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# The Coast Guard and Environmental Protection

## Recent Changes and Potential Impacts

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Lieutenant Rachel Canty, U.S. Coast Guard

**I**N DECEMBER 1998, the International Maritime Organization approved a U.S. proposal to establish a mandatory ship reporting system off the northeast and southeast coasts of the United States in order to protect the endangered northern right whale from ship strikes.<sup>1</sup> This marked the first time that the IMO had approved a mandatory ship reporting system aimed solely at protecting a marine species from shipping. Other systems, in contrast, have been established for areas with known navigational hazards; they are aimed at preventing groundings, collisions, and spills from damaged vessels. The path leading to the decision by the United States to propose the new and mandatory ship reporting system, or MSR, had not been an easy one. It was marked by fundamental disagreements among interested agencies as to the international precedent such a system would set, and by division as to whether a mandatory ship reporting system for the protection of the northern right whale should be established at all. The intensity of disagreement among the interested agencies on this issue was clearly illustrated when the final decision to propose the MSR to the International Maritime Organization was elevated to the president himself.<sup>2</sup>

The U.S. Coast Guard played a key role in the early stages of the debate within the U.S. government as to whether to propose such a system to the

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The views expressed in this article are solely those of the author and do not reflect the official view of the U.S. Coast Guard. The author gratefully acknowledges the assistance of Horst Greczmiel in the drafting of this article.

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IMO. The concept for an MSR was first put forward by the National Oceanic and Atmospheric Administration, but the Coast Guard's views became important, as it was the agency best equipped to implement the MSR and was to be designated the "shore based authority" regarding it.<sup>3</sup> There was strong opposition to the idea from the Department of Defense, and the Coast Guard itself foresaw negative implications for its own basic freedom-of-navigation interests. Nonetheless, in the spring of 1998, after extensive discussions within the service, the Commandant of the Coast Guard decided not to oppose submitting the MSR proposal to the IMO.<sup>4</sup>

The Coast Guard's decision provides a good illustration of the interests the Coast Guard frequently balances with its various missions. This decision was a choice in favor of protection of the environment (here, the northern right whale) even at the expense of other interests and missions, including enforcement of U.S. laws and treaties worldwide, the status of the Coast Guard as an armed service, and the advancement of maritime shipping and commerce. It also signaled a new recognition by the Coast Guard of a broader role in environmental protection, beyond fisheries enforcement and control of pollution by vessels. Species protection is now on the same level as these other roles, whereas previously it had been constrained by them.

The United States Coast Guard has always been a multimission agency. Internal turmoil often results when those missions conflict or when the priority among them is altered. The Coast Guard is unique in that it has responsibilities both as a *regulator* in the maritime arena and as an *enforcer* on the water of U.S. laws and treaties.<sup>5</sup> This mixture at times pits the agency's interests in controlling vessels for the protection of the coasts of the United States against its interest in free worldwide navigation.

This article examines the growing emphasis now being placed by the Coast Guard on environmental protection issues, in the context of the Coast Guard's decision not to oppose the MSR to protect the northern right whale. That decision (to which the several other aspects of the wide-ranging governmental debate on the issue are treated here only as backdrops) illustrates the tensions emerging between the Coast Guard's multiple missions, especially between environmental protection and freedom of navigation.

### Protection of the Northern Right Whale

The northern right whale, once hunted for its oil, is the rarest whale in the world. Approximately three hundred members of the species survive today, in the northern Atlantic Ocean.<sup>6</sup> The species has been designated as endangered by the National Marine Fisheries Service, and it is protected under U.S. law by the Endangered Species Act and the Marine Mammal Protection Act.<sup>7</sup> The very behavior that once made these animals vulnerable to whalers—that they

frequently lie on the surface, where they move slowly, if they choose to move at all—makes them vulnerable to ships. Approximately half of the known right whale deaths in the western North Atlantic since 1991 have been caused by collisions or entanglement in fishing gear.<sup>9</sup> The small size of the population makes statistical analysis of mortality and birth rates problematic if not meaningless. Leading scientists, however, agree that the small number of northern right whales now in existence, increasing calf mortality, and a recent tendency of females to give birth at greater age and with longer periods between pregnancies have put the species on the verge of extinction.<sup>9</sup>

Since the early 1990s there have been several coordinated efforts by U.S. federal and state agencies, the shipping community, and environmental groups to safeguard the remaining members of this species. These efforts focus on keeping vessels away from them by informing mariners about their presence in certain critical areas; there is an array of initiatives to conduct periodic aerial and surface surveys, locating whales and reporting them to vessels operating in the vicinity.<sup>10</sup> The Coast Guard is an active participant in these initiatives, and it participates in various working groups, such as the recovery plan implementation teams for the northeast and southeast Atlantic regions, the Ship Strike Subcommittee, the Large Whale Take Reduction Team, and the Whale Watch Advisory Group.

