

TESTIMONY OF THOMAS ALLEGRETTI, PRESIDENT, THE AMERICAN WATERWAYS OPERATORS, ON BEHALF OF THE AMERICAN MARITIME PARTNERSHIP, ON THE SUBJECT OF JONES ACT WAIVERS RELATED TO STRATEGIC PETROLEUM RESERVE DRAW DOWNS

TESTIMONY GIVEN BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE'S COAST GUARD AND MARITIME TRANSPORTATION SUBCOMMITTEE

JUNE 27, 2012

Good morning. I am Thomas Allegretti, president of The American Waterways Operators (AWO), the national trade association for the U.S. inland and coastal tugboat, towboat, and barge industry. Today I am testifying on behalf of AWO and the American Maritime Partnership (AMP), the largest legislative coalition in the history of the American maritime industry, representing every element of our nation's domestic shipping business.

Thank you for the opportunity to testify today about issues related to the Administration's 2011 Strategic Petroleum Reserve (SPR) draw down, which occurred almost exactly one year ago, and particularly about issues related to the Administration's issuance of Jones Act waivers during that draw down. My testimony will focus first on the circumstances leading to Jones Act waivers during the 2011 draw down and then turn to the worrisome potential for Jones Act waivers during a future draw down.

Brief Summary of Testimony

In the summer of 2011, an SPR draw down designed to help Americans actually had the opposite impact for American vessel operators and American mariners. Despite longstanding law to the contrary, virtually all transportation of crude oil from our nation's SPR was effectively reserved for foreign vessels crewed by foreign mariners while American crews, vessels, and companies stood by available but excluded from the process. As recounted by the *New York Times*, the Administration "repeatedly bypassed federal law by allowing all the oil to move on foreign-owned vessels." The *Times* added:

Even as unemployment hovered over 9 percent, the administration approved dozens of applications to transport nearly 30 million barrels of domestic crude oil within the borders of the United States on tankers employing foreign crews and flying the flags of the Marshall Islands, Panama and other foreign countries.

Particularly troubling was the Administration's approach to approving the waivers. Despite President Obama's own stated support for the Jones Act, there is strong evidence, described in detail below, that Administration officials established an informal minimum delivery lot size of 500,000 barrels – a level that they knew would effectively exclude the U.S. fleet – in direct contradiction of the much smaller minimum delivery lot sizes that were

established in the Department of Energy's (DOE) own Notice of Sale; conveyed that information informally to potential purchasers of crude oil in advance of the formal SPR sale; promised crude oil purchasers in advance that Jones Act waiver requests would be approved for volumes of 500,000 barrels or more and then fulfilled that promise without fail; and almost universally evaded the Jones Act, a fundamental American transportation law. The approach was contrary to federal law governing the sale, draw down, and transportation of crude oil from the SPR. The advance guarantee of approval for all Jones Act waivers is particularly odious because the Jones Act waiver process is a regulated administrative legal proceeding governed by federal rules of fairness and due process.

That first Jones Act waiver application was approved for a vessel named **PETROPAVLOVSK**, a large tanker flying the flag of Liberia, homeported in Monrovia, built in Japan, and owned/managed from Cyprus by Sovcomflot, a Russian State-owned corporation. That first waiver was for oil transportation between Texas and Louisiana, indisputably a movement requiring an American vessel under the Jones Act. Shell Trading was awarded a contract as an SPR crude oil purchaser on July 7, requested the Jones Act waiver for a 500,000 barrel movement on **PETROPAVLOVSK** the same day, and saw it approved by four federal departments/agencies within 24 hours. The approval of that waiver was followed by 51 similar Jones Act waivers to the benefit of foreign vessels and foreign shipping companies in the space of several months – more waivers of this kind, we believe, than in the entire 90-plus year history of the Jones Act. Ultimately, the vessels used for the SPR draw down flew the flags of the Bahamas, Greece, the Isle of Man, Liberia, the Marshall Islands, Panama, Singapore, and the United Kingdom. The 2011 SPR draw down occurred with virtually no participation by the American maritime industry despite unambiguous laws requiring the use of American vessels to move the SPR oil. To the best of our knowledge, only one small movement occurred on an American vessel. This record of waivers in 2011 is a serious stain on the integrity of the Jones Act.

