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Re: Emergency Trespass on Water Trails (NSGLC-16-04-08)

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Dear Mary:

In 2014, the NSGLC performed research for Michigan Sea Grant on whether local governments and landowners participating in Michigan's Great Lakes Water Trails would be subject to liability.¹ Recently, a Michigan Sea Grant constituent has asked whether water trail users are liable for trespass onto private property in emergency situations. In answering this question, we will look at the public's right to use the waters, the landowners' right to exclude the public from private property, the law of trespass, and any exceptions for trespass. The following information is intended as advisory research only and does not constitute legal representation of Michigan Sea Grant or its constituents by the National Sea Grant Law Center. It represents our interpretation of the relevant laws and cases.

Public Trust Rights

In Michigan, the public has the right to use the state's navigable waters up to the ordinary high water mark.² The state holds these lands "for the benefit of the public in the

¹ National Sea Grant Law Center, *Water Trail Liability* (Dec. 4, 2014). Available at <http://nsglc.olemiss.edu/Advisory/mi-watertrail.pdf>.

² *Glass v. Goeckel*, 703 N.W. 2d 58, 69 (Mich. 2005).

enjoyment of the ancient rights of navigation, fowling, and fishing” and to protect public resources.³ The public may not use land abutting the navigable waters above the ordinary high water mark. These are private lands, and, in most instances, use of these lands by water trail users would be trespass.

Trespass

Michigan has three potential causes of action related to trespass: civil trespass, criminal trespass, and recreational trespass, a more specific type of trespass created by the legislature. First, a landowner may bring a civil trespass action against a trespasser. At common law, a trespasser is a person who enters onto another’s land without consent.⁴ Any person who entered private property without permission would be liable to the landowner for nominal damages for that trespass.⁵ This means that any water trail user who trespassed onto private property may be required to pay the landowner a small amount of money for that trespass. In instances in which the trespass results in property damage, the trespasser must pay additional damages based on the injury to the land.⁶ For example, if a water trail user broke a fence climbing onto private property, he would be required to pay to return the fence to its original state.

A criminal trespass charge may be brought when one of the following occurs: 1) a person enters the lands or premises of another after having been forbidden to do so by the owner; 2) a person remains on the land or premises after being notified to leave; and 3) a person enters fenced or posted farm property of another person without the consent of the owner.⁷ In Michigan, conviction for criminal trespass could result in a misdemeanor punishable by imprisonment for not more than 30 days or by a fine of not more than \$250.00, or both.⁸ This means that if a water trail user is prevented or warned not to use private property and he does so anyway, he could be cited for criminal trespass.

The Recreational Trespass statute within the Natural Resources and Protection Act, MCL § 324.73102, defines trespass in the same manner as criminal trespass; however, it provides higher penalties for certain types of trespass during recreational activities. The statute states that an individual may not enter onto private property for recreational activities without consent of the property owner when: 1) a property is fenced or enclosed; 2) when there is a sign that conspicuously prohibits trespassing; or 3) when a person has previously been forbidden to enter a property.⁹ Unlike the criminal trespass provisions, the statute provides certain exceptions to trespass, including an exception for a person retrieving a hunting dog. Another exception in the statute provides that fisherman engaged in a recreational activity may enter onto posted property for the purpose of avoiding a natural or artificial hazard or an obstruction in the water.

³ *State v. Lake St. Clair Fishing & Shooting Club*, 87 N.W. 117, 125 (Mich. 1901).

⁴ *Giddings v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916).

⁵ *Id.*

⁶ *Kratze v. Indep. Order of Oddfellows, Garden City Lodge No. 11*, 500 N.W.2d 115, 122 (Mich.1993).

⁷ MICH. COMP. LAWS ANN. § 750.552.

⁸ *Id.*

⁹ MICH. COMP. LAWS ANN. § 324.73102.

On fenced or posted property or farm property, a fisherman wading or floating a navigable public stream may, without written or oral consent, enter upon property within the clearly defined banks of the stream or, without damaging farm products, walk a route as closely proximate to the clearly defined bank as possible when necessary to avoid a natural or artificial hazard or obstruction, including, but not limited to, a dam, deep hole, or a fence or other exercise of ownership by the riparian owner.¹⁰

Under the above laws, a water trail user who trespasses onto land of another could potentially be liable for trespass, unless he meets the exceptions provided for in the Recreational Trespass statute.

Emergency Circumstances

Some jurisdictions allow a defense to trespass. Under the concept of public necessity, trespass may be excused if the trespass was necessary to protect the public from danger or from an emergency situation. An example might be a person running onto private property to prevent a fire or to help in a natural disaster. When using this defense, the trespasser's actions must be reasonable under the circumstances. Another defense is private necessity. In this instance, trespass may be excused if it was necessary to protect the trespasser or his property from danger in a temporary, emergency situation. An example might be a person running onto another's property to escape a wild animal.

I was unable to find any cases in Michigan that used the public or private necessity defense. At this point, it would be safe to assume that trespass, even for emergency purposes, could result in citation for criminal or, more likely, recreational trespass. In addition, the water trail user would incur liability for any damage that is done to the property under common law trespass.

Thank you for bringing this request to the National Sea Grant Law Center. I hope this information is helpful. If you have any further questions or would like additional information, please let me know.

Sincerely,



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National Sea Grant Law Center

¹⁰ *Id.* § 324.73102 (3); *See People v. Gatski*, 677 N.W.2d 357, 361 (Mich. 2004).