

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRANK THOMPSON, JOEL STROUT,)
JASON LORD, CHRISTOPHER SMITH, and)
JACK CUNNINGHAM,)

Plaintiffs,)

v.)

PATRICK KELIHER, in his official capacity as)
COMMISSIONER, MAINE DEPARTMENT)
MARINE RESOURCES,)

Defendant.)

Docket No. 1:24-cv-00001-JAW

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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ACA	Atlantic Coastal Fisheries Cooperative Management Act
ACCSP	Atlantic Coastal Cooperative Statistics Program
ALWTRP	Atlantic Large Whale Take Reduction Plan
ASMFC	Atlantic States Marine Fisheries Commission
APA	Administrative Procedures Act
BiOP	Biological Opinion
CAA	Consolidated Appropriations Act
EEZ	Exclusive Economic Zone
ESA	Endangered Species Act
FMP	Fishery Management Plan
GPS	Global Positioning System
MDMR	Maine Department of Marine Resources
MMPA	Marine Mammal Protection Act
MSA	Magnuson-Stevens Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
SAFIS	Standard Atlantic Fisheries Information System
SMS	SAFIS Management System

NOW COME, Plaintiffs Frank Thompson, Joel Strout, Jason Lord, Chris Smith, and Jack Cunningham (the “Plaintiffs”), and hereby move the Court to preliminarily enjoin the Maine Department of Marine Resources (“MDMR”) from enforcing the so-called “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab Holders” promulgated pursuant to the Atlantic States Marine Fisheries Commission’s “Addendum XXIX to Amendment 3 of the American Lobster Fishery Management Plan; Addendum IV to the Jonah Crab Fishery Management Plan.”

I. INTRODUCTION

Before the Court is an unprecedented regulation that, if permitted to stand, would require federally permitted Maine lobster fishermen to install a tracking device on their fishing vessels that would monitor their movements on a minute-by-minute basis (and every six hours when the vessel is moored) “regardless of landing state, trip type, location fished or target species.” *See ECF No. 1-1* at Appendix B. As MDMR itself has acknowledged, the lobster fishery “has been a model of conservation, not only in the management of the lobster resource, but also in its two-decade participation in regulations aimed at protecting large whales.”¹ Now, without adequate explanation, Maine lobster fishermen suddenly are subject to limitless data collection through a rule that is a veritable intelligence free-for-all for government agencies and law enforcement to use in support of whatever purpose they fancy. Because these fishermen have not surrendered their constitutional rights simply by earning a living harvesting lobster in the Gulf of Maine, the Court must enjoin enforcement of the electronic tracking requirement.

II. STATUTORY FRAMEWORK FOR REGULATING ATLANTIC FISHERIES

The regulation of the Atlantic Coast’s fisheries is shared by the federal government and the coastal states. Waters within three nautical miles of shore are regulated by the individual states, while waters extending 200 nautical miles from the inner boundary of state waters (known as the “Exclusive Economic Zone” or “EEZ”) are federal waters regulated by the National Marine Fisheries Service

¹ *See Dec. 27, 2019 Ltr. from Commissioner Keliher to NMFS* at 1, available at ECF No. 61-1 at 19, *Me. Lobstermen’s Ass’n, Inc. v. NMFS*, D.D.C. Docket No. 1:21-cv-02509-JEB.

(“NMFS”). 16 U.S.C. §§ 1802(11), 1811(a), 1854, 1855(d).

A. State Waters: *The Atlantic Coast Fisheries Cooperative Management Act.*

States along the Atlantic coast have established a compact known as the Atlantic States Marine Fisheries Commission (“ASMFC”) to coordinate their conservation efforts and share the management of migratory fisheries in their state waters. Pub. L. No. 77-539, 56 Stat. 267 (1942). Commissioner Keliher is on the ASMFC. The Atlantic Coastal Fisheries Cooperative Management Act (“ACA”) encourages this shared responsibility by requiring the ASMFC to draft interstate fisheries management plans (“FMPs”), which the states then must adopt and enforce through administrative rulemaking in the portion of the migratory fishery falling within their waters. 16 U.S.C. § 5104(a). Should a member state fail to timely enact rules adopting the ASMFC’s FMP, the Secretary of Commerce is authorized to order a moratorium on fishing by the noncompliant state. 16 U.S.C. § 5106(c). MDMR regulates lobstering in Maine’s state waters pursuant to an FMP. *See* 12 M.R.S. §§ 6421-6482; 13 C.M.R. 188, ch. 25.

B. Federal Waters: *The Magnuson-Stevens Act.*

Fishing within the EEZ is governed by the Magnuson-Stevens Act (“MSA”). *See* 16 U.S.C. §§ 1801 *et seq.* The MSA authorizes NMFS to regulate fishing in federal waters by approving or disapproving species-specific FMPs developed by regional councils. *See* 16 U.S.C. § 1854. The New England Council – consisting of representatives from Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut – collectively has authority over fisheries in the Atlantic Ocean seaward from those states. 16 U.S.C.A. § 1852(a)(1). Lobster fishing in federal waters is governed by 50 C.F.R. 697. Federal FMPs must be “necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery.” 16 U.S.C. § 1853(a)(1)(A). The MSA only permits the collection of information that is beneficial for developing, implementing, or revising FMPs. *See* 16 U.S.C. § 1881(a)(1). If a Regional Fishery Management Council determines information collection is needed in

order to prepare an FMP, it may request that the Secretary of Commerce implement a complementary collection program. *Id.* Only where the Secretary determines that the collection is justified may regulations be promulgated that implement that collection program. *Id.* “It is undisputed that no provision [of the MSA] explicitly allows the Government to demand reporting of GPS information.” *Mexican Gulf Fishing Co. v. U.S. Dep’t of Com.*, 60 F.4th 956, 964 (5th Cir. 2023).

Section 301 of the MSA lists 10 “National Standards” that all FMPs – state and federal – are required to follow, including:

- A) That “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1);
- B) That [a]ll agency measures that “allocate or assign fishing privileges among various . . . fisherman” should be “fair and equitable” and “reasonably calculated to promote conservation.” 16 U.S.C. § 1851(a)(4);
- C) That “[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.” 16 U.S.C. § 1851(a)(6); and
- D) That “[c]onservation and management measures shall . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data . . . in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.” 16 U.S.C. § 1851(a)(8).

