

## **Performance Audit**

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### **Whitewater Commission**

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**The Whitewater Commission Should Review Rafting Injuries During Quarterly Meetings in an Effort to Promote the Outcome of Keeping West Virginia's Commercial Whitewater Rafting a Safe Activity**

**The Whitewater Officer Spends a Limited Amount of Time Enforcing Whitewater Code, While the Commission Consistently Spends the Majority of Its Budget to Pay the Whitewater Officer's Full Salary and Benefits**

**The Commission Should Stop the Practice of Proxy Voting**



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Director

September 11, 2007

The Honorable Edwin J. Bowman  
State Senate  
129 West Circle Drive  
Weirton, West Virginia 26062

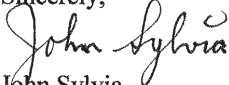
The Honorable Jim Morgan  
House of Delegates  
Building 1, Room E-213  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to West Virginia Code §4-2-5, we are transmitting a Performance Audit of the *Whitewater Commission*, which will be presented to the Joint Committee on Government Operations and Joint Committee on Government Organization on Tuesday, September 11, 2007. The issues covered herein are "*The Whitewater Commission Should Review Rafting Injuries During Quarterly Meetings in an Effort to Promote the Outcome of Keeping West Virginia's Commercial Whitewater Rafting a Safe Activity*," "*The Whitewater Officer Spends a Limited Amount of Time Enforcing Whitewater Code, While the Commission Consistently Spends the Majority of Its Budget to Pay the Whitewater Officer's Full Salary and Benefits*," and "*The Commission Should Stop the Practice of Proxy Voting*."

We transmitted a draft copy of the report to the Whitewater Commission and the Division of Natural Resources on August 2, 2007. We held an exit conference with the Division of Natural Resources on August 14, 2007. We received the agency response from the Whitewater Commission on August 30, 2007 and a response from the Division of Natural Resources on August 29, 2007.

Let me know if you have any questions.

Sincerely,  
  
John Sylvia

JS/tlc

*Joint Committee on Government and Finance*



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# Executive Summary

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## **Issue 1: The Whitewater Commission Should Review Rafting Injuries During Quarterly Meetings in an Effort to Promote the Outcome of Keeping West Virginia's Commercial Whitewater Rafting a Safe Activity.**

During the course of the Legislative Auditor's review of the Whitewater Commission it was noted that from CY 2002-2006, the Commission has failed to

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*The Legislative Auditor reviewed the Commission's meeting minutes from CY 2002 to CY 2006 and found no discussion concerning injuries or fatalities.*

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- discuss injuries or fatalities that have occurred on the rivers during its quarterly meetings, and
- keep the public informed with updated information that can be used to determine the Commission's activities.

The Legislative Auditor reviewed the Commission's meeting minutes from CY 2002 to CY 2006 and found no discussion concerning injuries or fatalities, despite the fact that West Virginia ranks fifth nationally with the highest number of total fatalities during the time period of 2002 to 2006. Injury statistics for the past five calendar years show that for every 2,981 people who go on a commercial whitewater rafting trip in West Virginia, one injury occurs. Although there are no mandates in West Virginia Code requiring the Commission to review injury forms, the quarterly review of injuries is the natural step, given that safety is a major concern for the Commission as well as the commercial whitewater industry.

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*The Commission's website shows that annual injury statistics have not been updated since FY 2002.*

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The Commission's website shows that annual injury statistics have not been updated since FY 2002, which was the last time the annual injury report was produced. Quarterly meeting minutes have not been updated since June 2003. The Whitewater Commission should annually update the content of its website to better inform the public.

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*Over the past five fiscal years, the Commission has spent an average of 81 percent of its annual budget to pay the full salary and benefits of a whitewater officer whose time spent enforcing whitewater code has dramatically decreased.*

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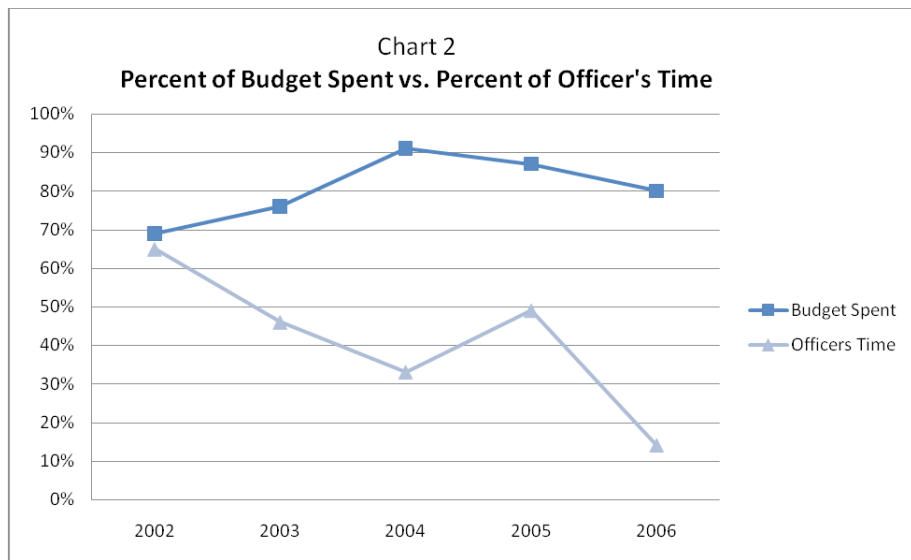
## **Issue 2: The Whitewater Officer Spends a Limited Amount of Time Enforcing Whitewater Code, While the Commission Consistently Spends the Majority of Its Budget to Pay the Whitewater Officer's Full Salary and Benefits.**

The whitewater enforcement officer is a position created specifically to enforce the whitewater code. This employee is a certified officer with the Division of Natural Resources permanently assigned to work with the Whitewater Commission. Over the past five fiscal years, the Commission has spent an average of 81 percent of its annual budget to pay the full salary and benefits of a whitewater officer whose time spent enforcing whitewater code has dramatically decreased.

