

Legislative Analysis



OPERATION OF SPORTCRAFT: CONFORM WITH VEHICLE CODE ALCOHOL PROVISIONS

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House Bills 4441 and 4442 as enacted
Public Acts 402 and 403 of 2014
Sponsor: Rep. Matt Lori

House Bill 4443 as enacted
Public Act 404 of 2014
Sponsor: Rep. Dave Pregel

House Bill 4445 as enacted
Public Act 405 of 2014
Sponsor: Rep. Andrew Kandrevas

House Committee: Criminal Justice
Senate Committee: Judiciary

Second Analysis (6-13-19)

BRIEF SUMMARY: House Bills 4441, 4443, and 4445 amend different provisions of the Natural Resources and Environmental Protection Act (NREPA) pertaining to the operation of watercraft, snowmobiles, and ORVs to make them conform to the drunk driving provisions of the Michigan Vehicle Code. Among other things, the bills change all current references to a bodily alcohol content (BAC) of 0.10% to a BAC of 0.08%.

House Bill 4442 makes complementary amendments to the sentencing guidelines provisions in the Code of Criminal Procedure.

The bills took effect March 31, 2015.

FISCAL IMPACT: The bills would have no fiscal implications for the Department of Natural Resources but could have an indeterminate effect on the state and local units of government based on the number of individuals convicted under their provisions. (See **Fiscal Information**, below, for a detailed discussion.)

THE APPARENT PROBLEM:

Statutes regulating the operation of snowmobiles, ORVs, and watercraft have historically mirrored the drunk driving provisions for operation of motor vehicles in the vehicle code.

However, when Public Act 61 of 2003 amended the Michigan Vehicle Code to establish a bodily alcohol content (BAC) of 0.08%, instead of 0.10%, as the *per se* level for drunk driving and to create a new offense category prohibiting a person from operating a motor vehicle with any amount of a Schedule 1 drug or cocaine in his or her body, the snowmobile, ORV, and watercraft statutes were not similarly amended.

For years, many people, including those in law enforcement, have called for the same BAC levels to be established for sportcraft as those in place for motor vehicles. They cite data supporting that a person too intoxicated to operate a motor vehicle is too intoxicated to safely operate a boat, jet ski or wave runner; snowmobile; or ORV. Each year, many boating, snowmobile, and ORV accidents are alcohol- or drug-related. Proponents say having separate

levels for what constitutes drunk operation for motor vehicles and sportcraft is not only illogical, but also sends a message that if a person drinks too much to lawfully drive a car, it is OK to operate a snowmobile, ORV, or boat instead.

In addition, provisions are not consistent among the different types of sportcraft. For instance, a person who refuses to consent to a breathalyzer test by a peace officer is guilty of a misdemeanor if operating a snowmobile, but responsible for only a state civil infraction if operating either a watercraft or ORV. The person would pay up to a \$500 civil fine for that infraction if operating a watercraft but only a maximum fine of \$100 if operating an ORV.

Legislation is offered to make the statutes regarding the operation of ORVs, watercraft, and snowmobiles conform to the changes in the Vehicle Code brought about by Public Act 61 of 2003 and to make the statutes regarding the operation of ORVs, watercraft, and snowmobiles conform more closely to each other, among other things.

THE CONTENT OF THE BILLS:

The *per se* level for drunken operation of an ORV, snowmobile, or watercraft had been established at 0.10 grams or more per 100 milliliters of blood. Additionally, provisions regarding the operation of a sportcraft were not consistent among ORVs, snowmobiles, or watercraft. The bills, among other things, change all current references to a bodily alcohol content (BAC) of 0.10 grams per 100 milliliters of blood to a BAC of 0.08 grams per 100 milliliters of blood and extend prohibitions and penalties that apply to drunken operation of an ORV, snowmobile, or watercraft to operating sportcraft with *any* bodily amount of a Schedule 1 controlled substance.

House Bill 4441 addresses **watercraft**, House Bill 4443 addresses **snowmobiles**, House Bill 4445 addresses **ORVs** (off-road recreation vehicles), and House Bill 4442 places the felony penalties for violations of HBs 4441, 4443, and 4445 in the sentencing guidelines.

