

The Northern Sea Route: National Regime in the Changing International Context

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The Northern Sea Route: National Regime in the Changing International Context

Both the Arctic states and other members of the global community are becoming increasingly interested in the Arctic. The issues of developing the Northern Sea Route (NSR) and the legal regulation of navigation in its waters are pending both for the Russian interests and in the international context, especially since the International Code for Ships Operating in Polar Waters (Polar Code) comes into force on 1 January 2017.

The NSR has a special role among the maritime shipping routes in the world (fig. 1). It is the shortest sea route between the European part of Russia and the Far East. Its use has always been complicated.

Even in summer, the Arctic seas the NSR crosses are occasionally covered with ice. Travelling through the Arctic ice requires icebreakers and Arctic ice class transportation vessels with a strong hull and powerful engines. However, even such technically perfect Arctic fleet is not always capable of ensuring navigation in ice-covered regions. Safe navigation in the NSR water area requires navigational, hydrographic, hydrometeorological, and search and rescue systems that are constantly improved. Experts note that successful Arctic navigation, proper management and appropriate legal governance of the route's use require clear understanding of the specifics of the Arctic region and of navigation therein.¹

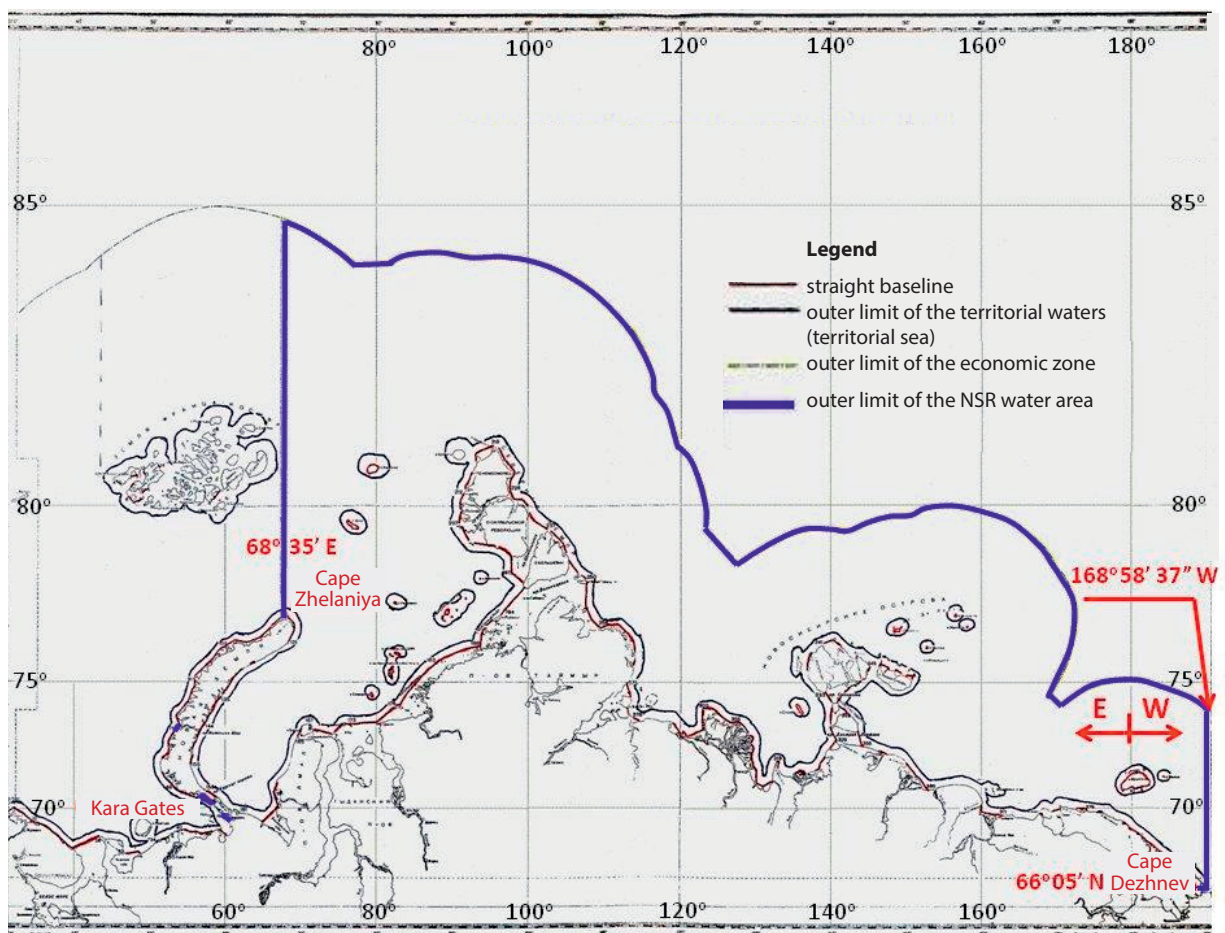


Figure 1. The Northern Sea Route water area.
Source: *The Northern Sea Route Administration.*²

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¹ Mednikov V., Huntington H.P. Arctic Navigation: Proper Management Based on Facts, and Not Myths // Russian International Affairs Council. 2 August 2016. URL: http://www.russiancouncil.ru/blogs/riacexperts/?id_4=2631 (in Russian)

² The Northern Sea Route Administration. URL: http://www.nsra.ru/en/granici_smp

1. The Northern Sea Route: Existing Legal Regime

INTERNATIONAL LEGAL REGIME

The main international treaty applicable to the Arctic Ocean is the UN Convention on the Law of the Sea of 1982 (UNCLOS).

*UNCLOS has strategic importance as it establishes comprehensive legal regime of the world oceans and seas, regulates all types of the oceans and their resources use, and serves as basis for national, regional, and international actions and cooperation in the marine sector, including in the Arctic.*³

Given that the NSR water area is a water space covering the internal sea waters, the territorial sea, the contiguous zone, and the exclusive economic zone of the Russian Federation, the appropriate clauses of the 1982 Convention are applicable (articles 2–33, 55–75 etc.). For instance, in accordance with Article 33 of UNCLOS, in its contiguous zone, the Russian Federation may exercise control required to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and the Russian Federation can also punish infringement of the regulations.

