



House of Representatives Passes Coast Guard Authorization Bill

The Coast Guard Authorization Act of 2008 (until recently, the “Act of 2007”) took a significant step forward on April 24 when it was passed by the U.S. House of Representatives. Senate and conference committee action still must occur later this year before the measure can become law. The Coast Guard Authorization was marked up by the House Transportation Committee on June 27, 2007, and the Committee issued its report on September 20, 2007.

The bill, as passed by the House, proposes significant changes to the law affecting virtually every aspect of the maritime industry doing business in the United States. A number of those changes are opposed by the Bush Administration, which threatened to veto the bill if it is presented for the President’s signature in its current form. The Bush Administration opposes, in particular, the LNG vessel/terminal security provision and the several interferences in Coast Guard internal affairs contained in the bill. Here are certain highlights:

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1. *LNG Vessel/Terminal Security.* One of the most controversial aspects of the bill, and the provision that generated the veto threat, relates to LNG vessel and LNG terminal security. The bill includes a provision ostensibly intended to improve security. The Coast Guard has strongly opposed the provision because, in their view, it shifts security responsibility from owners and operators to the Coast Guard and will force the Coast Guard to draw security resources from other important tasks to concentrate on LNG security. Many terminal owners oppose the provision, especially those with terminals under development, because the newly proposed burdens would fall heaviest on such terminals.

The bill requires the Coast Guard to take over enforcement of security zones established around any tanker containing LNG. The bill also appears to prevent the Coast Guard from approving any terminal security plan coming for review after the date of enactment of the legislation if it depends in part on security provided by a state or local government unless there is a contract between the terminal operator and that government and the Coast Guard finds that such state or local government security personnel have the training and resources sufficient “to deter to the maximum extent practicable” a security incident. Finally, no new terminal security plan can be approved by the Coast Guard for the construction of any terminal which commences after the date of enactment unless the Coast Guard determines that it has available “to the sector in which the terminal is located the resources it needs” for security.

The LNG security provision was amended on the floor of the House pursuant to an amendment offered by Congressman LaTourette, the ranking Member on the Coast Guard Subcommittee, and Congressman Boustany, to alleviate some of the burden on the Coast Guard with respect to new terminals by permitting the Coast Guard to take into account state and local law enforcement resources. It is unclear whether the amendment will remove the veto threat.

2. *Ballast Water Treatment.* Another provision that has drawn Presidential attention is Title V of the bill entitled the “Ballast Water Treatment Act of 2008.” The bill seeks to reauthorize and amend the Nonindigenous Aquatic Nuisance Species Prevention and Control Act of 1990, a goal that has eluded Congress for many years. The title would provide for a national ballast water standard that would preempt the states from implementing their own individual standards, but would still allow the states to pursue independent enforcement schemes not preempted by the legislation. The legislation also leaves unaddressed the regulatory threat presented to the industry by regulation of discharges incident to vessel operation via the Clean Water Act. The Clean Water Act permitting system has been found applicable to vessel discharges in the federal district court decision, *Northwest Environmental Advocates v. EPA*, 36 Env’tl. L. Rep. 20,194, (N.D. Cal. 2006). The decision is now on appeal to the U.S. Court of Appeals for the Ninth Circuit and a decision is expected soon.

3. *Fishing Vessel Safety.* The bill establishes new safety equipment standards for all commercial fishing vessels that operate beyond the three mile limit from the coast, establishes new design and construction standards for newly constructed vessels, and requires that such newly constructed vessels or vessels that undergo a “major conversion” be classed. The bill also requires new fishing vessels over 79 feet in length to have a load line, requires fishing vessels under 50 feet in length operating beyond the three mile limit to provide an equivalent level of safety as is done with recreational vessels, and authorizes the Coast Guard to examine vessels that operate beyond the three mile limit.

4. *Vessel Air Emissions.* Title VI of the bill entitled “Maritime Pollution Prevention Act of 2008” implements MARPOL Annex VI, which regulates air emissions from large vessels in international commerce by amending the Act to Prevent Pollution from Ships. The provision was previously passed by the House of Representatives as H.R. 802 and would represent a considerable expansion of EPA power over vessel regulation. It would expand the jurisdictional reach of APPS for purposes of Annex VI to the exclusive economic zone of the United States, *i.e.*, out to 200 miles offshore. It would also empower both the Coast Guard and the EPA to designate “by order” areas “from which emissions from ships are of concern with respect to the public health, welfare, or the environment.” It would also expand EPA’s power to include MARPOL Regulations 12, 16, 17, and 19 (ozone depleting substances, incineration, reception facilities, platforms, and drilling rigs) without consulting with the Coast Guard. It would grant the EPA far-reaching

enforcement power over reception facilities, fuel quality, and any matter referred by the Coast Guard.

5. *Jones Act Enforcement.* Certain segments of the U.S. Jones Act community have complained that the Jones Act is not adequately enforced, particularly in the Gulf of Mexico where foreign-flag vessels often operate. The bill grants authority to the Coast Guard to enforce the Jones Act, including the application of the Jones Act “to vessels that support the exploration, development, and production of oil, gas, or mineral resources in the Gulf of Mexico.” The bill also requires the Coast Guard to establish a program to enforce the Jones Act and to submit a report within a year of enactment of “the enforcement strategies and enforcement actions taken to enforce the coastwise trade laws.” The bill does not indicate how the Coast Guard will coordinate its efforts with Customs and Border Protection, which also has Jones Act enforcement responsibilities.