Substantive revisions to provisions of the Natural Resources and Environmental Act (NREPA) by House Bills 4441, 4443, and 4445 include the following:

- Replace references to “intoxicating liquor” with “alcoholic liquor” and define that term as it is defined in Section 1d of the Michigan Vehicle Code.
- Make a third or subsequent violation of drunk or drugged operation of a sportcraft a felony, regardless of the time elapsed since the previous convictions. Previously, the felony penalty was triggered when an individual had two or more convictions in the previous 10 years. (This is identical to provisions in the Vehicle Code known as “Heidi’s Law”.)
- Establish a new violation for a person under 21 years of age operating a sportcraft with any “bodily alcohol content” identical to provisions in the Michigan Vehicle Code. A violation is a misdemeanor punishable by community service for not more than 360 hours and/or a fine of not more than \$250; the court could also order the payment of prosecution costs.

A second or subsequent offense within seven years is punishable by up to 93 days in jail, up to 60 days community service, and/or a fine of not more than \$500; other than this enhanced penalty, only one violation or attempted violation of the “minor in possession” prohibition could be counted as a prior conviction when establishing the number of prior convictions for determining enhanced sentences under other violations of drunk or drugged operation of a sportcraft.

- Establish a new violation for operating a sportcraft under the influence of drugs or alcohol, visibly impaired, or a violation of those provisions causing severe impairment or death, with a person less than 16 years of age onboard the sportcraft. A violation is a misdemeanor punishable by a fine between \$200 and \$1,000 and one or both of the following: (a) imprisonment for not less than five days or more than one year or (b) not less than 30 days or more than 90 days of community service.

A second violation within seven years or a third or subsequent violation regardless of the time elapsed since the last prior conviction is a felony punishable by a fine of not less than \$500 or more than \$5,000 and either:

- Imprisonment under the jurisdiction of the Department of Corrections for at least one year but not more than five years.
- Probation with imprisonment in the county jail for at least 30 days but not more than one year along with community service for at least 60 days but not more than 180 days.

Not less than 48 hours of any term of imprisonment for either a misdemeanor or felony must be served consecutively and a sentence cannot be suspended.

- Establish a new violation for a person under 21 years of age operating a sportcraft with any BAC with someone under the age of 16 on board. Individuals violating this provision are guilty of a misdemeanor punishable by up to 60 days of community service, a \$500 maximum fine, and/or up to 93 days’ imprisonment. For violations occurring within seven years of a prior conviction or after two or more prior convictions, regardless of the time elapsed since the prior conviction, a person is required to pay a fine between \$200 and \$1,000 and either five days to one year imprisonment, or between 30 and 90 days of community service, or both. At least 48 hours of the imprisonment must be served consecutively and the imprisonment could not be suspended.
- Delete language pertaining to legal presumptions. Previously, if at the time of the offense the person had a BAC of 0.07 grams per 100 milliliters of blood or less, he or she was presumed not to be impaired; a BAC of more than 0.07 grams but less than 0.10 grams per 100 milliliters of blood was presumed to be impaired; and a BAC of 0.10 or more per 100 milliliters of blood was presumed to be under the influence. (Identical presumptions contained in the Michigan Vehicle Code were eliminated by Public Act 61 of 2003.)
- Delete the definition of “serious impairment of a body function” and replace it with the definition contained in Section 58c of the Michigan Vehicle Code.

- Increase the suspension of a person’s right to operate an ORV, watercraft, or snowmobile for unreasonably refusing to submit to a chemical test from six months to one year for a first refusal, and from one year to two years for a second or subsequent refusal within seven years.
- Prohibit the owner or person in charge of a sportcraft from authorizing its use if the person operating the sportcraft is under the influence of alcohol and/or a controlled substance; has a BAC of 0.08 grams or more per 100 milliliters of blood; or is visibly impaired due to the consumption of alcoholic liquor, a controlled substance, or a combination of the two.
- Define “prior conviction” and “law of another state” uniformly among the various statutes and include similar violations issued in Canada.

