

AQUATIC INVASIVE SPECIES: CHALLENGES FOR STATES



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**Federal Regulatory Framework for
Controlling the Movement of Invasive Species**

May 16, 2013

Introduction

- Jas. Adams, Attorney-in-Charge
 - Natural Resources, Oregon DOJ
- Natural Resources Section:
 - Advises natural resources agencies
 - Fish/Wildlife, Agriculture, Marine Board
- Views expressed not necessarily official position of Oregon Attorney General
 - Arise out of involvement with AIS in Oregon
 - Including analysis & drafting of HB 3399





Underlying Questions

- How do states unaffected by AIS prevent their invasion?
 - Boats on roads are *one* vector in West
 - Ballast water another for coastal states
- What legal obligation do affected states have re: outward spread?
- What regulatory leverage do states have with each other?
- What can interstate compacts achieve?
- What is most effective federal role?
- How to shape federal regulation?



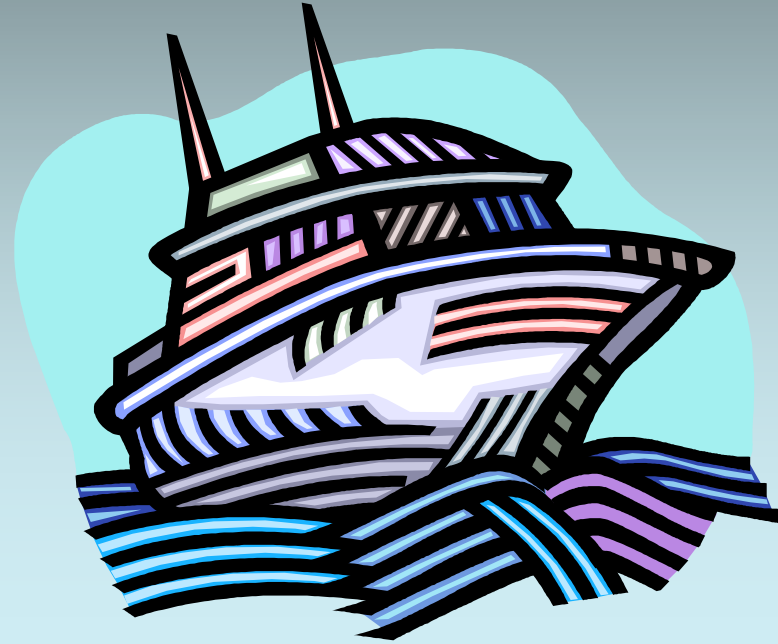
Western States: Affected and Unaffected

- Five affected states prohibit movement of zebra and quagga mussels (dreissenids)
 - Arizona, California, Colorado, Nevada, New Mexico
- Five *unaffected* states also prohibit dreissenids
 - Idaho, Washington, Oregon, Wyoming, Montana
- *As yet* unaffected = “Sword of Damocles”



Highlights Covered

- **AIS Control in Oregon**
- **A Constitutional Obstacle**
- **Search for Viable Model**
- **Mandatory Roadside Inspection Program**
- **Interstate Issues**
- **Potential Federal Roles**
- **Federal Regulation**



Saga of AIS in Oregon

- Oregon not yet affected by mussels
 - Illegal to possess or transport
- 2001: Oregon AIS Mgt Plan
- 2002: Creation of OISC
- So, how to *prevent* invasion?
- Mandatory roadside inspections
 - State Police doubted constitutional
- Enactment in 2009 of *voluntary* inspections as immediate solution



Efficacy of Voluntary Compliance

- 2010 Oregon AIS Report showed 27% *voluntary* compliance
 - 3 of 4 boats not stopping for inspection
- 2/3 of boats inspected came from states already infested with mussels
- Voluntary approach = ineffective
- This was the *missing link* in Oregon's program for control of highways as one vector of AIS



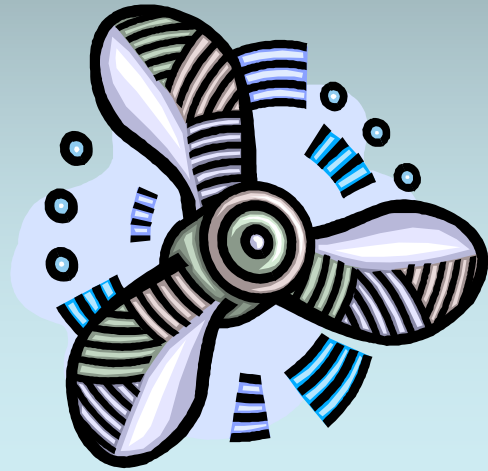
II. The Constitutional Barrier

- Nov 2010 OISC Summit
- Oregon's Constitution Art I § 8
 - *No* DUII roadside checkpoints
- If criminal liability :
 - Stop: reasonable suspicion
 - Search: probable cause
- Reasonable suspicion stops = spotty
 - E.g., boats/vehicles w/ AZ plates
 - But boats from other states may come directly from affected waters in AZ



