

## 323 CMR: OFFICE OF LAW ENFORCEMENT

### 323 CMR 6.00: COMMERCIAL USES ON THE DEERFIELD RIVER

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#### 6.01: Purpose

323 CMR 6.00 is intended to promote the protection of public safety and welfare by establishing rules of conduct and operation governing commercial uses of the Deerfield River, by promoting voluntary compliance with the rules, and, when necessary, by deterring through penalties noncompliance with the rules. 323 CMR 6.00 governs the use of commercial whitewater craft and tubes on the Deerfield River in Massachusetts. Specifically, there exists portions of the Deerfield River known as the Fife Brook and Monroe sections beginning at the Vermont border and extending to the Zoar Road bridge just upstream of the Zoar Picnic Area and downstream of Zoar Gap. These sections have seen an increased interest by commercial entities because of its excellent whitewater and other recreational potential. In addition, these sections of the Deerfield River presently contain the most popular, pristine, and beautiful angling spot in western Massachusetts, with two catch and release areas, and are among the most popular angling areas in the northeast.

Numerous states regulate the operation of whitewater use by including a limitation on the number of companies and rafts that may utilize a particular river, based in part on safety factors. Such states include Maine, New York, Pennsylvania, Virginia, West Virginia, North Carolina and many of the western states.

Based upon these facts the Director has determined that 323 CMR 6.00, regulating whitewater commercial use on the Deerfield River, is in the interest of public safety.

#### 6.02: Definitions

Commercial Tube Provider. A person, corporation, business, company, or other legal entity that Provides Tubes.

Commercial Whitewater Outfitter. A person, corporation, business, company or other legal entity that Provides Whitewater Craft or conducts Whitewater Craft excursions for compensation.

Director. The Director of the Office of Law Enforcement.

Passenger. Any person other than an employee of a Commercial Whitewater Outfitter or Commercial Tube Provider making a trip in a Whitewater Craft or Tube.

Provides. To allow, for compensation, the use of a Whitewater Craft or Tube for a period of time. This term also includes the offering for sale with a written or oral agreement or any other arrangement, to repurchase, at a reduced cost, the Whitewater Craft or Tube at the completion of its use.

Tube. Any inflatable tube, or other similar inflatable device, used to transport passengers along the Deerfield River.

Whitewater Craft. Any craft used to transport passengers along the Deerfield River including non-inflatable craft such as kayaks and stand up paddle boards. This term does not include Tubes.

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### 6.03: Commercial Whitewater Outfitters

(1) Safety Certificate. All Whitewater Craft operated by a Commercial Whitewater Outfitter are required to possess a safety certificate issued by the Director, which shall be applied for at the same time as the permit required by 323 CMR 6.05(1) is applied for, on forms supplied by the Director. Safety certificates shall be issued to Commercial Whitewater Outfitters for each Whitewater Craft owned or operated by that Commercial Whitewater Outfitter and shall be conditioned according to the criteria found in 323 CMR 6.03(2) through (7).

(2) Guide. Each Whitewater Craft shall be accompanied by a guide who shall be trained and experienced in the safe operation of such Whitewater Craft. The guide shall satisfactorily have completed courses in basic first aid and basic cardio-pulmonary resuscitation and provide documentation of completion if requested. The guide shall be present at all times during operation of the Whitewater Craft along with the passengers. Guides shall wear a personal flotation device and helmet distinctive in color than that of the passengers. Passengers who have previously acted or currently act as guides on Whitewater Craft expeditions on the Fife Brook and Monroe sections, on Whitewater Craft such as kayaks, canoes, and stand up paddle boards, are not required to be accompanied by a guide, provided that such passengers wear helmets and personal flotation devices, and are under the supervision of and in receipt of instruction in accordance with 323 CMR 6.03(6) by a Commercial Whitewater Outfitter permitted in accordance with 323 CMR 6.05.

(3) Equipment. Each Whitewater Craft excluding stand up paddleboards shall contain one throw bag. There shall be one first aid kit for every five Whitewater Crafts on the river. Commercial Whitewater Outfitters must train all users on safety protocols for use of the throw bags. The Whitewater Craft, throw bag and first aid kit shall each be of a kind and type approved by the Director. Commercial Whitewater Crafts may not carry more passengers than the number recommended by the manufacturer, as approved by the United States Coast Guard.