Article 234, “Ice-Covered Areas,” deserves particular attention from the point of view of regulating navigation in the NSR water area. In accordance with UNCLOS, coastal states have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone. In such areas, particularly severe climatic conditions and the presence of ice for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or

irreversible disturbance of the ecological balance. Special national legal regime of navigation along the NSR is applied in Russia according to this rule.

RUSSIAN LEGAL REGIME

In accordance with the Basic Principles of Policy of the Russian Federation in the Arctic for the period up to 2020 and beyond⁴ and the Strategy for the Development of the Arctic Zone of the Russian Federation and for Ensuring National Security for the period up to 2020,⁵ using the NSR as the integrated national transportation route is among the top national interests of Russia in the Arctic.

The main regulatory act to be applied to the area in Russia is Federal Law 132-FZ of 28 July 2012 “On Introducing Changes into Individual Legislative Acts of the Russian Federation Pertaining to the State Regulation of Commercial Navigation in the Northern Sea Route Water Area” (Federal Law 132-FZ), often referred to as the Russian NSR Law.⁶ It introduces the new concept of “the Northern Sea Route water area” as a water space adjacent to the Russian Northern coast and covering the internal sea waters, the territorial sea, the contiguous zone, and the exclusive economic zone of Russia. To the east it is limited by the line demarcating the Russian and the US maritime spaces and the Cape Dezhnev parallel in the Bering Strait, to the west it is limited by the Cape Zhelaniya meridian up until Novaya Zemlya archipelago, the eastern coast line of Novaya Zemlya archipelago, and the western limits of Matochkin Shar, Kara Gates, and Yugorsky Strait.⁷

*Navigation along the NSR, Russia’s historic national transportation route, is carried out in accordance with the generally recognized principles and norms of the international law, international treaties the Russian Federation is party to, the NSR Federal Law, other federal laws and other regulations adopted in accordance with these laws.*⁸

³ The Russian Federation ratified the 1982 Convention by Federal Law 30-FZ of 26 February 1997. As of 23 June 2016, 168 states, including the European Union, are parties to UNCLOS. See the up-to-date information on the Official Site of the Division for Ocean Affairs and the Law of the Sea of the UN Office of Legal Affairs. URL: <http://www.un.org/depts/los>

⁴ Basic Principles of Policy of the Russian Federation in the Arctic for the period up to 2020 and beyond. Approved by the President of the Russian Federation on 18 September 2008 no. Pr–1969. For the text see: URL: <http://www.government.ru/info/18359> (in Russian).

