

AQUATIC INVASIVE SPECIES IN OREGON: THE SEARCH FOR A VIABLE MODEL FOR MANDATORY ROADSIDE INSPECTIONS

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In the 2009 legislative session, the Oregon Legislature enacted eleven legislative bills addressing the control of invasive species – a truly remarkable achievement.² One of the bills was House Bill 2220, which provided for voluntary roadside boat inspection stations to allow boats being transported by motorists to

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² S.B. 105, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (increasing maximum civil penalties for non-compliance with ballast reporting and discharge requirements from \$10,000 to \$25,000); S.B. 571, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (increasing penalty for releasing or attempting to release live fish into body of water without permit to maximum of five years imprisonment, \$125,000 fine, or both; requiring State Fish and Wildlife Commission to revoke all angling licenses and tags of person convicted of releasing or attempting to release live fish into body of water without permit; allowing commission to institute suit for recovery of damages for control or eradication of live fish released into body of water without permit); H.B. 2020, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (establishing an invasive species rapid response fund using ATV funds from Oregon Parks and Recreation Department); H.B. 2212, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (consolidating Oregon's plant quarantine laws; enhancing definition of integrated pest management); H.B. 2213, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (adding two seats to the OISC; an ex-officio seat for the Oregon Department of Environmental Quality and another at large seat); H.B. 2220, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (prohibiting operation of a manually propelled boat or motorboat more than 10 feet in length without first obtaining an aquatic invasive species prevention permit; establishing an Aquatic Invasive Species Prevention Fund administered by the Oregon Marine Board to prevent and control aquatic invasive species); H.B. 2221, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (making it a crime to knowingly allow feral swine to roam on private land or to sell or purchase hunts for feral swine); H.B. 2424, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (expanding the role of the Adopt-A-Highway program to include weeds); H.B. 2583, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (prohibiting a person from launching a boat into waters of the state if there were any visible aquatic species on the hull, trailer or other related equipment, or any invasive species inside the boat); H.B. 2625, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (amending existing statute to provide explicit DEQ authority for vessel boarding, inspections and collection of ballast water samples for compliance verification purposes); H.B. 2714, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (continuing the Shipping Transport of Aquatic Invasive Species Task Force).

be inspected and decontaminated, in order to prevent the introduction and spread of aquatic invasive species (AIS) in Oregon.³

In the course of implementing the voluntary AIS roadside inspection station program during 2010, however, it became clear that the voluntary compliance rate for the AIS inspection program was only 27%. That meant that three out of every four motorists transporting boats on Oregon roads as they passed an AIS inspection station in 2010 were not stopping for voluntary inspection and decontamination. Such uninspected boats are potentially infested with aquatic invasive species, the introduction and spread of which, in Oregon, will inevitably cost millions of dollars in damage to natural resources and to water-related facilities.⁴

On November 18, 2010, the Oregon Invasive Species Council (OISC) held its Oregon Invasive Species Summit. During the morning session, six Oregon legislators participated in a panel discussion on the following topic:

Oregon's constitution does not allow for mandatory boat inspections. Yet we know that the primary way other states, like Idaho, prevent

³ H.B. 2220, 75th Leg. Assemb., Reg. Sess. (Or. 2009).

⁴ See *Center for Lakes and Reservoirs, Projects, Zebra Mussel Monitoring*, PORTLAND STATE UNIVERSITY, <http://www.clr.pdx.edu/projects/volunteer/zebra.php> (last visited Aug. 13, 2012). The Center for Lakes and Reservoirs at Portland State University coordinates the Zebra and Quagga Mussel Monitoring Program to help prevent the continued spread of invasive freshwater mussels such as zebra and quagga mussels. The Center reports that Zebra and quagga mussels cause far-reaching damage to water structures and native ecosystems. Monitoring and early detection of these mussels are key to minimizing the risks for Western water bodies. The quagga mussel, which is native to the Ukraine, is a freshwater bivalve slightly larger than the zebra mussel that is more tolerant of deeper, colder waters and can colonize both rocky and sandy substrates. See *Center for Lakes and Reservoirs*, PORTLAND STATE UNIVERSITY, <http://www.clr.pdx.edu/profiles.php> (last visited Feb. 22, 2012).

