

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal of the Invasive
Species/Infested Waters Civil Citation No.
CV 186585 Issued To Michael Frank Dillon

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

This matter came before Administrative Law Judge Steven M. Bialick for a Prehearing Conference held by telephone conference call on December 4, 2014, pursuant to a Notice of Prehearing Conference and Notice of Hearing that was issued on November 10, 2014. Conservation Officer Randy Posner (CO Posner) appeared on behalf of the Department of Natural Resources (Department) without counsel. Michael Frank Dillon (Appellant) appeared on his own behalf without counsel.

On December 4, 2014, the parties agreed to treat the Prehearing Conference as the formal hearing on the civil citation that was issued to Appellant. Sworn testimony was taken and arguments were presented during the hearing. The record closed on December 4, 2014, upon adjournment of the hearing.

STATEMENT OF THE ISSUES

1. Whether Appellant violated Minn. Stat. § 84D.09 (2014) by transporting aquatic macrophytes.
2. Whether \$100 is the appropriate civil penalty for the violation under Minn. Stat. § 84D.13, subd. 5(a)(1) (2014).

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that Appellant violated Minn. Stat. § 84D.09, and that a civil penalty of \$100 is appropriate. Therefore, the Administrative Law Judge recommends that the Commissioner affirm the citation and civil penalty.

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On September 27, 2014, Appellant was operating his boat on Gull Lake in Cass County, Minnesota. It was getting dark, and Appellant docked his boat at a water access site on the lake.¹

2. Appellant left his boat, and went to his vehicle and trailer which were parked in an overflow parking lot near the lake.²

3. Appellant drove back to the lake, removed his boat from the lake, and put the boat onto the trailer. He then drove away from the lake, past the main parking lot, past the overflow parking lot, and up to a fee box and light pole, where he was stopped by CO Posner and another Conservation Officer. That light pole was lit, and it was the closest lit light source to the lake. The parking lots, fee box, and light pole are on U.S. Army Corps of Engineers (ACE) property.³

4. While Appellant's boat was parked on the trailer on the ACE property, CO Posner and the other Conservation Officer inspected Appellant's boat and trailer and found a wet plant.⁴

5. Appellant removed the plant from his boat, and CO Posner picked it up and put it on a measuring board.⁵

6. CO Posner determined the plant was 22 inches long, and he recognized it as being northern milfoil. He took a photograph of it and retained it.⁶

7. CO Posner issued an Invasive Species/Infested Waters Civil Citation and \$100 civil penalty to Appellant for transporting aquatic macrophyte.⁷

8. By letter dated September 30, 2014, and postmarked October 7, 2014, Appellant appealed the citation and requested an administrative hearing pursuant to Minn. Stat. § 116.072, subd. 6 (2014). The letter noted that Appellant would be traveling out of the country for work purposes between October 31, 2014 and November 7, 2014, and that Appellant would not be available for a hearing during that time.⁸

9. By letter dated November 6, 2014, the Department notified Appellant that the hearing he requested was being referred to the Office of Administrative Hearings

¹ Testimony (Test.) of Appellant.

² Test. of Appellant.

³ Test. of Appellant.

⁴ Test. of CO Posner.

⁵ Test. of Appellant, Test. of CO Posner.

⁶ Test. of CO Posner.

⁷ Civil Citation No. CV 186585 (citation).

⁸ Letter and envelope from Appellant, dated September 30, 2014 and postmarked October 7, 2014.

(OAH), and that the OAH would be contacting him to let him know when and where the hearing would be held.⁹

10. By Notice of Prehearing Conference and Notice of Hearing dated November 10, 2014, Appellant was notified that the Prehearing Conference would be held on December 4, 2014 by telephone conference call.¹⁰

11. Prior to the Prehearing Conference, CO Posner submitted to the undersigned Administrative Law Judge a photograph of the plant sample he had taken on September 27, 2014, together with a note from Wayne Mueller, Aquatic Plant Specialist, which identified the plant as northern water milfoil.¹¹

12. At the Prehearing Conference, the parties agreed to treat the Prehearing Conference as the formal hearing.

13. During the formal hearing, Appellant did not dispute that the plant he removed from his boat was northern water milfoil.¹²

14. When CO Posner issued the citation, Appellant had already left the water access site with his boat and trailer.¹³

Based on the 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 (Commissioner) pursuant to Minn. Stat. §§ 14.50; 84D.13, subd. 8; 116.072, subd. 6 (2014).