In the fall of 1997, the dire situation of the northern right whale, and the fact that these animals tend to congregate in major shipping areas beyond the territorial waters of the United States, led the National Oceanic and Atmospheric Administration to propose a new international maritime ship reporting regime.<sup>11</sup> NOAA's objectives were to "provide increased protection of right whales, . . . provide a means to alert mariners about the problem of ship strikes of whales, the location of whales, and ways to obtain information on precautionary measures that may be taken to avoid ship strikes. . . . The system would also provide an important tool for the collection of data on ship traffic in the reporting areas and thus form the basis for the consideration of the need for any additional management measures."<sup>12</sup> The NOAA proposal required all vessels over three hundred gross tons (with the exception of public vessels, such as warships) entering either of two designated areas off the East Coast to report to a "shore based authority" (in practice, a commercial contractor funded by the Coast Guard and the National Marine Fisheries Service).<sup>13</sup> That authority, in turn, would reply with a standard message explaining how to get the latest information on the location of right whales and suggesting voluntary precautions to reduce the ship's likelihood of striking a whale.<sup>14</sup>

The first step on the road for implementation of the MSR would be a formal proposal by the U.S. government to the International Maritime Organization. The IMO was established by the United Nations in 1958 to be responsible for navigational safety and the protection of the marine environment from

pollution by ships. In 1994, the IMO issued detailed criteria that it would consider prior to approving new mandatory ship reporting systems.<sup>15</sup> Under the guidelines, a state or states desiring to implement an MSR beyond its territorial seas must submit a proposal to the proper committee of the IMO.<sup>16</sup> Mandatory ship reporting systems approved by the IMO are then incorporated into the International Convention for the Safety of Life at Sea (known as SOLAS) and thus become parts of a binding international treaty.<sup>17</sup> Once this occurs, all states party to SOLAS (virtually all flag states) and their flag vessels must comply. Today, nine MSRs are in effect.<sup>18</sup>

However, before the northern right whale matter could be proposed to the IMO, a U.S. government position had to be developed. Because the executive branch of the government needs to speak with one voice in an international forum, all the interested agencies and departments must agree among themselves as proposals (such as this one from NOAA) undergo an executive branch inter-agency review. If agreement cannot be reached at the lowest level, the issue is elevated to successive levels, if necessary to the final decision authority, the president. Thus, however strong its views about the need for an MSR to protect the northern right whale, NOAA had to gain the concurrence of other agencies.

The most basic question was whether the IMO was the appropriate organization to approach. This question arose because the IMO had generally been seen as an environmental protection organization principally concerned with marine pollution, whereas NOAA's proposal was directed toward species conservation. The appropriateness of promulgating through the IMO a system to protect marine mammals was not immediately apparent to all interested agencies.<sup>19</sup> However, after considerable debate it was agreed that there was clear scientific evidence that a ship reporting system for the specific purpose of safeguarding a single species from direct physical impacts of ships would be warranted in the case of the northern right whale. However, the U.S. delegation to the IMO pushed hard to insert into the IMO report language stressing the unique circumstances and detailing the extraordinary plight of this particular species.<sup>20</sup>

### **The Coast Guard's Balance of Interests**

The United States Coast Guard celebrates 1790, the year that Congress established the U.S. Revenue Cutter Service, as its birthday. This commemoration is a little misleading, however, as the Revenue Cutter Service and the Life Saving Service were combined by Congress in 1915 to form the Coast Guard, which also absorbed the Lighthouse Service in 1939 and the Bureau of Marine Inspection and Navigation in 1942.<sup>21</sup> Today, the Coast Guard's remarkable and varied background is reflected in the variety of missions that it performs, including its role as the fifth armed service—the Coast Guard in peacetime is part of

the Department of Transportation, but in wartime, or when the president directs, it becomes part of the U.S. Navy. The Coast Guard has five main missions: saving lives and property at sea; advancing safe, efficient maritime transportation and commerce; protecting the marine environment; enforcing federal laws and treaties in the maritime region; and defending U.S. interests in ports, on the seas, and in coastal regions.<sup>22</sup>

