

Recommendation 1: The Coast Guard should seek a *legislative* change to remove the *grandfathering* provisions provided for in 46 *CFR* 28.500 and require all fishing vessels and fish processors (including Head and Gut operations) over 79 ft in length to meet the stability requirements in 46 CFR Part 28, Subpart E, or remove the exemption for fishing vessels in 46 CFR Subchapter E and require load line assignment. [Emphasis added]

Why does the CG need a *legislation* to change a *regulation*?

Let's examine the regulation, 46 CFR 28.500, and the statute 46 U.S.C. 4502(d) as published in the FINAL RULE on 14 August 1991 read as follows.

46 CFR Part 28 –

Subpart E--Stability

Sec. 28.500 Applicability.

This subpart applies to each commercial fishing industry vessel which (sic) is 79 feet (24 meters) or more in length that is not required to be issued a load line under subchapter E of this chapter and that--

- (a) Has its keel laid or is at a similar stage of construction or undergoes a major conversion on or after September 15, 1991;
- (b) Undergoes alterations to the fishing or processing equipment for the purpose of catching, landing, or processing fish in a manner different than has previously been accomplished on the vessel; or
- (c) Has been substantially altered on or after September 15, 1991.

[CGD 88-079, 56 FR 40393, Aug. 14, 1991]

The preamble to the final rules published in the Federal Register on 14 August 1991 (56 FR 40384) states –

“Section 28.500 Applicability

“This subpart applies to all vessels built after the effective date of the regulations which are more than 79 feet (24 meters) in length The Act specifies that each vessel built after or which is substantially altered after December 31, 1989, be subject to regulations for operational stability. Since regulations were not finalized by December 31, 1989, there have been no stability evaluations required by regulation prior to the effective date (September 15, 1991) of these regulations.”

The preamble further states:

" As explained previously, an SNPRM is under development which (sic) will address the stability criteria applicable to commercial fishing industry vessels which

(sic) are less than 79 feet (24 meters) in length. Therefore, these rules will only apply to vessels more than 79 feet (24 meters) in length."

This SMPRM is still to come!

The preamble (56 FR 40385) goes on to discuss in detail the definition of 'substantially altered' –

"Several comments pointed out that the Act was not intended to restrict the use of fishing gear. They pointed out that the definition of "substantially altered" did not account for a vessel which (sic) changed fishing equipment to engage in different fisheries during different times of the year. This is a misinterpretation of the definition. This subject was discussed with the Committee and the definition in §28.050 of the NPRM included the wording "Alterations to fishing or processing equipment for the catching, landing, or processing fish in a manner *different that has previously been accomplished on the vessel*" (emphasis added). The intent of this wording was to allow routine changing of fishing gear to accommodate different fisheries, if that gear had been used on the vessel previously, i.e. before the effective date of the regulations. However, gear being used on the vessel for the first time would have been considered a substantial alteration."

On **September 20, 1991** the Coast Guard published 'corrections' to the Final Rules (56 FR 47679), including adding the word "started" to §28.500 so that (a) it reads:

"Has its keel laid or is a similar stage of construction or undergoes a major conversion *started* on or after September 15, 1991."

On **January 6, 1992** the Coast Guard published another correction (57 FR 363-4) to clarify / correct §28.500(b), so that it reads as follows –

"(b) Undergoes alteration to the fishing or fish processing equipment for the purpose of catching, landing, or processing fish in a manner different than has been previously been accomplished on the vessel -- these vessels need only comply with §28.501 of this subpart; or"

§28.580 regarding "Unintended flooding" was also corrected to read –

"(a) *Applicability*. Except for an open boat that operates on protected waters and as provided by paragraph (i) of this section, each vessel built on or after September 15, 1991 must comply with the requirements of this section.

The Preamble for these corrections states –

"Paragraph (b) of §28.500 is revised in order to clarify the requirements for vessels that undergo alterations to fishing or fish processing equipment in a manner different than had been accomplished previously. These vessels are considered to be "substantially altered". Therefore, they need only meet subpart E requirements in §28.501.

“Paragraph (a) of §28580 is revised in order to clarify the Coast Guard’s intent that U.S. commercial fishing vessels constructed before the he effective date of the regulations be exempt from §28.580(a). The Notice of Proposed Rulemaking (NPRM) published on April 19, 1990 (55 FR 14924) stated that §28.580(a) would apply *only* to vessels constructed on or after the effective date of the regulations. In drafting the final rule, the Coast Guard inadvertently deleted that provision thus making §28.580(a) apply to vessels that had undergone major conversions or alterations as well. This was not the Coast Guard’s intent, considering the difficulties existing vessels would have retrofitting bulkheads in order to meet the survival conditions specified.

