

Vessel safety requires deft congressional touch



By David E. Frulla and Shaun M. Gehan

Fishing is dangerous. No law, or set of equipment or practices, will completely eliminate these risks. But existing mandatory and voluntary measures, such as better trained crew with the right equipment and location devices, have meant fewer fatalities.

Recently, the U.S. House of Representatives passed H.R. 2830, its version of the Coast Guard Act reauthorization. This House bill focuses heavily on further enhancing safety at sea.

First, H.R. 2830 expands on proven safety approaches, including extending requirements for safety gear, such as survival craft and emergency radio beacons, to a larger universe of vessels. It would also require dockside inspection of all vessels operating beyond three miles twice every five years and impose safety training and drilling requirements.

H.R. 2830's second element is perhaps more noteworthy. The bill would require larger numbers of fishing vessel to be load-lined. In addition, by 2018, if not sooner, virtually all vessels 50 feet or longer would have to be classed. Each measure is costly and controversial. Whether

or not they are adopted this year, these proposals, along with dockside inspections, portend a heightened and probably enduring emphasis on vessel safety and seaworthiness.

The fisheries safety debate will and should also assess existing statutory and regulatory fishing vessel-related requirements. For instance, nearly every fishery management plan restricts replacement and upgrading.

Indeed, this spring, when the Bering Sea catcher/processor Alaska Ranger tragically sank, a regulatory interpretation prohibited any vessel in that sector from being replaced at all, forever locking owners into aging steel. A federal court recently, correctly, overturned this rule as illegally capricious. For its part, H.R. 2830 would permit the American Fisheries Act pollock fleet, but not vessel owners in the Alaska Ranger's fishery sector, to replace an aging vessel.

In addition, the American Fisheries Act largely prevents replacement of existing vessels longer than 165 feet with anything but an already existing ship. New vessels, even those replacing one lost on a foot-for-foot basis, appear to be ineligible for fishery endorsements without specific regulatory approval.

Accordingly, an owner may need to run the gauntlet of regional council and/or NMFS processes to build a safer new replacement. Further complicating matters, classification society restrictions on vessel age would prevent certain pre-existing potential replacement vessels from being classed, as H.R. 2830 would require. For older vessels this large, the Coast Guard bill provides an alternative safety compliance program. Alternative compliance is, however, a Band-Aid, not a long-term policy solution.

Nor can the owners of relatively smaller vessels write

these issues off as a "Bering Sea" or "big boat" problem, particularly if the provisions of H.R. 2830 become law. Controls on increasing vessel size and fishing power became a widely used management tool when fishing was largely regulated by input controls (including mesh size and trip limits).

They were particularly important in the era of open-access and derby fisheries, to level the playing field and avert overfishing. Such restrictions are still key components of fisheries governed by days-at-sea or other input controls, where the objective is to freeze capacity to maintain historical parity in fishing opportunities.

As management approaches change, regulatory policies on vessel upgrading should likewise be reviewed. Pursuant to the Magnuson-Stevens Act's 2006 reauthorization, fisheries will be governed by overall "annual catch limits." Managers are also exploring dedicated access programs such as individual transferable quotas, sectors, and cooperatives. Blanket vessel upgrading restrictions are harder to justify in fisheries governed by fixed allocations, particularly individualized output controls.

While we do not advocate for any particular management approach, we cannot avoid concluding that arbitrary or outdated vessel replacement laws and regulations can run counter to other important policy goals, such as safety and fuel efficiency. The fishery management councils and the industry should provide context and region-specific input regarding how to resolve the tension between safety and management issues. **NF**



David E. Frulla is a partner and Shaun Gehan is an associate in the Washington, D.C., office of Kelley Drye & Warren LLP.