

REGION III REGIONAL RESPONSE TEAM
GUIDANCE FOR LIMITED JONES ACT WAIVERS
DURING POLLUTION RESPONSE ACTIONS

Introduction

Federal On-Scene Coordinators (FOSCs) and Unified Commands (UCs) responding to pollution incidents often face challenges in locating suitable vessels. The law requires use of U.S.-flagged vessels for activities like oil/hazardous substance collection, cargo lightering, and salvage. However, when U.S. assets are unavailable, foreign assets may be necessary to protect lives, the environment, and minimize economic impacts in the interest of national defense.

This document provides Region III Regional Response Team (RRT3) guidance and decision-making tools for using foreign-flag vessels when the Jones Act applies. It aims to identify issues, provide consistent procedures, and alleviate barriers to the decision process. Area Committees are encouraged to incorporate this information into their Area Contingency Plans (ACPs). It includes a definition of purpose, authority, and scope, a flow chart, a checklist, and a sample waiver letter.

Section I

Purpose

This guidance supports the FOSC/UC's ability to quickly determine the best course of action to obtain a waiver for using foreign-flag vessels when suitable U.S. flag vessels cannot be located or obligated to assist and support removal and/or salvage operations to mitigate pollution or the threat of pollution. It outlines the decision-making process, identifies issues, suggests procedures, and provides checklists to standardize the waiver process and can be incorporated into ACPs.

The use of vessels to support pollution mitigation is an FOSC/UC decision. These guidelines assist the FOSC and Commonwealth/State **SOSC** partners within the UC, to employ concepts or tools from this guidance to help or assist in the obtainment of suitable vessel **assets** to meet an urgent need in the interest of national defense:

- Prevent or substantially reduce a hazard to human life.
- Minimize the environmental impact of spilled oil.
- Maximize available vessel resources for containment, collection, storage, cargo removal, salvage, or other necessary support when U.S. resources are unavailable.
- Reduce or eliminate economic or aesthetic losses.

Legal Background

Historically, waivers have been granted to respond to natural disasters, major pollution events, and releases. For example, following the grounding of the Exxon Valdez in 1989, Exxon requested foreign-flagged oil skimming barges to assist in clean-up efforts. MARAD, DoD, and the Coast Guard supported the waiver, with the Coast Guard adding that it supported their use until U.S.-flag vessels could effectively replace the vessels. Customs and Border Protection (CBP) ultimately granted the waiver but mandated that the vessels could not be used for supply purposes.

When U.S.-flagged vessels are unavailable, the FOSC/UC must coordinate with CBP to address two issues when considering a waiver to use foreign-flag vessels:

- **Merchandise Coastwise Law (Jones Act)**: 46 U.S.C. § 55102 prohibits the transportation of merchandise between U.S. coastwise points in non-U.S.-built, owned, and documented vessels. "Merchandise" includes goods, wares, and chattels of every description, including prohibited imports (19 U.S.C. § 1401(c)). The Jones Act generally applies within the three-nautical-mile territorial sea and internal waters. 46 U.S.C. § 55102. This act also applies to Puerto Rico (48 U.S.C. § 744)). Jones Act provisions are not applicable in the waters surrounding the United States Territory of the Virgin Islands.
- **Salvage Operations**: 46 U.S.C. § 80104-80105 prohibits foreign vessels, with the exception of certain Canadian vessels, from engaging in salvage operations on the U.S. Atlantic or Pacific coasts, or in the Gulf of America's territorial waters, unless authorized by treaty or the Commissioner of Customs. According to Customs, this statute does not apply to the waters of Puerto Rico or the U.S. Virgin Islands.
 - *Note: There is no single regulation that explicitly defines "coasts" for Jones Act purposes. The definition is developed through a combination of statutory interpretation, CBP rulings, and case law.*

Despite the general restrictions of the Jones Act, foreign-flagged vessels can be involved in pollution response activities in the U.S. under specific circumstances:

- **Waivers (Key Exception)**: In the event of a significant oil spill or the significant threat of an oil discharge or hazardous substance release, the U.S. government (specifically, the Maritime Administration - MARAD - in consultation with other agencies) can issue waivers to the Jones Act. This allows foreign-flagged vessels with specialized pollution response capabilities to assist in the cleanup efforts, even if they are transporting equipment or materials between U.S. ports. These waivers may be particularly important for accessing

specialized foreign-flagged resources like pollution response tugs or crane ships/barges that can efficiently deploy cleanup equipment or remove debris in sensitive areas. These waivers are typically granted when U.S.-flagged vessels are insufficient or lack the necessary equipment to address the emergency effectively. Waivers are granted only when it can be demonstrated that there's an urgent need for the foreign-flagged vessels' services and that U.S.-flagged vessels are not readily available or adequately equipped to handle the situation. The focus is on mitigating the environmental damage as quickly as possible. The process involves assessing the available resources and determining if a waiver is truly necessary in the interest of national defense 46 U.S.C. § 501. For salvage only operations, the waiver process is outlined in 46 U.S.C. § 80104.

