



The Killer Bees Appear to be Winning

AN UPDATE REGARDING WAKE BOATS/BLADDER BOATS

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The watercraft commonly known as wakeboard boats, bladder boats, ballast boats or wave boats (hereinafter, “wake boats”) are increasingly becoming a big problem on inland lakes throughout Michigan. Wake boats are not simply a different type of boat, and the problems they create are not just a matter of degree. The problems caused by wake boats are geometrically worse than conventional speed boats. This article will update my earlier Attorney Writes column on wake boats from the Fall 2013 issue of the Riparian Magazine called “Of Mosquitoes and Killer Bees.”

As wakeboarding has steadily increased in popularity over the past decade, statewide sales of recreational boats designed to create large, high energy wakes have also increased dramatically. Intense competition among wake boat manufacturers has led to the development of new technologies to improve the ability of their boats to create increasingly high energy wakes. Variable, high volume ballast systems, as well as specially designed hulls, propellers and powertrains, have all led to significant improvement in the performance of wake boats in recent years. The potential for collateral damage to docks, hoists, moored boats and other shoreline equipment as well as the potential for shoreline erosion increases with wake boat displacement, engine and hull size, and speed. Ballast-laden wake boats operating at even moderate speeds are capable of producing surface and near-surface wake related energy levels that substantially exceeds the energy created by even the largest of waves induced by intense summer thunderstorms and/or high winds on inland lakes.

Why are wake boats such a problem on Michigan inland lakes? There are generally at least three problems associated with such watercraft. First, they are having significant negative environmental impacts on lakes. Why? Wake

boats are designed not only to throw a larger wake or wave than conventional boats, but their propulsion system and deep wakes disturb the bottomlands of the lake involved to a much greater depth and degree than other boats. Given such boats’ hyper-wave effect, they tend to keep lake waters churned up (and murky) as well as continually disturbing the bottomlands of the shallower lakes, which imperils natural aquatic plants, insects, fish and microscopic life. Many of the adverse environmental impacts remain unknown and untested at this time.

Second, wake boats are destroying natural shorelines, seawalls and other shoreline protective structures throughout the state. Waves created by wake boats are not only larger and more intense than waves created by conventional boats, they also slam into shorelines and seawalls with much greater force and velocity. Many riparian landowners have reported that seawalls and shorelines, which have for years been able to withstand conventional boating activity, are being destroyed or disrupted in relatively short periods of time by the large waves from wake boats. In many instances, the operators of wake boats are destroying the private property of others.

Finally, wake boats present significant safety hazards to other boaters, swimmers and even people resting or sitting on or in moored boats, swim rafts and docks. It is not uncommon for the wave from a wake boat to cause a person to fall down on or fall off of a dock or moored boat, or even break boat mooring lines.

Unfortunately, on a relatively small lake, just a few wake boats operated irresponsibly (and even sometimes, operated in a normal fashion) can destroy many of the attributes that make lake living attractive.

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What can be done to resolve the problems associated with wake boats? Sadly, in Michigan, the options appear to be limited. Some of the possible solutions are as follows:

A. More vigorous enforcement of existing Michigan boating laws.

Existing Michigan laws already make it illegal to operate a boat at a wake producing speed within a certain distance of the shore, a dock, a swim raft, a swimmer, a fisherman or sailboats. Furthermore, the improper use of a wake boat could constitute careless or even reckless boating in a given situation. More vigorous enforcement of these laws as to wake boats could make a difference.

B. Special watercraft rules.

Pursuant to MCL 324.80108 *et seq.*, the Michigan Department of Natural Resources (the "DNR"), in conjunction with a local municipality, can adopt one or more special watercraft rules for a given inland lake. The special watercraft rules include no wake areas, no wake lakes, a limitation on hours for high speed boating and waterskiing and similar restrictions. Unfortunately, however, the statute does not allow the adoption of a special watercraft rule to ban or regulate certain types of boats, such as wake boats. Furthermore, the DNR generally will not agree to adopt a special watercraft rule unless there is a demonstrated safety problem with the lake involved.

C. The possibility of a municipality adopting its own local ordinance regarding wake boats.

Theoretically, a Michigan township, city or village could adopt a local ordinance (without DNR involvement) to regulate or potentially even ban wake boats on some or all lakes within the municipality. *Miller v Fabius Township Board*, 366 Mich 250 (1962). However, it is also possible that any such regulations are preempted by either state or federal law. Preemption occurs where either the federal or state government has taken away (or severely curtailed) the ability of a local government to regulate a particular area. Michigan courts have not yet ruled regarding whether the special watercraft rule procedure found in MCL 324.80108 *et seq.* preempts the ability of local municipalities to regulate on-water activities on their own.

D. State legislation.

The Michigan legislature has full power to regulate or even ban wake boats on Michigan inland lakes. However, due to the lobbying power of the boating industry, such regulations are not likely to be enacted. Nevertheless, it should also be pointed out that even if the sale and use of wake boats were prohibited or significantly regulated, it likely would not adversely affect commerce or the boating industry for

the simple fact that almost all of the people who would purchase wake boats would buy other conventional boats as an alternative.

One common sense legislative proposal would be for the Michigan Legislature to adopt a law or statute that prohibits wake boats from being used on inland lakes under a certain size (for example, 2,000 acres) and to forbid wake boats from being used (or at least their bladders or mega-wave capabilities from being used) within so many feet of the shoreline (for example, 1,000 feet). Such regulations could help minimize the adverse safety, environmental and property damage effects of wake boats.

E. Private civil damages lawsuits.

If a wake boat damages a riparian's dock, swim raft, seawall or other property, that riparian might have the ability to pursue a damages lawsuit against the operator of the wake boat involved. However, such lawsuits would likely be not only expensive, but could potentially be difficult to win. Damage to seawalls and other property is often cumulative and may not be caused simply by one wake boat.

F. A riparian rights lawsuit.

In Michigan, a lakefront or riparian property owner can only use his or her lake frontage and the surface of the water of the lake in a reasonable fashion. See *Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967); *Three Lakes Assn v Kessler*, 91 Mich App 371; 285 NW2d 300 (1979); *Pierce v Riley*, 81 Mich App 39; 264 NW2d 110 (1978); *West Michigan & Market Corp v Lakeland Investments*, 210 Mich App 505; 534 NW2d 212 (1995), and *Square Lake Hills Condo Assn v Bloomfield Twp*, 437 Mich 310; 471 NW2d 321 (1991). On a given lake (particularly a smaller inland lake), one or more riparian property owners could theoretically pursue a lawsuit against the operator of a wake boat for unreasonably interfering with the riparian rights of others. To the extent that the wake boat damages a riparian's lake bottomlands, seawall or other property, or effectively "crowds out" other riparians from using the lake, that could potentially be actionable via a civil lawsuit. The idea is somewhat novel, but could potentially evolve into court sanctioned litigation.

Many of the problems created by wake boats are a result of operators not being thoughtful of their neighbors and fellow riparians. Following the Golden Rule would likely cut down significantly on the problems caused by wake boats.

Should you feel strongly regarding this matter, please contact your local Michigan senator or representative. You can also contact the Michigan Waterfront Alliance at (989) 821-6661 or at www.mwai.org. 