



Maritime Developments Advisory

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Understanding the Jones Act and the Use of Foreign Skimmers to Respond to the Deepwater Horizon Incident

New Development

Since the unfortunate incident resulting in the oil spill from the Deepwater Horizon on April 20, 2010, there has been confusion and consternation with regard to the employment of foreign-flag oil spill response vessels (“OSRVs”) to provide assistance to clean up the oil. As of the date of this advisory, the oil continues to flow and estimates of the amount have dramatically increased from the initial amount of approximately 5,000 barrels per day to anywhere from 35,000 – 60,000 barrels per day. This dramatically increased release amount has made it even clearer that the Gulf Region needs as many response resources as possible, both domestic and foreign, to minimize damage to the environment. In that regard, the Coast Guard made a determination on June 16, 2010 that foreign-flag oil OSRVs may now operate on a temporary basis in the territorial waters of the Gulf of Mexico states for the purpose of recovering, transporting, and discharging oil in a U.S. port. See the Jones Act Fact Sheet published on June 18, 2010 at www.deepwaterhorizonresponse.com/posted/2931/MARAD_revised_Jones_Act_Fact_Sheet.670991.pdf.

Background

The Jones Act and Coastwise Laws: The coastwise merchandise statute (commonly known as the Jones Act), provides, in part, that no merchandise shall be transported by water, or by land and water, between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and at least 75% owned by citizens of the United States.

The Jones Act applies to “coastwise points” in the U.S.

territorial sea, which extends three nautical miles wide, seaward of the territorial sea baseline and to points located in internal waters, landward of the territorial sea baseline. The Outer Continental Shelf Lands Act (OCSLA) extends the Jones Act to artificial islands, installations, and other devices permanently or temporarily attached to the seabed of the Outer Continental Shelf (OCS) for the purpose of exploring for, developing, or producing resources of the OCS. Thus, any loading and unloading of merchandise between two coastwise points would fall within the scope of the Jones Act.

National Defense Waivers: A Jones Act waiver may be granted by the Secretary of Homeland Security when the Secretary deems it is necessary to the interests of national defense. Waiver requests are submitted to and scrutinized by U.S. Customs and Border Protection (“CBP”), in consultation with the U.S. Maritime Administration (“MARAD”) and the Department of Defense, which provides information on the capability and availability of coastwise-qualified vessels to accomplish the necessary work. Certain other federal agencies will also provide input to CBP. Most waivers were granted in the past due to catastrophic or extreme circumstances such as hurricanes, oil spills, or an immediate energy shortage. Waiver requests may also originate from the U.S. Department of Defense and must be granted by the Secretary of Homeland Security if the Secretary of Defense determines the waiver is necessary to the national defense of the United States.

Waivers for Use of Oil Spill Response Vessels

In times of emergency, U.S. law permits foreign-flag OSRVs to operate in U.S. waters on a temporary basis for the purposes of “recovering, transporting, and unloading in a United

States port" oil recovered from or near U.S. waters as long as: (i) there is a determination that there are not enough U.S.-flag OSRVs to sufficiently perform the oil spill response operations, and (ii) the country of the foreign-flag OSRV must extend the same privileges to U.S.-flag OSRVs. This law specifically overrides all other laws, including the Jones Act, and allows for the urgent employment of foreign-flag OSRVs to conduct spill response activities within U.S. territorial waters.

Congressional Oversight

Congressional committees have been holding hearings on various aspects of the Deepwater Horizon Oil incident including the use of foreign flag vessels. In addition, numerous bills have been introduced to address concerns that Members of Congress have had regarding the spill, including restrictions on the use of foreign-flag vessels. One criticism evident in congressional hearings has been of the availability of oil spill response vessels whether domestic or foreign flag. While some concern has been raised about the use of foreign flag vessels, the outcome of whether a change in existing law will occur is in doubt until Congress finishes its deliberations.

