

# MAINE'S COMMERCIAL WHITEWATER OUTFITTER LAWS: "MAXIMIZING COMPETITION" OR DESTROYING IT?

## INTRODUCTION

Business is booming for Maine's commercial whitewater rafting outfitters. During the 1985 season, nearly 45,000 commercial passengers were carried by licensed outfitters on Maine's whitewater rivers.<sup>1</sup> In 1976, the year commercial rafting began in Maine, the sole licensed outfitter carried about 600 people on these same rivers.<sup>2</sup> Recent estimates are that Maine's recreational whitewater industry contributes, directly and indirectly, a total of \$10 million per year to the state's economy.<sup>3</sup>

Although services vary somewhat between outfitters, the most common rafting trips offered by Maine's commercial outfitters are guided day-trips in eight-person inflatable rafts. The fares for these trips average between \$60 and \$70 per person; this fare includes the guided raft trip, use of equipment such as lifejacket and paddle, lunch, and shuttles to and from the river.<sup>4</sup>

The Maine outfitters are riding the crest of a multimillion dollar business boom for several reasons. First, the state's premier whitewater rivers—the Kennebec and the Penobscot<sup>5</sup>—drain im-

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1. Maine commercial whitewater rafting trips are run primarily on the Kennebec River and the West Branch of the Penobscot River [hereinafter referred to as the Penobscot River]. Other Maine rivers supporting commercial whitewater rafting include the Dead River and the Rapid River. The State of Maine records the numbers of commercial passengers carried on the Kennebec, Penobscot and Dead Rivers. In 1985, the total for these three rivers was 44,540 passengers; 23,677 passengers on the Kennebec, 18,912 passengers on the Penobscot and 1,951 passengers on the Dead. *1985 Whitewater Rafting Review* (official compilation by the State of Maine) (available in the Department of Inland Fisheries and Wildlife, State of Maine, Augusta, Maine) [hereinafter cited as *1985 Review*].

2. *Report of the Commercial Whitewater Study Commission to the Maine Legislature* (March 1983) at 18 (available in the Office of Legislative Assistants, State House, Augusta, Maine) [hereinafter cited as *Study Commission Report*]. The Commercial Whitewater Study Commission (Study Commission) was established by the Maine Legislature in 1982. The duties of the 10-member Study Commission include determining: the size of the commercial whitewater rafting industry; the social, safety, economic and environmental impact of the industry; and the carrying capacity of the Penobscot and Kennebec Rivers. 1982 Me. Acts 67.

3. Bangor Daily News, May 30, 1984, Sportsmonth Magazine at 1.

4. For a description of typical commercial whitewater rafting trips on the Kennebec and Penobscot Rivers, see *Study Commission Report*, *supra* note 2, at Appendices G and H.

5. The specific sections of these rivers that are covered under the Maine law are: the Kennebec River "between Harris Station [hydroelectric dam] and West Forks [village]" and

mense watersheds and both are dam-controlled, thus insuring dependable all-summer water releases.<sup>6</sup> No other whitewater rivers in New England have such a water supply. Second, these beautiful wilderness rivers are easily accessible and they are located in a state that is a well-known summer vacation destination. The most popular rafting trip in Maine, the Kennebec River run,<sup>7</sup> is only two to three hours from Maine's coast. Finally, Maine's unique laws regulating commercial whitewater rafting, enacted in 1983 and 1984 as title 12, sections 7361-7370-A, help insure stability and profits for the established businesses licensed by the state under those laws.<sup>8</sup>

the Penobscot River "between McKay Station [hydroelectric dam] and Pockwockamus Falls." ME. REV. STAT. ANN. tit. 12, §§ 7368(2)(C), (3)(C) (Supp. 1985).

6. See White and Kezis, *A Determination of the Economic Activity Generated by Commercial Rafting on the Kennebec and Penobscot Rivers and the Rivers' Feasible Carrying Capacity*, Social Science Research Institute, University of Maine at Orono (March 1983) (prepared for the Whitewater Outfitters Association of Maine) [hereinafter cited as *University of Maine Report*].

7. During 1985, 23,677 commercial passengers rafted the Kennebec River; this represents approximately 53% of the total for the Kennebec, Penobscot and Dead Rivers combined. 1985 Review, *supra* note 1.

8. Maine's statutes and administrative rules are evidently the first broad regulatory scheme in the United States with general applicability to all the whitewater rivers in an entire state. The scope of the Maine law is set out in the definitions section, ME. REV. STAT. ANN. tit. 12, § 7363 (Supp. 1985), which provides in pertinent part:

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5. "Commercial" means for financial compensation or other remuneration.
6. "Commercial whitewater outfitter" or "outfitter" means a person who conducts commercial whitewater trips.

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10. "Rapidly flowing river" means a river or stretch of a river with rapids classified as Class IV or higher by the department according to the International River Classification System, or a river or stretch of river designated by the department by rule on the basis of public safety. . . .
11. "Whitewater craft" means any raft, dory, bateau or similar watercraft which is used to transport passengers along rapidly flowing rivers, but does not include canoes or kayaks.

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13. "Whitewater trip" means any commercial effort to transport passengers by means of a whitewater craft on rapidly flowing rivers.

Colorado has recently enacted a set of licensing, safety and enforcement statutes to regulate commercial whitewater outfitters. COLO. REV. STAT. §§ 33-32-101 to -111 (1985). Pennsylvania has established quotas and safety regulations for both commercial and non-commercial whitewater rafting on the Youghieny River in Ohiopyle State Park. 25 PA. ADMIN. CODE § 31.75 (Shepard's 1983). West Virginia's commercial whitewater rafting statutes and regulations are found at: W. VA. CODE § 20-2-23a (Supp. 1984) (authorizes study of commercial whitewater rafting by the Director of the West Virginia Department of Natural Resources); W. VA. CODE § 20-2-24 to -26 (1974) (whitewater guide licenses and commercial whitewater outfitter licenses); W. Va. Admin. Reg. ch. 20, §§ 1.01-.16, 3, 4.01-.17 (1976) (commercial whitewater equipment standards and safety requirements).

Maine's broad regulatory scheme governing the operations of the commercial whitewater rafting industry was enacted by the Maine Legislature "to protect the health, safety and welfare" of the public, to protect Maine's "natural resources or rapidly flowing rivers," and to supervise navigation.<sup>9</sup> The legislature adopted the findings of its Commercial Whitewater Study Commission (Study Commission) that commercial whitewater rafting on the state's rivers was "an increasingly popular sport" and that the "sport may pose significant risks . . . if outfitters are not skilled and knowledgeable in the navigation of those rivers and are not properly regulated."<sup>10</sup> The legislature further found that the growth in use by commercial outfitters "has increased the environmental, physical and social burdens on that resource."<sup>11</sup> These are undeniably legitimate state interests.<sup>12</sup>

However, several provisions designed to achieve these state purposes also insure that the law's most powerful impact has been its adverse affect on business competition in the Maine whitewater rafting industry. Ironically, this result conflicts with several of the Maine Legislature's stated objectives for the law, including its goals of encouraging "diversity of whitewater trip experiences and services"<sup>13</sup> and "maximiz[ing] competition" within the industry.<sup>14</sup>

This note examines the major provisions of the Maine law and administrative regulations, and details how these provisions have restricted competition between licensed outfitters and virtually eliminated the possibility of new entry into the industry. The note also outlines possible legal challenges to the law's allocation system and order of launch provisions, and suggests alternative schemes for both systems.<sup>15</sup>

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9. ME. REV. STAT. ANN. tit. 12, § 7361 (Supp. 1985).

10. *Id.*

11. *Id.*

12. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) ("We assume New Jersey has every right to protect its . . . environment").

13. ME. REV. STAT. ANN. tit. 12, § 7364(6) (Supp. 1985).

14. *Id.* at § 7369(1)(C).

15. This note is not an exhaustive survey of all of the statutes and administrative rules that affect the Maine whitewater rafting industry. Those provisions cover many pages of statute and administrative code volumes; examination of all possibly relevant areas of Maine law is beyond the scope of this note.

## I. EFFECTS OF THE LAW ON COMPETITION

Maine law governs the operations of commercial whitewater outfitters by establishing regulations in two broad areas. First, recreational use limits are set on heavily used sections of certain rivers.<sup>16</sup> These use limits are implemented through an allocation system.<sup>17</sup> Second, safety requirements are mandated,<sup>18</sup> including an order of launch system applicable to commercial outfitters launching on river sections requiring allocations.<sup>19</sup>

## A. Recreational Use Limits

The recreational use limits established by the law place a cap on the total daily number of passengers permitted on commercial whitewater raft trips on the Kennebec River and on the Penobscot River.<sup>20</sup> These limits were instituted on the recommendation of the Study Commission;<sup>21</sup> the Study Commission Report showed that commercial use on these rivers had increased dramatically—more than forty-fold—between 1976 and 1982.<sup>22</sup> The report contained a prediction of further substantial increases unless state controls were adopted.<sup>23</sup> The stated goals of the recreational use limits include “minimizing detrimental impacts and maintaining the opportunity for a quality wilderness experience for rafters and other users.”<sup>24</sup>

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16. ME. REV. STAT. ANN. tit. 12, § 7368 (Supp. 1985).

17. *Id.* at § 7369.

18. *Id.* at § 7367.

19. *Id.* at § 7367(5).

20. *Id.* at § 7368(2)(C).

21. *Study Commission Report, supra* note 2, at 13-14.

There was substantial disagreement among the Study Commission members on the recreational use limits. On the Penobscot River, for example, Report A (signed by six members) recommended a limit of 560 while Report B, signed by three members, recommended a limit of 320. *Study Commission Report, supra* note 2, at 14. One Study Commission member who signed Report A, specially excepted to that Report's Penobscot limit, endorsing instead a limit of 450. *Study Commission Report, supra* note 2, at 21. The limit of 560 was adopted by the legislature.

22. *Study Commission Report, supra* note 2, at 18.