The American maritime industry, deeply distressed by the 2011 draw down, has started early and is taking all possible steps to avoid a similar circumstance should another draw down occur this year, as has been widely discussed in the press and as the Administration has repeatedly said remains an option. Since the 2011 draw down, significant additional legislation has been enacted and more is pending to emphasize to the DOE and the Departments of Transportation and Homeland Security that Congress will not allow America's federal transportation laws to be casually ignored. We deeply appreciate the leadership of this Committee, and that of many other members of the House and the Senate, in enacting these new laws, and we look forward to working with this Subcommittee to avoid a repeat of the unacceptable events of 2011. The remainder of this testimony addresses this situation in more detail.

Detailed Background

1) THE 2011 SPR DRAW DOWN

On June 23, 2011, approximately one year ago, the Obama Administration announced a draw down of 30 million barrels of petroleum from our nation's SPR. As part of that announcement, Energy Secretary Steven Chu said the draw down was necessary "in response to

the ongoing loss of crude oil due to supply disruptions in Libya and other countries and their impact on the global economic recovery.”

A) Transportation of Crude Oil During a Draw Down

The key issue in this hearing, of course, is the transportation of the crude oil in the SPR to refineries in the United States. Through a highly regulated process, potential purchasers of crude oil submit bids to DOE to purchase SPR oil and then are responsible for the transportation of the oil from the SPR location in the U.S. to a specific refinery in the U.S. Transportation can occur either by pipeline or by vessel on either tankers or barges.

Because transportation under an SPR draw down occurs between two points in the United States, any maritime transportation is subject to the Jones Act, the fundamental law regulating domestic American maritime transportation. *46 U.S.C. § 55102*. The Jones Act requires that any merchandise transported between two points in the United States move on American vessels – vessels owned by Americans, built in the United States, registered in the United States, and crewed by Americans. I don’t need to reiterate here why the Jones Act is important to our country. It is essential to our national, economic and homeland security, and for those reasons it has received strong support from every Administration and from every Congress of this generation. There is no dispute that SPR movements are subject to the Jones Act. In fact, DOE’s own regulations for SPR draw downs stipulate that “failure to comply with the Jones Act ... will be considered to be a failure to comply with the terms of any contract [and p]urchasers who have failed to comply with the Jones Act” may be subject to penalties even beyond those imposed by the Jones Act itself. *10 C.F.R. Part 625, Appendix A, Price Competitive Sale of Strategic Petroleum Reserve Petroleum, C.2*. There is no dispute by any party that the Jones Act fully applies to the SPR movements at issue here today.

B) Broad Jones Act Waiver Immediately Rescinded

The initial announcement of the 2011 draw down on June 23, 2011 included a blanket Jones Act waiver. In essence, a blanket waiver would have put aside the Jones Act and allowed the transportation of SPR oil by foreign vessels. According to emails received by AMP under the Freedom of Information Act (FOIA), DOE officials notified the U.S. Maritime Administration (MARAD), the agency responsible for administering the Jones Act within the U.S. Department of Transportation (DOT), of the blanket waiver at 9:51 a.m. on the very morning of the public draw down announcement, a notification that appears to have caught MARAD officials off guard.¹ Based on FOIA information, it appears that MARAD Administrator David Matsuda did not learn of the plans for a blanket Jones Act waiver until about 1 hour before the public announcement of it.²

¹ Email from Lindsay Partusch, DOE, to MARAD officials, June 23, 2011, 9:51 a.m.

² Email from David Matsuda, MARAD, to Chris McMahan, MARAD, copied to six other MARAD officials. Sent at 11:05 a.m. on June 23, 2011. Shortly before the public announcement, Matsuda was responding to an email informing him of the announcement and blanket waiver. “So they are releasing something today?!!” he asked. “Do we oppose? What was the result of our survey of vessels available for work? Can we put some contingencies in their waiver, at least?”

MARAD fought back against the blanket waiver, even though it had already been publicly announced. A MARAD official reported to his superiors at the agency that “[MARAD has] offered to locate [U.S.] tankers on a case by case basis to support the release but DOE is choosing to seek a general waiver of the Jones Act...”³ An email from the MARAD to DOE described a blanket waiver as “premature,” reminded the DOE of a Memorandum of Agreement to “make full use of American vessels,” and provided a “listing of U.S.-flag tank vessels that can be made available to carry this cargo.”⁴ Faced almost immediately with opposition from within its own Administration and from others who noted that significant American tank vessel capacity was available to assist with the draw down, the Administration and DOE, within 24 hours, rescinded the blanket waiver and announced that the Jones Act would apply. Another email from a MARAD official described the situation this way:

DOE tried to put through Jones Act waiver as part of the SPR draw down, however, the Maritime Administrator (Matsuda) and the DOT Secretary went to the White House and had it removed. The new amended solicitation is attached (without a waiver provision).⁵

The Jones Act requires that American vessels be used between U.S. coastal and inland points in an SPR draw down. However, in certain cases where a national security declaration has been made, federal law also permits so-called “case-by-case” Jones Act waivers in circumstances where no American vessel is available. Three federal departments/agencies share the responsibilities for considering waiver requests per the SPR draw down – MARAD, which determines if American vessels are available; U.S. Customs and Border Protection (CBP), which has legal authority to grant the waivers; and the Department of Homeland Security (DHS), which ultimately signs the waiver.⁶ The waiver process is governed by 46 U.S.C. § 501(b).

On June 24, the very day that the broad Jones Act waiver was rescinded, the DOE issued its “Notice of Sale of SPR Oil,” outlining its detailed specifications for the purchase, transportation and delivery of the SPR oil. In its Notice of Sale, as amended, DOE specifically required compliance with its Standard Sales Provisions at 10 C.F.R. Part 625, including the requirement for compliance with the Jones Act. The Notice of Sale established “minimum delivery lot sizes” of 40,000 barrels for barges and 300,000 barrels for self-propelled vessels.⁷

C) DOE’s Actions Related to the Jones Act

Within days of the release of the Notice of Sale, DOE took actions that irrevocably altered the normal SPR draw down process in a manner that assured the exclusion of all U.S.

³ Email from Mike Hokana, MARAD, to Chris McMahon, MARAD, June 23, 2011, 11:30 a.m.

⁴ Email from Hokana, MARAD, to Kelly Gele, DOE contracting officer, June 24, 2011, 8:36 a.m.

⁵ Email from Hokana, MARAD, June 24, 2011, 12:17 p.m.

⁶ In addition to those three traditionally involved departments/agencies, DOE became part of this SPR process, “verifying” that the waiver request was consistent with the draw down.

⁷ Notice of Sale, DE-NS96-11PO97000, Supplements and Amendments to the Standard Sales Provision, section 3. The tanker limit was originally set at 350,000 barrels but then quickly reduced to 300,000 barrels purportedly to increase opportunities for American vessel participation in the draw down.

vessels. Even today, one year after the fact, it is still not entirely clear what happened behind the scenes at DOE and other federal departments and agencies to circumvent the Jones Act and exclude Americans from the movement of the SPR oil.

What is known is that DOE expressly informed potential purchasers of oil in advance that Jones Act waiver requests for large SPR shipments would be approved, an action that effectively excluded the entire American fleet. Ironically, DOE offered that assurance of guaranteed Jones Act waivers within days of the rescission of the blanket waiver and despite the facts that: 1) no waivers had even been requested yet; and 2) DOE is not the federal department with jurisdiction or authority over the Jones Act administrative waiver process. On June 28, 2011, David Sandalow, DOE's assistant secretary for policy and international affairs, answered questions from potential purchasers during a DOE briefing. *Inside Energy Extra* reported on the following exchange between Sandalow and one potential purchaser:

A caller from Valero said no US ships could hold 500,000 barrels, and asked if there would be a de-facto blanket [Jones Act] waiver for large-volume sales.

“Once a bid has been awarded, then, yes, a waiver would be granted in that situation,” Sandalow said. “But you’ve got to apply for it.”⁸

An advance guarantee of waiver approval by a government official is astounding because the Jones Act waiver process is a highly regulated legal administrative process governed by federal rules requiring fairness and due process. Ultimately, Assistant Secretary Sandalow's advance guarantee was fulfilled as 52 waivers were approved, all for lot sizes of 500,000 barrels and larger.

In addition, there is evidence that DOE informally adopted and conveyed to the purchasers a 500,000 barrel minimum transportation lot size – flatly contrary to the minimum delivery lot sizes specified in the Notice of Sale⁹ – resulting in the exclusion of the entire American fleet. The secret 500,000 barrel minimum was rumored throughout the process but never admitted by any federal department, despite repeated inquiries by the maritime industry. At least one email received under FOIA refers to DOE and the “500K min. standard.”¹⁰ It seems no coincidence that well over half of the Jones Act waiver requests (and approvals) were for exactly a 500,000 barrel lot size and all of the waiver requests (and approvals) were for transportation in lot sizes 500,000 barrels and above.¹¹

⁸ DOE Offers More Details on SPR Auction, by Meghan Gordon, *Platt's Inside Energy Extra*, June 28, 2011, page 2.

