

## WHAT CAN BE DONE TO REGULATE JET SKIS

### AND PERSONAL WATERCRAFT?

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### Background

As virtually every riparian property owner in Michigan knows, jet skis and other personal watercraft have exploded in popularity over the last several years. In fact, on some lakes it seems as if the number of jet skis has increased geometrically recently. Obviously, the onslaught of such watercraft has created some true safety and logistical problems. Although both the Michigan Department of Natural Resources ("DNR") and state law use the term "personal watercraft," I prefer the term "jet skis" since it is so widely used and readily understood.

In this Article, I will steer clear from the debate over whether jet skis are more or less safe than other watercraft or whether the accident rate for jet skis is higher than statistics involving other types of watercraft. I will leave those issues to others who are more knowledgeable about such matters. Nevertheless, it seems beyond debate that due to the unique nature of jet skis different legal issues are involved when local governmental units or riparian owners attempt to regulate their use. Many local governments and lake associations are beginning to investigate regulating the use of jet skis. It appears that the controversy over jet ski safety has reached a level not seen since the debate over three-wheel motorcycles ("three wheelers") a decade ago. The following are some of the methods local municipalities or riparian property owners can attempt to use to regulate jet skis.

An outright ban - If a community believes that jet ski use on a given lake or in a particular area has become unreasonably dangerous, can the watercraft be banned altogether? Normally, no outright bans can occur only in highly unusual circumstances. Possible techniques include the following:

1. Special watercraft rules. One portion of the Michigan Marine Safety Act (MCLA 281.1014) authorizes the DNR to promulgate special watercraft rules on a lake-by-lake basis if requested to do so by the municipality involved. Normally, the process is initiated by a lake association or a group of riparian property owners petitioning the local municipality (city, township or village) to request that the DNR hold a local hearing for consideration of a special watercraft rule for the lake involved. After a hearing has been held, the DNR basically has three options. It can deny the request for a special watercraft rule, approve the request or approve a different special watercraft rule for the lake involved. If the DNR denies permission for a special watercraft rule, no such rule will go into effect under the Marine Safety Act despite the position of the municipality involved. If the DNR recommends approval of a special watercraft rule, the rule will not become effective until or unless the governing body for the municipality enacts the rule. Once a special watercraft rule is enacted, it is enforced by the municipality and its police department, or if the municipality has no police department, by the county sheriff's department and county prosecutor's office.

There are only a limited number of special watercraft rules which the DNR will consider for lakes. These include water skiing hours and no wake zones or no wake lakes. The DNR will not even consider a special watercraft rule for most lakes involving an outright ban of jet skis. Rather, the only way to effectively ban jet skis under the Marine Safety Act would be to have the DNR enact a special watercraft rule for a lake prohibiting all motorized watercraft from going faster than a "slow-no wake" speed.

2. Deed Restrictions. A few lakes in Michigan are covered by deed restrictions which bind all properties around the lake. Typically, such deed restrictions are only applicable to artificial lakes or lakes which involved a single developer at one time. Occasionally, such deed restrictions create a lake association which has the power to regulate what occurs, both on the surface of the lake and the shoreline. In some cases, the association could regulate or even ban jet ski use altogether. Unfortunately, such deed restrictions are rare and even where they are present, the only way to enforce them is by attempting to obtain a civil injunction against the violator in the county circuit court, which can be time-consuming and expensive.
3. Inherent Police Powers of Municipalities. The Michigan Supreme Court in the case of Square Lake Hills Condominium Ass'n v Bloomfield Township, 437 Mich 310 (1991), confirmed that local municipalities have the authority to enact ordinances to regulate the launching and docking of boats. That particular case involved the regulation of boating activities on the land or adjacent to the shoreline, rather than on the open water. Many municipal experts believe that local municipalities do not have the authority (apart from the Marine Safety Act, in conjunction with the DNR as mentioned above) to regulate watercraft once a watercraft is on the surface of the water. The reason behind that view is that once the Marine Safety Act and its special watercraft rule provisions were enacted in 1967, that Act may have "preempted" or prevented local municipalities from regulating water surface activities. Other legal experts believe that local municipalities still do retain the authority to regulate what occurs on the surface of the lake. In the case of Miller v Fabius Township Board, 366 Mich 250 (1962), the Michigan Supreme Court held that townships could regulate water skiing and power boat racing hours. Nevertheless, that court case occurred before the Marine Safety Act was enacted by the Michigan Legislature and it is possible that that statute might have implicitly overturned that court case. As late as 1991, however, the Supreme Court in the Square Lake case implied (without ever having to expressly decide the issue) that municipalities could still regulate what occurs on the surface of lakes by utilizing municipal police power ordinances. See also Stupak-Thrall v US, 843 F Supp 327, 331 (WD Mich 1994). Even if municipalities are authorized to regulate watercraft on the surface of lakes, it still is not clear whether municipalities could lawfully ban or regulate jet skis while permitting other watercraft to operate freely.

