

LG Mirror: Court Voids Permits to Kill Milfoil with Herbicide

MARCH 13, 2023

Treatment Delayed for at Least One Year

By Anthony F. Hall, Lake George Mirror

A New York Supreme Court has invalidated the Adirondack Park Agency's 2022 approval of the Lake George Park Commission's plan to treat 7.6 acres of Eurasian milfoil with the herbicide ProcellaCOR.

Justice Robert J. Muller ruled March 3 that a permit to use chemicals in Lake George should not have been granted without a public hearing first and concluded the permit was awarded arbitrarily and capriciously, in violation of the Adirondack Park Agency's own rules and regulations.

"Justice Muller's decision is a huge win for Lake George and the Adirondack Park," said Peter Menzies, Board chairman of the Lake George Association, which brought an Article 78 suit against the APA in May, 2022, charging that it failed to comply with its own

substantive and procedural requirements. “There is a time and a place for adjudicatory hearings, presided over by an administrative law judge, and when a unique and priceless natural resource, deserving of deliberate and careful stewardship and the protection of New York State law such as Lake George, is at issue, the standard is met. This is why this is an important decision, not only for Lake George, but for the Adirondack Park.”

Menzies added, “The LGA is grateful for the incredible groundswell of support from the Lake George Community.” According to Menzies, more than 4,600 people wrote letters or submitted comments to New York State agencies opposing the use of ProcellaCOR in Lake George.

“This was a win for the people of Lake George. They wanted their voices heard, and Justice Muller ruled, courageously, that they should have been given that opportunity,” said attorney Thomas A. West, who represented the Lake George Association in the suit, as well as its co-petitioners, the Lake George Waterkeeper, the Town of Hague and a resident of the lake’s east side, where two bays heavily infested with the invasive aquatic plant were to have been treated with the herbicide.

The LGPC responds; renews APA application

Dave Wick, the executive director of the Lake George Park Commission, commented, “We were disappointed by Justice Muller’s decision, but his decision was based on the APA’s procedures, not on the merits of ProcellaCOR.”

Wick noted that in his decision, Justice Muller remarked, “there is no dispute that ProcellaCOR is far more cost effective - especially when considering a body of water as large as Lake George that must triage its resources - than the current method of managing milfoil.”

“Nothing in the record indicates that the use of ProcellaCOR would in any way be dangerous for Lake George or its residents,” Wick said.

Wick said the Lake George Park Commission has submitted applications to the APA and the Department of Environmental for permits to use the herbicide in the same two bays in 2023.

The Park Commission’s applications have not been modified in any manner since 2022, said Wick.

“We submitted the same application, with the same material supporting the application,” said Wick.

Wick said providing additional scientific evidence was unnecessary since ProcellaCOR has already been studied by the U.S.

Environmental Protection Agency and reviewed by several New York State agencies and divisions within those agencies, all of which have concluded that its use is safe and appropriate for Lake George.

Another Setback for ProcellaCOR

In June, 2022, Judge Muller enjoined the Lake George Park Commission from applying ProcellaCOR to the two beds, one near Glenburnie, one near Huletts Landing, until he ruled on the merits of the LGA’s Article 78 law suit.

Muller’s March 3 decision is likely to be viewed as another setback for the Lake George Park Commission’s proposal to stage a pilot program to test ProcellaCOR’s effectiveness in reducing Lake George’s milfoil, which it has been battling since 1987.

According to Lake George Park Commission staff, ten to twenty percent of a dense bed of milfoil will return within a year of treatment when harvested by hand. In the absence of annual harvests, a site may return to its original size and density within two years.

“The Lake George Park Commission remains committed to doing the right thing for Lake George and to examining every scientifically-supported, ecologically-safe tool available to manage Eurasian milfoil,” said Wick.

Public Hearing Expected in 2023

The APA’s 2022 permit was time-sensitive and would have long since expired, regardless of Justice Muller’s decision. Nevertheless, his March 3 ruling is likely to influence APA board members’ future decision-making, leading the agency to hold public hearings before granting the Lake George Park Commission new permits to apply the herbicide in 2023.

“The APA has been told it acted arbitrarily and capriciously by not holding an adjudicatory hearing,” said Thomas West. “The APA can’t repeat its original error. If the Lake George Park Commission wants to proceed with an application to use ProcellaCOR this year, the APA will have to hold a hearing.”