⁹ The minimum delivery lot sizes in the Notice of Sale were 40,000 barrels for barges and 300,000 barrels for tankers.

¹⁰ Email from Hokana to multiple MARAD officials, July 8, 2011, as part of the consideration of the first waiver request for the **PETROPAVLOVSK**.

¹¹ MARAD chart, received under FOIA. It is believed that one 150,000 barrel movement occurred on a U.S. vessel and about 50 moved on foreign ships under Jones Act waivers at transportation delivery sizes of 500,000 barrels and above.

One email from MARAD Administrator Matsuda to the leadership of DOE, DHS, DOT, and others during the early days of the waiver process is particularly illuminating regarding the 500,000 barrel requirement:

...[W]e have now seen 3 separate requests by Shell Oil to move 1.5M barrels of oil in roughly 500k barrel increments, and they are winning bidders on an additional 2.0M barrels. We fully appreciate the Administration priorities discussed at length prior to today on the need to move expeditiously, but under the Jones Act we are hard-pressed to find that no U.S. flag vessel is available for any of the Shell oil without fully understanding their transportation plan for the entire amount of the oil they purchased and without hearing evidence that Shell dealt in good faith with U.S. carriers to try to procure their transportation services. If we are to presume Shell (and all winning bidders) will simply transport the oil only in 500k barrel shipments (this is not a contractual obligation, correct?), and seek Jones Act waivers for each of them to carry all of it on foreign flag vessels for the entire 3.5M barrels, there may be no opportunities at all for U.S. flag vessels in this initiative.¹²

D) More Than 50 Jones Act Waivers

What followed next was sadly predictable. Despite the clear application of the Jones Act and the requirement to use available American vessels first, the potential purchasers of crude oil made their bids based on the use of large foreign vessels and, once selected, immediately applied for Jones Act waivers. The first waiver request came from Shell Trading on July 7, the same day that Shell's oil purchase contract was awarded by DOE. Shell asked permission to move oil from Freeport, Texas to Sugarland Terminal, Louisiana, clearly a Jones Act movement. However, following the direction of DOE Assistant Secretary Sandalow, Shell Trading requested a waiver to move 500,000 barrels on a vessel named **PETROPAVLOVSK**, a large crude oil tanker flying the flag of Liberia, homeported in Monrovia, built in Japan, and owned/managed from Cyprus by Sovcomflot, a Russian State-owned corporation. On July 8, within 24 hours of the request, DOE had endorsed it, MARAD had apparently found that no U.S. vessels were available, and CBP and DHS had approved the waiver. That same day three additional waivers were approved – all three were for vessels registered in Singapore and all three were in the approximate 500,000 barrel range, per DOE Assistant Secretary Sandalow's comments.

One of the core elements of any waiver decision is an "availability" determination by MARAD. Under 46 U.S.C. § 501(b), after a national defense determination is made, a formal waiver request from an interested party is granted only when no U.S. vessel is available. Upon receipt of a waiver request, MARAD generally surveys American vessel companies, brokers and others using email and other lists to determine if U.S. vessels are available. Only upon a finding that a waiver is in the interest of national defense and when no U.S. vessels are available can a waiver be granted under 46 U.S.C. § 501(b).

¹² Email from Matsuda to many federal officials, July 12, 2011, 8:11 p.m. (emphasis supplied).

Beginning in late June and continuing throughout the summer, MARAD received waiver requests from SPR oil purchasers, surveyed the American industry, received countless assurances of American vessel availability, and yet repeatedly determined that no American vessels were available. Within two weeks, about 10 waivers had been granted. Within slightly over a month, about 40 were granted. Ultimately, the vessels used for the draw down flew the flags of the Bahamas, Greece, the Isle of Man, Liberia, the Marshall Islands, Panama, Singapore, and the United Kingdom. Only one small movement of 150,000 barrels occurred on an American vessel in the course of the entire draw down compared to 52 total waivers.

One background paper received under FOIA even suggested that purchasers were “booking cargo on foreign-flag vessels and then seeking a waiver.”¹³ Such a circumstance demonstrates how perverted the process had become during the 2011 draw down.