⁵ Strategy for the Development of the Arctic Zone of the Russian Federation and for Ensuring National Security for the period up to 2020. Approved by the President of Russian Federation on 20 February 2013. For the text see: URL: <http://www.government.ru/info/18360> (in Russian).

⁶ Federal Law 132-FZ of 28 July 2012 “On Introducing Changes into Individual Legislative Acts of the Russian Federation Pertaining to the State Regulation of Commercial Navigation in the Northern Sea Route Water Area”. Rossiyskaya gazeta. 30 July 2012. Federal issue no. 5845. For the text see: URL <https://www.rg.ru/2012/07/30/more-dok.html> (in Russian).

⁷ Paragraph 1, article 5.1, Merchant Shipping Code of the Russian Federation.

⁸ Article 14 of Federal Law 155-FZ of 31 July 1998 “On Internal Sea Waters, the Territorial Sea, and the Contiguous Zone of the Russian Federation” (amended and expanded).

The Rules of Navigation in the Water Area of the NSR⁹ establish the procedure for the organization of navigation of ships in the water area of the Northern Sea Route, rules of the icebreaker support, ice pilotage and pilotage along the lines in the water area of the Northern Sea Route; stipulate provisions for the navigational–hydrographic and hydrometeorological support of the navigation through the Northern Sea Route, rules of the radio communication, and requirements to ships in order to ensure safety of navigation and protection of the marine environment against the pollution from ships.

The navigation through NSR is possible on authorization only. The Northern Sea Route Administration (the NSR Administration) was established on 15 March 2013 in order to manage navigation in the NSR waters.¹⁰ Its functions in the area include:

- receiving applications for vessels to sail in the NSR water area, considering such applications and issuing permissions for navigation in the water area;
- issuing certificates to persons engaged in ice piloting confirming their right to pilot vessels in the NSR water area;
- monitoring the hydrometeorological, ice, and navigational situation in the NSR waters;
- approving installation of navigation equipment and identifying areas for conducting marine surveys in the NSR waters;
- assisting in mounting search and rescue operations in the NSR waters;
- assisting in elimination of the consequences of pollution from ships with hazardous and noxious substances, sewage, and garbage;
- providing information (applicable to the NSR water area) on organizing navigation, ensuring navigation safety, providing navigational and hydrographic, hydrometeorological assistance in vessel navigation, providing icebreaker support;
- drafting recommendations on track navigation and using icebreakers in the NSR water area

given the hydrometeorological, ice, and navigational situation in the area etc.

For example, in January–September 2016, the NSR administration issued 635 permissions; the majority was issued to ships flying the Russian flag, and 132 were issued to ships flying foreign flags. Their geography is diverse: The Netherlands, Sierra Leone, Antigua and Barbuda, Curaçao, the Bahamas, Norway, Luxembourg, Liberia, China, Hong Kong, Iceland, Germany, Saint Kitts and Nevis, Portugal, Malta, Italy, Panama, the Marshall Islands, Denmark, Gibraltar, Cyprus, Great Britain, Mauritius, Singapore, and Finland. In 2015, the NSR administration issued a total of 715 permissions, 631 in 2014, and 635 in 2013.¹¹

The NSR administration publishes for general access on its website the necessary information on navigation along the NSR in Russian and in English. The data includes legal regulations, the ship captain’s daily report form, ships’ movements while approaching the NSR and within the NSR water area, icebreaker support and ice pilotage (information on organizations that provide the relevant services), information on navigational and hydrometeorological conditions, providing search and rescue services, recommendations on communication during Arctic navigation, etc.¹²

The Merchant Shipping Code of the Russian Federation¹³ is a codified law and the main legal source for commercial navigation in Russia. The Code is applicable to the NSR water area according to the Federal Law 132-FZ amendments. It is the Code (Article 5.1) that introduces the new concept of “the NSR water area.” It also regulates using ships for pilotage, ice pilotage, and icebreaker support, as well as for search, rescue, and tugging; for hydrotechnic, underwater, and similar work; for the environment protection and preservation; for marine research; as well as for educational, sports, cultural and other purposes in the NSR area.