The APA is entitled to appeal Muller’s decision to a higher court, but as of March 6, no decision to do so had been made.

“The Adirondack Park Agency is reviewing the Muller decision and has no further comment at this time,” said Keith McKeever, the APA’s spokesman.

While confirming that the Lake George Park Commission has submitted an application to apply ProcellaCOR this spring, Wick conceded that it was highly unlikely that it could be tested in the two bays this year, given the probability of a public hearing, one that might not conclude before the end of summer.

The Lake George Park Commission’s new applications seek authorization to apply the treatments over the course of one day sometime between May 17 and June 30.

Ken Parker, chairman of the Lake George Park Commission, said, “whether we can proceed with the use of ProcellaCOR in the near term or in the far future has yet to be determined. But its safety and effectiveness have already been proven.”

The LGA’s Causes of Action

According to the LGA, the APA’s approval of the LGPC’s permit ought to have been deemed “procedurally flawed and arbitrary and capricious” for several reasons, among them, that the APA “orchestrated a rushed process to approve the use of an herbicide in Lake George despite an outpouring of technical and scientific opposition.”

When vacating the 2022 permits, Justice Muller appears to have been persuaded by many of the arguments put forward by the LGA, in documents and in court.

Muller found, for instance, that APA staff failed to apprise board members of the number and variety of public comments in a timely manner, including an April 12 resolution by Hague’s Town Board and an 11-page letter from Dr. Carol Collins opposing the use of ProcellaCOR in Lake George.

As a consequence, the LGA and the Waterkeeper argued, the APA was unable to fully assess the Park Commission’s proposal or to weigh ProcellaCOR’s potential impacts upon water quality, the ecosystem and the health of those who use the lake as a source of drinking water. Justice Muller agreed, writing that the APA staff’s presentation of the Lake George Park Commission’s request for a permit to use ProcellaCOR “was largely one-sided and favored the Lake George Park Commission.”

Muller concluded, “Without the benefit of all public comments - and the necessary time to review them - the board members could not adequately evaluate the project.”

Meeting the Criteria for a Public Hearing

Muller also found that the Lake George Park Commission’s application met the criteria for a public hearing.

When determining if an adjudicatory hearing is warranted, for instance, the APA must consider the degree of public interest in the project and whether the information presented at a hearing would be of assistance to the agency in its review.

The APA is also required to hold public hearings when substantive and significant issues have been raised, such as the potential impacts of an herbicide on non-target species.

The choice not to hold a hearing was itself arbitrary and capricious, wrote Muller, reiterating a previous point that “perhaps the board would have chosen to hold a public hearing had it been presented with all information both for and against the proposed herbicide application.”

Joshua Tallent, an Assistant Attorney General within the AG’s Environmental Protection Bureau charged with defending the APA, said he saw no reason to hold public hearings.

According to the LGA’s attorney, Tom West, the APA routinely held adjudicatory hearings in its first 34 years of existence, on issues ranging from open-pit mining to cell towers to a pilot project to use another herbicide in Lake George, SONAR. For the past 14 years, no such hearings have been held, he said.

The APA's 2002 hearings on the Lake George Park Commission's application to conduct a pilot project with SONAR were especially relevant to the application to test ProcellaCOR, said West. "The very same issues were adjudicated, and it led to permit denials," said West, who said the use of SONAR was rejected on the grounds that rare aquatic plants would be harmed.

Assuming a public hearing is scheduled, as expected, the LGA "will look forward to participating in the regulatory process and to presenting expert scientific testimony at the adjudicatory hearing to clearly convey and document our many concerns," the LGA's ProcellaCOR committee stated in a March 3 press release.

"If we've learned anything over the last decade, it's that Lake George is not only ecologically complex, it's unique," said Peter Menzies, indicating that the LGA's presentation would focus on the unknowns – the unanswered questions scientists may have about the short and long-term consequences of an herbicide treatment in a unique water body, and the risks to its ecology "of playing with fire."

Ken Parker, the LGPC's chairman, stated, "Our goal is to educate people. No one is neutral anymore. Our job will be to show people that ProcellaCOR is a valuable tool for the long-term management of milfoil that has been difficult to treat with other methods."

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