23. *Id.* at 13-14. See also *University of Maine Report, supra* note 6, at 20-21.

24. ME. REV. STAT. ANN. tit. 12, § 7368(1).

The law does not define “detrimental impacts” or “quality wilderness experience.” The Study Commission's recommendation of the “wilderness experience” goal was criticized by Study Commission member Sandra Neily. Neily, who did not endorse either of the Study Commission's Reports, commented that “[t]here has never been a definition of ‘wilderness experience’ or agreement on that as a common goal.” Moreover, Neily characterized the goal as “absurd on the Penobscot” where heavy logging operations and riverside cabins already

Under the law, the daily recreational use limits on the Kennebec River are 800 people on Saturdays, 1,000 people on weekdays, and no limit on Sundays.<sup>26</sup> The legislature based these limits on its finding that the "normal" pattern of water releases from the Harris Station hydroelectric dam on the Kennebec governed the amount of time available to launch rafts. On Saturdays, for example, water flows averaged only one to two hours in duration, permitting the launch of a maximum of 100 eight-person rafts.<sup>26</sup>

On the Penobscot River, the recreational use limit is 560 people on any day.<sup>27</sup> This Penobscot limit is based on the legislature's finding that the time required to safely maneuver through a major rapid on the Penobscot limited the total number of rafts that can navigate the river each day.<sup>28</sup>

While the term "recreational use limits" appears to apply to all river users, the law specifically states that "[n]on-commercial use is not limited" on either river.<sup>29</sup> Assuming that the Maine Legislature based its use limits for commercial passengers on valid findings of fact, the addition of substantial numbers of non-commercial users on the rivers could create safety problems or mean that some users would not be able to launch their craft.<sup>30</sup> The law makes no provision for resolving a conflict between commercial and non-commercial users in such an event. Although failing to address this potential problem, the law does establish both an allocation system and an order of launch schedule that govern the launches of commercial outfitters.

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detracted from the wilderness nature of the river. *Study Commission Report, supra* note 2, at 22, comment 2.

25. ME. REV. STAT. ANN. tit. 12, § 7368(2)(C) (Supp. 1985). Although this section of the law declares that there is no recreational use limit for Sundays on the Kennebec River because there is "no water released," there were 1,224 commercial passengers carried on Kennebec Sundays during the 1985 season. See *1985 Review, supra* note 1.

26. ME. REV. STAT. ANN. tit. 12, § 7368(2)(A) (Supp. 1985).

27. *Id.* at § 7368(3)(C).

28. *Id.* at § 7368(3)(A).

29. *Id.* at §§ 7368(2)(C), (3)(C).

30. The law allows "up to 10% of the recreational use limit" on any river to be reserved for non-commercial use by the public. ME. REV. STAT. ANN. tit. 12, § 7369(6) (Supp. 1985). Under the 1985 allocations, all available positions for both the Kennebec and Penobscot Rivers were assigned to commercial outfitters. See generally *Study Commission Report, supra* note 2, at 14 (finding by Study Commission in 1983 that "non-commercial whitewater rafting use is not extensive").

### B. The Allocation System

The Maine Legislature established a complex system for outfitters seeking permits for allocations within the recreational use limits.<sup>31</sup> The stated goals of the allocation system include: encouraging "a wide diversity of whitewater trip experiences and services";<sup>32</sup> providing "a fair distribution of river use among existing and future users";<sup>33</sup> "maximiz[ing] competition within the recreational use limits";<sup>34</sup> and allowing "reasonable business stability" for outfitters who are "providing excellent service and meeting the conditions of their allocations."<sup>35</sup> The allocation system is administered and enforced by the state agency that oversees commercial whitewater rafting, the Department of Inland Fisheries and Wildlife (the department).<sup>36</sup>

On the Kennebec, allocations are awarded in units of ten passengers beyond the minimum allocation of twenty; on the Penobscot, allocations are awarded in units of eight passengers beyond the minimum allocation of sixteen.<sup>37</sup> The maximum allocation per outfitter on each river is eighty passengers per day.<sup>38</sup> Since most commercial whitewater rafting use is on weekends, the outfitter allocations are presently required only on holidays and Saturdays on the Kennebec, and these days plus Sundays on the Penobscot.<sup>39</sup> Although the original (1983) law specified state review of outfitter

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31. ME. REV. STAT. ANN. tit. 12, § 7369 (Supp. 1985).

32. *Id.* at § 7369(1).

33. *Id.*

34. *Id.*

35. *Id.*

36. Although "the department" appears frequently throughout the chapter covering commercial whitewater outfitters, there is no definition of the term in ME. REV. STAT. ANN. tit. 12, §§ 7361-7370-A (Supp. 1985). However, ME. REV. STAT. ANN. tit. 12, § 7011 (Supp. 1985), provides in pertinent part:

There is established the Department of Inland Fisheries and Wildlife to preserve, protect and enhance the inland fisheries and wildlife resources of the State; to encourage the wise use of these resources; to ensure coordinated planning for future use and preservation of these resources; and to provide for effective management of these resources.

37. ME. REV. STAT. ANN. tit. 12, § 7369(3) (Supp. 1985). The differences in the minimum allocation and the multiples for additional allocations beyond the minimum appear to relate to the different total daily recreational use limits established for the two rivers. Allocation awards beyond the minimum allocations are made by administrative rule. See Maine Administrative Rules, (Department 09-137) Department of Inland Fisheries and Wildlife, chapter 14 at § 14.08 (1984) (available in the Secretary of State's Office, State of Maine, Augusta, Maine) [hereinafter cited as Rules].

38. ME. REV. STAT. ANN. tit. 12, § 7369(2) (Supp. 1985).

39. *Id.* at § 7369(10)(A). See also Rules, *supra* note 37, at § 14.08.

allocations on an annual basis,<sup>40</sup> the Maine Legislature amended this section in 1984 by permitting the department to award allocations for periods as long as three years.<sup>41</sup>

Since 1983, when the law went into effect, the department has awarded the full number of positions available under the recreational use limits to outfitters holding permits at the time of the law's enactment.<sup>42</sup> In addition, outfitters holding low allocations (at or near the minimum) have been unable to expand their business on days requiring allocations.<sup>43</sup> Although the law did not grandfather established outfitters in express terms, the effect of the allocation system has been precisely that.<sup>44</sup> The point system established by the department to administer the allocation system illustrates the effectiveness of the barrier against new entry and expansion by smaller licensed outfitters.

To qualify for an allocation an outfitter must satisfy a number of "allocation criteria."<sup>45</sup> These criteria include the outfitter's experience (on Maine rivers and elsewhere), safety record, financial

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40. See generally ME. REV. STAT. ANN. tit. 12, § 7369(5) (Supp. 1985) (note on prior history of statute).

41. ME. REV. STAT. ANN. tit. 12, § 7369(5) (Supp. 1985). Acting under the new law, the department awarded all allocations in 1985 for three year terms on both the Kennebec and Penobscot Rivers. See Memorandum from Col. John Marsh, Maine Warden Service, Augusta, Maine (January 2, 1985) (outlining commercial outfitter proposals for 1985-87).

42. Compare *Study Commission Report*, supra note 2, at 19 and 27 (commercial outfitters licensed at the time of the law's enactment) with *1985 Review*, supra note 1, (outfitters holding allocations for 1985-87).

43. See *Summary of Procedures used for 1985-1987 Whitewater Rafting Allocations* (Department of Inland Fisheries and Wildlife, State of Maine, Augusta, Maine) [hereinafter cited as *Summary*]. According to the department, all nine of the outfitters holding 1984 Kennebec River allocations less than the 80-passenger maximum applied for, and were denied, increased allocations for 1985-87.

Although the allocation system permits any licensed outfitter to carry up to 80 commercial passengers on days not requiring allocations, the allocated days are the highest volume days for outfitters. During the 1985 season, outfitters carried 48% of their Kennebec passengers and 70% of their Penobscot passengers on days requiring allocations; in 1985 outfitters without allocations carried 2% of the total Kennebec passengers and 1% of the total Penobscot passengers. See *1985 Review*, supra note 1.

44. Study Commission member Herbert Hartman, Director of the Maine Bureau of Parks and Recreation, warned that the allocation system proposed by the Study Commission majority (Report A) would create a "perpetual exclusive franchise to those currently licensed outfitters who meet the criteria established in that report." *Study Commission Report*, supra note 2, at 26. Report A was adopted, with relatively minor changes, as the law's allocation system. Compare *Study Commission Report*, supra note 2, at Appendix A (allocation system proposal) with ME. REV. STAT. ANN. tit. 12, § 7369 (Supp. 1985) (current allocation system).

45. ME. REV. STAT. ANN. tit. 12, § 7369(7) (Supp. 1985).

investment, and past performance within the terms of previous allocations.<sup>46</sup> Using a complex point system, the department quantifies an outfitter's record or experience in each category and then calculates a total score for each applicant.<sup>47</sup> The department then awards allocations based on an outfitter's total score—those with the highest rankings are awarded the highest allocations.

Under the department's 130-point ranking scheme, the established whitewater outfitters are clearly favored over newcomers. A maximum of thirty-five points may be awarded to outfitters with experience on Maine rivers and a maximum of twenty-five points may be awarded to outfitters based on their performance in meeting past Maine allocations.<sup>48</sup> Two other categories—outfitter experience on rivers outside of Maine and "other factors" which includes "growth" and "new entry" objectives—allow awards up to a maximum of fifteen points combined.<sup>49</sup> However, this is a small measure against the possible 60-point maximum advantage that an existing licensed outfitter is likely to carry into the allocation process.<sup>50</sup>

46. *Id.* at § 7369(7)(A).

47. The Rules, *supra* note 37, at § 14.07(C) (1985 amendments), provide:

Award of allocations. The Department shall evaluate information submitted by outfitters and assign points in each category as follows:

1. Outfitter's experience on Maine rivers	
a. On the river to be allocated	25
b. On other rivers in Maine	10
2. Outfitter's experience on rivers outside of Maine	5
3. Safety record	25
4. Financial investment	15
5. Services	15
6. Performance meeting past allocations	25
7. Other factors	5

The Department will award allocations based on the overall ranking of each company. At least one public hearing will be held before allocations are awarded.

