WEST VIRGINIA CODE: §20-2-23A

§20-2-23a. Whitewater commission; powers and duties of commission and Division of Natural Resources; allocations; civil and criminal penalties for violations.

(a) There is hereby created a whitewater commission within the Division of Natural Resources. The commission shall consist of the director of the Division of Natural Resources or his or her designee; the director of the Division of Parks and Tourism or his or her designee; three representatives of private river users who have no affiliation with any commercial river enterprise to be appointed by the Governor: Provided, That no more than one representative of the private river users may be from each whitewater zone; and four persons representing four different licensed commercial whitewater outfitters currently operating within the state to be appointed by the Governor. The superintendent of the New River Gorge National Park or his or her designee shall be a nonvoting member of the commission. All appointed members of the commission shall be citizens and residents of West Virginia. Of the four representatives of commercial outfitters, two persons shall represent commercial whitewater outfitters holding or controlling through corporate affiliation or common ownership multiple licenses in West Virginia and two persons shall represent commercial whitewater outfitters in West Virginia who hold only a single license and who have no common ownership or corporate affiliation with another licensee, the director of the Division of Natural Resources shall serve as chairperson of the commission. Of the seven members of the commission first appointed by the Governor, two shall be appointed for a term of one year, two for a term of two years and three for a term of three years. Thereafter, the terms of all appointed members of the commission are for three years. Members shall serve until their successors have been appointed and any vacancy in the office of a member shall be filled by appointment for the unexpired term. Members representing commercial outfitters who have served at least two years on the commission are not eligible for reappointment to a successive term.

(b) The commission has the following powers and duties:

(1) To investigate and study commercial whitewater rafting, outfitting and activities related thereto which take place along the rivers or waters of the state;

(2) To designate any such rivers or waters or any portions thereof as "whitewater zones" for which commercial whitewater rafting, outfitting and activities are to be investigated and studied, and to determine the order and the periods of time within which the investigations and studies are to be conducted. The commission shall first investigate and study those whitewater zones which it finds to present serious problems requiring immediate regulation, including, without limitation, safety hazards and problems of overcrowding or environmental misuse;

(3) To restrict, deny or postpone the issuance of licenses to additional commercial whitewater outfitters seeking to operate in areas and portions of rivers and waters in this

state designated whitewater zones by action of the director of the Division of Natural Resources as authorized under prior enactment of this section and so designated by the filing of a written notice entered upon the records of the division containing the designation and reasonable description of the whitewater zone: Provided, That in consideration of the consolidation occurring among outfitting companies providing rafting services on the Gauley River, the commission shall grant one additional whitewater rafting license for the Gauley River on or before July 1, 1999, with preference being given in the selection process to the applicant best satisfying the following criteria: (i) The applicant demonstrates a record of providing commercial rafting and related whitewater services in a safe and lawful manner on the New River and other rivers; (ii) the applicant has continuously engaged for three or more years in the commercial rafting business on the New River and has, or can obtain, the necessary equipment and facilities to support Gauley River operations; (iii) the seniority of the application as measured by the length of time the applicant has sought a Gauley River license with the more senior application given preference; (iv) that the applicant is not affiliated with, operated or owned by an existing Gauley River licensee; (v) that the applicant has no common ownership with an existing Gauley River licensee; and (vi) that the economic benefit represented by the award of a Gauley River license will serve to assist the promotion of tourism and the delivery of outfitting services beyond Fayette and Nicholas counties. In authorizing the issuance of an additional Gauley River license, it is the intention of the Legislature that the commission not increase the carrying capacity of a current Gauley River licensee, but that the commission promote and maintain competition among licensees by increasing the number of independent outfitters operating on the Gauley;

(4) To commission such studies as are necessary to determine the physical carrying capacity and monitor the levels of use on the New, Gauley, Cheat, Shenandoah and Tygart rivers and how each relates to the overall quality of the rafting experience, the economic impact of rafting, tourism and employment in the state and the safety of the general public: Provided, That if, during a study period, the commission deems that overcrowding is not a problem on any whitewater zone on the Cheat, Shenandoah and Tygart rivers, or on the New River upstream of the confluence of the Greenbrier and New rivers and on the Gauley River upstream of the Summersville Dam, then it may issue a license;

(5) Based on the findings of a study of the carrying capacity of a river, to formulate rational criteria for an allocation methodology for the river subject to the study, including, but not limited to, a minimum allocation for each river studied;

