

AQUATIC INVASIVE SPECIES: THE SEARCH FOR A VIABLE MODEL FOR MANDATORY BOAT INSPECTION STATIONS

-- Jas. Jeffrey Adams¹

In the 2009 legislative session, the Oregon Legislature enacted 11 legislative bills addressing the control of invasive species – a truly remarkable achievement.² One of the bills was HB 2220, which provided for *voluntary* boat inspection stations located alongside Oregon roads to prevent the introduction and

¹ The author is the Attorney-in-Charge of the Natural Resource Section of the Oregon Attorney General's General Counsel Division. The views expressed in this article are those of the author and do not necessarily represent the legal position of the Oregon Department of Justice.

² **SB 571** (increased 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; required 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; allowed commission to institute suit for recovery of damages for control or eradication of live fish released into body of water without permit);
HB 2020 (established an invasive species rapid response fund of \$350,000 million using ATV funds from Oregon Parks and Recreation Department);
HB 2212 (consolidated Oregon's plant quarantine laws; enhanced definition of integrated pest management);
HB 2213 (Added two seats to the OISC; an ex- officio seat for the Oregon Department of Environmental Quality and another at large seat);
HB 2220 (prohibited operation of a manually propelled boat or motorboat more than 10 feet in length without first obtaining an aquatic invasive species prevention permit; established an Aquatic Invasive Species Prevention Fund administered by the Oregon Marine Board to prevent and control aquatic invasive species);
HB 2221 (made it a crime to knowingly allow feral swine to roam on private land or to sell or purchase hunts for feral swine);
HB 2424 (expanded the role of the Adopt-A-Highway program to include weeds);
HB 2583 (prohibited 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);
HB 2625 (amended existing statute to provide explicit DEQ authority for vessel boarding, inspections and collection of ballast water samples for compliance verification purposes);
HB 2714 (continuation of the Shipping Transport of Aquatic Invasive Species Task Force); Senate Bill 105 (increased maximum civil penalties for non-compliance with ballast reporting and discharge requirements from \$5,000 to \$25,000).

spread of aquatic invasive species (AIS) in Oregon. During 2010, however, it became clear that the voluntary compliance rate for the AIS inspection program was only on the order of 27%. That means that 3 out of every 4 boats being transported on Oregon roads past an AIS inspection station were not stopping for voluntary inspection. Such 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.

On November 18, 2010, the Oregon Invasive Species Council (OISC) held its Oregon Invasive Species Summit. In 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 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 aquatic invasive species (AIS), given that Oregon's Constitution requires reasonable suspicion to stop and probable cause to search. The author of this article rose 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, and that a mandatory inspection program attended only by *civil* sanctions – an administrative search – was a potentially viable model under the Oregon Constitution for managing aquatic invasive species.

Subsequently, in the 2011 legislative session, Representative Bob Jensen sponsored HB 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.” The Oregon State Marine Board sought legal advice from the author of this article on how to provide for a valid mandatory boat inspection station program that would be consistent with the Oregon Constitution. The author then worked with Legislative Counsel to craft amendments to HB 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.

The Marine Board authorized the advice to be provided to the Oregon Legislature during the 2011 session for purposes of amending HB 3399. The gist of the advice was that six basic elements are necessary to create an effective administrative search approach to mandatory boat inspection stations to protect Oregon from aquatic invasive species:

1. A clear statement of the civil, noncriminal purpose of the mandatory boat inspection program, e.g., to prevent the introduction and spread of aquatic invasive species in Oregon.
2. Express authority from a politically accountable body (the Oregon Legislature) for the administrative search and seizure of aquatic invasive species.
3. Elimination of subjective official discretion by requiring that all vehicles with boats must stop.
4. Decriminalization of the consequences for motorists who stop and cooperate with inspection procedures, by uncoupling statutes that would lead to criminal liability.
5. Criminalization of the *failure* to stop at a mandatory boat inspection station as a violation, and authority for law enforcement officers to arrest or cite for failure to stop based on information received from inspection station officials.
6. Explicit authority for agency to adopt rules to implement an administrative search model for mandatory boat inspection stations.

Legal Background

A mandatory boat inspection checkpoint program qualifies as a valid administrative search program 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 agency guidelines.

“One of the recognized exceptions to the warrant requirement is the administrative search exception. 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. Furthermore, to be valid, such a policy must limit the

discretion of those responsible for conducting the search and the scope of search authorized must reasonably relate to its purpose.”

State v. Coleman, 196 Or App 125, 129, 100 P3d 1085 (2004), *rev den*, 338 Or 16 (2005). 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. 1 CRIMINAL LAW §§ 3.24, 3-32 (Oregon CLE 2005). An “administrative search” has been defined in Oregon as “one for a purpose other than the enforcement of laws by means of criminal sanctions.” *State v. Anderson*, 304 Or 139, 141, 743 P2d 715 (1987), *citing Nelson v. Lane County*, 304 Or 97, 743 P2d 692 (1987); *see also Dept. of Justice v. Spring*, 201 Or App 367, 120 P3d 1 (2005), *rev den*, 340 Or 483 (2006).