See also Summary, *supra* note 43.

48. Rules, *supra* note 37, at §§ 14.07(C)(1), (6).

49. *Id.* at §§ 14.07(C)(2), (7). See also ME. REV. STAT. ANN. tit. 12, § 7369(7)(A)(8) (Supp. 1985).

50. Under the Maine rivers experience category, the state will consider the experience of "the outfitter and any employee" in calculating the score for an applicant. See ME. REV. STAT. ANN. tit. 12, § 7369(7)(A)(1) (Supp. 1985). See also Rules, *supra* note 37, at § 14.07(B)(1). Thus it is possible for an outfitter-applicant to hire Maine-experienced employees to enhance the applicant's chances of receiving an allocation. However, a new applicant has no reasonable assurance that the state will award an allocation. Because a Maine-experienced employee is likely to have ample opportunity for employment with Maine outfitters holding allocations, there is no persuasive reason for such an employee to take a chance with a new outfitter applying for an allocation. A new outfitter-applicant is also unlikely to re-

Unlike state regulation of public utilities, the recreational use limits and the allocation system are not parts of a comprehensive regulatory scheme designed to provide a public service and protect the interests of consumers.<sup>51</sup> Maine's commercial whitewater rafting laws are administered by the Department of Inland Fisheries and Wildlife,<sup>52</sup> an agency with no background in supervising the daily operations of a multimillion dollar industry engaged in the business of carrying passengers for hire. Even if the department had the experience and staff to supervise the industry, the law provides no mechanism for controlling either the fares or profits of the outfitters. The control that the department exercises over the types of services offered (or not offered) by the outfitters is indirect and is largely a response to the decisions made by the outfitters themselves.<sup>53</sup> Simply stated, the present allocation system protects Maine's established outfitters from most of the rigors of normal business competition while preserving outfitter control over many business decisions usually given over to state regulators in a regulated industry.<sup>54</sup>

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ceive many points in the "financial investment" category (a total possible award of 15 points). See Rules, *supra* note 37, at § 14.07(C)(4). A new outfitter would be unwise to make a substantial investment in "equipment, training, insurance, facilities and services" required in that category on the speculation that the state might award an allocation. See ME. REV. STAT. ANN. tit. 12, § 7369(7)(A)(4) (Supp. 1985).

51. The Study Commission and the Maine Legislature did not consider designating the Maine commercial whitewater outfitters as "common carriers" under the state's public utility law. A "common carrier" includes "every corporation or person . . . operating or managing any vessel regularly engaged in the transportation of persons or property for compensation upon the waters of this state. . . ." ME. REV. STAT. ANN. tit. 35, § 15(3) (1964). The operations of such carriers may be regulated by the Maine Public Utilities Commission. See generally ME. REV. STAT. ANN. tit. 35, §§ 1-21 (1964 and Supp. 1985) (powers of the Maine Public Utilities Commission). See also *Interdepartmental Memorandum—Whitewater Rafting Study Commission—Antitrust Concerns* (July 23, 1982) (available in the Maine Attorney General's Office, State Office Building, Augusta, Maine) (suggestions for preserving competition within the commercial whitewater rafting industry under proposed laws).

52. See *supra* note 36 (quoting ME. REV. STAT. ANN. tit. 12, § 7011).

53. The department considers the following factors related to an outfitter's service when awarding allocations: "the safety record of the outfitter"; "financial stability of the outfitter, including the ability to provide service as advertised and as reserved by customers"; "financial investment of the outfitter"; "ability of the outfitter to serve the interests of the consuming public by providing a type of trip experience that is in the public interest as determined by the department"; and "performance of the outfitter in providing the services proposed for the previous allocations." ME. REV. STAT. ANN. tit. 12, § 7369(7) (Supp. 1985). The department relies primarily on the outfitters themselves to supply information relative to their "performance." See, e.g., *Application for 1985 Allocations* (available in the Department of Inland Fisheries and Wildlife, State of Maine, Augusta, Maine).

54. See, e.g., *Dickinson v. Maine Public Service Co.*, 223 A.2d 435 (Me. 1966).

A public utility yields to the sovereign with respect to approval of rates, methods of financing, and other matters of policy which are ordinarily within

### C. *The Order of Launch Provision*

A new outfitter who overcomes the substantial obstacles of the allocation system and actually receives an allocation faces yet another state-imposed obstacle—the order of launch provision. This section of the law, section 7367(5), insures that new outfitters remain forever at the “end of the line.”

Most of title 12, section 7367, entitled simply “Safety,” mandates specific safety equipment, procedures, and reporting requirements for commercial whitewater outfitters.<sup>55</sup> Many of these provisions were part of the original safety laws enacted in 1979.<sup>56</sup> Under the “Order of Launch” provision of this section,<sup>57</sup> the legislature established a procedure for determining a permanent launch schedule for commercial outfitters on the rivers requiring allocations.

Under the launch order system, the state permitted each licensed outfitter to choose a “preferred launch position” for each river—the order of choosing was based solely upon an outfitter’s “first documented dates of continuous commercial operation on the particular river or portion of river.”<sup>58</sup> In practice, this order of choosing generally meant that the oldest outfitter selected launch position number one, the second oldest selected launch position number two and so on.

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the sole province of management in private business. In return for relinquishing the right to determine without let or hindrance whom it will serve, what it will charge, or how it will finance or invest, it is usually given relative freedom from competition in its service area on the part of public utilities similarly regulated and controlled. The monopoly thus afforded as among competing public utilities is in effect a quid pro quo for the obligation to render public service and to submit to regulation and control. Monopoly granted and assured by the sovereign could not otherwise be justified within the framework of the constitution.

*Id.* at 438.

55. Another major provision of the “Safety” section of the law requires state licenses for individuals who guide commercial whitewater trips. *See* ME. REV. STAT. ANN. tit. 12, § 7366 (Supp. 1984). The annual fee for 1984 for the guide’s license was \$138 for non-residents and \$36 for Maine residents. *See* ME. REV. STAT. ANN. tit. 12, § 7301(7) (Supp. 1984). In *Fischer v. Manuel*, No. 84-0147P (S.D. Me. filed May 1, 1984), a Vermont resident challenged the license fees under the privileges and immunities clause of the United States Constitution. The suit was settled when the Maine Legislature amended the license provision, setting the annual license fees for all whitewater guides at \$25. *See* ME. REV. STAT. ANN. tit. 12, § 7366(4) (Supp. 1985).

56. ME. REV. STAT. ANN. tit. 12, §§ 7361-7362 (1979).

57. ME. REV. STAT. ANN. tit. 12, § 7367(5) (Supp. 1985).

58. *Id.*

The legislative history of the commercial whitewater rafting law reveals nothing to explain the legislature's concern with the order in which commercial outfitters launch their rafts.<sup>59</sup> Although the provision itself declares that the order of launch is established to "protect public health and safety,"<sup>60</sup> there is no record to show that the informal procedures followed by outfitters in the past created any risk to the public.<sup>61</sup> However, given the limited size of the popular launching sites on the Kennebec and Penobscot Rivers, and the possibility of one-hour water releases on the Kennebec, it is conceivable that actual physical conflicts could develop between outfitters on busy days.<sup>62</sup> Such conflicts, of course, could endanger the public health and safety. While clear, state-mandated and state-administered launch order procedures probably minimize the possibility of conflicts between users at launch sites, the actual method adopted by the legislature is flawed in several respects.

First, the operation of the state's launch order system significantly advantages older outfitters while it disadvantages newer outfitters. The advantages to the favored class of outfitters are many. Outfitters holding early launch order positions have a virtual guarantee of the best water conditions on those days when water releases are of short duration. Under the state system, the day's launch procedure begins once the number one outfitter decides to launch; that is, no outfitter with a higher number may launch before the number one outfitter. Consequently, during a short water release on the Kennebec, the outfitters at the end of the schedule bear all the risk of low water levels (or no water) as the hydroelectric dam shuts down.<sup>63</sup> On the Penobscot River, an

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59. The Study Commission did make the following finding concerning commercial outfitter launches: "on crowded days on the Kennebec, there is competition among the outfitters for early launch times, in order to be assured of good rafting conditions, or in fact the chance to go at all." *Study Commission Report*, *supra* note 2, at 6.

60. ME. REV. STAT. ANN. tit. 12, § 7367(5) (Supp. 1985).

61. In fact, the Study Commission recommended that the commercial outfitters establish launch order schedules by "voluntary agreement." *Study Commission Report*, *supra* note 2, at 9-10 and Appendix A at A-5.

62. The most used launch sites, Harris Station on the Kennebec and McKay Station on the Penobscot, are so confined that only one outfitter may launch at a time. Moreover, a one-hour water release on the Kennebec would mean that on an 800-commercial-passenger day outfitters must launch one raft approximately every forty seconds (assuming 100 rafts launched). See generally *Study Commission Report*, *supra* note 2, at Appendices G and H (narrative account of typical commercial rafting trips on the Kennebec and Penobscot Rivers).

63. See *Study Commission Report*, *supra* note 2, at G-3 ("A late departure [on a commercial raft trip on the Kennebec River] definitely provided a different trip experience . . .

early launch can mean the difference between running the entire scheduled river trip or taking out early to meet the law's 5:00 p.m. curfew for commercial outfitters.<sup>64</sup> Further, an early start usually means a significantly better wilderness rafting experience on both rivers: there are no long waits at a congested launch site, the river trip itself is unhurried, and the river is uncrowded.

