

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

2011 JUL 28 AM 11:33

WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

CITE AUTHORITY: W. Va. Code 21-15-6 and 21-15-8

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 10

TITLE OF RULE BEING PROPOSED: Zipline and Canopy Tour Responsibility Act

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 28, 2011

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

David W. Mullins, Commissioner, West Virginia Division of Labor, State Capitol Complex, Building 6, Room B-749, Charleston, WV 25305
304.558.7890 x 111 (phone); 304.558.2273 (fax); david.w.mullins@wv.gov

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Jennifer Burgess, Director, Safety Section, West Virginia Division of Labor, State Capitol Complex, Building 6, Room B-749, Charleston, WV 25305
304.558.7890 x 120 (phone); 304.558.2415 (fax); jennifer.w.burgess@wv.gov

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

June 27, 2011 through July 27, 2011

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

July 28, 2011

d. Attach findings and determinations and reasons:

Attached

WEST VIRGINIA DIVISION OF LABOR

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EARL RAY TOMBLIN
Governor



DAVID W. MULLINS
Commissioner

Statement of Circumstances and Brief Summary

of Proposed Legislative Rule, Title 42, Series 10

Zipline and Canopy Tour Responsibility Act

The West Virginia Division of Labor proposes a new legislative rule, Title 42, Series 10, of the West Virginia Code of State Regulations, in order to implement the provisions of a new article, W. Va. Code § 21-15-1, *et seq.*, the Zipline and Canopy Tour Responsibility Act, which became effective June 12, 2011. The proposed legislative rule includes the following provisions:

- It incorporates by reference the Association for Challenge Course Technology (“ACCT”) “Challenge Course and Canopy Zip Line Tour Standards,” 7th edition, 2008, that are to be used by inspectors and special inspectors to assess the installation, repair, use, operation, and maintenance of ziplines and canopy tours for the safety of the general public.
- It establishes administrative procedures for the registration, inspection, permit application and issuance of permits for ziplines and canopy tours.
- It establishes the qualifications for special inspectors and procedures for the certification of special inspectors.
- It defines terms that are not defined in the ACCT standards or the statute.

FISCAL NOTE FOR PROPOSED RULES

Zipline and Canopy Tour Responsibility Act

Rule Title:

Type of Rule:

Legislative Interpretive Procedural

Agency:

West Virginia Division of Labor

Address:

State Capitol Complex
Building 6, Room B-749
Charleston, WV 25305

Phone Number:

304.558.7890 x 111

Email: david.w.mullins@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The Division of Labor anticipates that this proposed rule will have a minimal impact on the costs and revenues of state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Zipline and Canopy Tour Responsibility Act

Rule Title:

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

N/A

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: June 8, 2011

Signature of Agency Head or Authorized Representative

Angel R. Moor

TITLE 42
LEGISLATIVE RULE
DIVISION OF LABOR

2011 JUL 28 AM 11:33

SERIES 10
ZIPLINE AND CANOPY TOUR RESPONSIBILITY ACT

CLARENCE M. BURNETT
GOVERNOR OF WEST VIRGINIA
SECRETARY OF STATE

§42-10-1. General.

1.1. Scope. -- This legislative rule sets the minimum acceptable safety standards for the installation, repair, use, operation, maintenance and inspection of ziplines and canopy tours and establishes procedures for the issuance of permits for ziplines and canopy tours.

1.2. Authority. -- W. Va. Code §§21-15-6, 21-15-8.

1.3. Filing Date. --

1.4. Effective Date. --

§42-10-2. Application and Enforcement.

2.1. Application. This legislative rule applies to the West Virginia Division of Labor and all persons, ziplines and canopy tours governed or otherwise within the purview of the Zipline and Canopy Tour Responsibility Act, W. Va. Code §21-15-1, *et seq.*

2.2. Enforcement. The enforcement of this legislative rule is vested with the West Virginia Division of Labor.

§42-10-3. Definitions.

3.1. "ACCT" means and refers to the Association for Challenge Course Technology, P. O. Box 47, Deerfield, IL 60015.

3.2. "Commissioner" means the Commissioner of the West Virginia Division of Labor or his or her designated representatives.

3.3. "Imminent danger" means a practice or condition which could reasonably be expected to cause death or serious injury to participants, operators and/or the general public.

3.4. "Inspector" means a person employed by the Division who meets the training and experience requirements set forth in the ACCT Challenge Course and Canopy/Zip Line Tour Standards, Seventh Edition, Chapter 5, Section C or substantially equivalent training and experience requirements.