It is also not clear to what extent the purchasers of the crude oil¹⁴ met their legal obligation to attempt to identify American vessels. DOE’s regulations make clear that the first obligation lies with the purchasers of the crude oil:

Any request for waiver should include ... [the] reason for not using qualified U.S. flag vessel, including documentary evidence of good faith effort to obtain suitable U.S. flag vessel and responses received from that effort. Such evidence would include copies of correspondence and telephone conversation summaries.¹⁵

To provide some context, in a typical year only a very small number of Jones Act waivers are applied for, much less approved. Although comprehensive statistics of this kind are not kept, it is believed that the 52 waivers during the 2011 draw down is greater than all the waivers of this type that have been approved under the Jones Act since the law was enacted in 1920.

The unprecedented number of waivers granted, combined with the obvious incongruity of transferring American maritime jobs to foreign vessel operators during an operation designed to help the American economy, drew the attention of a range of media outlets. On August 23, 2011 the *New York Times* featured an article titled “Oil Reserves Sidestep U.S. Vessels” that began this way:

WASHINGTON – In its hurry to transport millions of barrels of oil from federal stockpiles to stabilize world oil prices earlier this summer, the Obama administration has repeatedly bypassed federal law by allowing nearly all the oil

¹³ “Talking Points for August 11 SPR Meeting,” undated MARAD document.

¹⁴ Purchasers of the 2011 SPR crude oil were Barclays Bank Blc, ConocoPhillips, ExxonMobil Oil Corporation, Hess Energy Trading Company, J.P. Morgan Ventures Energy Corporation, Marathon Petroleum Company, Murphy Oil USA, Inc., Plains Marketing LP, Shell Trading (US) Company, Sunoco Inc. (R&M), Tesoro Refining & Marketing Company, Trafigura AG, Valero Energy Corp., Vitol Inc., and BP Oil Supply.

¹⁵ 10 C.F.R. Part 625, App. A, C.7(e)(6).

to move on foreign-owned vessels, drawing protests from domestic maritime operators...

Even as unemployment hovered over 9 percent, the administration approved dozens of applications to transport nearly 30 million barrels of domestic crude oil within the borders of the United States on tankers employing foreign crews and flying the flags of the Marshall Islands, Panama and other foreign countries.¹⁶

E) A Sham Process?

Throughout the 2011 draw down, U.S. vessel operators scrambled to decode a process that consistently excluded American vessels despite their availability. With each waiver request, MARAD actively surveyed American vessel availability and clearly American vessels that exceeded the minimum vessel size requirements established in the Notice of Sale were ready, able and available to move the SPR oil. In fact, throughout the summer MARAD maintained on its own website a comprehensive list of American vessels that were available to move the crude oil – MARAD’s list was even titled “U.S. FLAG AVAILABILITY/SPR RELEASE 2011.” And every American vessel on MARAD’s public list exceeded the minimum vessel size outlined in the DOE’s Notice of Sale. There were no apparent operational impediments to using these vessels, as many of the American vessels that were available were the same types of vessels that had delivered crude oil to fill the SPR in the first place. Nonetheless, MARAD repeatedly found that no American vessels were available and approved the waivers. Despite protests by Congress and the American maritime industry, ultimately virtually all SPR crude oil was transported on foreign vessels under Jones Act waivers based on the incredible finding that no American vessels were available.

There is evidence now to suggest that the entire American vessel availability process undertaken by MARAD was a sham – rendered meaningless by decisions made in early July regarding the 500,000 barrel minimum that effectively eliminated the entire U.S. fleet. If true, the massive efforts undertaken by MARAD, DOT and the American maritime industry during the summer of 2011 each time a waiver request came in – frantic efforts to gather information about the availability of American ships on extremely short notice – were meaningless given the secret 500,000 barrel minimum transportation lot size requirement. It was well-known from the beginning of this process that all American tankers with over 500,000 barrel capacity were fully employed in Alaska and elsewhere and were not available. If true, each waiver review during the SPR draw down was executed under conditions that guaranteed the final result in advance.

Although most of the discussion of the 500,000 barrel minimum transportation lot size appears to have occurred behind closed doors, one incident described in documents received under the FOIA is telling. On August 13, ConocoPhillips was granted a Jones Act waiver to move 500,000 barrels of SPR crude oil from Texas to New Jersey on a foreign vessel. Shortly afterward, ConocoPhillips’ circumstances changed and it requested a modified Jones Act waiver, proposing to divide the movement into two parts

¹⁶ “Oil Reserves Sidestep U.S. Vessels,” by John M. Broder, *New York Times*, August 23, 2011.