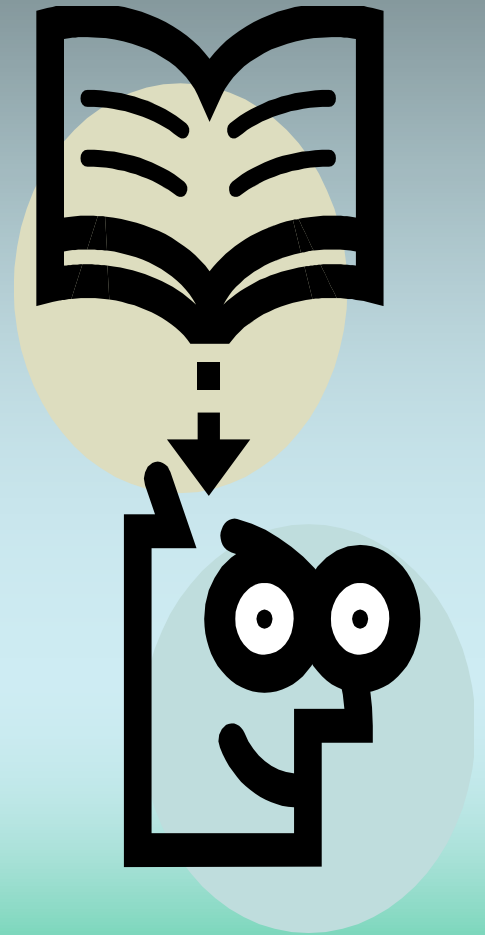
III. Search for Viable Model

- Introduction of HB 3399 in 2011
 - Bare authorization of mandatory roadside AIS inspections
 - Lacked any sidebars, parameters
- Advice to Oregon Marine Board
 - Must decouple criminal liability
 - Must satisfy Oregon constitutional standards



Required Elements under Or Const for Valid Administrative Searches

1. Clear statement of civil purpose
2. By politically accountable authority
3. Elimination of subjective discretion
4. *Decriminalizing* outcomes for cooperators
5. *Criminalizing* failure to stop
6. Explicit rulemaking authority



1. Statement of Civil Purpose

- A clear statement of the civil, noncriminal purpose of the mandatory roadside boat inspection program



- “The purpose of the administrative search authorized under this section is to prevent and limit the spread of aquatic invasive species within Oregon.”

H.B. 3399, 76th Leg. Assemb., Reg. Sess. (Or. 2011)

2. Politically Accountable Authority

- Authority from politically accountable body for administrative stop, search, seizure of AIS



- E.g., state legislation enacted by elected, politically accountable state legislators

3. Elimination of Subjective Discretion

- Program must eliminate subjective official discretion re scope and intensity of search.
- Hence: *All* persons transporting recreational or commercial watercraft must stop and agency shall inspect *every* watercraft.



4. Decriminalizing Consequences

- Decriminalization of consequences when motorists stop and cooperate with decontamination procedures
 - By uncoupling wildlife integrity rules and statutes that could lead to criminal liability.
- Hence: Person transporting watercraft who stops at check station and cooperates in inspection & decontamination is not subject to criminal sanctions for possessing or transporting AIS.



5. What If Failure to Stop?

- Criminalization of failure to stop punishable as a traffic violation is OK
 - Does not punish those who have stopped and cooperated
 - Only the transgressors are subject to criminal violations
- Hence: Person transporting watercraft who fails to stop and submit to inspection at AIS check station commits a Class D violation.



6. Explicit Rulemaking Authority

- Explicit authority for agency rulemaking to implement this administrative search approach to mandatory boat inspection stations.
 - Oregon Appellate Court: statute must be supplemented by rules to eliminate officer discretion or else warrantless, suspicionless seizures are unlawful
- Hence: legislation provided that 3 state agencies “may adopt” rules to implement.
 - And the Oregon State Marine Board did so



