

PREVENTING THE SPREAD OF AQUATIC INVASIVE SPECIES BY RECREATIONAL BOATS:

**MODEL LEGISLATIVE PROVISIONS & GUIDANCE TO PROMOTE RECIPROCITY
AMONG STATE WATERCRAFT INSPECTION AND DECONTAMINATION PROGRAMS**



Preventing the Spread of Aquatic Invasive Species by Recreational Boats: Model Legislative Provisions & Guidance to Promote Reciprocity among State Watercraft Inspection and Decontamination Programs

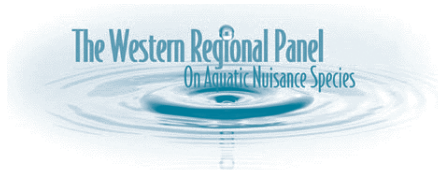
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EXECUTIVE SUMMARY

Recreational boating is incredibly popular in the United States. According to the U.S. Coast Guard's Recreational Boating Statistics, over 12.4 million recreational vessels were registered in the states in 2010. Many of these vessels are small enough to be towed overland on trailers, allowing boaters to enjoy the wonderful fishing, water sport, and scenic opportunities available at waters around the country.

Unfortunately, more is moving than just boats. Mud and plants can cling to the exterior of boats and boat trailers. Water can remain in ballast tanks, live wells, and other compartments. If proper precautions are not taken, boaters may inadvertently transport species to new environments where they can cause economic, environmental, and human harm by disrupting existing ecosystems. In extreme cases, these new arrivals – referred to as “aquatic invasive species” – can reduce fish populations, alter water quality, and damage public infrastructure.

In recent years, states around the country have taken action to reduce the risk that aquatic invasive species, such as quagga mussels and Eurasian water milfoil, are spread through the movement of trailered boats. States have funded extensive public education and outreach campaigns to raise awareness of the threat and promote best management practices. Some have enacted laws that require boaters to self-inspect their boats and pull drain plugs upon exiting from the water. A few states, primarily concentrated in the west where the looming threat of a quagga or zebra mussel invasion prompted legislative action, have implemented watercraft inspection and decontamination (WID) programs. WID programs seek to reduce the risk of aquatic invasive species spread through the inspection and decontamination of watercraft and equipment by trained personnel.

Currently western WID programs take a variety of forms. Although standard protocols for inspection and decontamination have been developed by the Pacific State Marine Fisheries Commission, state usage and terminology varies. Other non-western states also have some similar provisions and protocols in place, but again these vary. As a result, boaters crossing state lines encounter a potentially confusing array of inspection and decontamination requirements. Inspectors are often unsure of the WID history of a given boat and thus may unknowingly subject a boat to more scrutiny than is necessary. This increases WID implementation costs and inconveniences boaters. Interstate cooperation and reciprocity is essential to effectively manage aquatic invasive species risks from recreational boats and other pathways.

Purpose: These Model State Legislative Provisions were developed for two purposes. First, the provisions provide guidance to states with WID programs to create a foundation for reciprocity. Second, for states without WID programs, the provisions outline a legal framework for the authorization of new WID programs. Where states are able to align their legal authorities on this topic, the initial groundwork is laid to facilitate the adoption of standard protocols and agreements among states to accept one another's inspections, decontaminations, and receipts. In turn, alignment of state legislative provisions can greatly reduce confusion among the boating public and increase compliance, reduce the need for federal legislation to address interstate issues, and simplify law enforcement with respect to knowing violators or repeat offenders.

INTRODUCTION

Recreational boating is incredibly popular in the United States. According to the U.S. Coast Guard's Recreational Boating Statistics, over 12.4 million recreational vessels were registered in the states in 2010. Many of these vessels are small enough to be towed overland on trailers, allowing boaters to enjoy the wonderful fishing, water sport, and scenic opportunities available at waters around the country. Unfortunately, more is moving than just boats; sometimes invasive species are along for the ride.

Generally speaking, invasive species are “alien species [i.e., species not native to an ecosystem] whose introduction does or is likely to cause economic or environmental harm or harm to human health.”¹ An estimated 50,000 non-native species have been introduced into the United States. Many of these species were intentionally introduced as crops, livestock, sport fish, and pets and are considered economically and socially beneficial. Some non-native species, however, have inflicted great economic and environmental damage. It is these harmful species that are considered invasive.

Invasive species can be spread in many ways, both intentionally and unintentionally. Once established in a given environment, they can compete with native species for food and habitat and can significantly impact ecosystems by altering food webs, reducing biodiversity, and changing water quality. Researchers have estimated that economic damages associated with invasive species and measures to control them exceed \$100 billion per year.²

In particular, aquatic invasive species are often moved unintentionally, “hitchhiking” on vessels as they move across the sea or other waters; on floatplanes, boats, and trailers as they are moved between waters; and on equipment (bait buckets, waders, scuba tanks, anchors, etc.) used in recreational activities. Though boaters themselves are not always aware of the organisms their boats may be harboring, trailerable recreational boats are a primary vector of concern in addressing the threat of aquatic invasive species.

In January 2007, for instance, a diver found a quagga mussel (*Dreissena rostriformis*) during a routine inspection of a breakwater in a marina in Lake Mead National Recreation Area. Because Lake Mead is not hydrologically connected to any of the waters in the eastern United States known to harbor quagga mussels, it is likely that the mussel(s) entered Lake Mead on a watercraft that had been transported overland from another quagga-positive water body in the Great Lakes region. Quagga mussels, and their close cousins zebra mussels (*D. polymorpha*), are one of the most costly invasive species in the United States. Because these mussels typically attach themselves to hard surfaces in large numbers, they clogged the cooling intake systems of hydroelectric dams and reduced the pumping capacity of water treatment plants. The introduction of quagga and zebra mussels has also been linked to negative effects on the whitefish, alewives, bluegill and Chinook salmon fisheries.

¹ Exec. Order No. 13112, 64 Fed. Reg. 6183, 6183 (Feb. 3, 1999).

² See David Pimentel, Rodolfo Zuniga, & Doug Morrison, *Update on the environmental and economic costs associated with alien-invasive species in the United States*, 52 *Ecological Economics* 273 (2005).

Because invasive species do not observe geopolitical boundaries (e.g., state borders), interstate collaboration is essential to prevent their introduction, as well as limit or otherwise mitigate their impacts. Regional approaches are particularly important for aquatic invasive species management, as waters often form or cross state boundaries and people frequently move these species, whether knowingly or inadvertently, across state lines when moving along or between these and other waters.

Regional prevention and enforcement efforts, however, have been hindered by inconsistency, overlaps, and gaps between neighboring states' legal regimes. Consider, for instance, watercraft inspection and decontamination (WID) programs. A few states, primarily concentrated in the west where the looming threat of quagga or zebra mussel invasions prompted legislative action, have implemented WID programs to reduce the risk of aquatic invasive species spread through the inspection and decontamination of watercraft and equipment by trained personnel. These state programs take a variety of forms. Some states have specific requirements for inspection and decontamination by trained professionals, while other states allow self-inspection or -decontamination.

Although standard protocols for inspection and decontamination have been developed by the Pacific State Marine Fisheries Commission for western states, state usage and terminology varies. A few non-western states also have some similar provisions and protocols in place, but again these vary. As a result, boaters crossing state lines encounter a potentially confusing array of inspection and decontamination requirements. Inspectors are often unsure of the WID history of a given boat and thus may unknowingly subject a boat to more scrutiny than is necessary. This increases WID implementation costs and inconveniences boaters.

Interstate cooperation and reciprocity is essential to effectively manage aquatic invasive species risks from recreational boats and other pathways. On August 22 and 23, 2012, the U.S. Fish and Wildlife Service, the National Association of Attorneys General, Oregon Sea Grant, the National Sea Grant Law Center, and the Western Regional Panel on Aquatic Nuisance Species (WRP) convened a workshop in Phoenix, Arizona, hosted by the Arizona Game and Fish Department. The purpose of the workshop was to engage assistant attorneys general, natural resource agency attorneys, law enforcement supervisors, policy makers, and aquatic invasive species coordinators from the nineteen Western states, interstate organizations, and federal partners to identify clear legal and regulatory approaches and opportunities for aquatic invasive species abatement and improved management.

At the conclusion of the workshop, participants drafted "An Action Plan to Implement Legal and Regulatory Efforts to Minimize Expansion of Invasive Mussels through Watercraft Movements in the Western United States." One of the recommended actions was to develop model state legislative and regulatory language to authorize a comprehensive state WID program (see, Action Plan Item 2.6) whereby states could voluntarily choose to adopt all or parts of the model, as applicable. This document is the result of that action.

