

RECEIVED

99 APR -6 12:11:04

OFFICE OF THE
S. CLERK

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1999

ENROLLED

SENATE BILL NO. 572

(By Senator WOOTEN, ET AL)

PASSED MARCH 11, 1999
In Effect NINETY DAYS FROM Passage

RECEIVED

99 APR -6 11:04

OFFICE OF THE CLERK
SENATE

ENROLLED

Senate Bill No. 572

(BY SENATORS WOOTON, LOVE, BALL, ANDERSON, HUNTER,
BAILEY, SCHOONOVER, KESSLER AND EDGELL)

[Passed March 11, 1999; in effect ninety days from passage.]

AN ACT to amend and reenact sections twenty-three-a and twenty-three-e, article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend and reenact section one, article five-c, chapter twenty-one of said code, all relating to providing for the issuance of one additional whitewater rafting license on the Gauley River; instituting a moratorium on additional whitewater licenses on certain sections of the New and Gauley rivers; freezing minimum license allocations for existing licenses on certain sections of the New and Gauley rivers; defining minimum license allocations; providing for the continued study of rafting carrying capacity of the state's rivers by the whitewater commission; and clarifying that seasonal employees of commercial whitewater outfitters are exempt from overtime wage requirements.

Be it enacted by the Legislature of West Virginia:

That sections twenty-three-a and twenty-three-e, article two, chapter twenty of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and to amend and reenact section one, article five-c, chapter twenty-one of said code, all to read as follows:

CHAPTER 20. NATURAL RESOURCES.

ARTICLE 2. WILDLIFE RESOURCES.

§20-2-23a. Whitewater commission; powers and duties of commission and division of natural resources; allocations; civil and criminal penalties for violations.

1 (a) There is hereby created a whitewater commission
2 within the division of natural resources. The commission
3 shall consist of the director of the division of natural
4 resources or his or her designee; the director of the division
5 of parks and tourism or his or her designee; three represen-
6 tatives of private river users who have no affiliation with
7 any commercial river enterprise to be appointed by the
8 governor: *Provided*, That no more than one representative
9 of the private river users may be from each whitewater
10 zone; and four persons representing four different licensed
11 commercial whitewater outfitters currently operating
12 within the state to be appointed by the governor. The
13 superintendent of the New River Gorge national park or
14 his or her designee shall be a nonvoting member of the
15 commission. All appointed members of the commission
16 shall be citizens and residents of West Virginia. Of the
17 four representatives of commercial outfitters, two persons
18 shall represent commercial whitewater outfitters holding
19 or controlling through corporate affiliation or common
20 ownership multiple licenses in West Virginia and two
21 persons shall represent commercial whitewater outfitters
22 in West Virginia who hold only a single license and who
23 have no common ownership or corporate affiliation with
24 another licensee, the director of the division of natural
25 resources shall serve as chairperson of the commission. Of
26 the seven members of the commission first appointed by
27 the governor, two shall be appointed for a term of one
28 year, two for a term of two years and three for a term of
29 three years. Thereafter, the terms of all appointed mem-
30 bers of the commission are for three years. Members shall

31 serve until their successors have been appointed and any
32 vacancy in the office of a member shall be filled by
33 appointment for the unexpired term. Members represent-
34 ing commercial outfitters who have served at least two
35 years on the commission are not eligible for reappointment
36 to a successive term.

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

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

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

51 (3) To restrict, deny or postpone the issuance of licenses
52 to additional commercial whitewater outfitters seeking to
53 operate in areas and portions of rivers and waters in this
54 state designated whitewater zones by action of the director
55 of the division of natural resources as authorized under
56 prior enactment of this section and so designated by the
57 filing of a written notice entered upon the records of the
58 division containing the designation and reasonable
59 description of the whitewater zone: *Provided*, That in
60 consideration of the consolidation occurring among
61 outfitting companies providing rafting services on the
62 Gauley River, the commission shall grant one additional
63 whitewater rafting license for the Gauley River on or
64 before the first day of July, one thousand nine hundred
65 ninety-nine, with preference being given in the selection
66 process to the applicant best satisfying the following
67 criteria: (i) The applicant demonstrates a record of
68 providing commercial rafting and related whitewater
69 services in a safe and lawful manner on the New River and
70 other rivers; (ii) the applicant has continuously engaged