(6) To immediately implement a freeze on mandated changes in use allocations for the licenses of existing licensees on moratorium sections of the Gauley and New rivers as defined in subsection (d) of this section. All such licenses shall carry the use allocation in effect on May 2, 1992. The commission shall implement allocation methodologies for other rivers as the commission, after appropriate study, may deem necessary with all such allocation methodologies implemented by rules promulgated pursuant to chapter twenty-nine-a of this code;

(7) To determine administrative policies relating to regulation of the whitewater industry

WVLegislature

and to administer such policies, except that the commission shall delegate to the director of the Division of Natural Resources or his or her designee the authority to administer the day-to-day responsibilities of the commission pursuant to this section and may vest in the director of the Division of Natural Resources or his or her designee the authority to make determinations with respect to which it is not practicable to convene or to poll the commission, within guidelines established by the commission;

(8) To review all contracts or agreements with governmental agencies related to whitewater studies or regulation, and any negotiations related thereto;

(9) To verify reports by outfitters of numbers of river users and guides, to monitor the extent of the crowding conditions on the rivers and to establish a system for reporting the number of river users and guides on each whitewater expedition;

(10) To regulate the issuance, transfer, and renewal of licenses. However, licenses issued to commercial whitewater outfitters or use allocations or other privileges conferred by a license may be transferred, sold, offered as security to financial institutions or otherwise encumbered, upon notice in writing to the commission and the director of the Division of Natural Resources, subject to the following limitations: (i) The commission may refuse a transfer upon a finding that there is reasonable cause to believe that the safety of members of the public may be adversely affected by the transfer; and (ii) the commission shall require that taxes, workers' compensation and other obligations due the state be paid prior to any transfer;

(11) To collect, for the duration of a study period established in subdivision (4) of this subsection, an annual license fee of $500 for each river on which a commercial whitewater outfitter operates. The annual per river license fee is limited to the Cheat, Gauley, New, Shenandoah and Tygart rivers. The annual license fee for a commercial whitewater outfitter operating on a river not so designated is $500 regardless of the number of rivers operated on. A commercial whitewater outfitter who is operating on a river designated in this subdivision and who has paid the annual per river license fee may not be required to pay an additional annual license fee to operate on a nondesignated river. The commercial whitewater outfitter license shall be issued by the commission and is for a period of ten years: Provided, That an outfitter pays the required annual license fee. If an outfitter fails to pay the license fee, then the license shall be suspended until the license fee is paid. Licenses are subject to the bonding provisions set forth in section twenty-three-d of this article and the revocation provisions set forth in the rules promulgated by the director of the Division of Natural Resources. License fees shall be used by the Division of Natural Resources for the purpose of enforcing and administering the provisions of this section;

(12) To establish a special study and improvement fee to be paid by outfitters and to establish procedures for the collection and enforcement of the special study and improvement fee;

(13) To establish a procedure for hearings on violations of this section and rules

WV Legislature

promulgated thereunder and to establish civil penalties for violations of this section and rules promulgated thereunder; and

(14) To approve rules promulgated by the director of the Division of Natural Resources pursuant to chapter twenty-nine-a of this code, with respect to commercial whitewater outfitters operating upon the waters of the state, whether or not such waters have been designated whitewater zones, which relate to: (i) Minimum safety requirements for equipment; (ii) standards for the size of rafts and number of persons which may be transported in any one raft; (iii) qualifications of commercial whitewater guides; and with respect to waters designated whitewater zones; (iv) standards for the number of rafts and number of persons transported in rafts.

(c) The commission shall meet upon the call of the chairperson or a majority of the members of the commission. However, the commission shall meet at least quarterly and shall conduct business when a majority of the members are present. At the meetings, the commission shall review all data, materials and relevant findings compiled relating to any investigation and study then under consideration and, as soon as practicable thereafter, the commission may recommend rules to govern and apply to the designated whitewater zone(s). The commission may meet at its discretion for the purpose of considering and adjusting allocations and review fees and proposed expenditures. A budget shall be approved for each fiscal year for the expenditure of funds subject to the commission's control. The commission may not limit the number of commercial whitewater outfitters operating on rivers not designated as whitewater zones, nor may the commission limit the number of rafts or total number of persons transported in rafts by commercial whitewater outfitters on rivers not designated as whitewater zones. Commission members shall be reimbursed all reasonable and necessary expenses incurred in the exercise of their duties.

(d) Special provisions for the New River and the Gauley River:

(1) After the issuance of the Gauley River rafting license provided for in subdivision (3), subsection (b) of this section, a moratorium shall be imposed by the commission upon the issuance of additional commercial rafting licenses on whitewater zones of the New River between the confluence of the Greenbrier and New rivers and the confluence of the New and Gauley rivers and upon whitewater zones of the Gauley River from the Summersville Dam to the confluence of the New and Gauley rivers. The moratorium hereby imposed shall continue until such time as the commission is authorized by the Legislature to discontinue the moratorium.