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*Although permanently assigned to work with the Whitewater Commission, the whitewater officer does not submit an activity report to the Whitewater Commission.*

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Although permanently assigned to work with the Whitewater Commission, the whitewater officer does not submit an activity report to the Whitewater Commission. The whitewater officer submits activity reports only to the DNR law enforcement section. The Commission should also be receiving documentation that the officer is responding to and investigating reports of accidents and injuries in addition to other types of enforcement.

### **Issue 3: The Commission Should Stop the Practice of Proxy Voting.**

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*On at least four different occasions between the years 2002 and 2004 the Legislative Auditor found documents that show some Whitewater Commission members practiced proxy voting.*

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While reviewing the Commission's Quarterly Meeting Minutes, the Legislative Auditor noticed documents that referred to proxy voting. Upon review, it became apparent that some Whitewater Commission members have practiced what is known as proxy voting.

On at least four different occasions between the years 2002 and 2004 the Legislative Auditor found documents that show some Whitewater Commission members practiced proxy voting. The Legislative Auditor requested and received a legal opinion from the Legislative Services legal counsel regarding the practice of proxy voting as it applies to a state government commission. The Legislative Services legal counsel informed the Legislative Auditor that the practice of using proxy votes by non-ex officio Whitewater Commission members is an improper delegation of their duties. The Ethics Commission also provided its interpretation of proxy voting, stating there is no provision in the Open Meetings Act that



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governs the use of a written proxy vote. Whitewater Commission members should discontinue the practice of proxy voting by non-ex officio members.

## **Recommendations**

1. *The Legislative Auditor recommends that the Legislature continue the West Virginia Whitewater Commission.*
2. *The Legislative Auditor recommends that the Legislature amend the West Virginia Code to require the Whitewater Commission to produce an annual report detailing injury and fatality statistics, consumer statistics, river use and river condition statistics as well as any additional information determined useful to the Commission and the public.*
3. *The Legislative Auditor recommends that the Legislature amend the West Virginia Code to require the Whitewater Commission to conduct a formal review of fatality reports during quarterly meetings for the purpose of determining the facts, conditions, and circumstances relating to the incident and the probable cause thereof. These results should then be used to determine measures that may prevent similar incidents in the future.*
4. *The Whitewater Commission should update its website to improve the public's knowledge of the Commission's activities.*
5. *The Commission should require the Whitewater Officer to submit quarterly reports regarding his or her daily, weekly and/or monthly activities as they relate to the enforcement and administration of whitewater code.*
6. *The Whitewater Commission should only reimburse the DNR for the true amount of time spent on whitewater-related activities.*
7. *The Commission should discontinue the use of proxy voting by non-ex officio commission members.*



# Review Objective, Scope and Methodology

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This performance review of the Whitewater Commission was authorized by West Virginia Code §4-2-5.

## Objective

While conducting this review, the Legislative Auditor looked at the following criteria in order to evaluate the performance of the Whitewater Commission.

- Is the agency created to solve a problem or provide a service?
- Has the problem been solved or the service been provided?
- To what extent have past agency activities and accomplishments, current projects and operations, and planned activities and goals for the future been effective?
- Would there be significant and discernible adverse effects on the public health, safety, or welfare if the agency were abolished?
- Does the agency operate in a sound fiscal manner?

## Scope

This review covers the time period of fiscal and calendar years 2002 through 2006.

## Methodology

Information about the Whitewater Commission was obtained through interviews with law enforcement, legal, and administrative personnel of the Division of Natural Resources. The Legislative Auditor examined the Commission's meeting minutes; analyzed injury reports and budget information; and reviewed the Whitewater Officer's monthly work reports. Additional resources consulted during the review process include the Ethics Commission and Legislative Services legal counsel. All aspects of this review comply with **Generally Accepted Government Auditing Standards (GAGAS)**.



# Issue 1

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## **The Whitewater Commission Should Review Rafting Injuries During Quarterly Meetings in an Effort to Promote the Outcome of Keeping West Virginia’s Commercial Whitewater Rafting a Safe Activity.**

### **Issue Summary**

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*The Commission was established for the purpose of assisting the director of DNR in regulating, studying and investigating the whitewater industry to protect the public and allow for the enjoyment of the natural beauty of the state.*

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In 1992, the Legislature created the Whitewater Commission within the Division of Natural Resources (DNR) to replace the Whitewater Advisory Council. The Commission was established for the purpose of assisting the director of DNR in regulating, studying and investigating the whitewater industry to protect the public and allow for the enjoyment of the natural beauty of the state. There have been safeguards established and enforced by the Commission that were designed to keep commercial whitewater rafting safe. During the course of the review however, the Legislative Auditor noted that from CY 2002-2006, the Commission has not discussed injuries or fatalities that have occurred on the rivers during its quarterly meetings. In addition, the Commission is not keeping the public informed with updated information that can be used to determine the Commission’s activities.