The tariffs for icebreaker support in the NSR water area are determined in accordance with

⁹ Rules of Navigation in the Water Area of the NSR. Approved by the order no. 7 of 17 January 2013 of the Ministry of Transport of the Russian Federation, and registered by the Ministry of Justice of the Russian Federation on 12 April 2013. Rossiyskaya gazeta. 19 April 2012. Federal issue no. 6062. For the text see: <https://www.rg.ru/2013/04/19/pravila-dok.html> (in Russian).

¹⁰ Federal Law 132-FZ stipulates for establishing the NSR Administration. It was established under the order no. 358-r of the Government of the Russian Federation as a federal public establishment.

¹¹ Permissions for Navigation in the Water Area of the Northern Sea Route. URL: <http://nsra.ru/en/razresheniya>

¹² The Northern Sea Route Administration. URL: http://nsra.ru/en/celi_funktsii

¹³ The Merchant Shipping Code of the Russian Federation 81-FZ of 30 April 1999 (amended as of 3 July 2016) // Consultant Plus. URL: http://www.consultant.ru/document/cons_doc_LAW_22916 (in Russian).

the legislation of the Russian Federation on natural monopolies and take into account the vessel's gross registered tonnage, ice class, pilotage distance, and navigation period. The official NSR Administration's website lists tariffs for icebreaker support by Atomflot indicating the approved maximum tariffs.¹⁴ The icebreaker support and ice pilotage along the NSR services are paid for based on services actually rendered.¹⁵

Federal Law 132-FZ also modified and expanded Federal Law 147-FZ of 17 August 1995 "On Natural Monopolies" which now regulates natural monopolies in icebreaker support and ice pilotage in the area.¹⁶

Federal Law 155-FZ of 31 July 1998 "On Internal Sea Waters, Territorial Sea, and Contiguous Zone of the Russian Federation" was also amended by the Federal Law 132-FZ, for it to regulate navigation in the NSR water area.¹⁷

The "Socioeconomic Development of the Arctic Zone of the Russian Federation Until 2020" Governmental Programme¹⁸ and the Northern Sea Route Comprehensive Development Project¹⁹ are among other instruments adopted in order to develop the NSR. The Comprehensive Project incorporates measures on navigational and hydrometeorological assistance for navigation in the NSR water area, on emergency assistance for navigation, on sea ports development, on defense in the NSR water area, and also on marine equipment, systems, and means development and construction. It is supposed to be implemented in 2015–2030.

On the instruction of the President of the Russian Federation, in order to ensure both short-term and long-term NSR development and functioning, in 2016 the Analytical Centre under the Government of the Russian Federation developed the financial and economic model of the NSR for the Ministry for the Development of the Russian Far East. The Centre assessed the willing-

ness of global cargo transit actors to transport their goods via the Arctic Ocean (given the time-frame and costs of the new service), as well as the prospects for advancing Russia's own cargo base. It analyzed the conditions of the NSR's transportation infrastructure and current capacities of various types of transportation; they also assessed capital expenditures connected to developing the NSR given the condition of the ports, navigation facilities, hydrometeorological and other on-shore equipment, etc.²⁰

2. The Polar Code and Navigation along the Northern Sea Route

The International Code for Ships Operating in Polar Waters comes into force on 1 January 2017. The Code's Preamble states that it has been developed to supplement existing International Maritime Organization's (IMO) instruments in order to increase the safety of ships' operation and mitigate the impact on the people and environment in the remote, vulnerable and potentially harsh polar waters.

