

In the course of implementing the voluntary AIS roadside inspection station program during

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

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 P

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

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

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

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

station by making it a violation would jeopardize the administrative search approach for those that did stop and cooperate with the inspection procedures.

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

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

APPENDIX

A. Provisions of HB 3399 as enacted

(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.

(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

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