Consequently, in 1997 and 1998, when it had to decide whether or not to support a northern right whale MSR, the Coast Guard directly faced a choice between irreconcilable features of two of its missions: freedom of navigation and environmental protection. At issue was the balance between the right of vessels to navigate freely on the high seas and within exclusive economic zones (and to a lesser extent territorial seas) without interference from other states, and the right of a coastal state to implement measures to protect the environment.<sup>23</sup> Obviously there were other factors involved as well, such as resource allocation, legal authority, and feasibility. In the background were yet more aspects of Coast Guard involvement with the right whale, including commitments already made by the service to use its legal authority to protect the species. Moreover, a court order resulting from a lawsuit brought when one of its cutters struck a right whale required the Coast Guard to live up to those commitments. Nonetheless, the final decision of the Commandant was framed primarily in terms of whether seeking an international mandatory ship reporting system to protect an endangered marine mammal would damage the nation's interests in freedom of navigation.

The tension that confronted the Coast Guard was not new, nor was it unique to the Coast Guard. The historical conflict between coastal states' interests in environmental resources near their shores and the rights of other states to engage in freedom of navigation is apparent in the balance struck in the 1982 United Nations Convention on the Law of the Sea regarding the jurisdiction that can be exercised by coastal states. The convention confers on coastal states specific enforcement powers over foreign-flag vessels in their territorial seas and exclusive economic zones (EEZ), under limitations meant specifically to safeguard against excessive assertions of authority. Thus, the drafters of the convention maintained the concept of freedom of navigation overall but provided cases when a coastal state could interfere with the freedom of a ship to pass through its waters. In this context, the potential ramifications of the Coast Guard's ultimate decision are subtle but important. For the first time in recent memory, the Coast Guard chose not to side with the Department of Defense on an issue involving potential effects on freedom of navigation.<sup>24</sup>

"Freedom of navigation" is the idea that vessels registered in any country are free to travel upon the high seas without interference from other states. Article 97 of the 1982 UN Convention asserts the right of freedom of navigation on the high seas, and Article 58 confirms that freedom in exclusive economic zones as

well.<sup>25</sup> The term includes also the right of vessels to proceed through territorial waters in “innocent passage,” subject to very specific limitations. The principle of freedom of navigation is essential to the fulfillment of many of the Coast Guard’s missions, in that it allows cutters to patrol in waters all over the world, American vessels in commerce to transit freely between ports worldwide, and warships (which, as noted, Coast Guard cutters sometimes are) to navigate without any jurisdictional interference from other states.

The Defense Department was concerned that although public ships—notably warships—were exempt under the NOAA proposal, to require civilian vessels to report would make it possible to determine (by elimination) which ships were military. More broadly, it believed that this proposed mandatory ship reporting system “would erode navigational freedoms globally and endanger American lives.”<sup>26</sup> If freedom of navigation were hampered, the Defense Department argued, “our global mobility [would be] prejudiced, and the cost of security mobility by other means could escalate dramatically in some places and become prohibitive in others.”<sup>27</sup> For the U.S. government to initiate a proposal like NOAA’s for the northern right whale, the Pentagon argued, would commit the United States to a precedent other nations could (and, the military feared, would) invoke in many other straits, seas, and oceans.

The Coast Guard’s decision-making process regarding the MSR brought into focus the extent to which increased demand for protection of the environment may affect future maritime operations. Though the northern right whale currently is the most endangered of all marine mammals, other endangered marine species are not faring much better and may require the same degree of protection in the near future.<sup>28</sup> Thus, the decisions made in 1998 regarding the lengths to which the Coast Guard and the United States as a whole are willing to go to protect a marine species will undoubtedly have long-term effects.