C. *The Consolidated Appropriations Act, 2023.*

In 2021, NMFS promulgated a Biological Opinion (the “2021 BiOp”) and amendments to its Atlantic Large Whale Take Reduction Plan (“ALWTRP”) under the Endangered Species Act (“ESA”) and the Marine Mammal Protection Act (“MMPA”) that were ostensibly designed to protect the North Atlantic right whale. In the midst of litigation that ultimately resulted in the D.C. Circuit’s vacating the 2021 BiOp and remanding the 2021 ALWTRP amendments for, *inter alia*, failing to apply the best available science to scenarios reasonably likely to occur, *see generally Me. Lobstermen’s Ass’n, Inc. v. NMFS*, 626 F. Supp. 3d 46 (D.D.C. 2022), *rev’d and remanded sub nom.*, 70 F.4th 582 (D.C. Cir. 2023), Congress passed the Consolidated Appropriations Act, 2023 (the “CAA”). *See* Pub. L. No. 117-328, Div. JJ, 136 Stat. 4459, 6089-92 (2022). Section § 101 of the CAA included a mandate that the 2021 amendments to the ALWTRP “shall be deemed sufficient to ensure that the continued Federal and State

authorizations of the American lobster and Jonah crab fisheries are in full compliance with” both the ESA and the MMPA until December 31, 2028.²

III. THE ELECTRONIC TRACKING REQUIREMENT

In March of 2022, the ASMFC published Addendum XXIX to its existing FMP for the American lobster fishery for the purpose of supporting the risk reduction efforts promulgated in NMFS’s 2021 ALWTRP. *See generally* “*Addendum XXIX to Amendment 3 to the American Lobster Fishery Plan; Addendum IV to the Jonah Crab Fishery Management Plan*” (ECF No. 1-1) (“Addendum XXIX”).

A. *Addendum XXIX to the American Lobster Fishery FMP.*

Addendum XXIX requires states to issue rules mandating that federally permitted lobster vessels install an electronic tracking device on board their fishing vessels by December 15, 2023. The tracking device will transmit their spatial data using a Global Positioning System (“GPS”). According to the Addendum, the tracker must be capable of collecting “location data at a minimum rate of one ping per minute for at least 90% of the fishing trip,” transmit the “device’s current datetime, latitude, longitude, device and vessel identifier,” have a “[m]inimum accuracy of 100 meters,” and “maintain the confidentiality of personally identifying information and other protected data in accordance with federal law.” ECF No. 1-1 at § 3.1.1. The tracker also “must remain powered and transmitting when the vessel is in the water regardless of landing state, trip type, location fished or target species.” *See id.* at Appendix B. The Addendum exempts holders of state-only lobster permits without a federal commercial trap gear area permit and other fishermen licensed only in state waters. *Id.* at § 3.0.

The four stated purposes of Addendum XXIX are not limited to “the conservation and management of the fishery.” 16 U.S.C. § 1853. Although Addendum XXIX cites a “critical need for high resolution spatial and temporal data” as its first goal, ECF No. 1-1 at §§ 1.0 & 2.1(1), it gives no

² While Section 101(b) of the CAA provides that the provisions of subsection (a) “shall not apply to an existing emergency rule, or any action taken to extend or make final an emergency rule that is in place on the date of enactment of this Act, affecting lobster and Jonah crab,” there was no emergency rule in place requiring the installation of any electronic vessel tracker at the time of the CAA’s enactment.

indication that the ASMFC consulted either the New England Council or the Secretary of Commerce on its electronic tracking data collection program either before, during or after the drafting process. *See id.* (stating that the “American Lobster Management Board initiated Addendum XXIX” based on an alleged “critical need for high-resolution spatial and temporal data to characterize effort in the federal American lobster and Jonah crab fisheries”). Second, Addendum XXIX cites a need to improve risk reduction efforts under the ALWTRP. *Id.* at § 2.1(2). Third, the Addendum identifies “prioritiz[ing] the development of offshore renewable energy” as one of its driving purposes. *See id.* at § 2.1(3). Of course, offshore energy has nothing whatsoever to do with the management of the *fishery* itself, just its waters.

Finally, Addendum XXIX prioritizes “the efficiency and efficacy of offshore enforcement efforts.” *See* ECF No. 1-1 at § 2.1(4). To that end, the Addendum states, in part, that:

Enforcement personnel have consistently noted that having the ability to differentiate when a boat is steaming versus hauling is critical to efforts to inspect gear and identify when fishermen are using illegal gear. Even if location data are not reported in real-time, once a fishing location can be identified from vessel tracking data, enforcement personnel would be able to go to that location to inspect gear for appropriate markings, buoys, escape vents, and ghost panels. Given finite enforcement resources, information on distinct fishing locations would improve the efficiency and capability of offshore enforcement efforts.

Id. at § 2.2.5. After data is collected from the electronic tracking devices, it then will be shared and managed by the Atlantic Coastal Cooperative Statistics Program (“ACCSP”), which already maintains a database of self-reported information from lobster fishermen. *Id.* at § 3.2.3; *Compl.* at ¶¶ 53-56 (detailing existing requirement of mandatory SAFIS or trip ticket self-reports containing vessel, trip, and landings information). Although the ACCSP will then compare the electronic tracker data with the self-reported data by means of trip identification numbers and other vessel registration information, the criteria for “matching reported trip data with location data” has not yet been developed. ECF No. 1-1 at § 3.2.3.

Addendum XXIX contains little to no information on how the privacy of the electronic data will be maintained and protected from unauthorized use and disclosure. With respect to its “Data Dissemination and Confidentiality” policy, the Addendum simply states that:

ACCSP maintains the confidentiality of trip and location data that have been submitted to ACCSP via API in addition to the trip data already maintained under its authority. **Data is accessible to the appropriate state or federal entities with confidential data access. A map interface will be available in the SAFIS Management**

System (SMS) for authorized federal and state administrators to query and visualize trip locations.