Regulating Jet Skis - Apart from an outright ban, communities can consider regulating jet skis as follows:

1. Special Watercraft Rules. The above-mentioned DNR special watercraft rules could be used to regulate jet skis and other watercraft via speed limits and no wake zones.
2. Regulation of Municipal Parks and Boat Launches. Where a municipality owns and controls a boat launch, park, or other public property adjoining a lake or stream, the

municipality would normally have the authority to regulate what type of watercraft can utilize such property, including jet skis. In the recent unpublished Michigan Court of Appeals case of Warren v Bridgman City Commission (Case No. 160094; decided April 21, 1994), the court ruled that the City of Bridgman had the authority to ban the launching of jet skis at its municipal boat launch. Even though the person challenging the ordinance claimed the rule was unreasonable, discriminatory and a violation of equal protection principles, the court held that the findings of the municipality regarding the dangers associated with launching jet skis at that boat launch justified the ordinance ban.

The Marine Safety Act - In addition to its special watercraft rule procedure for individual lakes, the Michigan Marine Safety Act also provides several useful regulations which can be used to prosecute unsafe jet ski operators. It is unlawful for anyone to operate a jet ski in a careless or reckless fashion. Jet skis are subject to the general counter-clockwise direction requirements. It is also unlawful for any person to operate a jet ski at higher than a "no wake" speed within 100 feet of any dock, raft, swimmer, skier, or other anchored boat. Nor can a jet ski be operated above a "no wake" speed within 150 feet behind another vessel underway (other than another jet ski). Normally, these offenses constitute criminal misdemeanors punishable by up to a fine of \$500 and/or 90 days in jail. If these laws were enforced more strictly, word would get around quickly and jet skis would undoubtedly be operated in a safer fashion. The drunk boating laws also apply to jet ski operators. Video cameras can be used by riparians to assist in prosecuting individuals who violate these laws.

Road Ends - Many lakes have roads (developed or undeveloped) that end at the water. Generally, such road ends can be regulated by municipal ordinance. See Square Lake above, and Jacobs v Lyon Township, 199 Mich App 667 (1993). Even without a municipal ordinance, a jet skier can only utilize the road ends consistent with the original document creating the road. Roads can be created by plat dedications, express deed or "highway by user." While the courts have generally held that boats (including jet skis) can be launched from developed or undeveloped roads, other activities associated with boating or water use might be prohibited. Courts look to the document which created the road to determine what activities can be engaged in at the road end. Generally, jet skis can only be used for "day use" on road ends. That is, they must be put in the water, taken out and completely removed from the property prior to nightfall. On most road ends, jet skis cannot be beached, stored, docked or otherwise kept on the road or offshore from the road overnight. Furthermore, while one day dock might be permitted on a road end, normally not more than one dock can be utilized and since it is on public property, it can be utilized by anyone who desires to use it. That is, no individual person can monopolize the dock for his or her own personal use it is public property. Once those legal issues become commonly known, it is far less convenient for any one person to launch or keep a jet ski at or on a public road end.

Additional Police Patrols - On most lakes, the local municipal police department (or county sheriff's department in rural areas) provides some minimal or basic level of policing for on-surface lake activities. In some jurisdictions, the police force periodically patrols lake waters by using speed boats or even jet skis. A few lake associations have actually contracted with the local police department or county sheriff's department for extra on-water patrols. While the cost for such added police protection and patrolling is not cheap, it is usually very worthwhile. Unfortunately, it is often difficult for voluntary lake associations to raise the revenues necessary for added police protection. It is sometimes possible to prompt local municipalities to set up a special assessment district for a lake or group of lakes to pay for added police protection.

## **Conclusion**

While there exists many different ways to regulate jet skis, most of the legal means of control available at the local level are inadequate. A more comprehensive approach might be needed. Hopefully, the Michigan Legislature will address the need for possible additional regulations of jet ski operation soon so that the appropriate safety tools can be provided to local governments or riparian property owners.

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