

Lake Jeane Issue Paper

Ecology's Policy for Managing Permits to Use Aquatic Labeled Pesticides in Lake Jeane

Background

Lake Lorene and Lake Jeane are two manmade lakes connected by Joe's Creek. The parcel underlying Lake Lorene was deeded to the Twin Lakes Homeowners Association (TLHOA), and the parcel underlying Lake Jeane was deeded Twin Lakes Golf & Country Club (TLGCC). This created a complex situation where the apparent authority to administer each lake based on ownership of the bed of the lake was with a party that did not live around the lake as a homeowner. For Lake Lorene, TLHOA provided sponsorship for coverage to treat the lake under Ecology's Aquatic Plant and Algae Management General Permit (permit). On Lake Jeane, the TLGCC provided sponsorship for a separate permit coverage, however it has different management objectives for Lake Jeane than the lake shoreline residents.

The differences in management objectives for Lake Jeane led to litigation in King County Superior Court between several shoreline residents and the TLGCC. This litigation resulted in a number of court decisions, a settlement agreement, and a stipulated judgment. These developments shed light on who has authority to manage and treat Lake Jeane. *See Ward v. Twin Lakes Golf & Country Club*, King County Superior Court No. 16-2-07439-1 SEA.

Prior to the King County Superior Court litigation, Ecology also denied permit coverage to a separate shoreline resident on Lake Jeane. Ecology made this decision because the resident did not provide documentation that showed that he or his organization had management authority for the lake sufficient to qualify as a permit sponsor. *See Woolley v. Ecology*, PCHB No. 16-078 (Jan. 6, 2017). The decision to deny coverage was appealed; the outcome of this appeal was delayed until the TLGCC and shoreline homeowner litigation was completed.

Lake Management Authority

During the litigation between the Lake Jeane residents and TLGCC, the court analyzed language in the declaration of Covenants, Conditions, and Restrictions (CC&Rs) that had not been provided to Ecology as part of the permit application it denied to another one of the lakeside residents. The CC&R gave each lakeside resident "a non-exclusive easement of use and enjoyment In [sic] and to [Lake Jeane] in common with the owners of [Lake Jeane]." Based on this language, the court found that the lakeside residents "as the dominate [sic] estate for the non-exclusive easement of use and enjoyment of Lake Jeane have the responsibility of maintaining that easement of enjoyment." *Ward v. Twin Lakes Golf & Country Club*, Order Granting Plaintiffs' Motion for Reconsideration, King County Superior Court No. 16-2-07439-1 SEA at 2 (Feb. 17, 2017). In the subsequent stipulated judgment, the court ruled that: "*Because of their easement over Lake Jeane the [Lakeside resident] Plaintiffs, collectively and individually, and/or their successors in interest have the right, but not the obligation to maintain their easement, which includes treating and/or maintaining Lake Jeane.*" *Ward v. Twin Lakes Golf & Country Club*, King County Superior Court No. 16-2-07439-1 SEA, Stipulated Final Judgment at 4 (Dec. 18, 2017).

The lakeside resident plaintiffs in the case also entered into a detailed settlement agreement with TLGCC setting out a plan for coordinating their treatment of Lake Jeane. This settlement

agreement, as well as the court's ruling and the stipulated judgment are binding only on the parties to the case. However, absent different facts unique to other lakeside residents that were not party to the case, the court would be expected to make the same findings on the nature of other lakeside residents' easement rights to treat and maintain Lake Jeane. The settlement agreement however, is not binding on other lakeside residents.

This litigation has made clear that the shoreline homeowners, through the CC&Rs that are associated with their deeds, have an easement that gives them authority to manage Lake Jeane, either individually or collectively. In addition to the eight settlement parties, there are 32 residences around Lake Jeane. It appears that each homeowner has the same CC&R's associated with their deed as the settlement parties have. These CC&R's provide each homeowner with a use and maintenance easement for all of Lake Jeane. This means that each homeowner (individually or collectively) could potentially qualify as a sponsor for a permit for management of the entire lake.

Challenges

Number of Permit Coverages

Each lakeside resident with the CC&R language granting them an easement is eligible to be the sponsor (individually or collectively) for a permit coverage for the entire lake. Since there were eight homeowners party to the case, each could sponsor their own coverage for all of Lake Jeane resulting in nine separate permit coverages on Lake Jeane (including the permit coverage sponsored by TLGCC). Adding in the additional 32 shoreline homeowners not party to the case but with the same CC&R language, this could potentially increase the number of permit coverages.

Due to the expense of lake management with chemicals, it is unlikely that an individual shoreline homeowner would choose to fund an entire lake treatment. It is more likely that several homeowners working together would provide the funds for an effective whole lake treatment of Lake Jeane.

Product Labels

Chemical methods of managing algae problems in Lake Jeane include algaecides and phosphorus inactivation products. Herbicides and algaecides are registered pesticides, which have a product label. The product label is a regulatory document that must be followed. WSDA enforces pesticide product labels and it is also a violation of Ecology's permit if the label is not followed.