(4) Passengers. Each passenger in a Whitewater Craft owned or operated by a Commercial Whitewater Outfitter shall wear a safety helmet and a personal flotation device of appropriate size and type approved by the Director.

(5) Age Restriction. All persons younger than 15 years old must be accompanied by and directly supervised by an adult of 18 years of age or older other than the guide during any trip on any Whitewater Craft. Such adult may accompany and supervise more than one person younger than 15 years old and may be on a different Whitewater Craft, but must be on the same trip. No person younger than 5 years old may be a passenger in a Whitewater Craft. These age restrictions shall not be construed to apply to organized classes or camps for children younger than 18 years old conducted by a Commercial Whitewater Outfitter.

(6) Instruction. Commercial Whitewater Outfitters shall provide instruction to each passenger in the operation of Whitewater Craft and shall advise each passenger of the attendant hazards and appropriate safety procedures and of a code of conduct regarding private property prior to any excursion. Safety procedures and code of conduct shall be posted visibly at Commercial Whitewater Outfitter facilities.

(7) Conditions. The Director may further condition a safety certificate in the interest of public safety.

(8) Limit. The Director may limit the number of safety certificates to that number which is necessary to carry the daily passenger quota.

(9) Numbering. Each Whitewater Craft shall be numbered in a manner approved by the Director.

### 6.04: Commercial Tube Providers

(1) Tubing Area. Commercial Tube Providers may not Provide Tubes for use upstream of the Zoar Gap or downstream of Mill Brook.

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- (2) Equipment. All Tubes Provided by Commercial Tube Providers must be multi-chamber and made of commercial grade rubber; provided, however, that single-chambered tubes in use as of the effective date of these regulations may be Provided on or before December 31, 2023. No Tubes may be tied together by means of a rope or any other connecting material or mechanism. Double Tubes that hold two passengers are not permitted.
- (3) Passengers. Each Tube may not carry more than one Passenger. All Passengers in Tubes Provided by Commercial Tube Providers shall wear a personal flotation device of appropriate size and type approved by the Director.
- (4) Age Restriction. All persons younger than 15 years old must be accompanied by and directly supervised by an adult of 18 years of age or older during any trip on any Tube. Such adult may accompany and supervise more than one person younger than 15 years old. No persons younger than 10 years old may be Provided a Tube.
- (5) Instruction. Commercial Tube Providers shall provide instruction to each passenger of the attendant hazards and appropriate safety procedures, and of a code of conduct regarding private property, prior to any excursion. Safety procedures and code of conduct shall be posted visibly at Commercial Tube Provider facilities.
- (6) Numbering. Each Tube shall be numbered, and the name or an identifying symbol or logo of the Commercial Tube Provider shall be affixed to each Tube, in a manner approved by the Director.

### 6.05: Permits

- (1) Requirement. All Commercial Whitewater Outfitters and Commercial Tube Providers are required to have a permit issued by the Director.
- (2) Eligibility. Unless otherwise provided in 323 CMR 6.05(12), only Commercial Whitewater Outfitters and Commercial Tube Providers who have held a permit from the Office of Law Enforcement to conduct excursions or Provide Tubes on the Deerfield River in any previous year are eligible to apply for such a permit. This section shall not apply to those Commercial Tube Providers who are seeking a permit for the year 2023.
- (3) Application. Applications for a permit shall be on forms supplied by the Director. The application shall be submitted on or before December 1<sup>st</sup> of each year. The Director shall approve or deny any application on or before February 1<sup>st</sup> of the following year.
  - (a) Commercial Tube Providers will not be required to obtain a permit for the year 2022, but will be required to obtain a permit thereafter.
  - (b) If a Commercial Tube Provider intends to apply for a permit for the year 2023, they must submit a letter of intent to the Director no later than November 1, 2022..
- (4) Public Comment. Prior to the approval or denial of any permit application, the Director may, in his discretion, hold a public meeting in a city or town in Berkshire or Franklin County. Notice of the meeting shall be published in a local newspaper of general circulation. At the meeting, the Director shall receive testimony and comment on pending permit applications.
- (5) Evaluation of Commercial Whitewater Outfitters. The Director shall evaluate a Commercial Whitewater Outfitter's permit application on the basis of the following criteria:
  - (a) length and breadth of experience in the commercial operation of Whitewater Craft;
  - (b) experience on the Deerfield River;
  - (c) number and type of violations, citations or enforcement warnings issued, if any;
  - (d) safety record;
  - (e) level of safety, rescue and competency training achieved by each guide;
  - (f) quality and condition of equipment including, but not limited to, rafts, safety helmets, personal flotation devices, throw bags, first aid kits, paddles and wetsuits;
  - (g) adequacy of insurance; and,
  - (h) testimony presented at the public meeting, if any, and any written comments received.