3.5. "Serious injury" means an injury that results in death, loss of consciousness, or requires medical treatment other than first aid by a physician or other medical professional for which a record is created.

3.6. "Unscheduled cessation of operation" means an unplanned cessation of operation of a zipline or canopy tour due to any mechanical, electrical, operational or structural malfunction, modification or adjustment or due to any environmental conditions, including weather.

§42-10-4. Adoption of Standards.

The ACCT "Challenge Course and Canopy Zip Line Tour Standards," 7th edition, 2008, are adopted and incorporated herein by reference.

§42-10-5. Registration and Permit to Operate Required.

5.1. Before beginning the operation of a zipline or canopy tour in West Virginia for participant use, the owner or operator of the zipline or canopy tour shall apply in writing to the Commissioner for a permit to operate and shall register each zipline or canopy tour.

5.2. A permit to operate a zipline or canopy tour shall expire annually on December 31st of each year.

5.3. A permit to operate is valid only for the zipline or canopy tour registered with the Commissioner.

§42-10-6. Permit Application Requirements.

6.1. An owner of a zipline or canopy tour shall submit an application for a permit to the Commissioner and shall register each zipline or canopy tour at least 15 days before the first intended date of use.

6.2. An owner of a zipline or canopy tour shall submit the application and registration on forms provided by the Commissioner.

6.3. An owner of a zipline or canopy tour shall submit any amendment to the application or registration to the Commissioner at least 24 hours before the first intended date of use of the zipline or canopy tour.

6.4. An owner of a zipline or canopy tour shall include the following information on the application:

6.4.a. The name, address, telephone number, email address (if applicable) and website address (if applicable) of the zipline or canopy tour operator;

6.4.b. Registration of the zipline or canopy tour, including the location, dates of operation, date of installation, and the name and address of the installer of the zipline or canopy tour equipment;

6.4.c. Documentation of a commercial general liability insurance policy covering claims for personal injury, death and property damages arising from the operation of a zipline or canopy tour in amounts not less than those specified in W. Va. Code §21-15-3(4);

6.4.d. The most recent inspection report prepared by an inspector or special inspector, including a certification that the inspection fee has been paid, or a request for inspection by the Division and a check for the inspection fee, as specified by W. Va. Code §21-15-7(a).

6.5. An owner of a zipline or canopy tour shall include the permit fee with the permit as specified by W. Va. Code §21-15-7(a).

§42-10-7. Annual Inspection; Issuance of a Permit to Operate; Emergency Contact Protocol.

7.1. An inspector or special inspector shall inspect a zipline or canopy tour and determine that it is in compliance with the provisions of W. Va. Code § 21-15-1, *et seq.* and this rule before a permit to operate can be issued.

7.2. A permit to operate shall be in the form of a certificate of inspection, which shall include the date or dates of the inspection.

7.3. A zipline or canopy tour operator shall post a copy of the certificate of inspection in close proximity to the entry to the zipline or canopy tour where it is readily visible to participants.

7.4. With the issuance of each permit to operate, the Division shall furnish its emergency contact protocol for the reporting of a serious accident, fatality, or other emergency, which shall include 24/7 electronic and telephone access.

§42-10-8. Qualifications and Certification of Special Inspectors.

8.1. A person applying for certification as a special inspector shall make application annually on a form provided by the Commissioner.

8.2. An applicant shall furnish documentation of the following with the application:

8.2.a. Experience and training that comply with the requirements set forth in the ACCT Challenge Course and Canopy/Zip Line Tour Standards, Seventh Edition, Chapter 5, Section C; or

8.2.b. Experience and training that is substantially equivalent to the requirements set

forth in the ACCT Challenge Course and Canopy/Zip Line Tour Standards, Seventh Edition, Chapter 5, Section C.

§42-10-9. Commercial General Liability Insurance.

9.1. The Commissioner may, in his or her discretion, require the zipline or canopy tour operator to submit the complete insurance policy or contract.

9.2. A zipline or canopy tour operator shall obtain an insurance policy issued by a carrier licensed or approved to transact business by the WV Offices of the Insurance Commissioner

9.3. The Commissioner shall not accept any commercial general liability insurance policy unless it obligates the insurer to give written notice to the Commissioner at least 30 days before any proposed cancellation, suspension or non-renewal of the policy.

§ 42-10-10. Unscheduled Cessation of Operation; Imminent Danger; Serious Injury or Fatality; Reports and Records.

