

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 116961 Issued to Craig Jason Spencer

**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 February 24, 2015, pursuant to a Notice of Prehearing Conference and Notice of Hearing that was issued on February 4, 2015. Conservation Officer Julie Siems (CO Siems) appeared on behalf of the Department of Natural Resources (Department) without counsel. Craig Jason Spencer (Appellant) appeared on his own behalf without counsel.

On February 24, 2015, 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 at 4:30 p.m. on February 24, 2015, after receipt of exhibits from the parties.

STATEMENT OF THE ISSUES

1. Whether the Department proved by a preponderance of the evidence that Appellant violated Minn. Stat. § 84D.05, subd. 1 (2014) by transporting a prohibited invasive species.
2. Whether \$500 is the appropriate civil penalty if Appellant violated Minn. Stat, § 84D.05, subd. 1.

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the Department has not proven by a preponderance of the evidence that Appellant violated Minn. Stat. § 84D.05, subd. 1. Therefore, the Administrative Law Judge recommends that the commissioner of the Department (Commissioner) rescind the citation and the \$500 civil penalty issued to Appellant.

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

FINDINGS OF FACT

1. Appellant works as a driver for Ames Construction (Ames).¹
2. Ames uses large “sheets,” approximately 3½ to 4 feet wide and approximately 28 to 34 feet long which weigh approximately 100 pounds per foot length, as temporary walls during construction of projects on the Mississippi River.²
3. On or about November 12, 2014, approximately 12 sheets, weighing approximately 3,000 pounds each, were removed from the Mississippi River near Dresbach, Minnesota, by another employee of Ames. Those sheets were stacked on a trailer by another employee of Ames, using cranes.³
4. On December 8, 2014, Appellant cleaned and inspected the visible areas of the sheets that were stacked on the trailer, and he did not see any zebra mussels.⁴
5. Appellant was not able to move the sheets to inspect the middle sheets in the stack because of their weight.⁵
6. On December 8, 2014, after inspecting the visible areas of the stacked sheets, Appellant transported the trailer containing the sheets on Highway 43 to a Department boat landing site on the Mississippi River in Winona, Minnesota.⁶
7. Another employee of Ames unloaded the sheets at the boat landing site in Winona, Minnesota.⁷
8. On approximately December 17, 2014, another company prepared an Environmental Compliance Report which noted that there were zebra mussels attached to one of Ames’ sheets, and it had to be decontaminated. The Minnesota Department of Transportation was notified of the zebra mussels on the sheet, and they notified the Department.⁸
9. On approximately January 8, 2015, CO Siems received notice of the zebra mussels on Ames’ sheet from the Department and, on January 9, 2015, she inspected the sheets.⁹
10. During her inspection, CO Siems found a 4 to 5 foot section of a sheet which contained zebra mussels. The sheet containing the zebra mussels was a middle

¹ Testimony (Test.) of Appellant.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Test. of CO Siems.

⁹ *Id.*

sheet in a stack of sheets, and the zebra mussels would not have been visible until the sheets were unstacked.¹⁰

11. After her inspection, CO Siems spoke to the project foreman at Ames and was told that Appellant was the driver who transported the sheet containing the zebra mussels from Dresbach, Minnesota to Winona, Minnesota.¹¹

12. On January 13, 2015, CO Siems spoke to Appellant, and he told her that he did transport some sheets for Ames. He said he was told by his foreman at Ames that he was the person who likely transported the sheet containing the zebra mussels.¹²

13. However, Appellant cleaned everything that was visible on the sheets he transported, he did not see any zebra mussels, and he does not know if he was the person who transported the sheet that contained the zebra mussels.¹³

14. On January 15, 2015, CO Siems issued a civil citation to Appellant and assessed a \$500 penalty against him for transporting prohibited invasive species, namely zebra mussels, on December 8, 2014.¹⁴

15. By letter dated and postmarked January 27, 2015, Appellant appealed the citation.¹⁵

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

2. Minn. Stat. § 84D.05, subd. 1, prohibits the transportation of a prohibited invasive species, with limited exceptions not applicable to this case.

3. Zebra mussels are a prohibited invasive species, as defined in Minn. Stat. § 84D.01, subd. 13 (2014).

4. Conservation Officers are legally authorized to issue civil citations to persons who violate Minn. Stat. § 84D.05, subd. 1 and to impose a statutory penalty of \$500 for such violations.¹⁶

¹⁰ *Id.*

¹¹ *Id.*

¹² Test. of Appellant.

¹³ *Id.*

¹⁴ Test. of CO Siems; Invasive Species/Infested Waters Civil Citation No. CV 116961.

¹⁵ Letter from Appellant dated January 27, 2015; envelope from Appellant postmarked January 27, 2015.

¹⁶ Minn. Stat. § 84D.13, subds. 4, 5(a)(3) (2014).

5. 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.

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

7. 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

8. The Department did not prove by a preponderance of the evidence that Appellant violated Minn. Stat. § 84D.05, subd. 1.

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 116961 and the \$500 civil penalty issued to Appellant be **RESCINDED**.

Dated: March 13, 2015

s/Steven M. Bialick

STEVEN M. BIALICK
Administrative Law Judge

Reported: Digitally Recorded

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).

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

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 the person receiving the citation violated the law.¹⁸

In this case, Appellant did not remove the sheets he transported from the water. He did not stack those sheets on the trailer. He cleaned and inspected the visible areas of the stacked sheets before transporting them, and he did not see any zebra mussels. He could not move the sheets to inspect the middle sheets in the stack because they weighed approximately 3,000 pounds each. He did not unload the sheets after transporting them. Neither Appellant nor CO Siems have first-hand knowledge that the sheet containing the zebra mussels was a sheet Appellant transported. The citation Appellant received was issued more than five weeks after he transported some sheets.

In issuing the citation, CO Siems relied on information provided by another employee of Ames, who said Appellant was the driver that transported the sheet containing the zebra mussels. However, the Department did not produce a written or recorded statement from that employee, and they did not have that employee testify as a witness at the hearing of this matter.

Minn. R. 1400.7300, subp. 1 (2014), allows the Administrative Law Judge to admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. However, in this case, the hearsay information the Department presented regarding the driver who transported the sheet containing zebra mussels is not sufficient to prove that Appellant was that driver.

Therefore, the Department failed to prove by a preponderance of the evidence that Appellant violated Minn. Stat. § 84D.05, subd. 1 by transporting a prohibited invasive species, and the citation and \$500 penalty issued to him should be rescinded.

S. M. B.

¹⁸ *Id.*