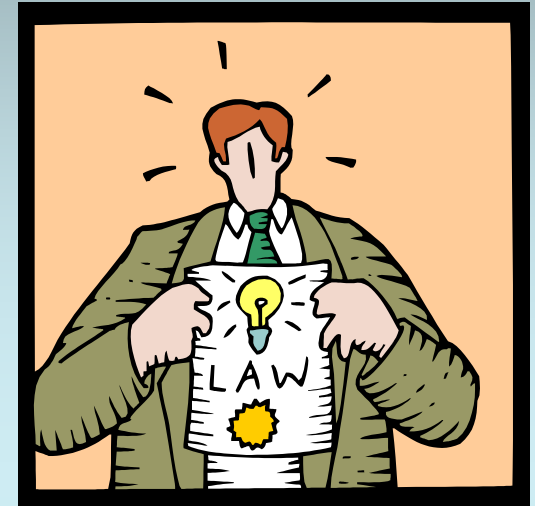
Cf. Federal Tests for Administrative Searches

- See article by Kondo/Cotter/Otts
- Closely regulated industries:
 - Substantial government interest
 - Warrantless inspection necessary to regulation
 - Certainty /regularity = adequate warrant substitute?
- Balancing test for general roadblocks:
 - Need for government intrusion
 - Vs. level of intrusion on individual privacy
 - As long as not a subterfuge for crime control



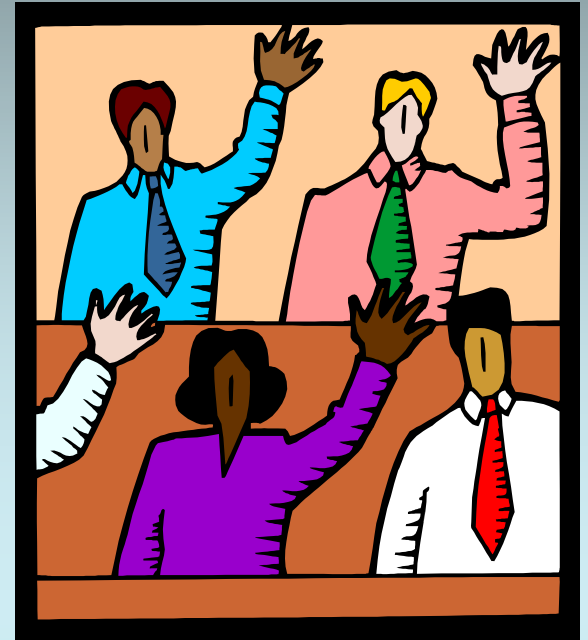
Oregon Boat Inspections

- Oregon now has a mandatory roadside AIS inspection system
- All boats being transported on roads must stop and be inspected
- But -- no ability to compel decontamination
- And no quarantine of vessel
 - Due to fiscal impacts of those aspects



Effectiveness of Oregon's AIS *Mandatory* Inspection Program

- In 2012, 4256 vessels were inspected at mandatory checkpoint stations in Oregon
- 54 vessels were infected with AIS and decontaminated
- 17 were infected with zebra or quagga mussels
- Busiest point of entry was I-5 at California border
 - 2079 inspections; 12 AIS infestations
- Six vehicles that bypassed stations were fined \$110



AIS Challenges for States

- How do *unaffected* states prevent AIS invasion?
 - Guard roads but with scarce resources
 - Oregon: only 5 mobile stations
 - Not 24/7/365 coverage
 - Not all entry points
 - Regulate ballast water on west coast
 - Federal vs. state control (SB 116)
- What is legal obligation of *affected* states to control outward spread of AIS?
 - Only as set forth in compacts, federal law?
- What regulatory leverage does one state have with another state? (Same answer?)



Interstate Compacts

- What gaps can interstate compacts fill re AIS?
- Generally, compact hodgepodge not ideal system
- AIS Violator Compacts = reciprocal enforcement
 - One state agrees to revoke or not renew
 - Its own fishing and hunting licenses
 - For AIS violations in sister state.
 - No federal legislation: cf. Wildlife Violator Compacts
- Some affected states may not agree to curb their licenses internally, let alone reciprocally
 - Fishing & hunting licenses = source of revenue



Voluntary Programs

- Voluntary compliance rates are low
 - As Oregon's voluntary inspections showed:
1 in 4 compliance rate
- Interstate compacts are voluntary
- Oregon appreciates *all* voluntary efforts by sister states re notice, coordination
 - Re boat movements – yet not comprehensive
- As noted, some states may not volunteer to impose effective, enforceable constraints on own recreational boaters



Incentives

- Often seen as alternative to regulation
- Incentives could help improve voluntary compliance and best practices
- Query whether providing incentives is best role for federal or state government
- Private sector and non-profits can provide incentives as a way to aid compliance
- Only the federal government can provide *national* regulation



Shaping Federal Regulation

- Currently only zebra mussels listed as “injurious wildlife”
 - Add quaggas = legislative proposal
- Lacey Act Enforced by US FWS
 - Only one 2010 case: \$3K for 4 barges
 - Transporting zebras (Iowa-Alabama)
 - Importation appears to be higher priority
- Query: Does even vigorous federal or state enforcement deter *recreational* boaters, as opposed to the commercial sector?