Additional provisions regarding **watercraft**

- Revise the definition of “personal watercraft” to mean that term as defined under federal law in 40 CFR 1045.801.
- Replace most references to “vessel” with “motorboat”.
- In section 80176, which contains prohibitions on operating a motorboat while under the influence of alcohol or controlled substances and prescribes penalties for violations, the term “operate” means to be in control of a vessel propelled wholly or in part by machinery while the vessel is underway and is not docked, at anchor, idle, or otherwise secured.

Additional provisions regarding **snowmobiles**

- An individual who refuses to submit to a preliminary chemical test upon the lawful request of a peace officer would be responsible for a state civil infraction and subject to a civil fine of not more than \$500 instead of being guilty of a misdemeanor. This then is identical to the penalty imposed for ORVs and watercraft.
- If a person had one or more prior convictions for an alcohol/drug violation within seven years, a court could order a person to not operate a snowmobile for a period of not less than one year or more than two years. The person would be required to take and successfully complete the snowmobile safety education and training program before operating a snowmobile.

Additional provisions regarding **ORVs**

- Repeal Section 81135, which prohibits the operation of an ORV while visibly impaired due to the consumption of alcoholic liquor and/or a controlled substance, and relocate the provision to Section 81134. The minimum mandatory suspension of the right to operate an ORV for a first offense is increased from 90 days to 93 days.

- Require a court to order, without an expiration date, that a person convicted of drunk or drugged operation of an ORV causing death or serious impairment of a body function not operate a sportcraft. This change is identical to provisions pertaining to snowmobiles and watercraft.
- Add a mechanism for an appeals process for a person aggrieved by a final determination by the secretary of state for operators of ORVs that is identical to the appeals process in place for operators of snowmobiles and watercraft. House Bill 4445 also adds a provision to allow a peace officer to petition the circuit court to review the determination of a hearing officer if, after an administrative hearing, the person who refused the chemical test prevailed. This change is identical to provisions pertaining to snowmobiles and watercraft.
- Increase the maximum fine for a civil infraction for refusing to submit to a preliminary breath analysis upon a lawful request by a peace officer from \$100 to \$500. This is identical to the penalty imposed for snowmobiles and watercraft.
- Revise various prohibitions and penalties to conform to those applying to snowmobiles and watercraft.

MCL 324.80101 et seq. (HB 4441, watercraft)

MCL 324.82101 et seq. (HB 4443, snowmobiles)

MCL 324.81101 et seq. (HB 4445, ORVs)

House Bill 4442 amends the Code of Criminal Procedure to place the descriptions of the violations under HB 4441, 4443, and 4445; felony categories; felony classes; and statutory maximum terms of imprisonment within the sentencing guidelines as follows:

Operating a vessel, an ORV, or a snowmobile under the influence or while impaired or with the presence of a controlled substance:

- Causing death—Class C felony against a person, 15 year maximum.
- Causing serious impairment—Class E felony against a person, 5 year maximum.
- Third or subsequent offense—Class E felony against public safety, 5 year maximum.

Operating a vessel, an ORV, or a snowmobile while intoxicated or impaired with a minor in the vessel, ORV, or snowmobile:

- Subsequent offense—Class E felony against a person, 5 year maximum.

MCL 777.13g

BACKGROUND INFORMATION:

Similar legislation was passed by the House in the 2003-04, 2005-06, and 2007-08 legislative sessions. In the 2011-12 session, House Bills 4072, 4073, 4794, 4795, 5028, and 5029 were reported by the House Judiciary committee.

FISCAL INFORMATION:

The bills would have no fiscal implications for the Department of Natural Resources.

To the extent that the bills result in a greater number of convictions, increased costs on state and local correctional systems would occur. Information is not available on the number of persons that might be convicted under these provisions. New felony convictions could result in increased costs related to state prisons, county jails, and/or state probation supervision. New misdemeanor convictions could increase costs related to county jails and/or local misdemeanor probation supervision. The average cost of prison incarceration in a state facility is roughly \$35,500 per prisoner per year, a figure that includes various fixed administrative and operational costs. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. State costs for parole and felony probation supervision average about \$3,000 per supervised offender per year. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally designated recipients of those revenues.