– one delivery for 250,000 barrels to a New Jersey refinery and another for 250,000 barrels to a Pennsylvania refinery.¹⁷ MARAD responded that it had determined that an American vessel was available to help move one of the 250,000 vessel lots, specifically named the American vessel, and directed ConocoPhillips to contact the American vessel’s charterer.¹⁸ Instead, ConocoPhillips withdrew its request to break the movement into two smaller lots and reverted to the single 500,000 barrel movement using the original waiver for a foreign vessel flying the flag of Singapore.¹⁹

In one equally notable case, MARAD officials appeared to think that a large SPR oil purchase was being broken down into lots small enough to move on American vessels. “Really? Are they committing to offer this piece to US flag?” asked a surprised MARAD Administrator Matsuda in an email. In response, his staff noted that “[n]o one from DOE contested that this large lot is being broken into smaller parcels.”²⁰ Ultimately and predictably, however, the large lot was broken into three parcels of 500,000 barrels each and moved on vessels from Singapore and Liberia. The fact that the MARAD Administrator would find it surprising that DOE and a purchaser would agree to “offer this piece to U.S. flag” – despite the legal requirement under the Jones Act to do so – is symptomatic of the entire unacceptable situation, one in which the Administration clearly did not proceed from the premise that the Jones Act is the law of the land and cannot be summarily ignored.

Finally, it is unbelievable to us that MARAD never exercised its authority to make availability determinations based on the “collective capacity” of multiple vessels in the American fleet, something that it is specifically authorized to do by a Memorandum of Agreement between the federal agencies for SPR draw downs.²¹ That authority – which would, for example, encourage the use of two smaller vessels to move a 500,000 barrel transportation lot – would have led directly to the movement of the oil on American vessels. As described below, the requirement that MARAD consider the collective capacity of multiple American vessels on availability determinations has been codified in federal law since the 2011 draw down. MARAD’s unwillingness or inability to exercise its authority here was a key component of the perverted process that denied cargo to American vessels and employment to U.S. mariners.

¹⁷ Memorandum from ConocoPhillips to DOE, DOT and DHS, August 23, 2011.

¹⁸ Email from MARAD to ConocoPhillips, August 25, 2011, 6:20 p.m.

¹⁹ Email from ConocoPhillips to DOE, DOT and DHS, August 27, 2011, at 9:55 a.m.

²⁰ Email exchange between MARAD officials, including Administrator Matsuda, between 6:07 p.m. and 6:42 p.m. on July 15, 2011.

²¹ *Agreement Among the U.S. Customs Service of the Department of the Treasury, Maritime Administration of the Department of Transportation, and the Department of Energy concerning drawdown of the Strategic Petroleum Reserve*, effective October 16, 1987. The Agreement says, “MARAD may determine as ‘suitable’ a vessel or vessels with single or collective capacity exceeding the requestor’s contract commitment.” (emphasis supplied)

F) The Federal Explanation

To this day, DOE, DOT and DHS have not provided a satisfactory explanation for the American vessel “unavailability” determinations that amounted to a *de facto* blanket waiver of the Jones Act. No Administration official has confirmed the presence of the secret 500,000 barrel transportation size limit, which appears to have driven the entire process. No Administration official has explained why MARAD’s collective capacity authority in the memorandum among the federal agencies was not exercised. Perhaps most remarkably, Administration officials have actually congratulated themselves for their efforts to include the American fleet in the draw down, citing the rescission of the original blanket Jones Act waiver and the decision to include lower minimum vessel size standards in the Notice of Sale.²²

At one point, Administration officials argued that American vessels were too small and too few to transport all the oil.²³ However, American vessel operators never argued that the U.S. fleet could move all the oil. In fact, the federal waiver provisions require only that U.S. vessels be used first. If all available American vessels had been employed in the draw down, U.S. companies would not have objected to subsequent waivers. Instead, virtually no American vessels were used, even those readily available. As to the size of the vessels, it was DOE that established the “minimum delivery lot sizes” of 40,000 barrels for barges and 300,000 for tankers in its Notice of Sale. Every vessel that the American maritime industry considered available exceeded those requirements. In addition, some of the American vessels that were available in 2011 were the very same types of vessels that had helped fill the SPR with crude oil in the first place.