According to the Arizona Department of Game and Fish, quagga mussels were first found in Arizona in Lake Mead in January of 2007. They originally came from Eurasia and became established in the Great Lakes in the 1980s. Since being discovered, these prolific invaders have spread rapidly. A single adult quagga mussel can produce a half-million larvae in a single year. They colonize rapidly on hard surfaces and can ruin boat motors and clog water intake structures, such as pipes and screens, thereby impacting pumping capabilities for power and water treatment plants. Invasive mussels such as quaggas and the closely related zebra mussels have cost industries and businesses in the Midwest hundreds of millions of dollars in maintenance and damage repair. See *Outdoor Recreation, Watercraft*, ARIZONA GAME AND FISH DEPARTMENT, http://www.azgfd.gov/h_f/zebra_mussels.shtml (last visited Aug. 13, 2012).

the introduction of aquatic invasive species, such as Quagga and zebra mussels, is to conduct mandatory boat inspection stations. How can we protect Oregon's economy and environment from the threat of aquatic invasive species, AND not violate the rights of private citizens?

The panel discussion among the legislators focused on the perceived need to amend the Oregon Constitution to permit mandatory boat inspections for AIS, given that Oregon's Constitution requires reasonable suspicion to stop and probable cause to search. During the panel discussion, the author of this article commented to clarify that what the Oregon Constitution prohibits is the imposition of *criminal* sanctions arising out of mandatory boat inspections without reasonable suspicion to stop and probable cause to search. The author noted that a mandatory inspection program attended only by civil sanctions remained a potentially viable model under the Oregon Constitution for managing aquatic invasive species.

Following the 2010 Oregon Invasive Species Summit, the Oregon State Marine Board sought legal advice from the author of this article on how to provide for a constitutionally viable and effective mandatory boat inspection station program to prevent the spread of aquatic invasive species. That advice was provided to the Oregon Marine Board in December 2010. In January 2011, Representative Bob Jensen sponsored House Bill 3399, which, as introduced, provided simply that state agencies "may require a person operating or transporting a recreational or commercial watercraft to stop at a check station for the purpose of inspecting the watercraft for the presence of aquatic invasive species."⁵

The Marine Board then authorized the advice it had obtained from the Oregon Attorney General's Office to be released to the Oregon Legislature for purposes of amending House Bill 3399. The author worked closely with Legislative Counsel⁶ to craft amendments to House Bill 3399 to create a viable administrative search model for mandatory boat inspection stations to control the introduction and spread of aquatic invasive species within Oregon.

A. History of Control of Aquatic Invasive Species in Oregon

In 2010, the Oregon State Marine Board (OSMB) and the Oregon Department of Fish and Wildlife (ODFW) issued their Oregon Aquatic Invasive

⁵ H.B. 3399, 76th Leg. Assemb., Reg. Sess. (Or. 2011)

⁶ Much credit goes to Heidi Elliott, the attorney in Legislative Counsel who worked with the author on the final wording of the amendments to HB 3399 to achieve a viable administrative search approach to mandatory AIS inspection stations.

Species Prevention Program 2010 Report.⁷ This report detailed the history of the attempts to control aquatic invasive species in western states, including Oregon, and also described the status of AIS control efforts in 2010. The history and status of AIS control efforts detailed in that report are summarized as follows.

The Oregon Invasive Species Council (OISC) was created by the Oregon State Legislature to conduct a coordinated and comprehensive effort to prevent invasive species from being introduced into Oregon and to eliminate, reduce, or mitigate the impacts of invasive species already established.⁸ After a fresh water invasive species, the quagga mussel (*Dreissena bugensis*), was detected in Lake Mead, Nevada in 2007, many western states implemented programs to protect water bodies against the spread of that highly destructive aquatic invasive species. Those efforts were primarily focused on establishing recreational boat inspection stations and implementing early detection and rapid response strategies.⁹

The OISC then asked the Oregon Department of Fish and Wildlife (ODFW), the Oregon State Marine Board (OSMB), the Oregon Department of Agriculture (ODA), and Portland State University (PSU) to develop a state plan to address the growing threat posed by spread of the quagga mussel. Initially, the plan included developing mandatory boat inspection stations on main highways crossing the state's borders and requiring trailered watercraft to stop for an AIS inspection. A program budget was submitted to the 2009 Oregon Legislative Assembly to create the infrastructure to build border inspection stations and to staff them at an adequate level for intercepting watercraft being transported on major highways before entering the state. After the budget was submitted, however, the Oregon State Police (OSP) noted that such roadside checkpoint stations, if mandatory, would constitute an unreasonable search under the Oregon Constitution.¹⁰