Approach to Development of the Model State Legislative Provisions

In preparation for the August 2012 workshop in Phoenix, the National Sea Grant Law Center compiled the laws and regulations in the nineteen Western states applicable to recreational WID programs. In addition, common state approaches were outlined in a law review article written by Stephanie Showalter Otts and Terra Bowling following the workshop entitled “Legislative and Regulatory Efforts to Minimize Expansion of Invasive Mussels through Watercraft Movements” and published by the *Arizona Journal of Environmental Law and Policy*.

In August 2013, the National Sea Grant Law Center and the Association of Fish and Wildlife Agencies received funding from the U.S. Fish and Wildlife Service to facilitate the development and drafting of model state legislative provisions (the Model) with nationwide applicability. A multidisciplinary Working Group was formed to provide input and guidance to the project team. The following individuals graciously volunteered their time to serve on the Working Group.

Working Group Leads:

- Stephanie Showalter Otts, Director, National Sea Grant Law Center
- Priya Nanjappa, Invasive Species Coordinator, Association of Fish and Wildlife Agencies

Working Group Members:

- Jas Adams, Attorney in Charge – Natural Resources, Oregon Department of Justice
- Beth Bear, Aquatic Invasive Species Coordinator, Wyoming Game & Fish Department
- Elizabeth Brown, Invasive Species Coordinator, Colorado Parks and Wildlife
- Greg Hansen, Assistant Attorney General, Utah Division of Wildlife Resources
- Blake Johnson, Assistant Attorney General, Nebraska Attorney General’s Office
- Jeanette Manning, NAGTRI Program Counsel, National Association of Attorneys General
- Tom McMahan, Invasive Species Coordinator, Arizona Game and Fish Department
- Joe Panesko, Washington State Assistant Attorney General, Fish, Wildlife & Parks Division
- Lana N. Pettus, Senior Trial Attorney, Environmental Crimes Section, U.S. Department of Justice
- Angela Kaufmann, Lead Deputy Attorney General, Idaho State Department of Agriculture
- Elaine Wizzard, Assistant Attorney General, State of Colorado

A draft of the Model was circulated for review in early 2014 through a variety of organizations, including the National Association of Attorneys General, the Association of Fish and Wildlife Agencies, and the WRP of the ANSTF.

Purpose of the Model

These Model State Legislative Provisions were developed to serve two purposes. First, the provisions provide guidance to states with WID programs to create a foundation for interstate reciprocity. Second, for states without WID programs, the provisions outline a legal framework for the authorization of new WID programs. Almost all states have some legislation addressing aquatic

invasive species threats and many have laws touching on the recreational boating pathway. As such, wholesale verbatim adoption of the Model may not be necessary in every state. The Model may be adopted in full, or in part, as applicable. The Model should be viewed simply as a resource states can drawn upon when considering current or future modifications or additions to their existing legal authorities for managing aquatic invasive species.

The Model provides an example of what a “gold standard” for reciprocity among recreational watercraft inspection and decontamination programs might look like. In an ideal world, all states would have the funding, staff, and political and public support to implement a comprehensive WID program. In the real world of tightening state budgets and competing priorities, however, it is unrealistic to expect all states to implement such programs. Some states may only be able to implement pieces of the Model, while others may never chose to require watercraft inspection and decontamination.

When states choose to implement WID programs, significant benefits can be achieved when they are able to align their legal authorities on this topic. A common legislative framework lays the necessary foundation for the adoption of standard protocols and agreements among states to accept one another’s inspections, decontaminations, and receipts. In turn, alignment of state legislative provisions can greatly reduce confusion among the boating public and increase compliance, reduce the need for federal legislation over cooperative state management authority, and simplify law enforcement with respect to knowing violators or repeat offenders. Along with model regulatory language that will be developed to accompany the legislative provisions, this consistent approach can help address the multi-jurisdictional, regional threats posed by aquatic invasive species.

Structure of the Model

Because the Model is designed to provide a foundation for cooperation among states or jurisdictions with respect to recreational WID programs, there are certain authorities that are the most important for every state or jurisdiction that wishes to enter into reciprocal agreements to have in place. These are presented in the Core Legislative Package. In addition, other Supplemental Legislative Provisions are provided that states may wish to consider, but are not essential for enabling cooperation for WID requirements.

For each authority, suggested legislative language is provided followed by an Explanatory Note that discusses the rationale for the section and the specific application of the section, which highlights key issues to consider prior to adoption. It is important to read these Explanatory Notes for the thoughts and details they provide to enhance understanding of the intent of each section of the Model. In addition, these Explanatory Notes provide cross-references to other relevant sections that may provide further detail or address related matters.

Specifically, the structure of the Core Legislative Package includes the following:

- **Short Title:** Provides a popular name for the legislation that seeks to reinforce the environmental and water resource protection goals and to encourage public compliance and acceptance.
- **Legislative Findings:** Provides findings relevant to the purposes of the Model, specifically, that the WID program is being authorized to address the environmental and economic threat from aquatic invasive species. This section helps to clarify the intent of the legislative provisions, and can provide background and guidance for the relevant departments or agencies charged with developing regulations to implement the law.
- **Definitions:** Defines the relevant terms used in the Model.
- **Powers and Duties of [Department]:** Sets forth the specific authorities that the designated agency or department needs in order to implement an effective WID program. Details on these technical aspects are separately provided in the Inspection of Conveyances and Decontamination sections.
- **Prohibitions:** Sets forth the legal foundation, for states that do not already have similar provisions, against the possession, movement, transport, etc., of aquatic invasive species, and thus justifies the development and implementation of a WID program.
- **Responsibilities of Conveyance Owners, Operators, and Transporters:** Provides the legal foundation for public compliance at, and independent from, official inspection stations or decontamination services. Further details are separately provided in the Inspection of Conveyances and Decontamination sections.
- **Inspection of Conveyances:** Authorizes the designated agency or department to establish inspection stations, and provides details for the actions needed to facilitate reciprocity among states or jurisdictions, as well as to authorize stopping a conveyance based on the suspected presence of aquatic invasive species.
- **Decontamination of Conveyances:** Authorizes designated personnel to decontaminate a conveyance based on the presence or suspected presence of aquatic invasive species, as determined during an inspection, and provides details for the actions needed to facilitate reciprocity among states or jurisdictions.
- **Certificate of Inspection and Decontamination:** Authorizes the responsible state agency or department to develop a certification system to provide information to future inspectors, including those in other jurisdictions, to facilitate reciprocity, which in turn can enhance customer service for the boating public that moves between and among jurisdictions.
- **Penalties:** Sets forth both civil and criminal enforcement mechanisms to respond to violations of the Model.

The Supplemental Authorities section provides suggested legislative language for additional authorities that are not essential for reciprocity, but that states may wish to incorporate into their WID programs to achieve additional programmatic goals. These include:

- **Aquatic Invasive Species Fund:** Authorizes the establishment of a dedicated account or fund, and designates mechanisms for capitalizing and maintaining it, that could provide or supplement funding for state aquatic invasive species prevention and management programs. Fines and penalties or auction proceeds following forfeiture of property could be deposited into this fund.
- **Closure of Waters:** Authorizes the restriction of conveyance usage on waters if necessary to respond to an aquatic invasive species threat. Provides a mechanism for the development of management plans by entities with jurisdiction over affected waters.
- **Drying Time:** Authorizes the imposition of mandatory drying periods for conveyances through the issuance of administrative orders or impoundment.
- **Local Government Authority:** Preempts local governments from adopting more stringent local regulations and ordinances relating to WID, and provides a mechanism for development of, and state agency or department authorization or certification of, local WID programs.
- **Forfeiture:** Authorizes suspension of boating licenses and forfeiture of conveyances, and disposition of funds from the auction of forfeited property, following a violation.
- **Immunity:** Clarifies, for states where broad sovereign immunity does not exist, that the state has not waived immunity for damages that occur as the result of properly implemented WID protocols.
- **Reporting:** Creates a mandatory reporting requirement to help the agency or department gain more information on potential or new locations where aquatic invasive species may be present.

Important lessons will be learned as states and jurisdictions implement and modify their WID programs in the coming years. These lessons will inform and enhance any future changes in legislative and regulatory structures to address deficiencies identified in practical application of the law. The National Sea Grant Law Center, the Association of Fish and Wildlife Agencies, the WRP, and other project partners will be tracking legislative and regulatory developments and are available to serve as resources to any state that may need additional information or assistance prior to pursuing modifications based upon this Model.

