

Senate Bill No. 26

(By Senators D. Hall and Karnes)

[Introduced January 14, 2015; referred to the Committee on Natural Resources.]

1
2
3
4
5
6
7
8
9 A BILL to amend and reenact §20-2-23a of the Code of West Virginia, 1931, as amended, relating
10 to discontinuing the moratorium on issuance of commercial rafting licenses on a section of
11 the New River.

12 *Be it enacted by the Legislature of West Virginia:*

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

15 **ARTICLE 2. WILDLIFE RESOURCES.**

16 **§20-2-23a. Whitewater commission; powers and duties of commission and Division of Natural**
17 **Resources; allocations; civil and criminal penalties for violations.**

18 (a) There is hereby created a whitewater commission within the Division of Natural
19 Resources. The commission shall consist of the Director of the Division of Natural Resources or
20 his or her designee; the Director of the Division of Parks and Tourism or his or her designee; three
21 representatives of private river users who have no affiliation with any commercial river enterprise
22 to be appointed by the Governor: *Provided*, That no more than one representative of the private river

1 users may be from each white water zone; and four persons representing four different licensed
2 commercial white water outfitters currently operating within the state to be appointed by the
3 Governor. The Superintendent of the New River Gorge National Park or his or her designee shall
4 be a nonvoting member of the commission. All appointed members of the commission shall be
5 citizens and residents of West Virginia. Of the four representatives of commercial outfitters, two
6 persons shall represent commercial white water outfitters holding or controlling through corporate
7 affiliation or common ownership multiple licenses in West Virginia and two persons shall represent
8 commercial white water outfitters in West Virginia who hold only a single license and who have no
9 common ownership or corporate affiliation with another licensee, the Director of the Division of
10 Natural Resources shall serve as chairperson of the commission. Of the seven members of the
11 commission first appointed by the Governor, two shall be appointed for a term of one year, two for
12 a term of two years and three for a term of three years. Thereafter, the terms of all appointed
13 members of the commission are for three years. Members shall serve until their successors have
14 been appointed and any vacancy in the office of a member shall be filled by appointment for the
15 unexpired term. Members representing commercial outfitters who have served at least two years on
16 the commission are not eligible for reappointment to a successive term.

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

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

20 (2) To designate any such rivers or waters or any portions thereof as "white water zones" for
21 which commercial white water rafting, outfitting and activities are to be investigated and studied,
22 and to determine the order and the periods of time within which the investigations and studies are

1 to be conducted. The commission shall first investigate and study those white water zones which
2 it finds to present serious problems requiring immediate regulation, including, without limitation,
3 safety hazards and problems of overcrowding or environmental misuse;

4 (3) To restrict, deny or postpone the issuance of licenses to additional commercial white
5 water outfitters seeking to operate in areas and portions of rivers and waters in this state designated
6 white water zones by action of the Director of the Division of Natural Resources as authorized under
7 prior enactment of this section and so designated by the filing of a written notice entered upon the
8 records of the division containing the designation and reasonable description of the white water
9 zone: *Provided*, That in consideration of the consolidation occurring among outfitting companies
10 providing rafting services on the Gauley River, the commission shall grant one additional white
11 water rafting license for the Gauley River on or before July 1, 1999, with preference being given in
12 the selection process to the applicant best satisfying the following criteria: (I) The applicant
13 demonstrates a record of providing commercial rafting and related white water services in a safe and
14 lawful manner on the New River and other rivers; (ii) the applicant has continuously engaged for
15 three or more years in the commercial rafting business on the New River and has, or can obtain, the
16 necessary equipment and facilities to support Gauley River operations; (iii) the seniority of the
17 application as measured by the length of time the applicant has sought a Gauley River license with
18 the more senior application given preference; (iv) that the applicant is not affiliated with, operated
19 or owned by an existing Gauley River licensee; (v) that the applicant has no common ownership with
20 an existing Gauley River licensee; and (vi) that the economic benefit represented by the award of a
21 Gauley River license will serve to assist the promotion of tourism and the delivery of outfitting
22 services beyond Fayette and Nicholas counties. In authorizing the issuance of an additional Gauley

1 River license, it is the intention of the Legislature that the commission not increase the carrying
2 capacity of a current Gauley River licensee, but that the commission promote and maintain
3 competition among licensees by increasing the number of independent outfitters operating on the
4 Gauley;