6. *Coast Guard ALJ Reform.* The Coast Guard has come under significant criticism regarding its internal appeals process with respect to merchant mariner license-related decisions. Both press reports and Congressional testimony alleged that the Coast Guard’s Administrative Law Judges (“ALJ”) favored the Coast Guard and utilized unfair processes. As Congressman Cummings, the Coast Guard Subcommittee Chairman, indicated on the House floor, his Subcommittee was “responding to compelling testimony” in transferring the appeals process to the National Transportation Safety Board. Specifically, the bill would provide certain mariners whose licenses have been denied, suspended, or revoked a right of appeal to the NTSB. This appeal mechanism would allow the NTSB to review Coast Guard license decisions *de novo*, that is, it would not be bound by the findings of fact by the Coast Guard ALJ. Moreover, it would allow the NTSB to set aside agency interpretations of law as arbitrary and capricious and it would stay license decisions against a mariner unless the Coast Guard could show that an emergency exists. Additionally, the legislation would transfer all pending cases before a Coast Guard ALJ to the NTSB while barring the agencies from entering into any agreement to sustain the existing Coast Guard ALJ program.

7. *Marine Safety.* Title XI of the bill represents an attempt at congressional reform of the Coast Guard marine safety program, which Chairman Oberstar has apparently concluded requires vigorous oversight and a statutory foundation. The legislation would establish the marine safety program as a matter of congressional enactment. The provision would require that the program be led by a Rear Admiral or a civilian from the Senior Executive Service.

Furthermore, the legislation would mandate minimum staffing levels, qualifications of key personnel, the development of a marine industry training program, the establishment of a Center for Expertise for Marine Safety, and other provisions aimed at improving the quality of the program. Chairman Oberstar indicated on the floor of the House that the program was intended to raise the quality of the Coast Guard's marine safety program without detracting from the Coast Guard's other priorities.

8. *Marine Pollution Investigation Enhancement.* The bill also contains a provision, urged by the Coast Guard, to create (first included in S.1892) the "Support of Seafarers Fund," which the Administration asserts will provide for the protection of seafarers abandoned by shipowners in the United States. While the legislation would establish a fund which would allow the Coast Guard to pay seafarers costs where they are abandoned, it also would provide the Coast Guard greater leverage by requiring shipowners to post bond to guarantee such costs during a Coast Guard investigation of potentially unlimited duration in order to receive clearance to depart port.

9. *Vessel Fuel Tank Protection.* The bill, responding to the *Cosco Busan* incident in San Francisco, would impose Regulation 12A under Annex I of MARPOL for all U.S.-flag vessels constructed under a contract entered into after the date of enactment with an aggregate capacity of 600 cubic meters or more of fuel oil. That Regulation requires double hull equivalent protection for bunker tanks.

10. *Coast Guard Ombudsmen.* Apparently responding to industry criticism that the Coast Guard has grown distant from the civilian merchant marine industry post 9/11, the bill would require that the Coast Guard appoint an ombudsman for each Coast Guard district "to serve as a liaison between ports, terminal operators, shipowners, and labor representatives and the Coast Guard."

11. *Limitation on Foreign Vessel Regasification in U.S. Waters.* The bill prohibits a vessel from engaging in regasifying in U.S. navigable waters if it is not a U.S.-flag vessel unless the vessel transported the gas from a foreign port. The provision does not apply to any structure not qualifying as a "vessel."

12. *Offshore Supply Vessel Measurement.* The bill would amend the definition of "offshore supply vessel" in Chapter 21 of Title 46 of the U.S. Code by striking language previously limiting such vessels to those less than 500 tons but more than 15 tons. It would also clarify that only offshore

supply vessels of less than 500 tons shall be prohibited from being classified as tank vessels. Moreover, the provision would apply a 500-ton limitation on provisions of law excepting offshore supply vessels from certain watch requirements on voyages of less than 600 miles. The bill would also except offshore supply vessels of more than 5,000 tons from the otherwise applicable requirement that watches be divided into at least three watches and kept on duty successively if the individuals are in compliance with hours of service requirements (including recording and record keeping). Lastly, the bill would amend the minimum number of licensed persons required to be on an offshore supply vessel to require that they have at least one mate, with additional mates for vessels over 6,000 tons required to comply with the watchstanding hour limitations.

13. *Cruise Ship Crimes.* In response to concerns voiced at recent Congressional hearings about crimes against U.S. citizens on cruise ships, Title VII, Port Security, includes provisions to require cruise ships to include in their advance notices of arrival information about any criminal act or omission resulting in death or bodily injury, all sexual assaults, all missing persons, and other specified incidents. The bill also was amended on the floor in response to an amendment offered by Congressmen Matsui, Poe, Maloney, and Shays to require that the Coast Guard maintain an Internet site containing a numerical accounting, updated quarterly, of missing persons and crimes alleged to have been committed onboard, as tallied by each cruise line. Cruise lines would also be required to include a link to the site on their own Web pages.

14. *National Pollution Fund Claims.* The bill would cut the limitation period for claims to the National Pollution Fund Center in half, from six years to three years.

15. *New Employee MMD Requirements for Offshore Supply Vessels.* One of the problems identified with the Merchant Mariner Documentation program for the small vessel industry in the U.S. is the delay new employees must endure to commence work while they obtain a TWIC card. The bill requires the Coast Guard to develop an interim clearance process with respect to the issuance of merchant mariner documents "to enable a newly hired seaman to begin working on an offshore supply vessel or towing vessel" if the Coast Guard makes "an initial determination that the seaman does not pose a safety and security risk."

16. *Limitation on Jurisdiction of States to Tax Seamen.* The bill would amend existing law which exempts seamen on interstate voyages from state taxation, to clarify that the

exemption applies on vessels “operating on navigable waters in 2 or more States” versus “on the navigable waters of more than one State” as provided under current law.

Please contact one of the following attorneys listed on the following if you have any questions regarding this briefing:

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