ECF No. 1-1 at § 3.2.3 (emphasis supplied). Apart from this vague statement, Addendum XXIX does not define those entities that the map will be available to, much less what laws these entities can use the data to enforce. *Id.* The Addendum also contains no reference to encryption, any data governance or privacy policy, or limits on the types of data that can be collected. Fishermen are not given an opportunity to review the actual data that is collected from them or review terms of service that describe how the data from the tracking device on their vessels will be collected, transmitted, stored, and used.

B. The MDMR Rule Implementing Addendum XXIX.

Although Addendum XXIX recommends that NMFS “promulgate all necessary regulations . . . to implement complementary measures to those approved in this addendum” by May 1, 2023, with “implementation no later than December 15, 2023,” ECF No. 1-1 at § 5.0, no such federal rule has been published or implemented, even on an emergency basis. Accordingly, MDMR presently has the sole responsibility for enforcing Addendum XXIX’s electronic tracking requirement in the Gulf of Maine.

On September 13, 2023, MDMR issued a proposed rule entitled “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders.” *See* 13 C.M.R. 188, ch. 25, § 98 (the “MDMR Rule”), attached hereto as Exhibit A. Although the proposed Rule has not been published in the Code of Maine Regulations, MDMR began informing fishermen with federal lobster permits that they must “have a tracker operational prior to the first fishing trip after December 15, 2023.” *See Federal Permit Holder Tracking Requirements* at 1 (ECF No. 1-3). The MDMR Rule mirrors Addendum XXIX by requiring a device that “meets all the specifications outlined in Section 3.1 of [Addendum XXIX],” *Ex. A* at § A(1), and collects “the time and position of your vessel once per minute while the vessel is moving. While the vessel is tied up, the tracker collects the time and position of your vessel every 6 hours, until in motion again.” ECF No. 1-3 at 1. MDMR represents that it will pay for the tracker and 3 years of associated cellular data service but is silent as to whether

fishermen will be responsible for all associated costs beyond the first three years of activation. *Id.*

The proposed MDMR Rule declares five new actions to be unlawful for “federally permitted lobster and crab license holders.” *Ex. A* at § D. They include:

- A) Fishing, taking, possessing, or landing “lobster or Jonah crab taken with trap gear without having an approved tracking device installed aboard the permitted vessel listed on their license;”
- B) “[R]emov[ing] or hav[ing] removed the approved tracking device from the permitted vessel listed on their license without written approval from [MDMR];”
- C) “[A]llow[ing] the permitted vessel listed on their license to be operated in the coastal waters of the State without the approved tracking device being powered by an external power source at all times; an exception to this requirement exists when the vessel is moored or docked at berth;”
- D) Failing to maintain the tracking device “in an operational condition, minimally powered by an internal battery, when a permitted vessel is docked, moored, or *removed from the water*,” or failing to “notify [MDMR] prior to an approved tracking device being rendered inoperative in instances where the permitted vessel is removed from the coastal waters for an extended period of time or for purposes of repairing or replacing an approved tracking device; and³
- E) “[T]amper[ing] with an approved tracking device or device signal; tampering includes any activity that may affect the unit's ability to operate or signal properly or to accurately compute or report the vessel's position.”

Id. (emphasis supplied). As for enforcement, the MDMR Rule simply states that:

In the event of an electronic tracking device failure, a violation of the prohibitions in section (C) shall not exist when the federally permitted lobster and crab fishing license holder makes notification of the failure to the Department by phone, text message, or email prior to beginning a fishing trip with the inoperable device. The license holder must work with the Department in good faith and in a timely manner to restore device operability as soon as possible. It is unlawful for a license holder to begin subsequent fishing trips with an inoperable device without written approval from the Department.

Id. at § E. Because the proposed but currently enforced Rule does not specify how enforcement will be handled in other exigent circumstances, it remains unclear what responsibilities and repercussions will be applied to fishermen unaware of a malfunction of their electronic tracking device, a particular concern given that fishermen are not given access to the settings on the device itself, or if the fisherman is unable to repair the device at sea. Additionally, it is unclear: (i) what penalties may be imposed for violations of the Rule; (ii) whether an appeal process exists for fishermen to exercise their Due Process rights; and (iii) if so, what branch of government will have jurisdiction to process such an appeal.

³ In many parts of Maine, lobstermen remove their vessels from the water during the winter months, often keeping them in the dooryards of their personal residences. In other words, surveillance is taking place in the curtilage of people's homes.

C. *The Particle TrackerOne Device.*

In the fall of 2023, MDMR began sending federally permitted lobster fishermen the electronic trackers required by the MDMR Rule, together with operating instructions crafted by MDMR. *See Operating Instructions* (ECF No. 1-3). The tracking device MDMR selected is known as the “TrackerOne,” an electronic tracker distributed by Particle, a U.S. based company that manufactures the devices in China. *Aff. of Frank Thompson* at ¶ 4, attached hereto as Exhibit B (“Thompson Aff.”). Although Particle offers users a so-called “dashboard” allowing them visibility into the data being collected by the device in real time, Maine lobstermen receiving the tracker were not provided with dashboard access or any terms of service describing how the data from the tracking device will be collected, transmitted, stored, and used. *See id.* at ¶ 9. Indeed, apart from referring fishermen to Addendum XXIX, neither the MDMR Rule nor the instructions accompanying the tracker provide any information concerning what precise data will be collected or how it will be used, maintained, or shared.

The lack of specificity concerning the data to be collected is particularly worrisome given that, in addition to collecting the device’s current datetime, latitude, longitude, device and vessel identifier, the TrackerOne is *Bluetooth compatible*, may be adapted in order to collect *audio information*, and employs a predictive algorithm that can *anticipate vessel movements*. *Thompson Aff.* at ¶ 9. *See also* <https://www.particle.io/particle-tracking-system/> (stating that the “Particle Tracking System is designed to integrate with any external sensor, enabling your business to track asset location, along with any additional variable such as temperature, sound, motion, air quality, and more” and can “[t]rack asset history to suggest optimal routes or increase accuracy of information needed for business intelligence”).