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

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

16 (6) To immediately implement a freeze on mandated changes in use allocations for the
17 licenses of existing licensees on moratorium sections of the Gauley and New rivers as defined in
18 subsection (d) of this section. All such licenses shall carry the use allocation in effect on May 2,
19 1992. The commission shall implement allocation methodologies for other rivers as the commission,
20 after appropriate study, may deem necessary with all such allocation methodologies implemented
21 by rules promulgated pursuant to chapter twenty-nine-a of this code;

22 (7) To determine administrative policies relating to regulation of the white water industry and

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

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

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

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

19 (11) To collect, for the duration of a study period established in subdivision (4) of this
20 subsection, an annual license fee of \$500 for each river on which a commercial white water outfitter
21 operates. The annual per river license fee is limited to the Cheat, Gauley, New, Shenandoah and
22 Tygart rivers. The annual license fee for a commercial white water outfitter operating on a river not

1 so designated is \$500 regardless of the number of rivers operated on. A commercial white water
2 outfitter who is operating on a river designated in this subdivision and who has paid the annual per
3 river license fee may not be required to pay an additional annual license fee to operate on a
4 nondesignated river. The commercial white water outfitter license shall be issued by the commission
5 and is for a period of ten years: *Provided*, That an outfitter pays the required annual license fee. If
6 an outfitter fails to pay the license fee, then the license shall be suspended until the license fee is
7 paid. Licenses are subject to the bonding provisions set forth in section twenty-three-d of this article
8 and the revocation provisions set forth in the rules promulgated by the Director of the Division of
9 Natural Resources. License fees shall be used by the Division of Natural Resources for the purpose
10 of enforcing and administering the provisions of this section;

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

13 (13) To establish a procedure for hearings on violations of this section and rules promulgated
14 thereunder and to establish civil penalties for violations of this section and rules promulgated
15 thereunder; and

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

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

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

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

1 confluence of the Greenbrier and New rivers to Brooks Falls, located approximately five miles north
2 of the confluence of the Greenbrier and New rivers, is discontinued.

3 (2) For the portions of the Gauley and New ~~Rivers rivers~~ subject to the moratorium imposed
4 by this section, the minimum use allocation conferred by a license is one hundred twenty for each
5 designated section of a white water zone on the Gauley and one hundred fifty for each designated
6 section of a white water zone on the New River. A licensee who held a use allocation on May 2,
7 1992, with a use allocation greater than the minimum allocation established in this subdivision shall
8 retain such use allocation on each designated section of a white water zone on the moratorium
9 portions of the New and Gauley rivers subject only to the sale, loss or forfeiture of the license or to
10 a subsequent action of the commission imposing a reduction in use allocations pursuant to
11 subdivision (4) of this subsection. The commission is authorized to increase or decrease minimum
12 use allocations for the moratorium sections of the New and Gauley rivers only in accordance with
13 the provisions of subdivisions (4) and (5) of this subsection. The commission may permit additional
14 allocations or licenses for white water outfitters which are nonprofit entities operating upon the
15 waters of the state upon the effective date of this section. Except as provided in subdivision (4),
16 subsection (d) of this section, nothing in this section shall be deemed to require the reduction of a
17 use allocation granted under an existing license or to prohibit a commercial white water outfitter
18 from acquiring a license with a use allocation in excess of the minimum allocations hereby
19 established: *Provided*, That if a licensee has sold, leased or assigned his or her license, or sold or
20 leased a portion of the use allocation under his or her license, nothing herein shall be deemed to have
21 the effect of increasing the use allocation assigned to such license.

22 (3) The commission may permit peak-day variances from license limitations not exceeding

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

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

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

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

1 such license.

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

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

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

15 (h) All orders, determinations, rules, permits, grants, contracts, certificates, licenses, waivers,
16 bonds, authorizations and privileges which have been issued, made, granted or allowed to become
17 effective pursuant to any prior enactments of this section by the Governor, the Secretary of the
18 Department of Commerce, labor and environmental resources, the Director of the Division of
19 Natural Resources, the white water advisory board or by a court of competent jurisdiction, and which
20 are in effect on the effective date of this section, shall continue in effect according to their terms until
21 modified, terminated, superseded, set aside or revoked by the Governor, secretary, director or
22 commission pursuant to this section, by a court of competent jurisdiction, or by operation of 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 from the confluence of the Greenbrier and New rivers to Brooks Falls, located approximately five miles north of the confluence of the Greenbrier and New Rivers.

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