Labels often have retreatment windows that prevent retreatment before a specified period. For example: "*Do not reapply within 48 hours (Phycomycin SCP).*" or "*Therefore, treat only 1/3 to 1/2 of the water body area at one time and wait 14 days between treatments (Reward).*" Unless applicators across multiple permits coordinate their activities, there is potential for applicators to violate product label requirements if they do not know what applicators for other permits already used for treatment.

Differences in Homeowner Goals

In general, shoreline homeowners want to stop the harmful algae blooms (HABs) that are regularly occurring on Lake Jeane. However, the method by which the HABs may be treated

generates debate. Some homeowners prefer the better-known method of alum treatments, with algaecides as necessary. Others believe an experimental method and algaecides will work better. It is possible that the differences in homeowner goals will lead to both alum and experimental phosphorus sequestration treatments. Phosphorus sequestration products do not have product labels like registered pesticides, so there is no concern for label violations.

Ecology's Current Policy for Managing Lake Jeane Aquatic Pesticide Use Permits

Sponsorship

- Based on the King County Superior Court rulings, each homeowner who chooses to may be a sponsor for a permit coverage. The sponsor and their applicator must still meet all eligibility requirements to apply for permit coverage.
- Ecology encourages multiple homeowners to jointly-sponsor a single permit coverage for Lake Jeane, or to sign on as an additional sponsor of an existing permit coverage. Multiple homeowners jointly sponsoring a single permit coverage must each sign the permit application as a sponsor.

Coverage Letter

In addition to the standard language included in a letter issuing permit coverage, Ecology will add language to the coverage letter that:

- Reminds applicators that herbicide/algaecide product label requirements are enforceable, so coordination with other applicators (if there are any), is necessary to prevent label violations.
- Lists the current applicators operating on Lake Jeane along with their contact information to inform coordination.
- Clarifies that Ecology will not make lake management decisions, arbitrate between parties to determine whether a treatment is appropriate, or determine if a party is following the Lake Jeane Settlement Agreement. Ecology's role is to ensure permit compliance.
- Inform other permit holders on Lake Jeane of each new coverage, so that all Permittees are aware of who is doing work on the lake.

Case Citations

Ward v. Twin Lakes Golf & Country Club, King County Superior Court No. 16-2-07439-1 SEA, Order Granting Plaintiffs' Motion for Reconsideration (Feb. 17, 2017).

Ward v. Twin Lakes Golf & Country Club, King County Superior Court No. 16-2-07439-1 SEA, Stipulated Final Judgment and Order (Dec. 18, 2017).

Woolley v. Ecology, PCHB No. 16-078, Order on Summary Judgment (Jan. 6, 2017)

Harmful Algae Bloom Management Funding Sources

Generally, providing funding for lake management projects is the responsibility of the project proponent. In the case of the permit coverages for Lake Jeane, these are the shoreline property owners.

In some circumstances, lake management projects may qualify for grant funding through Ecology. For qualifying projects managing harmful algae blooms, the Freshwater Algae Control Grant Program is available. The grants are competitive, and the recipient must be a public entity such as a city, county, or special purpose district. More information is available at:

<https://ecology.wa.gov/About-us/How-we-operate/Grants-loans/Find-a-grant-or-loan/Freshwater-algae-program-grants>.

In some situations, forming a Lake Management District (LMD) has created a stable funding source and group overseeing lake management. The Municipal Research and Services Center provides an overview of the function of a LMD and how LMDs are formed. This overview is accessible at: <http://mrsc.org/Home/Explore-Topics/Governance/Forms-of-Government-and-Organization/Special-Purpose-Districts-in-Washington/Lake-and-Beach-Management-Districts.aspx>.

Contact Information

For more information about the Aquatic Plant and Algae Management General Permit, please see: <https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Aquatic-pesticide-permits/Aquatic-plant-algae-management>

For questions about the permit, or this policy for managing the permit coverages on Lake Jeane, please contact Jon Jennings at (360) 407-6283 or jonathan.jennings@ecy.wa.gov.

Please direct questions about the Freshwater Algae Control Grant Program to Lizbeth Seebacher at (360) 407-6938 or lsee461@ecy.wa.gov.

cc:

- Representative Mike Pellicciotti – Washington State House of Representatives
- Representative Kristine Reeves – Washington State House of Representatives
- Senator Mark Miloscia – Washington State Senate
- Yarden Weidenfeld – City of Federal Way
- Scott Weaver – Carney Badley Spellman, P.S., Attorney for Lake Jeane Residents
- David Chawes - Preg O'Donnell & Gillett, PLLC, Attorney for Twin Lakes Golf & Country Club
- Phil Matonti – President, Twin Lakes Golf & Country Club
- Patrick Pomeroy – President, Twin Lake Homeowners Association
- Patty Ward – Lake Jeane Resident
- Bob Woolley – Lake Jeane Resident
- Kyle Langan – Aquatechnex, LLC
- Doug Dorling – Northwest Aquatic Ecosystems
- Rob Zisette – Herarra Consultants
- Michelle Wilcox – EPA
- Chris Reitz – Assistant Attorney General, Ecology Division