As a result of the constitutional concern raised by the OSP, the approach for AIS boat inspection stations shifted during the 2009 legislative session from mandatory checkpoints to purely voluntary inspections, as reflected in House Bill 2220.¹¹ In June 2009, the Oregon Legislature also authorized ODFW and OSMB to develop a boat permit program modeled after Idaho. Implemented in April

⁷ GLENN DOLPHIN & RICK BOATNER, OR. DEPT. OF FISH AND WILDLIFE OREGON AQUATIC INVASIVE SPECIES PREVENTION PROGRAM, 2010 PROGRAM REPORT (Feb. 2011) [hereinafter 2010 AIS Report], *available at* http://www.dfw.state.or.us/conservationstrategy/invasive_species/docs/AISPP_Annual%20report_2010.pdf.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

2009, this program established a new user fee on boats (both motorized and non-motorized) that would be used to implement a state-wide prevention program. The new program would fund mobile teams for voluntary roadside boat inspections and public education outreach efforts to help in the battle against the introduction and spread of AIS in Oregon.

The 2009 voluntary inspection program sought to protect Oregon against the introduction and spread of aquatic invasive species. Quagga and Zebra mussels (*Dreissena polymorpha*), along with Hydrilla (*Hydrilla verticillata*) were deemed among the top species of concern to keep out of the state. Species like Eurasian watermilfoil (*Myriophyllum spicatum*) and New Zealand Mudsnails (*Potamopyrgus antipodarum*) already had contaminated some Oregon waterbodies, and hence there was a perceived need for those species to be contained within current locations.¹²

Monitoring conducted in 2010 during the first year of the new program indicated that over two-thirds of the inspected vessels came from states or provinces already infested with zebra or quagga mussels.¹³ The decontamination procedure consisted of hot water pressure treatment and physical removal of aquatic invasive species.¹⁴ But the monitoring of the roadside AIS inspection stations also revealed the statistic that only 27% of motorists transporting boats voluntarily stopped at the roadside checkpoint stations.¹⁵

¹² *Id.* at 3.

¹³ *Id.* at 12 (explaining that in the AIS inspections conducted during 2010, “five [inspection] teams completed 2,852 watercraft inspections with eighty percent of the watercraft inspected being registered in Oregon, 7% Washington, 6% California, 4% Idaho and the remaining 3% included 23 other states and British Columbia (BC). Watercraft from 19 of the 27 states and BC came from states infested with quagga or zebra mussels.”)

¹⁴ *Id.* at 13-14 (explaining that the decontamination equipment consisted of “five self-contained decontamination trailers, one for each [team]. Each trailer contain[ed] a water heater that could heat water temperatures in excess of 140°F and a pressure washer, capable of sustaining water pressure at 3,000 psi. The decontamination units [met] or exceed[ed] all of the standards for watercraft decontamination of quagga/zebra mussels... Each trailer also contain[ed] a catch basin tarp (10’x 26’x2’’ with round foam walls) to capture any water during a watercraft decontamination and a siphon pump to recapture the water for proper disinfection and disposal.”)

¹⁵ *Id.* at 10. The roadside inspection program implemented in 2010 involved watercraft inspections at the following state-wide rest areas: Wilsonville, Santiam, Ogden, Chemult, Baker Valley and Midland. Additionally, inspections were performed off I-84 at Farewell Bend, near Idaho and the I-5 Port of Entry near Ashland. To gain compliance data, when visibility permitted, the inspection teams recorded the number of watercraft that drove by an inspection site without stopping. The teams inspected 422 watercraft but

Clearly, giving the alarmingly low voluntary compliance rate revealed by the monitoring conducted in 2010, the report summarized *ante* identified a huge gap in Oregon’s ability to prevent the introduction and spread of quaga and zebra mussels.

