

DISALLOWABLE INSTRUMENT



**Maritime Transport Act 1994**

**Maritime Rules**

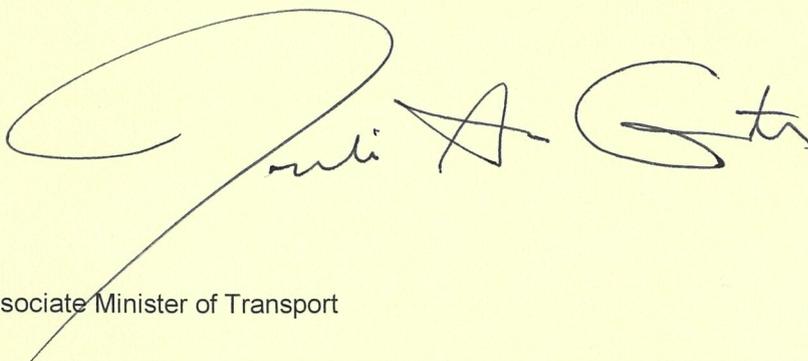
**Part 81 Amendment Rules 2019**

Pursuant to sections 36 and 34(1) of the Maritime Transport Act 1994 I, Julie Anne Genter, Associate Minister of Transport, having had regard to the criteria for making maritime rules in section 39(2) of the Maritime Transport Act 1994, hereby make the following Maritime Rules.

Signed at Wellington

This        23        day of    *September*    2019

By Hon JULIE ANNE GENTER



Associate Minister of Transport



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## **Part 81 Amendment Rules 2019**

### **Objective**

The objective of this Part 81 Amendment Rules 2019 is to revoke Part 81. On and from 1 October 2020 applicable commercial rafting operations currently operating under Part 81 will come within the scope of the Health and Safety at Work (Adventure Activities) Regulations 2016.

Part 81 rafting operations are currently excluded from being an Adventure Activity under the Health and Safety at Work (Adventure Activities) Regulations 2016 (the Regulations). Regulation 4(2) of the Regulations excludes “an activity for which a maritime document (as defined in section 2(1) of the Maritime Transport Act 1994) is required”. A Certificate of Compliance (CoC) is required and issued under Part 81 and is a maritime document.

When this Part is revoked operators conducting rafting operations under the authority of Part 81 will no longer be excluded from the Regulations and accordingly applicable operations will have to comply with the requirements under the Regulations, including the requirement for a safety audit and to obtain a safety audit certificate and become registered.

Whether an operator conducting rafting operations under the authority of Part 81 does come under the scope of the Regulations will depend on (amongst other things) whether their operation falls within the scope of regulations 4(1)(a)(v) and (vi)(A) and (B) of the Regulations and depends on whether the activity causes exposure to serious risk to health and safety if operational management failure occurs or exposure to dangerous terrain or waters.

The Part 81 Amendment Rules 2019 revokes Part 81 on 1 October 2020 and, until then, enables operators to continue to operate under that Part. Any CoC that is current when these rules come into force (1 November 2019) will remain in force until the end of 30 September 2020.

Under section 15 of the Interpretation Act 1999 the power of the Minister to make a rule includes the power to revoke it. Section 34(1) of the Maritime Transport Act 1994 (the Act) provides that maritime rules may require that a maritime document (for example, a certificate of compliance issued by the Director under Part 81) be held in respect of a ship. Section 36(1)(za)(i) of the Act provides the Minister may make Maritime Rules for any purpose reasonably incidental or related to the objectives of the Minister under the Act, including undertake functions in a way that contributes to an integrated, safe, responsive, and sustainable transport system.

Maritime Rules are disallowable instruments under the Legislation Act 2012. Under that Act, the rules are required to be tabled in the House of Representatives. The House of Representatives may, by resolution, disallow any rules. The Regulations Review Committee is the select committee responsible for considering rules under that Act.

### **Extent of consultation**

From 3 December 2015 Maritime New Zealand consulted, via its website, with the public on drafts of the proposed amendments to the Maritime Rules in accordance with the Act, including the expected costs and benefits. A notice regarding this consultation was placed in the New Zealand Gazette on 3 December 2015. The deadline for making a submission was 31 March 2016. 21 submissions were received.

### **Entry into force**

The Part 81 Amendment Rules 2019 comes into force on 1 November 2019.

