September 29, 2022

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Department of Homeland Security
2707 Martin Luther King Jr, Ave SE
Washington, D.C. 20258-0525

RE: BP Jones Act waiver

Dear Secretary Mayorkas:

As the American Maritime Partnership, representing most of the U.S. domestic maritime industry—ship operators, mariners, shipyards, and pro-defense organizations—we are deeply disappointed by your decision on behalf of the U.S. Department of Homeland Security ("DHS") to grant a Jones Act waiver to BP yesterday to land its cargo that was moved from the mainland United States to Puerto Rico on a foreign vessel.

As DHS surely knows, all federal agencies involved in this situation—the U.S. Department of Energy, the U.S. Coast Guard, the Federal Emergency Management Agency and the U.S. Army Corps of Engineers—reported prior to the waiver that there was no diesel fuel shortage in Puerto Rico. The fuel situation on the Island has been compromised by difficulties with the on-land distribution system there. Truck distribution within Puerto Rico, not maritime transportation, is the issue, just as it was in Hurricane Maria five years ago. In fact, American tank vessels, and foreign vessels too, have arrived and continue to arrive with additional fuel for Puerto Rico. This waiver is unnecessary.

The waiver is unlawful. The Jones Act waiver statute, 46 U.S.C. §501(b)("Section 501"), requires a determination of the non-availability of American vessels before any waiver can be granted. It is a core requirement of the statute. In this case, because the vessel in question was already four days underway when the waiver was applied for, such a determination was not possible. That should have ended the inquiry. Instead, the U.S. Maritime Administration ("MARAD") conducted an unprecedented retroactive U.S. availability determination 12 days after the fact, and we are well aware that American vessel operators reported U.S. vessel availability in that survey. The U.S. vessel availability survey is intended to be a sincere effort to avoid outsourcing American jobs to foreign operators; it is not a "check the box" exercise conducted nearly two weeks after the fact to justify a waiver. In addition, Section 501 specifically requires MARAD "to identify any actions that could be taken to enable qualified United States flag capacity to meet national defense requirements," something that

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also is not possible after the fact. See 46 U.S.C. §501(b)(3)(A). In this case, DHS simply ignored the U.S. vessel availability element of the Jones Act waiver statute. Further, your public statement about the waiver actually implied that no American vessels were available, when our members advise that was not the case.

Because DHS has now granted an unlawful waiver, it has signaled to oil traders, arbitragers, and others around the world that the American federal government will grant waivers that do not meet the conditions of Section 501. As a result, DHS can expect a rash of new waiver requests. In that sense, this waiver sets the worst possible precedent, extending far beyond the factual circumstances in this specific case.

In this case, DHS has rewarded a foreign operator who has been widely criticized, both in Washington, D.C. and in Puerto Rico, for its behavior. This foreign operator took the nearly unprecedented step of applying for the waiver after the vessel was underway, negating the possibility of a legitimate U.S. vessel availability survey. No previous waiver under those circumstances has **ever** been granted and, until this week, no retroactive vessel availability survey has **ever** been conducted. Now, DHS has effectively sanctioned this foreign vessel operator's behavior. DHS has permitted the waiver recipient to engage in "disaster arbitrage," the practice of exploiting humanitarian crises to enrich themselves. Oil traders everywhere, including at BP, are likely rejoicing over DHS's decision. DHS's actions have established a terrible precedent for similar future activities.

The government's most important contribution to an industry like ours is to provide legal certainty and consistency. This decision, which places foreign workers and foreign companies ahead of American workers, has undermined that certainty and consistency. It is also inconsistent with the President's Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers, which seeks to reduce the use of waivers of Made in America law (which includes the Jones Act).

We are disappointed that DHS would ignore the requirements of Section 501, side with foreign operators over Americans operators and mariners in an unprecedented way, and sanction the worst possible commercial behavior. We urge you to never approve a waiver like this again.

Sincerely,

Ku'uhaku Park
President, American Maritime Partnership