## **The Whitewater Commission Has Not Consistently Compiled Injury Reports and Does Not Review Injury Reports During Quarterly Meetings**

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*The Commission has not discussed injuries or fatalities that have occurred on the rivers during its quarterly meetings.*

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The Whitewater Commission has established several key rules and regulations to improve the safety of commercial whitewater rafting. One example is the requirement that outfitters use a standardized injury form to document each accident. This standardized form was adopted in 2002 after recommendations in a previous PERD report. The form allows the Commission to capture the following information:

- identification of Outfitter;
- date, time and location of injury;
- injured person’s pertinent information;
- weather and river conditions;
- thorough description of injury;
- witness and trip/guide statements;
- action taken by Outfitter; and
- required treatment.

This information is supposed to allow for an accurate and consis-

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tent evaluation of injuries that occur on the rivers. Injury report forms are required to be filed with the Commission's director within 15 days of the accident. Detailed information on these injuries provides the Commission a means to analyze the cause of individual injuries and deaths and determine the need for additional regulations or needed discipline for outfitters.

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*The Commission does not receive a quarterly compilation of the number of injuries, or a description from the staff.*

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Although this information is required to be submitted to the Whitewater Commission, there is no record of the Commission reviewing this information. The Legislative Auditor reviewed the Commission's meeting minutes from CY 2002 to CY 2006 and found no discussion concerning injuries or fatalities. In addition, the Commission does not receive a quarterly compilation of the number of injuries, or a description from the staff. In 2002, when the Legislative Auditor recommended to the Commission that a standardized injury form be utilized, the purpose was to create a means for the Commission to compile the information and utilize it in an effort to improve safety. Nothing in West Virginia Code requires the Commission to review the forms, but the quarterly review of injuries is the natural step, given that safety is a major concern for the Commission as well as the commercial white water industry.

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*At one time, these injury statistics were compiled and published by the Commission in the form of an Annual Injury Report. However, 2002 was the last year the Commission compiled these injury statistics.*

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At one time, these injury statistics were compiled and published by the Commission in the form of an Annual Injury Report. However, 2002 was the last year the Commission compiled these injury statistics. Compilation of information captured by the standardized injury form can be a valuable tool for the Commission to utilize. Past annual injury reports have provided the Commission with the following information:

- number of injuries, percent of injuries and percent of river use by licensed outfitter;
- injuries by designated whitewater zone;
- incidence rates; and
- injuries by type of injury, injured body part and professional care required.

These injury statistics are a measure of an important outcome for the Whitewater Commission.

## **West Virginia Ranks Fifth Nationally With the Highest Number of Total Fatalities During the Period of 2002 to 2006**

According to the American Whitewater Organization, West Virginia

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*West Virginia ranks fifth nationally with the highest number of total fatalities from 2002 to 2006.*

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ranks fifth nationally with the highest number of total fatalities from 2002 to 2006.<sup>1</sup> Three of the fatalities in West Virginia occurred during commercial whitewater rafting trips regulated by the Whitewater Commission. Table 1 documents the fatalities for West Virginia and the surrounding states.

**Table 1**  
**Commercial and Non-Commercial Fatalities in Neighboring States**  
**CY 2002-2006**

State	2002	2003	2004	2005	2006	Total
Kentucky	1	0	0	0	0	1
Ohio	2	7	1	0	1	11
Pennsylvania	1	3	3	0	0	7
Virginia	0	1	3	1	3	8
West Virginia	2	4	2	3	5	14

*Source: American Whitewater Organization*

*Injury statistics for the past five calendar years show that for every 2,981 people who go on a commercial whitewater rafting trip in West Virginia, one injury occurs.*

Injury statistics for the past five calendar years show that for every 2,981 people who go on a commercial whitewater rafting trip in West Virginia, one injury occurs. Table 2 documents injury rates from 2002 through 2007.

**Table 2**  
**Injuries per Number of Rafters CY 2002-2006**

Year	Injuries	Rafters	Injuries per Rafters
2002	88	222,427	1 per 2,528
2003	92	223,744	1 per 2,432
2004	90	211,637	1 per 2,352
2005	71	210,940	1 per 2,971
*2006	18	201,358	1 per 11,187
*2007	16	**102,569	N/A

*Source: The West Virginia Whitewater Commission*

*\*In 2006, Outfitters began filing reports only on injuries that required medical services at an established medical facility. In previous years, outfitters filed an injury report for all customer injuries, regardless of whether the customer sought additional medical care or not.*

*\*\*CY2007 is a partial year ending August 24th.*

<sup>1</sup>Appendix B lists the fatalities from every state in the nation for the last five years.

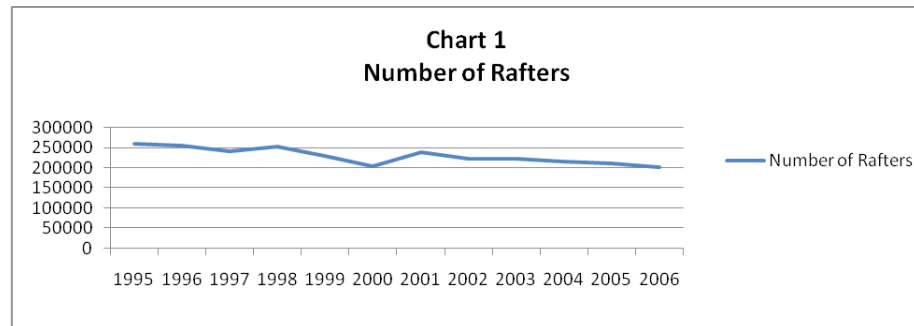
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## The Commission Should Continually Update Public Information

*The Commission's website shows that annual injury statistics have not been updated since FY 2002, which was the last time the annual injury report was produced.*

A review of the Commission's computer website indicates that the Commission members may not be regularly reviewing the information they are providing to the public. The Commission's website shows that annual injury statistics have not been updated since FY 2002, which was the last time the annual injury report was produced. **Quarterly meeting minutes have not been updated since June 2003.** Other boards and commissions use websites to keep the public aware of its activities. Potential customers tend to utilize the internet as a tool to form an opinion of a potential destination. As noted in the chart below, there has been a downward trend in the number of rafters since 1995. Since 2003 the number of commercial whitewater rafters in the state has declined by 22,386 individuals.