Particle’s privacy policy (which was not provided to fishermen by MDMR) states that it collects and retains “personally identifiable information,” including “[g]eneral personal information, such as full name, email address, mailing and billing addresses,” “[t]echnical identifiers, such as usernames, device IDs, SIM card ID and IP address[es],” “[g]eolocation information, such as GPS coordinates,” “[b]rowser

identifiers, such as user agent strings” and other “commercial information,” as well as “[i]nferences about personal preferences and attributes drawn from profiling.” *See Particle Privacy Policy* at 2-3 & 13, attached hereto as Exhibit C. It is unclear who the “user” of MDMR’s tracking device is. The policy further states that “Particle may share personally identifiable information with its chosen service providers in support of its principal business operations” and to assist with “[a]uditing,” “[a]dvertising analytics” and “[m]arketing” services. *Id.* at 5 & 13-14. Particle also reserves the right to “disclose personally identifiable information as is necessary” in order to, *inter alia*, “comply with a subpoena or court order,” “[c]ooperate with law enforcement or other government agencies,” and “[h]elp with internal and external investigations.” *Id.* at 6. Particle’s Terms of Use require strict adherence to its Privacy Policy and allows Particle *to use an individual’s image and likeness*. *See Particle Terms of Use* at 6, 9, attached hereto as Exhibit D. Ironically, Particle’s Terms of Use prohibit the use of its devices for “non-consensual surveillance” – which is precisely the use intended by the MDMR Rule. *Id.* at 7-8.

IV. LEGAL STANDARD

In considering a request for a preliminary injunction, the Court must determine: “(1) the movant’s likelihood of success on the merits; (2) whether and to what extent the movant would suffer irreparable harm if the request were rejected; (3) the balance of hardships between the parties; and (4) any effect that the injunction or its denial would have on the public interest.” *Diaz-Carrasquillo v. Garcia-Padilla*, 750 F.3d 7, 10 (1st Cir. 2014). “The first two factors are the most important.” *Together Emps. v. Mass Gen. Brigham Inc.*, 32 F.4th 82, 85 (1st Cir. 2022) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

V. ARGUMENT

Each of the Plaintiffs are federally permitted Maine lobster fishermen who have received a Particle TrackerOne device from MDMR. *See, e.g., Thompson Aff.* at ¶¶ 2, 4. Like thousands of other fishermen in this state, the Plaintiffs do not use their vessels solely for lobster fishing; Mr. Thompson, for example, uses his vessel not only to transport his lobsters and others from Vinalhaven to Rockland,

but also to fish for tuna, menhaden, and scallops. *Id.* at ¶ 3. He also takes recreational day trips with his family. *Id.* Like other similarly situated fishermen, Mr. Thompson has been told that if he does not install the TrackerOne on his vessel by December 15, 2023, he will face sanctions that could have adverse impacts on his ability to harvest lobster in federal waters. *Id.* at ¶ 8. Mr. Thompson, however, is unclear what those sanctions will be due to the absence of any enforcement provisions in the MDMR Rule. *Id.* Mr. Thompson also is acutely concerned about his privacy, as he considers his chosen fishing grounds to be a personal trade secret that he zealously guards. *Id.* ¶ 9.

A. The Plaintiffs Can Demonstrate a Likelihood of Success on the Merits.

Because the “district court is required only to make an estimation of likelihood of success and need not predict the eventual outcome on the merits with absolute assurance,” *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013) (internal quotation marks omitted), the Plaintiffs in this case can easily establish the “most important” factor in the Court’s analysis for three reasons. *Woodhouse v. Me. Comm’n on Gov’t Ethics & Election Practices*, 40 F. Supp. 3d 186, 191 (D. Me. 2014).

First, by requiring electronic surveillance of their movements on a minute-by-minute basis, the Rule subjects the Plaintiffs to an unconstitutional warrantless search and seizure under the Fourth Amendment. Second, the MDMR Rule is a violation of the Plaintiffs’ equal protection rights in that the Rule: 1) subjects federally-permitted fishermen to constant surveillance even when fishing in state waters, while fishermen with state-only permits fishing in those same waters are not monitored; and 2) is void for vagueness in that it fails to describe the conditions under which it will be enforced, any penalties for noncompliance, and the mechanism for an appeal of any adverse actions taken. Finally, the MDMR Rule is both arbitrary and capricious and contrary to law under the Maine Administrative Procedure Act, 5 M.R.S. §§ 8001 et seq. (the “Maine APA”), because it both does not promote the National Standards set forth in the MSA and violates the CAA’s prohibition on new regulations designed to reduce entanglement risks to the North Atlantic right whale.

1. The MDMR Rule Violates the Fourth Amendment.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The “basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Municipal Court of City and Cnty. of San Francisco*, 387 U.S. 523, 528 (1967)). Searches unsupported by probable cause and a warrant are *per se* unreasonable when they violate a reasonable expectation of privacy. *Arizona v. Gant*, 556 U.S. 332 (2009); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). An unconstitutional search also occurs when the Government trespasses upon private property without a warrant. *See United States v. Jones*, 565 U.S. 400, 404 (2012) (attachment of GPS tracking device to motor vehicle was a “search” by trespassing against an “effect” (i.e., the vehicle) for the purpose of revealing information). Both types of searches are at issue here.

a) *The MDMR Rule is an Unconstitutional Search of an Effect.*

A search need not amount to an invasion of privacy to trigger the “guarantee against unreasonable searches, which . . . provide[s] at a minimum the degree of protection [the Fourth Amendment] afforded when it was adopted.” *Jones*, 565 U.S. at 411. Under this property-based analysis, “a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information.” *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019) (citing *Jones*, 565 U.S. at 404). “It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the [Fourth] Amendment,” *Jones*, 565 U.S. at 404, because it is the “physical intrusion,” not the information collected, that matters. *See Florida v. Jardines*, 569 U.S. 1, 11 (2013). Accordingly, a warrantless trespass is unconstitutional regardless of whether the trespass is reasonable. *Id.* By compelling fishermen to install an electronic tracker on their vessels, MDMR is effectively forcing them to consent to a warrantless trespass in lieu of excluding them from participating in the only industry they know. *See Thompson Aff.* at ¶¶ 2, 9 (describing how Mr.

Thompson has been fishing off of Vinalhaven for 55 years and is a fifth-generation lobsterman).

b) The MDMR Rule is an Unconstitutional Invasion of Privacy.