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(6) Evaluation of Commercial Tube Providers. The Director shall evaluate a Commercial Tube Provider's permit application on the basis of the following criteria:

- (a) length and breadth of experience in the commercial provision of Tubes;
- (b) experience on the Deerfield River;
- (c) number and type of violations, citations or enforcement warnings issued, if any;
- (d) safety record;
- (e) whether the Commercial Tube Provider provides personal flotation devices, and if so, the quality and condition of such personal flotation devices;
- (f) adequacy of insurance; and,
- (g) testimony presented at the public meeting, if any, and any written comments received.

(7) Quotas. The Director shall condition each permit to: (i) a Commercial Whitewater Outfitter by allocating daily passenger quotas from a total daily quota of 480 passengers; and (ii) a Commercial Tube Provider by allocating daily passenger quotas from a total daily quota of 400 passengers. For purposes of the daily quota only, passengers on Whitewater Craft such as kayaks or canoes used for purposes of instruction by a Commercial Whitewater Outfitter permitted in accordance with 323 CMR 6.05 shall not be included. The Director may also allocate the daily number of Whitewater Crafts that may be operated per Commercial Whitewater Outfitter, and may also allocate the number of Whitewater Crafts and Tubes that may be on the Deerfield River at any one time. This quota shall be based on a permittee's qualifications, experience, financial security, safety record and insurance status as well as public safety on the Deerfield River. This quota shall also take into consideration the daily whitewater rapids classifications (Class I, II, III, IV, V, and VI) and the whitewater release schedule from the Fife Brook Dam. Each daily quota shall be effective from 9:00 A.M. to sunset per day as published annually in the Massachusetts Division of Fisheries and Wildlife *Massachusetts Guide to Hunting, Freshwater Fishing, and Trapping Laws* sourced from the U.S. Naval Observatory Astronomical Applications Department, Washington, D.C. Unused portions of daily quotas are not cumulative and may not be carried over.

(8) Signature. An applicant shall sign the permit when issued and such signature shall constitute a statement that the permit holder has read 323 CMR 6.00, the provisions of M.G.L. c. 90B and any conditions and restrictions of the permit and agrees to fully comply therewith. The applicant's signature shall also constitute consent by the applicant to allow the Director to arrange for inspections of the applicant's books and records to determine compliance with this regulation.

(9) Validity. Permits shall remain in full force and effect for the period of time set forth in the permit unless otherwise suspended or revoked pursuant to 323 CMR 6.08.

(10) Transfer. Permits are not the property of the holder. Permits may not be transferred, sold, bartered or exchanged for cash or property, except that a Commercial Whitewater Outfitter or Commercial Tube Provider that is purchased or otherwise acquired by another person or business may, subject to the approval of the Director, transfer its permit to the new owner if, in the opinion of the Director the transfer is in the public interest and otherwise consistent with public safety on the Deerfield River. The Director's decision shall be governed by the provisions of 323 CMR 6.05(5) and (6).

(11) Bankruptcy or Death. Unless otherwise provided by applicable laws or regulations, the executor, in the case of a permit holder's death, or the trustee, in the event of a permit holder's bankruptcy, may, with the approval of the Director, continue to conduct excursions or Provide Tubes on the Deerfield River pursuant to the permit. The Director's decision shall be governed by the provisions of 323 CMR 6.05(5) and (6).

