

Updated Informative Digest (Policy Statement Overview)

Please refer to the original Final Statement of Reason's (FSOR) Updated Informative Digest, dated April 19, 2010, for the original policy statement overview.

On June 7, 2010, the Office of Administrative Law (OAL) disapproved the regulatory action, OAL File No. 2010-0423-04 S, to establish new restricted species permits and requirements. This amended Final Statement of Reasons was developed to address OAL's reasons for disapproval. An overview of OAL's reasons for disapproval and the Commission's regulatory revision to address them are shown below:

On November 8, 2010, the Commission withdrew their submission of OAL File No. 2010-0423-04 S for additional revisions in the following discussion shown in bold text and double strikeout and double underline in the regulations language.

1) FAILURE TO MEET CLARITY STANDARDS

A) Permits for Aquatic Restricted Species: A retail seller of aquatic restricted species at a terminal market may not be a registered aquaculturist or in the wholesale or importation business of selling fish or aquaculture product. It is not easy to understand from the proposed regulations which type of permit that a retail seller of aquatic restricted species at a terminal market will need to obtain.

Proposed solution: The proposed Wholesale/Importation restricted species permit in subsection 671.1(b)(12) was renamed to Fish and retail sales was added as one of the permitted activities for this permit to clarify this issue. Subsequent changes were made in the section 671.1 and 671.7 to align the proposed regulations with the new permit name.

B) Permit Application Requirements in subsection 671.1(c)(2)(A) through (N): Subsection 671.1(c)(2) sets forth a list of fourteen permit "application" requirements, lettered (A) through (N). In general, these permit requirements cover all types of restricted species permits. The regulations regarding the applicability of each of the particular application requirements need to be clear and fully set forth in the regulation text and cannot be subject to determination outside the scope of the regulations.

Proposed solution: Regulatory changes are being proposed to section 671.1 to clarify:

- a) when the additional application requirements in 671.1(c)(2) apply,
- b) when an applicant must comply with the requirements specified in subsection 671.1(c)(2)(A) through (N) and when they are exempted, and
- c) that only persons who are not a university, college or governmental research agency must submit specified items for the department to review and determine if they should be considered a bone fide scientific research institute or not and thereby meeting the requirements for a research permit.
- d) **Non-substantial changes and additions were made to improve alignment between the application forms and regulatory language.**

C) Form and Renewal Requirements: Proposed regulation subsections (a)(1)(B) through (a)(1)(I) of Section 703 list and incorporate by reference seven forms which are utilized in connection with restricted species permit applications. There is no specificity or explanation in either Section 703 or Section 671.1 regarding the circumstances under which particular forms apply.

Proposed solution: Regulatory changes are being proposed to sections 671.1 and 703 to clarify which form in Section 703 is needed for the appropriate subsection 671.1(b) permit. These changes will improve the clarity of the regulations and help reduce public confusion as to which fee, application and form to submit.

D) Veterinarian Inspections and Certifications: In general, the proposed regulations provide that an applicant for a restricted species permit must submit a veterinarian's documentation for a native species exhibiting permit regarding inspections of the restricted species animals and/or the restricted species animal housing or, alternatively, submit an inspection fee for an inspection of the restricted species animals and/or the restricted species animal housing. However, as

discussed below, the specific veterinarian inspection and certification provisions in proposed regulation section 671.1 and in several of the permit application forms are not fully in agreement and are confusing when read together, and there is a lack of clarity regarding the exact requirements for veterinarian inspections and certifications.

Proposed solution: Regulatory changes are being proposed to section 671.1 to clarify:

- a) that the veterinarian certification must be written, from a permitted California Wildlife Rehabilitation facility licensed veterinarian, but that this facility's veterinarian is not required to also be USDA accredited,
- b) the differences in inspections and fees for animals to be acquired and when animals are present, and
- c) which sections listed are for determining compliance with animal care and housing requirements are applicable due to differences in permit types, species and activities.
- d) **Non-substantial changes and additions were made to improve alignment between the application forms and regulatory language.**

E) Permits for Businesses: In general, the proposed regulations provide that an applicant or the applicant's full time employee can meet the permit application experience qualifications. The existing subsections 671.1(a)(6) and 671.1(c)(1) has a conflicting language structure that needs to be clarified.