With respect to searches that invade a reasonable expectation of privacy, “the requirement that charter boats,” like commercial fishing boats, “transmit their GPS location to the Government appears to be a search, and no warrant authorizes that search.” *Mexican Gulf Fishing Co.*, 60 F.4th at 967. Nevertheless, “[s]earch regimes where no warrant is ever required,” like the one at issue here, “may be reasonable where special needs . . . make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is distinguishable from the general interests in crime control.” *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 420 (2015) (internal quotation marks and citations omitted). Accordingly, this so-called “closely-regulated-industry doctrine” operates as an exception to the general rule that warrantless searches are unreasonable. While the Plaintiffs concede that commercial fishing is a closely-regulated industry, *United States v. Raub*, 637 F.2d 1205, 1209 (9th Cir. 1980) (“Commercial fishing has a long history of being a closely regulated industry”), even warrantless searches in a closely regulated commercial fishing industry are unconstitutional if vessel operators “have a legitimate expectation of privacy to the whole of their movements while at sea, and, if so, . . . the regulation violates that expectation.” *Mexican Gulf Fishing Co.*, 60 F.4th at 970.

i) The Plaintiffs Have a Reasonable Expectation of Privacy in the Movements of Their Fishing Vessels.

“Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.’” *Carpenter*, 138 S. Ct. at 2213-14 (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925) (footnote omitted)). It is also informed by the notion “that a central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance.’” *Id.* (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

As technology changes, so does the law. Because “individuals have a reasonable expectation of

privacy in the whole of their physical movements,” the Supreme Court has held that GPS monitoring of individuals and their vehicles constitutes a search regardless of “[w]hether the Government employs its own surveillance technology” or “leverages the technology of a wireless carrier.” *Carpenter*, 138 S. Ct. at 2217, 2220. *Cf. Mexican Gulf Fishing Co.*, 60 F.4th at 970-71 (voicing “serious concerns that the GPS requirement violates the Fourth Amendment in this circumstance, given the Supreme Court’s instruction [in *Carpenter*] that members of the public have a ‘reasonable expectation of privacy in the whole of their movements’” but declining to reach the issue because “the [tracking] requirement violates the APA for other, non-constitutional reasons”). While the Plaintiffs certainly have an expectation of privacy in their trade secretive fishing grounds, *Thompson Aff.* at ¶¶ 2, 9, this is *not* a case where MDMR is merely surveilling fishermen for a brief period of time such that there is no concern that the entirety of their fishing grounds will be exposed with detailed precision. Rather, by subjecting fishermen to minute-by-minute surveillance, MDMR and others will know the precise location of their traps, where they fish in certain seasons and weather, and “a wealth of detail” concerning their fishing habits. *See Leaders of a Beautiful Struggle, et al. v. Baltimore Police Dept.*, 2 F.4th 330, 341 (4th Cir. 2021) (aerial surveillance violated reasonable expectation of privacy when the program enabled “retrospective location tracking in multi-hour blocks, often over consecutive days, with a month and a half of daytimes for analysts to work with” that yielded “‘a wealth of detail,’ greater than the sum of the individual trips”). Maine lobstermen obviously have an expectation of privacy in keeping that “wealth of detail” private.

ii) The MDMR Rule Violates Reasonable Expectations of Privacy.

Having established that fishing vessel operators have a legitimate expectation of privacy in their movements, the question then becomes whether the MDMR Rule violates that expectation. Because “businesspeople ha[ve] a constitutional right to go about [their] business free from unreasonable official entries upon [their] private commercial property,” to pass constitutional muster, so-called “administrative searches” – i.e., regulations requiring the collection of transactional, commercial or location data from a

business – must be minimally intrusive, limited in scope and specific in the information it demands. *See Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 487–88 (S.D.N.Y. 2019) (finding unconstitutional a city ordinance that required Airbnb to produce monthly reports containing a variety of rental information collected from hosts because the ordinance applied to all “booking services,” was of indefinite duration, and did not restrict the City’s ability to share the information with law enforcement and other governmental authorities). There also must be a “substantial” government interest behind the regulatory scheme pursuant to which the administrative search is made. *See New York v. Burger*, 482 U.S. 691, 702 (1987). This should hold particularly true when information obtained by the search reveals commercial trade secrets. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (“[o]nce data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest”).

The MDMR Rule does not satisfy any of these criteria. First, Addendum XXIX’s overarching goal of improved spatial information does not establish a “substantial” government interest justifying a warrantless search in the form of its electronic tracking requirement because, since 2018, the American lobster fishery FMP has required fishermen to self-report their trip data through SAFIS reports, which must include fishing location, number of traps hauled, number of traps set on a trip, length of trip, and quantity (in pounds) of the harvest. *See generally* ECF No. 1-2. The electronic monitoring called for in Addendum XXIX simply increases the precision of the information that fishermen already must self-report without a corresponding risk reduction to the fishery based on the National Standards set forth in the MSA. *See Mexican Gulf Fishing Co.*, 60 F.4th at 973 (similar tracking requirement for charter fishing vessels held invalid because the data to be collected “only tells the Government what it already knows: when a charter boat embarks on a trip, how long it is gone, and when it returns”). While the Addendum professes a “critical need for electronic tracking data” to satisfy the program’s stated goals, it does not specify why *minute-by-minute surveillance* is necessary to combat an existing lack of current

spatial information, particularly when a vessel is not fishing for lobster in federal waters. It also does not specify why “there is no basis to believe ... spot checks” are “unworkable.” *Patel*, 576 U.S. at 427.

Second, Addendum XXIX’s minute-by-minute tracking requirement is not “carefully limited in time, place, and scope.” *Burger*, 482 U.S. at 703. Any statute that requires the collection of information must serve the “two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” *Id.* In this case, however, the MDMR Rule has made no effort whatsoever to limit the scope of the information it collects – or the manner in which the agency uses it – to only what is *necessary* to promote the conservation and sustainability of the lobster fishery. Indeed, there are no limits on its use in enforcement actions taken outside of the fishery based on alleged conduct exposed by the data, nor will notice be provided to fishermen if the scope of the data collected changes and/or its use for enforcement expands. Unlike the scallop fishery, which operates on a quota system and requires vessels to power on trackers that “ping” once every hour only when they leave port for the purpose of fishing for scallops in designated waters, *see generally* 50 C.F.R. 648, *Thompson Aff.* at ¶ 7, the MDMR Rule and Addendum XXIX require lobster vessels to install trackers that ping at *sixty times* that rate through a tracker that “must remain powered and transmitting when the vessel is in the water regardless of landing state, trip type, location fished or target species.” *See* ECF No. 1-1 at Appendix B. This means that a holder of a federal lobster permit must have her movements surveilled at all times when she is operating her vessel, even if she is fishing for scallops, pleasure cruising with her family, or conducting a search and rescue operation. Put simply, collecting such granular GPS data from lobster fishermen when they are not lobster fishing does nothing to conserve the lobster fishery.

