

MARINE ENVIRONMENT PROTECTION  
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Agenda item 11

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## REPORTS OF SUB-COMMITTEES

### Use of goal-based standards in part II-A of the Polar Code

#### Submitted by the United States

#### SUMMARY

*Executive summary:* This documents comments on the use of the goal-based standards approach and the proposed functional requirements contained in part II-A of the draft Polar Code. The United States believes that the proposed functional requirements in part II-A create ambiguity as to the legal obligations for Member Governments and need to be either deleted or clarified in the draft Polar Code.

*Strategic direction:* 5.2

*High-level action:* 5.2.1

*Planned output:* 5.2.1.17

*Action to be taken:* Paragraph 16

*Related documents:* MEPC 66/11/2; SDC 1/WP.4; MEPC 65/22; DE 57/WP.6 and DE 57/11/9

#### Background

1 This document comments on document MEPC 66/11/2 which reports urgent matters emanating from the Sub-Committee on Ship Design and Construction (SDC), and is submitted in accordance with paragraph 6.12.5 of the *Guidelines on the organization and method of work of the Maritime Safety Committee and the Marine Environment Protection Committee and their subsidiary bodies* (MSC-MEPC.1/Circ.4/Rev.2).

2 In keeping with other efforts at IMO, the Polar Code employs a risk-based and goal-based (GBS) approach for parts I and II. Based on a submission noting the usefulness of GBS in developing safety-level based standards, the Sub-Committee on Ship Design and Equipment (DE), at its fifty-fourth meeting, first endorsed using a GBS approach, noting that it would give sufficient flexibility for alternative designs and arrangements. This approach is similar to the GBS approach in MSC.1/Circ.1394 – *Generic guidelines for developing IMO goal-based standards*, which was developed by the Maritime Safety Committee (MSC) for the safety context. No similar document has been developed by the Marine Environment Protection Committee (MEPC) or any other body, with regard to how a GBS approach might

be developed in the environmental context; therefore, the development and implementation of such an approach for the environmental context is still an open question. However, it is instructive to note that these IMO Guidelines outline the goals and functional requirements (FR) in the GBS structure as not legally binding "Rules for Rules", where compliance is demonstrated separately through regulations developed using these "Rules for Rules".

3 Although MSC 89 took note of the GBS approach in the Polar Code, which consisted of goals and FR as well as prescriptive provisions, the MEPC has not specifically considered the issue of how or whether use of a GBS approach is appropriate for part II-A of the draft Polar Code.

4 At MEPC 65, the Committee considered the then-current draft Polar Code (DE 57/WP.6). That draft contained a single environmental chapter, consisting of a single goal and FR, which were not intended to impose additional legal obligations beyond what was contained within several specific environmental provisions. MEPC 65 discussions focused on certain prescriptive provisions but did not discuss the draft goal and FR in the draft chapter or how they relate to the specific environmental provisions.

5 Following MEPC 65, the Polar Code was restructured. The single environmental chapter that MEPC had reviewed was moved into part II and divided into five chapters, each containing brand new FR language. This new FR language introduces substantial legal ambiguity and a potentially different level of environmental protection than what was intended or evaluated by MEPC 65.

#### **Functional requirements in part II-A**

6 While there remains a lack of clarity about the legal effect of FR, the FR for safety in part I-A generally imply binding legal obligations that a regulated entity may satisfy by complying with the associated prescriptive requirements or by demonstrating the adequacy of some other alternative design or arrangements, although in some instances it is not clear whether compliance with the enumerated prescriptive requirements would be sufficient to satisfy all the FR. The interrelationship between FR and prescriptive requirements and the possibility of alternative design and arrangements has been considered throughout the development of part I-A.

7 In part II-A, any clarity about the meaning and effect of FR is lacking. It is not clear whether the FR are intended to be binding legal obligations beyond the prescriptive requirements. Also, in contrast to part I-A, the various environmental protection provisions in part II-A were developed to accomplish a specific level of environmental protection without consideration of whether alternative arrangements might be appropriate. Overlaying the GBS approach in the text of part II-A, therefore, introduces substantial ambiguity and lack of uniformity with regard to both the level of substantive environmental protection and the ability to legally enforce or demonstrate compliance with these provisions. This presents the opportunity for varying interpretations of FR in part II-A by port States, beyond what was considered adequate for compliance by the Administration, if the interrelationship between FR and prescriptive requirements is not addressed in the Polar Code.

8 An example of a situation that could result in lower-than-intended levels of environmental protection can be found in part II-A, chapter 1. The FR 1.3.1 requires ships to "avoid environmental impact from oil or oily mixtures during normal operation." The requirements in paragraph 1.4.1 prohibit discharge of oil and oily mixtures into the sea. However, since the FR is vague and potentially broader than the specific requirements in paragraph 1.4.1, it leaves open the possibility that an alternative measure may be deemed to

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meet the FR to "avoid environmental impact", even though it does not prohibit discharge of oil or oily mixtures into the sea.