71 for three or more years in the commercial rafting business
72 on the New River and has, or can obtain, the necessary
73 equipment and facilities to support Gauley River opera-
74 tions; (iii) the seniority of the application as measured by
75 the length of time the applicant has sought a Gauley River
76 license with the more senior application given preference;
77 (iv) that the applicant is not affiliated with, operated or
78 owned by an existing Gauley River licensee; (v) that the
79 applicant has no common ownership with an existing
80 Gauley River licensee; and (vi) that the economic benefit
81 represented by the award of a Gauley River license will
82 serve to assist the promotion of tourism and the delivery of
83 outfitting services beyond Fayette and Nicholas counties.
84 In authorizing the issuance of an additional Gauley River
85 license, it is the intention of the Legislature that the
86 commission not increase the carrying capacity of a current
87 Gauley River licensee, but that the commission promote
88 and maintain competition among licensees by increasing
89 the number of independent outfitters operating on the
90 Gauley;

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

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

109 (6) To immediately implement a freeze on mandated
110 changes in use allocations for the licenses of existing

111 licensees on moratorium sections of the Gauley and New
112 rivers as defined in subsection (d) of this section. All such
113 licenses shall carry the use allocation in effect on the
114 second day of May, one thousand nine hundred ninety-
115 two. The commission shall implement allocation method-
116 ologies for other rivers as the commission, after appropri-
117 ate study, may deem necessary with all such allocation
118 methodologies implemented by rules promulgated pursu-
119 ant to chapter twenty-nine-a of this code;

120 (7) To determine administrative policies relating to
121 regulation of the whitewater industry and to administer
122 such policies, except that the commission shall delegate to
123 the director of the division of natural resources or his or
124 her designee the authority to administer the day-to-day
125 responsibilities of the commission pursuant to this section
126 and may vest in the director of the division of natural
127 resources or his or her designee the authority to make
128 determinations with respect to which it is not practicable
129 to convene or to poll the commission, within guidelines
130 established by the commission;

131 (8) To review all contracts or agreements with govern-
132 mental agencies related to whitewater studies or regula-
133 tion, and any negotiations related thereto;

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

139 (10) To regulate the issuance, transfer, and renewal of
140 licenses. However, licenses issued to commercial white-
141 water outfitters or use allocations or other privileges
142 conferred by a license may be transferred, sold, offered as
143 security to financial institutions or otherwise encumbered,
144 upon notice in writing to the commission and the director
145 of the division of natural resources, subject to the follow-
146 ing limitations: (i) The commission may refuse a transfer
147 upon a finding that there is reasonable cause to believe
148 that the safety of members of the public may be adversely
149 affected by the transfer; and (ii) the commission shall

150 require that taxes, workers' compensation and other
151 obligations due the state be paid prior to any transfer;

152 (11) To collect, for the duration of a study period estab-
153 lished in subdivision (4) of this subsection, an annual
154 license fee of five hundred dollars for each river on which
155 a commercial whitewater outfitter operates. The annual
156 per river license fee is limited to the Cheat, Gauley, New,
157 Shenandoah and Tygart rivers. The annual license fee for
158 a commercial whitewater outfitter operating on a river not
159 so designated is five hundred dollars regardless of the
160 number of rivers operated on. A commercial whitewater
161 outfitter who is operating on a river designated in this
162 subdivision and who has paid the annual per river license
163 fee may not be required to pay an additional annual
164 license fee to operate on a nondesignated river. The
165 commercial whitewater outfitter license shall be issued by
166 the commission and is for a period of ten years: *Provided*,
167 That an outfitter pays the required annual license fee. If
168 an outfitter fails to pay the license fee, then the license
169 shall be suspended until the license fee is paid. Licenses
170 are subject to the bonding provisions set forth in section
171 twenty-three-d of this article and the revocation provi-
172 sions set forth in the rules promulgated by the director of
173 the division of natural resources. License fees shall be
174 used by the division of natural resources for the purpose of
175 enforcing and administering the provisions of this section;

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

180 (13) To establish a procedure for hearings on violations
181 of this section and rules promulgated thereunder and to
182 establish civil penalties for violations of this section and
183 rules promulgated thereunder; and

184 (14) To approve rules promulgated by the director of the
185 division of natural resources pursuant to chapter
186 twenty-nine-a of this code, with respect to commercial
187 whitewater outfitters operating upon the waters of the
188 state, whether or not such waters have been designated
189 whitewater zones, which relate to: (i) Minimum safety

190 requirements for equipment; (ii) standards for the size of
191 rafts and number of persons which may be transported in
192 any one raft; (iii) qualifications of commercial whitewater
193 guides; and, with respect to waters designated whitewater
194 zones, (iv) standards for the number of rafts and number
195 of persons transported in rafts.