Nor does the MDMR Rule attempt to minimize its intrusion on the fishermen’s rights to privacy by limiting the way the data can be used. Apart from applications to the lobster fishery, the Rule and Addendum XXIX allow MDMR and the ASMFC to assist in developing offshore wind projects, to

reduce risks to right whales, and to share the information collected with “appropriate state and federal entities” and “authorized federal and state administrators” (whoever they are) through a virtual data map that updates the movements of each member of the federal lobster fleet in real time. ECF No. 1-1 at § 3.2.3. In an Orwellian twist that was not part of the story that MDMR told to the fishermen, these unnamed “federal and state administrators” can even employ the device’s predictive algorithms to make “[i]nferences about personal preferences and attributes drawn from profiling.” *See Ex. C* at 13; *Thompson Aff.* at ¶ 9. MDMR, in other words, has not even limited the scope of its search to *current* movements – it has expanded it to include possible *future* ones as well, an inadvertent but chilling homage to H.L. Mencken’s Minority Report. Nor has MDMR made any effort to restrict or foreclose Particle’s ability to maintain, use or disclose the information its devices collect to its business partners and others having nothing to do with regulating the lobster fishery. *Ex. C* at 6.

In sum, the granular level of the data collected by the TrackerOne device without a warrant, probable cause, or court oversight, combined with the fact that fishermen have a reasonable expectation of privacy not only in their physical movements, but in the precise location of their fishing grounds, gives rise to an unconstitutional search and a violation of their reasonable expectations of privacy.

2. The MDMR Rule Violates Equal Protection.

The Plaintiffs are also likely to succeed on their claim that the MDMR Rule violates the equal protection guarantees of Articles V and XIV of the U.S. Constitution because the Rule 1) treats some fishermen in state waters differently than other fishermen in state waters based on whether a fisherman also has a permit to fish in *federal* waters; and 2) is void for vagueness because it does not describe the penalties for noncompliance or any due process rights for an appeal and challenge.

a) The MDMR Rule Treats Similarly Situated Individuals Differently.

“The Equal Protection Clause contemplates that similarly situated persons are to receive substantially similar treatment from their government.” *Tapalian v. Tusino*, 377 F.3d 1, 5 (1st Cir. 2004).

In assessing an equal protection claim based on disparate treatment, courts in this Circuit “look for two elements: (1) whether the [] [plaintiffs] [were] treated differently than others similarly situated, and (2) whether such a difference was based on an impermissible consideration” *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 452 (D. Me. 2017) (quoting *Macone v. Town of Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002). “Once these two elements are shown, the court must determine what level of scrutiny applies to the law at issue.” *Id.*

In this case, similarly situated persons – i.e., those engaged in the commercial harvesting of lobsters in state waters – are treated differently in those same waters based on whether or not they also have a permit to harvest lobsters within the EEZ. Fishermen with only a state permit are not subject to 24/7, minute-by-minute surveillance at *any* time. *See Ex. A.* at § A (defining those subject to the MDMR Rule); ECF No. 1-1 at § 3.0 (Addendum XXIX’s statement that the electronic tracking requirement does not apply to “[a] person with a state-only lobster permit and no federal commercial trap gear area permit”). But fishermen with federal permits are subject to constant surveillance, even when they are fishing in those same state waters (or are not fishing at all). Put differently, whether or not an individual is subject to around-the-clock surveillance by the state government while operating their vessels in state waters does not depend on their conduct but on whether that individual also is permitted by a *separate* government to fish in *separate* waters. Federal licensure status is an impermissible consideration when determining if a fishermen should be surveilled in state waters because the entire purpose of the MDMR Rule is to promote “offshore enforcement efforts” in federal waters. ECF No. 1-1 at § 2.1. Because the Rule is not concerned with fishermen harvesting lobsters in state waters, their dual federal license should not inform whether they are subject to surveillance when they are not fishing under their federal permit.

Nor is the MDMR Rule “suitably tailored to serve a compelling state interest.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that laws “imping[ing] on personal rights guaranteed by the Constitution” are subject to strict scrutiny). As a practical matter, the interest at issue

here is only a federal one. Now if the MDMR Rule applied only to lobstering in state waters (and leaving aside altogether the excessive amount of surveillance at issue) there might not be an equal protection problem because all similarly situated fishermen (i.e., those harvesting lobsters in state waters) would be treated substantially the same under a suitably tailored law to promote enforcement efforts in a state fishery. But because the MDMR Rule *exempts* holders of state only permits yet requires around the clock surveillance of federally permitted fishermen “regardless of landing state, trip type, location fished or target species,” *see* ECF No. 1-1 at Appendix B, the MDMR Rule patently violates equal protection because it does not promote any compelling *state* interest in regulating fishing in waters within its jurisdiction. Because the only purpose behind the MDMR Rule is a federal one, the State clearly cannot demonstrate it has a compelling interest in requiring an activated electronic tracking device while federally permitted individuals are engaged in fishing in state waters.

b) The MDMR Rule is Void for Vagueness.

Second, “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 13 (1st Cir. 2011) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). To comport with historical due process requirements, a rule or regulation therefore must define prohibited conduct “[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* at 13–14 (citation omitted). “Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement,” the Supreme Court has recognized “that the more important aspect of vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’” *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (citation omitted). For this reason, “laws that fail to incorporate a scienter requirement may also receive greater scrutiny.” *Loc. 8027, AFT-N.H., AFL-CIO v. Edelblut*, 651 F. Supp. 3d 444, 460 (D.N.H. 2023)

(citing *United States v. Nieves-Castano*, 480 F.3d 597, 603 (1st Cir. 2007)).