*If potential customers review the outdated website they may be inclined to go whitewater rafting in another state.*



If potential customers review the outdated website they may be inclined to go whitewater rafting in another state. As noted in Table 2, the percentage of rafters receiving an injury while on the river is low. Publishing current injury statistics should document the safety of the industry in the state, thus serving as an industry promotion. The Whitewater Commission should annually update the content of its website to better inform the public, which may help to increase the number of rafters coming to West Virginia.

*The Legislative Auditor finds the Whitewater Commission does not review and analyze the circumstances involved in all injuries and fatalities during quarterly meetings.*

## Conclusion

Since its creation, the Whitewater Commission has met its mandate of establishing safeguards and regulations for commercial whitewater rafting. However, the Legislative Auditor finds the Whitewater Commission does not review and analyze the circumstances involved in all injuries and fatalities during quarterly meetings. By not discussing injuries and fatali-



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ties during its quarterly meetings, the Commission is missing an opportunity to determine underlying causes of injuries and fatalities. That could ultimately make commercial whitewater rafting a safer form of outdoor recreation in the state. In addition, the Whitewater Commission needs to ensure the public has access to accurate, up to date information regarding the industry and its activities in order to assist in the promotion of the industry.

### **Recommendations:**

1. *The Legislative Auditor recommends that the Legislature continue the West Virginia Whitewater Commission.*
2. *The Legislative Auditor recommends that the Legislature amend the West Virginia Code to require the Whitewater Commission to produce an annual report detailing injury and fatality statistics, consumer statistics, river use and river condition statistics as well as any additional information determined useful to the Commission and the public.*
3. *The Legislative Auditor recommends that the Legislature amend the West Virginia Code to require the Whitewater Commission to conduct a formal review of fatality reports during quarterly meetings for the purpose of determining the facts, conditions, and circumstances relating to the incident and the probable cause thereof. These results should then be used to determine measures that may prevent similar incidents in the future.*
4. *The Whitewater Commission should update its website to improve the public's knowledge of the Commission's activities.*



# Issue 2

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## **The Whitewater Officer Spends a Limited Amount of Time Enforcing Whitewater Code, While the Commission Consistently Spends the Majority of Its Budget to Pay the Whitewater Officer's Full Salary and Benefits.**

### **Issue Summary**

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*Over the past five fiscal years, the Commission has spent an average of 81 percent of its annual budget to pay the full salary and benefits of a whitewater officer whose time spent enforcing whitewater code has dramatically decreased.*

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The whitewater enforcement officer is a position created specifically to enforce the whitewater code. This employee is a certified officer with the DNR permanently assigned to work with the Whitewater Commission. The Legislative Auditor observed a disparity in the percentage of the Whitewater Commission's budget expended to pay the salary and benefits of the whitewater officer, compared to the amount of time the whitewater officer spent enforcing whitewater related code. The Commission does not receive quarterly reports from the whitewater officer detailing activities. Over the past five fiscal years, the Commission has spent an average of 81 percent of its annual budget to pay the full salary and benefits of a whitewater officer whose time spent enforcing whitewater code has dramatically decreased. The Commission should only reimburse the DNR for the true amount of time the enforcement officer spends on whitewater related activities. If the Commission only reimbursed the DNR for the true amount of time the enforcement officer spent on whitewater related issues, additional money could be spent on advertising, which may help to alleviate the 20 percent decline in customers the industry has seen in the past 10 years.

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*The whitewater officer's monthly reports to DNR law enforcement from FY 2002 through FY 2006 show a steady decline in the amount of time the whitewater officer spent on whitewater issues.*

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### **The Whitewater Officer Spends a Limited Amount of Time on Whitewater Issues**

According to the Commission, the whitewater officer's job description is as follows:

*Under limited supervision, the employee shall be responsible for the enforcement of Chapter 20, Article 3B, Code of West Virginia and Series 1, Commercial Whitewater Outfitters Legislative Rules.*

The Legislative Auditor noted a disparity in the percentage of the Whitewater Commission's budget to pay the salary and benefits of the whitewater officer compared to the amount of time the whitewater officer spent enforcing whitewater-related code. The whitewater officer's monthly reports to DNR law enforcement from FY 2002 through FY 2006 show a steady decline in the amount of

time the whitewater officer spent on whitewater issues. This decline is documented by the Legislative Auditor in Table 3 and Chart 2.

