

POINTS TO CONSIDER IN DRAFTING A HAZARDOUS WAKE ORDINANCE FOR A WISCONSIN TOWN

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March 8, 2023

DNR BOATING ORDINANCE HANDBOOK

The DNR has published a helpful handbook that should be consulted by anyone wishing to draft a municipal boating ordinance.

“A Guideline for Creating Local Boating Ordinances and Placing Waterway Markers in Wisconsin Waters”

- Published August 2019, DNR. Available online

MAY WISCONSIN TOWNS, VILLAGES AND CITIES REGULATE THE USE AND OPERATION OF BOATS?

Yes. See Wisconsin Stat 30. 77(3) :

(3) ORDINANCES.

(a) Except as provided in par. (ab), any town, village, or city may, in the interest of public health, safety, or welfare, including the public's interest in preserving the state's natural resources, enact ordinances applicable on any waters of this state within its jurisdiction if the ordinances are not contrary to or inconsistent with this chapter and if the ordinances relate to the equipment, use, or operation of boats or to any activity regulated by ss. 30.60 to 30.71.

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COUNTY GOVERNMENTS IN WISCONSIN MAY NOT REGULATE THE USE/OPERATION OF BOATS ON LAKES

- **Only towns, villages and cities... and of course Wisconsin itself... may regulate boats on lakes**
- **But Counties may regulate boats on rivers and streams**

REGULATE SPECIFIC USES OF BOATS, NOT THE BOATS THEMSELVES

- Wisconsin legal precedent indicates you can't forbid all use of any specified type of boat.
- But certain forms of boat operation/use can be regulated.
 - For example:
 - Clear you can regulate distance from shore, depth of operation, lake size and use/condition of ballast tanks.
 - It appears that all “bow high” operation enhancing wakes can be prohibited. (see Mequon and Rhine ordinances)

DNR REVIEW

- **Wisconsin law mandates that all proposed town/village ordinances regulating watercraft must be submitted to the DNR for advisory review no less than 60 days prior to enactment.** See WI Stat 30.77(3)(d).
- **Include a “Condition Report”.** See *“A Guideline for Creating Local Boating Ordinances and Placing Waterway Markers in Wisconsin Waters”*

CONDITION REPORT TO DNR

- The DNR requests that a “condition report” accompany each ordinance submitted for review. Prepare and submit a condition report. They need not be elaborate. See the previously cited “*A Guideline for Creating Local Boating Ordinances...*”
- A sample condition report is in your materials
- The condition reports for the four Sawyer County Towns which enacted hazardous wake ordinances are extremely brief

HOW DO I GO ABOUT DRAFTING AN ORDINANCE?

- Consider ordinances already in place and proven.
- The following Wisconsin towns and cities have hazardous waste ordinances:
 - Mequon, Thiensville, Rhine, Rockland and four Sawyer County towns: Hunter, Round Lake, Bass Lake, Hayward.
- Consider the model ordinance created by the Last Wilderness Alliance, derived from the Mequon and Rhine ordinances.

“WHEREAS PROVISIONS”

- The basis for Wisconsin granting municipalities authority to regulate boat use is based on the municipality exercising such authority:
in the interest of public health, safety, or welfare, including the public's interest in preserving the state's natural resources,
- Highly recommended that any ordinance begin with a series of “whereas provisions” reflecting the conclusions of the town board on which they base their decision to enact an ordinance. Examples:

WHEREAS, boats with ballast systems increase the likelihood of aquatic invasive species being introduced and spread on lakes; and

WHEREAS, the use of ballast and wake enhancing fins can cause unsafe operation by causing the bow to rise, obscuring vision forward

CONSIDER A “CARVE OUT” FOR WATER SKIING, TUBING ETC-

- Our experience is that opponents will base their opposition on strained constructions of the proposed ordinance.
- If there is any argument that your draft ordinance could restrict water skiing or tubing etc, you will hear: “*This forbids training young skiers at transition speed.*”
- Anticipate this by including a carve out provision for skiing, tubing etc. See the LWA model ordinance for a sample provision.