(12) List. The Director shall maintain a list of Commercial Whitewater Outfitters and Commercial Tube Providers who are not eligible to apply for a permit pursuant to 323 CMR 6.05(2) but have otherwise expressed written interest in applying for a permit as evidenced by the records of the Office of Law Enforcement. Notwithstanding 323 CMR 6.05(2), permits that become available as a result of application or transfer denials, bankruptcy, or death of a permit holder, revocations or any future increase in passenger quotas may be issued by the Director to those Commercial Whitewater Outfitters and Commercial Tube Providers on said list. The

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Director's decision shall be governed by the provisions of 323 CMR 6.05(5) and (6).

### 6.06: Whitewater Advisory Committee

(1) The Director shall appoint a Whitewater Advisory Committee. The Whitewater Advisory Committee shall consist of one member from the Appalachian Mountain Club, one member from Trout Unlimited, one member from New England FLOW, one member from American Whitewater, one member from the Deerfield River Watershed Association, one member from an area chamber of commerce, one representative from the Executive Office of Energy and Environmental Affairs, one representative from the Office of Law Enforcement, one representative from the Division of Fisheries & Wildlife, and as an *ex-officio* member one from each of those Commercial Whitewater Outfitters and Commercial Tube Providers that hold a permit issued in accordance with 323 CMR 6.05.

(2) The Committee shall advise the Director on the administration of 323 CMR 6.00 except that *ex-officio* members from each Commercial Whitewater Outfitter or Commercial Tube Provider that holds a permit issued pursuant to 323 CMR 6.05 may not comment or advise the Director on the permit application of any other Commercial Whitewater Outfitter or Commercial Tube Provider.

### 6.07: Prohibitions

It is a violation for:

(1) a Commercial Whitewater Outfitter or Commercial Tube Provider to operate on the Deerfield River without a permit from the Director;

(2) a Whitewater Craft operated by a Commercial Whitewater Outfitter to operate on the Deerfield River without a safety certificate from the Director;

(3) a Commercial Whitewater Outfitter to violate any term or condition of the permit or safety certificate, including not allowing inspections of books and records;

(4) a Commercial Tube Provider to violate any term or condition of the permit, including not allowing inspections of books and records;

(5) a Commercial Whitewater Outfitter or Commercial Tube Provider to operate on the Deerfield River without adequate liability insurance, provided such insurance is commercially available;

(6) a Commercial Whitewater Outfitter or Commercial Tube Provider to exceed its established daily passenger quota on the Deerfield River;

(7) a Commercial Whitewater Craft excursion to occur on the Deerfield River or Provision of Tubes for trips on the Deerfield River before the first Saturday in April or after Columbus Day;

(8) any portion of a Commercial Whitewater Craft excursion or trip on a Tube Provided by a Commercial Tube Provider to occur on the Deerfield River before 9:00 A.M. or after sunset as published annually in the Massachusetts Division of Fisheries and Wildlife *Massachusetts Guide to Hunting, Freshwater Fishing, and Trapping Laws* sourced from the U.S. Naval Observatory Astronomical Application Department, Washington, D.C.;

(9) the consumption or possession of drugs or alcohol to occur during an excursion on a Whitewater Craft or on a Tube Provided by a Commercial Tube Provider;

(10) any glass bottles or containers to be onboard or carried by a Passenger of a Whitewater Craft operated by a Commercial Whitewater Outfitter during an excursion or carried by a Passenger while on a Tube Provided by a Commercial Tube Provider;

(11) a Commercial Whitewater Outfitter or Commercial Tube Provider to loan, sell, assign or transfer any portion of its allocated daily passenger quota for the use of another.

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### 6.08: Penalties

(1) For purposes of M.G.L. c. 90B, §14, a violation of 323 CMR 6.00 shall be deemed a violation of M.G.L. c. 90B, §12A.

(2) Any violation of 323 CMR 6.00 by a Commercial Whitewater Outfitter or Commercial Tube Provider may result in the suspension or revocation of the permit issued pursuant to 323 CMR 6.05(1) and any safety certificates issued pursuant to 323 CMR 6.03 for Whitewater Craft owned or operated by that Commercial Whitewater Outfitter. Suspensions and revocations are subject to the provisions governing adjudicatory proceedings pursuant to the relevant provisions of M.G.L. c. 30A.

### REGULATORY AUTHORITY

323 CMR 6.00: M.G.L. c. 90B, § 11