<b>Fiscal Year</b>	<b>Total Hours Worked</b>	<b>Total Hours Spent on Whitewater Issues</b>	<b>Total Hours Spent on Non-Whitewater Issues</b>	<b>*Salary Earned for Whitewater Hours</b>	<b>*Salary Earned for Non-Whitewater Hours</b>
<b>2002</b>	1,900	1,234	666	\$35,848	\$19,347
<b>2003</b>	1,764	816	948	\$28,454	\$33,056
<b>2004</b>	1,785	590	1,195	\$22,226	\$45,016
<b>2005</b>	**2699	**1313	1,368	\$20,231	\$53,007
<b>2006</b>	1,748	248	1,500	\$11,316	\$68,442

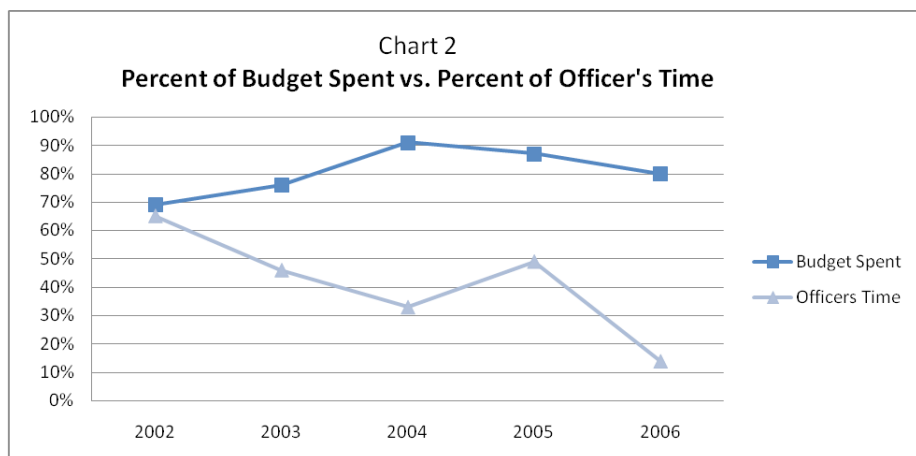
*Source: The Whitewater Commission*

*\*The Whitewater Officer's budgeted annual salary plus benefits were used to tabulate the totals.*

*\*\*During CY 2005 there was a nine month period where the current whitewater officer was training his replacement. However, the officer in training suffered an injury and was unable to proceed to his new assignment as the Whitewater Officer.*

*A review of budget amounts spent shows that in FY 2002 the Commission spent 69 percent of its budget on the whitewater officer. This amount surged to 91 percent of the Commission's budget being spent on the whitewater officer in FY 2004.*

The Commission is consistently spending the majority of its budget solely on the whitewater officer's salary/benefits. A review of budget amounts spent shows that in FY 2002 the Commission spent 69 percent of its budget on the whitewater officer. This amount surged to 91 percent of the Commission's budget being spent on the whitewater officer in FY 2004. In FY 2006, 80 percent of the Commission's budget went toward the whitewater officer. Since FY 2002, the Commission has spent an average of 81 percent of its annual budget on the whitewater officer's salary and benefits.



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The whitewater officer's monthly work reports submitted to DNR law enforcement during FY 2002 through FY 2006 show the officer to be working in many areas throughout the state that are not designated white-water zones and addressing multiple DNR issues, such as: logistics for fish and wildlife, licensing and inspections on private boats, enforcement at special events, personnel management, operational firearms training and report preparation related to fish and wildlife enforcement. Although permanently assigned to work with the Whitewater Commission, the whitewater officer does not submit an activity report to the Whitewater Commission. The whitewater officer submits activity reports only to the DNR law enforcement section. The Commission should also be receiving documentation that the officer is responding to and investigating reports of accidents and injuries in addition to other types of enforcement. The whitewater officer is also responsible for enforcing outfitter licensing, daily river use limits, minimum safety requirements for equipment, standards for the size of rafts and the number of persons transported in one raft, and the qualifications of commercial whitewater guides.

*Although permanently assigned to work with the Whitewater Commission, the whitewater officer does not submit an activity report to the Whitewater Commission.*

**In order to document the whitewater officer's time spent on whitewater issues in the future, the Legislative Auditor recommends that the Commission require the whitewater officer to submit quarterly reports.** This report would allow the Commission to review the officer's activities and determine any areas that need additional focus and attention. **The Whitewater Commission should also only reimburse the DNR for the true amount of time spent on whitewater related activities.**

*The amount being paid towards the whitewater officer should be commensurate with the amount of time the officer spends enforcing the whitewater code.*

## **Conclusion**

The Legislative Auditor recognizes that there are occasions when the DNR provides additional officers, other than the whitewater officer, to administer and enforce whitewater code. However, considering the limited amount of time the whitewater officer spent administering and enforcing whitewater code over the scope of this review, there is an appearance that the Whitewater Commission is subsidizing a DNR officer's salary and benefits. This circumstance creates the impression that the Commission is failing to make the best use of its resources. The amount being paid towards the whitewater officer should be commensurate with the amount of time the officer spends enforcing the whitewater code.

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## **Recommendations:**

5. *The Commission should require the Whitewater Officer to submit quarterly reports regarding his or her daily, weekly and/or monthly activities as they relate to the enforcement and administration of whitewater code.*
6. *The Whitewater Commission should only reimburse the DNR for the true amount of time spent on whitewater-related activities.*

# Issue 3

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## The Commission Should Stop the Practice of Proxy Voting.

### Issue Summary

While reviewing the Commission's Quarterly Meeting Minutes, the Legislative Auditor noticed documents that referred to proxy voting.<sup>2</sup> Upon review, it became apparent that some Whitewater Commission members have practiced what is known as proxy voting.

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*Upon review, it became apparent that some Whitewater Commission members have practiced what is known as proxy voting.*

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The Legislative Auditor requested and received a legal opinion from the Legislative Services legal counsel regarding the practice of proxy voting as it applies to a state government commission. The Legislative Services legal counsel determined that there is no statutory or legislative rule that authorizes Whitewater Commission members to assign their vote to another member as a proxy vote in their absence.

