WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1999

ENROLLED

SENATE BILL NO. 572

(By Senator WOOTEN, GT 12)

PASSED March 14, 1999
In Effect NINETY DAYS FROM PASSAGE
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.

(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 represent-
ing 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 por-
tions 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 the first day of July, one thousand nine hundred
ninety-nine, 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 opera-
tions; (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 conflu-
ence 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 the
second day of May, one thousand nine hundred ninety-
two. The commission shall implement allocation method-
oologies for other rivers as the commission, after appropri-
ate study, may deem necessary with all such allocation
methodologies implemented by rules promulgated pursu-
ant to chapter twenty-nine-a of this code;

(7) To determine administrative policies relating to
regulation of the whitewater industry 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 govern-
mental agencies related to whitewater studies or regula-
tion, 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 white-
water 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 follow-
ing 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 five hundred dollars 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 five hundred dollars 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 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 the second day of May, one
thousand nine hundred ninety-two, 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 morato-
rium portions of the New and Gauley rivers subject only to
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 four and five 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 li-
censee 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 pro-rata 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 four and five 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 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 river 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.

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

Other provisions of this article notwithstanding, the implementation of an allocation methodology for the nonmoratorium whitewater zones of the New, Gauley, Cheat, Shenandoah and Tygart rivers, shall be made based upon criteria identified in existing or future studies of carrying capacity, the overall economic impact on the state and the safety of the general public as identified in section twenty-three-a of this article, and shall be implemented at such time as the commission deems appropriate,
by rules promulgated pursuant to chapter twenty-nine-a of this code. In determining whether to increase or decrease existing use allocations on the portions of the New and Gauley rivers subjected to a moratorium on new licenses by this article, the commission may continue existing studies and undertake new studies of the carrying capacity of whitewater zones, the quality of the rafting experience, the economic impact of raft and the safety of the general public.

CHAPTER 21. LABOR.

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

21-5C-1. Definitions.

As used in this article:

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

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

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

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

(e) "Employer" includes the State of West Virginia, its agencies, departments and all its political subdivisions, any individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee; and who employs during any calendar week six or more employees as herein defined in any one separate, distinct and permanent location or business establishment: Provided, That the term "employer" shall not include any individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent of the persons employed by him are subject to any federal act relating to minimum wage, maximum hours and overtime compensation.
(f) "Employee" includes any individual employed by an employer but shall not include: (1) Any individual employed by the United States; (2) any individual engaged in the activities of an educational, charitable, religious, fraternal or nonprofit organization where the employer-employee relationship does not in fact exist, or where the services rendered to such organizations are on a voluntary basis; (3) newsboys, shoeshine boys, golf caddies, pinboys and pin chasers in bowling lanes; (4) traveling salesmen and outside salesmen; (5) services performed by an individual in the employ of his parent, son, daughter or spouse; (6) any individual employed in a bona fide professional, executive or administrative capacity; (7) any person whose employment is for the purpose of on-the-job training; (8) any person having a physical or mental handicap so severe as to prevent his employment or employment training in any training or employment facility other than a nonprofit sheltered workshop; (9) any individual employed in a boys or girls summer camp; (10) any person sixty-two years of age or over who receives old-age or survivors benefits from the social security administration; (11) any individual employed in agriculture as the word agriculture is defined in the Fair Labor Standards Act of 1938, as amended; (12) any individual employed as a fire fighter by the state or agency thereof; (13) ushers in theaters; (14) any individual employed on a part-time basis who is a student in any recognized school or college; (15) any individual employed by a local or interurban motorbus carrier; (16) so far as the maximum hours and overtime compensation provisions of this article are concerned, any salesman, parts man or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; (17) any employee with respect to whom the United States department of transportation has statutory authority to establish qualifications and maximum hours of service; (18) any person employed on a per diem basis by the Senate, the House of Delegates, or the joint committee on government and finance of the Legislature of West Virginia, other employees of the Senate or House of
Delegates designated by the presiding officer thereof, and additional employees of the joint committee on government and finance designated by such joint committee; or (19) any person employed as a seasonal employee of a commercial whitewater outfitter where the seasonal employee works less than seven months in any one calendar year and, in such case, only for the limited purpose of exempting the seasonal employee from the maximum wage provisions of section three of this article.

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

(h) "Hours worked", in determining for the purposes of sections two and three of this article, the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday, time spent in walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform and activities which are preliminary to or postliminary to said principal activity or activities, subject to such exceptions as the commissioner may by 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 3rd Day of... 1999

Governor