Second, because the launch order schedule appears to be permanently fixed, the state has created a business asset of substantial value for older outfitters. The law's order of launch provisions does not expressly require that an outfitter's position be relinquished when the business is sold or transferred. This contrasts with other sections of the law that specifically address disposition of an outfitter's license<sup>65</sup> and allocation<sup>66</sup> upon sale or transfer of the business. It is likely that positions near the beginning of the launch order schedule could add significantly to the sale price of an older outfitter's business. Conversely, outfitters holding positions near the end of the launch order schedule have little or no marketable value in their position.

Finally, determining launch positions by the seniority method serves no identifiable state interest. There is no evidence, for example, that older outfitters have demonstrated abilities to launch their trips in a safer or more expeditious manner than newer outfitters.<sup>67</sup> In fact, the business holding the number one position will

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[there was] little of the . . . exciting challenge that was experienced by those who had left at the beginning. . . .")

64. Commercial whitewater trips are prohibited on the Penobscot River before 8:30 a.m. and after 5:00 p.m. "in order to allow free time for other uses." ME. REV. STAT. ANN. tit. 12, § 7368(3)(B) (Supp. 1985). This provision does not apply to any other rivers or to any other users on the Penobscot River.

65. ME. REV. STAT. ANN. tit. 12, § 7365(6) (Supp. 1985) provides in pertinent part: "When a licensed whitewater outfitter's business is sold, the license shall be returned to the department. . . . The license is not an asset."

66. ME. REV. STAT. ANN. tit. 12, § 7369(7)(D)(1) (Supp. 1985) provides in pertinent part: Reviews [of an outfitter's provision of service] may be made [by the department] . . . when a majority ownership of an outfitter is sold or otherwise transferred. Sale or transfer of majority ownership shall not be cause for reduction or revocation of an allocation without a showing that the sale or transfer creates a significant possibility of a failure to substantially maintain the level and quality of service.

67. Reference to "older" and "newer" outfitters may be deceiving because in many cases "older" outfitters deserve that characterization only because they began commercial operations weeks (or even days) ahead of "newer" outfitters. For example, in 1979 there were a total of six licensed commercial whitewater outfitters in Maine; in 1981 there were fourteen outfitters and during the 1982 season there were nineteen outfitters. *Study Commission Report, supra* note 2, at 18 (there are no figures shown for the 1980 season). Assum-

continue to control that position irrespective of the outfitter's actual performance in launching its commercial trips.

The more likely rationales for the system are simple: Awarding launch order priority to older outfitters through a permanently fixed chronological schedule is administratively convenient (although no more convenient than some alternative systems) and is responsive to the political power that older outfitters probably exercised in the legislative process.<sup>68</sup> Neither rationale, however, implicates a legitimate state interest. Given the significant disadvantages inherent in a late launch order position and the lack of any legitimate state interest protected by the seniority method, there is no plausible justification for the present launch order system.

## II. CHALLENGES TO THE MAINE LAW

### A. Commerce Clause Challenge to the Allocation System

Part I detailed the burden imposed by Maine's allocation system on the entry of outfitters from outside the state. Although the point scheme established by the department to administer the allocation system does not expressly bar applicants on the basis of state citizenship, the department's administration of the law effectively disadvantages outfitters from states other than Maine.<sup>69</sup> This disadvantage is somewhat ironic considering the Maine Legislature's stated goal of "maximiz[ing] competition within the recreational use limits."<sup>70</sup>

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ing that the newly licensed outfitters began commercial operations at the start of the whitewater season, it is likely that launch order assignments for many outfitters are based upon virtually insignificant differences between their business start-up dates.

68. The political power of the established commercial outfitters may be substantial. Two voting members of the ten member Study Commission were outfitters; in fact, they represented "the two largest whitewater outfitters," controlling approximately forty-five percent of the total market in 1982. *Study Commission Report, supra* note 2, at 2 and 19. During 1982 and 1983, the Whitewater Outfitters Association of Maine, a trade association representing many of the established outfitters, retained Preti, Flaherty and Beliveau, an Augusta, Maine lobbyist, paying the firm \$24,747.72 in fees to lobby in support of the proposed law. See Annual Lobbyist Filings (available in the Maine Secretary of State's Office, State Office Building, Augusta, Maine). Finally, in 1983 the Maine Legislature established the Joint Select Committee on Whitewater Rafting solely to consider proposals to regulate the industry. See Joint Order of the Legislature S.P. 505, reprinted in *Maine Legislative Record—Senate 669* (April 26, 1983).

69. See *supra* notes 45-50 and accompanying text.

70. ME. REV. STAT. ANN. tit. 12, § 7369(1)(C) (Supp. 1985). Of the total of eight goals for the allocation system, the first four goals relate to business competition. ME. REV. STAT. ANN. tit. 12, § 7369(1) (Supp. 1985) provides in pertinent part:

Maximizing competition is also a fundamental goal of our national economic system, embodied in the commerce clause of the United States Constitution.<sup>71</sup> In a long line of cases, the Supreme Court has repeatedly and unequivocally enforced the Constitution's commerce clause by striking down state laws and regulations that discriminate against competition from outside the state. In *H.P. Hood & Sons v. Dumond*,<sup>72</sup> the Court struck down a New York statute that had been applied to prohibit Hood from establishing a milk receiving depot in New York near the Massachusetts border. The New York Commissioner of Agriculture denied Hood's application to build the depot because the facility would divert milk away from other established depots in the area and Hood's proposed shipment of New York milk to Massachusetts could create shortages for New York consumers.<sup>73</sup>

Declaring that "our economic unit is the Nation,"<sup>74</sup> Justice Jackson, writing for the Court, stated that "the right to engage in interstate commerce is not the gift of a state, and . . . a state cannot regulate or restrain it."<sup>75</sup> In another passage, still regarded as a classic statement of commerce clause doctrine, Justice Jackson continued:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold

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- A. To encourage a wide diversity of whitewater trip experiences and services;
  - B. To provide a fair distribution of river use among existing and future users;
  - C. To maximize competition within the recreational use limits;
  - D. To allow for reasonable business stability for outfitters by allowing stable, well-qualified outfitters who are providing excellent service and meeting the conditions of their allocations to continue to do so, subject to periodic review when allocations are reviewed.

71. U.S. CONST. art. I, § 8, cl. 3 provides: "The Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Most of the passengers carried by Maine's commercial whitewater rafting outfitters are from states other than Maine. In 1981, 26% of the passengers were from Maine while 74% were from other states. *University of Maine Report*, *supra* note 6, at 5. Presumably, a similar percentage would apply to outfitter expenditures for advertising and promoting of Maine rafting trips.

72. 336 U.S. 525 (1949).

73. *Id.* at 528-9.

74. *Id.* at 537.

75. *Id.* at 535.

his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.<sup>76</sup>

Even the state's "admitted powers to protect the health and safety of its people,"<sup>77</sup> the Court concluded, did not protect the New York law from invalidation under the commerce clause.

In a later milk case, *Dean Milk Co. v. City of Madison*,<sup>78</sup> the Court struck down a Madison, Wisconsin ordinance that prohibited the sale of milk in the city unless the milk had been processed and bottled within five miles of the center of Madison.<sup>79</sup> Though the plaintiff in *Dean Milk* was based in the state of Illinois, the Court noted that the fact that Wisconsin milk processed outside the five-mile limit was similarly proscribed by the ordinance was "immaterial" to commerce clause analysis.<sup>80</sup> "[I]n practical effect," the Court reasoned, the regulation "excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois."<sup>81</sup> The Court continued:

[I]n thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.<sup>82</sup>

In this situation, the Court suggested, the city could simply charge processors for "the actual and reasonable cost" of inspecting processing plants located outside of the Madison city limits.<sup>83</sup>

Perhaps the most powerful reminder of the vitality of the commerce clause in the area of environmental protection is the Su-

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76. *Id.* at 539.

77. *Id.* at 538.

78. 340 U.S. 349 (1951).

79. *Id.* at 356.

80. *Id.* at 354 n.4.

81. *Id.* at 354.

82. *Id.* at 354 (footnote omitted).

83. *Id.* at 354-55.

preme Court's decision in *City of Philadelphia v. New Jersey*.<sup>84</sup> In that case, the Court struck down a New Jersey law that prohibited disposal in that state of solid waste collected in other states. As a predicate to its ruling, the Court declared that solid waste was "an article of commerce" deserving of commerce clause protection.<sup>85</sup> While agreeing with New Jersey's contention that solid waste disposal in that state posed critical environmental problems, the Court held that New Jersey's law was invalid because it placed the entire burden on commercial interests outside the state. The law, the Court concluded, was an example of "a presumably legitimate goal . . . sought to be achieved by the illegitimate means of isolating the State from the national economy."<sup>86</sup> The Court continued, "the evil of protectionism can reside in legislative means as well as legislative ends."<sup>87</sup>

In reaching its decision, the Court applied the "flexible approach"<sup>88</sup> outlined in *Pike v. Bruce Church, Inc.*<sup>89</sup> for commerce clause challenges to state statutes where "legislative objectives are credibly advanced and there is no patent discrimination against interstate trade. . . ."<sup>90</sup> The Arizona law challenged in the *Bruce Church* case required fruit and vegetable growers to pack their produce in standard containers within the state of Arizona and to label their containers as Arizona produce before transport out of the state.<sup>91</sup> The plaintiff, a commercial cantaloupe grower with a packing facility located just across the state line in California, contended that the law imposed an unconstitutional burden on interstate commerce.<sup>92</sup>

Although the Court found that the application of the Arizona statute to the grower did "affect and burden interstate commerce,"<sup>93</sup> the Court did not hold the law to be violative *per se* of the commerce clause. Rather, Justice Stewart, writing for the Court, balanced the state's declared interests against the effects of the law on interstate commerce:

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84. 437 U.S. 617 (1978).

85. *Id.* at 621-22.

86. *Id.* at 627.

87. *Id.* at 626.

88. *Id.* at 624.

89. 397 U.S. 137 (1970).

90. *City of Philadelphia v. New Jersey*, 437 U.S. at 624.

91. *Pike v. Bruce Church, Inc.*, 397 U.S. at 138.

92. *Id.*

93. *Id.* at 139-40.

