

Maine lobstermen sue state over requirement to track boats

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A lobster boat heads out past House Island in Casco Bay at sunrise in October 2023. *Gregory Rec/Staff Photographer*

Five lobstermen are suing the Maine Department of Marine Resources over a new regulation that requires tracking devices on boats that fish in federal waters, saying the devices violate their privacy rights.

The trackers had to be installed by Dec. 15 under a new regulation from the Atlantic States Marine Fisheries Commission. According to the department, the trackers periodically monitor the locations of a lobstering or crabbing vessel to help identify fishing patterns, which are then used to help grow the fishing stock and better protect the endangered North American right whale population – a contentious issue in the fishing community.

But the lobstermen and other fishing groups believe the trackers violate multiple amendments of the U.S. Constitution and threaten the fishermen’s personal and commercial interests.

“The plaintiffs contend that minute-by-minute surveillance of Maine’s federally licensed lobster fleet is unconstitutional, unwarranted and unfair to Maine lobstermen, who have proven through the actions of generations of lobstering families that they are good stewards of the ocean ecosystems essential to their livelihoods,” Portland attorney Thimi Mina, who is representing the lobstermen, said in a statement.

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The Department of Marine Resources, however, views the lawsuit as counterintuitive. Commissioner Patrick Keliher said the trackers should help quell concerns about insufficient research.

“It’s ironic that a few members of an industry which has voiced a strong opinion that Maine needs to do more to protect this fishery are now resisting efforts to gather the data necessary to help defend their interests in the long run,” Keliher said.

REGULATIONS TO BUILD RESEARCH

In early 2022, the Atlantic States Marine Fisheries Commission announced requirements for fishermen catching lobsters and crabs in federal waters off the coast of New England to use trackers by December 2023. The trackers collect the time and location of a fishing vessel once per minute while it is moving and every six hours when it is not moving. The technology has been provided for free through congressional funding, and the Department of Marine Resources said it would assist fishermen as they work to install and use the trackers.

With data from the trackers, the American Atlantic Coastal Cooperative Statistics Program and the National Oceanic and Atmospheric Administration will observe fishing activity, transit routes and patterns linked to popular fishing grounds – which state and federal agencies have historically struggled to quantify. That data, the Atlantic States Marine Fisheries Commission said, would help identify the amount of lobster and crab stock in federal waters and interactions between protected marine species that could, in turn, inform best regulatory practices.

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In September 2023, the department announced it would be adopting and enforcing the commission’s regulation, which is required by federal statute. At the time, lobstermen raised concerns through the Sustainable Maine Fishing Foundation about privacy and the

challenges of complying with the regulations.

Lobstermen can violate the regulation if they fish without the tracker (even when using their boats for purposes that aren't related to lobstering), remove the device without written approval, insufficiently maintain the tracker for operation and tamper with the tracker, the foundation stated, adding that there are no clarifications on remedial or punitive action in these instances.

"Each of these violations could occur intentionally, or unintentionally, and many could occur without interference by the vessel operators themselves," the foundation wrote to Keliher. "What if a fisherman is unaware his device is malfunctioning and therefore fails to notify MDMR? What if a fisherman is unable to repair the device prior to his subsequent fishing trip?"

A LONG-RUNNING CONFLICT

This is the latest regulation, and subsequent lawsuit, in a drawn-out conflict between federal regulators, the state's marine agency and the fisheries industry over the conservation of the endangered North Atlantic right whale.

Federal regulators contend that traditional lobstering gear severely harms the right whale population, which NOAA estimates is dwindling in part due to entanglements. No right whale deaths have been conclusively linked to Maine's lobster industry, and the last known entanglement in Maine was nearly two decades ago. But scientists have emphasized that there hasn't been enough gear marking to precisely nail down where a whale has been entangled.

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NOAA and other regulatory agencies have mapped out plans to protect that right-whale population. Those contested regulations include new gear-marking mandates, a reduction in the number of vertical lines in the water, the insertion of weak points in rope, a seasonal closure of a nearly 1,000-square-mile area in the Gulf of Maine and potential limits on the size of lobsters that can be legally harvested.

The regulations would transform lobstering methods, and fishermen fear they would gut their businesses and the lobster fishery at large. Some of these regulations have been challenged in court, delaying some rules from taking effect for similar judgment about adverse impacts on the fishery. And now, lobstermen are hesitant to collaborate with regulators on research that could ultimately impact the survival of their industry.