B. Necessary elements of an administrative search approach to a viable and effective mandatory AIS inspection program

A mandatory inspection checkpoint program qualifies as a valid administrative search if it meets four basic requirements: (1) authorization from a politically accountable source; (2) a legitimate administrative purpose; (3) limitation of official discretion regarding the scope and intensity of the search; and (4) compliance by implementing officials with duly adopted agency rules. An administrative search has been described as follows by the Oregon Court of Appeals:

One of the recognized exceptions to the warrant requirement is the administrative search exception. *State v. Haney*, 195 Or App 273, 277, 97 P3d 1211 (2004). A valid administrative search must be conducted for purposes other than law enforcement, pursuant to a policy that is authorized by a politically accountable lawmaking body. *Id.* at 277-78. Furthermore, in order to be valid, such a policy must limit the discretion of those responsible for conducting the search and the scope of the search authorized must reasonably relate to its purpose. *Id.* at 278.¹⁶

The term “administrative search” generally describes routine, non-emergency governmental actions that may intrude into constitutionally protected interests for non-criminal inspection or regulatory purposes.¹⁷ An “administrative search” has been defined in Oregon as “one for a purpose other than the enforcement of laws by means of criminal sanctions.”¹⁸

The gist of the legal advice authorized by the Marine Board to be released to the Oregon Legislature and as developed during the process of a series of amendments to House Bill 3369 was that six elements were needed to create a

observed 1,155 trailered watercraft pass the inspection sites. That translated into a 27% compliance rate for the voluntary inspection stations.

¹⁶ *State v. Coleman*, 196 Or. App. 125, 129 (2004).

¹⁷ 1 Criminal Law §§ 3.24, 3-32 – 3-33 (Or. CLE 2005).

¹⁸ *State v. Anderson*, 304 Or. 139, 141 (1987), *citing* *Nelson v. Lane County.*, 304 Or. 97 (1987); *see also* *Dep’t of Justice v. Spring*, 201 Or. App. 367 (2005).

constitutionally viable and effective administrative search approach to mandatory boat inspection stations:

1. A clear statement of the civil, noncriminal purpose of the mandatory boat inspection program.
2. Express authority from a politically accountable body for the administrative search and seizure of aquatic invasive species.
3. Elimination of subjective official discretion.
4. Decriminalization of the consequences for motorists who stop and cooperate with inspection procedures.
5. For effective enforcement purposes, making *failure* to stop at a mandatory boat inspection station punishable as a violation.
6. Explicit authority for an administrative agency to adopt rules to implement an administrative search model for mandatory boat inspection stations.

Each of those elements is discussed below.

1. Legitimate administrative purpose

Stops and searches under a mandatory AIS inspection program must be for a legitimate administrative or regulatory purpose, not for purposes of criminal-law enforcement. “Preventing prospective or ongoing violations is an administrative purpose . . . , [as] long as the intended consequences of noncompliance with whatever standards the inspection is meant to uphold are non-criminal. If offenders face criminal sanctions, the inspection implicates criminal law enforcement purposes and is not ‘administrative’ in nature.”¹⁹ “If the purpose of the statutory directive is to search for evidence of a crime, then the constitutional strictures of Article I, section 9, must be satisfied.”²⁰

In determining whether the administrative-search scheme has a legitimate non-criminal purpose, “[t]he proper analysis involves first identifying the purpose

¹⁹ *Nelson*, 304 Or. at 104-05, *citing* *Brown v. Multnomah Cnty. Dist. Ct.*, 280 Or. 95 (1977); *see also* *Coleman*, 196 Or. App. at 129-30 (explaining that policy lawfully authorized administrative search of persons detained temporarily at police station, both to ensure safety of detainees and to prevent damage to facility).

²⁰ *State v. Saunders*, 103 Or. App. 488, 494 (1990).

or purposes of the policy and then determining whether the search is reasonable in relation to that purpose or purposes.”²¹ “To be reasonable, the search need not be the least restrictive means to accomplish an end.”²²

This fundamental element (articulation of an administrative purpose) was provided by the legislature in House Bill 3399 in the form of an amendment to section 570.855(1) of the Oregon Revised Statutes:

The State Department of Fish and Wildlife, the State Marine Board [and] or the State Department of Agriculture [are authorized to] may require a person transporting a recreational or commercial watercraft to stop at a check station to inspect the watercraft for the presence of aquatic invasive species. The purpose of the administrative search authorized under this section is to prevent and limit the spread of aquatic invasive species within Oregon.²³

2. Politically accountable authority

To be valid, an administrative search must be directly or indirectly authorized by politically accountable policy makers.²⁴ That authority may be provided by “politically accountable officials [through] laws, ordinances, or delegations of rulemaking authority.”²⁵ Generally, the authority for the initial intrusion (search) must be explicit.²⁶

This element (politically accountable authority) was provided by the enactment of House Bill 3399 by the Oregon Legislature, which is comprised of elected, and hence politically accountable, policy makers.