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>94</sup>

To meet the law's mandate, the cantaloupe grower was required to build an Arizona packing facility valued at \$200,000.<sup>95</sup> The Court acknowledged that the local interests protected by the Arizona law, identified as protection and enhancement of the reputation and financial return of the state's produce growers, were "surely legitimate."<sup>96</sup> However, those interests, when balanced against the substantial burden placed on the grower, were not great enough to sustain the Arizona statute.<sup>97</sup>

The principles of commerce clause doctrine apply to the allocation system administered by the state of Maine. The allocation system is a mechanism distinct from the law's recreational use limits (with their safety and environmental protection goals). Alternative systems that allocate use within the limits without burdening otherwise qualified out-of-state outfitters would still meet the state's legitimate goals.

The department devised the present allocation point scheme ostensibly to meet the legislature's specific objectives for the allocation system.<sup>98</sup> However, the effects of the point scheme cannot be reconciled with the legislature's declared pro-competition goals, particularly that of "maximiz[ing] competition."<sup>99</sup> In fact, it is difficult to conceive of any regulation—short of an outright ban on licenses for commercial outfitters from outside Maine—that would be more harmful to the competition that true interstate commerce brings.<sup>100</sup>

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94. *Id.* at 142.

95. *Id.* at 144.

96. *Id.* at 143.

97. *Id.* at 146.

98. See *supra* notes 32-36 and accompanying text.

99. See *supra* note 70 and accompanying text.

100. The Study Commission declared that deciding on an allocation system to divide use within the recreational use limits was "one of the most troublesome issues for the Com-

No findings in the *Study Commission Report* justify the burden imposed by the present system on outfitters with commercial outfitting experience on rivers outside of Maine. In fact, the Commission recommended, and the legislature adopted, the International River Classification System as the measure by which the entire scope of the Maine law is defined.<sup>101</sup> The legislature thus expressly recognized that rated Maine rivers have no qualitative differences from similarly rated rivers in other states. Under the law, the state regulates all commercial whitewater outfitters operating on Maine rivers, or portions of rivers, rated "Class IV or higher."<sup>102</sup> According to the department's standards, an applicant with outfitting experience on any "Class IV or higher" rivers outside of Maine may earn a maximum total of only ten points in the experience category.<sup>103</sup> This total is only one-sixth of the total an outfitter holding a Maine allocation may earn in the equivalent allocations criteria.<sup>104</sup> This discrimination against outfitters with experience on comparable rivers outside of Maine is not justified by fact or reason.

In the *Dean Milk* case, the Court expressed the underlying concern that motivated the adoption of the Constitution's commerce clause: "To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."<sup>105</sup> The Maine allocation system's point scheme necessarily burdens the entry of even qualified new businesses from outside of Maine solely because their experience—no matter how extensive—has come on comparable rivers outside of Maine's borders. Maine has thus established, through

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mission." *Study Commission Report*, *supra* note 2, at ES-3 and 15-16. See also *supra* note 44 (Study Commission member's concerns about system recommended by the Study Commission majority).

It is possible, of course, for an out-of-state outfitter to purchase the business of a Maine outfitter holding an allocation. However, the Supreme Court implied that similar "opportunities" for the plaintiffs in *Dean Milk* and *Pike v. Bruce Church, Inc.* only provided further illustration of the protectionist nature of the laws at issue in those cases.

101. ME. REV. STAT. ANN. tit. 12, § 7363(10) (Supp. 1985).

102. *Id.*

103. See *supra* note 47.

104. These criteria include: "experience on Maine rivers" (35 possible points) and "performance meeting past [Maine] allocations" (25 possible points). Rules, *supra* note 37 at § 14.07(C) (1985 amendments).

105. *Dean Milk*, 340 U.S. at 356.

parochial regulation, precisely the type of hurdle to competition and free enterprise that the commerce clause is intended to protect against.

No discernible safety purpose is advanced by the allocation system's discriminatory treatment of out-of-state outfitters. Maine's stringent guide and outfitter licensing requirements, as well as the detailed safety equipment and navigation practices standards, have been shown to effectively protect hundreds of thousands of passengers on commercial rafting trips.<sup>106</sup> Writing for the plurality in *Kassell v. Consolidated Freightways Corp.*,<sup>107</sup> Justice Powell stated, in a somewhat different context, that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack."<sup>108</sup> Likewise, the Maine Legislature's incantation of a similar purpose<sup>109</sup> does not protect the allocation system as administered from commerce clause scrutiny.

Another specific goal of the Maine allocation law, in addition to maximizing competition, is "[t]o allow reasonable business stability" for the licensed outfitters who hold allocations.<sup>110</sup> If the department reads this goal to mean "protection" from out-of-state competition for those businesses, the invalidity of the law becomes apparent at the start. While it is unlikely that a state would announce its purpose so baldly, the Supreme Court recently addressed a similar legislative purpose in *Bacchus Imports, Ltd. v.*

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106. See *Study Commission Report, supra* note 2, at 5-6 ("Maine has safety regulations that are reputed to be as tough as any in the nation . . . the overall safety record of the industry is good").

107. *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

108. *Id.* at 670.

109. ME. REV. STAT. ANN. tit. 12, § 7361 (Supp. 1985).

110. *Id.* at § 7369(1)(D). The department has affirmed the "business stability" goal in administrative regulations adopted in 1984. Rules, *supra* note 37, at § 14.07(A). In those rules, the allocation system goals include "provid[ing] stability for [the] whitewater rafting industry." *Id.* These rules make no mention of the "maximizing competition" goal found in the statute. ME. REV. STAT. ANN. tit. 12, § 7369(1)(C) (Supp. 1985). Perhaps the state rulemakers themselves acknowledge the inconsistency of their allocation point system with the pro-competition goals mandated by the legislature. At the public hearing on the 1985 outfitter allocation awards, department spokesman Charles Colgan illuminated the process used by the department to reconcile the "conflict" in the law's business stability goal and the maximizing competition goal. Spokesman Colgan remarked that the department simply considered business stability as the more important goal in the allocation awards process. 1985 Commercial Outfitter Allocation Awards: Hearing Before Representatives of the Department of Inland Fisheries and Wildlife, Augusta Civic Center, Augusta, Maine (January 29, 1985).

*Dias*.<sup>111</sup> The petitioner in *Bacchus*, a liquor wholesaler, brought a commerce clause challenge against a Hawaii statute that exempted some locally produced alcoholic beverages from a twenty percent state excise tax. Hawaii enacted this exemption for the purpose of "aiding" Hawaiian industry.<sup>112</sup>

While acknowledging that a state may enact laws that encourage domestic industry, the *Bacchus* Court cautioned that the commerce clause "stands as a limitation on the means by which a State can constitutionally seek to achieve that goal."<sup>113</sup> The Court struck down the statute, declaring that such "legislation constitutes 'economic protectionism' in every sense of the phrase."<sup>114</sup>

The Maine Legislature acted under its powers to preserve the state's natural environment and protect public health and safety when it enacted the laws regulating the commercial whitewater rafting industry. It is beyond question that the whitewater stretches of the Kennebec and Penobscot Rivers are limited natural resources and that steadily increasing commercial use of these rivers could threaten environmental harm. The recreational use limits established for each river have insured that daily commercial use by licensed outfitters does not exceed limits set by the legislature.<sup>115</sup> While these numerical limits appear reasonable and properly within the legislature's powers, the allocation system established to assign the available positions within these limits—even if administered as part of the state's plan to protect the environment—must achieve this end in a manner consistent with the commerce clause.

By heavily weighting the allocation award process in favor of only those outfitters with experience on the Maine rivers requiring allocations, the allocation system established by the department creates a constitutionally impermissible burden against competi-

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111. 104 S.Ct. 3049 (1984).

112. *Id.* at 3056.

113. *Id.*

114. *Id.* at 3057.

115. During the 1985 season, the average use for allocated days on the Kennebec River was 589 commercial passengers (outfitters filled 74% of the allocated spaces over the season) and the 800-passenger recreational use limit was reached or exceeded on one day. On the Penobscot River, the average use for allocated Saturdays was 416 commercial passenger (outfitters filled 74% of the allocated spaces over the season); the average use for allocated Sundays was 335 commercial passengers (outfitters filled 57% of the allocated spaces over the season) and the 560-passenger recreational use limit was reached or exceeded on two allocated days. See *1985 Review*, *supra* note 1.

tion from outside Maine. The present system's invalidity is made more evident because efficient, even-handed allocation system alternatives, examined in Part III of this note, are readily available to achieve the state's legitimate purposes.

*B. Equal Protection Challenges to the Allocation System and the Order of Launch Provision*

In a series of decisions examining state statutes that regulate business and economic activity, the Supreme Judicial Court of Maine has held that such laws must conform to the equal protection clauses of the state<sup>116</sup> and federal<sup>117</sup> constitutions. In these cases the court has set out the standards it employs for determining whether a law violates the equal protection rights of businesses.

While the court has stated that its analysis under the Maine Constitution is "no more stringent than the restrictions federally imposed,"<sup>118</sup> it has struck down on equal protection grounds a number of statutes that regulate business. In the process, the court has engaged in an examination of the challenged statute that is more thorough—and less deferential—than the "minimum rationality" standard of equal protection analysis of the United States Supreme Court.<sup>119</sup>

The court in *Dickinson v. Maine Public Service Co.*<sup>120</sup> held that state laws granting a territorial monopoly to an electric cooperative deprived regulated competitors of the equal protection of

116. ME. CONST. art. I, § 6-A provides: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof."

117. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

118. *State v. Richardson*, 285 A.2d 842, 844 (Me. 1972). See also *McNicholas v. York Beach Village Corp.*, 394 A.2d 264, 268 (Me. 1978); *Beaulieu v. City of Lewiston*, 440 A.2d 334, 338 n.4 (Me. 1982).