**Environmental Protection.** In wrestling with the MSR proposal, the Coast Guard was concerned with a number of policy issues related to its environmental mission. First and foremost was species protection. It would be difficult for an organization that counts protection of the marine environment, including living marine resources, among its core purposes to oppose a system aimed at saving a species on the brink of extinction. The true policy issue involved was more subtle: was the Coast Guard willing to consider its environmental protection as extending to responsibilities beyond fisheries enforcement and control of pollution from vessels?<sup>29</sup>

Historically, the Coast Guard has acted in the environmental protection arena primarily through the enforcement of U.S. laws and treaties relating to fisheries and discharges from ships. The early 1970s saw the enactment of a series of laws and treaties aimed at prevention of pollution from ships, including

the Clean Water Act and the International Convention for the Prevention of Pollution from Ships.<sup>30</sup>

Environmental protection today is being viewed more broadly by the agency. The Coast Guard now recognizes the roles of environmental planning, marine species protection, and habitat protection. This new attitude was recognized in a recently published vision of what the service will look like in 2020; being “stewards of the marine environment” has become a primary function of Coast Guard personnel.

The Nation’s waters and their ecosystems are vital to the health, well-being, and economy of America. . . . Stewardship of the marine environment entails a broad spectrum of activities, including education, surveillance, inspection, enforcement, response, and investigation. . . . Coordinated management of the marine environment will improve the quality of American life for generations.

Prevention strategies will be foremost among the Coast Guard’s environmental initiatives. Moreover, solutions must be comprehensive and global. . . . In all operations, the Coast Guard will be a model of environmental excellence that others will follow. . . .

Greater domestic marine traffic and coastal development will threaten habitats. Specially designated sanctuaries and zones to protect endangered marine species will require closer Coast Guard monitoring of coastal areas. . . .

America’s waters are truly a national treasure. *The Coast Guard will be an unfailing steward of the marine environment.*<sup>31</sup>

**Freedom of Navigation.** The concerns facing the Coast Guard on the freedom-of-navigation side are less obvious, mainly because public vessels, including warships and Coast Guard cutters, are excluded from the reporting requirement of the MSR. The tension between rights of vessels to navigate freely and those of coastal states to implement environmental protection measures has resulted in a chronic struggle between states wanting to expand their jurisdictions as far as possible and those seeking to preserve freedom of navigation. The United States, with its reliance on forward deployment, is in general a staunch supporter of freedom of navigation and usually leads the opposition to any proposal in the international arena that appears to erode it. In a 1983 ocean policy statement, President Ronald Reagan underscored the importance the United States attaches to those rights:

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 UN] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights



and freedoms of the international community in navigation and overflight and other related high seas uses.<sup>32</sup>

In 1979, the United States established the Freedom of Navigation Program. Under that program the State Department protests excessive maritime claims of other countries and engages them in negotiation. Additionally, U.S. military units often conduct operations asserting freedom of navigation; there were fourteen such assertions in fiscal 1994.<sup>33</sup>

As noted, some individuals, agencies, services, and departments viewed this MSR, and its reporting requirement for vessels merely transiting designated areas or proceeding to a port, as the top of a "slippery slope" toward a degradation of freedom of navigation. In particular, there was a fear that if the United States lessened its opposition to systems that impede, even if slightly, navigational rights, other countries would respond with more restrictive regimes. Those critics argued that although the proposed MSR did not of itself curtail navigational rights, it would be difficult for the United States to convince other nations to oppose similar proposals, not as carefully constructed, that did.

The Coast Guard's interest in preserving freedom of navigation stems particularly from its roles as an operational law-enforcement agency in international waters, as the fifth U.S. armed service, and as a facilitator of maritime transportation and commerce. As a law enforcement agency, the Coast Guard patrols both U.S. and international waters for drug interdiction, illegal-immigration prevention, and living-marine-resource enforcement; freedom of navigation is the key element that allows the Coast Guard to do so. As an armed service, the Coast Guard must be able to deploy without the consent of any other country. "By virtue of their multimission day to day operations, Coast Guard units will be ready to deploy immediately, anywhere, anytime as required in the interests of national security."<sup>34</sup>

Lastly, yet importantly, as a facilitator of maritime transport the Coast Guard views freedom of navigation as vital to U.S. commerce, which depends on free transit of merchant vessels worldwide. In 1997, approximately 95 percent of U.S. foreign trade, representing almost \$1.7 trillion, went by sea.<sup>35</sup> In today's expanding global economy, the need to maintain access for ships carrying raw materials, petroleum, and finished goods has become crucial to U.S. domestic and foreign interests.