3. Elimination of subjective official discretion

²¹ Weber v. Oakridge Sch. Dist. 76, 184 Or. App. 415, 437 (2002).

²² *Id.* at 439.

²³ H.B. 3399, 76th Leg. Assemb., Reg. Sess. (Or. 2011) (enacted).

²⁴ Smith v. Washington County., 180 Or. App. 505, 516-17 (2002); *see also Weber*, 184 Or. App. at 435.

²⁵ State v. Atkinson, 298 Or. 1, 6 (1984) (differentiating the roles of the courts and legislatures).

²⁶ Nelson v. Lane County, 304 Or. 97, 104 (1987) (explaining need for explicit authority from outside executive branch for executive agencies to search and seize).

The administrative search procedure must be narrowly and specifically drawn, so that the executing official has no individual discretion as to the scope or intensity of the search.²⁷

If “the legislative authority...does not sufficiently limit the scope of executive discretion concerning such searches, it is possible for the executive itself to provide such limits by establishing a systematically administered program pursuant to its statutory authority.”²⁸

This element (eliminating subjective official discretion) was provided by the following provision of House Bill 3399 as amended:

(4) An agency that operates a check station under this section shall require all persons transporting recreational or commercial watercraft to stop at the check station, and the agency shall inspect every recreational or commercial watercraft that goes through the check station.²⁹

4. Eliminating criminal sanctions when motorists stop and cooperate with inspection procedures

The potential for criminal liability for those who stop and cooperate with the mandatory boat inspection at the check stations would jeopardize the integrity of an administrative search approach to mandatory AIS boat inspection stations. Absent a specific legislative exemption, criminal liability for possessing or transporting aquatic invasive species listed in rules adopted by the Oregon Department of Fish and Wildlife would be possible under section 496.992 of the Oregon Revised Statutes.

²⁷ *Atkinson*, 298 Or. at 10; *State v. Coleman*, 196 Or. App. 125, 129-30 (2004); *Weber*, 184 Or. App. at 436 (“The purpose of that requirement is to protect against arbitrariness and to ensure that individuals or particular items of property are not improperly singled out for special attention.”).

²⁸ *AFSCME Local 2623 v. Dep’t of Corr.*, 315 Or. 74, 83 (1992) (clarifying that rules in the current case “more than adequately rein[ed] in executive discretion”); *see also State v. Boone*, 327 Or. 307 (1998) (explaining that when authority to impound vehicle is authorized by legislative body, a law-enforcement agency may adopt a mandatory inventory policy subject to judicial review to ensure it does not violate constitutional guarantees); *but see State v. LeCarros*, 187 Or. App. 105, 111-12 (2003) (noting that application of 830.035(1) authorizes peace officers to board watercraft for administrative purposes, but the lack of rules to guide officers’ discretion rendered a suspicionless search based on the statute unlawful).

²⁹ Or. H.B. 3399.

Chapter 635, division 56, section 50 of the Oregon Administrative Rules prohibits the importation, possession or transportation within Oregon of zebra mussels and quagga mussels.³⁰ Section 496.992 of the Oregon Revised Statutes makes punishable as a Class A misdemeanor violation of any rule adopted pursuant to the wildlife laws if committed with a culpable mental state and as a Class D violation if committed without a culpable mental state.³¹ Culpable mental state, as defined in section 161.085 of the Oregon Revised Statutes, means intentionally, knowingly, recklessly or with criminal negligence.³²

Because importing, possessing or transporting zebra or quagga mussels in Oregon posed the potential for criminal liability, it was necessary to eliminate the potential for criminal sanctions for those motorists who stopped and cooperated with the administrative search.

This element (elimination of criminal liability for complying motorists) was provided by the following provision of House Bill 3399 as amended:

(5) Notwithstanding ORS 496.992, a person transporting a recreational or commercial watercraft who stops at a check station for inspection and who cooperates in the decontamination process is not subject to criminal sanctions for possessing or transporting aquatic invasive species.³³

5. Provision of criminal sanctions for the *failure* to stop to provide a deterrent to noncompliance with mandatory inspections

Although not a necessary element of an administrative approach to mandatory AIS inspection stations, it was deemed important by policymakers to provide an additional deterrent to noncompliance at the inspection stations, in order to achieve an effective AIS inspection program. The legal question then became whether criminalizing the failure to stop at a mandatory AIS inspection station by making it a violation would jeopardize the administrative search approach for those that did stop and cooperate with the inspection procedures.