119. See *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). In a *per curiam* opinion, the Court noted that "[w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of the particular statutory discriminations." *Id.* at 303. Such statutes, the Court continued, are examined under a standard where "it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id.* at 303-4. The Court has struck down on equal protection grounds only one statute regulating business or economic activity. That case, *Morey v. Doud*, 354 U.S. 457 (1957), was overruled by *New Orleans v. Dukes*.

120. 223 A.2d 435 (Me. 1966).

the laws because the state did not treat the cooperative in all respects as a fully regulated public utility. Under the challenged state laws, the state expressly exempted electric cooperatives from obligations requiring non-discriminatory service to the public within its service area; the cooperatives were also exempted from state supervision and control over electric rates and methods of financing.<sup>121</sup> At the same time, competitors of the cooperatives offering identical services were subject to comprehensive state regulation as public utilities.<sup>122</sup> In holding that the laws granting the cooperative a territorial monopoly were unconstitutional, the court declared that "each competitor is entitled to equal protection of the laws and the scales may not be weighted so as to give one competitor an unfair advantage over the other."<sup>123</sup>

In *Ace Tire Co., Inc. v. City of Waterville*,<sup>124</sup> an auto junkyard operator brought an equal protection challenge against a Maine law that set annual junkyard permit fees at \$500 for junkyards located less than 100 feet from a state highway and \$10 for those located more than 100 feet from a state highway.<sup>125</sup> The state justified the higher fees for junkyards within 100 feet of the road by contending that such establishments were aesthetically "offensive" to the public and posed a danger to motorists on state highways.<sup>126</sup> While recognizing that preservation of the aesthetic value of the natural environment and promotion of highway safety are legitimately within the scope of the state's police power, the court reasoned that more effective regulatory measures—such as requiring that all junkyards be screened from view from highways—were available to achieve the state's goals.<sup>127</sup>

The *Ace Tire* court struck down the state statute as violative of the state's equal protection clause, stating that the \$500 fee

bears no actual relation to the end purpose of the Act. The discrimination is unwarranted and arbitrary, the difference is illusory and in effect the statute unreasonably and without proper distinction favors some operators of junkyards over others. . . . The Act and its application under the police

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121. *Id.* at 437.

122. *Id.* at 438.

123. *Id.* at 439.

124. 302 A.2d 90 (Me. 1973).

125. *Id.* at 93-94.

126. *Id.* at 97.

127. *Id.* at 100.

power must have a clear, real and substantial relation to its purpose.<sup>128</sup>

The court's command in *Ace Tire* is unequivocal: when a state law regulating business classifies competitors in a manner that burdens some businesses while benefitting other similarly situated competitors, the basis for the classification must bear a real and substantial relationship to the public purpose that the state seeks to accomplish.<sup>129</sup>

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128. *Id.*

129. The *Ace Tire* standard has been cited in other state equal protection cases. In *McNicholas v. York Beach Village Corp.*, 394 A.2d 264 (Me. 1978), the court struck down on equal protection grounds a municipal park user fee assessed only on scuba divers. Stating that "*Ace Tire* does control here," the court noted that equal protection limitations "apply not only to the *fact* of discrimination but also to the *manner* of discrimination between legislatively created classes." *Id.* at 269 (emphasis in original). The fee established in the ordinance was invalid, the court concluded, because the municipality failed to show "us any legitimate governmental purpose to justify the difference." *Id.* at 270 (footnote omitted). For other cases in which the court has invalidated business regulation statutes on equal protection grounds see: *Boothby v. City of Westbrook*, 23 A.2d 316 (Me. 1941) (ordinance prohibiting storage of gasoline within 300 feet of public schools but exempting gasoline stations established before enactment of the ordinance); *Maine v. Union Oil Co. of Maine*, 120 A.2d 708 (Me. 1956) (state law limiting size of signs displayed at gasoline stations but inapplicable to any other type of business); *Associated Hospital Service of Maine v. Mahoney*, 213 A.2d 712 (Me. 1965) (state law permitting charitable tax-exempt corporation to sell health and accident insurance free from state regulations governing sales of similar policies by non-charitable taxable corporations).

*But see Beaulieu v. City of Lewiston*, 440 A.2d 334, 339 (Me. 1982) (In deciding case involving equal protection challenge to municipal welfare assistance program, the court declared "even if the classification lacks mathematical precision, the law survives constitutional scrutiny unless there exists no conceivable set of facts which prevents the characterization of the . . . distinction as arbitrary, invidious, or irrational").

The court has upheld state and local laws challenged on equal protection grounds where it has found the classifications created by the laws did not offend the state or federal constitution. *See, e.g., Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Me. 1973) (statute establishing absolute liability for oil spills and creating claims fund for injured third parties imposed only to off-loading vessels and their shore-based terminals; distinction with other types of vessels and terminals was valid because it bore a substantial relationship to actual differences related to achieving the statutory objective), *appeal dismissed*, 414 U.S. 1035 (1973); *Town of Boothbay v. National Advertising Co.*, 347 A.2d 419 (Me. 1975) (ordinance enacted as highway safety measure prohibited all off-premise roadside advertising but permitted limited on-premise roadside advertising); *Shapiro Brothers Shoe Co., Inc. v. Lewiston-Auburn Shoeworkers Protective Ass'n.*, 320 A.2d 247 (Me. 1974) (statute requiring that employers with 100 or more employees give advance notice of voluntary closures to employees valid because it was rationally related to the objectives of the law of preventing social and economic disruptions caused by sudden large-scale layoffs); *State v. S.S. Kresge, Inc.*, 364 A.2d 868 (Me. 1976) (Sunday closing law that classified stores selling the same types of goods on the basis of size was not invidious discrimination because larger stores forced to close on Sundays under the law employed more people and drew more customers than exempt smaller stores); *State v. National Advertising Co.*, 387 A.2d 745 (Me. 1978) (statute classifying roadside advertising signs as compensable or

In enacting the commercial whitewater outfitter laws, the Maine Legislature sought to protect against two evils: the "significant [safety] risks" that the trips "pose to users of these rivers" and the "environmental, physical and social burdens" that increased commercial use places on the state's resources.<sup>130</sup> These objectives have been achieved through the state's licensing and safety requirements and the recreational use limits mandated for heavily used rivers. But Maine has gone one step too far by compelling certain commercial outfitters to bear a disproportionate burden of insuring the achievement of the state's legitimate goals.

By utilizing a scheme that awards allocations to outfitters already protected from competition by the law, the allocation system creates, in effect, a series of self-perpetuating exclusive franchises. Outfitters holding allocations profit, grow, and accumulate higher allocation system point totals each year. But no new business has the "experience," the "investment," or record of "performance meeting past allocations" because no outfitter starting operations after the law's effective date can realistically expect to hold an allocation.<sup>131</sup>

The allocation system creates three classes of licensed com-

noncompensable under state sign removal program solely on the basis of availability of federal funds to reimburse state removal costs upheld because minimization of state removal costs was a secondary express purpose of the program) (3-2 decision).

130. ME. REV. STAT. ANN. tit. 12, § 7361 (Supp. 1985).

131. See *supra* note 44 and accompanying text.

The original law, enacted in 1983, provided that the department make allocation awards for the 1983 season based primarily on an outfitter's "demonstrated use" during the preceding season. ME. REV. STAT. ANN. tit. 12, §§ 7369 (4)(A), (B) (Supp. 1983). Additional allocations not based solely on "demonstrated use" were permitted under the original awards for (1) "growth of outfitters with demonstrated use in 1982" and (2) "entry of new outfitters, especially when a substantial business commitment . . . was made prior to June 15, 1983." *Id.* at § 7369(4)(C). Thus the law created three classes of commercial whitewater outfitters based on the dates set by the legislature: outfitters operating in 1982, outfitters that had made a "substantial business commitment" prior to June 15, 1983, and outfitters that began operations after June 15, 1983. This method of classification by itself likely offends constitutional equal protection. In *Opinion of the Justices*, 261 A.2d 58 (Me. 1970), the court issued an advisory opinion to the Maine Legislature on, *inter alia*, the validity of a proposed state school aid law that set aid eligibility based on the date of a school's establishment. The court noted:

When the classification is based upon time, "putting in one class all the instances existing at a certain date, and placing all others in another class" and where such procedure discriminates "unwarrantably in favor of establishments . . . existing . . . on a given date, such classification has been held a denial of equal protection of the laws."

*Id.* at 77 (citations omitted).

mercial whitewater outfitters. These are: (1) The most favored class, consisting of six outfitters who control nearly seventy percent of the allocations. This class is effectively protected from any realistic business competition that would reduce its valuable market share.<sup>132</sup> This benefit comes at the expense of the two disfavored classes. (2) The nine outfitters sharing thirty percent of the allocations; this class, while protected from the outfitters with no allocations, is frozen into a small share of the market. (3) The most disfavored class is the group of outfitters without state allocations. This class, carrying between one and two percent of the total number of passengers, is essentially shut out of the market.

What characteristics do the disfavored classes of licensed outfitters possess that would support the state's differential treatment? It is important to note initially that these licensed outfitters are subject to the same insurance, bonding, licensing, safety, and resource protection laws that govern the operations of the favored class of outfitters and their employees. The characteristic that distinguishes the disfavored classes is, in the final analysis, simply the dates on which those outfitters began operations.<sup>133</sup> The favored class under the law is made up of those outfitters with high "demonstrated use" in 1982, the season prior to the statute's enactment. All other licensed outfitters fall into one of the two disfavored classes, against whom Maine has assessed the costs of its program designed to insure safe and environmentally sound commercial whitewater trips. This distinction offends Maine's equal protection doctrine because it plainly "rests on grounds wholly irrelevant to the achievement of the statute's objectives."<sup>134</sup> Like the laws in *Dickinson* and *Ace Tire*, the allocation system should fall and make way for a new statute that treats the businesses regulated by the system in an equal manner.

