

H. B. 4306

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(By Delegates White, Eldridge, L. Phillips,
R. Phillips, O'Neal, Campbell and Cooper)

[Introduced January 24, 2014; referred to the
Committee on Agriculture and Natural Resources then
Government Organization.]

**FISCAL
NOTE**

A BILL to amend and reenact §20-2-23a of the Code of West Virginia,
1931, as amended, relating to discontinuing the moratorium on
the issuance of commercial rafting licenses on a section of
the New River.

Be it enacted by the Legislature of West Virginia:

That §20-2-23a of the Code of West Virginia, 1931, as amended,
be amended and reenacted to read as follows:

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

1 or her designee; three representatives of private river users who
2 have no affiliation with any commercial river enterprise to be
3 appointed by the Governor: *Provided*, That no more than one
4 representative of the private river users may be from each
5 whitewater zone; and four persons representing four different
6 licensed commercial whitewater outfitters currently operating
7 within the state to be appointed by the Governor. The
8 Superintendent of the New River Gorge National Park or his or her
9 designee shall be a nonvoting member of the commission. All
10 appointed members of the commission shall be citizens and residents
11 of West Virginia. Of the four representatives of commercial
12 outfitters, two persons shall represent commercial whitewater
13 outfitters holding or controlling through corporate affiliation or
14 common ownership multiple licenses in West Virginia and two persons
15 shall represent commercial whitewater outfitters in West Virginia
16 who hold only a single license and who have no common ownership or
17 corporate affiliation with another licensee, the director of the
18 Division of Natural Resources shall serve as chairperson of the
19 commission. Of the seven members of the commission first appointed
20 by the Governor, two shall be appointed for a term of one year, two
21 for a term of two years and three for a term of three years.
22 Thereafter, the terms of all appointed members of the commission
23 are for three years. Members shall serve until their successors
24 have been appointed and any vacancy in the office of a member shall

1 be filled by appointment for the unexpired term. Members
2 representing commercial outfitters who have served at least two
3 years on the commission are not eligible for reappointment to a
4 successive term.

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

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

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

18 (3) To restrict, deny or postpone the issuance of licenses to
19 additional commercial whitewater outfitters seeking to operate in
20 areas and portions of rivers and waters in this state designated
21 whitewater zones by action of the director of the Division of
22 Natural Resources as authorized under prior enactment of this
23 section and so designated by the filing of a written notice entered
24 upon the records of the division containing the designation and

1 reasonable description of the whitewater zone: *Provided*, That in
2 consideration of the consolidation occurring among outfitting
3 companies providing rafting services on the Gauley River, the
4 commission shall grant one additional whitewater rafting license
5 for the Gauley River on or before July 1, 1999, with preference
6 being given in the selection process to the applicant best
7 satisfying the following criteria: (i) The applicant demonstrates
8 a record of providing commercial rafting and related whitewater
9 services in a safe and lawful manner on the New River and other
10 rivers; (ii) the applicant has continuously engaged for three or
11 more years in the commercial rafting business on the New River and
12 has, or can obtain, the necessary equipment and facilities to
13 support Gauley River operations; (iii) the seniority of the
14 application as measured by the length of time the applicant has
15 sought a Gauley River license with the more senior application
16 given preference; (iv) that the applicant is not affiliated with,
17 operated or owned by an existing Gauley River licensee; (v) that
18 the applicant has no common ownership with an existing Gauley River
19 licensee; and (vi) that the economic benefit represented by the
20 award of a Gauley River license will serve to assist the promotion
21 of tourism and the delivery of outfitting services beyond Fayette
22 and Nicholas counties. In authorizing the issuance of an
23 additional Gauley River license, it is the intention of the
24 Legislature that the commission not increase the carrying capacity

1 of a current Gauley River licensee, but that the commission promote
2 and maintain competition among licensees by increasing the number
3 of independent outfitters operating on the Gauley;

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

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

19 (6) To immediately implement a freeze on mandated changes in
20 use allocations for the licenses of existing licensees on
21 moratorium sections of the Gauley and New rivers as defined in
22 subsection (d) of this section. All such licenses shall carry the
23 use allocation in effect on May 2, 1992. The commission shall
24 implement allocation methodologies for other rivers as the

1 commission, after appropriate study, may deem necessary with all
2 such allocation methodologies implemented by rules promulgated
3 pursuant to chapter twenty-nine-a of this code;

4 (7) To determine administrative policies relating to
5 regulation of the whitewater industry and to administer such
6 policies, except that the commission shall delegate to the Director
7 of the Division of Natural Resources or his or her designee the
8 authority to administer the day-to-day responsibilities of the
9 commission pursuant to this section and may vest in the Director of
10 the Division of Natural Resources or his or her designee the
11 authority to make determinations with respect to which it is not
12 practicable to convene or to poll the commission, within guidelines
13 established by the commission;

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

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

21 (10) To regulate the issuance, transfer, and renewal of
22 licenses. However, licenses issued to commercial whitewater
23 outfitters or use allocations or other privileges conferred by a
24 license may be transferred, sold, offered as security to financial

1 institutions or otherwise encumbered, upon notice in writing to the
2 commission and the Director of the Division of Natural Resources,
3 subject to the following limitations: (i) The commission may
4 refuse a transfer upon a finding that there is reasonable cause to
5 believe that the safety of members of the public may be adversely
6 affected by the transfer; and (ii) the commission shall require
7 that taxes, workers' compensation and other obligations due the
8 state be paid prior to any transfer;