### Commission's Practice of Proxy Voting

While reviewing the Commission's Quarterly Meeting Minutes, the Legislative Auditor found four documents, two documents from the year 2002 and two documents from the year 2004, showing that some Whitewater Commission members practiced proxy voting. Commission members who knew in advance that they were going to be absent from a quarterly commission meeting would advise the Commission's administrative assistant via a facsimile that they would be absent. The commission member(s) who had to be absent from the scheduled Whitewater Commission meeting would state that the person assigns his or her *proxy* to another member for the Whitewater Commission meeting scheduled on a particular date and then sign the document. The Legislative Auditor requested and received a legal opinion from the Legislative Services legal counsel regarding the practice of proxy voting as it applies to a state government commission.

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*There is no statutory or legislative rule that authorizes Whitewater Commission members to assign their vote to another member as a proxy vote in their absence.*

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The legal opinion rendered by Legislative Services legal counsel stated:

*... no statutory or legislative rule authority that authorizes members of boards and commission generally, or members of the Whitewater Commission specifically, to assign their*

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<sup>2</sup>Merriam-Webster's Dictionary of Law © 1996 defines proxy as: "1. the act or practice of a person serving as an authorized agent or substitute for another. 2. authority or power to act for another."

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*A proxy vote involves an authorization to vote in place of another person.*

*vote to another member as a “proxy” vote when the member does not attend the meeting. While there are numerous statutory references that permit ex officio board members (i.e., government officials who serve on the basis of their governmental position or title) to designate a subordinate to attend meetings on their behalf, and while W. Va. Code §20-2-23a expressly permits the ex officio members on the Whitewater Commission (i.e., the DNR Director, etc.) to name a designee - there is no provision that I am aware of that authorizes non-ex officio commission or board members to assign their vote to another member as a “proxy” vote. The non-ex officio members of the Whitewater Commission are public officials appointed to the commission by the Governor. Their practice of using “proxy” votes appears to be an improper delegation of their duties in the absence of express authority to do so.*

### **In 2002 the West Virginia Ethics Commission Ruled Against Proxy Voting**

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*There is no provision in the Open Meetings Act that governs attendance by a written proxy.*

The Legislative Auditor requested from the West Virginia Ethics Commission its opinion on proxy voting. The Ethics Commission responded by forwarding an opinion issued on October 3, 2002 to the Greenbrier Valley Economic Development Corporation (GVEDC). The GVEDC had asked for guidance on proxy voting. Its corporation’s by-laws provided that each member could vote in person or by proxy. The GVEDC had asked if reading proxy voting forms complies with the Open Meetings Act or if there was another way to accommodate absentee voting.

The Ethics Commission’s opinion was that according to WV Code §6-9A-8(b):

*A public agency may not vote by secret or written ballot.*

A proxy vote involves an authorization to vote in place of another person. The proxy vote contains directions on how to vote for or against an issue by a written ballot. The code specifically prohibits voting by a written ballot. The Ethics Commission also indicated that there is no provision in the Open Meetings Act that governs attendance by a written proxy and that the GVEDC did not have authority to determine who could vote in place of the missing member. Therefore, according to the Ethics Commission



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there is no provision in the Open Meetings Act that governs the use of a written proxy vote. The Legislative Services legal counsel and the Ethics Commission have both informed the Legislative Auditor that the practice of using proxy votes by a non-ex officio commission member is improper.

## **Conclusion**

Whitewater Commission members have, on at least four occasions, designated a substitute to attend a Commission meeting and cast a vote on their behalf. The Legislative Services legal counsel has informed the Legislative Auditor that the practice of using proxy votes by non-ex officio Whitewater Commission members is an improper delegation of their duties. The Ethics Commission also provided its interpretation of proxy voting. The Ethics Commission responded by forwarding an opinion issued on October 3, 2002 to the Greenbrier Valley Economic Development Corporation (GVEDC). The Ethics Commission's opinion was that there is no provision in the Open Meetings Act that governs the use of a written proxy vote. Whitewater Commission members should discontinue the use of proxy voting by non-ex officio members.

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*The Legislative Services legal counsel and the Ethics Commission have both informed the Legislative Auditor that the practice of using proxy votes by a non-ex officio commission member is improper.*

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## **Recommendation:**

7. *The Commission should discontinue the use of proxy voting by non-ex officio commission members.*



# Appendix A: Transmittal Letter

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## WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0610  
(304) 347-4890  
(304) 347-4939 FAX



John Sylva  
Director

August 2, 2007

Frank Jezioro, Director  
Division of Natural Resources  
Building 3, Room 669  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0660

Dear Director Jezioro:

This is to transmit a draft copy of the Preliminary Performance Review of the Whitewater Commission. This report is scheduled to be presented during the September interim meeting of the Joint Committee on Government Operations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have.

We would like to schedule an exit conference with you at your convenience no later than Thursday, August 16, 2007, to discuss any concerns you may have with the report. Please contact Beverly Gaudet to set up a meeting time and location. We need your written response by noon on August 29, 2007, in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Thursday, September 6, 2007 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Midkiff".