The most consistent explanation offered by the Administration to explain the waivers has been tied to the “desires”²⁴ of the oil purchasers to use larger foreign vessels to transport approximately 500,000 barrel lots in a single vessel movement. For example, a White House official, quoted in the *New York Times*, stated that the waivers were in part due to “the volumes requested by the purchasing companies...”²⁵ MARAD indicated at one point that the waivers were necessary to meet the “transportation plans” of the purchasers of the oil. Several of MARAD’s unavailability findings specifically cited the lack of an American vessel to “carry the entire lots of cargo in one trip as requested by the applicants.” And a letter from senior DOE and DOT officials noted that purchasers of oil had “elected” to move the oil by tankers.²⁶

²² Letter from Daniel B. Poneman, DOE Deputy Secretary, and John D. Porcari, DOT Deputy Secretary, to Sen. Mary Landrieu, December 27, 2011.

²³ *Id.*

²⁴ “Desires” is the description used by DOE in endorsing many of the Jones Act waiver requests (e.g., “ConocoPhillips’ desire to move 500,000 barrels of crude oil ... in one shipment...”).

²⁵ “Oil Reserves Sidestep U.S. Vessels,” *New York Times*.

²⁶ Poneman and Porcari letter.

It is simply incredible to us that these Administration officials could conclude that the transportation desires and plans of the oil purchasers to use large foreign ships trump and override the clear requirements of the Jones Act, federal regulations, the Notice of Sale, and other federal law.

G) The Bottom Line

The American Maritime Partnership urges this Committee to review this situation with care and inquire into at least the following areas:

- How a federal action designed to help the American economy could expressly favor foreign shipping companies and foreign workers to the detriment of American mariners and vessel owners and lead to the largest number of Jones Act waivers in history.
- Whether the federal departments adopted and conveyed to the purchasers a secret 500,000 barrel minimum transportation lot size, despite much lower minimums in the DOE's own Notice of Sale. If so, how was the 500,000 barrel minimum lot size information conveyed to the oil purchasers and why was it never conveyed to the maritime industry?
- How a DOE official with no jurisdiction or authority over the waiver process could inform the potential purchasers in advance that their Jones Act waivers would be approved (and they were).
- How the desires of purchasers of this SPR oil to use large foreign vessels could supersede federal law requiring the use of American vessels first.
- Whether the purchasers of the crude oil met their legal obligation to attempt to identify available American vessels and whether DOE enforced its own regulations and verified compliance by seeking documentary evidence of good faith efforts to obtain suitable U.S. flag vessels and responses received from that effort.
- Why MARAD failed to exercise its authority to consider the "collective capacity" of multiple American vessels in determining availability.

2) FUTURE DRAW DOWNS

For as disappointed as we are with the inexplicable actions of the Administration in this terrible saga, we are most gratified and appreciative of the many actions taken by Congress since 2011 to avoid a similar situation in future draw downs.

A) Congressional Action

Congress responded quickly to the record number of waivers by enacting legislation impressing upon the federal agencies the need to follow existing law. Specifically, no waiver approvals may be granted until DHS "takes adequate measures to ensure the use of United States flag vessels." *Section 529 of Division D of the Consolidated Appropriations Act of 2012, P.L. 112-74.* Moreover, no waivers may be granted unless DOT has determined whether U.S.-flag vessels with single or collective capacity are capable of assisting in the SPR move. If not, DHS must provide a written justification for not using those U.S.-flag vessels. *Section 172 of Division C of the*

Consolidated and Further Continuing Appropriations Act of 2012, P.L. 112-55. Prior to taking either of these steps, the Departments are statutorily required to consult with representatives of the U.S.-flag maritime industry. The Fiscal Year 2013 version of the DHS Appropriations bill, which was adopted by the full Senate Appropriations Committee on May 22, contained similar language.

In addition to enacted legislation, several related pieces of legislation have been approved by the House of Representatives and may be enacted into law yet this Congress. As you well know, Section 409 of H.R. 2838, the Coast Guard Authorization Act of 2011, includes an amendment sponsored by Congressmen Cummings and Landry that requires MARAD to include information in its vessel availability assessments regarding actions that could be taken to encourage use of American vessels; publish its determinations on its website; and notify Congress when a waiver is requested or issued. Similar language was also adopted by the full House of Representatives in the Defense Authorization Act of Fiscal Year 2013, H.R. 4310. In addition, Section 6 of the Senate's MARAD Authorization Act of Fiscal Year 2012 requires MARAD's certification to the Senate Armed Services Committee, the Senate Commerce Committee, the House Transportation and Infrastructure Committee and the House Armed Services Committee that "it is not possible to use a United States flag vessel or United States flag vessels collectively to meet the national defense requirements" before any waiver can be granted.