9 An example of a situation in which a regulated entity may find itself subject to liability in spite of compliance with the prescriptive requirements can be found in part II-A, chapter 5. The FR 5.3.2 requires ships to "minimize the risk of environmental impact by garbage." While the prescriptive requirements in paragraph 5.4.2 address discharges of food waste and animal carcasses in the Arctic, they do not address any other forms of garbage that may be discharged under MARPOL Annex V. A port State might claim that compliance with the prescriptive requirements, as well as with existing MARPOL Annex V requirements, is not sufficient to "minimize the risk of environmental impact by garbage" (e.g. by requiring additional measures for discharges of cargo residues).

10 The original objective of the single environmental chapter previously reviewed by the MEPC was to require compliance with the enumerated environmental provisions; no flexibility was provided allowing for alternative design and arrangements beyond what is already allowed under a given MARPOL Annex. Applying that intent to the present part II-A would mean that the FR are redundant with the prescriptive requirements, introducing unnecessary confusion and substantial ambiguity but having no intended substantive effect. If that is correct, the FR should be deleted to preserve legal clarity.

11 If, however, the FR operate in part II-A as they do in part I-A (e.g. where the FR itself contains a binding legal obligation that may or may not be met through compliance with the prescriptive requirements and allows for alternative design and arrangements), this would be inconsistent with the original intent of the single environmental chapter, and the impacts of this approach have not been fully considered by the Sub-Committee or either parent Committee. Many of the prescriptive requirements in part II-A prohibit discharge or provide specific restrictions for the discharge of wastes; a ship can demonstrate compliance by retaining wastes onboard or satisfying the specific discharge restrictions (e.g. distance to ice). Without clarifying the interrelationship between FR and prescriptive requirements, the Polar Code may allow a ship to demonstrate compliance other than by meeting the prescriptive discharge requirements in part II-A, which is not the intent of this part. The United States notes that although equivalents are allowed in MARPOL Annexes I, II, and IV with regard to fittings, materials, and other equipment regulated under those annexes, no equivalents are provided for operational requirements in the annexes relevant to the Polar Code. The United States would request that the MEPC give careful consideration to the potential substantive environmental and legal implications inherent in this approach before agreeing to any GBS text in the Polar Code.

### **Use of GBS approach in MARPOL**

12 The United States also requests that the MEPC give careful consideration to whether the Polar Code is an appropriate vehicle for introducing the GBS approach into MARPOL. Given the limited attention that the GBS approach has had in part II-A and the lack of experience generally in using GBS in the environmental context, the United States believes more thought should be given to how GBS should work for environmental provisions. At present, the approach of using FR in part II-A is inconsistent with how any MARPOL requirements have previously been crafted, and as indicated above could be confusing for regulated entities and potentially result in levels of environmental protection that are lower than intended. The United States recommends that the MEPC focus on approving appropriate prescriptive provisions for part II-A and reserve for future

consideration the question of how and whether to incorporate the GBS approach into MARPOL.<sup>1</sup>

## Conclusions

13 For the reasons discussed above, the United States is of the view that GBS should not be included in the text of part II-A of the draft Code and proposes that the goals and especially the FR be deleted from part II-A and that each chapter of part II-A consist only of prescriptive requirements. The United States would prefer that any GBS approach used in an environmental context be limited to the Committee's process of developing legal rules, and not as the substance of the legal rules themselves.

14 If the GBS approach is nevertheless retained in the text of the Polar Code, the United States considers it essential that clarification be provided to expressly articulate that the FR in part II-A have no legal effect and do not give rise to any legal obligations. This is especially important if the amendments to MARPOL simply incorporate the text of the Polar Code by reference; that approach would adopt into MARPOL any ambiguities presented by the current GBS approach and FR text. Therefore, the United States proposes that making the following two revisions could provide the necessary clarification for part II-A:

- .1 removing legally binding language (e.g. "shall") from the text of the functional requirements, and revising each chapeau of the functional requirements as follows:

"In order to achieve the goal set out in paragraph [xx] above, the following functional requirements are established. These functional requirements do not create any legal obligation beyond what is contained in regulations [xx] below nor do they allow for compliance via equivalents beyond what is allowed pursuant to [cite to regulation XX, in relevant MARPOL Annex XX]; and "

- .2 revising each chapeau of the prescriptive requirements as follows:

"Achievement of the functional requirement[s] in paragraph [xx] above is demonstrated by compliance with the requirement[s] below."

15 In addition, if the United States' suggestion in document MEPC 66/11/14, Polar Code Incorporation into MARPOL (i.e., to move the discussion of the Code's structure and the operability of the FR separately into each part) is not adopted, any remaining discussion in the Introduction must distinguish how the FR operate in each part of the Polar Code.

## Action requested of the Committee

16 The Committee is invited to consider the proposals above and take action as appropriate.

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<sup>1</sup> The United States recommends the Committee take this issue into account also when considering the options for amending MARPOL to make the Polar Code mandatory. Incorporating the Polar Code by reference into MARPOL would indirectly adopt the GBS approach into MARPOL and may be precedential for how a GBS approach might be developed in the environmental context in the future. Direct amendments to MARPOL may allow for more flexibility in determining how a GBS approach could be developed under MARPOL. See also the United States submission MEPC 66/11/14 on Polar Code Incorporation into MARPOL.