The Polar Code is a corpus of additional requirements and rules for ships, their systems and operation going beyond the existing requirements of the International Convention for the Safety of Life at Sea of 1974 (SOLAS Convention) as modified, the International Convention for the Prevention of Pollution from Ships of 1973, as modified by the Protocol of 1978 amended by the 1997 Protocol (MARPOL Convention).

The Polar Code is a result of many years of work by the IMO. The IMO first decided to develop the Polar Code in 1996. The IMO Sub-Committee on Ship Design and Construction (SDC) was tasked with drafting the document. In 1999 the IMO Maritime Safety Committee (MSC) on the US's

¹⁴ The Order was approved by the Federal Tariff Service on 4 March 2014 no. 45-t/1. Registered by the Ministry of Justice of the Russian Federation on 31 March 2014 no. 31774. For the text see: http://www.nusra.ru/files/fileslist/20140428133914en-Tariff_rules%2046t2.pdf (in Russian).

¹⁵ Paragraph 5, article 5.1, Merchant Shipping Code of the Russian Federation.

¹⁶ Federal Law 147-FZ of 17 August 1995 "On Natural Monopolies" // Consultant Plus. URL: http://www.consultant.ru/document/cons_doc_LAW_7578/ (in Russian).

¹⁷ Federal Law 155-FZ of 31 July 1998 "On Internal Sea Waters, Territorial Sea, and Contiguous Zone of the Russian Federation" // Garant. URL: <http://www.base.garant.ru/12112602> (in Russian).

¹⁸ "Socioeconomic Development of the Arctic Zone of the Russian Federation Until 2020" Governmental Programme // Ministry of Economic Development of Russia. URL: <http://economy.gov.ru/minec/about/structure/depOsobEcZone/201412263> (in Russian).

¹⁹ Developed by the Ministry of Transport of the Russian Federation jointly with the relevant federal executive bodies in accordance with subparagraph 24 of paragraph 1 of the instructions of the President of the Russian Federation for implementing the Address to the Federal Assembly (no. Pr-2821 of 5 December 2014).

²⁰ Based on the information on the official site of the Analytical Centre under the Government of the Russian Federation. URL: <http://www.ac.gov.ru/en>

proposal decided to develop advisory Guidelines for Ships Operating in the Arctic Ice-Covered Waters as a MSC Circular instead of the Code.

In 2001, the Sub-Committee's working group drafted the Guidelines for Ships Operating in Polar Waters (MSC/Circ.1056 and MEPC/Circ.399). The document was approved in 2002 by the MSC's 76th session.

In 2008, the Sub-Committee started revising the Guidelines for Ships Operating in Polar Waters in order to develop compulsory requirements for vessels navigating in the Arctic and the Antarctic in order to ensure their safety in the ice conditions. The main argument in favor of developing a mandatory Polar Code was the accumulated data on intensified navigation and fisheries in the Arctic and an increased number of passenger ships in the Antarctic. Two disasters were particularly high-profile: the sinking of MV Explorer cruise ship in November 2007 and the distress of the MV Ushuaia followed by a rescue operation and evacuation of passengers and crew in December 2008.²¹

At its 94th session MSC IMO adopted parts I-A and I-B of the Polar Code by Resolution MSC.385(94) and Resolution MSC.386(94). These acts stipulated amendments to SOLAS-1974, whereby making mandatory the safety-related clauses of the Polar Code. Clauses related to environmental protection and amendments to MARPOL were adopted at the 68th session of the Environment Protection Committee in May 2015.²²

The Polar Code is primarily based on a risk assessment approach in order to establish the areas the Code covers and on a systemic approach in order to identify measures mitigating the consequences of the risks. The Polar Code considers dangers that might lead to elevated risks (such as ice, topside icing, low temperatures, etc.). The level of risk in the Arctic waters may differ; therefore, mitigating measures for various types of hazards may also differ in the polar waters and vary between the Arctic and Antarctic waters.

The Polar Code comprises Introduction and Parts I and II. The Introduction contains manda-

tory clauses applicable to both parts. Part I is subdivided into Part I-A containing mandatory safety clauses and Part I-B containing safety recommendations. Part II is subdivided into Part II-A containing mandatory clauses on preventing pollution, and Part II-B containing recommendations on preventing pollution.