9 (11) To collect, for the duration of a study period
10 established in subdivision (4) of this subsection, an annual
11 license fee of \$500 for each river on which a commercial whitewater
12 outfitter operates. The annual per river license fee is limited to
13 the Cheat, Gauley, New, Shenandoah and Tygart rivers. The annual
14 license fee for a commercial whitewater outfitter operating on a
15 river not so designated is \$500 regardless of the number of rivers
16 operated on. A commercial whitewater outfitter who is operating on
17 a river designated in this subdivision and who has paid the annual
18 per river license fee may not be required to pay an additional
19 annual license fee to operate on a nondesignated river. The
20 commercial whitewater outfitter license shall be issued by the
21 commission and is for a period of ten years: *Provided*, That an
22 outfitter pays the required annual license fee. If an outfitter
23 fails to pay the license fee, then the license shall be suspended
24 until the license fee is paid. Licenses are subject to the bonding

1 provisions set forth in section twenty-three-d of this article and
2 the revocation provisions set forth in the rules promulgated by the
3 Director of the Division of Natural Resources. License fees shall
4 be used by the Division of Natural Resources for the purpose of
5 enforcing and administering the provisions of this section;

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

9 (13) To establish a procedure for hearings on violations of
10 this section and rules promulgated thereunder and to establish
11 civil penalties for violations of this section and rules
12 promulgated thereunder; and

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

23 (c) The commission shall meet upon the call of the chairperson
24 or a majority of the members of the commission. However, the

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

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

20 (1) After the issuance of the Gauley River rafting license
21 provided for in subdivision (3), subsection (b) of this section, a
22 moratorium shall be imposed by the commission upon the issuance of
23 additional commercial rafting licenses on whitewater zones of the
24 New River between the confluence of the Greenbrier and New rivers

1 and the confluence of the New and Gauley rivers and upon whitewater
2 zones of the Gauley River from the Summersville Dam to the
3 confluence of the New and Gauley rivers. The moratorium hereby
4 imposed shall continue until such time as the commission is
5 authorized by the Legislature to discontinue the moratorium:
6 Provided, That the moratorium on the issuance of commercial rafting
7 licenses on a section of the New River from Brooks Falls, located
8 approximately five miles north of the confluence of the Greenbrier
9 and New Rivers, to Prince is discontinued.

10 (2) For the portions of the Gauley and New Rivers subject to
11 the moratorium imposed by this section, the minimum use allocation
12 conferred by a license is one hundred twenty for each designated
13 section of a whitewater zone on the Gauley and one hundred fifty
14 for each designated section of a whitewater zone on the New River.
15 A licensee who held a use allocation on May 2, 1992, with a use
16 allocation greater than the minimum allocation established in this
17 subdivision shall retain such use allocation on each designated
18 section of a whitewater zone on the moratorium portions of the New
19 and Gauley rivers subject only to the sale, loss or forfeiture of
20 the license or to a subsequent action of the commission imposing a
21 reduction in use allocations pursuant to subdivision (4) of this
22 subsection. The commission is authorized to increase or decrease
23 minimum use allocations for the moratorium sections of the New and
24 Gauley rivers only in accordance with the provisions of

1 subdivisions (4) and (5) of this subsection. The commission may
2 permit additional allocations or licenses for whitewater outfitters
3 which are nonprofit entities operating upon the waters of the state
4 upon the effective date of this section. Except as provided in
5 subdivision (4), subsection (d) of this section, nothing in this
6 section shall be deemed to require the reduction of a use
7 allocation granted under an existing license or to prohibit a
8 commercial whitewater outfitter from acquiring a license with a use
9 allocation in excess of the minimum allocations hereby established:
10 *Provided*, That if a licensee has sold, leased or assigned his or
11 her license, or sold or leased a portion of the use allocation
12 under his or her license, nothing herein shall be deemed to have
13 the effect of increasing the use allocation assigned to such
14 license.

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

20 (4) If, as result of a study employing the limits of
21 acceptable change process, the whitewater commission acts to reduce
22 the aggregate maximum daily use limit for all commercial rafting
23 licenses on a section of the New River or Gauley River subject to
24 the license moratorium, the reduction shall be distributed on a

1 prorata basis among all licenses granted for the section in
2 proportion to an individual license's relative share of the total
3 use allocation for such river section.

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

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

1 allocation assigned to such license.

2 (e) In the event the commission determines through an
3 appropriate study and the limits of acceptable change process that
4 a whitewater zone or a designated section of a whitewater zone on
5 waters other than the moratorium sections of the New and Gauley
6 rivers requires implementation of use allocations, all whitewater
7 rafting licenses issued for such zone or section thereof shall be
8 given the same use allocation.

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

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

20 (h) All orders, determinations, rules, permits, grants,
21 contracts, certificates, licenses, waivers, bonds, authorizations
22 and privileges which have been issued, made, granted or allowed to
23 become effective pursuant to any prior enactments of this section
24 by the Governor, the secretary of the Department of Commerce, labor

1 and environmental resources, the director of the Division of
2 Natural Resources, the whitewater advisory board or by a court of
3 competent jurisdiction, and which are in effect on the effective
4 date of this section, shall continue in effect according to their
5 terms until modified, terminated, superseded, set aside or revoked
6 by the Governor, secretary, director or commission pursuant to this
7 section, by a court of competent jurisdiction, or by operation of
8 law.

NOTE: The purpose of this bill is to discontinue the moratorium on the issuance of commercial rafting licenses on a section of the New River generally known as the Upper New River.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.