

November 30, 1998

Colonel Leo W. Haseman, Director
Division of Enforcement
Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155

RE: In the Matter of the Harmful Exotic Species Civil Citation Issued to John William Deverell, Citation No. 15032; OAH Docket No. 6-2000-11929-2

Dear Colonel Haseman:

On November 24, 1998, I conducted a telephonic hearing involving Lieutenant Kathy Hamm and Mr. John Deverell. In addition to her own testimony, Lieutenant Hamm presented testimony from Gary Montz of the Ecological Services Section. Mr. Deverell testified on his own behalf. The hearing lasted for one hour, and continued until both sides had presented everything they wanted to say.

Mr. Deverell owns a large (36-foot-long, with 13-foot beam, weighing 25,000 pounds) boat which he docks at the Windmill Marina. This marina is located on the St. Croix River near Afton. Mr. Deverell has been boating out of Stillwater or Afton since 1973. While he spends most of his time on the St. Croix River, he does take his boat down the St. Croix and into the Mississippi River roughly five or six times per year. He might go to Red Wing, Lake City or LaCrosse, and then return to his slip in Afton.

During the summer of 1996, divers monitoring boats at the Windmill Marine found zebra mussels attached to Deverell's boat. The Department told Deverell to have his boat taken out of the water and heat washed in order to kill the mussels. Deverell complied, and the boat was re-launched. Again in 1997, divers found zebra mussels on Deverell's boat in the Windmill Marina. Again, the boat was pulled and cleaned, and then re-launched. Finally, on June 5, 1998, divers again found zebra mussels on Deverell's boat in the marina. Again, Deverell was directed to have the boat pulled and cleaned, which he did. However, on this occasion, the Department issued a \$500 citation to Deverell. Deverell has appealed the citation, and thus the hearing was held.

Minn. Stat. § 84D.10 (1998) provides, in part, that: "A person may not place or attempt to place into waters of the state a watercraft . . . that has . . . zebra mussels . . . attached." Minn. Stat. § 84D.13, subd. 5 (1998) provides that a civil citation may be issued "for placing or attempting to place into waters of the state a watercraft . . . that has prohibited exotic species attached when the waters are not designated by the Commissioner as being infested with that species, [with a fine of] \$500 for the first offense, and \$1,000 for each subsequent offense."

During the hearing, Department personnel acknowledged that thousands, if not tens of thousands of boat trips occur from the Mississippi into the St. Croix each year. They further acknowledge that it would be a practical impossibility to have boats heat cleaned each time they entered the St. Croix from the Mississippi. Instead, the Department believes that the most serious threat of infestation resulting from pleasure boats comes from boats which are “bubbled” or otherwise allowed to remain in the water throughout the winter. The reason for this is that mussel larvae which attach themselves to a boat during the summer will normally die after a boat is taken out of the water for the winter. But larvae attached to a bubbled boat will survive the winter, and will grow to reproductive age by the following spring.

The vast majority of boats on the St. Croix are pulled out of the water each fall, and spend the winter on land. Any mussels adhering to them die over the winter. But there are roughly 200 boats which are left in the water. Aeration devices “bubble” the water, preventing it from freezing. Despite the cold temperature of the water, mussels do survive over the winter, and thus are a reproductive threat in the spring.

The Department has gradually, over the years, developed an unwritten rule which provides that if a boat is to be left in the water over the winter, it should be heat washed in the fall in order to remove any mussels. Boats which have been heat washed in the fall have never been found to have mussels on them in the spring. The Department takes the position that if a bubbled boat owner does have his boat heat washed in the fall, the Department will not issue him a citation even if mussels are discovered the following spring.

Following the 1997 inspection dives, Gary Montz wrote a memo to the St. Croix Zebra Mussel Task Force, indicating that four boats in the Windmill Marina were found to have zebra mussels (including Deverell’s). The memo states, in pertinent part, as follows:

The last boats found in the June dives with attached zebra mussels were pulled and cleaned today. In discussions with Joe Riley (the manager of Windmill Marina), it appears that these boats were bubbled in for winter. Most had few mussels attached. The mussels were of the size that I suspect were from last year’s late veligers, and overwintered. . . . As we did not get the notice out to the marinas in time for the overwintered boats to be pulled and cleaned last fall, I’m not too surprised at these findings. Joe has said they are getting new equipment and will be working this year to get the overwintered pulled and cleaned in the fall.

The record does not indicate why Deverell’s boat was not pulled and cleaned in the fall of 1997, but Deverell testified, in response to a direct question, that no one told him that the boat should be pulled and washed that fall. Deverell testified that only recently, in 1998, did Riley tell him that the boat should be pulled and cleaned this fall [the fall of 1998], and so Deverell did it. That was the second time it had been cleaned in 1998. It had also been cleaned in June following the issuance of the citation.

Technically, Deverell did violate the law by allowing his boat to remain in the water with zebra mussels attached. But the Department acknowledges that there are thousands, if not tens of thousands, of trips made from the Mississippi to the St. Croix. The Department further acknowledges that it is impossible to pull and clean boats after each of these trips. Over the years, the Department has formulated the policy that boats which are left in the river all year round (such as Deverell's, and approximately 200 others on the St. Croix), should be pulled and washed in the fall. Deverell argues that he has washed his boat every time the Department has asked him to, and that he was never told that it should be pulled and washed in the fall until this year. After being told that the Department wanted all bubbled boats to be pulled and washed in the fall, Deverell had it done. He is, therefore, now in compliance with the Department's stated policy.

The Administrative Law Judge believes that Deverell would have complied with that policy in past years if he had been told of it. The Department has relied upon marina operators, such as Joe Riley at Windmill, to notify owners of the Department's wishes. But by choosing that route, the Department relies on Riley to notify the owners. Deverell testified, and the Administrative Law Judge accepts his testimony, that Riley did not notify Deverell in the fall of 1997, and that Riley did notify Deverell until the fall of 1998.

Given all the circumstances above, the Administrative Law Judge respectfully recommends that the citation be dismissed. It appears that Deverell is one of a limited number of people who create a particular hazard by keeping their boats in the water all year long. The Department has come around to the position that those boat owners must pull and clean their boats each fall. Deverell complied with the Department's policy once he learned of it, and there is no reason to believe he will not comply with it in the future. In such a situation, a fine is inappropriate.

Sincerely,

ALLAN W. KLEIN
Administrative Law Judge

Telephone: 612/341-7609

AWK:lr

cc: John William Deverell
Lt. Kathy Hamm