

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Invasive  
Species/Infested Waters Civil Citation of  
Lyle Frank Sellers III

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

This matter came on for a hearing, via telephone, before Administrative Law Judge Jim Mortenson on August 28, 2014.

Anna Fisher, Assistant Waseca County Attorney, appeared on behalf of the Department of Natural Resources (Department). Thomas J. Kraus, Kraus Law Office, appeared on behalf of Lyle Sellers III (Appellant). The Office of Administrative Hearings' record closed at the conclusion of the hearing on August 28, 2013.

Evidence for this matter consisted of the testimony of Appellant, and Conservation Officers Chad Davis and Brent Ihnen. The Exhibits consisted of two photographs of the Appellant's boattrailer (IMG\_1067.JPG and IMG\_1068.JPG), Civil Citation 202782, and Letter of Appeal, dated July 14, 2014. The hearing was digitally recorded.

**STATEMENT OF THE ISSUE**

The issue presented in this matter is whether Appellant was properly issued a civil citation under Minn. Stat. § 84D.13 on July 3, 2014, for unlawfully transporting aquatic macrophytes, in violation of Minn. Stat. § 84D.09.

**SUMMARY OF RECOMMENDATION**

The Administrative Law Judge concludes that the evidence fails to demonstrate that Appellant transported aquatic macrophytes on July 3, 2014, and recommends that the Commissioner RESCIND the Citation.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. On the evening July 3, 2014, Appellant removed his boat from Clear Lake in Waseca, Minnesota.<sup>1</sup> Upon removing his boat from the lake and securing it to his trailer, Appellant conducted a “Five Point Check” to ensure his boat was secure, lake weeds removed, and drainplug open.<sup>2</sup> He removed a weed from the boat propeller before leaving the boat landing.<sup>3</sup>

2. On the evening of July 3, 2014, the State Patrol asked Conservation Officer Chad Davis to investigate a boating complaint on Clear Lake and was given a description of the boat.<sup>4</sup> The boat belonged to and was being operated by Appellant.<sup>5</sup> Officer Davis arrived and parked at the Clear Lake boat landing where Appellant was removing his boat just a couple of minutes prior to Appellant leaving the landing.<sup>6</sup>

3. Within minutes after leaving the boat landing, Appellant was pulled over by Officer Davis.<sup>7</sup> Appellant stopped and parked in a residential driveway after Davis alerted him to pull over.<sup>8</sup>

4. Officer Davis advised Appellant he pulled him over because of a suspected aquatic weed on his trailer.<sup>9</sup> On the axel of the trailer was a piece of vegetation, resembling a blade of grass, that was five to seven inches long, which hung down a few inches from the axel.<sup>10</sup>

5. After Officer Davis pulled Appellant over, he pointed the vegetation out to Appellant.<sup>11</sup> Appellant attempted to remove the weed and was ordered to stop by Officer Davis, who wanted to photograph the vegetation.<sup>12</sup> The vegetation was photographed, then removed by another Conservation Officer Chad Howe, and was later destroyed by Officer Davis.<sup>13</sup>

6. The vegetation on the Appellant’s trailer axel may have been a blade of terrestrial grass or aquatic vegetation.<sup>14</sup> While it is unknown what the vegetation was, it was not duckweed or Eurasian milfoil.<sup>15</sup>

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<sup>1</sup> Testimony (Test.) of Appellant.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Test. of Chad Davis.

<sup>5</sup> *Id.*, Test. of Appellant.

<sup>6</sup> Test. of C. Davis.

<sup>7</sup> *Id.*, Test. of C. Davis.

<sup>8</sup> *Id.*, Test. of Brent Ihnen.

<sup>9</sup> Test. of Appellant, Test. of C. Davis.

<sup>10</sup> Test. of C. Davis, Ex. 2.

<sup>11</sup> Test. of C. Davis, Test. of Appellant.

<sup>12</sup> *Id.*

<sup>13</sup> Test. of C. Davis, Test. of B. Ihnen, Ex. 1, Ex. 2.

<sup>14</sup> *Id.*, Test. of Appellant.

<sup>15</sup> Test. of C. Davis, Test. of B. Ihnen, Test. of Appellant.

7. Officer Davis issued Appellant a civil citation, for transporting what he believed to be acaquatic macrophytes, on July 3, 2014.<sup>16</sup>

8. Appellant appealed the citation in a letter from his attorney dated July 14, 2014.<sup>17</sup> The letter did not specify the reason for the appeal.<sup>18</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS OF LAW

1. This matter is properly before the Administrative Law Judge and the Commissioner of Natural Resources pursuant to Minn. Stat. §§ 14.50 and 116.072, subd. 6.

2. "Aquatic macrophyte" means a macroscopic nonwoody plant, either a submerged, floating leafed, floating, or emergent plant that naturally grows in water.<sup>19</sup>

3. Transportation of aquatic macrophytes is prohibited under Minnesota law, with the following exceptions:<sup>20</sup>

(1) duckweeds in the family Lemnaceae;

(2) for purposes of constructing shooting or observation blinds in amounts sufficient for that purpose, provided that the aquatic macrophytes are emergent and cut above the waterline;

(3) when legally purchased or traded by or from commercial or hobbyist sources for aquarium, wetland or lakeshore restoration, or ornamental purposes;

(4) when harvested for personal or commercial use if in a motor vehicle;

(5) to the department, or another destination as the commissioner may direct, in a sealed container for purposes of identifying a species or reporting the presence of a species;

(6) wild rice harvested under section 84.091;

(7) in the form of fragments of emergent aquatic macrophytes incidentally transported in or on watercraft or decoys used for waterfowl hunting during the waterfowl season; or

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<sup>16</sup> Test. of C. Davis, Test. of Appellant, Ex. 3.

