

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 Richard Matthew
O'Meara

**ORDER RECOMMENDING
DISMISSAL WITH PREJUDICE**

This matter came before Administrative Law Judge Jeanne M. Cochran pursuant to a Notice of Prehearing Conference and Notice of Hearing dated August 25, 2015.

David P. Iverson, Deputy General Counsel, Department of Natural Resources (DNR), appeared on behalf of the DNR. Charles J. Schoenwetter, Bowman and Brooke, L.L.P., appeared on behalf of Richard Matthew O'Meara.

This matter involves an appeal brought by Richard Matthew O'Meara of a citation issued by the DNR to Mr. O'Meara pursuant to Minn. Stat. § 84D.13, subd. 4(1) (2014). This statute permits DNR Conservation Officers to issue citations to persons who unlawfully transport prohibited invasive species or aquatic macrophytes.

On October 1, 2015, Mr. O'Meara filed a motion to dismiss the citation.¹ On October 29, 2015, the DNR filed its Memorandum of Law in Opposition.²

On November 10, 2015, the Administrative Law Judge issued an Order Staying the Matter until June 15, 2016.³ The matter was stayed at the request of the parties to allow the DNR to pursue legislation related to the statutory provisions at issue in this appeal.

By letter dated June 15, 2016, the DNR informed the Administrative Law Judge that the agency's legislative proposal to clarify the applicable statute was successful

¹ Richard O'Meara's Motion Seeking to Dismiss the Civil Claim Asserted Against Him by the Minnesota DNR (October 1, 2015).

² DNR's Memorandum of Law in Opposition to O'Meara's Dispositive Motion to Dismiss (October 29, 2015).

³ SECOND PREHEARING ORDER AND ORDER STAYING MATTER UNTIL JUNE 15, 2016 (November 19, 2015).

and signed into law by the Governor.⁴ As a result of this legislative action, the DNR also proposed to dismiss the citation issued to Mr. O'Meara.⁵

On July 16, 2016, counsel for Mr. O'Meara submitted a response to the DNR's letter agreeing to dismissal with prejudice and requesting additional relief.⁶ On June 24, 2016, the DNR replied to Mr. O'Meara's June 16, 2014 email and suggested that a prehearing conference be held to discuss the status of the case.⁷

A prehearing conference was held on July 25, 2016, to address the DNR's filing and Mr. O'Meara's response.⁸ At the prehearing conference, the parties agreed to dismissal of the citation with prejudice, and further agreed that the Administrative Law Judge provide a summary of the undisputed facts in the instant Order. The parties agreed these steps would resolve the matter.

On August 2, 2016, counsel for the DNR and counsel for Mr. O'Meara each provided a proposed Order for consideration by the Administrative Law Judge. On August 3, 2016, further suggestions were provided by counsel for each of the parties. The Administrative Law Judge reviewed and considered these filings.

Based upon the record and the submissions of the parties, the Administrative Law Judge makes the following:

FINDINGS OF UNDISPUTED FACTS

1. Mr. O'Meara is an employee of Nisswa Dock Co., a lake service provider (LSP) that has completed DNR training and been issued an LSP permit authorizing its employees to transport certain water-related equipment, such as boatlifts, with attached aquatic invasive species in limited situations for the purposes of cleaning such species from the equipment. Mr. O'Meara and all of the other employees of Nisswa Dock Co. who install and remove water-related equipment have completed aquatic invasive species-related training allowing them to work for Nisswa Dock Co. and transport water-related equipment for this purpose.⁹

2. Mr. O'Meara was issued Citation No. 890000699306 for transporting a boat lift on behalf of his employer, Nisswa Dock Co., on June 2, 2014, that was alleged to have a prohibited invasive species attached to it (*i.e.*, Zebra Mussels).¹⁰

⁴ Letter from David Iverson, Deputy General Counsel, DNR to Administrative Law Judge Jeanne M. Cochran (June 15, 2016).

⁵ *Id.*

⁶ Email from Charles Schoenwetter, Bowman and Brooke, to Administrative Law Judge Jeanne M. Cochran (June 16, 2016, 3:15 p.m.).

⁷ Email from David Iverson, Deputy General Counsel, DNR, to Administrative Law Judge Jeanne M. Cochran (June 24, 2016, 3:01 p.m.).

⁸ THIRD PREHEARING ORDER at 1 (June 28, 2016).

