

Regulatory Language

Section 672, Title 14, CCR is to be added as follows:

§672. Possession, Importation, and Transportation of Dreissenid Mussels

(a) Definitions.

For the purposes of sections 672, 672.1 and 672.2 of these regulations, the following definitions apply:

(1) "Control" is any activity intended to eradicate or prevent the movement of adult or veliger dreissenid mussels from a waterbody by any means.

(2) "Control Plan" is a written document that describes the actions to be implemented to control dreissenid mussels.

(3) "Conveyance" is any item that may contain or carry adult or veliger dreissenid mussels including, but not limited to, vehicles, watercraft, containers, and trailers. Conveyance does not include water supply systems, facilities and infrastructure.

(4) "Detected" means:

A) There has been an observed presence of one or more adult dreissenid mussels, or;

B) There has been an observed presence of one or more veliger dreissenid mussels that has been verified by the best available laboratory methodologies.

(5) "Dreissenid mussel" is collectively all species in the taxonomic family Dreissenidae, including quagga mussels (*Dreissena rostriformis bugensis*) and zebra mussels (*Dreissena polymorpha*).

(6) "Introduction" means the intentional or unintentional placement of adult or veliger dreissenid mussels into a reservoir.

(7) "Prevention Program" is a written document that describes the actions to be implemented at a reservoir to keep dreissenid mussels from being introduced and keep them from being moved from the reservoir should they be present.

(8) "Quarantine" means to restrict the movement and/or use of a conveyance.

(9) "Veliger" is the microscopic larva of dreissenid mussels.

(10) "Waterbody" is any water of the state that includes, but is not limited to lakes, rivers, streams, canals, ponds, flooded areas, reservoirs, sloughs, and springs.

(11) "Water Supply System" is any natural or man-made means for distributing or holding water, operated by a public or private agency.

(b) General Permit Provisions.

(1) Any person, scientific or educational institution, federal, state, or local agency, private or public district or authority may apply for a Dreissenid Mussel Permit, which, according to its terms, may authorize that entity to possess, import, ship or transport dead dreissenid mussels.

(2) Permits to possess dead dreissenid mussels will be issued only for the purpose(s) of outreach, education, species verification, training, or other purposes deemed by the department to be in the best interest of the State.

(3) This permit does not authorize the collection of live or dead dreissenid mussels.

(4) A permit issued pursuant to this section does not supersede any federal, state, or local law regulating or prohibiting possession or transportation of dreissenid mussels.

(5) The department may enter any holding facility, vehicle, vessel, or other place where dreissenid mussels are permitted to be kept or may be kept to inspect mussels, facilities or equipment.

(c) Permit Application.

An applicant for a new permit, renewal of an existing permit, or amendment to an existing permit, must submit a completed application on Dreissenid Mussel Permit Application, DFW 1014 (NEW 04/10/15), incorporated by reference herein. Application forms are available on the department's website.

(1) Review and Approval. After receiving a complete application, the department shall review the application within 30 business days. If approved, the department shall notify the applicant via an approval letter and signed permit. The permit shall be presented upon request by any individual in possession of dreissenid mussels, to any department employee or person with delegated authority under Fish and Game Code section 2301.

(2) Denial. The department may deny the issuance, renewal or amendment of a permit if any of the following occurs:

(A) The department determines that the application or other documents submitted do not support the applicant's stated purpose or use for the dreissenid mussels.

(B) The department determines that the possession, importation, shipment or transportation of dead dreissenid mussels as proposed is not in the best interest of the State.

(C) The permittee has failed to comply with terms and conditions of a permit or any provision of the Fish and Game Code or regulations adopted pursuant thereto.

(d) Revocation. The department may revoke at any time any permit issued pursuant to these regulations for failure to comply with the terms and conditions of the permit or failure to comply with any provision of the Fish and Game Code or regulations adopted pursuant thereto. In the event of a permit revocation, the permittee shall immediately surrender any dreissenid mussels in its possession to the department.