2. Minn. Stat. § 84D.09, prohibits the transportation of aquatic macrophytes with limited exceptions, including an exception “when removing water-related equipment from waters of the state for purposes of cleaning off aquatic macrophytes before leaving a water access site.”¹⁴

3. Conservation Officers are legally authorized to issue civil citations to persons who violate Minn. Stat. § 84D.09 and to impose a statutory penalty of \$100 for such violations.¹⁵

⁹ Letter from Department to Appellant, dated November 6, 2014.

¹⁰ Notice of Prehearing Conference and Notice of Hearing.

¹¹ E-mail from CO Posner, dated December 4, 2014.

¹² Test. of Appellant.

¹³ Aerial photographs Appellant submitted to the undersigned Administrative Law Judge at the hearing, Test. of CO Posner.

¹⁴ Minn. Stat. § 84D.09, subd. 2(8).

¹⁵ Minn. Stat. § 84D.13, subds. 4, 5(a)(1) (2014).

4. Pursuant to Minn. Stat. § 84D.13, subd. 8, an appeal of a civil citation shall be considered under the procedures in Minn. Stat. § 116.072, subd. 6, if the person who received the citation requests a hearing within 15 days after receipt of the citation.

5. Appellant filed a timely appeal and request for hearing.

6. Minnesota law requires the Commissioner to notify the person seeking a hearing of the time and place of the hearing at least 20 days before the hearing and further requires the hearing to be held within 30 days after a request for hearing has been filed with the Commissioner, unless the parties agree to a later date.¹⁶

7. Because Appellant limited the time during which he was available to attend a hearing, he is deemed to have waived the requirement that the hearing be held within 30 days after the request for hearing was filed.

8. Appellant violated Minn. Stat. § 84D.09 by transporting aquatic macrophytes, specifically northern water milfoil.

9. The exception set forth in Minn. Stat. § 84D.09, subd. 2(8) is not applicable to this case because Appellant had left the water access site.

10. Pursuant to Minn. Stat. § 116.072, subd. 6(c), the Administrative Law Judge may not recommend a change in the amount of the proposed penalty unless the judge determines that the amount of the penalty is unreasonable.

11. The penalty amount of \$100 is not unreasonable, and it is the appropriate civil penalty for Appellant's violation of Minn. Stat. § 84D.09.

12. For purposes of Minn. Stat. § 116.072, subd. 6(d), Appellant's request for hearing was not solely for purposes of delay and was not frivolous.

Based on the Conclusions of Law, and for the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that Invasive Species/Infested Waters Civil Citation No. CV 186585 and the \$100 civil penalty issued to Appellant be **AFFIRMED**.

Dated: December 31, 2014

s/Steven M. Bialick

STEVEN M. BIALICK
Administrative Law Judge

Reported: Digitally Recorded

¹⁶ Minn. Stat. § 116.072, subd. 6 (2014).

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 in the manner provided in Minn. Stat. §§ 14.63-.69 (2014).

MEMORANDUM

In an appeal of a civil citation, the burden of proof is on the Department to prove by a preponderance of the evidence that a violation of law occurred.¹⁷ In this case, a preponderance of the evidence establishes that Appellant violated Minn. Stat. § 84D.09 by transporting aquatic macrophytes, specifically northern water milfoil. Appellant did not fall within the exception set forth in Minn. Stat. § 84D.09, subd. 2(8) because that exception applies to cleaning off aquatic macrophytes before leaving a water access site and Appellant had already left the water access site when he received the citation. Further, there is no exception for transporting aquatic macrophytes for the purpose of finding the nearest light source in order to examine a boat when it is dark outside.

While a \$100 penalty is significant, it is the amount specified by Minn. Stat. § 84D.13, subd. 5(a)(1), and is reasonable in relation to the harm that the Department seeks to prevent. The civil citation and penalty should be affirmed.

Appellant challenged the timeliness of the hearing. If a hearing is to be held within 30 days after a request for hearing has been filed, and if the person seeking the hearing is to receive notice of the time and place of the hearing at least 20 days before the hearing, then there is only a 10-day period during which the hearing can take place. In this case, Appellant's written request for hearing was postmarked October 7, 2014. The 10-day period would have run from October 27, 2014 to November 6, 2014. When he appealed, Appellant informed the Department that he would not be available to attend a hearing between October 31, 2014 and November 7, 2014. Appellant cannot be allowed to both limit the available timeframe for the hearing, and then complain that the hearing fell outside the required timeframe.

S. M. B.

¹⁷ Minn. R. 1400.7300, subp. 5 (2013).