<sup>17</sup> Ex. 4.

<sup>18</sup> *Id.*

<sup>19</sup> Minn. Stat. § 84D.01, subd. 2.

<sup>20</sup> Minn. Stat. § 84D.09.

(8) when removing water-related equipment from waters of the state for purposes of cleaning off aquatic macrophytes before leaving a water access site.

4. DNR Conservation Officers are authorized to order the removal of aquatic macrophytes from water-related equipment, and issue warnings, civil citations, or criminal penalties to a person who transports aquatic macrophytes in violation of Minn. Stat. § 84D.09.<sup>21</sup> A civil citation for transporting aquatic macrophytes requires a \$100.00 penalty.<sup>22</sup>

5. Appeals of civil citations must be made by notifying the Commissioner of the Department of Natural Resources of a request for a hearing within 15 days after receipt of the citation.<sup>23</sup> If a hearing is not requested within the 15-day period, the citation becomes a final order not subject to further review.<sup>24</sup> The request must specifically state the reasons for seeking review of the order.<sup>25</sup>

6. Appellant timely requested a hearing, appealing the civil citation he received on July 3, 2014. He failed to specifically state the reason for the appeal. This error was corrected by requiring Appellant to present his case first at hearing.

7. The evidence does not show Appellant transported aquatic macrophytes. The small piece of vegetation found on Appellant's boattrailer may have been terrestrial or aquatic. No one could specifically identify it. Duckweed (which is not prohibited) and Eurasian milfoil were ruled out as the species of vegetation by the conservation officers.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### RECOMMENDATION

The Administrative Law Judge recommends that Invasive Species/Infested Waters Civil Citation No. 202782 issued to Lyle Sellers III be RESCINDED.

Dated: September 11, 2014

s/Jim Mortenson  
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JIM MORTENSON  
Administrative Law Judge

Reported: Digitally Recorded  
No Transcript Prepared

<sup>21</sup> Minn. Stat. §§ 84D.10, Subd. 3, 84D.13.

<sup>22</sup> Minn. Stat. § 84D.13, subd. 5(a)(1).

<sup>23</sup> Minn. Stat. § 84D.13, subd. 8.

<sup>24</sup> *Id.*

<sup>25</sup> Minn. Stat. § 116.072, Subd. 6(a).

## NOTICE

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not issue a final order until at least five days after receipt of the report of the Administrative Law Judge. The persons to whom the order is issued may, within those five days, comment to the Commissioner and the Commissioner will consider the comments. The final order of the Commissioner may be appealed, pursuant to Minn. Stat. §§ 14.63 and 14.69.

## MEMORANDUM

The record in this case is insufficient to find a violation of Minn. Stat. § 84D.09 as set forth in Citation No. 202782. The dispute at hand is whether the vegetation on Appellant's boattrailer axel was an aquatic plant (thus an aquatic macrophyte) or a terrestrial plant. Despite the conservation officers' assertions that the small piece of vegetation found on Appellant's trailer axel was an aquatic macrophyte, neither the Department nor the Appellant can specifically identify what the vegetation was. It is possible it was not aquatic vegetation at all, but a blade of grass.

The parties agree that despite this matter being a civil rather than criminal matter, the burden of proof is on the Department. The Department has not shown, by a preponderance of the evidence, that the vegetation on Appellant's boattrailer was an aquatic macrophyte.

Appellant diligently inspected his boat to be sure he was compliant, removing weeds and opening his drainplug. When he was pulled over by Officer Davis and a small piece of vegetation was pointed out to him on the axel of his boattrailer, Appellant offered to remove it. He was ordered to not do so by the conservation officer.

Officer Davis accurately defined the class, "aquatic macrophytes," under the Minnesota statute. He testified he was trained in spotting such vegetation. However, neither conservation officer explained why the vegetation in question was an aquatic macrophyte or what species it was. Officer Davis wanted a photograph of the blade vegetation, but he did not use the photograph, nor the vegetation itself, to specifically identify and confirm it was aquatic and not terrestrial. The Appellant said the vegetation looked like a blade of grass. Officer Davis said he was trained to identify aquatic macrophytes and could easily identify even a small one, yet he could not identify, with specificity, the vegetation in question. Nor could another conservation officer assisting. Yet, both conservation officers could identify other aquatic macrophytes with specificity.

A dispute over whether a piece of vegetation is an aquatic macrophyte is easily resolved with a positive identification of the species of vegetation. This was not done in this case, and there is no basis to conclude the vegetation was, in fact, an aquatic macrophyte when the Appellant testified that it looked like a blade of grass and the Department cannot specifically identify it. Simply calling the piece of vegetation in question an aquatic macrophyte, which is a defined class of vegetation, in such a case is not sufficient to resolve this dispute.

Despite not being able to specifically identify the vegetation on the trailer axel, the conservation officer could have ordered Appellant to remove it, so as to prevent possible infestation if it were an invasive species. This was not done. Rather, Appellant was ordered to not remove the vegetation and a civil citation was issued. Given the wide range of latitude the legislature provided to conservation officers and other licensed peace officers in enforcing laws designed to prevent the spread of invasive species, it would have been reasonable that the vegetation be removed as Appellant was perfectly willing to do, even though it was not yet identified. It was within the conservation officer's power to have the vegetation subsequently identified, pursuant to Minn. Stat. § 84D.09, subd. 2(5), and issue a citation to Appellant if it was, in fact, an aquatic macrophyte.

Because the Department has not shown that the vegetation removed from Appellant's trailer was aquatic, and it is not obviously so, it has not shown Appellant has illegally transported aquatic macrophytes. For these reasons, it is the opinion of the undersigned that Civil Citation No. 202782 should be rescinded.

**J. R. M.**