Similarly, the law's order of launch provision, while evidently protecting a legitimate state interest, achieves that protection by

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132. An outfitter holding an allocation could lose the allocation for violating any of the law's provisions. Penalties that the department may assess against outfitters include "nonrenewal, revocation or suspension of an outfitter's or guide's license or an allocation or both." ME. REV. STAT. ANN. tit. 12, § 7370-A (Supp. 1985). The department has never invoked this provision against an outfitter.

133. See *supra* note 131.

134. *State v. S.S. Kresge*, 364 A.2d 868, 872 (Me. 1976). See also *McNicholas v. York Beach Village Corp.*, 394 A.2d 264, 270 (Me. 1978) ("The basis of any such distinctions must be the rational relationship between a legitimate governmental purpose and the manner chosen to effect the distinction.").

creating a system of classifications that gives a significant business advantage to some outfitters. The system of basing launch order priority on the dates that outfitters began business lacks even the "any conceivable state of facts" justification that *Beaulieu v. City of Lewiston* permits.<sup>136</sup> To support the discriminatory treatment of outfitters forced to launch at the end of the line, the state must explain how its public safety purpose is served by a system that grants preferences based on dates alone<sup>136</sup> and that permits an outfitter selling its business to transfer the state-assigned launch order position to a new owner.<sup>137</sup> If the state has an argument that justifies the law's distinctions, it is one that is not apparent from either the Study Commission's findings of fact or from the law itself.

### III. ALTERNATIVES TO THE PRESENT LAW

#### A. *The Allocation System*

The present Maine laws and regulations that establish recreational use limits, together with commercial outfitter licensing and safety provisions, ensure a state role in preserving the natural environment and supervising navigation on public waters. Likewise, specific safety laws and regulations covering the individuals licensed as guides by the state to operate commercial whitewater trips protect the public health and safety.<sup>138</sup> Noting that Maine's

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135. 440 A.2d 334, 338 (Me. 1982) (emphasis in original). The plaintiff in *Beaulieu* was a homeowner challenging a municipal general assistance program that paid shelter expenses for rent but not for mortgage payments. The court rejected the homeowner's equal protection argument, holding that the program was "founded upon a rational premise: the purpose of general assistance is to provide immediate and necessary aid; the existence of a mortgage obligation rationally suggests the existence of equity from which the purchaser may draw to satisfy those very needs." *Id.* at 342 (footnote omitted).

136. See *supra* note 63 and accompanying text.

137. See *supra* notes 61-62 and accompanying text.

138. ME. REV. STAT. ANN. tit. 12, § 7366 (Supp. 1985). See also *id.* at § 7367(1) (white water trip restrictions); § 7367(2) (Whitewater Safety Committee); § 7367(3) (safety reports); and § 7369-A (Whitewater Advisory Committee). The administrative safety rules for commercial whitewater outfitters are found in Rules, *supra* note 37, at §§ 14.01-.06.

Since the primary responsibility for a safe rafting trip rests with the licensed guide in charge of the trip, it is worthwhile to note the testing and licensing procedures used by the state to certify guides. Each applicant for a guide's license must be at least eighteen years old and satisfactorily complete the following: (1) a physical examination, (2) Red Cross certified Cardiopulmonary Resuscitation and first aid courses, (3) a preliminary written exam with the guide application, (4) training as a guide on each river for which a license is sought and a recommendation from the licensed outfitter who gave the training, (5) a 100-question written examination, and (6) an oral examination before the Guides Examination Board. Separate examinations and certifications are required for both the Kennebec and Penobscot Rivers (the Penobscot is broken down further into upper-river and lower-river categories).

"safety regulations are reputed to be as tough as any in the nation,"<sup>139</sup> the Study Commission in 1983 recommended only relatively minor additions to the safety laws and regulations governing the state's commercial whitewater rafting outfitters.<sup>140</sup> However, the Study Commission did propose both recreational use limits on the Kennebec and Penobscot Rivers and an allocation system designed to divide up the positions available within those limits.

The *Study Commission Report* identified weekend over-use by commercial outfitters as a potential threat to safe and environmentally sound whitewater trips.<sup>141</sup> While the law's recreational use limits prevent weekend over-use,<sup>142</sup> the allocation system itself undermines efforts to spread out commercial use over the rest of the week. Under the allocation system's point scheme,<sup>143</sup> an outfitter's point award in the "Performance" category is based solely on that outfitter's use figures for days requiring allocations. As a consequence, an outfitter with a record of high weekend use is rewarded by the system, while an outfitter with commercial use spread out evenly over the entire week is, in effect, punished if that outfitter fails to meet its weekend allocation.

### 1. *Modifications to the Existing Allocation System*

To alter the present unbalanced use pattern,<sup>144</sup> the state could establish a sliding permit schedule that assesses the highest permit fee for an outfitter whose total weekday use fails to meet a specified percentage of the outfitter's weekend allocation. For example, using a sixty percent goal, an outfitter with an 80-person Kennebec allocation would have a total weekday goal of forty-eight people. If

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The state maintains a computerized record on each licensed whitewater guide; a guide cannot renew the license unless all first aid certifications are current. See *Study Commission Report*, *supra* note 2, at N-1 to -3.

139. *Study Commission Report*, *supra* note 2, at 5-6.

140. *Id.* at 7-10. See also ME. REV. STAT. ANN. tit. 12, § 7367(2) (Supp. 1985) (establishing a whitewater safety committee to "advise the commissioner [of the department] in establishing and reviewing safety requirements for whitewater trips, developing a safety information program and reviewing the safety record of whitewater guides and outfitters.").

141. *Study Commission Report*, *supra* note 2, at ES-2 to -3 and 12-14.

142. See *supra* note 115.

143. See *supra* note 47 and accompanying text.

144. In 1985, 56% of the total commercial passengers carried on the Kennebec and Penobscot Rivers rafted on allocated days. On the Penobscot, 70% of the commercial use was on allocated days. While the Kennebec figure is lower, 48% of the total use of that river, the only allocated Kennebec days are Saturdays and holidays. 1985 *Review*, *supra* note 1.

the outfitter's actual total use over the weekdays was substantially below forty-eight people, the state permit fee for that week would be highest; if weekday use was substantially above the 48-person goal, the outfitter could establish a credit against its permit fee.<sup>145</sup> This provision could be part of a new allocation system or incorporated into the existing scheme.

Because this sliding permit fee system could significantly affect profits, outfitters would have an incentive to seek realistic weekend allocations and to meet their weekday use goals. Further, such a provision would be an efficient substitute for the existing allocation system award for "performance in meeting past Maine allocations."

The law's allocation system itself does not operate directly to protect public health and safety or preserve natural resources—it is merely a mechanism to assign the limited positions available for commercial passengers within the recreational use limits established for the Kennebec and Penobscot Rivers. Because the state's recreational use limits by definition act as limitations on free enterprise in the commercial whitewater rafting market, the allocation system should function to offset—not reinforce—those constraints.<sup>146</sup> Several alternative approaches are available to modify or replace the present system.

The framework of the existing allocation system's point scheme could be retained with some changes. There is nothing in the present statute establishing the criteria for the allocation system<sup>147</sup> that expressly authorizes the department to weight the criteria unequally or to deny a new applicant an allocation.<sup>148</sup> The legislature should clarify this section of the law with modifications that permit greater opportunity for new entry into the market.

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145. Commercial outfitter fees are found in ME. REV. STAT. ANN. tit. 12, § 7365(3) (Supp. 1985) (annual license fee), § 7369(8)(A) (allocation fees), and § 7369(8)(B) (user fees).

146. See, e.g., *Exxon v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (statute designed to enhance business competition in retail gasoline market by prohibiting gasoline producers and refiners from owning retail stations advances a "legitimate [state] purpose"); *Opinion of the Justices*, 376 A.2d 118, 120 (N.H. 1977) (statute prohibiting gasoline suppliers from owning retail stations effects valid state goals of "promoting free and fair competition" and preventing "monopolistic control" of the market).

147. ME. REV. STAT. ANN. tit. 12, § 7369(7)(A) (Supp. 1985).

148. Changes in the law that permit or encourage new entry would also meet the Maine Legislature's own pro-business competition goals expressed in the law itself. See *supra* note 67 and accompanying text.

The statute should specify that all of the present allocation system criteria are weighted equally (i.e., the same number of points in each category) in the department's evaluation of applicants. Further, the legislature should require the department to award at least the minimum allocation to applicants compiling points in any six of the eight existing categories; higher point totals would go to determining allocations beyond the minimum (i.e., up to the maximum outfitter allocation for each river). Under this system, a new outfitter would not be denied an allocation for failure to compile points in categories such as "Maine rivers experience" and "performance in meeting past Maine allocations."