(e) Request for reconsideration. Any applicant or permittee who is denied a permit or renewal or amendment to an existing permit, or whose permit is revoked by the department pursuant to these regulations, may request reconsideration of that denial or revocation by filing a written request with the Invasive Species Program, 1416 Ninth Street, Sacramento, California 95814, postmarked no later than 30 business days after the date of the notification letter from the department. The letter shall set forth the reason(s) for the reconsideration, including any new information or facts pertinent to the issue(s) raised by the request for reconsideration. The department shall notify the applicant or permittee, in writing, of its decision within 45 business days of its receipt of the request for reconsideration.

NOTE: Authority: Fish and Game Code Sections 702 and 2301. Reference: Fish and Game Code Section 2301.

Section 672.1, Title 14, CCR is to be added as follows:

§672.1. Dreissenid Mussel Control and Prevention.

(a) Control Plan.

If a public or private agency that operates a water supply system detects dreissenid mussels, the agency shall immediately begin developing a dreissenid mussel control plan and implement measures to prevent further spread.

(1) A control plan shall be submitted to the department either:

(A) Within 60 business days of the date the department requests a control plan from the operator of a water supply system that has previously reported dreissenid mussel detections; or,

(B) Within 60 business days of dreissenid mussels being detected; or,

(C) Within 60 business days of changes to the approved control plan.

(2) Control plans shall be revised within 60 business days of receipt of comments from the department.

(3) Control plans that have been approved prior to the effective date of these regulations are not required to be resubmitted for review by the department. The authorization contained in such control plans is deemed to be in effect as of the date it was approved.

(4) The department shall maintain a list of waterbodies where dreissenid mussels have been detected.

(5) Control plans shall consist of a written document describing the status of the dreissenid mussel population at the time the plan is developed, control activities, and monitoring to determine changes in the population. A control plan may also include a description of maintenance activities to maintain functionality of the water supply facility.

(6) Monitoring activities associated with an approved control plan per Fish and Game Code section 2301 do not require a separate permit for collection, transport to laboratories, or analysis, unless activities are associated with scientific research.

(7) Plan implementation shall be demonstrated through submission of annual reports (January 1 – December 31) to the department by March 31 of each year, that summarize changes in dreissenid mussel populations, control activities implemented, and monitoring results.

(8) Any public or private agency that violates this section by failing to submit a control plan, revision, or annual report is subject to a maximum penalty of \$1,000 that shall be imposed administratively by the department. The administrative penalty and appeal process are described in section 672.2.

(b) Prevention Program.

It is unlawful for any person, or federal, state, or local agency, district or authority that owns or manages a reservoir, as defined in section 6004.5 of the Water Code, where recreational, boating, or fishing activities are permitted, to operate without developing and implementing a dreissenid mussel prevention program that meets the requirements of this subsection.

(1) Dreissenid mussel prevention programs shall include, at a minimum, a report summarizing the following:

(A) An assessment of the vulnerability of the reservoir for the introduction of both adult and veliger dreissenid mussels.

(B) A monitoring program to detect the presence of adult and/or veliger dreissenid mussels.

(C) Management of recreational activities to prevent the introduction of mussels and to keep them from being moved from the waterbody if present, that includes public education and outreach.

(2) Possession of dreissenid mussels as a result of early detection monitoring is not a violation of Fish and Game Code section 2301, subdivision (a) provided that monitoring is conducted under a prevention program being implemented consistent with Fish and Game Code section 2302.

(3) A written document describing the prevention program shall be submitted to the department within 90 business days of the date the department requests documentation of the prevention program.

(4) Prevention programs shall be revised within 60 business days of receipt of comments from the department.

(5) Program implementation shall be demonstrated through submission of an annual report (January 1 – December 31) to the department by March 31 of each year that summarizes any changes in the reservoir's vulnerability, monitoring results, and management activities.

(6) Any person, or federal, state, or local agency, district or authority that violates this section by failing to submit a prevention program, revision, annual report, or fails to report a new discovery of dreissenid mussels as required by Fish and Game Code section 2301, subdivision (e) is subject to a maximum penalty of \$1,000 that shall be imposed administratively by the department. The administrative penalty and appeal process are described in section 672.2.