³⁰ OR. ADMIN. R. 635-056-0050 (2012) (“live wildlife listed...may not be imported, possessed, sold, purchased, exchanged or transported in the state...Zebra mussel, Quagga mussel — *Dreissenidae* — All species.”)

³¹ OR. REV. STAT. § 496.992(1)-(2), (12) (2011).

³² *Id.* at § 161.085(6)-(10) (2011).

³³ Or. H.B. 3399.

The non-criminal nature of administrative searches is not altered by the possibility that criminal sanctions might result from evidence of criminal activity observed in “plain view” during the administrative search. It is the purpose of the search, not what may be found in plain view during the search, that determines whether the search is a valid administrative search. For example, although the initial justification for the administrative search or seizure must be for a non-criminal, regulatory purpose, evidence of criminal activity discovered during the course of the administrative search nonetheless may be admissible in subsequent criminal proceedings.³⁴

Further, as a conceptual matter, it should not jeopardize the administrative search nature of the mandatory AIS boat inspection program to criminalize the failure to stop as required. By definition, the administrative search has not occurred when someone has failed to stop at a mandatory boat inspection checkpoint. For those motorists who stop as required at the inspection station and who cooperate with the inspection procedures, the search and seizure (i.e. decontamination) features of a mandatory boat inspection station program would still be civil or administrative in nature.

This element (making failure to stop punishable as a violation), designed to improve the effectiveness of the AIS mandatory inspection program, was supplied by the following provision in section 2 of House Bill 3399 as amended:

(2) A person who is transporting a recreational or commercial watercraft and fails to stop and submit to an inspection at an aquatic invasive species check station operated by the State Department of Fish and Wildlife, the State Marine Board or the State Department of Agriculture as provided under ORS 570.855 commits a Class D violation.

As an additional legal wrinkle, section 153.042 of the Oregon Revised Statutes requires that a law enforcement officer must personally witness a violation in order to issue a citation, unless a specific exception has been legislatively enacted.

³⁴ See *State v. Lippert*, 317 Or. 397, 405 (1993) (paperfold of cocaine seized during an inventory search from the pocket of a person lodged for detoxification held admissible in criminal proceeding); *Nelson v. Lane County*, 304 Or. 97, 104 fn 5 (1987) (evidence of a crime found during a “legally authorized and properly administered administrative inspection” could be admissible in a criminal prosecution if the prerequisites for the “plain view” doctrine were met); *Weber v. Oakridge Sch. Dist.* 76, 184 Or. App. 415, 434, (2002) (if the primary purpose of the administrative search properly is non-criminal, it does not matter that “there is some *possibility* that evidence obtained by means of a search *might* be used later as the basis for a criminal prosecution.”) (emphasis in original).

“Except as... otherwise specifically provided by law, an enforcement officer may issue a violation citation only if the conduct alleged to constitute a violation takes place in the presence of the enforcement officer and the enforcement officer has reasonable grounds to believe that the conduct constitutes a violation.”³⁵ As a practical matter, inspection station officials are likely to be in a position to personally observe motorists transporting boats who fail to stop at a mandatory AIS inspection station.

To provide the authority for law enforcement officers to arrest or cite for failure to stop based on information received from inspection station officials, the following exception to Section 153.042 of the Oregon Revised Statutes was inserted into section 2 of House Bill 3399 as amended:

Notwithstanding ORS 153.042, an enforcement officer may issue a citation under subsection (2) of this section when the conduct alleged to constitute a violation has not taken place in the presence of the enforcement officer, if the enforcement officer has reasonable grounds to believe that the conduct constitutes a violation on the basis of information received from an employee of an agency authorized to operate an aquatic invasive species check station who observed the violation.

6. Explicit authority for rulemaking to guide official action

Compliance with agency procedures is a requirement to ensure that individual discretion has not determined the target of the administrative search or its scope and intensity. “If the evidence shows that the inventory deviated from the established policy or procedures of the particular * * * agency, the inventory should be deemed invalid.”³⁶

In one case, the Oregon Court of Appeals invalidated a random safety inspection of a private cabin cruiser boat by county deputy sheriffs under the authority of a Marine Board statute, section 830.035(1) of the Oregon Revised Statutes.³⁷ The court held that section 830.035(1) provided sufficient legislative

³⁵ Or. Rev. Stat. § 153.042 (2011).

