

BUBBLERS – AND WE DON'T MEAN CHAMPAGNE

By: Dennis Zimmerman and Cliff Bloom

For years, some marinas on the Great Lakes have utilized compressed air machines in the winter to prevent ice damage by ensuring that ice does not form around permanent docks and large boats. These are often referred to as “bubblers.” In the past, the use of bubblers on inland lakes in Michigan has been rare, but the practice is increasing.

Many riparians (including the authors of this article) believe that bubblers on inland lakes create a severe safety hazard and should be banned. What is the problem? Quite simply, bubblers create open water and also weaken the ice for some distance beyond the open water. It is very easy for children, pets, ice fishermen and snowmobilers to fall into the open water or through weakened ice near bubblers, particularly at night or during snowstorms. We believe that the limited benefit of bubblers to property such as docks and boats is greatly outweighed by the danger to life. Furthermore, permanent docks should generally not be utilized in inland lakes anyway, and boats should be removed in the winter.

Are bubblers legal? Probably. Under the Michigan Marine Safety Act (MCL 324.80103 et. seq.), the DNR does have jurisdiction to abate dangers or nuisances to navigation, but it is unclear whether “navigation” is involved in frozen waters. Local municipalities (cities, villages and townships) can enact local ordinances which expressly ban or severely regulate bubblers. However, in *Belle Maer Harbor v Harrison Charter Township*, 170 F.3d 553 (6th Cir. 1999), a federal appeals court invalidated a local ordinance which regulated bubblers. Notably, the ordinance was not struck down due to the inability of a municipality to pass such an ordinance, but rather because it was unduly vague. It is highly likely that a well-drafted ordinance would be upheld by the courts. Furthermore, while a riparian generally owns the bottomlands under a lake adjacent to his or her shoreline property, the waters are owned by the people in the state of Michigan. Accordingly, a use such as bubblers which dramatically affects public waters and the uses thereof would normally be an entirely appropriate subject for local municipal regulation.

In the old days, one of the incidents of riparian ownership was the right to cut and remove ice over one's bottomlands for use in the riparian's ice box or for sale to other users. That consumptive use of ice was still subject to the “reasonable use doctrine” (also sometimes known as the “riparian use doctrine”).

In other words, ice could only be removed to such a degree and in such fashion so as not to unreasonably endanger other riparians or interfere with the coequal rights of other riparians to remove ice. Is not the use of a bubbler simply another permitted use akin to removal of ice in the olden days? Perhaps, but it is possible that the reasonable use doctrine as applied today would prevent significant ice removal. In the distant past, open water pursuant to ice removal was much less of a threat to other people than it would be today for at least two reasons. First, most lakes were remote or lightly populated, such that the chances of someone falling through a large open hole in the ice were remote. Second, travel on the ice almost always involved walking, and on rare occasions, horseback travel. It is much easier to fall through a large hole in the ice today with a high speed snowmobile, 4-wheeler, or vehicle, which did not exist in the old days.

By definition, the reasonable use doctrine changes over time to meet contemporary situations. It is possible that the courts would find that large scale ice removal from lakes would now be unreasonable. It is also possible that the courts could find that bubblers on many inland lakes would constitute an unreasonable interference with the rights of others to use the whole surface of the frozen lake in a safe fashion. What about ice fishing holes? Rarely are they large enough on inland lakes to allow a snowmobiler, 4-wheeler, or even a pedestrian to fall into the water.

Even without a specific state or local law making bubblers illegal on inland lakes, it is usually foolish to utilize bubblers due to the liability potential. If someone drowns or is injured due to open water or weakened ice caused by a bubbler, it is almost inevitable that the owner or operator of the bubbler will be sued for damages under tort liability. It is highly probable that a jury could find such a person liable based on negligence, if not gross negligence or even recklessness. It is unlikely that markers or warning signs would prevent such liability.

It is unfortunate that in this litigious society everyone tends to think only in terms of legal requirements or potential tort liability. Before a riparian even considers using a bubbler, one would hope that they would decide not to use a bubbler due to more important considerations such as human life, safety and courtesy.

watermilfoil with minimal impacts on native species is between five and eight parts per billion (ppb).