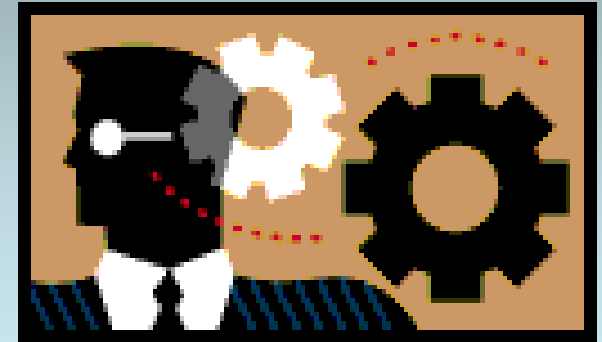
Ideal Federal Regulation

- How to design if clean slate?
- States might arguably want:
 - Comprehensive focus (not just AIS)
 - Standard protocols
 - For decontamination methods
 - For establishing proof for interstate travel
 - I.e. standard tags, cable locks
 - Flexibility -- to allow response to new invasive threats as yet unknown but potentially catastrophic



Control by High-Risk Vectors

- Control by species clumsy
 - Rules take 3-5 years to amend
 - Legislation is uphill battle
 - Both too slow for new threats
- Control by high-risk vectors
 - More flexible
 - Allows more rapid response
 - “Built-in” adaptive management



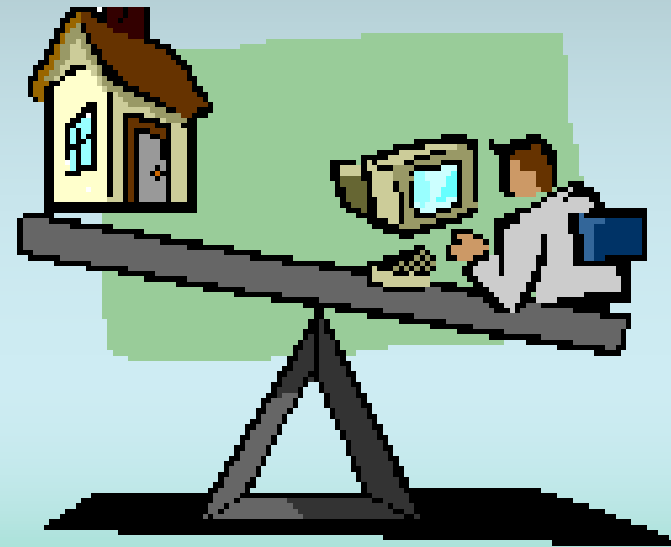
High-Risk AIS Vectors

- **Transportation**
 - Highways, roads, rail
 - Shipping – ships, containers
 - Ballast water – original vector
 - Still poses risk for coast states
 - Oregon SB 116 calls for study
 - Seaplanes –pristine waters as recreational destinations (Waldo)
- Internet trade – *global* risk
 - Aquariums, aquaculture, live bait



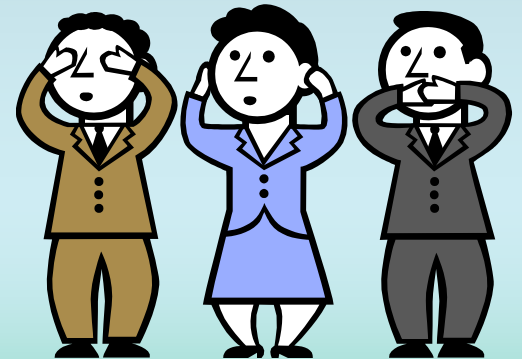
Specifics for Federal Legislation

- Require fee be charged to those using affected waters
 - To pay for decontamination
 - Then, *require* decontamination
- Require states or feds at water bodies to give notice of violators to other states?
 - Which states? Destination?
 - Doable under Privacy Act?



Federal Preemption

- States generally chafe under federal preemption
- Express & field preemption *preclude* state regulation
 - S.3606 bars “more stringent” state laws re import or interstate transport, but possession left to states
- Should federal regulation be *floor* or *ceiling*?
 - May depend on rigor of standards
 - States want to remain involved
 - Yet uniformity is important
- Important to be *deliberate* in this



Looking Beyond AIS

- Invasive species are *global* problem
- Invasive control also national crisis
- Requires interstate coordination
- Federal regulation should be organized around high-risk vectors
- Must ensure rapid response to new threats to *all* states in the US
- We should heed dreissenid experience to inform our *future* prevention efforts to protect nation



The End

- Thank you for your consideration of points made in this presentation
- Email or call with any questions
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