³⁶ *State v. Atkinson*, 298 Or. 1, 10 (1984); *see also* *State v. Swanson*, 187 Or. App. 477, 481-85 (2003) (opening lock-box and “purse accessory” kit was not authorized by inventory policy); *State v. Dillon*, 182 Or. App. 308 (2002) (inventory policy authorizing police to inventory possessions of “prisoners” did not authorize police to inventory possessions of person taken into custody pursuant to a civil detoxification hold); *State v. May*, 162 Or. App. 317, 321-22 (1998) (officer who opened opaque cloth bundle violated arrest inventory policy; evidence suppressed).

³⁷ *State v. LeCarros*, 187 Or. App. 105, 111-12 (2003).

authority for the search, and the court noted that the statute authorized the OSMB to promulgate implementing regulations. Because the OSMB had not promulgated such rules to limit the discretion of the officials in carrying out boat searches or seizures, the court invalidated the inspection and seizure of the vessel. The court said, “[s]o long as ORS 830.035(1) is not supplemented by rules governing its enforcement so as to eliminate officer discretion, it cannot lawfully authorize warrantless, suspicionless seizures.”³⁸

In addition to the provision of House Bill 3399 requiring that all persons transporting recreational or commercial watercraft must stop at the check station and that the agency shall inspect every recreational or commercial watercraft that goes through the check station, this element (explicit rulemaking authority) was provided by the following provision of House Bill 3399 as amended:

(6) The State Department of Fish and Wildlife, the State Marine Board and the State Department of Agriculture may adopt rules to carry out the provisions of this section.

Conclusion

The challenge for Oregon in controlling aquatic invasive species within Oregon has been to find a way to craft a mandatory boat inspection program to control aquatic invasive species that comports with the Oregon Constitution. An administrative search approach is the model enacted by the 2011 Oregon Legislature to prevent the introduction and spread within Oregon of aquatic invasive species like Quagga and zebra mussels. With this element of the aquatic invasive species program now in place, there is renewed hope that Oregon can prevent aquatic invasive species from gaining a foothold in Oregon and hence avoid the staggering costs that other states have incurred in trying to control aquatic invasive species once introduced.

³⁸ *Id.* at 111.

APPENDIX

A. Provisions of HB 3399 as enacted

As enacted, HB 3399 provided as follows:

SECTION 1. ORS 570.855 is amended to read:

570.855. (1) The State Department of Fish and Wildlife, the State Marine Board [*and*] **or** the State Department of Agriculture [*are authorized to*] **may require a person transporting a recreational or commercial watercraft to stop at a check station to inspect the watercraft for the presence of aquatic invasive species. The purpose of the administrative search authorized under this section is to prevent and limit the spread of aquatic invasive species within Oregon.**[:]

[(a) Operate check stations for the purpose of inspecting recreational or commercial watercraft for the presence of aquatic invasive species.]

[(b)] **(2) The State Department of Fish and Wildlife, the State Marine Board or the State Department of Agriculture may decontaminate, or recommend decontamination of, any recreational or commercial watercraft that [*is inspected*] the agency inspects at a check station operated under authority of this section.**

[(2)] **(3) All check stations operated under authority of this section must be plainly marked by signs that comply with all state and federal laws and must be staffed by at least one uniformed employee of the State Department of Fish and Wildlife, the State Marine Board or the State Department of Agriculture trained in inspection and decontamination of recreational or commercial watercraft.**

(4) An agency that operates a check station under this section shall require all persons transporting recreational or commercial watercraft to stop at the check station, and the agency shall inspect every recreational or commercial watercraft that goes through the check station.

(5) Notwithstanding ORS 496.992, a person transporting a recreational or commercial watercraft who stops at a check station for inspection and who cooperates in the decontamination process is not subject to

criminal sanctions for possessing or transporting aquatic invasive species.

(6) The State Department of Fish and Wildlife, the State Marine Board and the State Department of Agriculture may adopt rules to carry out the provisions of this section.

SECTION 2. ORS 570.990 is amended to read:

570.990. **(1)** Violation of a provision of ORS 570.010 to 570.050, 570.105 to 570.190, 570.320 to 570.360 or 570.410 is a Class A violation.

(2) A person who is transporting a recreational or commercial watercraft and fails to stop and submit to an inspection at an aquatic invasive species check station operated by the State Department of Fish and Wildlife, the State Marine Board or the State Department of Agriculture as provided under ORS 570.855 commits a Class D violation.