Unlike other legal challenges, though, the most recent lawsuit is focused on how these regulations infringe on the civil liberties of lobstermen.

CONCERNS ABOUT PRIVACY

The suit was filed in Maine’s U.S. District Court on behalf of lobstermen Frank Thompson, of Vinalhaven; Joel Strout, of Harrington, who is president of the Maine Lobstering Union; Jason Lord, of Pemaquid; Christopher Smith, of Jonesport; and Jack Cunningham, of Bar Harbor. It contends that the trackers violate their rights, enshrined through the Fourth and 14th amendments in the U.S. Constitution, because of near-constant geolocation tracking throughout the course of a day, even when vessels aren’t in use for lobstering.

“There’s no industry that would impose these sorts of privacy intrusion on its members – none,” attorney Mina said in an interview. “We want ... to try to work with (the regulators) to get some sort of a regulatory scheme here that both accommodates the need for science and data with the privacy rights of the participants.”

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The Fourth Amendment bars the government from unreasonable searches and seizures without probable cause and a warrant, while the 14th Amendment bars the government from “depriving any person of life, liberty, or property, without due process of law.”

The lawsuit states that the amendments extend to protection of a person’s privacy, based on previous case law, and that the “24/7 tracking requirement” constitutes an illegal search infringing on that reasonable right to privacy while “conducting business activities within federally regulated waters” and “their personal movements while in state-controlled waters.”

The plaintiffs also are concerned about the safety of their private information. The data, the state and federal agencies have promised, will remain confidential to conceal personally identifying information and other sensitive information.

The Atlantic States Marine Fisheries Commission’s regulatory language outlines a process to protect the information, but some are concerned about stated intents for the data to inform “development of emerging ocean uses such as wind energy, aquaculture, and marine protected areas (that) may all create marine spatial planning challenges for the lobster and Jonah crab fisheries.”

Further, plaintiffs are concerned with how their data will be disseminated and used.

“There’s also the commercial trade secret issue. These lobster fishermen in particular, jealously guard, the whereabouts and the techniques they use to place their traps,” Mina said. “This is directly correlated to their ability to make a living. What’s going to happen to this data? Who’s going to get this information?”

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The Atlantic States Marine Fisheries Commission declined on Wednesday afternoon to comment on the case until officials had fully reviewed the lawsuit.

Virginia Olsen, the Maine Lobstering Union’s political director, believes that the trackers can have impacts on Maine’s fisheries at large – beyond just lobstermen with permits to fish in federal waters. Olsen fishes only in state waters, but she fears that the regulations – which require the technology to track movement in state waters, too – can put the secrecy of fishing locations, passed down through generations of her family, at risk. And to Olsen, the intent to use data for research on offshore wind power is a red flag that the information will reach hands beyond stipulated regulators.

Marine Resources Commissioner Keliher, however, said the trackers are in lobstermen’s best interest.

“I believe their arguments have no merit,” he said.

CASE LAW WEIGHTED TOWARD PRIVACY

The arguments made in the lawsuit aren’t unprecedented. There is already case law on geolocation tracking and surveillance that could inform the outcome of this lawsuit. Supreme Court cases in 2012, 2015 and 2018 have affirmed that using GPS tracking devices – and, in turn, a record of a person’s physical movements – without consent or a warrant constitutes an unlawful search if the use is deemed unreasonable. The main distinction is that those cases involve law enforcement tracking, not tracking by regulatory agencies.

Elek Miller, the lead attorney at Drummond Woodsum’s privacy and data security practice, said the law is evolving to classify geolocation data as personal information that deserves protection under the U.S. Constitution.

“The whereabouts of a person through their vehicle, car or boat, says a lot about that person’s activities, and can say a lot about a person,” Miller said. “Movement can provide a pretty clear, detailed window into somebody’s life or certain activities, certain behaviors, particularly if it’s collected over a longer period of time. ... It’s highly sensitive information that

needs to be treated carefully and protected if it is going to be collected and used only in certain ways. That's how the law has treated those situations where it has so far directly addressed geolocation data.”

Miller, who is not affiliated with the lobstermen's lawsuit, is interested to see how the case plays out. He wonders what kind of impact it could have beyond determining the level of privacy protection for Maine's fishermen.

“A case like this could help to further define the legal landscape of individual privacy rights in some way, whether broadly or narrowly,” Miller said.

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