

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Invasive Species -
Infested Waters Civil Citation Issued to
Kelli Jean Gillispie

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

Citation Number: 173907

This matter came before Administrative Law Judge Stephen D. Swanson for a telephone conference hearing on July 27 and August 26, 2015.

Conservation Officer Traci Lee Hanson and Inspector Trent William Monroe Seamans appeared on behalf of the Minnesota Department of Natural Resources (Department). John A. Price, III, Attorney at Law, appeared on behalf of the Appellant, Kelli Jean Gillispie.

Conservation Officer Hanson, Inspector Seamans, and Ms. Gillispie each testified under oath. Exhibits 1 and 2 were offered by the Department and received in evidence. Exhibits 3 and 4 were marked for identification by the Department and then withdrawn. The hearing record closed at the conclusion of the telephone conference on August 26, 2015.

STATEMENT OF THE ISSUE

Whether Ms. Gillispie attempted to place into waters of the state water-related equipment that had aquatic macrophytes or prohibited invasive species attached, in violation of Minn. Stat. § 84D.13, subd. 4(2) (2014)?

SUMMARY OF THE CONCLUSION

The Administrative Law Judge concludes that the Department has failed to prove by a preponderance of the evidence that Ms. Gillispie attempted to place into waters of the state water-related equipment that had aquatic macrophytes or prohibited invasive species attached, in violation of Minn. Stat. § 84D.13, subd. 4(2), and recommends that the Commissioner of the Department of Natural Resources **RESCIND** the Citation issued to Ms. Gillispie.

FINDINGS OF FACT

1. Ms. Gillispie owns and operates a licensed company that transports watercraft for private owners. She holds a lake services provider aquatic invasive species permit issued by the Department. The permit authorizes her to transport water-related equipment with invasive species attached. She has successfully completed all the training related to the holding of the permit required by the Department.¹

2. Based upon receipt of a report from a Department inspector that Ms. Gillispie, on May 2, 2015, had attempted to place a boat into Lake Minnetonka with invasive species attached, Conservation Officer Hanson met briefly on that date with Ms. Gillispie, and they mutually agreed to meet in two weeks. Ultimately, Conservation Officer Hanson issued Ms. Gillispie a verbal warning related to the May 2nd incident.²

3. On May 14, 2015, Ms. Gillispie transported a large cabin cruiser boat for a private owner to the public access boat landing at Maxwell Bay on Lake Minnetonka with the intent of placing the boat in the water.³

4. At the boat landing, prior to an attempt to launch the boat, Inspector Seamans, in the presence of the owner of the boat, inspected the boat and observed three or four zebra mussels on the underside of the back swim deck. At the time of the inspection, the boat was on the transportation trailer, and an attempt to launch the boat had not commenced.⁴

5. The owner reported to Inspector Seamans that he had sand-blasted the boat twice after the previous season and stored the boat away for the winter. Inspector Seamans found the owner's report to be credible.⁵

6. In accordance with the Department training he had received, Inspector Seamans determined that the mussels were dry and dead and he easily removed them from the boat. He then authorized the launch of the boat into the waters of Lake Minnetonka because there were no living zebra mussels attached to the boat.⁶

7. Inspector Seamans forwarded the license registration number of the boat and a report of his inspection to Conservation Officer Hanson.⁷

8. Based upon the inspection report of Inspector Seamans, Conservation Officer Hanson, on May 27, 2015, issued Invasive Species/Infested Waters Notice of

¹ Testimony (Test.) of Kelli Jean Gillispie; Test. of Traci Lee Hanson; *see generally* Minn. R. 6216.0265 (2015).

² Test. of T. Hanson.

³ Test. of K. Gillispie; Test. of Trent William Monroe Seamans; Exhibits (Exs.) 1 and 2.

⁴ Test. of T. Seamans; Exs. 1 and 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Civil Citation, number 173907, to Ms. Gillispie, requiring the payment of a penalty in the amount of \$500.00.⁸

9. The Citation was issued for a violation of Minn. Stat. § 84D.13, subd. 4(2).⁹

10. On May 14, 2015, Lake Minnetonka carried a Department infested waters designation.¹⁰

11. Ms. Gillispie supports the Department's enforcement efforts to prevent the spread of invasive species.¹¹

12. Ms. Gillispie duly appealed the citation.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of the Department of Natural Resources have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 84D.13, subd. 8, and 116.072, subd. 6 (2014).

2. Pursuant to Minn. Stat. § 84D.10, subd. 1 (2014), it is unlawful for a person to place or attempt to place water-related equipment into the waters of the state of Minnesota that has prohibited invasive species attached.

3. Pursuant to Minn. Stat. § 84D.13, subd. 4(2), trained conservation officers are authorized to issue warnings or citations to a person who unlawfully places or attempts to place water-related equipment into the waters of the state of Minnesota that has prohibited invasive species attached.