Although Addendum XXIX and the MDMR Rule purport to promote “the efficiency and efficacy of offshore enforcement efforts,” ECF No. 1-1 at § 2.1, it remains unclear how violators of the MDMR Rule will be punished. While the Rule lists five categories of conduct that are now declared to be “unlawful,” the Rule does not state whether such conduct will be punished civilly or criminally, the amount of any associated fines, whether intentional and unintentional violations will be treated differently, whether violations can impact state as well as federal licensure, what other laws the data can be used to enforce, whether any additional, non-data driven individualized suspicion will be required before the data can be used to bring any enforcement action, who will be bringing those actions, whether criminal enforcement actions can rely on the new electronic data, what adjudicatory processes must be followed before sanctions can be imposed, and what appellate rights are available. *Ex. A* at § C; *Thompson Aff.* at ¶ 8. While the “mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague,” *United States v. Lachman*, 387 F.3d 42, 56 (1st Cir. 2004), “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108–09. With only a description of prohibited conduct and no discussion whatsoever of the consequences of that conduct, the MDMR Rule crosses the constitutional line.

3. The MDMR Rule Violates the Maine Administrative Procedures Act.

Finally, the MDMR Rule violates the Maine APA in two ways. First, while the fact sheet accompanying the MDMR Rule provides a brief “estimate of the fiscal impact of the rule” 5 M.R.S. § 8057-A(1), the Rule only does so from the perspective of MDMR, not from the perspective of affected fishermen. Second, the MDMR Rule “is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law” pursuant to 5 M.R.S. § 8058(1) in that the Rule “is unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence.” *Cent. Me. Power*

Co. v. Waterville Urb. Renewal Auth., 281 A.2d 233, 242 (Me. 1971).

The MDMR Rule is procedurally deficient because it fails to contain “[a]n estimate of the fiscal impact of the Rule,” 5 M.R.S. § 8057-A(1)(C), or provide a small business impact statement under 5 M.R.S. § 8052(5-A).⁴ In this case, the MDMR Rule’s statement of fiscal impact simply states that: “[e]nforcement of these proposed amendments will not require additional activity in this agency. Existing enforcement personnel will monitor compliance during their routine patrols.” *Ex. A at Rule-Making Fact Sheet*. While the Rule states that “at this time a minimum of three years of costs associated with this requirement will be covered for permit holders,” it is silent as to who will bear the associated costs after that or what those costs will be apart from “the annual data plan costing ~\$130 per participant.” *Ex. A at 12-13*. Because the Rule does not contain any of the information required by 5 M.R.S. § 5082(5-A) with respect to small businesses, it is procedurally defective. *See also Mexican Gulf Fishing Co.*, 60 F.4th at 973-74 (finding that the “insignificant benefits” of a GPS tracking requirement “do not bear a rational relationship to the serious financial and privacy costs imposed”).

Second, the Rule is arbitrary and capricious because there is no rational factual or legal basis for justifying minute-by-minute surveillance in the face of the undisputed infringement on individual privacy rights. Mark Walick, a privacy expert for Google, has reviewed the MDMR Rule and notes the lack of a clear data governance policy and numerous privacy concerns that do not appear to have been addressed by MDMR or the ASMFC, including the following:

- 1) The MDMR Rule and Addendum XXIX are silent as to data encryption, meaning there is no information about how the confidentiality of the data will be maintained throughout the collection and storage process. Data collection policies typically are explicit in how the data collected will be encrypted. *Affidavit of Mark Walick at ¶ 6*, attached hereto as Exhibit E.
- 2) There is no description or mention of access control in the Addendum, meaning it is not clear who will actually review the data that is being collected, what data beyond GPS data is being collected, where the data will be stored and viewed, or how the data will be used after it is collected. Although Addendum XXIX states the ACCSP will be responsible for filtering the electronic data, it does not say who will be responsible for detecting such discrepancies or how access to the data set will be limited, if at all. This is

⁴ For any rule that may impact a small business, 5 M.R.S. § 5082(5-A) requires an economic impact statement that identifies A) the type and number of the small businesses subject rule; B) the “costs required for compliance;” C) “[a] brief statement of the probable impact;” and D) “[a] description of any less intrusive or less costly, reasonable alternative methods....”

inconsistent with typical data governance policies. *Id.* at ¶ 7.

- 3) The MDMR Rule does not include an explicit intended purpose for the data that the tracker will be collecting. Such a pronouncement is typically included within data governance policies. While Addendum XXIX identifies four objectives for the electronic tracking requirement, there is no description of what sort of testing was done to determine the minimum data needed to accomplish these objectives, and there is no evidence that minute by minute granular location changes are necessary in order to accomplish the purposes of the Addendum. *Id.* at ¶ 8.
- 4) Neither the MDMR Rule nor Addendum XXIX contain an explanation of the format that any data reports will take or the explicit purposes that these reports will serve (i.e., whether different reports will be prepared for spatial planning forecast and enforcement efforts). For example, should MDMR desire to overlay whale migration paths with the data retrieved by the TrackerOne devices, the data collected should be limited to that purpose and the fisherman assured of that limited use. Because MDMR does not identify what data fields or data points will be used in pursuit of each individual purpose, place any limits on the individuals and organizations with whom the data can be shared, or limit how long that data can be retained, the Rule runs afoul of typical governance policies. *Id.* at ¶ 9.

There is also no indication that MDMR considered collecting data anonymously, which would give it all the benefits intended by the Rule while protecting individual users from becoming targeted or having their individualized trade secrets exposed. Because the MDMR Rule has not even considered these variables, much less provide an adequate explanation for why it does not comport with typical data governance policies, the Rule is arbitrary and capricious on its face. *Cf. Mexican Gulf Fishing Co.*, 60 F.4th at 971-73 (finding a GPS tracking requirement for charter fishing vessels was arbitrary and capricious under the federal APA because NMFS failed to adequately address privacy concerns).