Proposed solution: Regulatory changes are being proposed to subsections 671.1(a)(6) and 671.1(c)(1) to clarify the procedures for an applicant's full time employee to meet the subsection 671.1(c) qualifications.

F) Unique Identification Effective Date: The effective date for the Unique Identification in subsection 671.1(c)(2)(K) is proposed to be December 31, 2011 to allow for additional time to meet the requirement.

2) FAILURE TO MEET NECESSITY STANDARDS

A) Inspections Fees: The rulemaking record is incomplete as to how the Commission, utilizing the information in the rulemaking record, concluded that the "fee for two initial inspections" should be set at \$3,000 for all permits. The Commission also needs to provide additional information to support the \$100 hourly fee for inspections longer than 2 hours.

Proposed solution: The original intent of the \$3,000.00 initial inspection fee was to cover fish pathology staff costs for the new Aquaculture and Fish permits as shown in Table 1. The other 10 restricted species permits do not require an inspection by fish pathology staff headquartered in Sacramento and this regulatory package clarifies this fee for two inspections. The other ten restricted species permit fees will remain the same (with adjustments pursuant to Section 699, Title 14, CCR). Fish pathology staff work out of the Sacramento area and they must drive throughout California to all inspections to transport their equipment.

Table 1. Estimated Inspection Costs for Restricted Species Permits		
<i>800 mile round trip from Sacramento to Southern CA</i>		
Inspection time ¹	2 hrs.	\$91.91
Vehicle costs ²	800 miles	\$400.00
Lodging and meals	1 day	\$140.00
Travel time ³	13.3 hrs.	\$612.73
Staff time and vehicle costs total		\$1244.
Dept. overhead (20.43%)		\$254.28

Total Cost		\$1498.92
Estimated cost for 800 mile roundtrip = \$1500		
Hourly Inspection Fee		
Inspection time ¹	1 hrs.	\$45.95
Staff time total		\$45.95
Dept. overhead (20.43%)		\$9.39
Total Cost		\$55.34
Estimated cost for an extra hour of inspection time = \$55		
Footnotes		
1) Salary estimates derived from 50/50 split of Associate and Senior Fish Pathologist positions.		
2) Vehicle costs based 50 cents per mile for private vehicles.		
3) Travel time based upon 60 mph.		

Ninety-five percent of live tilapia production in California is in Southern California. The Department expects some of these Southern California facilities to convert their tilapia production into barramundi production. The Northern California facilities are expected to stay primarily focused on production of game fish such as trout, bass, bluegill, and catfish. In addition, sea food importers are interested in selling barramundi to the Asian live fish market which is significantly larger in Southern California. With most of interest for the new aquaculture and fish restricted species permits coming from Southern California producers and businesses along with one producer from Massachusetts, Department of Fish and Game anticipates that most of the applications will come from Southern California. Consequently the department anticipates inspection trips of approximately 800 miles will be required in most instances.

The \$3,000 was chosen as the year 2011 permit fee to cover costs of this new permit program. The \$100 hourly inspection fee for inspections longer than two hours is proposed to be reduced to a \$55.00 hourly fee for inspections as shown in Table 1 due to an error in the original calculation that mistakenly included travel time.