⁹ Affidavit (Aff.) of Dennis Zimmerman at ¶3 (Sept. 28, 2015), Exhibit (Ex.) 1 (attached to Richard O'Meara's Motion to Dismiss).

¹⁰ Zimmerman Aff. at ¶ 5; O'Meara Aff. at ¶ 4 (Sept. 28, 2015); Schoenwetter Aff. (Oct. 1, 2015), Ex. 1 (Citation) (attached to Richard O'Meara's Motion to Dismiss).

3. On June 2, 2016, Miranda Hanson (an intern Water Craft Inspector), Jon Parker (an Aquatic Invasive Species Inspector), and Randy Posner (a DNR Conservation Officer) conducted a thorough inspection of the boat lift transported by Mr. O'Meara.¹¹ These individuals identified "dead" Zebra Mussels attached to the boatlift. None of these individuals found any living Zebra Mussels - or any other living aquatic invasive species - on the boat lift transported by Mr. O'Meara. Mr. O'Meara was sent back to Nisswa Dock Co. two times for additional decontamination, but dead Zebra Mussels remained on the boatlift on the DNR's third inspection.¹² For purposes of this appeal, the parties have stipulated that all of the Zebra Mussels found on the boat lift in question were dead.¹³

4. The boat lift had been out of the water since November 2013. The boat lift remained out of the water all winter, as recommended by the DNR for the killing of Zebra Mussels.¹⁴ The DNR Lake Service Provider Training Manual for the Preventing the Spread of Aquatic Invasive Species states that boat lifts such as the one at issue are "extremely difficult, if not impossible, to fully decontaminate" in order to eliminate Zebra Mussels. Therefore, it explains that "overwinter" drying is advocated by the DNR as the "best practice" and "only option for ensuring aquatic invasive species that could not be removed are not alive."¹⁵

5. Mr. O'Meara and Mr. Zimmerman both submitted sworn affidavits explaining that prior to transporting the boat lift in question, the boat lift had been subjected to a decontamination process that included, for example, a decontamination station at Nisswa Dock Co. and employees using heated water, at a minimum of 140 °F (190 °F was used), with a pressure washing system exerting at least 2,400 psi (2,500 psi was used), to remove or kill any Zebra Mussels.¹⁶

6. Nisswa Dock Co. and Mr. O'Meara have both filed sworn affidavits assuring the Administrative Law Judge that they take seriously the risk invasive species pose to Minnesota lakes and rivers and make efforts to work with the DNR and the public to prevent the proliferation of such species.¹⁷

7. Mr. O'Meara asserted in this appeal that the statutes applicable at the time of the citation was issued did not apply to dead Zebra Mussels and, therefore,

¹¹ Schoenwetter Aff., Ex. 7 (Initial Complaint Report and Supplemental Report, prepared by Officer Posner).

¹² See generally *id.*

¹³ DNR's Memorandum of Law in Opposition to O'Meara's Dispositive Motion to Dismiss at 2 (October 29, 2015).

¹⁴ Zimmerman Aff. at ¶ 8.

¹⁵ Schoenwetter Aff. at ¶ 8, Ex. 8 (DNR Manual at 34).

¹⁶ Zimmerman Aff. at ¶ 9; O'Meara Aff. at ¶ 6.

¹⁷ O'Meara Aff. at ¶ 11; Zimmerman Aff. at ¶ 2.

the citation should be dismissed.¹⁸ The DNR asserted that the statutes applied to all invasive species, living or dead.¹⁹

8. The 2016 legislative changes to the applicable statutes clarified that the prohibition on transporting invasive species applies whether they are living or dead.²⁰

Based upon the foregoing Findings of Undisputed Facts and with the agreement of the parties, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that Invasive Species Civil Citation No. 890000699306 issued to Richard Matthew O'Meara be **DISMISSED WITH PREJUDICE** by the Commissioner of the DNR.

Dated: August 25, 2016.



JEANNE M. COCHRAN
Administrative Law Judge

¹⁸ Richard O'Meara's Memorandum of Law in Support of His Dispositive Motion to Dismiss at 12-24.

¹⁹ DNR's Memorandum of Law in Opposition to O'Meara's Dispositive Motion to Dismiss at 5-9.

²⁰ 2016 Minn. Laws. Ch. 189, Art. 3, §§ 14-15.