- **Non-Transportation Activities:** If a foreign-flagged vessel is directly involved in removing pollutants from the water or shoreline without transporting them to another U.S. location, the Jones Act may not apply. For instance, a vessel equipped with specialized skimming equipment could collect oil and process it onboard, without moving it to another U.S. port. The key is that the vessel is performing a direct cleanup function, not transporting merchandise between U.S. points.
- **Coordination with U.S. Resources:** Foreign-flagged vessels can often work in coordination with U.S.-flagged vessels. For example, a foreign-flagged vessel might deploy booms or other containment equipment, while a U.S.-flagged vessel transports the collected pollutants to a disposal facility. This allows for a combined effort where each vessel contributes its unique capabilities while adhering to the Jones Act requirements.
- **Pre-Positioning and Agreements:** Sometimes, the U.S. government or private entities may have pre-arranged contracts with foreign companies that specialize in pollution response. These contracts may include provisions for obtaining Jones Act waivers in the event of an emergency. Foreign-flagged vessels with pollution response capabilities may be strategically positioned near U.S. coastlines, ready to respond quickly if needed. The readiness allows for quicker action while waiver processes are being considered.

Scope of Process

This guidance outlines the process for the FOSC/UC to pursue a Limited Jones Act Waiver when suitable U.S. vessel resources are unavailable.

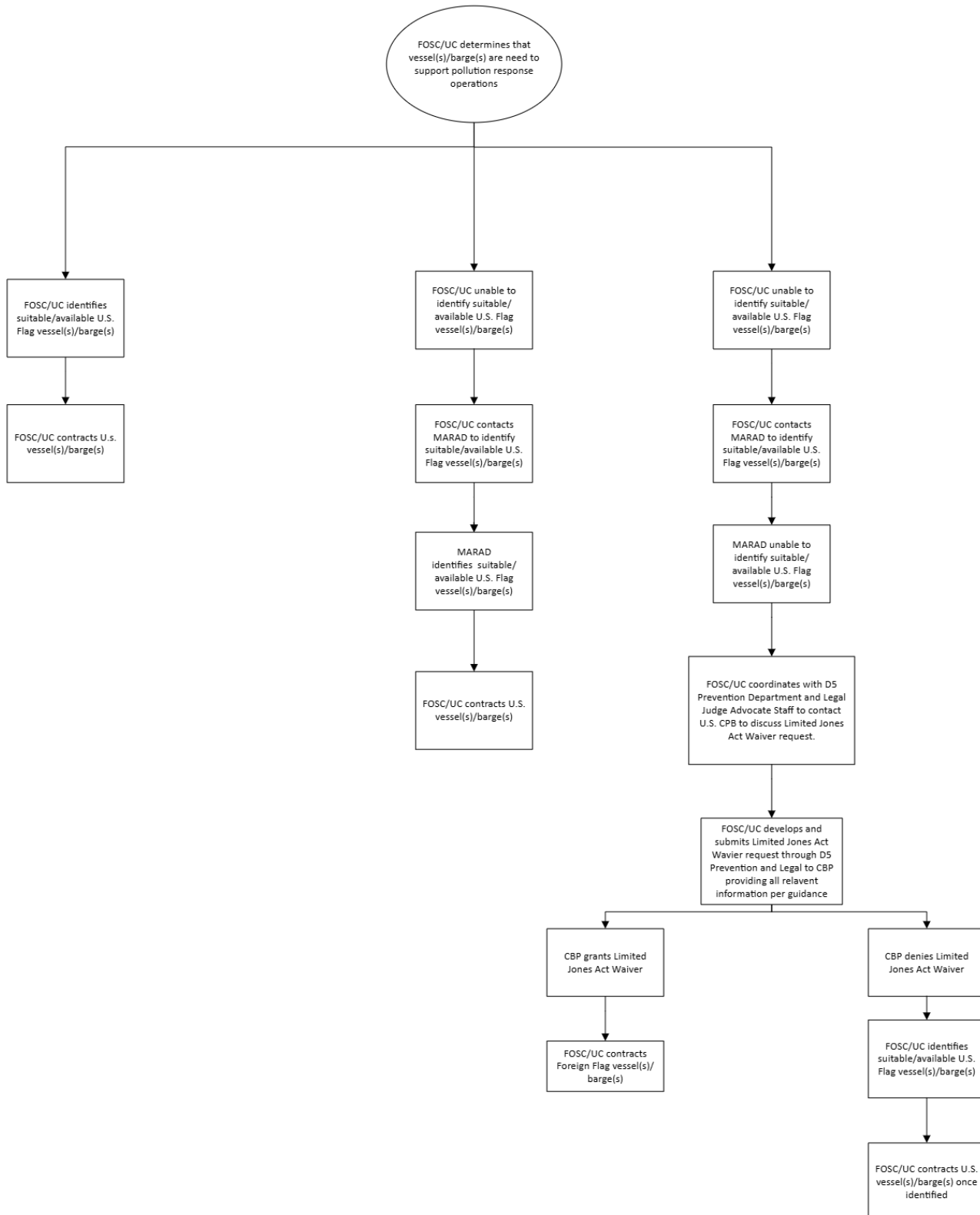
MARAD: The Maritime Administration (MARAD) must be consulted to identify U.S.-flagged vessels. This interaction must be documented to support a waiver request.