I. Short Title

This Act may be cited as the “Keeping Waters Healthy Act.”

EXPLANATORY NOTES

Rationale: In many states, a bill’s official title is lengthy and not easily referenced. A short title provides a popular name or label for the legislation that makes it easier to reference in legal documents and other writings. A short title can also be used to make a political statement about, or draw public attention to, the legislation.

Application: The Model offers one possible short title or popular name – “Keeping Waters Healthy Act.” This short title could be included in legislation if the Model is adopted in whole as a comprehensive package. This short title is designed to reinforce the environmental and water resource protection goals of the law and to encourage public acceptance and compliance by highlighting the proactive role that the public can play in protecting the state’s waters.

II. Legislative Findings

It is hereby found and declared as follows:

1. Aquatic invasive species pose an immediate and significant threat to [State’s] water supply, flood control, power generation, native wildlife populations and biodiversity, and aquatic recreation infrastructure. Infestations from these species create a heavy financial burden for state and local government economies. Infestations of aquatic invasive species can also result in negative environmental and economic impacts caused by the devastation of native ecosystems.
2. The transportation of recreational watercraft and associated equipment from one waterbody to another is a primary vector for the spread of aquatic invasive species.
3. Inspection programs help prevent the spread of aquatic invasive species via transportation of conveyances. These programs provide for the inspection and decontamination of conveyances, as well as an opportunity for outreach and education on the risks posed by the introduction and spread of aquatic invasive species. The programs protect both the environmental and recreational values of [State’s] waters and [State’s] infrastructure and economy.

EXPLANATORY NOTES

Rationale: Although the inclusion of legislative findings is not usually required by law, it is good drafting practice for state legislatures to do so. By expressly stating their findings and the purposes of the law, legislators can help clarify for state agencies, courts, and the public the legislative intent and factual, scientific, or policy rationale for passage of the law. Such guidance can be helpful to state agencies as they develop regulations to implement the law's provisions and courts called upon to resolve disputes.

Application: This section establishes that the watercraft inspection and decontamination (WID) program is being authorized to address the environmental and economic threat from aquatic invasive species. The Model is designed to encourage behavior change by increasing awareness of the risk and facilitating inspection and decontamination efforts. The Model is not intended to criminalize recreational boaters. However, adoption of the provisions in this Model need not preclude prosecution or criminal proceedings, particularly following non-compliance or multiple violations. Individual states, for instance, may choose to reference existing penalty provisions used to enforce other existing laws (see Section X). Those provisions may provide for civil penalties, criminal penalties, or both.

In states where the search and seizure of recreational watercraft might be problematic if the civil nature of the law is not expressly declared, drafters may wish to add an additional legislative finding expressly stating that any proceedings arising under this law shall be civil in nature. In such cases, only civil penalties should be provided for in Section X.

Following Subsection (1), some states may wish to go further and declare that the introduction, presence, and transport of aquatic invasive species within the state is a public nuisance that shall be abated. In some states, such a declaration might allow state and local officials to take additional action to address the aquatic invasive species threat.

III. Definitions

1. "Aquatic Invasive Species" means an aquatic species that is not native to [State], including their seeds, eggs, spores, larvae, or other biological material capable of propagation, and whose presence within [State] may cause economic or environmental harm.
2. "Conveyance" means a motorized or non-motorized recreational watercraft and associated equipment that may come in contact with water or that is able to transport water. Conveyance includes trailers, engines and motors, live wells, ballast tanks, bilge areas, anchors, and other items that may come in contact with water or are able to transport water that could harbor an aquatic invasive species.

3. “Decontamination” means a process used to kill, destroy, or remove aquatic invasive species and other organic material that may be present in or on a conveyance.
4. “Inspection” means a visual and tactile examination of a conveyance to determine whether it may harbor any organisms or other organic material that could present a risk of spreading aquatic invasive species.
5. “Person” means an individual; a corporation, partnership, or other legal entity, or their legal representative, agent, or assigns; or a governmental entity.
6. “Waters” means public waters within the jurisdiction of the state used for recreational boating, including rivers, streams, and natural or manmade lakes, ponds, and reservoirs.

EXPLANATORY NOTES

Rationale: Definitions are important for providing clarity, especially if unfamiliar terms are used or familiar terms are used in unfamiliar ways. Ordinary words used in a manner that is consistent with their everyday meaning do not need to be defined. If key terms have already been defined through previous legislative acts, cross-references may be provided to maintain consistency. A review of existing definitions should be undertaken during the drafting process to ensure consistency, avoid duplication, and identify terminology gaps.

Application: Of the terms defined here in the Model, three (conveyance, decontamination, and inspection) relate to the technical aspects of recreational WID programs. Although these terms or similar terms may already be defined in states with existing WID programs, a common understanding of the meaning of these terms, and use thereof, is a necessary foundation for reciprocity. Conveyance is defined very broadly to include all recreational watercraft and associated equipment. Depending on the financial and human resources available, states may wish to narrow the scope of the WID program to cover only certain conveyances or provide authority to the relevant agencies to do so through rulemaking. Inspection and decontamination are processes used to assess the risk that a conveyance may harbor an aquatic invasive species and kill, destroy, or remove any species that may be present. As the specific processes used will depend on the type of conveyance and species present, detailed protocols for both should be set forth in regulations.

Many states already have definitions of “aquatic invasive species,” “person,” and “waters,” and may choose to keep their existing definitions. These definitions, however, are included in the Model because they are key terms establishing the scope and applicability of the law. Because the Model is a pathway-based (as opposed to a species-based) legal framework and it is impossible to predict which species might present the next threat, the Model is designed to authorize a response to a threat from a group – “aquatic invasive species” – rather than particular species (e.g., quagga and zebra mussels or Eurasian water

milfoil). Given the potential scope of this definition, many states often refine their aquatic invasive species definitions through the development of “white” (approved) or “black” (prohibited) lists, which identify non-native species that can and cannot be brought into the state. For example, certain non-native sportfish may be identified as approved, whereas certain federally listed injurious wildlife may be prohibited. States with such lists may wish to reference them in their definition to clarify the scope of the law.

“Person” is likewise defined broadly to ensure that all recreational watercraft owners, operators, and transporters, including state agencies and their personnel, comply with the inspection, decontamination, and other requirements of the Model. The express inclusion of “government entity” might not be absolutely necessary, as individuals – not agencies – drive vehicles and operate watercraft; it might, however, prevent possible misconceptions as to an implicit exemption for official state vehicles. Finally, the Model recommends limiting the scope of the WID program to waters used for recreational boating to avoid applicability to waters used for other purposes, such as irrigation or power.

Additional terms may be needed if states choose to include one or more of the supplemental authorities.

IV. Powers and Duties of [Department]

The [Department] is authorized to take any of the following actions to prevent, control, contain, monitor, or eradicate the presence of aquatic invasive species within the state:

1. Identify aquatic invasive species subject to this Act.
2. Identify waters or other locations affected by the presence of aquatic invasive species, including but not limited to waters or locations outside the [State].
3. Possess and transport aquatic invasive species for the purposes of identification, sampling, testing, and disposal.
4. Stop, detain, and inspect a conveyance.
5. Decontaminate or order the decontamination of a conveyance.
6. Enter into agreements with other governmental entities to facilitate interstate or intrastate cooperation regarding the inspection and decontamination of conveyances.
7. Enter into agreements with other governmental entities to address management issues associated with interstate or intrastate waters.

EXPLANATORY NOTES

Rationale: Under the separation of powers doctrine, one branch of state government (executive, legislative, and judicial) is generally prohibited from exercising powers belonging to another branch. In theory, the legislative branch is responsible for enacting the laws of the state, which are then implemented by the executive branch subject to

judicial oversight. In reality, powers often overlap and delegation of lawmaking power to the executive branch is often desirable, especially with complex environmental problems. Through the delegation of lawmaking power, the state legislature can leave the development of detailed policies to the subject matter experts working within state administrative agencies. This section sets forth the specific powers and duties the state legislature is delegating to the appropriate department.