### **The Coast Guard's Decision and Implications for the Future**

In early discussions, the weight of opinion in the Coast Guard was against the NOAA proposal; ultimately the issue went to the Commandant. He, in turn, decided that the Coast Guard as an organization must increase its emphasis on protecting the marine environment. He recognized that this shift in emphasis

would require the Coast Guard to change the way it did business and that there would be instances, and not only with the northern right whale, where environmental protection interests would outweigh traditional freedom of navigation concerns.

What does the final decision mean in the long run? Clearly, it represents a break from traditional Coast Guard views and priorities. In retrospect, one could see the break coming, as the latest step in a trend toward an environmental protection role. With the grounding of the *M/V Exxon Valdez* on 24 March 1989 and the passage by Congress of the Oil Pollution Act of 1990, a new awareness of the need for environmental protection arose within the American public and the Coast Guard. Pressure from environmental groups, as well as lawsuits brought based on the National Environmental Policy Act and related statutes, forcefully reminded the agency that aside from ensuring that other entities complied with U.S. environmental statutes, it had its own responsibilities under those laws—responsibilities that it would have to meet more proactively. These events resulted in a reevaluation by the Coast Guard of its traditional priority for freedom of navigation.

Increased environmental awareness, combined with a public perception that the U.S. emphasis on defense could be lessened with the Cold War over and the nation no longer facing an “evil empire” or a “peer competitor,” thus made it probable that at some point environmental protection concerns would begin to temper freedom of navigation interests. It is highly unlikely that the Coast Guard will endorse initiatives that directly encroach on them in the near future. Over time, the agency will probably become more supportive of (or at least not oppose) initiatives that may appear to impede navigational freedoms—but only those that do not do so directly. The Coast Guard, as a U.S. government agency, would not support an initiative violating international law of the sea principles.

Customary—as contrasted with treaty-based—international law results from general, consistent state practice arising from a sense of legal obligation.<sup>36</sup> That is, international law is to some extent formed by perception. Consequently, the Coast Guard must consider whether international law increasingly recognizes environmental protection as a justifiable reason to curtail freedom of navigation. The development of customary law is subtle, but it occurs, and it produces contention, in the international maritime arena.

The implications of this shift in policy are many. Any new Coast Guard proactiveness in the area of marine mammal protection is likely to antagonize the shipping industry if it delays commerce. For example, one idea that has been considered for the protection of the northern right whale is for the IMO to impose mandatory routing to avoid areas where northern right whales are found.<sup>37</sup> This would add several hundred miles to the voyages of vessels bound for Boston.

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The MSR decision also signifies a potential source of weakness of the Coast Guard's traditional alliance with the Defense Department on freedom of navigation issues. Traditionally, the two have stood shoulder to shoulder against any erosion of such rights. The Defense Department, of course, must conform to U.S. laws designed to protect the environment, but its mission is to provide military forces to deter war and ensure the security of the United States.<sup>38</sup> Freedom of navigation principles are essential to that mission. Thus, as environmental protection plays a more prominent role in Coast Guard actions, the potential for disagreement with the Defense Department will increase. In the northern right whale case, as we have seen, Defense reservations led the United States to sponsor in the report finally adopted by the IMO's Marine Safety Committee language strictly defining the criteria that had justified the new regime and that would be applied to such proposals in the future. To merit such protection, it would have to be true that a threatened species, like the northern right whale, was "immediately endangered with extinction[;] that major shipping routes passed through an area or areas of habitat critical for the population[; and that] the greatest known threat to the survival and recovery of the population [was] posed by direct physical impacts of ships, such as collisions."<sup>39</sup>

The impact of this policy shift on the Coast Guard's role as an armed service seems likely to be small. In the short term, notwithstanding philosophical differences with the Defense Department, there would appear to be few long-term implications. Once the decision was made by the president to submit the MSR proposal to the International Maritime Organization, the Defense Department was supportive. Despite its original opposition to the MSR, the U.S. Navy has been active in programs designed to protect the right whale. For example, after a series of right whale deaths, it adopted measures to protect the animal in Navy operating areas off the southeastern coast of the United States. It has also implemented seasonal restrictions on north-south transits and high-speed steaming in calving areas.<sup>40</sup>

More broadly, present flux regarding U.S. force structure and security strategy makes it hard to predict the possible effects of changes in policy. It is likely that protection of the nation's environment will be elevated in importance within the total strategic goals of the United States. If so, the Coast Guard's northern right whale decision will be heralded as forward thinking.