Use of Non-Coastwise Qualified Vessels in the Deepwater Horizon Response to Date

According to the Coast Guard, there are currently 15 foreign-flag vessels involved in response efforts related to the spill and no Jones Act waivers have been granted. This is due to the fact that no waiver is required for vessels performing clean-up operations outside of the three mile territorial sea, because skimming operations in these waters do not involve "coastwise points" as long as the OSRV is not attached to the seabed of the OCS during skimming operations. On the other hand, a waiver is required for a foreign-flag vessel conducting skimming operations within three miles of the coastline, because CBP has determined that skimming operations within three miles constitute coastwise transportation under the Jones Act.

According to National Incident Commander, Admiral Thad Allen, Jones Act waivers have not yet been granted, because there has been no need to grant a waiver to date to conduct operations as part of the response operation. However, although there have been no Jones Act waivers granted thus far, Admiral Allen has provided guidance to ensure that Jones Act waiver requests, if received, would be processed as quickly as possible to allow the spill response activities to continue without delay.

It is also noteworthy that a foreign-flag vessel engaged in OCS activities must be manned with a U.S. crew unless otherwise exempted in accordance with OCSLA manning requirements. A foreign-flag vessel may engage in OCS activities with a foreign crew if the vessel is over 50% owned or effectively controlled by non-U.S. citizens or entities or if the vessel owner can show that there is not a sufficient number of U.S. citizens or permanent residents available to crew the vessel. The Coast Guard issues such exemptions upon request if it can be shown that this criteria has been met. The importance of obtaining the OCS exemption is that this allows a crewmember to obtain a B-1 (OCS) visa from a U.S. embassy in order to travel through the United States for crew changes.

Coast Guard Determination of Shortage of Jones Act Qualified OSRVs

On June 16, 2010, the Coast Guard Federal On-Scene Coordinator ("FOSC"), in coordination with MARAD and other federal agencies, determined that there are not enough specialized oil skimming vessels in the United States to keep up with the daily release of oil into the Gulf of Mexico. As a result of this determination, foreign OSRVs may be immediately permitted to perform clean-up operations in the U.S. Gulf, both inside and outside the territorial sea, provided that the country of the foreign-flag OSRV extends the same privilege to U.S.-flag OSRVs. The Coast Guards is now reviewing OSRV waiver requests and is expected to make decisions with BP as to which foreign-flag vessels will be activated to assist in the response. Accordingly, the use of OSRVs under these circumstances would not violate the Jones Act or require a Jones Act waiver.

Should any applications for a Jones Act waiver requiring a national defense waiver be received for operations inside the territorial sea, the FOSC will coordinate the effort with CBP and will work closely with to the necessary agencies to determine if a Jones Act waiver is required. CBP will then make a recommendation to the Secretary of the Department of Homeland Security, in consultation with MARAD, based on the unique characteristics and capabilities of the foreign-flag vessel compared to what availabilities exist in the U.S. fleet. Any delays in operations or other negative impacts due to waiting for a U.S. vessel to become available and reach the U.S. Gulf will be considered prior to determining the need for a Jones Act waiver for a foreign vessel.

Conclusions and Recommendations

In order to keep pace with the unprecedented levels of oil discharges from this incident, the Coast Guard has made a determination that there are not enough U.S.-flag OSRVs available. Accordingly, the Deepwater Horizon Unified Command will entertain requests to use foreign-flag OSRVs to operate within three miles of the coastline based on this determination. Requests for the use of foreign-flag vessels that are not OSRVs will require a Jones Act waiver based on national defense needs. Owners, operators, agents, or other stakeholders who are interested in providing response assistance to this extraordinary oil spill should submit requests to use foreign-flag response vessels and equipment to the FOSC for consideration. In addition, owners, operators, agents, or other stakeholders should also be aware of and closely monitor changes that may be proposed by Congress affecting the use of vessels on the U.S. OCS. Please contact the persons listed in this advisory should you have any questions or desire assistance.■

**For more information about the developments mentioned in this advisory, please contact
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For Additional Information

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