After correction Section 28.500 reads –

Sec. 28.500 Applicability.

This subpart applies to each commercial fishing industry vessel which is 79 feet (24 meters) or more in length that is not required to be issued a load line under subchapter E of this chapter and that--

(a) Has its keel laid or is at a similar stage of construction or undergoes a major conversion *started* on or after September 15, 1991;

(b) Undergoes alterations to the fishing or processing equipment for the purpose of catching, landing, or processing fish in a manner different than has previously been accomplished on the vessel—*these vessels need only comply with Sec. 28.501 of this subpart*; or

(c) Has been substantially altered on or after September 15, 1991.

[CGD 88-079, 56 FR 40393, Aug. 14, 1991; 56 FR 47679, Sept. 20, 1991, as amended by CGD 88-079, 57 FR 364, Jan. 6, 1992]

The Commercial Fishing Industry Vessel Act of 1988 states at:

46 U.S.C. 4502

(d) (1) The Secretary shall prescribe regulations for the operating stability of a vessel to which this chapter applies -

(A) that was built after December 31, 1989; or

(B) the physical characteristics of which are *substantially altered* after December 31, 1989, in a manner that affects the vessel's operating stability.

(2) The Secretary may accept, as evidence of compliance with this subsection, a certification of compliance issued by the person providing insurance for the vessel or by another qualified person approved by the Secretary.

On page 21 of the House of Representatives, Committee on Merchant Marine and Fisheries (MM&F) Report (100-729) on the *Commercial Fishing Industry Vessel Safety and Compensation Act of 1987* (H.R. 1841) elaborates section 4502(d)(1) as follows –

“New section 4502(d)(1) requires the Secretary to prescribe regulations for the operating stability of a documented fishing, fish processing, or fish tender vessel that is built after December 31, 1989, or whose physical characteristics are substantially altered after December 31, 1989, in a manner affecting the vessel’s operating stability.

“Many fishing industry vessels operate in hazardous waters where maintaining vessel stability is vital to the survival of the vessel and those on board. It is not uncommon for a vessel to be altered to engage in a new fishery or have significant amounts of equipment or permanent topside weights added that materially alters its sea-keeping characteristics so as to make it an unstable platform. The Committee expects that the requirements in this subsection will reduce the number of fishing vessel capsizings and sinkings. The Committee does not intend that the Secretary use the authority under this section to regulate the type or use of fishing gear. By using the term “gear” the Committee means to include only such articles as nets, lines, etc., *but does not mean to include heavy equipment such as booms or machinery attached to the vessel. If this equipment unduly affects a vessel’s stability, the Secretary may use this section to establish stability requirements for the use of that equipment.* [emphasis added]

It would appear that the CG already have the authority to write regulations for stability for **any** vessel built / altered after 31 December 1989.

The above recommendation doesn't mention a need to legislatively fix a problem with 'substantially altered'. It implies a problem with 'grandfathering' -- which I guess means the date of December 31, 1989 that in the regs was changed to September 15, 1991.

NOW LET’S LOOK AT THE HISTORY OF MODIFICATIONS TO ARCTIC ROSE [From the Casualty Report]

11. HISTORY OF VESSEL REPAIRS, MODIFICATIONS AND SURVEYS

a. Shrimp Boat. The ARCTIC ROSE was originally constructed at Covacevich Boat Works in Biloxi, Mississippi by Mr. John Van Nguyen as a gulf shrimper and named SEA POWER. Due to a lack of plans it is unknown what construction methods were employed and it is unknown as to whether the vessel was constructed in accordance with a recognized standard.

b. Scallop Boat. Information regarding the vessel’s initial operations is sketchy. In the early 1990s, the vessel was modified to dredge for scallops and home ported in New Bedford,

Massachusetts. There are no known drawings or plans to reflect this modification. Pictures taken by a marine surveyor show heavy doubler plates on the port and starboard sides and stern were installed with plug welds, most likely to protect the sideshell when the scallop dredge banged against those portions of the hull.