ARGUMENTS:

For:

Historically, the laws for consuming alcohol and then operating snowmobiles, ORVs, and watercraft in the state have been the same as for operating a motor vehicle. With the enactment of Public Act 61 of 2003, which lowered the *per se* bodily alcohol content (BAC) for driving while intoxicated from 0.10 to 0.08 grams per 100 milliliters of blood, it is now necessary to make changes to the statutes regulating these recreational vehicles and vessels.

The bills adopt the same *per se* level of a 0.08 BAC as used in the vehicle code, thus bringing consistency and uniformity between the acts. The bills also correct an inconsistency between sportcraft and motor vehicles regarding the drunk operation by a minor and operating a vehicle in violation of the drunk/drugged laws with a child under 16 years of age onboard.

Proponents of the legislation maintain that there shouldn't be two levels of intoxication – one level for driving a car and another for recreational vehicles such as boats, ORVs, and snowmobiles. Safety requires that the bodily alcohol levels be consistent regardless of the vehicle or vessel being operated, especially considering that in the case of snowmobiles, and sometimes ORVs, these vehicles can enter the roadway, and may even be permitted on roadways under certain conditions.

It is well documented that a BAC of 0.08 grams and over per 100 milliliters of blood results in significant impairment of judgment and motor skills. And many accidents involving boats and personal watercraft are caused by operators who have been drinking or using drugs - by some estimates at least one-third of all boating accidents involve alcohol consumption. The state snowmobile fatality summary issued by the Department of Natural Resources for 2012-13 shows that five of the 23 fatalities were alcohol related (almost 22%), with alcohol use suspected in five others. Statistics regarding ORVs show a similar relationship between accidents and drunk and/or drugged operation. In addition to the fatalities, many more individuals are injured, some seriously.

Statistics support the assumption that many lives will be protected by the lower BAC levels for sportcraft. Yet, Michigan lags behind other states that have already adopted the lower BAC standard for operation of sportcraft. With Michigan lakes and trails being a huge draw for tourists, making a BAC of 0.08 grams per 100 milliliters of blood the *per se* level for drunk and drugged driving, in any vehicle, is good public policy and protects the public safety.

For:

The bills correct several inconsistencies between the three types of sportcraft. For example, House Bill 4445 would correct an oversight by adding a mechanism for an appeals process for ORV operators who receive an adverse determination in an administrative hearing regarding a refusal to submit to a chemical test. This appeals process is already in place for operators of snowmobiles and watercraft. House Bill 4443 changes a criminal penalty for refusing to take a breathalyzer test to a civil infraction as it is for operators of watercraft and ORVs and standardizes the civil fine for all sportcraft to \$500.

For:

The bills were needed to right the scales of justice for victims injured or killed by drunk or impaired operators of ORVs, watercraft, and snowmobiles, and to give prosecutors the tools necessary to do so. Under the previous laws, a drunk or drugged driver faced harsher penalties than a drunk or drugged operator of a recreational vehicle.

In one well-publicized Cass County example, a seven-year-old boy died when he was struck by a jet-ski operated by a man with a BAC of 0.08. In the incident, the boy was riding on one of several tubes being towed behind a boat on an inland lake. Even though, according to media reports, the man acknowledged he operated the watercraft at a high rate of speed and in a reckless fashion despite being warned by adults on the boat towing the tubes of the danger he posed to the children, the current presumptions in the law meant he could only be prosecuted as being impaired. Thus, he saw no prison time, only minimal time in the county jail, and was eligible to operate watercraft again within two years. Had the same incident occurred with a motor vehicle, the man could have been charged with a 15-year felony. At the very least, he would have faced a longer license suspension.

In addition, the 2003 legislation that lowered the drunk driving threshold to a 0.08 BAC also made it illegal to drive with any bodily content of cocaine or Schedule 1 drugs – which includes heroin, LSD, and marijuana. These drugs are well-known for altering a person's judgment and physical acuity. Operating these vehicles and vessels on crowded trails and crowded lakes and streams already carry an inherent danger of flipping over on rough terrain, hitting trees, or colliding with other vehicles and vessels; operating watercraft, ORVs, or snowmobiles while impaired or under the influence of controlled substances only increases those risks. State laws should not be giving the message that a person too drunk or high to drive a car safely is OK to operate a boat, Jet Ski, snowmobile, or ORV.

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