(c) Inspection of Conveyances.

It is unlawful for any person to fail to fully comply with any verbal or written order, or to resist, obstruct, delay or interfere with any department employee or any other state agency representative who has been delegated the authority to enforce Fish and Game Code section 2301. Full compliance with an order shall include, but is not limited to, the order being followed in the manner, time frame, and to the degree directed by an agency representative authorized to implement Fish and Game Code section 2301.

(1) Any department employee or any other state agency representative, to whom the department has delegated the authority to implement Fish and Game Code section 2301, may impound or quarantine any conveyance known or suspected to contain dreissenid mussels for the period of time necessary to ensure the removal or death of any such mussels. Impounded or quarantined conveyances shall be stored at a location determined by the enforcing authority, and all costs associated with the impounding or quarantine are the responsibility of the owner of the conveyance or the person in possession of the conveyance. The department is not responsible for any costs that are in any way, whether directly or indirectly, related to or resulting from quarantine or storage.

(2) State agencies delegated authority to implement Fish and Game Code section 2301 are not obligated to impound or quarantine conveyances.

(3) Tags, stickers or other methods used to identify a conveyance as quarantined shall not be tampered with or destroyed prior to the conveyance being released from quarantine by the department.

(4) When a conveyance is quarantined by the department, the owner or person in possession of the conveyance will receive a copy of Quarantine Notice, DFW 1015

(NEW 09/25/14), incorporated by reference herein. If the owner is not present at time of the department-issued quarantine, the department shall provide a copy of the Quarantine Notice electronically or by mail to the owner. The conveyance will remain under quarantine until the department has re-inspected the conveyance, determined it has been properly treated to remove or kill all dreissenid mussels, and/or has released it from quarantine. The owner of the conveyance is responsible for contacting the department for re-inspection of the conveyance.

(5) In addition to any other penalty provided by law, any person who violates this section, section 2301 of the Fish and Game Code, or any verbal or written order issued pursuant to these sections, or who resists, delays, obstructs, or interferes with the implementation of these sections, is subject to a penalty of not less than one hundred dollars (\$100) and not more than one thousand dollars (\$1,000), that shall be imposed administratively by the department. Any such person shall be issued an Administrative Penalty Citation Form DFW 1016 (NEW 04/10/15), incorporated by reference herein. The owner of any conveyance involved in the violation or quarantine may be held responsible for the violation, impoundment, or quarantine. In determining the amount of the penalty, the department may consider the willfulness of the action or failure to act, the nature and gravity of the action or failure to act, including the potential impacts on public safety, recreation, or natural resources of the state, the history of past acts or failures to act, and any other relevant factors as justice may require. The administrative penalty and appeal process is described in section 672.2 of these regulations.

NOTE: Authority: Fish and Game Code sections 702, 2301 and 2302. Reference: Fish and Game Code section 2301 and 2302.

Section 672.2, Title 14, CCR is to be added as follows:

§672.2. Dreissenid Mussel Penalty and Appeal Procedures.

(a) Penalties.

This section applies to violations of section 672.1 of these regulations.

(1) The department will send a written notification of penalty assessment to persons against whom an administrative penalty has been imposed. The penalty amount shall be based on a review of all relevant circumstances. The department may provide notification together with its notice that a person or entity has violated section 672.1, or may provide the notification of penalty assessment by writing within 30 business days after a person has been issued a citation pursuant to subsection 672.1(c)(5). The department may provide written notification by mail or email. The notification will at a minimum include a brief description of the reason the administrative penalty has been imposed, the amount of the administrative penalty, and the time and method for providing payment. The notification shall also include a statement of a person's right to appeal an administrative penalty and directions explaining how to initiate an appeal.

(2) Requests for an appeal must be postmarked no later than 30 calendar days after issuance of the notification of penalty assessment and shall include an advance deposit of the full amount of the administrative penalty. Any administrative penalty that has been deposited shall be refunded if it is determined, after an appeal hearing, that the penalty

is reduced or excused. No request for an appeal to an administrative penalty shall be considered unless both a request for an appeal hearing and a deposit in the full amount of the penalty is received in a timely manner by the department.