Application: This Section provides the designated agency or department with the necessary legislative authority to develop and implement an effective WID program. The department needs the authority to identify aquatic invasive species of concern, so inspectors and the boating public know what to look for. The department needs the authority to identify waters that may be affected by the presence of aquatic invasive species to guide the selection of inspection and decontamination protocols and prioritize management actions. The department needs the authority to stop, detain, inspect, and decontaminate or order the decontamination of conveyances. And finally, the department needs the authority to enter into intrastate and interstate agreements to facilitate the implementation of reciprocity and management programs. Additional provisions may need to be added to this list if states choose to include one or more of the supplemental authorities.

That said, enacting a given authority into law does not necessarily obligate or require the agency or department to implement the authorized activities. It merely provides the state with the authority to implement such activities when desired and human or financial resources are available.

The ability to delegate lawmaking authority to the executive branch varies by state. Many states require that the statute delegating authority provide clear guidance to the administrative agency as to what regulations are required to implement the statutory authority and what those regulations may or may not contain. In other states, a general legislative statement of policy may be considered sufficient to guide the agency. The language recommended above may need to be altered in a particular state to ensure effective delegation.

Cross References: Section VII (Inspection of Conveyances)
 Section VIII (Decontamination)
 Section IX (Certificate of Inspection and Decontamination)
 Supplemental Authorities (Drying Time, Closure of Waters)

V. Prohibitions

1. Except as authorized by [Department], a person may not possess, import, ship, or transport within this state, or cause to be imported, shipped, or transported within this state, an aquatic invasive species.
2. Except as authorized by the [Department], a person may not place a conveyance, or cause a conveyance to be placed, into waters within this state without first complying with the applicable requirements of section VI of this Act and rules adopted by the [Department] under this Act.

EXPLANATORY NOTES

Rationale: This section provides the legal foundation for recreational WID programs. Most states with aquatic invasive species laws already prohibit these activities. As mentioned above, WID programs are designed to minimize the risk of aquatic invasive species spread and raise awareness of, and facilitate compliance with, state laws prohibiting the movement of aquatic invasive species.

Application: If the recreational WID program law will nest within a state's broader aquatic invasive species law, Subsection (1) may not be absolutely necessary. In such instances, however, drafters are encouraged to cross-reference the existing general prohibition to ensure the regulated public is aware of and clearly understands what conduct is prohibited. By prohibiting the launching of a non-compliant conveyance, Subsection (2) reinforces the mandatory nature of the WID program and provides an important enforcement mechanism. The suggested penalties for violating this prohibition and other provisions of the Model are set forth in Section X.

Cross References: Section X (Penalties)

VI. Responsibilities of Conveyance Owners, Operators, and Transporters

1. A person removing a conveyance from waters must, to the extent practicable, and in accordance with applicable requirements and protocols established by the [Department]:
 - a. Clean the conveyance by removing all visible organic material, including, but not limited to, plants, animals, and mud;
 - b. Drain the conveyance by removing any plug or other barrier that prevents water drainage and running any pumps on board to expel water; and
 - c. Dry all compartments, spaces, and associated equipment that hold or may hold water.

2. The [Department] by rule may establish requirements and protocols for the cleaning, draining, and drying of a conveyance.
3. Any person transporting a conveyance must:
 - a. Stop at all inspection stations established by [Department] under section VII of the Act on or near the conveyance's route of travel;
 - b. Comply with inspection and decontamination procedures set forth in this Act and rules adopted by [Department] under this Act; and
 - c. Comply with all lawful inspection and decontamination orders issued by the [Department].

EXPLANATORY NOTES

Rationale: One of the most critical tools in the fight against invasive species is public outreach and education. Because many invasive species are spread by human activities, future invasions can be prevented through changes in behavior. This section provides the legal foundation for public compliance with the overall intent of the law – ensuring that conveyances are clean before use or re-entry into waters of the state – in situations where inspection stations or decontamination services are not available, as well as where these stations and services are present or available.

Application: Subsection (1) is designed to reinforce recreational boater outreach and education initiatives, including “Clean, Drain, and Dry” or similar campaigns, by encouraging boaters to take individual responsibility for preventing aquatic invasive species from hitching a ride on their boats to other waters.

Subsection (2) provides the designated department with express authority to issue regulations setting forth the specific requirements and protocols for the cleaning, draining, and drying of conveyances by individuals.

Subsection (3) establishes a mandatory, as opposed to voluntary, WID program. In 2009, the Oregon State Legislature authorized voluntary roadside boat inspection stations. Watercraft owners could stop and take advantage of the state's inspection and decontamination services, but they were not required to participate. Oregon's voluntary program was deemed insufficient as a means of intercepting watercraft at risk of spreading aquatic invasive species when the state learned that the voluntary compliance rate during the 2010 inspection season was approximately 27 percent. This meant that three of every four boats failed to stop at an inspection station. To be effective, WID programs must be mandatory for all conveyances.

Cross References: Section VII (Inspection of Conveyances)
 Section VIII (Decontamination)
 Supplemental Authorities (Drying Time)

VII. Inspection of Conveyances

1. To prevent the introduction, importation, infestation, and spread of aquatic invasive species, the [Department] is authorized to establish aquatic invasive species inspection stations at any location within the state, including but not limited to: interstate borders, highways or other roads; locations adjacent to or near waters; and at [Department] offices.
2. At inspection stations established under this section, authorized [Department] personnel may inspect the exterior of conveyances for the presence of organisms or organic material that may harbor aquatic invasive species. Authorized [Department] personnel may also examine any interior portion of a conveyance that may carry or transport water or organic material, including, but not limited to, engines and motors, live wells, ballast tanks, and bilge areas. During the inspection, authorized [Department] personnel may also check for compliance with the requirements of this Act and with rules adopted by the [Department] under this Act.
3. The [Department] by rule may establish standards and procedures for inspecting conveyances for the presence of organisms and organic material.
4. If organisms or organic material that may harbor aquatic invasive species are found or suspected to be present as the result of an inspection, the [Department] may decontaminate the conveyance or order the decontamination of the conveyance pursuant to [Section VIII].
5. A law enforcement officer may stop a conveyance at a location other than an inspection station established under this section, to inspect the conveyance for the presence of organisms or organic material that may harbor aquatic invasive species, or for proof of a certification issued pursuant to [Section IX], under the following circumstances:
 - a. If the conveyance is visibly transporting organisms or organic material, including, but not limited to, animals, plants, or mud, or the law enforcement officer otherwise reasonably believes, based on articulable facts, that the conveyance presents a risk of spreading aquatic invasive species; or
 - b. If the owner of the conveyance fails to stop at a required inspection station or to comply with [Department] required procedures related to inspection and decontamination of conveyances.
5. If a law enforcement officer conducts an inspection of a conveyance pursuant to this Act and finds or suspects the presence of organisms or organic material that may harbor aquatic invasive species or on the basis of other articulable facts that an aquatic invasive species is being transported, a law enforcement officer may:
 - a. Escort the conveyance to the nearest inspection station for immediate decontamination;
 - b. Issue an order requiring the decontamination of the conveyance; or
 - c. Detain or impound the conveyance until decontamination is complete.

EXPLANATORY NOTES

Rationale: This section authorizes the designated agency or department to establish inspection stations throughout the state and to inspect conveyances for the suspected presence of aquatic invasive species.

Application: A number of policy decisions must be made with respect to WID programs, not the least of which is where to locate inspection stations. Depending on a state's geography and the resources available to the administrative agency, a state may choose to conduct inspections at state borders, along highways, or at popular or at-risk waters. In addition, because the list is non-exclusive, states could also establish stations at other locations, including on privately owned property, such as a private marina, with the permission of the property owner. Subsection (1) provides broad authority to the authorized agency or department to establish inspection stations at various locations throughout the state.

Aquatic invasive species often closely resemble native species. As a result, it can be difficult to identify individual species accurately in the field. Subsection (2) therefore permits authorized personnel to inspect for the presence of all organisms and organic material, as opposed to the presence of aquatic invasive species. This eliminates the need for inspectors to definitively identify an aquatic invasive species before undertaking an inspection, or subsequently requiring decontamination pursuant to Subsection (4).

Because the possession and transport of aquatic invasive species is prohibited in the Model (or may already be prohibited by a state's existing invasive species law), law enforcement officers need the authority to stop conveyances based on probable cause and inspect those conveyances independent from an established inspection station. Such an inspection might be appropriate if the conveyance is visibly transporting organic material (e.g., plant material hanging from the motor or trailer) or has departed from a high-risk water without decontaminating. Subsection (5)(a) of the Model requires a finding of probable cause before a conveyance may be stopped and inspected outside the inspection station context. The search and seizure law of some states might permit law enforcement officers to stop and inspect conveyances based on reasonable suspicion, which is a less demanding standard. Drafters should consult with relevant law enforcement agencies within their state to determine the appropriate standard to adopt.

