WAKE BOATS – WHAT CAN BE DONE?

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Over the past decade, *The Michigan Riparian* has published numerous articles about so-called "wake boats" or "wave boats" (hereafter, "wake boats"), including concerns about their potential negative impacts on Michigan inland lakes and the ecosystems of those lakes. On July 28, 2023, the Michigan Department of Natural Resources (the "DNR") released an authoritative and comprehensive study about the impact of wake boats on the ecosystems of inland lakes. Pursuant to that report, the DNR recommends that the wave making apparatus of a wake boat should not be engaged within 500 feet from the shore due to adverse environmental impacts and fisheries. In addition, the DNR recommends that a wake boat's wave making apparatus not be engaged in areas on a lake in waters less than 15 feet deep. Logically, that data could also lead to the reasonable conclusion that the wave making apparatus of a wake boat should not be used within 500 feet of docks, swim rafts, swimmers, sailboats, and other vulnerable persons, property, or watercraft. The waves created by fully engaged wake boats can have a devastating impact on not only property and the lake ecosystem, but on boat and swimmer safety as well.

Ideally, a solution to the potential destructive aspects of the wave making capacity of wake boats should come at the state level. The Michigan Legislature could enact three regulatory provisions that would greatly help matters as follows:

1. Prohibit wake boats from engaging their wave making capabilities within 500 feet of the shore, docks, boat hoists, swim rafts, swimmers, sailboats, row boats, and similar items.
2. Prohibit the wave making capacity of a wake boat from being engaged in areas of a lake involving water less than 15 feet deep.
3. Ban wake boats altogether on lakes under a certain size (for example, under 200 acres or where a lake is less than 500 feet wide for more than 75% of the surface area of the lake).

Given the number of wake boats in Michigan and the strength of the watercraft industry, it is unknown whether any such legislation will ever be enacted by the Michigan Legislature.

Can local municipalities (townships, cities, or villages) enact similar legislation via local ordinances? At this time, it is not clear whether the courts would uphold local ordinances that would involve water depth, lake size, or non-wake distances for inland lakes.

In Michigan, local municipalities cannot enact and enforce ordinances that either conflict with state statutes or where state statutes have "occupied the field." That is often referred to as "preemption." Perhaps the biggest obstacle to local ordinances regulating the effects of the wave making capacity of wake boats is the Michigan Marine Safety Act, being MCL 324.80101 *et seq.* (the "Marine Safety Act"). The Marine Safety Act regulates a variety of different matters regarding motorized boats in Michigan waters, including, but not limited to, boat speed limits, buoys, licenses, vessel offenses, and towing. In addition, the Marine Safety Act sets up a procedure whereby the DNR and a local municipality can enact special regulations for specific lakes based on safety factors (MCL 324.80110). Those "special local watercraft rules" have generally involved prohibitions regarding any of the following:

A. Assisting in the propulsion of a person on water skis, a water sled, a surfboard, or another similar contrivance during certain hours.
B. Operating a vessel at high speed.
C. Towing a water skier, water sled, kite, surfboard, or other similar contrivance at any time or during certain hours.
D. Operating a vessel to exceed a slow or no-wake speed.
E. Operating a motorboat during certain times of the year.
F. Operating any motorboat.
G. Operating any vehicle propelled by machinery.

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H. Operating a boat with any motor except an electric motor.

I. Operating a boat in designated slow-wake areas of the lake.

J. Propelling more than two persons at a time on water skis, water sleds, surf boards, or similar contrivances.

If a township, city, or village were to enact a local ordinance regulating the wave making capacity of wake boats regarding lake depth, the minimum size of a lake, or distances, such an ordinance would likely be challenged as being preempted by the Marine Safety Act, and specifically by the local special watercraft rule procedures involving the DNR. A municipality would potentially have three defenses to such a preemption claim. First, there is nothing in the Marine Safety Act (or apparently any other state statute) that would expressly prohibit wave regulations involving wake boats. Nor does either the Marine Safety Act or any other statute appear to "occupy the field" because they do not have any boating regulations similar to wave regulations. Second, both the DNR and the Michigan attorney general's office has stressed for decades that the Marine Safety Act is concerned only with *safety* and not environmental or ecological impacts. Although local wave regulations could have a safety component, such regulations typically deal primarily with the environmental and ecological impacts of the wave making done by wake boats. Finally, in 1962 the Michigan Supreme Court held that the predecessor statute to the Marine Safety Act and its local watercraft rules did not preempt the ability of local municipalities to enact and enforce speed limits for individual inland lakes. See *Miller v Fabius Township Board*, 366 Mich 250 (1962). However, it should also be pointed out that not only is that appellate decision somewhat old, but the language of the Marine Act has changed somewhat regarding special local watercraft rules since 1962.

Absent state preemption, do cities, villages, and townships have the legal authority to enact wake boat regulations? Almost undoubtedly, yes. The Michigan Constitution gives townships, cities, and villages broad ordinance regulatory authority. See Article VII, Section 34 of the Michigan Constitution of 1963. The state-enabling legislation is also broad for local municipal ordinance authority. See MCL 41.181 *et seq.* (for general law townships); MCL 42.15 *et seq* (for charter townships); MCL 117.1 *et seq.* (for cities); and MCL 66.1 and 67.1 *et seq.* (for villages). See also *Square Lake Hills Condominium Assn v Bloomfield Twp*, 437 Mich 310 (1991) and *Hess v West Bloomfield Twp*, 439 Mich 550 (1992). Municipalities in Michigan also have broad ordinance powers to protect the environment. See Article IV, Section 52 of the Michigan Constitution. Any wake boat regulations would clearly be enacted primarily to protect the environment. Finally, municipalities likely have their greatest ordinance authority when regulating nuisances. Therefore, wake boat regulations could also be partially justified as nuisance abatement measures. Based on all the above, it is likely (although not certain) that local municipalities could enact wave making regulations that could withstand court challenge.

Should a local municipality attempt to enact wake boat regulations as a special watercraft rule together with the DNR under the Marine Safety Act? No, for a variety of different reasons. First, if the Marine Safety Act is concerned primarily with safety, most wave regulations would not involve safety. Second, it is highly unlikely that the DNR could agree to a wave regulation based special watercraft rule for any inland lake given the political realities in Michigan. Third and finally, given the strength of the boating industry, it is unlikely that the DNR would approve such local regulations in any event.