Further modifications to the present allocation system should include:

(a) A new category for "Total Allocation Sought." Under this category, the department would award the highest points to applicants seeking the lowest allocations and the lowest points to applicants seeking the highest allocations. An applicant seeking the maximum allocation for all three days on both rivers would receive no points in this category. (Presumably an applicant with the capacity to carry a maximum allocation on both rivers would receive substantial points in other categories such as "Financial Investment" and "Services.") While not barring an outfitter from holding the maximum allocation on each river, this scoring would permit new entry into the market and would tend to prevent the present concentration of allocated positions in a few large outfitters.<sup>149</sup>

(b) The maximum allocation for the Penobscot River should be reduced to fifty six commercial passengers per outfitter. This would mean that no outfitter would hold an allocation of more than ten percent of the total 560-passenger recreational use limit

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149. While all existing outfitters holding Maine allocations are protected from new competition by the system's point scheme, the allocation system provides an added advantage to the six largest businesses by effectively protecting their valuable market shares from all competition. Under the 1985 allocations, three outfitters hold the maximum 80-passenger allocations on all days requiring allocations on both the Kennebec and Penobscot. These outfitters thus control 720, or 38%, of the 1,920 total positions available. Three additional outfitters hold a total of 608 positions on both rivers. Thus, six businesses control a total of 1,328 allocated positions for both rivers; this figure represents approximately 69% of the total. The remaining 620 positions, approximately 31% of the total, are divided among nine smaller businesses. In 1985, the three largest outfitters (controlling 38% of the allocations) carried 47% of all commercial passengers on the Kennebec and Penobscot Rivers; the six largest outfitters (controlling 69% of the allocations) carried 72% of the total passengers. 1985 Review, *supra* note 1.

for the Penobscot. (The present 80-passenger limit per outfitter on the Kennebec is ten percent of that river's 800-passenger recreational use limit.) Under this proposal, a total of 192 new positions would be available for new entry or growth on the Penobscot River.<sup>150</sup>

(c) If the above modifications do not create expanded opportunities sufficient to encourage growth and accommodate new entry, the legislature could enact an additional major modification: a prohibition on outfitters holding concurrent allocations on both the Kennebec and Penobscot Rivers.<sup>151</sup> A bar on concurrent allocations would create healthy inter-river competition as outfitters promoted both weekend and weekday trips on "their" rivers. This provision would serve both to foster business competition within the recreational use limits for each river and spur development of rafting trips on under-used weekdays.<sup>152</sup>

## 2. *New Allocation System*

The existing allocation system could be abandoned altogether and annual allocation awards made on a presumption that each outfitter meeting basic qualifications<sup>153</sup> is entitled to the maximum allocation available within a river's recreational use limit. The maximum outfitter allocation for each river would vary annually depending on the total number of outfitters applying for allocations. For example, if sixteen qualified outfitters applied for allocations on the Kennebec River with its 800-passenger recreational use limit, each outfitter would receive a 50-passenger allocation.

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150. The reduction to a 56-passenger maximum allocation would make available 104 positions on Saturday and 88 positions on Sunday. 1985 *Review*, *supra* note 1.

151. See generally *Exxon v. Governor of Maryland*, 437 U.S. 117, 124 n.13 (1978) (statute mandating divestiture of retail stations owned by gasoline producers and refiners "is by no means a novel form of economic regulation . . . courts have had little difficulty sustaining such statutes against a substantive due process attack").

152. Under the present system, outfitters who hold allocations on both rivers (10 outfitters with Kennebec allocations hold the entire Penobscot allocation) have little business motivation to operate simultaneous weekday trips on the two rivers. To sustain business volume and profits, an outfitter confined to a one-river allocation would presumably turn to increased promotion of weekday trips. See generally 1985 *Review*, *supra* note 1 (1985 outfitter allocations); *supra* note 144 and accompanying text (data showing heavy commercial use on allocated days).

153. Basic qualifications already include: guide licensing, see *supra* note 138; requirement of liability insurance coverage, see Rules, *supra* note 37, at § 14.06(A); authority for department to require surety bond in an amount sufficient to cover deposits of customers, see ME. REV. STAT. ANN. tit. 12, § 7369(7)(B) (Supp. 1985).

Under this system, an outfitter would have the option of choosing an allocation less than the maximum initially awarded by the state. The outfitter choosing a lower allocation would return unwanted positions to the state's allocation pool. All returned positions would be awarded by the state in a second round to outfitters who seek the maximum allocation.<sup>154</sup> In the above example, if six outfitters returned a total of sixty positions to the allocation pool, each of the remaining ten outfitters would receive an additional allocation award of six passengers.<sup>155</sup>

To insure that allocations under this system are used to their fullest, an outfitter would pay an annual state permit fee based on a sliding scale that penalized an outfitter whose actual use figures were significantly below the allocation the outfitter received. At the end of each season, the state would review an outfitter's actual use figures and assess the permit fee against a deposit posted with the state by each outfitter.<sup>156</sup>

The modifications and the new allocation system proposed in this note do not exhaust all of the possible changes that could be made in the present system. The variety and number of these proposals, however, illustrate the ready availability of alternatives. The underlying objective of any changes to the present allocation system should be to insure that the commercial whitewater rafting industry in Maine is open to genuine business competition from new outfitters—both in-state and out-of-state—as well as existing outfitters currently holding small allocations. The Maine Legislature made clear that its goals for the law's allocation system included encouraging diversity, providing fair distribution to existing and future users, and maximizing competition within the recreational use limits.<sup>157</sup> These are salutary purposes that benefit both consumers and the outfitting businesses—they are, however, goals that the present allocation system effectively frustrates.

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154. See *Study Commission Report*, *supra* note 2, at F-3 (commercial whitewater outfitter allocation system in Arches and Canyonlands National Park, Moab, Utah, uses presumption of maximum allocation for all outfitters meeting qualifications).

155. Under this system, outfitters may end up with allocations that are not in multiples of eight or ten. However, allocations in these multiples are presently made by the department on the basis of administrative rule; they are not mandated by the statute and there appears to be no sound reason that they should be required.

156. See *Study Commission Report*, *supra* note 2, at F-3 (Arches and Canyonlands National Park allocation systems assesses outfitters' annual fees based on the higher of the outfitter's allocation or actual use for the season).

157. See *supra* note 70.

### B. *The Order of Launch Provision*

State regulation of the order of launch for commercial whitewater outfitters can be justified as a legitimate exercise of the state's police power. However, for the launch order regulation to satisfy the requirements of state equal protection law, the statutory scheme must treat all licensed whitewater rafting outfitters in a substantially similar fashion.

A law could be drafted that would achieve both of these objectives while permitting the state to administer a launch order system to protect public health and safety. The following proposal should replace the present order of launch system.<sup>158</sup>

5. Order of launch. Launch order of commercial outfitters on rivers or portions of rivers requiring allocations shall be determined, supervised and enforced by the department to protect public health and safety.

A. On or before December 1 annually, the department shall determine the order of launch schedule for the next whitewater season by a random drawing of all commercial outfitters licensed to operate on a particular river or portion of river. This order of launch schedule shall be published by the department on or before December 10 annually.

B. Launch order positions assigned by the department shall not be sold or transferred from one commercial outfitter to another commercial outfitter; the launch order position of a commercial outfitter remains with that outfitter's business throughout the whitewater season regardless of sale or transfer of the outfitter's business. A commercial outfitter who becomes licensed after December 1 to operate on a river requiring an allocation shall be assigned a position at the end of the launch order schedule at the time the outfitter's license is issued by the department.

C. Commercial outfitters are required to comply with the annual order of launch schedule on weekends and holidays throughout the whitewater season as defined by 12 M.R.S.A. § 7369(10)(D). The department may require compliance with the order of launch schedule on other days of the week when

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158. ME. REV. STAT. ANN. tit. 12, § 7367(5) (Supp. 1985) would be repealed.

necessary to protect public health and safety.

D. Nothing in this section shall be construed to apply to non-commercial users of the rivers or portions of rivers requiring allocations. Non-commercial users of rivers or portions of rivers requiring allocations for commercial outfitters under 12 M.R.S.A. § 7369 shall be permitted to launch their craft at any time during the operation of the order of launch schedule.

E. Failure of a commercial outfitter to comply with this section or any rule promulgated by the department to administer this section shall subject the outfitter to the penalties of 12 M.R.S.A. § 7370-A.

This proposal assures that the state's order of launch system treats all of the licensed commercial outfitters in an even-handed manner. By utilizing a random drawing to determine order of launch positions, the state gives each commercial outfitter an equal opportunity to secure the number one launch position, with all of its advantages. This section expressly provides a method for accommodating outfitters who become licensed after the state's random drawing. Further, this system establishes priority in the launch schedule for private parties to prevent conflicts between commercial and non-commercial users. Because this system gives new and old businesses equal opportunity for the best launch order positions, the barrier of the present seniority system that discourages new entry is removed. Equally important, this proposal does not confer a state-created business asset on a favored group of outfitters. By adopting this system, the Maine Legislature would establish a simple, efficient and equitable launch order procedure, while abolishing a scheme that is both unfair and unjustified by the circumstances.<sup>159</sup>

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159. Other possible alternatives for a launch order system include a voluntary system, a rotation method in which outfitters move along a fixed order on an annual or monthly basis, and a random drawing conducted on a monthly or weekly basis. All of these systems, however, would create significant problems. Under a voluntary system, many of the same problems that characterize the present system would arise. Most important, of course, no outfitter is likely to volunteer for the last position in the launch order schedule. Under the fixed order schedule, there could be problems accommodating new outfitters. Moreover, the fixed order schedule and the monthly or weekly drawing systems involve relatively frequent changes in the launch order schedule. These changes would be inefficient and confusing for outfitters and their customers and would involve substantial administrative and enforcement problems for the state. By setting a fixed schedule for the entire system on December 1 of the preceding year, the system proposed in this note would be more efficient for outfitters, commercial passengers and the state. This proposal also has a specific provision for handling new outfitters who become licensed after the state launch order is promulgated.

## CONCLUSION

Maine's laws regulating the commercial whitewater rafting industry were ostensibly enacted to protect public health and safety and preserve the state's natural resources. While the laws evidently achieve both of these legitimate—and laudable—objectives, the actual methods chosen by the Maine Legislature also adversely affect business competition in significant ways. The law's allocation system effectively bars new entry into the Maine commercial whitewater industry—particularly by out-of-state outfitters—while it protects the market and the market shares of the existing licensed outfitters. The law's order of launch provision mandates a launch schedule that unnecessarily provides a competitive advantage to older outfitters over newer businesses.

Both sections of the state scheme appear to violate federal and state constitutional law. The allocation system conflicts with both the strong "national marketplace" policy embodied in the federal constitution's commerce clause and the equal treatment goals of Maine law. The order of launch provision arbitrarily burdens newer outfitters by weighting the scales against them in a manner contrary to the equal protection clause of the Maine Constitution.

As the first comprehensive state regulatory system for commercial whitewater rafting, the Maine law will likely serve as a model for other states considering similar legislation. Before other states pattern their own legislation after Maine's law, the Maine Legislature should consider alternative systems, such as those proposed in this note, to effectuate legitimate state purposes in a manner that is more even-handed and more open to genuine business competition. With such a system in place, Maine would provide well-deserved national leadership in the regulation of this growing industry.

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