MDEQ Conclusion 5. Boosting the concentration of Sonar® 10 - 14 days after the treatment (i.e., bringing the concentration of Sonar® in lake water back up to the target concentration) enhances the effectiveness and timeliness of the treatment without additional negative impacts on native species.

In general, the scientific literature supports and the MESB Panel concurs with both MDEQ Conclusions 4 and 5; however, several suggested changes regarding the current MDEQ methodology for calculating lake volume and a more precise application rate are offered by the MESB in the report. In particular, the MESB Panel recommends that the application rate of Sonar® for selective control of Eurasian watermilfoil be six ppb followed by the potential of retreatment boosting the concentration back to six ppb two to three weeks after the initial treatment based on results of a FasTEST® for water column concentrations of the compound. Under this protocol, impact to non-target native plant species would be minimal in the year of treatment and beyond, and the amount of native vegetation habitat remaining would be adequate for fish and wildlife.

MDEQ Conclusion 6. Sonar® is one tool for controlling Eurasian watermilfoil on a whole-lake basis.

The MESB Panel concurs with MDEQ Conclusion 6 since each lake has unique aquatic plant populations and distributions. When exotic species, such as Eurasian watermilfoil, grow in numbers that are considered nuisance then all control options must be considered including mechanical harvest, chemical control, and nutrient source reduction. Currently, the MDEQ requires that only a minimum of information be provided with a permit application. In order to better understand the dynamics of the interrelated natural ecological processes that operate within a lake and, therefore, the potential impacts that may take place due to manipulation of these processes, a greater level of information would be useful. There currently exist several lake information-gathering models that may be used to supplement the information currently required by the MDEQ. The MESB Panel suggests that the MDEQ evaluate the use of these and other similar models and encourage the use of such tools in conjunction with its permit program.

MDEQ Conclusion 7. Sonar® does not have any direct negative impacts on fish or wildlife populations, or pose any human health concerns when used according to the product label.

The MESB Panel concurs with MDEQ Conclusion 7 but recommends that it be modified by adding the words, “and its permitted use by the MDEQ” to the end of the sentence.

¹A summary of a report written by the Michigan Environmental Science Board Sonar Investigation Panel.

²The author, who was recently appointed to the Michigan Lake and Stream Associations’s Science Advisory Committee, gratefully acknowledges the efforts of all the other Panel members who co-authored the report.

freely float on the water over another’s bottomlands and even to temporarily anchor thereon pursuant to navigation, people do not have the right to place docks, shorestations or raft anchors on the bottomlands of another without permission, or to moor boats other than temporarily on such bottomlands. Furthermore, one cannot normally walk on the bottomlands of another without permission. Unfortunately, law enforcement agencies will almost never prosecute bottomlands trespass cases due to their lack of knowledge of riparian law and the difficulty of ascertaining bottomlands boundaries. Only a county circuit court in a full-blown civil lawsuit can determine true bottomlands boundaries, which is an expensive and complicated process. Accordingly, the ultimate relief for the owner of bottomlands who experiences bottomlands trespassing is a private civil lawsuit.

The various trespass laws differ regarding whether or not a property must be posted before a trespasser can be pursued. The RTA requires signage at every visible point, or, alternately fencing. Some local ordinances do not require any signage or fencing, while others do. To be safe, it is best to post your property, utilize fencing or use both methods if you are concerned about trespassing. If you are dealing with a relatively small lot, a confined area or lake bottomlands where fencing or posting is not practical, either you or your attorney should send a warning letter to whomever has been a trespasser in the past warning that person not to trespass or you will take appropriate legal action. Obviously, you should keep a copy of the letter in your file and preferably send it by registered mail to the potential trespasser so you can later prove that he or she had prior notice if court action should be necessary.

Here are a few additional tips regarding trespass:

1 Once you have had a survey done (which can be quite expensive), you may desire to dig a small hole around each corner iron (without disturbing it) and pour a little redi-mix cement into the hole, leaving a half-inch or so of the iron protruding through the concrete. If you desire, you can place topsoil over this cement and plant grass. This will ensure that corners do not get moved, lost, bent, etc., so that your property lines will remain established.

2 If someone trespasses on your property and damages, cuts or takes your trees, crops, wood or other natural resources without permission, they are potentially liable for triple damages under MCLA 600.2919.