B) Nonresident Nuisance Bird Abatement Fee: In this restricted species rulemaking, the Commission establishes a new type of permit for "Nuisance Bird Abatement" which can be issued to either resident or nonresident persons. Subsection 703(a)(1)(A)14. would establish the "nonresident nuisance bird abatement" permit fee" at an amount of \$851.75. The original chart in the rulemaking record which calculates all of the fees with adjustments pursuant to Section 699 shows a 2010 fee of \$426.00 for "Restricted Species Permit Nonresident Nuisance Bird." Thus, the chart does not support the \$851.75 fee amount. This discrepancy needs to be remedied in order to provide adequate support in the rulemaking file for the Nonresident Nuisance Bird Abatement permit fee.

Proposed solution: The original fee schedule chart showed the wrong fee for the Nonresident Nuisance Bird Abatement. A new fee schedule has been provided to show the correct 2010 fee to align it with other nonresident restricted species permit fees.

C) Except for the \$3,000 and \$55 fees discussed above, the 2010 permit and inspection fees were updated based upon the 2011 cost of living adjustment derived from the Federal Implicit Price Deflator (in accordance with Section 699, Title 14, CCR) and a new fee structure chart is provided.

3) FAILURE TO MEET AUTHORITY AND REFERENCE STANDARDS

In connection with the restricted species rulemaking, OAL has reviewed the Commission's authority and

reference citations and has determined that the following revisions need to be made:

A) Section 671.1: First, add as both an authority and a reference citation Fish and Game Code section 2157. Second, add as additional reference citations Fish and Game Code sections 2120, 2150.2, 2151, and 2193, each of which is being implemented, interpreted or made specific by one or more provisions of regulation section 671.1.

Proposed Solution: The authority and reference changes were made as requested in this amended Final Statement of Reasons. **Incorrect authority and reference changes were found and fixed.**

B) Section 671.7: Omit as a reference citation Fish and Game Code section 2188, since that statute has been repealed.

Proposed Solution: The authority and reference changes were made as requested in this amended Final Statement of Reasons. **Incorrect authority and reference changes were found and fixed.**

C) Section 703: First, add as both an authority and a reference citation Fish and Game Code section 2157, which is both authority and reference for the "unique identification" provisions which appear on some of the section 703 forms. Second, delete from the authority and reference citations Fish and Game Code sections 200, 202,205,206 and 220, as the article of the Fish and Game Code commencing with section 200 does not apply to these particular regulations. Third, add as additional reference citations Fish and Game Code sections 2120, 2125, 2150, 2150.2, 2151, 2193,12000 and 12002, as each of these statutes is being implemented, interpreted or made specific in regulation section 703 or in the forms incorporated by reference in section 703. Fourth, Fish and Game Code section 1055 (pertaining to license agents) may not be an appropriate reference citation for this regulation and should be re-evaluated.

Proposed Solution: The authority and reference changes were made as requested in this amended Final Statement of Reasons. **Incorrect authority and reference changes were found and fixed.**

4) ADDITIONAL ISSUES

A) OAL determined a limited number of the public comments did not receive adequate summaries and responses.

Proposed Solution: The Public Comments and Department Recommendations for New Restricted Species Permits and Requirements document were updated as requested.

B) The supporting documents listed in the Initial Statement of Reasons were not attached to the rulemaking package.

Proposed Solution: Electronic copies of the twelve documents listed in the Initial Statement of Reasons were provided.

C) Substantial revisions to sections 671.1 (c)(4) and 671.1 (c)(6), provisions pertaining to "denial" and "appeal," which did not appear in the January 29, 2010 noticed regulation text or in the March 8, 2010 regulation text.

Proposed Solution: The revisions in question were highlighted in the revised regulation text noticed in August 2010.

D) Final Regulation Text Underline and Strikeout:

Proposed Solution: Underline and strikeout problems in the final regulation text are being corrected.

E) Additional minor changes were also made to correct typographical errors, align incorrect form names, solve incorporation by reference concerns, and improve the clarity of the regulations and help reduce public confusion.

F) Non-substantial changes and additions were made to correct typographical errors, fix formatting issues, and improve the clarity and help reduce public confusion of the text of the regulations and forms.