(3) Notwithstanding ORS 153.042, an enforcement officer may issue a citation under subsection (2) of this section when the conduct alleged to constitute a violation has not taken place in the presence of the enforcement officer, if the enforcement officer has reasonable grounds to believe that the conduct constitutes a violation on the basis of information received from an employee of an agency authorized to operate an aquatic invasive species check station who observed the violation.

SECTION 3. This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.

HB 3399 was signed by the Governor and became effective on August 2, 2011.

B. Provisions of Administrative Rule Implementing HB 3399

The Oregon State Marine Board adopted a temporary administrative rule on August 23, 2011, followed by a permanent rule filed on January 12, 2012 to implement the mandatory AIS inspection station program:

OAR 250-010-0660 Watercraft Inspection Stations

(1) For the purpose of this rule, the following definitions apply:

(a) “Check Station” is a location in Oregon that a watercraft inspection team has designated for conducting watercraft inspections for aquatic invasive species.

(b) “Decontamination” is the removal of aquatic invasive species from a watercraft.

(c) “Inspector” is an individual certified and authorized by the Oregon Department of Fish and Wildlife to conduct boat inspections for aquatic invasive species.

(d) “Inspection Certificate” is a form used by the inspector to conduct and record watercraft inspection information.

(e) “Seal” is a plastic zip tie or cable with a unique number that is affixed to the trailer or other device to carry or convey the watercraft.

(f) “Watercraft Inspection Team” is one or more inspectors authorized to inspect for aquatic invasive species on all types of watercraft being transported over roads.

(g) “Watercraft” are recreational or commercial, motorized and non-motorized boats, including canoes, kayaks and rafts, as provided in ORS 830.005, and any equipment used to transport a boat and any auxiliary equipment, as provided in ORS 570.850.

(2) The watercraft inspection team will select Oregon locations to conduct mandatory watercraft inspections as described in the Oregon Department of Fish and Wildlife Aquatic Invasive Species Watercraft Inspection Handbook. Signs will be placed along roads, as prescribed by the Oregon Department of Transportation, directing motorists transporting a watercraft over roads to a designated inspection station.

(3) The watercraft inspection team will inspect every watercraft that enters the check station for the presence of aquatic invasive species and may order decontamination of the watercraft. The inspection will include the hull, motor, propulsion system or component, anchor or other attached apparatus, trailer or other device used to transport the boat, and the bilge, live-well, motor-well and other interior locations that could harbor aquatic plants or animals.

(4) The watercraft inspection team will complete, submit and file an inspection certificate with the Oregon Department of Fish and Wildlife for each watercraft inspection conducted.

(5) The watercraft owner, operator or carrier must provide to the inspector, on request, his or her name and ZIP code. If an inspector determines that

decontamination is required, the owner, operator or carrier must provide the additional information requested on the inspection certificate form including contact information.

(a) The decontamination process will include the hull, motor, propulsion system or component, anchor or other attached apparatus, trailer or other device used to transport the watercraft, bilge, live-well, motor-well or other interior location that could harbor aquatic plants or animals.

(b) Means of decontamination include, but are not limited to, one or more of the following: hot water washing or flushing, high-pressure water jets, hand removal and chemical treatment as determined necessary by the watercraft inspection team.

(6) The inspector will determine that the watercraft is a severe risk if the boat contains quagga or zebra mussels or other high risk aquatic invasive species, as defined in Oregon Department of Agriculture OAR chapter 603, division 052 "Quarantine; Noxious Weeds" or Oregon Department of Fish and Wildlife OAR chapter 635, division 056 "Importation, possession, confinement, transportation and sale of nonnative wildlife", or is of a design that prevents or inhibits effective on-site decontamination and the watercraft is from a known aquatic invasive species contaminated waterbody. In such cases, the inspector will place a seal on the watercraft indicating potential contamination. Only the inspector may attach this seal. Tampered, broken or removed seals are void and no longer valid for the purposes as to when they were attached.

(7) When the inspector determines the watercraft is clean or fully decontaminated, the inspector will attach a seal between the watercraft and trailer or other carriage device indicating a completed inspection. Only the inspector may attach this seal. Tampered, broken or removed seals are void.

Stat. Auth.: ORS 830.110

Stats. Implemented: HB3399, ORS 570.855

Hist.: OSMB 13-2011(Temp), f. & cert. ef. 8-23-11 thru 1-31-12; OSMB 2-2012, f. 1-13-12, cert. ef. 2-1-12