- **Limited Jones Act Waiver Process:** The waiver request should be forwarded to CBP via the Fifth Coast Guard District (refer to the checklist). The Fifth District Staff Judge Advocate can assist and liaise with CBP Jones Act Division of Enforcement (JADE). Waivers can only be granted under the Act of December 27, 1950 (64 Stat. 1120), which allows the head of an agency administering navigation laws to waive compliance upon request of the Secretary of Defense or on their own initiative if it's in the interest of national defense. The only provision to obtain a Limited Jones Act Waiver is by receiving a national defense waiver CBP. This provision shall be documented within any requested forwarded by the FOSC/UC.

- **Waiver Request Criteria:** The Limited Jones Act Waiver request should address:
 - A background synopsis of the incident focusing on the operational need for support vessel use.
 - Documentation of the inability to identify suitable U.S.-flagged vessels through the FOSC/UC's own sources and MARAD.
 - The specific extent of the intended use of foreign-flagged vessel(s).
 - The threat to national defense if the waiver is not granted (e.g., blockage of a significant channel, military base, or transportation route).
 - The request should begin with language such as: "This requests an expedited limited waiver of the provisions of 46 U.S.C. § 55102 on the basis of National Defense to allow for the use of"

Section II

Limited Jones Act Waiver Request Flow Chart



Section III

Limited Jones Act Waiver Operational Checklist

This checklist, separated into six steps, assists in the Jones Act Limited Waiver decision process, mirroring the "Limited Jones Act Waiver Decision Tree." Each step guides the user through key issues, providing points of contact and amplifying information to streamline the process for the FOSC and UC.

Steps:

- Step 1 - Incident & Environmental Background
- Step 2 - U.S.-Flagged Vessel Identification
- Step 3 - MARAD Consultation
- Step 4 - National Defense Determination
- Step 5 - Foreign-Flagged Vessel Identification
- Step 6 - Limited Jones Act Waiver Request

NOTE: This checklist is a job aid to assist the FOSC/UC through the waiver process. It's designed for quick reference, and not all sections may be applicable to every incident. Use it as a tool to expedite efforts, not to hinder them.

Limited Jones Act Waiver Operational Checklist

Step 1: Incident & Environmental Background

- **General Information:**

- Incident Name:
- Unified Command Location:
- Responsible Party (if known):
- Date/Time of Incident:
- Incident Type (check all that apply): Vessel Grounding, Vessel Fire, Facility Incident, Tank Truck Incident, Transfer Operation, Explosion, Vehicle Accident, Blowout, Pipeline, Mystery Pollution, Other:
- Spill Location:
- Proximity to Human Use Areas (distance/direction to schools, hospitals, recreation areas, water intakes, etc.):

- **Pollutant/Oil Information:**

- Product(s) Released (check all that apply): Heavy Crude, Bunker C/#6 Fuel Oil, Medium Crude, Diesel/#2 Fuel Oil, Jet Fuels, Gasoline, Other:
- Product Details: Name, Viscosity, API Gravity, Pour Point
- Estimated % Evaporation: 24 Hours: ____%, 48 Hours: ____%
- Estimated Volume Released: ____ gals/bbls
- Estimated Potential Release: ____ gals/bbls
- Release Status: Continuous, Intermittent, One-Time (Stopped? Yes/No). If Continuous/Intermittent, Rate: ____ gals/bbls per hour
- Estimated Surface Area Covered: ____ acres/sq. ft.