10.1. Unscheduled Cessation of Operation.

10.1.a. Following any unscheduled cessation of operation, the operator of a zipline or canopy tour shall immediately have the participants safely removed or unloaded from the zipline or canopy tour.

10.1.b. If the operator determines that the zipline or canopy tour can safely resume operation, the operator shall first operate the zip line or canopy tour without participants to ensure that the cause of the unscheduled cessation of operation has been corrected.

10.1.c. The operator shall document any unscheduled cessation of operation, including the identification of the zipline or canopy tour, the name of the employee operating the zipline or canopy tour during the unscheduled cessation, and a complete description of the incident, including the date, time, weather conditions, location, number of participants, etc.

10.2. Imminent Danger.

10.2.a. If the Commissioner or a special inspector determines that a zipline or canopy tour presents an imminent danger, he or she shall immediately give written notification to the zipline or canopy tour owner or operator, advising him or her that the zipline or canopy tour shall be immediately removed from service.

10.2.b. If the owner or operator does not immediately remove the zipline or canopy tour from service, the inspector shall immediately report the imminent danger to the Commissioner.

10.2.c. If the owner or operator does not immediately remove the zipline or canopy tour from service, the Commissioner may seek a temporary or permanent restraining order or injunction to prohibit the continuing operation of the zipline or canopy tour.

10.3. Serious Injury or Fatality.

10.3.a. If a participant or member of the general public is involved in an accident related to the operation of a zipline or canopy tour that results in a serious injury or a fatality, the owner or operator shall immediately shut down the operation of the zipline or canopy tour and secure the safety of other participants and the general public.

10.3.b. An owner or operator shall ensure that the scene of a serious injury or fatality is left intact from the time of the accident and shall ensure that the zipline or canopy tour involved is not removed from the scene of the accident without written authorization from the Commissioner or a law enforcement officer.

10.3.c. The owner and any employees who witnessed the accident or who operated the zipline or canopy tour when the accident occurred shall be available to be interviewed by the Commissioner.

10.3.d. The owner of the zipline or canopy tour shall make a report of the injury or fatality to the Commissioner within 24 hours of its occurrence, using the Division's emergency contact protocol.

10.3.d.1. After the owner of the zipline or canopy tour notifies the Commissioner of a serious injury or fatality, the Commissioner shall, with reasonable promptness, advise the owner whether the zipline or canopy tour shall remain shut down pending investigation and inspection or whether it can be placed back in service.

10.3.d.2. In deciding whether the zipline or canopy tour shall remain shut down or whether it can be placed back in service, the Commissioner's sole consideration shall be the safety of participants and the general public.

10.3.e. The owner shall document the accident, to include the full name, address and telephone number of the injured person(s), a description of the injuries, identification of the zipline or canopy tour involved, the names and addresses of the owner and employees who witnessed the accident, and any other pertinent information describing the events leading up to the accident.

10.3.f. An owner or operator shall keep a record of every accident or fatality with the certificate of inspection, which shall be readily accessible to the general public. The record shall include the following information:

10.3.f.1. The date(s) of every accident or fatality;

10.3.f.2. A description of the type(s) of accident(s);

10.3.f.3. The number of people injured or killed; and

10.3.f.4. A description of the types of injuries.

10.4. Reports and Records.

10.4.a. The owner of the zipline or canopy tour shall retain all reports, documents, photographs and records required by this section of the rule for not less than 3 years from the date of the unscheduled cessation, imminent danger notification, or serious injury or fatality.

10.4.b. If an owner violates any provision of this section of the rule, the Commissioner may permanently revoke the permit to operate.

SUMMARY OF COMMENTS RECEIVED **AGENCY RESPONSES AND AMENDMENTS**

Comment from Steven P. McGowan, Esquire

1. Mr. McGowan suggested incorporating by reference the 8th edition of the Association for Challenge Course Technology (“ACCT”) standards rather than the 7th edition.

Agency Response

A legislative rule cannot prospectively adopt through incorporation by reference future or as yet unpublished editions of standards. When a standard incorporated by reference is revised in the future, the legislative rule can be amended to incorporate the revision or the new editions at that time. For this reason, the Division has not amended the proposed rule in response to this comment.

Comment from Steven P. McGowan, Esquire

2. Mr. McGowan suggested that the Commissioner reserve the right to recognize alternate means of compliance for the issuance of a permit to operate and for inspections when there may be special circumstances that would warrant a variance. He further suggested that any alternative should be “safe or safer than” the ACCT standard.