(1) Politically accountable authority for the intrusion

To be valid, an administrative search must be directly or indirectly authorized by politically accountable policy makers. *Smith v. Washington County*, 180 Or App at 516-17; *see also Weber v. Oakridge School District 76*, 184 Or App 415, 435, 56 P3d 504 (2002), *rev den*, 335 Or 442 (2003). That authority may be provided by “politically accountable officials [through] laws, ordinances, or delegations of rulemaking authority,” *Atkinson*, 298 Or at 6. Generally, the authority for the initial intrusion (search) must be explicit. *Nelson v. Lane County*, 304 Or 97, 104, 743 P2d 692 (1987).

(2) Legitimate administrative reason for the intrusion

The intrusion 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.”

Nelson, 304 Or at 104-05, *citing Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 570 P2d 52 (1977); *State v. Coleman*, 196 Or App 125, 129-30, 100 P3d 1085 (2004), *rev den*, 338 Or 16 (2005) (policy lawfully authorized administrative search of persons detained temporarily at police station, both to ensure safety of detainees and to prevent damage to facility); *Weber*, 184 Or App at 434. “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.” *State v. Saunders*, 103 Or App 488, 494, 799 P2d 159 (1990).

In determining whether the administrative-search scheme has a legitimate non-criminal purpose, “[t]he proper analysis involves first identifying the purpose or purposes of the policy and then determining whether the search is reasonable in relation to that purpose or purposes.” *Weber*, 184 Or App at 437. “To be reasonable, the search need not be the least restrictive means to accomplish an end.” *Id.* at 439.

(3) Limiting officials’ discretion regarding the scope and intensity of the search.

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. *Atkinson*, 298 Or at 10; *State v. Coleman*, 196 Or App 125, 129-30, 100 P3d 1085 (2004), *rev den*, 338 Or 16 (2005); *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.”).

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.” *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 83, 843 P2d 409 (1992) (rules “more than adequately rein[ed] in executive discretion”). *See also State v. Boone*, 327 Or 307, 959 P2d 76 (1998) (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, 66 P3d 543 (2003) (although ORS 830.035(1) authorizes peace officers to board watercraft for administrative purposes, the lack of rules to guide officers’ discretion rendered a suspicionless search based on the statute unlawful).

(4) Need for executing official to follow agency guidelines

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.” *Atkinson*, 298 Or at 10; *see also State v. Swanson*, 187 Or App 477, 481-85, 68 P3d 265 (2003) (opening lock-box and “purse accessory”

kit was not authorized by inventory policy); *State v. Dillon*, 182 Or App 308, 50 P3d 1172 (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, 986 P2d 608 (1999), *rev den*, 330 Or 375 (2000) (officer who opened opaque cloth bundle violated arrest inventory policy; evidence suppressed).

In *State v. LeCarros*, 187 Or App at 111-12, the court invalidated a random safety inspection of a private cabin cruiser boat by county deputy sheriffs under the authority of a Marine Board statute, ORS 830.035(1). The court held that that statute provided sufficient legislative authority for the search, but the court noted that that 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, “So 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.” *Id.* at 111.

Decoupling criminal sanctions when motorists comply with inspections

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 the wildlife integrity rules adopted by the Oregon Department of Fish and Wildlife in its Division 56 rules would be possible under ORS 496.992.

Such a specific exemption was accordingly incorporated into HB 3399 in order to decouple criminal sanctions for motorists cooperating with the mandatory inspection program:

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.

Criminal sanctions for *failure* to stop for mandatory inspections

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. 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. *See State v. Lippert*, 317 Or 397, 405, 856 P2d 634 (1993) (paperfold of cocaine seized during an inventory search from the pocket of a person lodged for detoxification held admissible in criminal proceeding); *Nelson*, 304 Or at 104 fn 5 (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*, 184 Or App at 434 (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).

Further, 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. Hence, as an analytical matter, for those motorists who have stopped 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 in nature.

As an additional wrinkle, when a motorist fails to stop at an inspection station, a law enforcement officer would need to personally witness the violation in order to issue a citation, unless a specific exception were legislatively enacted. ORS 153.042 provides in pertinent part: “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.”

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 ORS 153.042 was inserted into HB 3399:

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.

Conclusion

The challenge for Oregon in controlling aquatic invasive species within Oregon has been to find a way to craft a mandatory boat inspection model 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.

APPENDIX

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.

Provisions of Administrative Rule Implementing HB 3399

The Oregon State Marine Board adopted a temporary administrative rule on August 23, 2011, to implement the mandatory AIS inspection station program:

OAR250-010-0660

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, or is of a design that prevents or inhibits effective on-site decontamination. 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.

(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: HB 3399, ORS 570.855

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