(3) Anyone who is issued a citation or notice of violation pursuant to section 672.1, but does not receive a notification of penalty assessment shall contact the department within 30 calendar days of being issued a citation or notice of violation and provide the department with a current address to send the notification of penalty assessment. The department is to be reached by calling (866) 440-9530 or sending an email to invasives@wildlife.ca.gov.

(4) The department shall deposit administrative penalties into the Fish and Game Preservation Fund.

(5) In the event a person fails to pay the administrative penalty when due, the department may take any actions permitted by law to collect the unpaid penalty, which shall accrue interest at a rate of ten percent per year, commencing 30 calendar days after the administrative penalty becomes due and continuing until paid. In the event a civil action is commenced to collect the administrative penalty, the department shall be entitled to recover all costs associated with the enforcement, investigation, establishment and collection of the penalty. Costs include, but are not limited to, staff time and costs incurred in the investigation, establishment and the collection or processing of the penalty. The penalty and any late payment charges and costs shall be deposited into the Fish and Game Preservation Fund.

(b) Appeal Procedure.

This subsection shall govern appeals when a person requests an appeal of the imposition of administrative penalties.

(1) A person wishing to appeal a decision of the department shall file a written request for an appeal with the department's Office of the General Counsel and the request shall be postmarked no later than 30 calendar days after the department's issuance of the notification of penalty assessment. The time limit for filing a request for an appeal shall be deemed jurisdictional and may not be waived. A request for an appeal shall specifically set forth the decision being appealed and the legal and factual grounds for the appeal. The request for an appeal may include a request for an oral hearing. The request for an appeal and any subsequent written submittals shall be signed by the appellant under penalty of perjury.

(2) Administrative penalties imposed by the department shall be presumed to be correct, and the appellant shall have the burden of proof.

(3) Appeals shall be considered by an unbiased hearing officer designated by the director, who has not served as an investigator, prosecutor or advocate regarding the department decision. The hearing officer shall control the nature and order of the proceedings. Appeals may be informal and may, at the hearing officer's discretion, be based on written submittals only.

(4) The hearing officer shall notify the appellant if the appeal will be limited to written submittals and shall notify the appellant of the date by which the appellant must provide any additional submittals or documentary evidence to the department. No later than 30 business days after receipt of the appellant's additional submittals or evidence, the department may submit a response to the hearing officer, with a copy sent to the appellant, along with any supporting documentary evidence and/or declarations under

penalty of perjury. No later than 15 business days after receipt of the department's response, the appellant may submit a reply to the hearing officer, with a copy sent to the department that addresses arguments and evidence raised in the department's response. The appellant's reply shall not contain any new evidence or new factual or legal grounds for challenging the department's action.

(5) The hearing officer shall only consider evidence that is relevant to whether the action or failure to act identified in the notification of penalty assessment in fact occurred and whether the recipient of the administrative penalty has caused or allowed the action or failure to act to occur.

(6) If determined necessary by the hearing officer, oral hearings shall be held at such times and locations as determined by the hearing officer. The hearing officer may engage in ex parte communications with the parties for the purpose of settling a time and place of hearing. The parties shall be notified of the time and place set for hearing at least 10 calendar days prior to the date of the hearing. The hearing officer may continue the hearing as he deems necessary.

(7) The failure of an appellant who has requested an oral hearing to appear at the hearing, after receiving notice of the hearing, shall constitute abandonment of the appeal unless the appellant has submitted a written request for a continuance at least two days prior to the oral hearing.

(8) Any appeal conducted pursuant to this section need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. However, the hearing officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will cause undue consumption of time. The hearing officer may examine any party or witness.

(9) Within 45 calendar days of the conclusion of any oral hearing, or the day by which the department receives all written submittals if the appeal is based on written submittals only, the hearing officer shall provide the parties with a written decision containing the hearing officer's findings of fact and conclusions. The decision of the hearing officer shall be the final administrative decision of the department.

NOTE: Authority: Fish and Game Code sections 702, 2301 and 2302. Reference: Fish and Game Code sections 2301 and 2302.