The Polar Code regulates the following issues:

In Part I-A "Safety Measures":

- polar water operational manual;
- ship structure;
- subdivision and stability;
- watertight and weathertight integrity;
- machinery installations;
- fire safety/protection;
- life-saving appliances and arrangements;
- safety of navigation;
- communication;
- voyage planning;
- manning and training;

Part II-A "Pollution Prevention Measures":

prevention of pollution by

- oil,
- noxious liquid substances,
- harmful substances carried by sea in packaged form,
- sewage from ships,
- garbage from ships.

Given the varying navigational conditions in polar waters and the practice of Arctic and Antarctic navigation of ships of different ice classes, the decision was made to create three categories of polar ships (A, B, and C) and to clearly define their capabilities and conditions for navigation in the Polar Regions.²³ IMO developed the Guidance on Methodologies for Assessing Operational Capabilities and Limitations in Ice to help ship owners determine whether their ice-class vessels belong to one of the polar classes of the

²¹ For more details see: Vasiliev V.Y., Semenov V.E., Tsoy L.G. Introduction // The International Code for Ships Operating in Polar Waters (the Polar Code). St. Petersburg, TsNIIMF JSC, 2016 (37). P. 3 ff. (in Russian); Peresyppkin V., Tsoy L., Shurpyak V. The International Polar Code: Russia's Proposals // Morskoy flot 4 (2012). URL: <http://www.morvesti.ru/tems/detail.php?ID=29222> (in Russian).

²² See: Resolution MEPC.264(68), adopted on 15 May 2015. The IMO Marine Environment Protection Committee. URL: <http://www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx>

²³ Peresyppkin V., Tsoy L., Shurpyak V. The International Polar Code: Russia's Proposals // Morskoy flot 4 (2012). URL: <http://www.morvesti.ru/tems/detail.php?ID=29222> (in Russian).

International Association of Classification Societies (IACS). The Polar Code contains the table of approximate equivalency between ice classes and polar classes.

The Polar Code applies to both the Arctic and the Antarctic. At the same time, it takes into account legal and geographical differences between the two regions.

Every ship covered by the Polar Code must have on board a valid Polar Ship Certificate issued after the initial or renewal survey to a ship which complies with the relevant requirements of the Code. The administration that issued the document assumes full responsibility for the Certificate.

Chapter 2 of Part I-A stipulates for Polar Water Operation Manual to provide the ship owner, ship operator, captain and crew with sufficient information on the ship's operational capabilities and limitations (such as the monitoring procedure and safety maintenance during ice navigation, including any requirements for icebreaker escorting or icebreaker assistance; procedures to carry out appropriate measures if the ship is in an ice-covered area and/or subjected to temperatures that exceed the ship's capabilities and limitations, etc.).

Ships built prior to 1 January 2017 must comply with the applicable Polar Code requirements by the date of their first intermediary survey after 1 January 2018. The ships which are already operational and intended for polar navigation must have on board, as of 1 January 2017, a Polar Ship Certificate and the Polar Water Operation Manual. Experts note that the Polar Code is silent about the obligation to have those documents on board when only a small part of the ship's route lies in polar waters.²⁴

The main clauses of the international and national legal regulations of the navigation along the NSR already in action are not amended by the Polar Code.

The principal amendment to be introduced now in order for the Federal Law on the NSR to comply with the Polar Code is to include a Polar Ship Certificate and the Polar Water Operation Manual in the list of documents to be submitted when applying for NSR navigation permission, taking into account the requirements and limitations indicated therein.

Conclusions

The NSR is Russia's historic transportation route; ships flying both Russian and foreign flags navigate its water area. In Russia, the NSR navigation is governed by the generally recognized principles and norms of the international law, the international treaties Russia is party to, Federal Law 132-FZ and other federal laws and other regulations adopted in accordance with laws.

Navigation along the NSR is to be authorized. The NSR Administration was established in order to manage navigation and issue permits.