Internally, a shift of priorities is occurring within the Coast Guard, bringing the environmental protection mission on a par with the agency's other priorities. All program managers are beginning to realize that proactive environmental planning is an integral part of any undertaking. As environmental protection requires more and more resources, traditional operational programs are likely to absorb losses. This shift may produce an eventual decrease in funding and other resources for some areas, with a corresponding increase in the environmental protection programs.<sup>41</sup>

The Coast Guard's greater emphasis on environmental protection will have lasting effects on the service's operations as a whole. Though the change has been gradual, it is now apparent that environmental protection concerns will be coequal with other Coast Guard priorities and missions. As a result, tomorrow's Coast Guard decision makers will more frequently be faced with difficult assessments of the relative importance of competing missions, and they will probably make different choices than their predecessors did. Proactive environmental protection has arrived as one of the primary concerns of the Coast Guard.

## Notes

1. Report of the Marine Safety Committee (MSC), MSC 70/WP.14/Add.1, 11.15–11.20 (MSC Report); Regulation 8-1 of chapter V, Safety of Navigation, of the International Convention for the Safety of Life at Sea, 1974 (SOLAS), provides for the adoption of mandatory reporting systems by IMO and gives the MSC authority to approve MSR systems. SOLAS opened for signature on 17 June 1960. The United States is a party to SOLAS; 16 UST 185, TIAS no. 5780, 536 UNTS 27. The convention establishing the International Maritime Organization was adopted on 6 March 1948 by the United Nations Maritime Conference and entered into force on 17 March 1958. The purposes of the IMO, as summarized by Article 1(a) of the Convention, are "to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships." The organization has 155 member states and two associate members. For the IMO, "An Introduction to IMO," <http://www.iino.org/iino/introd.htm>.
2. Statement of President William Clinton, 23 April 1998; "Clinton OKs Protection for Whales," Environmental News Network, *Daily News*, 27 April 1998. Available at <http://www.enn.com/enn-news-archive/1998/04/042798/whale.asp>.
3. Submission of the United States to the Navigational Sub-Committee of IMO for the adoption of a mandatory ship reporting system off the northeastern and the southeastern coasts of the United States, NAV 44/3/1 and NAV44/INF4 [hereafter U.S. Submission]. The shore-based authority is responsible for the overall management of the MSR.
4. Decision of Admiral Robert Kramek, USCG, during a meeting on 20 March 1998, as reported by senior Coast Guard officials present at the meeting. This decision was subsequently expressed in two letters from Rear Admiral Ernest R. Riutta, Coast Guard Assistant Commandant for Operations, to Mary Beth West, Deputy Assistant Secretary for Oceans and Space, Department of State, and to Terry Garcia, Assistant Secretary for Oceans and Atmosphere, NOAA, both dated 31 March 1998. It declared in part, "The Coast Guard does not object to NOAA's proposal for a Mandatory Ship Reporting system ... in the northeast and southeast United States."
5. The Coast Guard is authorized in the *U.S. Code*, vol. 14, sec. 89, to enforce all laws of the United States on the high seas and waters subject to American jurisdiction. Numerous other statutes, such as the Ports and Waterways Safety Act (33 USC 1221 et seq.) grant authority to the Coast Guard to issue regulations governing maritime related issues, including safety of navigation and equipment design.
6. Marine Mammal Commission [hereafter MMC], *Annual Report to Congress*, 1997, p. 3.
7. The species is also listed as endangered on Annex I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The Marine Mammal Commission assesses the survival of the western North Atlantic population of the species as in "grave doubt." MMC, p. 50.
8. MMC, p. v.
9. MMC, pp. 3–6.
10. For a full discussion of initiatives undertaken to protect the northern right whale, see MMC, pp. 3–10.
11. Assistant Secretary for Oceans and Atmosphere, Department of Commerce, letter to the Commandant of the Coast Guard, 16 January 1998.
12. MMC.
13. U.S. Submission. The mandatory reporting areas extend from the coastline of the United States out twenty-five miles offshore in the south and ninety miles offshore in the north, encompassing the primary

calving area for the right whale and its designated critical habitat. Included in the northern area is the port of Boston. The exact coordinates of the two areas are available in the recently enacted statute giving the Coast Guard domestic authority to implement the MSR: *U.S. Code*, vol. 33, sec. 1220(d).

14. U.S. Submission.

15. "Guidelines and Criteria for Ship Reporting Systems," Resolution MSC.43(64) (9 December 1994).