Subsection (6) provides express authority to law enforcement officers to order the decontamination of a conveyance and detain or seize a conveyance until decontamination is complete. Because individuals are entitled to legal protections under federal and state constitutions against the improper seizure of property, only law enforcement personnel following appropriate state procedures would be able to remove a conveyance from the owner's possession (e.g., take the conveyance to an impound yard).

Cross References: Section IV (Powers and Duties)
 Section VIII (Decontamination)
 Supplemental Authorities (Drying Time)

VIII. Decontamination

1. Personnel authorized by the [Department] may decontaminate or order the decontamination of a conveyance found or reasonably believed to harbor aquatic invasive species after an inspection conducted pursuant to [Section VII].
2. The [Department] may by rule establish standards and procedures for decontaminating conveyances and disposing of organisms and organic material.
3. If a person refuses to submit to decontamination of a conveyance found or reasonably believed to harbor aquatic invasive species, or due to personal hardship is unable to immediately accompany the conveyance for decontamination, a law enforcement officer may detain or impound the conveyance until the decontamination is complete.
4. The owner of a conveyance that is decontaminated or detained due to failure to cooperate by the owner or person in possession of the conveyance is liable for all costs associated with the decontamination or impoundment, in accordance with the applicable rules promulgated by [Department] under this Act.

EXPLANATORY NOTES

Rationale: This section authorizes the decontamination of a conveyance, specifically by authorized personnel, if organisms or organic material are found during an inspection or the presence of aquatic invasive species is suspected. Decontamination, usually consisting of a high temperature water rinse or spray of the exterior and interior compartments of the conveyance at high or low pressure, along with draining the conveyance and allowing a suggested drying time, is generally an effective means of removing or killing most aquatic invasive species found in or on a conveyance.

Application: The Model is designed to allow only authorized personnel to perform decontamination of a conveyance. It is important to note that under the legal framework suggested by the Model, individuals in compliance with the clean, drain, and dry requirements set forth in Section VI have not decontaminated the conveyance. Professional decontamination is considered necessary in many states to ensure the conveyance does not pose a threat of spreading aquatic invasive species to other waters. Professional decontamination is also essential for safety reasons, as the high water temperatures could result in injuries if improper techniques are used. However, professional decontamination of all conveyances is not possible for a variety of logistical and financial reasons. As a result, some states may wish to recognize individual actions within their WID programs. Under the Model, however, such conveyances would be considered “undocumented” and not entitled to any form of interstate reciprocity.

Decontamination protocols will vary depending on the category, particular design, or features of the conveyance and the level of risk it presents for potentially spreading aquatic invasive species. Training and certification requirements for authorized personnel, along with decontamination standards and protocols, should be set forth by the responsible state agency or department in regulations or guidance documents.

Cross References: Section VI (Responsibilities of Conveyance Owners, Operators, and Transporters)
 Section VII (Inspection of Conveyances)
 Section IX (Certificate of Inspection and Decontamination)

IX. Certification of Inspection and Decontamination

1. The [Department] may issue an inspection or decontamination certificate to the owner or person in possession of a conveyance that has been inspected. The certificate must reflect:
 - a. The name of the [Department] and of the person who conducted the inspection;
 - b. The date, place, and time of inspection;
 - c. Any preventative measures performed or ordered; and
 - d. Any decontamination performed.
2. If the [Department] issues an inspection or decontamination certificate to the owner or person in possession of the conveyance, the [Department] may attach a tamper-proof device to the conveyance. The device may be a seal, tag, or band that prevents the conveyance from coming in contact with water without being broken.
3. The [Department] by rule shall establish required retention periods for inspection and decontamination certificates issued under this section.
4. The [Department] may recognize by reciprocity an inspection or decontamination certificate issued by another governmental entity, if the other governmental entity adheres to the minimum standards for inspection and decontamination established in [agreed upon standard protocols, such as the Uniform Minimum Protocols and Standards for Watercraft Interception Programs].

EXPLANATORY NOTES

Rationale: To effectively implement WID programs and facilitate reciprocity among states or jurisdictions, a system needs to be in place to establish and record the most recent inspection and decontamination history of particular conveyances. This section authorizes the responsible state agency or department to develop a certification system to provide information to future inspectors.

Application: Various mechanisms are available to establish compliance with a state's WID laws. Inspectors can fill out paper forms and require a copy be retained by conveyance owners, operators, and transporters and presented to future inspectors. Tamper-proof devices, such as tags or bands, can be placed on conveyances by inspectors to provide information about inspection status. Issuing certificates of compliance assists inspectors both within the state and in other states in determining the appropriate inspection and decontamination protocols to apply to a particular conveyance. Further, such proof of compliance in states or jurisdictions where reciprocity has been established benefits the conveyance owner, operator, or transporter, by simplifying their compliance and thus potentially reducing his or her time if stopped for inspection in other jurisdictions. Such enhanced customer service can help to reinforce compliance among the recreational boating public.

In the context of the Model, reciprocity simply means that a state would recognize the WID paperwork issued by another jurisdiction adhering to agreed upon minimum standards. Reciprocity would not preclude a state from inspecting or decontaminating a conveyance that arrives with paperwork from another state. Inspectors would continue to follow their state's inspection and decontamination protocols, but might make adjustments as appropriate based on the additional information provided by the paperwork.

X. Penalties

Option 1: Civil Enforcement Only

1. A person who violates or fails to comply with any provision of this Act or any rules adopted under this Act is subject to a civil penalty of not more than [X] dollars.
2. All civil penalties collected under this section shall be deposited in [designated fund].

Option 2: Civil and Criminal Enforcement

1. Any person who violates or fails to comply with any provision of this Act or any rules adopted under this Act commits a Class [X] misdemeanor.

2. Any person who complies with this Act's requirements for inspection and decontamination of conveyances is not subject to criminal sanctions under this section for violations of Section V(1) of the Act, unless the person knowingly contaminates or attempts to contaminate waters with an aquatic invasive species.
3. In addition to any other criminal penalty provided in this section, any person who violates or fails to comply with any provision of this Act or any rules promulgated under this Act may be assessed civil penalties in an amount not to exceed [X].
4. Civil penalties collected under this section shall be deposited in [designated fund].

EXPLANATORY NOTES

Rationale: Enforcement is an essential component of any legal framework, as violations of the law will occur and need to be addressed. The imposition of penalties punishes non-compliance and serves as a deterrent to future violations. Enforcement can be civil, criminal, or both. This section sets forth the enforcement mechanisms available to respond to violations of the Model. An additional enforcement mechanism, forfeiture of property, is discussed in the Supplemental Authorities.

Application: The penalty framework will vary by state, as a number of policy choices must be made. Authorizing both civil and criminal enforcement provides the greatest amount of flexibility to enforcement personnel in responding to violations. Criminal penalties may be necessary in order to impart the seriousness of the violations. However, the search and seizure laws in some states might require that enforcement be limited to civil proceedings. The Model, therefore, presents two options for drafters. Option 1 authorizes only civil enforcement. Option 2 authorizes both civil and criminal enforcement.

When designing a penalty framework, the drafters may establish minimum and maximum fines. In the Western states, the authorized civil penalties range from \$250 to \$10,000. Although \$250 may be viewed as a sufficient punishment for a first offense, it may not be high enough to deter future violations. When fines are set too low, they can come to be viewed as a "cost of doing business," a state of affairs that can significantly decrease the effectiveness of regulatory programs. Because of this, a state needs to ensure that its fines are not too low and may want to consider increasing fines for subsequent violations.

Violations of aquatic invasive species laws can lead to significant environmental and economic damages. Rapid response actions and enforcement costs money. Drafters need to carefully consider where the revenues raised through the assessment of civil and criminal penalties are to be deposited. Ideally, the revenues would be deposited in a designated Aquatic Invasive Species Fund that the authorized department could draw upon to offset programmatic and enforcement costs.

Cross References: Supplemental Authorities (Aquatic Invasive Species Fund)

SUPPLEMENTAL AUTHORITIES

Aquatic Invasive Species Fund

1. A person shall not operate a conveyance on the waters of this State unless the person has paid to the [Department] the aquatic invasive species fee established pursuant to Subsection (2).
2. The [Department] shall establish by regulation the fee structure for conveyances, which shall take into account the various categories and uses of conveyances, the financial needs of the aquatic invasive species program, and administrative costs.
3. The aquatic invasive species fee established pursuant to Subsection (2) shall be paid annually. The fee shall be deposited in the [Aquatic Invasive Species Fund] and used by the [Department] for enforcement of this Act and for public education, research, and management activities to address aquatic invasive species.