196 (c) The commission shall meet upon the call of the
197 chairperson or a majority of the members of the commis-
198 sion. However, the commission shall meet at least quar-
199 terly and shall conduct business when a majority of the
200 members are present. At the meetings, the commission
201 shall review all data, materials and relevant findings
202 compiled relating to any investigation and study then
203 under consideration and, as soon as practicable thereafter,
204 the commission may recommend rules to govern and apply
205 to the designated whitewater zone(s). The commission
206 may meet at its discretion for the purpose of considering
207 and adjusting allocations and review fees and proposed
208 expenditures. A budget shall be approved for each fiscal
209 year for the expenditure of funds subject to the commis-
210 sion's control. The commission may not limit the number
211 of commercial whitewater outfitters operating on rivers
212 not designated as whitewater zones, nor may the commis-
213 sion limit the number of rafts or total number of persons
214 transported in rafts by commercial whitewater outfitters
215 on rivers not designated as whitewater zones. Commission
216 members shall be reimbursed all reasonable and necessary
217 expenses incurred in the exercise of their duties.

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

220 (1) After the issuance of the Gauley River rafting license
221 provided for in subdivision (3), subsection (b) of this
222 section, a moratorium shall be imposed by the commission
223 upon the issuance of additional commercial rafting
224 licenses on whitewater zones of the New River between the
225 confluence of the Greenbrier and New rivers and the
226 confluence of the New and Gauley rivers and upon white-
227 water zones of the Gauley River from the Summersville
228 Dam to the confluence of the New and Gauley rivers. The
229 moratorium hereby imposed shall continue until such time

230 as the commission is authorized by the legislature to
231 discontinue the moratorium.

232 (2) For the portions of the Gauley and New rivers subject
233 to the moratorium imposed by this section, the minimum
234 use allocation conferred by a license is one hundred twenty
235 for each designated section of a whitewater zone on the
236 Gauley and one hundred fifty for each designated section
237 of a whitewater zone on the New River. A licensee who
238 held a use allocation on the second day of May, one
239 thousand nine hundred ninety-two, with a use allocation
240 greater than the minimum allocation established in this
241 subdivision shall retain such use allocation on each
242 designated section of a whitewater zone on the morato-
243 rium portions of the New and Gauley rivers subject only to
244 the sale, loss or forfeiture of the license or to a subsequent
245 action of the commission imposing a reduction in use
246 allocations pursuant to subdivision (4) of this subsection.
247 The commission is authorized to increase or decrease
248 minimum use allocations for the moratorium sections of
249 the New and Gauley rivers only in accordance with the
250 provisions of subdivisions four and five of this subsection.
251 The commission may permit additional allocations or
252 licenses for whitewater outfitters which are nonprofit
253 entities operating upon the waters of the state upon the
254 effective date of this section. Except as provided in
255 subdivision (4), subsection (d) of this section, nothing in
256 this section shall be deemed to require the reduction of a
257 use allocation granted under an existing license or to
258 prohibit a commercial whitewater outfitter from acquiring
259 a license with a use allocation in excess of the minimum
260 allocations hereby established: *Provided*, That if a li-
261 censee has sold, leased or assigned his license, or sold or
262 leased a portion of the use allocation under his license,
263 nothing herein shall be deemed to have the effect of
264 increasing the use allocation assigned to such license.

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

271 (4) If, as result of a study employing the limits of accept-
272 able change process, the whitewater commission acts to
273 reduce the aggregate maximum daily use limit for all
274 commercial rafting licenses on a section of the New River
275 or Gauley River subject to the license moratorium, the
276 reduction shall be distributed on a pro-rata basis among
277 all licenses granted for the section in proportion to an
278 individual license's relative share of the total use alloca-
279 tion for such river section.