- **Cargo Information (If Applicable):**

- Cargo Type: Bulk Oil, Bulk Liquid Hazardous Substance, Dry Bulk, Containerized, Other:
- Product Details: Name

- Estimated Volume Released/Threatened: ____ (units)
- Estimated Potential Release: ____ (units)
- Release Status: Continuous, Intermittent, One-Time (Stopped? Yes/No). If Continuous/Intermittent, Rate: ____ units per hour
- Estimated Surface Area Covered: ____ acres/sq. ft.
- **Environmental Information:**
 - Current Weather: Clear, Partly Cloudy, Overcast, Rain/Snow/Fog, Inversion
 - 24-Hour Projection:
 - 48-Hour Projection:
 - Wind Speed: Current (mph/direction), 24-Hour Projection (mph/direction), 48-Hour Projection (mph/direction)
 - Visual Overflight Information (slick thickness, characterization of spilled oil, etc.):

Step 2: U.S.-Flagged Vessel Identification

- **Resource Information:**
 - Vessel/Barge Needed For (check all that apply): Collect/Contain/Store Pollutants, Support Lightering, Other:
 - Types of Vessels/Barges Needed:
 - Response Window/Target for Resources: (Resource Type: hrs/days/week)
 - Does Jones Act Apply? Yes/No (If No, STOP)
 - Has Unified Command Identified Suitable U.S.-Flagged Vessels Within Response Window? Yes/No (If Yes, STOP)

Step 3: MARAD Consultation

- Contact MARAD to identify suitable U.S.-flagged vessels/barges.
 - MARAD Headquarters: 202-366-5807
 - MARAD South Atlantic Gateway: 202-384-6001
- Did MARAD or Unified Command Identify Suitable Vessels Within Response Window? Yes/No (If Yes, STOP)-

Step 4: National Defense Determination

- Has the FOSC/Unified Command determined that failure to obtain suitable vessel/barge resources within the acceptable response window would threaten U.S. national defense? Yes/No (If No, waiver not possible)
- Explain Threat to National Defense:

Step 5: Foreign-Flagged Vessel Identification

- Has Unified Command Identified Suitable Foreign-Flagged Vessels Within Response Window? Yes/No (If No, continue pursuit of resources)
- List Identified Vessels/Barges: (Vessel/Barge, Flag, Purpose)

Step 6: Limited Jones Act Waiver Request

- Has the FOSC/UC, through Coast Guard District Five Staffs Verbally Communicated with CBP's JADE? Yes/No (If No, contact CBP through District channels)
- Information to be Addressed and Documented by FOSC/UC (Coast Guard District Five for consultation with Legal):
 - Background synopsis of the incident and need for vessel support.
 - Documentation of the inability to identify suitable U.S.-flagged vessels within the response window.
 - Specific extent of intended use of foreign-flagged vessel(s).
 - Explanation of the threat to national defense if the waiver is not granted.
- The Coast Guard District Five Legal Office will draft the waiver request and forward it to CBP's JADE. The request will contain the following language: The request should begin with the following language or similar wording: "This request is an expedited limited waiver of the provisions of 46 U.S.C. § 55102 on the basis of National Defense to allow for the use of"

Section IV

Limited Jones Act Waiver Request Sample Letter

The following document is a sample waiver letter that can be used as a tool to complete the final step of the proceeding checklist. The letter should at a minimum include the following criteria specified within the “Waiver Request” portion of Step 6.

- Background synopsis of the incident focusing on the operational need for support vessel or barge use.
- The inability of the FOSC/UC working through its own sources and through MARAD to identify suitable U.S.-flagged vessels to support the operation within a specific response window.
- The specific extent that you intend to employ Foreign-flagged vessel(s) to mitigate the incident.
- The threat to national defense should the waiver not be granted (e.g., block of significant channel, military base, transportation route, etc.).

Port Director
U.S. Customs & Border Patrol

Attn: _____

[Port Name]

[Port Address]

[City, State, Zip Code]

Dear _____:

RE: REQUEST FOR NATIONAL DEFENSE WAIVER

This requests an expedited limited waiver of the provisions of 46 U.S.C. § 55102 based on National Defense to allow for the use of _____ foreign-flagged vessels in the response to the grounding of the M/V

Provide a synopsis of the situation:

.....
.....

Explain the inability of the Unified Command, with the assistance of the Maritime Administration to identify suitable U.S.-flagged vessels to support the operation within a specific response window:

.....
.....

Accordingly, I request a limited National Defense waiver to allow ____ foreign-flag vessels to augment U.S.-barges to affect the immediate and efficient removal of the vessel's cargo of _____ to refloat the vessel and alleviate the threat to the channel. The advent of worsening weather along with the progressing damage on board the vessel makes the probability of the vessel breaking apart and blocking the navigable channel of _____. This would prohibit the passage of U.S. Coast Guard and other U.S. military vessels entering and departing the harbor to fulfill their national defense obligations.

Sincerely,

Rear Admiral, U.S. Coast Guard
Coast Guard East District
District Commander

Copy: USCG SECTOR _____
MARAD, Washington, D.C.