Michael Midkiff  
Research Manager

Enclosure

\_\_\_\_\_ *Joint Committee on Government and Finance* \_\_\_\_\_



## Appendix B: Whitewater Fatalities by States 2002-2006

American Whitewater Database of Fatalities 2002-2006						
State	2002	2003	2004	2005	2006	Total
Alabama	0	1	0	0	1	2
Alaska	0	0	3	1	1	5
Arizona	0	0	2	0	0	2
Arkansas	0	0	0	1	1	2
California	3	7	2	5	4	21
Colorado	2	3	1	5	8	22
Connecticut	0	0	1	0	1	2
Delaware	0	0	0	0	0	0
District of Columbia	0	0	0	0	0	0
Florida	0	0	0	0	0	0
Georgia	0	2	1	0	1	4
Hawaii	0	0	0	0	1	1
Idaho	2	2	2	0	3	9
Illinois	0	1	0	0	1	2
Indiana	0	0	0	0	0	0
Iowa	0	0	0	0	0	0
Kansas	0	0	1	0	0	0
Kentucky	1	0	0	0	0	1
Louisiana	0	0	0	0	0	0
Maine	0	0	1	3	0	4
Maryland	0	1	1	0	0	2
Mass.	0	0	0	0	0	0
Michigan	0	2	0	0	0	2
Minnesota	1	0	1	1	0	3
Miss.	0	0	0	0	0	0
Missouri	1	0	0	0	0	1
Montana	4	0	1	1	2	8
Nebraska	0	0	0	0	0	0

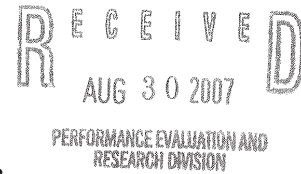
Nevada	0	0	0	0	0	0
New Hampshire	0	2	0	1	1	4
New Jersey	0	1	0	0	2	3
New York	6	4	5	1	2	18
North Carolina	0	3	3	1	1	8
North Dakota	0	0	0	0	0	0
Ohio	2	7	1	0	1	11
Oklahoma	0	0	0	0	0	0
Oregon	3	2	2	4	9	20
Pennsylvania	1	3	3	0	0	7
Rhode Island	0	0	0	0	0	0
South Carolina	0	0	0	1	0	1
South Dakota	0	0	0	0	0	0
Tennessee	2	2	1	1	0	6
Texas	2	0	1	0	0	3
Utah	0	0	0	0	2	2
Vermont	0	0	0	0	1	1
Virginia	0	1	3	1	3	8
Washington	1	5	2	1	5	14
West Virginia	2	4	2	3	3	14
Wisconsin	0	0	1	0	1	2
Wyoming	0	1	1	1	2	5

*Source: American Whitewater Organization*

# Appendix C: Agency Responses

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**West Virginia Whitewater Commission  
Response to Comments from the  
West Virginia Legislature  
Performance Evaluation and Research Division's  
August 2, 2007 Draft Copy of the Preliminary Performance Review of the  
Whitewater Commission.**



August 24, 2007.

**Issue 1: The Whitewater Commission Should Review Rafting Injuries During Quarterly Meetings in an Effort to Promote the Outcome of Keeping West Virginia's Commercial Whitewater Rafting a Safe Activity.**

Recommendations:

1. The Legislative Auditor recommends that the Legislature continue the West Virginia Whitewater Commission.  
*Response: Comment Noted*
  
2. The Legislative Auditor recommends that the Legislature amend the West Virginia Code to require the Whitewater Commission to produce an annual report detailing injury and fatality statistics, consumer statistics, river use and river condition statistics as well as any additional information determined useful to the Commission and the public.  
*Response: This information is already collected by the WVDNR via trip leader reports, monthly use reports and accident reports. The Commission will form a subcommittee to further research this recommendation.*
  
3. The Legislative Auditor recommends that the Legislature amend the West Virginia Code to require the Whitewater Commission to conduct a formal review of fatality reports during quarterly meetings for the purpose of determining the facts, conditions, and circumstances relating to the incident and the probable cause thereof. These results should then be used to determine measures that may prevent similar incidents in the future.  
*Response: The Commission will form a subcommittee to further research this recommendation.*
  
4. The Whitewater Commission should update its website to improve the public's knowledge of the Commission's activities.  
*Response: The Commission will work with the WVDNR to bring the website up to date and keep it current.*

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**Issue 2: The Whitewater Officer Spends a Limited Amount of Time Enforcing Whitewater Code, While the Commission Consistently Spends the Majority of Its Budget to pay the Whitewater Officer's Full Salary and Benefits.**

Recommendations:

1. The Commission should require the Whitewater Officer to submit quarterly reports regarding his or her daily, weekly, and/or monthly activities as they relate to the enforcement and administration of whitewater code.

*Response: The WVDNR's new job code system will provide a complete breakdown of any given officer's time throughout each day. The Whitewater Commission will work with the WVDNR to review the allocation of time spent enforcing the whitewater code or otherwise working relative to the whitewater industry.*

2. The Whitewater Commission should only reimburse the DNR for the true amount of time spent on whitewater-related activities.

*Response: The Whitewater Officer's salary is a static number set by the Whitewater Commission. The figures used to arrive at the amount of time spent by the Whitewater Officer should be revisited and take into account the time spent by Jena Webb as part of the WVDNR's enforcement efforts.*

**Issue 3: The Whitewater Commission Should Stop the Practice of Proxy Voting.**

1. The Commission should discontinue the use of proxy voting by non-ex officio commission members.

*Response: The Commission will stop the practice of Proxy Voting by non-ex officio commission members.*





**DIVISION OF NATURAL RESOURCES**

1900 Kanawha Boulevard East  
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Joe Manchin III  
Governor

Frank Jezloro  
Director

August 29, 2007



Mr. Michael Midkiff  
Research Manager  
West Virginia Legislature  
Performance Evaluation and Review Division  
1900 Kanawha Boulevard East  
Charleston, West Virginia 25305

RE: *Preliminary Performance Review, Whitewater Commission.*

Dear Mr. Midkiff:

Thank you for providing the Division of Natural Resources (DNR) the opportunity to review and comment on the draft version of the Preliminary Performance Review of the Whitewater Commission. The DNR always values insightful reviews of its programs and embraces opportunities to improve upon those programs. The draft audit certainly offers many useful suggestions as will be discussed below. Please contact me with questions relating to our response.<sup>1</sup>

**Comments on Recommendations:**

1. *We concur.*
2. *We are without authority to implement the recommendation.* The Performance Evaluation and Research Division (PERD) expressed concerns regarding the accurate and consistent evaluations of injuries that occur in the commercial whitewater industry by the Whitewater Commission but acknowledges that the Whitewater Commission has "...met its mandate of establishing safeguards and regulations for commercial whitewater rafting." (PPR, at 4.) The DNR clearly holds safety in the highest regard in any outdoor sporting endeavor. However, the DNR also supports the position that the Whitewater Commission has acted in the interest of the sporting public and has acted in conformity with the requirements of W.Va. Code § 20-2-23a.

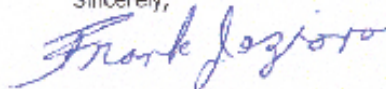
<sup>1</sup> For clarification, three (3) issues were raised in the Preliminary Performance Review. While the DNR shall respond to each, it has been decided by the Whitewater Commission that the Commission is better able to respond to the factual matters raised in Issue 1.

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Mr. Michael Midkiff  
Page Two  
August 29, 2007

3. We are without authority to implement the recommendation. See comment for #2, above.
4. We concur. The PERD recommended that the Whitewater Commission update its website to improve the public's knowledge of the Commission's activities. The DNR supports the concept of public access to governmental functions and agrees that improving the informational content of the website should be considered by the Commission.
5. We do not concur. The Whitewater Commission is required to meet quarterly to review data, materials and relevant findings compiled relating to any investigation and study then under consideration. The Commission must also approve a budget for each fiscal year for the expenditure of its fund, but such approval is not required at each quarterly meeting. W.Va. Code § 20-2-23a(c). While a review of the funds allocated to the DNR is appropriate, that review should be in the ordinary course of budget approval.
6. We do not concur. The DNR is required to enforce the provisions of the Whitewater Code and the rules promulgated thereunder, and it is further mandated to "...provide necessary staff and support services to the commission to effectuate the purposes of this section." W.Va. Code § 20-2-23a(g). Pursuant to the comments to #5, above, the DNR supports a budget review of any allocation made for statutorily-required support services the DNR provides to the Commission. However, the Commission is not required to institute a reimbursement system for those mandatory services. (See attached "WV Division of Natural Resources Monthly Work Report" and actual time costs for FY 2003 and 2004 for further information on services provided and the accounting thereof.)
7. We concur. The Preliminary Performance Review concludes that the practice of proxy voting at Whitewater Commission meetings is inconsistent with the enabling statute creating the Commission. In support thereof is the legal opinion by the Legislative Services legal counsel as well as a 2002 ruling of the West Virginia Ethics Commission that the use of proxy votes by non-ex officio members is improper. Having reviewed the same, the DNR has no objection to the recommendation that the Commission should discontinue the use of proxy voting by non-ex officio members.

Sincerely,



Frank Jezioro  
Director

FJ:wvh

Attachment

**WV DIVISION OF NATURAL RESOURCES  
MONTHLY WORK REPORT**

11 ID CODE \_\_\_\_\_ MONTH \_\_\_\_\_ YEAR \_\_\_\_\_ (Page)

19 ENDING MILEAGE \_\_\_\_\_  
20 LCD NUMBER \_\_\_\_\_

I hereby certify that this information is correct to the best of my knowledge.

21 Supervisor's Initials \_\_\_\_\_  
Page \_\_\_\_\_ of \_\_\_\_\_  
22

DAY	LOC. CODE	PROJECT	ACTIVITY			ACCOMPLISHMENTS (I.A. DEVELOPMENT PROJECTS ONLY)	VEHICLE		EQUIPT.		EXPENSE ACCOUNT	LABOR USED (except spec. Labor)*		Special Labor HR.	C-COMPR
			WORK PLAN	JOB NUMBER	PROCED. Number		HOURS	UNITS	I.D. CODE	MI.		I.D. CODE	HR.		
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13:14 Thursday, April 12, 2007  
 TIME COST FOR PROJECT 689-BOSTON, WATERTOWN COSTS EXCLUDING INVOICES  
 FOR JULY 2003 - JUNE 2004

CITY: 3102-00000113

Project BOSTON - Low

TABLE 1. COST BY PROJECT, WORK PLAN, JOB NUMBER	TOTAL HOURS	DAYS	WAGES	OVERHEAD	FRILING MCH.	BILLES	VEHICLE EXP.	EXPENSE AC.	OTHER FROM WORK REPORTS
	Sum	Days	Sum	Sum	Sum	Sum	Sum	Sum	Sum
WORK PLAN									
JOB NUMBER									
689									
WATERTOWN	1426.00	131.25	23888.86	3281.88	498.04	8177.08	1308.70	168.11	55830.18
OR 20 PREFORCE	708.00	88.00	15744.04	3102.28	2945.23	12354.00	3077.78	9.00	23471.28
SUBTOTAL	2134.00	219.25	39632.90	6384.16	7923.27	19531.08	4386.48	177.11	79301.46
SUBTOTAL	2134.00	219.25	39632.90	6384.16	7923.27	19531.08	4386.48	177.11	79301.46