16. *Ibid.*

17. SOI.AS, Regulation 8-1, chap. V.

18. The nine systems are:

Adopted by IMO on 30 May 1996 [Resolution MSC.52(66)]:

- In the Torres Strait region and the Inner route of the Great Barrier Reef (Australia)—entry into force 1 January 1997; proposed for safety of navigation and protection of a unique marine environment.

- Off Ushant (France)—entry into force 30 November 1996; proposed for protection of the marine environment (rugged coast, busy shipping route, AMOCO CADIZ).

Adopted by IMO on 3 December 1996 [Resolution MSC.63(67)]:

- In the Great Belt Traffic Area (Denmark)—entry into force 3 June 1997; proposed for collision prevention (restricted waters, strong current, suspension bridges) and protection of the marine environment.

- In the Strait of Gibraltar (Spain)—entry into force 3 June 1997; proposed for collision prevention (dense converging traffic, unfavorable weather, concentration of fishing vessels) and protection of the marine environment.

- Off Finisterre (Spain)—entry into force 3 June 1997; proposed for collision prevention (dense converging traffic, unfavorable weather, concentration of fishing vessels) and protection of the marine environment.

Adopted by IMO on 29 May 1998 [Resolution MSC.73(69)]:

- Straits of Bonifacio (France)—entry into force 1 December 1998; proposed for protection of the environment (ecologically rich marine environment, narrow twisting channels, rocky shore) and collision avoidance.

- Straits of Malacca and Singapore (Indonesia, Malaysia and Singapore)—entry into force 1 December 1998; proposed for safety of navigation and protection of the marine environment to facilitate the movements of vessels and to support SAR and pollution response operations.

Adopted by IMO on 3 December 1998 [Resolution MSC.85(70)]:

- Off the northeastern and southeast United States—entry into force 1 July 1999; proposed to provide information to mariners to protect the northern right whale from ship strikes.

- In the Strait of Dover/Pas de Calais (U.K./France)—entry into force 1 July 1999; proposed for collision prevention (one of busiest shipping areas in the world, with over three hundred ship movements and over two hundred cross-Channel operations daily).

19. The MMC considered that the IMO and the mandatory ship reporting system were perfect vehicles, "as a stated purpose of the IMO ship reporting provision is 'protection of the marine environment.'" Marine Mammal Commission letter to the Commandant of the Coast Guard, 6 March 1998. The merits of this argument are beyond the scope of this article.

20. "Mandatory Ship Reporting System 'Off the Northeast and Southeastern Coasts of the United States,'" MSC 70/23, *Report of the Maritime Safety Committee on Its Seventh Session*, 17 December 1998.

21. For a discussion of the history of the Coast Guard, see *The Coast Guardsman's Manual*, 8th ed. (Annapolis, Md.: Naval Institute Press), chap. 1.

22. U.S. Coast Guard, *FY 1999 Budget in Brief* (Washington, D.C.: March 1998). For incorporation into the U.S. Navy, *U.S. Code*, vol. 28, sec. 3.

23. See *Strahan v Linnon*, 967 F Supp 581 (Dma 1997), aff'd *Strahan v Linnon*, 97-1787 (1st Cir., 16 July 1998).

24. This opinion is based on discussions by the author with numerous senior Coast Guard officials.

25. See Article 21 of the 1982 Convention for the types of laws and regulations coastal states may impose upon vessels traveling in innocent passage in territorial seas. The 1982 Convention opened for signature 10 December 1982, UN Doc A/CONF.62/122 (1982), 21 ILM 1261, and entered into force 16 November 1994. Although the United States has not yet ratified the convention, it has stated its intent to adhere to the provisions of the treaty (excluding those regarding deep-seabed mining) as customary international law. President Ronald Reagan, statement of 10 March 1983, in *Weekly Compilation of Presidential Documents*, 14 March 1983, pp. 383-5. The powers of a coastal state are broader in its territorial sea than in its exclusive economic zone, but since the proposed MSR extends beyond the U.S. territorial sea, the possible infringement on

transiting vessels should be viewed in the context of freedom of navigation through the EEZ rather than that of the more restrictive innocent-passage regime of the territorial sea.