On 1 January 2017, the Polar Code is coming into force. It is the IMO's new international instrument, a corpus of requirements and rules for ensuring ship safety in polar waters and protecting vulnerable ecosystems of the Polar Regions. The Polar Code introduces additional requirements that apply to ships, their systems, and use. Its stipulations go beyond the requirements currently set by the SOLAS and MARPOL international conventions. The Polar Code applies to the polar waters defined in the Code, including the NSR water area.

The integrity and specifics of the NSR legal status and regime, and the possibility of regulating and controlling the use of the NSR by the coastal state are founded on the continuity and unity of this Russian national transportation route and special characteristics of the region.²⁵ The future practice of applying the Polar Code, a new international instrument, will require close attention in order to observe the rights and national interests of the coastal state in the NSR water area.

²⁴ The International Code for Ships Operating in Polar Waters (the Polar Code) // International Maritime Organization.
URL: <http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>

²⁵ Gavrilov V.V. Legal Regime of the Northern Sea Route of Russia // Russian Law Review, 2015. V. 3. 2.

RECOMMENDATIONS

1. The Rules of Navigation in the Water Area of the NSR must be brought into compliance with the Polar Code by the time it comes into force on 1 January 2017. According to the Polar Code, the ships navigating polar waters and holding certificates required under Chapter 1 of the SOLAS Convention, must be issued a separate Polar Ship Certificate, and also the Polar Water Operation Manual.
2. Controlling compliance with the Rules of Navigation in the Water Area of the NSR requires improvement and amendment as regards the rules of icebreaker support and ice pilotage in the NSR water area, the rules for pilotage along the lines in the NSR water area, radio communication when navigating the NSR water area, etc. Developing the mechanism for imposing penalties for infringement upon these rules is also necessary. Currently, without such regulations in Russian legislation, non-compliance with, or infringement of the rules may occur increasingly often (see the 2013 incident with the Arctic Sunrise flying the Netherlands' flag).
The official NSR Administration's website lists the ships navigating the NSR water area without the Administration's permission. The NSR Administration informs the Federal Service for Supervision of Transport of every such incident.
It appears expedient to amend the current Russian legislation to set up an efficient control mechanism for compliance with the Rules, specifying governmental bodies and agencies with appropriate powers.
Article 23.10 of the 2001 Code of Administrative Offences of the Russian Federation (modified as of 2016) states that border control agencies examine offences stipulated in Article 11.7 "Infringement upon Rules of Navigation" in relation to breaching the rules of navigation in the NSR water area. It appears expedient to amend the appropriate articles of the Code to indicate specific agencies, officials, and the mechanism for drawing up administrative infraction acts at the place of an infringement committed in the NSR water area by the navigator of a ship flying the Russian or a foreign flag.
3. Possible human impact in the NSR water area sets the task of creating proper legal foundations for ensuring environmentally safe navigation taking into account the requirements set by UNCLOS (Articles 211, 234, and 235, etc.). The issues of environment protection control (environmental control) as stipulated in the Federal Law "On Environmental Protection" of 10 January 2002 and in the Environmental Doctrine of the Russian Federation (approved by order of the Government of the Russian Federation no. 1225-r of 31 August 2002) and other regulations appear relevant to the NSR water area as well. During a large-scale analysis of the Russian Arctic seas supported by the Ministry for Natural Resources and Environment of the Russian Federation a project of protected marine territories' system was drafted. The system which would allow ensuring preservation of the biological diversity of the northern seas against the background of climate change and intensified socioeconomic development of the Arctic.
At the same time, the large number of regulatory acts on environmental control, its broad scope, division of the objects of environmental control into federal and regional, dispersing the exercise of functions across various executive governmental bodies (both "vertically" and "horizontally") inevitably generate practical problems and decrease environmental control efficiency. Codification remains high on the agenda.
4. Navigation in the NSR water area is developing. It is necessary to consolidate the efforts of all the Russian ministries, agencies, and bodies involved to formulate an integrated policy on the further development of the NSR as the national transportation route. The Government Commission on Arctic Development may contribute to it as a coordinating body ensuring interaction between the Russian governmental bodies and various organizations when resolving socioeconomic and other issues pertaining to developing the Arctic zone of the Russian Federation and to ensuring national security.



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