4. The boat transported by Ms. Gillispie on May 14, 2015, is "water-related equipment,"¹² and Ms. Gillispie transported the boat with the intent to place the boat into the waters of Lake Minnetonka.

5. Zebra mussels are a prohibited invasive species.¹³

⁸ Invasive Species/Infested Waters Notice of Civil Citation, number 173907.

⁹ Test. of T. Hanson.

¹⁰ Test. of T. Seamans; Test. of K. Gillispie; see *generally* Minn. R. 6216.0300 (2015).

¹¹ Test. of K. Gillispie.

¹² Minn. Stat. § 84D.01, subd. 18a (2014).

¹³ Minn. R. 6216.0250, subps. 1, 4(E) (2015).

6. An intent to place a boat into the waters of the state with four clearly dead zebra mussels attached to the boat does not constitute an unlawful attempt under Minn. Stat. § 84D.10, subd. 1.

7. The Department has failed to prove by a preponderance of the evidence that Ms. Gillispie violated the provisions of Minn. Stat. § 84D.10, subd. 1.

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

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of the Department of Natural Resources **RESCIND** Citation No. 173907 issued to Kelli Jean Gillispie.

Dated: September 4, 2015

s/Stephen D. Swanson

STEPHEN D. SWANSON
Administrative Law Judge

Reported: Digitally recorded.

NOTICE

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner of the Department of Natural Resources 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-.69 (2014).

MEMORANDUM

The facts in this case are not in dispute. On May 14, 2015, Ms. Gillispie, on behalf of a private owner, transported a large cabin cruiser to Maxwell Bay on Lake Minnetonka for the purpose of launching the boat to begin the boating season. The owner had sand-blasted the boat twice after it was removed from the lake at the conclusion of the 2014 boating season and had stored the boat over the winter.

Prior to an attempt by Ms. Gillispie to launch the boat, it was inspected by a trained Department inspector. The inspector discovered three or four dried up zebra mussels, a prohibited invasive species, on the boat. Based upon his training, the inspector determined that the mussels were clearly dead and he easily removed them from the boat. After their removal, he authorized Ms. Gillispie to launch the boat. In essence, the inspection forestalled the launch process.

Ms. Gillispie was later cited for a violation of Minn. Stat, § 84D.10, subd. 1, which provides that it is unlawful for a person to place or attempt to place water-related equipment into Minnesota lakes that has prohibited invasive species attached. Ms. Gillispie was not cited for a violation of Minn. Stat. § 84D.05, subd. 1 (2014), which, in pertinent part, prohibits the transportation of a prohibited invasive species without a permit.

Ms. Gillispie argues that she did not violate the invasive species/infested waters statute because the zebra mussels on the boat were clearly dead, as recognized by the Department inspector, and therefore, could not pose a threat of propagation. Whether or not the prohibitions in the statute cover dead zebra mussels is an issue of importance, but it is not an issue that the Administrative Law Judge must reach in this case. Here, the Administrative Law Judge concludes that the Department failed to prove that Ms. Gillispie attempted to launch the boat with the dead zebra mussels attached.

At the hearing, the Department did not offer any evidence of particular steps taken by Ms. Gillispie to attempt to launch the boat, other than evidence that the boat had been placed on a trailer and transported to the public access boat landing at Maxwell Bay. The Department offered no testimony to establish the precise location of the boat and trailer at the boat landing or the distance of the trailer from the water.¹⁴ Before the boat was launched, it was inspected and the dead zebra mussels removed. The launch was then expressly authorized by the Department inspector. Simply put, the lawful transport of a boat to a public access boat landing, without more, does not constitute an attempt to place the boat in the water, as proscribed in Minn. Stat.

¹⁴ Exhibit 1 is a photograph of the boat at the boat landing. It appears to show the trailer in a position that would allow an attempt to launch the boat. However, the distance of the trailer from the water is unclear. Moreover, there is no evidence in the record to establish whether the photograph was taken before or after the dead zebra mussels were removed, or whether or not the trailer was moved into the position depicted in the photograph after the Department inspector had removed the mussels and authorized the launch.

§ 84D.10, subd. 1.¹⁵ Therefore, under the particular facts of this case, the Administrative Law Judge concludes that the Department has failed to establish by a preponderance of the evidence that Ms. Gillispie violated the provisions of Minn. Stat. § 84D.10, subd. 1, and recommends that the Commissioner rescind the citation.

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¹⁵ Under Minn. Stat. § 84D.13, subd. 3(a) (2014), a person who violates Minn. Stat. § 84D.10, subd. 1, is guilty of a misdemeanor crime. Being essentially penal in nature, the provisions of Minn. Stat. § 84D.10, subd. 1, must be strictly construed. See, e.g., *In re the Welfare of C.R.M., child*, 611 N.W.2d 802, 805 (Minn. 2000).