel in the short, medium and long term.”).

<sup>8</sup> The phrase “disaster arbitrage” in the Jones Act context was coined by a Reuters reporter in 2012, to describe situations where oil traders use Jones Act waivers to pocket windfall profits. See Joshua Schneyer and Jonathan Saul,

5. Why was the issuance of this waiver necessary and in the interest of national defense?

We look forward to working with you and your departments as we continue to support the recovery of Puerto Rico and its residents from the destruction caused by Hurricane Fiona. However, we are concerned that this waiver was both unlawful and unjustified and we strongly urge you not to issue waivers in the future that are clearly circumventing the process in 46 U.S.C. § 501 and subverting the statutory goal to ensure utilization of American ships. If you have questions please contact Matt Dwyer, Democratic Staff Director, Subcommittee on Coast Guard and Maritime Transportation at (202) 225-4472, and John Clark Rayfield, Republican Staff Director, Subcommittee on Coast Guard and Maritime Transportation at (202) 225-3372.

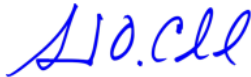
Sincerely,



Peter DeFazio  
Chair



Sam Graves  
Ranking Member



Salud Carbajal  
Chair  
Subcommittee on Coast Guard  
and Maritime Transportation



Bob Gibbs  
Ranking Member  
Subcommittee on Coast Guard  
and Maritime Transportation