
Wisconsin Legislative Council

Anne Sappenfield
Director



TO: SENATOR MARY FELZKOWSKI

FROM: Anna Henning, Principal Attorney

RE: The Public Trust Doctrine and Wake Boat Regulations

DATE: December 6, 2023

You asked whether legislation to restrict wake boats¹ would be upheld if challenged under the Public Trust Doctrine. For reasons discussed below, the short answer is that such legislation would likely be upheld.

THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine is rooted in the Wisconsin Constitution. As developed and interpreted by the courts, the doctrine provides that navigable waters are held in trust by the state for the benefit of the public. The doctrine has been interpreted to require the Wisconsin Legislature to serve as trustee for the public's rights to navigate and enjoy recreational activities in the waters of the state.²

The Legislature has generally delegated its trustee obligations to the Department of Natural Resources (DNR), except where statutes state otherwise. Evidence of that delegation is found, in part, in ss. 281.11 and 281.12, Stats., which specify that the DNR "shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private," and "shall have general supervision and control over the waters of the state."³ In addition, the DNR is specifically authorized to pursue relief regarding possible infringements of public rights relating to navigable waters. [s. 30.03 (4)(a), Stats.]

The Public Trust Doctrine protects a broad range of public rights, including the right of navigation and the recreational use of waters, including the enjoyment of scenery. The doctrine protects such rights in all navigable bodies of water.⁴

¹ Wake boats, which are sometimes called "surf boats" or "wakeboard boats," are boats designed to create larger wakes for use by a wakeboarder, wakesurfer, or water skier.

² For additional background regarding the Public Trust Doctrine, see Legislative Reference Bureau, *The Public Trust Doctrine*, Reading the Constitution vol. 5, no. 4 (2020); and Legislative Council, *The Public Trust Doctrine*, Issue Brief (Oct. 2019).

³ For additional discussion regarding the DNR's role as trustee, see *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72; Legislative Council, *Clean Wisconsin v. Department of Natural Resources Decisions*, Issue Brief (July 2021).

⁴ In this context, a waterbody is "navigable" if it is "capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes." [*Madison v. State*, 1 Wis. 2d 252, 259-60 (1952).]

STATE AND LOCAL REGULATION OF WAKE BOATS AND BOATING SPEED

Although current state law does not specifically regulate wake boats, it imposes more general restrictions that affect wake boat operation. Very generally, Wisconsin law prohibits the operation of a motorboat "at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing." Wisconsin law also requires motorboat speed to be "so controlled as to avoid colliding with any object lawfully in or on the water or with any person, boat or other conveyance in or on the water in compliance with legal requirements and exercising due care." [s. 30.66 (1), Stats.] In addition, the statutes provide more specific speed restrictions that apply throughout the state, except where local ordinances specify otherwise. [s. 30.66 (2), Stats.]

At the local level, certain units of local government may also enact ordinances to regulate boating speeds, if an ordinance is in the interest of public health, safety, or welfare, and the ordinance is not contrary to or inconsistent with state statutes governing boat use and operation. [s. 30.77 (1) and (3), Stats.]

Local units of government may also prohibit or regulate certain types of boats, although ordinances that regulate boats by type must be structured carefully to avoid legal challenge, particularly under the equal protection clauses of the U.S. and Wisconsin Constitutions. In guidance to local units of government regarding local boating ordinances, DNR specifies criteria that it considers when reviewing a proposed local ordinance that regulates a particular type of watercraft differently than other types of watercraft.

DISCUSSION

You asked whether legislation to restrict wake boats could be challenged under the Public Trust Doctrine. Such a restriction could be in the form of a direct prohibition on wake boats on some or all waterbodies, or it could be in the form of a prohibition on certain types of operation, which may have the indirect effect of restricting wake boats on some or all waterbodies. In either case, a court is likely to find that the regulation is consistent with the Public Trust Doctrine.

In Public Trust Doctrine case law, Wisconsin courts have recognized that, when protecting public rights in navigable waters, DNR may also need to also consider riparian owners' rights and environmental protection. [See, e.g., *R.W. Docks and Slips v. State*, 2001 WI 73, ¶ 28.] In other words, although the doctrine protects a broad set of public rights, including recreational use of navigable waters, it allows regulation of such recreation.

The current statutes reflect that general approach, for example by allowing local units of government to adopt more stringent speed restrictions than state law requires. In practice, those more stringent restrictions are typically adopted to protect shorelines or ecosystems.

As reflected in the DNR guidance mentioned above, a regulation that singles out wake boats could potentially be challenged on other grounds, depending how it is structured. But a challenge under the Public Trust Doctrine would be relatively unlikely to succeed.

Please let me know if I can provide any further assistance.

AH:jal