c. Catcher-Processor Boat – Second Owner and Operator. In 1991 Dr. Kusum and Dr. D.K. Stokes (North American Seafoods) purchased the SEA POWER. That year the vessel was modified to work in the H & G and freeze industry at SEA-FAB Inc., in Pascagoula, Mississippi. **A shelter deck was extended aft from the house on the main deck (above the waterline) and consumed approximately two thirds of the aft working deck. This new space was equipped with fish processing equipment. A gantry and net reel was added at the stern for trawl operations. The existing live fish hold was converted to a cargo hold. The cargo hold was insulated with a spray-on urethane foam and equipped with a refrigeration system. A concrete deck was poured to level the deck and serve as insulation from the shaft alley that runs through the cargo hold.** Mr. Bruce Culver, Naval Architect, reviewed the changes and conducted an inclining experiment on December 11, 1991 once the majority of work was complete. Mr. Culver issued a stability book to the owner, which incorporated the processing space as part of the vessel's watertight envelope. As such, the processing space was required to be weathertight whenever the vessel was underway. The vessel departed Pascagoula to work off the Oregon/Washington coast and transited to India for a brief period to engage in trawling operations. After the failed India excursion, the vessel operated in the Gulf of Alaska and Bering Sea waters.

d. Same Owner, New Operator. In 1995, the vessel's day to day management was assumed by SCANSEA Inc., from North American Fish Company at the owner's request. SCANSEA renamed the vessel changing it to TENACITY and continued to operate in the GOA and Bering Sea as a H & G processor. The vessel was plagued with engine, shaft and trawl equipment problems that led to North American Fish Company filing for bankruptcy in 1996. At that time, the TENACITY was taken out of service and moored at Fisherman's Terminal in Seattle, Washington. The vessel remained in lay-up status for over two years.

e. Third Owner, Additional Modifications. The TENACITY was purchased by Arctic Rose LLC in March of 1999 and changed its name to the ARCTIC ROSE on June 25, 1999. In May 1999, the vessel was moved from Tippet Marine shipyard's waterside facility to the marine railway at Marine Fluid Systems in Seattle, Washington **where a 13,600 lb keel shoe was welded to the exterior of the vessel. The old gantry was removed and a new larger "A" frame gantry was installed.** Six inch pipe guards were installed on the upper deck to center the trawl net. A Cummins generator was installed in the engine room. A refurbished propeller and intermediate shaft were machined and installed. The original shafts were removed by SCANSEA personnel and could not be located.

The processing space (See Figure 4) received a complete overhaul with all old equipment removed except for 2 plate freezers. The following new stainless steel equipment was installed: packing table with 2 Marel scales, wash tanks with incline conveyor, break tank gutting belt heading machine, bleeding bins, bleeding bin conveyor with incline conveyor, sorting belt with incline conveyors, dump box with incline conveyor and hydraulic sliding hatch, bleeding bins with three hydraulic doors. Tsurimi and Vaughn sump pumps were installed respectively on the port and starboard sides of the processing space. The deck of the processing space had steel framing and new fiberglass grating installed throughout.

This grating was at a minimum of five inches off the floor. The by-catch and waste overboard discharge chutes were raised to four feet and five feet above the deck respectively. Both overboard chutes were fitted with closures. The by-catch chute was fitted with a manual guillotine type closure and the waste discharge chute was fitted with a flopper door. During the fall of 2000, the Cummins MDE was replaced with a Luger 6170. A Maxim model J10 water maker and Mitsubishi centrifuge diesel purifying system were installed in the auxiliary machinery space. The refrigeration system was completely overhauled. The port and starboard freon accumulator tanks and associated piping were removed from the weather deck, as was the accumulator tank in the auxiliary machinery space. Two new 8' x 4' low side receivers and associated piping and control panels were installed in the auxiliary machinery space. The processing space received a Jackson 100 pan plate freezer, for a total of three pan plate freezers in this space. To accommodate the new freezer, a Dole 96 pan plate freezer was moved several feet to the starboard side. Associated piping was modified to accommodate this new installation.

Unfortunately we don't know from the Casualty Report exactly when in 1991 the vessel was converted to H&G operations. We do know that the inclining experiment on December 11, 1991 and issued a stability book. If those modifications took place after 15 September 1991 it would appear that the vessel should have been subject all the requirements of Subpart E – Stability.

The vessel was modified again in **1999** when the “old gantry was removed and a new larger “A” frame gantry was installed,” along with “a 13,600 lb keel shoe.” Such a modification would seem to be just what the MM&F Committee was thinking of when it discussed what it meant by the term “gear” – certainly a “keel-shoe” is not fishing “gear. To reiterate what the committee said --

“By using the term “gear” the Committee means to include only such articles as nets, lines, etc., **but does not mean to include heavy equipment such as booms or machinery attached to the vessel.** If this equipment unduly affects a vessel's stability, the Secretary may use this section to establish stability requirements for the use of that equipment.”

So why wasn't the ARCTIC ROSE required to meet the full stability standards set forth in Subpart E?

If it was what is the purpose / goal of Recommendation 1? Is it to get rid of “grandfathering” or to revisit the issue of “substantial alteration”?

Both are worthy goals. But it would appear that the Coast Guard could clarify both issues through the rule making process.