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

289 (6) If any party contracts to purchase a license contain-
290 ing a use allocation for a moratorium section of the New
291 River or the Gauley River, or if a licensee has obtained, or
292 in the future shall obtain additional use allocations for a
293 moratorium section by lease or purchase from another
294 licensee, the commission shall permit the transfer of such
295 license rights in accordance with the provisions of subdivi-
296 sion (10), subsection (b) of this section. Unless the owners
297 of a license otherwise agree, when two or more licensees
298 share ownership or control of the use allocation assigned
299 to a license, any increase or decrease in use allocations
300 which results from an action of the commission under
301 subdivisions four and five of this subsection shall be
302 distributed by the commission between such owners in
303 proportion to their ownership or control of the use alloca-
304 tion assigned to such license.

305 (e) In the event the commission determines through an
306 appropriate study and the limits of acceptable change
307 process that a whitewater zone or a designated section of
308 a whitewater zone on waters other than the moratorium
309 sections of the New and Gauley river requires implementa-
310 tion of use allocations, all whitewater rafting licenses

311 issued for such zone or section thereof shall be given the
312 same use allocation.

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

317 (g) The director of the division of natural resources shall
318 promulgate, pursuant to the provisions of chapter
319 twenty-nine-a of this code, all rules necessary to effectuate
320 the purposes of this section and these rules must be
321 approved by the commission. The division of natural
322 resources shall enforce the provisions of this section and
323 rules promulgated pursuant to this section, and shall
324 provide necessary staff and support services to the com-
325 mission to effectuate the purposes of this section.

326 (h) All orders, determinations, rules, permits, grants,
327 contracts, certificates, licenses, waivers, bonds, authoriza-
328 tions and privileges which have been issued, made, granted
329 or allowed to become effective pursuant to any prior
330 enactments of this section by the governor, the secretary of
331 the department of commerce, labor and environmental
332 resources, the director of the division of natural resources,
333 the whitewater advisory board or by a court of competent
334 jurisdiction, and which are in effect on the effective date
335 of this section, shall continue in effect according to their
336 terms until modified, terminated, superseded, set aside or
337 revoked by the governor, secretary, director or commission
338 pursuant to this section, by a court of competent jurisdic-
339 tion, or by operation of law.

§20-2-23e. Implementation of allocation methodology.

1 Other provisions of this article notwithstanding, the
2 implementation of an allocation methodology for the
3 nonmoratorium whitewater zones of the New, Gauley,
4 Cheat, Shenandoah and Tygart rivers, shall be made
5 based upon criteria identified in existing or future studies
6 of carrying capacity, the overall economic impact on the
7 state and the safety of the general public as identified in
8 section twenty-three-a of this article, and shall be imple-
9 mented at such time as the commission deems appropriate,

10 by rules promulgated pursuant to chapter twenty-nine-a
11 of this code. In determining whether to increase or
12 decrease existing use allocations on the portions of the
13 New and Gauley rivers subjected to a moratorium on new
14 licenses by this article, the commission may continue
15 existing studies and undertake new studies of the carrying
16 capacity of whitewater zones, the quality of the rafting
17 experience, the economic impact of raft and the safety of
18 the general public.

CHAPTER 21. LABOR.

ARTICLE 5C. MINIMUM WAGE AND MAXIMUM HOURS STANDARDS FOR EMPLOYEES.

21-5C-1. Definitions.

1 As used in this article:

2 (a) "Commissioner" means the commissioner of labor or
3 his duly authorized representatives.

4 (b) "Wage and hour director" means the wage and hour
5 director appointed by the commissioner of labor as chief
6 of the wage and hour division.

7 (c) "Wage" means compensation due an employee by
8 reason of his employment.

9 (d) "Employ" means to hire or permit to work.

10 (e) "Employer" includes the State of West Virginia, its
11 agencies, departments and all its political subdivisions,
12 any individual, partnership, association, public or private
13 corporation, or any person or group of persons acting
14 directly or indirectly in the interest of any employer in
15 relation to an employee; and who employs during any
16 calendar week six or more employees as herein defined in
17 any one separate, distinct and permanent location or
18 business establishment: *Provided*, That the term "em-
19 ployer" shall not include any individual, partnership,
20 association, corporation, person or group of persons or
21 similar unit if eighty percent of the persons employed by
22 him are subject to any federal act relating to minimum
23 wage, maximum hours and overtime compensation.