## **Part 81 Amendment Rules 2019**

### **Amendment rule 1 Table of contents**

1.1 Amend the table of contents in Part 81 to include, in the appropriate order, the following:

“81.2A Revocation of Part 81”:

“81.21 Expiry of certificates of compliance”.

1.2 Amend the table of contents in Part 81 such that each row has the appropriate page number.

### **Amendment rule 2 New rule 81.2A**

2.1 After the end of rule 81.2 insert new rule 81.2A as follows:

#### **“81.2A Revocation of Part 81**

At the close of 30 September 2020 Part 81 is revoked.”.

### **Amendment rule 3 81.18 Information about certificates of compliance**

3.1 Amend rule 81.18 by replacing subrule (3) with:

“(3) Except as provided in subrule (3A), a certificate of compliance remains in force for 4 years, but may be suspended or revoked by the Director in accordance with Part 5 of the Act.”.

3.2 Amend rule 81.18 by inserting, after subrule (3), new subrule (3A) as follows:

“(3A) A certificate of compliance that is in force on 1 November 2019 remains in force until it expires under rule 81.21, but may be suspended or revoked by the Director in accordance with Part 5 of the Act.”.

### **Amendment rule 4 New rule 81.21**

4.1 After the end of rule 81.20 insert new rule 81.21 as follows:

#### **“81.21 Expiry of certificates of compliance**

At the close of 30 September 2020 all Certificates of Compliance expire and cease to be current, in force, and valid.”.

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### Amendment rule 5      Consequential amendments

At the close of 30 September 2020 amend Parts 19, 20, and 31 as follows:

#### ***Part 19***

- 5.1 In Part 19, in rule 19.2, amend the definition of “maritime transport operation” by deleting “81,” from paragraph (a)(ii) of that definition.

#### ***Part 20***

- 5.2 In Part 20—

- (a) delete rule 20.1(2)(d); and
- (b) rename rule 20.1(2)(e) as rule 20.1(2)(d).

#### ***Part 31***

- 5.3 In Part 31—

- (a) delete rule 31.1(2)(e); and
- (b) rename rules 31.1(2) “(f)”, “(g)”, “(h)”, and “(i)” as rules 31.1(2) “(e)”, “(f)”, “(g)”, and “(h)” respectively.”.

### Summary of Submissions

Maritime New Zealand released the proposal to revoke Maritime Rules Part 81: Commercial Rafting Operations (Part 81) for consultation on 3 December 2015. The consultation document was posted on the Maritime New Zealand website and an email notification was sent to all current commercial rafting operators, as well as industry bodies and other parties interested in rules consultations. A notice was also placed in the *New Zealand Gazette* notifying the consultation. Consultation was originally scheduled to run until 22 January 2016.

On 11 December 2015, following a request from the Tourism Industry Association of New Zealand (TIANZ) and the New Zealand Rivers Association (NZRA), the consultation period was extended until 31 March 2016. An email notifying the extension was sent to all rafting operators, and a notice advertising of the extension was placed in the *Gazette* on 17 December 2015.

On 17 February 2016, Maritime New Zealand posted a set of questions and answers on the consultation page alongside the consultation document, answering some common questions that had been asked during interactions with industry.

During the period of consultation, Maritime New Zealand received 22 submissions on the proposal to revoke Part 81. The majority of submissions raised concerns about one or more aspects of the proposal. Maritime New Zealand and WorkSafe have worked together to address these concerns where possible. Responses to the themes raised in submissions, and any actions taken as a result, are set out below.

#### **1. Many submissions highlighted the need for a regulatory tool to replace Part 81, if the proposed transition occurred**

Submitters expressed concern that moving to the Adventure Activities regime without a regulatory document similar to Part 81 would allow for more variation in how rafting is carried out, leading to reduced safety outcomes.

WorkSafe intends to develop an activity safety guide for commercial rafting, based on Part 81. This would retain the features of Part 81 that submitters said ensured rafting is a safe activity. One key feature of the current framework that submitters liked was the requirement for commercial raft guides to hold a Raft Guide qualification from SkillsActive. The guide for rafting would continue to require these qualifications for all raft guides. The process of developing activity safety guides includes consultation with industry.

An activity safety guide applies to all workplaces involved in the industry that it covers, regardless of whether a particular provider is required to register as an AAO. Therefore, the guide would apply to raft hire, any non-AAO rafting (e.g. educational institutes) and also to rafting on lower-risk Grade 1 rapids that may not require registration. A guide provides for consistent standards across all rafting involving any place of work.