EXPLANATORY NOTES

Rationale: All of the activities set forth in the Model require resources, yet states rarely have adequate funds to implement a comprehensive aquatic invasive species prevention program. Pursuant to the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, state aquatic invasive species management plans approved by the Aquatic Nuisance Species Task Force are eligible for federal cost-share funding. These funds are extremely limited, however, and state programs need access to stable sources of funding. Authorizing the establishment of a dedicated Aquatic Invasive Species Fund or account, and designating mechanisms for capitalizing and maintaining the fund, is one way in which state legislatures can provide supplement funding for state aquatic invasive species prevention and management programs.

Application: This provision authorizes the creation of a dedicated Aquatic Invasive Species Fund through the assessment of a user fee on conveyance operators. As it can be difficult to alter fee structures set forth in statutes, Subsection (2) delegates the development of the fee structure to the appropriate department. The calculation of the fee amount may vary by state, and drafters should provide guidance as to their relevant considerations. In addition to the three set forth in the Subsection (2), other considerations may include the willingness of the regulated public to pay the fee and availability of other funding sources.

User fees can be unpopular, especially if they are imposed on an activity that users had been able to previously engage in for free. In such situations, creative naming (e.g., “Resource Protection Stamp” or “Healthy Water Fee”) and proactive outreach and marketing may help encourage acceptance and compliance by the public.

Cross References: Section X (Penalties)
 Supplemental Authorities (Forfeiture)

Closure of Waters

1. The [Department] may restrict conveyance usage on waters of the state when necessary to prevent, control, contain, monitor, or eradicate the presence of aquatic invasive species within the state.
2. The [Department] by rule may establish standards and procedures for monitoring waters to determine whether they are affected by the presence of aquatic invasive species and what management actions are required.
3. The [Department] is authorized to develop procedures to ensure proper notification of person(s) affected by the closure of a water body pursuant to Subsection (1). The notification shall:
 - a. Set forth the reasons for the closure or restriction;
 - b. Identify the type and extent of conveyance restrictions; and
 - c. Identity the time period the restrictions will be in place.
4. The [Department] is authorized to work with person(s) responsible for the management of a water affected by conveyance restrictions to prepare and implement management plans to prevent, control, contain, monitor, or eradicate the presence of aquatic invasive species. Plans shall be developed in accordance with rules promulgated by the [Department] under this Act.
 - a. Upon approval of a management plan by the [Department], the [Department] may amend or rescind conveyance usage restrictions issued pursuant to Subsection (1).
 - b. If the [Department] determines at any time that a management plan is not being effectively implemented, the [Department] may further restrict conveyance usage.

EXPLANATORY NOTES

Rationale: In some instances, simply establishing inspection stations or invoking decontamination requirements is not enough to prevent the spread of an aquatic invasive species, or may be more costly than simply closing the water. This may be due to a high level of infestation of the aquatic invasive species in question, or due to the discovery of a new or particularly harmful aquatic invasive species where measures to prevent its spread may not yet be well-known or tested, or for other reasons as determined by the authorized department. This provision authorizes the department to restrict the use of conveyances on, or public access to, state waters in such instances.

Application: Restrictions may be reactive or proactive. Usage might be restricted upon the discovery of an aquatic invasive species to prevent conveyances from spreading the species to other waters (reactive) or to protect a popular or high priority water from introductions (proactive). Closures may be permanent or temporary depending on the level of risk; often the timeframes of such closures are dependent on the time needed for state or local officials to assess the level of risk and to develop a management plan. Such management plans may include criteria for when access to the water may be partially or fully reinstated. Subsection (1) provides broad authority to restrict the use of conveyances in either of these situations. Subsection (3) requires the department to provide notice to users and to clearly articulate the extent of any justifications for the restrictions.

In many cases, due to the popularity of recreational boating or fishing and the strong support for open, public access to state waters, permanent closures are not desirable or feasible. Subsection (4) authorizes the department to work with entities affected by conveyance restrictions to develop management plans for the affected water that detail the conditions under which, upon approval and implementation, the restrictions would be lifted. Drafters considering adopting this optional provision are encouraged to add this authority to the enumerated lists in Section IV (Powers and Duties of Department).

Cross Reference: Section IV (Powers and Duties of Department)

Drying Time

1. The [Department] may issue an order requiring the owner or person in possession of a conveyance to dry the conveyance for a designated period of time, not to exceed [X] days, before launching the conveyance in waters.
2. The [Department] may allow the owner or person in possession of the conveyance to retain possession of the conveyance during the drying period, subject to any requirements established by the [Department].
3. The [Department] may impound a conveyance if necessary to ensure that the mandatory drying period is achieved.

EXPLANATORY NOTES

Rationale: All steps of the decontamination process may not always be feasible, due to conveyance design, the presence of aquatic invasive species in high numbers, or a lack of compliance by the conveyance owner, operator, or transporter. Unless all steps are completed, however, a proper decontamination cannot be achieved. This section authorizes the department to impose a mandatory drying period for conveyances under such circumstances to minimize the risk of spreading aquatic invasive species.

Application: Mandatory drying periods, referred to as “quarantine” in some states, reduce the risk of aquatic invasive species spread through desiccation. Aquatic species generally have limited ability to survive out of water and drying periods can help ensure that conveyances are properly decontaminated. For quagga and zebra mussels, the general recommendation is to keep the conveyance out of water and to allow it dry for a minimum of 30 days after cleaning all equipment and draining all possible sources of standing water. Drying periods may be reduced, however, in areas with higher temperatures and lower humidity, or lengthened for areas with lower temperatures and increased humidity. With respect to mussels, the 100th Meridian Initiative’s Drying Time Estimator (<http://www.100thmeridian.org/emersion.asp>) can help state officials determine how long particular watercraft should remain out of the water in specific locales. These drying periods might not be applicable to other species, so states may need to develop more generally applicable protocols.

Depending on the level of control desired by state officials, the mandatory drying time could be accomplished through the voluntary actions of a conveyance owner (i.e., agreeing to park the conveyance in their driveway for the designated time) or through the physical seizure of the conveyance using law enforcement impoundment authority. Subsections (2) and (3) authorize the department to use both of these methods.

Cross Reference: Section VIII (Decontamination)

Local Government Authority

1. This Act preempts a city, county, or other unit of local government from adopting local regulations or ordinances related to conveyance inspection and decontamination that are more stringent than those adopted by the state.
2. Any city, county, or other unit of local government that owns or manages a water where recreational, boating, or fishing activities are permitted, except a privately owned water that is not open to the public, is encouraged to do both of the following:
 - a. Assess the vulnerability of the water for the potential introduction of aquatic invasive species via conveyances; and
 - b. Develop and implement a program designed to prevent the introduction of aquatic invasive species via conveyances. Such program shall be authorized by the [Department] and carried out in accordance with rules promulgated by the [Department] under the Act. The program may include, as feasible and authorized by the [Department], the following components:
 - i. Monitoring of the water for the presence of aquatic invasive species;
 - ii. Management of the recreational boating and fishing activities that are permitted, particularly the potential pathways of aquatic invasive species introduction;
 - iii. Public education; and
 - iv. Conveyance inspection and decontamination.

EXPLANATORY NOTES

Rationale: Local governments have the authority, as provided by state law, to take action to protect the health, welfare, and safety of their citizens. Given the scale of the aquatic invasive species problem, the costs of management and eradication following the discovery of such species, and limited governmental resources, states may wish to partner with local governments to implement their WID programs. This section provides a mechanism for the development of, and state agency or department authorization of, local WID programs.

Application: To avoid confusion and intrastate jurisdictional conflicts with respect to WID requirements and boater compliance, Subsection (1) prohibits local governments from adopting local laws that impose more stringent WID requirements. Subsection (2) encourages local governments that manage recreational waters to assess the vulnerability of those waters to introduction of aquatic invasive species through the recreational watercraft pathway and to implement management programs to address those risks. To ensure that local programs are implemented consistently throughout the state, Subsection (2)(b) requires state certification of local programs by the appropriate department. State certification is an oversight mechanism that can help ensure local programs adhere to minimum standards, enhance and complement statewide programs, and do not conflict with provisions established by the core authorities in the Model.