(2) For the portions of the Gauley and New rivers subject to the moratorium imposed by this section, the minimum use allocation conferred by a license is one hundred twenty for each designated section of a whitewater zone on the Gauley and one hundred fifty for each designated section of a whitewater zone on the New River. A licensee who held a use allocation on May 2, 1992, with a use allocation greater than the minimum allocation established in this subdivision shall retain such use allocation on each designated section of a whitewater zone on the moratorium portions of the New and Gauley rivers subject only to

WV Legislature

the sale, loss or forfeiture of the license or to a subsequent action of the commission imposing a reduction in use allocations pursuant to subdivision (4) of this subsection. The commission is authorized to increase or decrease minimum use allocations for the moratorium sections of the New and Gauley rivers only in accordance with the provisions of subdivisions (4) and (5) of this subsection. The commission may permit additional allocations or licenses for whitewater outfitters which are nonprofit entities operating upon the waters of the state upon the effective date of this section. Except as provided in subdivision (4), subsection (d) of this section, nothing in this section shall be deemed to require the reduction of a use allocation granted under an existing license or to prohibit a commercial whitewater outfitter from acquiring a license with a use allocation in excess of the minimum allocations hereby established: Provided, That if a licensee has sold, leased or assigned his license, or sold or leased a portion of the use allocation under his license, nothing herein shall be deemed to have the effect of increasing the use allocation assigned to such license.

(3) The commission may permit peak-day variances from license limitations not exceeding ten percent of the use allocation granted under a license. The commission may permit off-peak-day variances from license limitations not exceeding twenty-five percent of the use allocation granted under a license.

(4) If, as result of a study employing the limits of acceptable change process, the whitewater commission acts to reduce the aggregate maximum daily use limit for all commercial rafting licenses on a section of the New River or Gauley River subject to the license moratorium, the reduction shall be distributed on a prorata basis among all licenses granted for the section in proportion to an individual license's relative share of the total use allocation for such river section.

(5) If the limits of acceptable change process results in an increase in the aggregate maximum daily use limit for all commercial rafting licenses on any section of the New River or Gauley River subject to a moratorium on new licenses, such increase shall be divided by the total number of commercial rafting licenses issued for the relevant section of river and the minimum use allocation for each such license shall be increased by the nearest whole number resulting from the division.

(6) If any party contracts to purchase a license containing a use allocation for a moratorium section of the New River or the Gauley River, or if a licensee has obtained, or in the future shall obtain additional use allocations for a moratorium section by lease or purchase from another licensee, the commission shall permit the transfer of such license rights in accordance with the provisions of subdivision (10), subsection (b) of this section. Unless the owners of a license otherwise agree, when two or more licensees share ownership or control of the use allocation assigned to a license, any increase or decrease in use allocations which results from an action of the commission under subdivisions (4) and (5) of this subsection shall be distributed by the commission between such owners in proportion to their ownership or control of the use allocation assigned to such license.

(e) In the event the commission determines through an appropriate study and the limits of

WV Legislature

acceptable change process that a whitewater zone or a designated section of a whitewater zone on waters other than the moratorium sections of the New and Gauley rivers requires implementation of use allocations, all whitewater rafting licenses issued for such zone or section thereof shall be given the same use allocation.

(f) Violation of this section or any rule promulgated pursuant to this section constitutes a misdemeanor punishable by the penalties set forth in section twenty-three-d of this article.

(g) The director of the Division of Natural Resources shall promulgate, pursuant to the provisions of chapter twenty-nine-a of this code, all rules necessary to effectuate the purposes of this section and these rules must be approved by the commission. The Division of Natural Resources shall enforce the provisions of this section and rules promulgated pursuant to this section, and shall provide necessary staff and support services to the commission to effectuate the purposes of this section.

(h) All orders, determinations, rules, permits, grants, contracts, certificates, licenses, waivers, bonds, authorizations and privileges which have been issued, made, granted or allowed to become effective pursuant to any prior enactments of this section by the Governor, the secretary of the Department of Commerce, labor and environmental resources, the director of the Division of Natural Resources, the whitewater advisory board or by a court of competent jurisdiction, and which are in effect on the effective date of this section, shall continue in effect according to their terms until modified, terminated, superseded, set aside or revoked by the Governor, secretary, director or commission pursuant to this section, by a court of competent jurisdiction, or by operation of law.

WV Legislature