#### **2. Submitters questioned whether audits under the AAR would hold all companies to the same standard**

The initial cycle of adventure activity auditing and surveillance showed a high level of conformity to the Scheme – operators are held to a consistent standard across widely varying activities without activity safety guides, and Accreditation, moderation and appeal processes work to prevent or correct significant variations among audits.

Given the extra influences of an activity safety guide, a strong industry body, and a single staff qualification, it is a reasonable expectation that very high consistency would continue to be achieved in the rafting sector.

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### 3. A number of submissions requested that Maritime New Zealand include other water-based adventure activities, such as kayaking, or other activities, such as rock jumping, within the scope of Part 81, variations on 'Option 2' in the consultation document

The consultation document described the options that were considered as part of the policy development process. One of these was Option 2: Retaining Part 81, with Maritime New Zealand assuming responsibility for auditing other water-based adventure activities.

This option was included to describe what Maritime New Zealand had considered when identifying the preferred option, and to set out why this was not preferred. There are a number of reasons why Maritime NZ does not favour this option.

- For Maritime New Zealand to take on other adventure activities involving ships not covered by Part 81 (such as kayaks, canoes or river boarding), new Maritime Rules would need to be developed to regulate these activities. This would require additional staff capability with expertise in these activities, and would come at significant expense.
- Activities like rock jumping and intentional swimming, which some submitters asked for Maritime New Zealand to include in audits under maritime rules, are outside the scope of Maritime NZ's ability to regulate.
- The Adventure Activities regulations create a regime that is specifically tailored to manage risks in adventure activities. Shifting these activities out of the AAR into maritime rules would be against the intent of the AAR.
- Moving ship-based adventure activities out of the Adventure Activities Regulations and into a maritime regime would still not solve the issue of dual regulation for operators providing different types of adventure activities, as some operators offer both land-based adventure activities and water-based adventure activities.

For these reasons, Maritime New Zealand does not consider Option 2 is better than either what was proposed, or the status quo, so will not be pursuing Option 2 any further.

### 4. Some submissions raised concern about the consultation process that was followed for the proposal to revoke Part 81

The way the draft rules were developed, and the process followed at consultation, is consistent with the standard process for developing maritime rules.

- 1 **Issue identification.** In this case, the problem that was identified was the dual regulation of some operators who provide both adventure activities under the AAR and commercial rafting.
- 2 **Policy investigation.** This is where the problem is analysed and different ways to address the issue are considered and weighed against each other. The policy investigation leads to a preferred option.
- 3 **In-principle decision making.** Maritime New Zealand and the Ministry of transport recommend the preferred course of action to the Associate Minister of Transport. If the Minister agrees with Maritime NZ consulting on the proposal, the project is added to the annual Transport Rules Programme and confirmed by Cabinet.
- 4 **Rule development.** A draft rule is developed to give effect to the policy, and a discussion document is prepared setting out the policy investigation, the proposal, and the draft rule.
- 5 **Consultation.** The discussion document is posed on the Maritime New Zealand website and sent to interested parties. Consultation usually runs for a minimum of four weeks, but can go for longer, depending on the issue and the consultation required.

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- 6 Preparation of final rule and signing by Minister.** Any submissions on the proposal are collected and analysed. The draft rule is changed if necessary – this depends on the content of submissions. Final papers are prepared and sent to the Minister. If the Minister accepts the proposal, the rule is signed and will enter into force.

### 5. Exemptions from rules

Under maritime rules, operators are required to apply for an exemption if they want to depart from the rules. Exemptions from the maritime rules can be issued for a maximum of five years. There are currently exemptions from Part 81 issued to two rafting operators.

Under the AAR, if an operator wants to depart from the method of compliance set out in the approved code of practice, their audit body is able to approve the alternative on advice from the auditor's Technical Expert, if and only if what is proposed achieves the same, or higher, safety outcomes.

### 6. Raft hire

Some submitters questioned whether the proposal would lead to a reduction in safety standards for raft hire operations. Currently, Part 81 includes requirements for raft hire.

As noted under topic 1 (above), the proposed activity safety guide would apply to raft hire. The relevant requirements of Part 81 would be carried across to the activity safety guide ensuring that there is no reduction in the safety standards for raft hire.