Forfeiture

Any person who violates any of the provisions of this Act may have his or her boating license suspended or the conveyance forfeited to the [Department]. The conveyance may be disposed of by the [Department] through public auction and the [Department] must deposit any proceeds thereof in the [designated fund].

EXPLANATORY NOTES

Rationale: In addition to standard penalty provisions, violations of laws can be enforced through forfeiture provisions. Through the suspension of licenses or confiscation of property, forfeiture provisions are generally designed to (1) prevent the offender from engaging in the activity that resulted in the violation and (2) prevent the offending property from being used to commit subsequent offenses. In addition, forfeiture provisions can offer a mechanism to generate additional revenue to offset enforcement costs. This section authorizes forfeiture actions and the disposition of the proceeds from the auction of forfeited property following a violation of the law.

Application: Forfeiture can be criminal or civil in nature. Criminal forfeiture usually accompanies a criminal conviction, whereas civil forfeiture can be imposed independent of criminal proceedings. Civil forfeiture is often controversial due to the lower standard of proof in civil proceedings and the perception that forfeiture is used to improperly generate revenue, especially if the proceeds flow back to the agency or department that set the forfeiture in motion.

The broad language of this section authorizes the suspension of boating licenses and the confiscation of conveyances following any violation of the law. This could be perceived as unduly harsh, especially if the violations did not result in any environmental or economic harm. Drafters may therefore wish to consider limiting the scope of the forfeiture provisions to multiple violations, egregious violations, violations with a minimum level of culpability, or criminal or felony offenses.

The Model suggests disposal of property through public auction. The preferred mechanism, however, will likely vary by state. As discussed in Section X, drafters should carefully consider where penalty proceeds are deposited. Forfeiture proceeds, like other penalty proceeds, are a potential source of revenue to offset programmatic and enforcement costs and ideally would be placed in a fund for use by the agency or department responsible for aquatic invasive species management.

Cross References: Section X (Penalties)
Supplemental Authorities (Aquatic Invasive Species Fund)

Immunity

The [Department] shall not be liable to any person for any loss resulting from damage to conveyances as the result of inspection or decontamination provided the [Department] adhered to all rules promulgated by [Department] under this Act.

EXPLANATORY NOTES

Rationale: Pursuant to the doctrine of sovereign immunity, a government is generally immune from lawsuits or other legal action unless it has consented to them. Many state governments have waived sovereign immunity for purposes of tort liability, allowing lawsuits in some circumstances, such as the negligence of state employees. This section clarifies that the state has not waived immunity for damages that occur as the result of properly implemented WID protocols.

Application: Depending on the doctrine of sovereign immunity in a particular state, this provision may not be necessary. However, in states where broad sovereign immunity does not exist, this provision can maintain immunity in situations where there has been compliance with the established rules and standards. Further, it provides an incentive for the designated department to ensure that program personnel are adequately trained and supervised with respect to inspections and decontaminations. The state may also choose to apply immunity to a broader scope of agency or department actions as part of the state's aquatic invasive species program and authorities, as applicable.

Reporting

A person who discovers an aquatic invasive species within [State] or has reason to believe an aquatic invasive species may exist at a specific location shall report the discovery to the [Department] within 48 hours.

EXPLANATORY NOTES

Rationale: Due to funding, personnel, and time constraints, agencies are unable to continuously survey and monitor all the waters in a state for the presence of aquatic invasive species. Mandatory reporting requirements help states obtain information about and respond to aquatic invasive species threats. This section sets forth such a mandatory reporting requirement.

Application: Although the legislative language is simple, the implementation of mandatory reporting requirements involves a number of complex policy choices, not least of which is what the response to a report should be. For instance, state agency or department personnel could be expected to simply log the report into a database for future reference or to actively investigate the veracity of a report and implement rapid response actions if necessary. Drafters should carefully review the desired outcomes of the mandatory reporting requirement and consider adding additional provisions to clarify the scope of agency or department responsibility upon receipt of a report.

APPENDIX

CORE AUTHORITIES

I. Short Title

This Act may be cited as the “Keeping Waters Healthy Act.”

II. Legislative Findings

It is hereby found and declared as follows:

1. Aquatic invasive species pose an immediate and significant threat to [State’s] water supply, flood control, power generation, native wildlife populations and biodiversity, and aquatic recreation infrastructure. Infestations from these species create a heavy financial burden for state and local government economies. Infestations of aquatic invasive species can also result in negative environmental and economic impacts caused by the devastation of native ecosystems.
2. The transportation of recreational watercraft and associated equipment from one waterbody to another is a primary vector for the spread of aquatic invasive species.
3. Inspection programs help prevent the spread of aquatic invasive species via transportation of conveyances. These programs provide for the inspection and decontamination of conveyances, as well as an opportunity for outreach and education on the risks posed by the introduction and spread of aquatic invasive species. The programs protect both the environmental and recreational values of [State’s] waters and [State’s] infrastructure and economy.

III. Definitions

1. “Aquatic Invasive Species” means an aquatic species that is not native to [State], including their seeds, eggs, spores, larvae or other biological material capable of propagation, and whose presence within [State] may cause economic or environmental harm.
2. “Conveyance” means a motorized or non-motorized recreational watercraft and associated equipment that may come in contact with water or that is able to transport water. Conveyance includes trailers, engines and motors, live wells, ballast tanks, bilge areas, anchors, and other items that may come in contact with water or are able to transport water that could harbor an aquatic invasive species.
3. “Decontamination” means a process used to kill, destroy, or remove aquatic invasive species and other organic material that may be present in or on a conveyance.

4. “Inspection” means a visual and tactile examination of a conveyance to determine whether it may harbor any organisms or other organic material that could present a risk of spreading aquatic invasive species.
5. “Person” means an individual; a corporation, partnership, or other legal entity, or their legal representative, agent, or assigns; or a governmental entity.
6. “Waters” means public waters within the jurisdiction of the state used for recreational boating, including rivers, streams, and natural or manmade lakes, ponds, and reservoirs.

IV. Powers and Duties of [Department]

The [Department] is authorized to take any of the following actions to prevent, control, contain, monitor, or eradicate the presence of aquatic invasive species within the state:

1. Identify aquatic invasive species subject to this Act.
2. Identify waters or other locations affected by the presence of aquatic invasive species, including but not limited to waters or locations outside the [State].
3. Possess and transport aquatic invasive species for the purposes of identification, sampling, testing, and disposal.
4. Stop, detain, and inspect, a conveyance.
5. Decontaminate or order the decontamination of a conveyance.
6. Enter into agreements with other governmental entities to facilitate interstate or intrastate cooperation regarding the inspection and decontamination of conveyances.
7. Enter into agreements with other governmental entities to address management issues associated with interstate or intrastate waters.

V. Prohibitions

1. Except as authorized by [Department], a person may not possess, import, ship, or transport within this state, or cause to be imported, shipped or transported within this state, an aquatic invasive species.
2. Except as authorized by the [Department], a person may not place a conveyance, or cause a conveyance to be placed, into waters within this state without first complying with the applicable requirements of section VI of this Act and rules adopted by the [Department] under this Act.

VI. Responsibilities of Conveyance Owners, Operators, and Transporters

1. A person removing a conveyance from waters shall, to the extent practicable, and in accordance with applicable requirements and protocols established by the [Department]:

- a. Clean the conveyance by removing all visible organic material, including, but not limited to, plants, animals, and mud;
 - b. Drain the conveyance by removing any plug or other barrier that prevents water drainage and running any pumps on board to expunge water; and
 - c. Dry all compartments, spaces, and associated equipment that hold or may hold water, including complying with measures for drying and drying times as established in rules promulgated by [Department] under this Act.
2. The [Department] by rule may establish requirements and protocols for the cleaning, draining, and drying of a conveyance.
 3. Except as authorized by the [Department], a person may not place a conveyance, or cause a conveyance to be placed, into the waters of the state without first complying with the aquatic invasive species prevention requirements set forth in this Act or rules promulgated by [Department] under this Act.
 - a. Stop at all inspection stations established by [Department] under section VII of the Act on or near the conveyance's route of travel;
 - b. Comply with inspection and decontamination procedures set forth in this Act and rules adopted by [Department] under this Act; and
 - c. Comply with all lawful inspection and decontamination orders issued by the Department.