In addition to this legislation, numerous Members of Congress, including key Members of this Subcommittee, have expressed their displeasure to the Administration in a variety of ways, including written correspondence.

This array of impressive actions by Congress should make abundantly clear to the Administration the fact that its actions are viewed as inconsistent with longstanding U.S. transportation policy. Today's hearing is an important part of Congress's oversight of the continued integrity of the Jones Act. We applaud you for that.

B) Maritime Industry Response

The American maritime industry also has been aggressive in taking steps to avoid a similar situation. Media reports continue to suggest that another SPR draw down may occur in 2012.

In particular, we have met with federal officials regularly over the last several months at our initiative to ensure that the Administration has accurate information about the availability of U.S. vessels. On several occasions, we have arranged for senior officials from tank vessel companies to come to Washington, D.C. to meet with federal officials regarding issues related to any future draw down. (Unfortunately, despite repeated attempts, we have been unsuccessful in arranging a meeting with DOE.) At the request of federal officials, we have surveyed the industry and provided updated information about the availability of American vessels. We have responded to a broad range of technical questions from federal officials. Most recently we met with federal officials to address misconceptions by certain federal departments about operational issues related to vessels, including barges, and their ability to deliver crude oil to and

from SPR terminals. For example, some DOE officials apparently believe that barges cannot serve certain SPR terminals, even though barges have served and do serve those very terminals. One thing is clear: there continues to be a great deal of confusion on the part of the federal government regarding the way the maritime industry works that could be overcome with a more regular exchange of information between the American vessel industry and the federal departments and agencies, including DOE. We are doing everything in our power to correct those errors now before new decisions are made that cannot be reversed.

We have invested a great deal of time and resources to develop vessel availability lists at the request of the federal departments/agencies and to update those lists showing vessels available now on the spot market, available in 30 days, and available in 60 days. These lists, which we assume are supplemented with information gleaned by MARAD itself, are conservative because not all tank vessel companies participated in our survey. However, even an incomplete list showed there are at least 30 American vessels with 2.5 million barrels of capacity available to move crude oil within 30 days in the event of another draw down.

On April 16, 2012, AMP received a response to our letter to DOT Secretary Ray LaHood, DOE Secretary Steven Chu, and DHS Secretary Janet Napolitano urging compliance with the Jones Act in any future SPR draw downs.²⁷ We were pleased that it acknowledged the Jones Act as “a well-established element of U.S. law” and described President Obama as “committed to the faithful implementation of its provisions.” According to the letter, “In the event of a future decision to release petroleum from the SPR, our Departments will continue to operate consistent with the Jones Act, including the recently enacted appropriations language referenced in your letter.” Frankly, however, we were concerned by the use of the word “continue,” as it suggested that the Department officials believe that their previous actions were consistent with the law. Finally, the letter promised a continuation of “our dialogue” on the subject.

Our concern here is not merely semantic. Actions speak louder than words. Given the very troublesome actions of the Administration throughout 2011 in the previous draw down, we remain extraordinarily concerned with the potential for repeat actions from the Administration in the next draw down. Missing from the April 16 letter, and missing from all verbal communications we have had with the Administration, is the clear and unambiguous commitment that in any future draw down, all available American vessels will be utilized for the transportation of SPR oil before any waiver of the Jones Act is sought. We have yet to receive such an assurance from the Administration, and until it is provided, we have no choice but to be extremely concerned about how the Administration will enforce the Jones Act in the next draw down.

²⁷ The letter to the AMP Board of Directors was signed by Matsuda, Sandalow, and David V. Aguilar, Acting CBP Commissioner, on April 16, 2012.

3) CONCLUSION

The American maritime industry is deeply grateful for this Committee's and this Subcommittee's willingness to address this serious issue. As described in detail above, federal actions in 2011 were unlawful, constituted poor public policy, occurred with an almost total absence of transparency, and sadly resulted in a record number of Jones Act waivers within a short period. Those actions cost American companies and American workers much needed employment opportunities. We are committed to working with you and, we hope, with the relevant departments and agencies to ensure that such a circumstance never occurs again and that any future draw down is executed in full accordance with federal law.

Thank you for the opportunity to testify today.