Any raft hire operation will still be covered by obligations under the Maritime Transport Act 1994 and the Health and Safety at Work Act 2015. If the situation changed and more operators started doing raft hire, regulators may choose to examine the controls in place for this activity.

### 7. One submitter raised concerns that the safety documentation required under the AAR would be very different to that required under Part 81

The NZ Safety Audit Standard for Adventure Activities does not prescribe the layout, order and wording of the documents; it prescribes what they must achieve. The auditor needs to be able to find the required points clearly covered, but what the documents look like is up to the operator.

Existing systems approved under part 81 will generally be compliant for the areas they do cover. There may be some updates required in parts of a safety system, where the existing system does not meet the intent of the Standard.

Most Part 81 safety systems are expected to need extra information added before complying with the Standard. 12 compulsory items in the Standard have been identified that are not required in safe operating plans currently approved under Part 81; these items may require new documentation. Around 15 other areas may need further information added to existing systems.

There would be no requirement for operators to change their entire system of safety documentation solely because of the change in auditor.

### 8. Cost

The majority of submitters raised concerns about the cost of audit and monitoring activity under the AAR. The average costs provided by WorkSafe are higher than the average cost of an audit by Maritime NZ. Maritime NZ also carries out audits at a frequency determined by the Director, whereas some contact with an audit body (audit, or monitoring) happens every year as part of the AAR. This further increases the difference between the average annual costs of both regimes. However, the costs of operating under Part 81 will increase in the future, which submitters may not have taken into account when making the comparison between the costs they currently incur for audits and the average costs under the AAR. The first reason for this cost increase is that the Maritime NZ hourly rate for audits increases every year until 2019.

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The second factor that will increase costs if commercial rafting remains under the maritime rules is the planned requirement for all commercial maritime operators to have a drug and alcohol management plan that involves random testing of staff in safety sensitive roles. The intention to include these requirements in the maritime rules was announced by the Associate Transport Minister on 10 February 2016. The costs of these requirements are unlikely to have been included in cost comparisons by operators who submitted during the consultation.

### 9. Specific issues raised by the NZRA

The NZRA submission was endorsed by ten submitters, and identified shortfalls that the Association considered needed to be addressed before Part 81 could be revoked.

*1. The content of Rule 81 being protected in the form of a Code of Practise.*

WorkSafe intends to develop an Approved Code of Practice (ACOP) for commercial rafting, based on Part 81 – see topic 1 above.

*2. Consultation processes when variation from the Code of Practise is sought.*

If you want to depart from the ACOP it has to meet the same standard (or higher) of safety. Audit bodies rely on technical experts' judgement.

*3. Embedding the NZ Raft guide qualification in its current form as the only accepted qualification.*

An ACOP would do this, with the ability to add in anything additional during the process of developing the ACOP. – see topic 1 above.

*4. The appointment and moderation of Technical Experts, considering suitable qualifications and their scope.*

Technical Experts are appointed by an audit body, but must meet qualification requirements set by the certification Scheme. The qualification requirements would be set by a technical committee convened by WorkSafe and the accreditation body (JAS-ANZ). The technical committee would include representatives of the rafting industry.

*5. The formation of an Activity Group that Raft and associated activities are to fall under.*

The grouping of comparable activities within the certification Scheme is carried out by technical committee convened by WorkSafe and the accreditation body (JAS-ANZ). The technical committee would include representatives of the rafting industry to ensure a satisfactory outcome.

*6. The smooth transition into the AAR including pre audit assistance, acknowledgement of history of audits and a practical time frame for any change over.*

The adventure activities certification Scheme allows for previous the audit history established by rafting operators to be recognised by audit bodies. That is expected to assist in reducing the time required for a certification audit, and/or reduce the work and cost of surveillance auditing. No guarantees can be provided however, because the total duration depends on the audit findings and the amount of work to resolve any non-conformities.

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Maritime NZ has good information about the timing of raft operator audits, CoC expiries, and seasonal influences. This information has been considered at each point in this proposal and rule drafting process. MNZ has already responded to industry feedback about the timing of this proposal, and continues to consider industry views. No single proposal will be ideal for the whole sector, but the proposals are designed with a workable timeline, to the greatest possible extent.

*7. The acknowledgement of NZRA as representatives of the industry to all aspects outlined above.*

As the responses to previous points have outlined, aspects of the process of setting an ACOP and determining who will be Technical Experts will involve industry engagement. As the representative industry body for rafting, the NZRA will be invited to provide input in these processes.