VII. Inspection of Conveyances

1. To prevent the introduction, importation, infestation, and spread of aquatic invasive species, the [Department] is authorized to establish aquatic invasive species inspection stations at any location within the state, including but not limited to: interstate borders, highways or other roads; locations adjacent to or near waters; and at [Department] offices.
2. At inspection stations established under this section, authorized [Department] personnel may inspect the exterior of conveyances for the presence of organisms or organic material that may harbor aquatic invasive species. Authorized [Department] personnel may also examine any interior portion of a conveyance that may carry or transport water or organic material, including, but not limited to, engines and motors, live wells, ballast tanks, and bilge areas. During the inspection, authorized [Department] personnel may also check for compliance with the requirements of this Act and with rules adopted by [Department] under this Act.
3. The [Department] by rule may establish standards and procedures for inspecting conveyances for the presence of organisms and organic material.
4. If organisms or organic material that may harbor aquatic invasive species are found or suspected to be present as the result of an inspection, the [Department] may decontaminate the conveyance or order the decontamination of the conveyance pursuant to [Section VIII].

5. A law enforcement officer may stop a conveyance at a location other than an inspection station established under this section, to inspect the conveyance for the presence of organisms or organic material that may harbor aquatic invasive species, or for proof of a certification issued pursuant to [Section IX], under the following circumstances:
 - a. If the conveyance is visibly transporting organisms or organic material, including, but not limited to, animals, plants, or mud, or the law enforcement officer otherwise reasonably believes, based on articulable facts, that the conveyance presents a risk of spreading aquatic invasive species; or
 - b. If the owner of the conveyance fails to stop at a required inspection station or to comply with [Department] required procedures related to inspection and decontamination of conveyances.

6. If a law enforcement officer conducts an inspection of a conveyance pursuant to this Act and finds or suspects the presence of organisms or organic material that may harbor aquatic invasive species or on the basis of other articulable facts that an aquatic invasive species is being transported, a law enforcement officer may:
 - a. Escort the conveyance to the nearest inspection station for immediate decontamination;
 - b. Issue an order requiring the decontamination of the conveyance; or
 - c. Detain or impound the conveyance until decontamination is complete.

VIII. Decontamination

1. Personnel authorized by the [Department] may decontaminate or order the decontamination of a conveyance found or reasonably believed to harbor aquatic invasive species after an inspection conducted pursuant to [Section VII].
2. The [Department] may by rule establish standards and procedures for decontaminating conveyances and disposing of organisms and organic material.
3. If a person refuses to submit to decontamination of a conveyance found or reasonably believed to harbor aquatic invasive species, or due to personal hardship is unable to immediately accompany the conveyance for decontamination, a law enforcement officer may detain or impound the conveyance until the decontamination is complete.
4. The owner of a conveyance that is decontaminated or detained due to failure to cooperate by the owner or person in possession of the conveyance is liable for all costs associated with the decontamination or impoundment, in accordance with the applicable rules promulgated by [Department] under this Act.

IX. Certification of Inspection and Decontamination

1. The [Department] may issue an inspection or decontamination certificate to the owner or person in possession of a conveyance that has been inspected. The certificate must reflect:
 - a. The name of the [Department] and of the person who conducted the inspection;
 - b. The date, place, and time of inspection;
 - c. Any preventative measures performed or ordered; and
 - d. Any decontamination performed.
2. If the [Department] issues an inspection or decontamination certificate to the owner or person in possession of the conveyance, the [Department] may attach a tamper-proof device to the conveyance. The device may be a seal, tag, or band that prevents the conveyance from coming in contact with water without being broken.
3. The [Department] by rule shall establish required retention periods for inspection and decontamination certificates issued under this section.
4. The [Department] may recognize by reciprocity an inspection or decontamination certificate issued by another governmental entity, if the other governmental entity adheres to the minimum standards for inspection, decontamination, and quarantine established in [agreed upon standard protocols, such as the Uniform Minimum Protocols and Standards for Watercraft Interception Programs].

X. Penalties

Option 1: Civil Enforcement Only

1. A person who violates or fails to comply with any provision of this Act or any rules adopted under this Act is subject to a civil penalty of not more than [X] dollars.
2. All civil penalties collected under this section shall be deposited in [designated fund].

Option 2: Civil and Criminal Enforcement

1. Any person who violates or fails to comply with any provision of this Act or any rules adopted under this Act commits a Class [X] misdemeanor.
2. Any person who complies with this Act's requirements for inspection and decontamination of conveyances is not subject to criminal sanctions under this section for violations of Section V(1) of the Act, unless the person knowingly contaminates or attempts to contaminate waters with an aquatic invasive species.

3. In addition to any other criminal penalty provided in this section, any person who violates or fails to comply with any provision of this Act or any rules promulgated under this Act may be assessed civil penalties in an amount not to exceed [X].
4. Civil penalties collected under this section shall be deposited in [designated fund].

SUPPLEMENTAL AUTHORITIES

Aquatic Invasive Species Fund

1. A person shall not operate a conveyance on the waters of this State unless the person has paid to the [Department] the aquatic invasive species fee established pursuant to Subsection (2).
2. The [Department] shall establish by regulation the fee structure for conveyances, which shall take into account the various categories and uses of conveyances, the financial needs of the aquatic invasive species program, and administrative costs.
3. The aquatic invasive species fee established pursuant to Subsection (2) shall be paid annually. The fee shall be deposited in the [Aquatic Invasive Species Fund] and used by the [Department] for enforcement of this Act, and for public education, research, and management activities to address aquatic invasive species.

Closure of Waters

1. The [Department] may restrict conveyance usage on waters of the state when necessary to prevent, control, contain, monitor, or eradicate the presence of aquatic invasive species within the state.
2. The [Department] by rule may establish standards and procedures for monitoring waters to determine whether they are affected by the presence of aquatic invasive species and what management actions are required.
3. The [Department] is authorized to develop procedures to ensure proper notification of person(s) affected by the closure of a water body pursuant to Subsection (1). The notification shall:
 - a. Set forth the reasons for the closure or restriction;
 - b. Identify the type and extent of conveyance restrictions; and
 - c. Identify the time period the restrictions will be in place.
4. The [Department] is authorized to work with person(s) responsible for the management of a water affected by conveyance restrictions to prepare and implement management plans to prevent, control, contain, monitor, or eradicate the presence of aquatic invasive

species. Plans shall be developed in accordance with rules promulgated by the [Department] under this Act.

- a. Upon approval of a management plan by the [Department], the [Department] may amend or rescind conveyance usage restrictions issued pursuant to Subsection (1).
- b. If the [Department] determines at any time that a management plan is not being effectively implemented, the [Department] may further restrict conveyance usage.

Drying Time

1. The [Department] may issue an order requiring the owner or person in possession of a conveyance to dry the conveyance for a designated period of time, not to exceed [x] days, before launching in waters.
2. The [Department] may allow the owner or person in possession of the conveyance to retain possession of the conveyance during the drying period, subject to any requirements established by the [Department].
3. The [Department] may impound a conveyance if necessary to ensure that the mandatory drying period is achieved.

Local Government Authority

1. This Act preempts a city, county, or other unit of local government from adopting local regulations or ordinances related to conveyance inspection and decontamination that are more stringent than those adopted by the state.
2. Any city, county, or other unit of local government that owns or manages a water where recreational, boating, or fishing activities are permitted, except a privately owned water that is not open to the public, is encouraged to do both of the following:
 - a. Assess the vulnerability of the water for the potential introduction of aquatic invasive species via conveyances; and
 - b. Develop and implement a program designed to prevent the introduction of aquatic invasive species via conveyances. Such program shall be authorized by the [Department] and carried out in accordance with rules promulgated by the [Department] under the Act. The program may include, as feasible and authorized by the [Department], the following components:
 - i. Monitoring of the water for the presence of aquatic invasive species;
 - ii. Management of the recreational boating and fishing activities that are permitted, particularly the potential pathways of aquatic invasive species introduction;
 - iii. Public education; and
 - iv. Conveyance inspection and decontamination.

Forfeiture

Any person who violates any of the provisions of this Act may have his or her boating license suspended or the conveyance forfeited to the [Department]. The conveyance may be disposed of by the [Department] through public auction and the proceeds thereof deposited in the [designated fund].

Immunity

The [Department] shall not be liable to any person for any loss resulting from damage to conveyances as the result of inspection or decontamination provided the [Department] adhered to all rules promulgated by [Department] under this Act.

Reporting

A person who discovers an aquatic invasive species within [State] or has reason to believe an aquatic invasive species may exist at a specific location shall report the discovery to the [Department] within 48 hours.