26. John H. Boit, "U.S. Defense Department Says Whale Plan Threatens Security," (*Quincy, Mass.*) *Patriot Ledger*, 7 March 1998, quoting Rear Admiral John Hutson, USN, memorandum, 18 February 1998. The Marine Mammal Commission disagreed: "We believe that the problem and the highly endangered status of the [northern right whale] are sufficiently unique that they would not prompt a proliferation of similar reporting systems" (letter 6 March 1998). The Massachusetts congressional delegation wrote the Secretary of Defense on 27 February 1998 expressing "deep concern" at the department's opposition, which it characterized as "perplexing." See Brian McGrory, "Clinton Sets Whale Plan in Break with Pentagon," *Boston Globe*, 24 April 1998.

27. U.S. Defense Dept., "National Security and the Convention of the Law of the Sea," 2d ed. (Washington, D.C.: January 1996), p. 8.

28. For example, in the 1997 MMC *Annual Report*, fourteen inarine mammal populations were singled out and discussed as species of special concern due to pressing conservation problems. These include three populations of whales, four populations of seals, and one population each of porpoise, sea lion, walrus, polar bear, sea otter, manatee, and dugong.

29. This attitude is exemplified by the description of the Coast Guard's protection of natural resources program in the FY 1999 *Budget in Brief*: "The Coast Guard pursues this goal primarily through our marine environmental protection and fisheries enforcement program."

30. International Convention for the Prevention of Pollution from Ships, 2 November 1973, reprinted in 12 ILM 1319 (1973), as modified by Protocol Relating to the International Convention for the Prevention of Pollution from Ships, 1 June 1978, reprinted in 17 ILM 546 (1978).

31. "Coast Guard 2020: Ready Today . . . Preparing for Tomorrow," [http://www.uscg.mil/commandant/2020/vis\\_real.htm](http://www.uscg.mil/commandant/2020/vis_real.htm) on 30 December 1998. In the original, the final sentence is set in all capitals.

32. Reagan statement. See U.S. State Dept., *U.S. Freedom of Navigation Program*, December 1988, Annex A2-7, and U.S. Defense Dept., Instruction C2005.1, "U.S. Program for the Exercise of Navigation and Overflight Rights at Sea."

33. John Negroponte, "Current Developments in U.S. Oceans Policy," *Department of State Bulletin*, September 1986, pp. 84-5; "Navigation Rights and the Gulf of Sidra," *Department of State Bulletin*, February 1987, p. 90; and J. Ashley Roach, "Excessive Maritime Claims," *Proceedings of the American Society of International Law*, 1990, pp. 288-90. For a more detailed discussion of the Freedom of Navigation Program and U.S. government actions in this area, see *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1997), sec. 2.6. See also U.S. Defense Dept., "Freedom of Navigation," *Annual Report to the President and the Congress* (Washington, D.C.: February 1995), app. I, <http://www.dtic.mil/execsec/adr95/>.

34. "Coast Guard 2020."

35. *Budget in Brief*.

36. Restatement of the Foreign Relations Law 3d (Restatement 3d), art. 102 (1987).

37. SOLAS, Regulation 8-1, chap. V, sets the guidelines for issuing ship-routing measures through the IMO.

38. U.S. Defense Dept., Directive 5100.1, "Functions of the Department of Defense and Its Major Components," 25 September 1987.

39. MSC, *Annual Report*, 11.18-11.19.

40. An indication of the place that environmental protection is assuming in the Defense Department is found in the recent creation of an Office of Environmental Security. For a more thorough discussion of the Defense Department's future role in this area see, Kent Highs Butt, *Environmental Security: What Is DOD's Role?* (Carlisle Barracks, Penna.: Strategic Studies Institute, U.S. Army War College, 1993). See also MMC, *Annual Report*, and Hon. Steven S. Honigman and John P. Quinn (Capt., JAGC, USN), "Navy Blue Goes Green," U.S. Naval Institute *Proceedings*, August 1998, pp. 56-9.

41. Between fiscal year 1994 and FY 1999, funding for the Coast Guard's marine environmental protection operating expenses rose from \$265.3 million (or 23 percent), while funding for all law enforcement missions (including fisheries enforcement, migrant interdiction, and drug interdiction) rose from \$974.7 million to \$1.1707 billion (20 percent). U.S. Coast Guard, *Fiscal Year 2000 Budget in Brief* (Washington, D.C.: 1999). While these increases may appear modest, in today's constrained budget environment it is doubtful that the Coast Guard can maintain such increases across the board in years to come.