Certain Operations Excluded. In no event shall any of the following operations be deemed a violation of this Ordinance, provided such operations do not use ballast tanks, water sacks or wake enhancing fins: i) water skiing, ii) tubing, iii) brief transition operation to empty a boat of water, or iv) brief transition operation of a boat accelerating into a planing condition

ALL ORDINANCES MUST CONTAIN A PENALTY PROVISION

Per WI Stat. 800.037, deposits for boating violations shall be in accordance with the amount established by the uniform deposit schedule under s. 23.66, Wis. Stats. The DNR recommends this wording:

Wisconsin state boating penalties as found in s. 30.80, Wis. Stats. and deposits as established in the Uniform Deposit and Bail Schedule established by Wisconsin Judicial Conference, are hereby adopted by reference and all references to fines amended to forfeitures and all references to imprisonment deleted. (Note: a uniform bond schedule may be obtained from the Recreational Safety Warden in your area.)

CAUTION REGARDING DNR RECOMMENDED PENALTY PROVISION AS IS

- The recommended DNR language includes a potential pitfall.
- “state boating penalties as found in s. 30.80” in the recommended DNR language appears to apply only to violations of state boating law
- Thus, if a town enacts a hazardous wake ordinance with the recommended DNR language as its sole penalty provision, there may be no stated penalty at all for a violation
- The model ordinance resolves this by adding a provision setting penalties specific to a violation of the ordinance

CONSIDER ENFORCEABILITY

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- It is important to consider enforceability in drafting an ordinance.
- Run the thought experiment “*How will a violation be proven, if we issue a citation and the boater contests it.*”
- For example, any ordinance quantifying wave height (e.g., forbidding wakes over 30”) will create defense avenues for the cited boater (e.g. “*You can’t prove the wake height was 30 inches*”)

GOOD NEWS! ENFORCEMENT IS RARELY A PROBLEM IN A WELL DRAFTED ORDINANCE

- Most boaters will honor laws, even if they don't like them
- **Self-enforcement**-- Every town enacting a hazardous wake ordinance has experienced that the ordinance is self-enforcing. 95% of folks will honor a posted ordinance.
- **Big exception**– For whatever reason, the Wisconsin statute preventing removing and transporting a boat with water in the ballast tanks is widely ignored.

REGULATING BOATS ON LAKES INCLUDING A TOWN BOUNDARY-

- Regulating watercraft use on lakes extending into two or more towns involves special requirements. See for example WI Stat 30.77(3)(aw).
- See the ordinance enacted by the Town of Rhine, covering Crystal Lake, which extends into both Rhine and Plymouth Townships.

PROVIDE FINAL ORDINANCE TO THE DNR

- Once the ordinance is enacted by the Town Board, provide a signed copy of the final ordinance to the DNR.
- The DNR posts these on the publicly their available data pages on every lake in the state

POST ORDINANCE AT PUBLIC LANDINGS

- **This is very important. See Wisconsin Stat 30.77 (4).**
- **See previously cited “*A Guideline for Creating Local Boating Ordinances...*” (DNR 2019)**

SAMPLE OF POSTED ORDINANCE

LOCAL ORDINANCE—CRYSTAL LAKE

PER T.RHINE CODE #5.12—NO PERSON MAY USE OR EMPLOY WATER SACKS, BALLAST TANKS, SUBMERSIBLE WINGS OR ANY OTHER DEVICE WHICH CAUSES A BOAT TO OPERATE IN A BOW-HIGH MANNER OR WHICH INCREASES OR ENHANCES A BOAT'S WAKE.

ALSO, NO PERSON MAY OPERATE A BOAT ON CRYSTAL LAKE IN AN ARTIFICIALLY BOW-HIGH MANNER IN ORDER TO INCREASE OR ENHANCE THE BOAT'S WAKE. SUCH PROHIBITED OPERATION SHALL INCLUDE WAKE ENHANCEMENT BY USE OF BALLAST, MECHANICAL HYDROFOILS, UNEVEN LOADING OR OPERATION AT TRANSITION SPEED.

THREATS OF SUIT

PROMISE!– I make few promises... but I will promise you this. If you begin talking about having a wake surf ordinance in your town, someone will say ***“I WILL SUE YOU IF YOU PASS ANY RESTRICTION ON WAKE SURFING”***

- Take comfort!!-- when folks say “I’ll sue!” it is because they have no better argument.
- Every Wisconsin town that has enacted a hazardous wake ordinance has been threatened.
- **To date, not even one threatened suit been brought.**
- It is beyond dispute that Wisconsin Towns have the right to enact boating ordinances, provided they don’t conflict with state law. These laws are presumed valid.
- There is nothing you can do to prevent these threats. But it is hard to imagine any serious risk of loss in enacting a well drafted ordinance.