24 (f) "Employee" includes any individual employed by an
25 employer but shall not include: (1) Any individual em-
26 ployed by the United States; (2) any individual engaged in
27 the activities of an educational, charitable, religious,
28 fraternal or nonprofit organization where the em-
29 ployer-employee relationship does not in fact exist, or
30 where the services rendered to such organizations are on
31 a voluntary basis; (3) newsboys, shoeshine boys, golf
32 caddies, pinboys and pin chasers in bowling lanes; (4)
33 traveling salesmen and outside salesmen; (5) services
34 performed by an individual in the employ of his parent,
35 son, daughter or spouse; (6) any individual employed in a
36 bona fide professional, executive or administrative
37 capacity; (7) any person whose employment is for the
38 purpose of on-the-job training; (8) any person having a
39 physical or mental handicap so severe as to prevent his
40 employment or employment training in any training or
41 employment facility other than a nonprofit sheltered
42 workshop; (9) any individual employed in a boys or girls
43 summer camp; (10) any person sixty-two years of age or
44 over who receives old-age or survivors benefits from the
45 social security administration; (11) any individual em-
46 ployed in agriculture as the word agriculture is defined in
47 the Fair Labor Standards Act of 1938, as amended; (12)
48 any individual employed as a fire fighter by the state or
49 agency thereof; (13) ushers in theaters; (14) any individual
50 employed on a part-time basis who is a student in any
51 recognized school or college; (15) any individual employed
52 by a local or interurban motorbus carrier; (16) so far as the
53 maximum hours and overtime compensation provisions of
54 this article are concerned, any salesman, parts man or
55 mechanic primarily engaged in selling or servicing auto-
56 mobiles, trailers, trucks, farm implements, aircraft if
57 employed by a nonmanufacturing establishment primarily
58 engaged in the business of selling such vehicles to ultimate
59 purchasers; (17) any employee with respect to whom the
60 United States department of transportation has statutory
61 authority to establish qualifications and maximum hours
62 of service; (18) any person employed on a per diem basis by
63 the Senate, the House of Delegates, or the joint committee
64 on government and finance of the Legislature of West
65 Virginia, other employees of the Senate or House of

66 Delegates designated by the presiding officer thereof, and
67 additional employees of the joint committee on govern-
68 ment and finance designated by such joint committee; or
69 (19) any person employed as a seasonal employee of a
70 commercial whitewater outfitter where the seasonal
71 employee works less than seven months in any one calen-
72 dar year and, in such case, only for the limited purpose of
73 exempting the seasonal employee from the maximum wage
74 provisions of section three of this article.

75 (g) "Workweek" means a regularly recurring period of
76 one hundred sixty-eight hours in the form of seven consec-
77 utive twenty-four hour periods, need not coincide with the
78 calendar week, and may begin any day of the calendar
79 week and any hour of the day.

80 (h) "Hours worked", in determining for the purposes of
81 sections two and three of this article, the hours for which
82 an employee is employed, there shall be excluded any time
83 spent in changing clothes or washing at the beginning or
84 end of each workday, time spent in walking, riding or
85 traveling to and from the actual place of performance of
86 the principal activity or activities which such employee is
87 employed to perform and activities which are preliminary
88 to or postliminary to said principal activity or activities,
89 subject to such exceptions as the commissioner may by
90 rules and regulations define.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



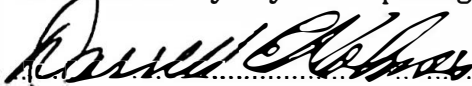
Chairman Senate Committee



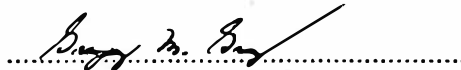
Chairman House Committee

Originating in the Senate.

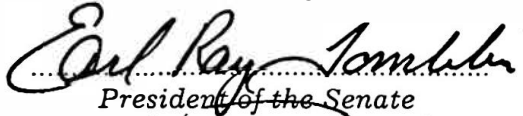
In effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates



President of the Senate



Speaker House of Delegates

The within approved this the 2nd
Day of April, 1999



Governor

PRESENTED TO THE

GOVERNOR

Date 3/30/99

Time 10:52am