Agency Response

Although the Zipline and Canopy Tour Responsibility Act permits compliance with standards that are “substantially equivalent” to ACCT standards, after discussion with individuals involved in the zipline and canopy tour field, the Division is not aware of any standards that are substantially equivalent to the ACCT standards. At such time when there are standards that are recognized as being “substantially equivalent” to the ACCT standards, the Division can and will amend the rule to incorporate them. In addition, the statute does not currently have any provision for granting variances. For these reasons, the Division has not amended the proposed rule in response to these comments.

Comment from Steven P. McGowan, Esquire

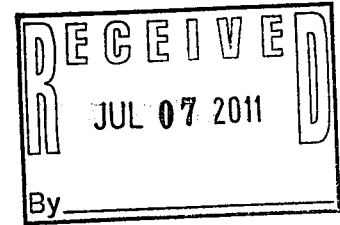
3. Mr. McGowan expressed his concern that, if a zipline or canopy tour were shut down due to a serious injury or fatality, the Division would not be able to respond quickly enough so that the zipline or canopy tour could be placed back into operation if there were no risk to the safety of participants or the general public.

Agency Response and Amendments

After discussion with Mr. McGowan and Richard Bourlon, Health and Safety Team Leader, Boy Scouts of America, the proposed rule has been amended to include the following provisions: that the Division will provide an emergency response protocol with the issuance of a permit to

operate, with 24/7 telephone and electronic access for the reporting of a serious injury, fatality, or other emergency; that when notified of a serious injury or fatality, the Division will respond as quickly as possible in order to determine whether the zipline or canopy tour must remain shut down for further investigation and inspection or whether it can be placed back into service; and that the sole consideration in determining whether the zipline or canopy tour must remain shut down will be the safety of participants and the general public.

July 6, 2011



David W. Mullins, Commissioner
Division of Labor
State Capitol Complex
Building 6, Room B-749
Charleston, WV 25305

Re: Proposed Zipline and Canopy Tour Responsibility Act Rules

Dear Commission Mullins:

We represent Arrow WV, Inc., an affiliate of the Boy Scouts of America, in connection with the development of the Summit Bechtel Family National Scout Reserve in Fayette County. We have reviewed the proposed rules and offer the following comments for your consideration.

1. We understand that the 8th Edition of the ACCT standards is nearing publication. We suggest you consider amending the rule so as to incorporate future updates of the standard as opposed to relying on the 7th Edition.

2. We suggest that the Commissioner reserve the right to allow for alternative means of compliance for the purposes of permitting and inspections due to special circumstance where a variance may be warranted. Any such alternative should be subject to an "as safe or safer than" standard and require written approval.

3. Section 10.3 could result in a serious hardship on operators, especially if the Commissioner is unable to immediately respond to an accident causing serious injury as it is currently defined. This may be the case even if an inspection reveals that the zipline or canopy is in compliance and does not pose a risk to others.

For example, a participant sustaining an injury requiring stitches from a cut or casting of a broken bone unrelated to the zipline or canopy tour being in compliance could result in the zipline or canopy tour being out of service for an indeterminate amount of time. The operator would seem to be precluded by proposed rule 10.3.b from putting the zipline or canopy tour back in service after such an accident with no deadline imposed on the Commissioner to inspect or release the scene.

The proposed rule should be modified to provide for the release of the scene within a reasonable period of time after such an accident provided there is: (1) a timely report of the accident to the Commissioner; (2) no prior similar accident at the facility within thirty (30) days and (3) an inspection of the facility after an accident by a qualified person that shows the facility is in compliance with the applicable standard.

David W. Mullins, Commissioner

Page 2

July 6, 2011

The Commissioner should require someone from the Division be available twenty-four (24) hours a day to make the determination as soon as possible as to whether an on-site investigation will be conducted or to release the scene.

Any accident resulting in a fatality or serious injury with the clear potential for causing death should be immediately reported to the Commissioner and the Commission should be required to commence an on-scene investigation within twenty-four (24) hours.

In the event of a serious injury requiring hospitalization, the Commission should be able to commence an on-scene investigation within twenty-four (24) hours and release the scene immediately after completing the on-scene investigation.

If the serious injury does not require hospitalization and is determined by inspection to be unrelated to the design, equipment or operation of the facility, then the scene should be released immediately by verbal order of the Commissioner's representative, but in no case should the scene need to be preserved more than twenty-four (24) hours absent special circumstances.

Please feel free to call if you should have any questions regarding these comments.

Very truly yours,



Steven P. McGowan

cc: Jack Furst
Richard Mathews
Mike Patrick
Isaac Manning
Tom Wagner