Third, as the Fifth Circuit has explained, the MDMR Rule is contrary to law because electronic trackers are not “necessary” or “appropriate” measures to carry out the National Standards set forth in the MSA because the Government already has the information it seeks to collect. *Mexican Gulf Fishing Co.*, 60 F.4th at 964-65. Moreover, the MDMR Rule does not limit its surveillance to those operating in the federal fishery. Electronic tracking cannot be said to prevent overfishing, be “reasonably calculated to promote conservation,” “take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches,” or utilize “economic and social data . . . in order to provide for the sustained participation of such communities, and . . . minimize adverse economic impacts on such communities” when it is tracking individuals who are not even harvesting lobsters. *See* 16 U.S.C. § 1851. Were the Rule designed to track fishermen only while they are actually harvesting lobsters from the

federal fishery, it would (at least arguably) serve these purposes to some extent. But because the Rule requires constant surveillance of fishermen when they are fishing for other species, on recreational day trips, or even engaged in search and rescue missions, the Rule goes far beyond the purposes of the MSA and is therefore contrary to the only law that even arguably supports an electronic tracking requirement.

Finally, to the extent the MDMR Rule is designed to promote “risk reduction efforts under the [ALWTRP],” *see* ECF No. 1-1 at § 2.1, the Rule is again contrary to law. The CAA, which clearly preempts the MDMR Rule to the extent it is implemented as part of ALWTRP, states that the existing ALWTRP measures are sufficient until December 2028. The only exception applies to emergency rules. Because Addendum XXIX and the MDMR Rule are not emergency rules, MDMR, or any other agency acting under the color of federal law, are barred from publishing new regulations pursuant to ALWTRP.

B. The Plaintiffs Have Demonstrated a Likelihood of Irreparable Harm.

The Court must measure irreparable harm “on a sliding scale, working in conjunction with a moving party’s likelihood of success on the merits.” *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 42–43 (1st Cir. 2010) (internal quotation marks and citation omitted). Thus, “[t]he strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown.” *Id.* at 43 (internal quotation marks omitted). Accordingly, even if the Court finds that the “likelihood of success is low,” it can still order injunctive relief based on a “significant showing of irreparable harm.” *Me. Educ. Ass’n Benefits Trust v. Cioppa*, 842 F. Supp. 2d 386, 387 (D. Me. 2012).

“Although constitutional violations are not per se irreparable harm, certain constitutional violations are more likely to bring about irreparable harm, namely ‘infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief.’” *Me. Forest Products Council v. Cormier*, 586 F. Supp. 3d 22, 62 (D. Me. 2022) (emphasis supplied) (quoting *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484 (1st Cir. 2009)). It is hard to imagine a more fundamental genre of irreparable

harm than an administrative rule, promulgated without legislative oversight, that subjects individuals to around the clock surveillance as a condition of their ability to engage in their chosen vocation. *See Condon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997) (“It is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional law or regulation”). But even leaving aside the Plaintiffs’ interests in their constitutional rights, enforcement of the MDMR Rule will result in the storage of individualized trip data with minute-by-minute precision without a strong privacy policy in place. Making matters worse, such data collection risks exposure of valuable trade secrets to the public domain, which could result in harmful economic outcomes for the fishermen.

Consider the following: if any of the data collected is used in connection with promulgating another update to the ALWTRP or in granting a permit to an offshore wind developer, it will necessarily become part of the related administrative record and will be publicly revealed during any subsequent challenge. Consequently, these routes and locations will become general knowledge to competitive and adverse interests, ruining hard earned business advantages. With no limitation on the agencies that can view this data, it risks further exposure through subpoena *duces tecum*, data breaches, or even inadvertent Bluetooth connections. The fact that the economic implications of these privacy concerns have not been addressed also is a violation of the MSA’s National Standard that FMPs must “take into account the importance of fishery resources to fishing communities by utilizing economic and social data[,]. . . to the extent practicable, [to] minimize adverse economic impacts on such communities.” 16 U.S.C. § 1851(8).

C. The Balance of Hardships Weigh in the Plaintiffs’ Favor.

The third factor is what the First Circuit terms the “balance of relevant impositions,” an assessment of “the hardship to the nonmovant if enjoined as contrasted to the hardship to the movant if no injunction is granted.” *Esso Stand. Oil Co. (Puerto Rico) v. Monroig-Zayas*, 445 F.3d 13 (1st Cir. 2006). Leaving aside the unconstitutional invasion of their privacy rights and the loss of trade secrets, the burden imposed on fishermen is extensive. Not only will they need to install and ensure compliance

with an unfamiliar technology, they also face possible monetary fines and enforcement actions by MDMR and other agencies without knowing precisely what information they are transmitting.

Meanwhile, MDMR's interest in improving its data collection appears minimal, as neither MDMR nor the ASMFC has identified a compelling state interest that can only be addressed by constant surveillance – only a federal one. And even Addendum XXIX's "statement of the problem" does not identify a specific risk to the federal lobster fishery. Quite to the contrary, recent stock assessment reports indicate that there is a record high stock abundance of lobster in the Gulf of Maine.⁵ To the extent spatial information is needed to conserve either the state or federal fishery, this information is already available through the FMP's existing self-reporting requirements, which already require the reporting of fishing locations, the number of traps hauled, the numbers of traps set per trip, the length of the trip, and the quantity (in pounds) of the harvest. *See* ECF No. 1-2. The duplicative nature of the electronic tracker is a violation of the MSA itself. *See* 16 U.S.C. § 1851(a)(7) ("Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication"); *Mexican Gulf Fishing Co.*, 60 F.4th at 973 ("Although the Government stresses the value of verifying this information, verification is entirely duplicative where, as here, the Government offers no evidence that the preexisting reporting is inaccurate."). Accordingly, enjoining the Rule will only minimally impact either fishery, if at all.

D. The Public Interest Lies in Favor of an Injunction.

Finally, it is axiomatic that the public has a compelling interest in upholding constitutionally protected rights. "[W]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *Acosta v. Pablo Restrepo*, 470 F. Supp. 3d 161, 168 (D.R.I. 2020) (quoting *Am. Civ. Liberties Union Fund of Michigan v. Livingston Cnty.*, 796 F.3d 636 (6th Cir. 2015)). Indeed, "[i]t is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional

⁵ *See, e.g., 2021 BiOp* at 17 ("The Gulf of Maine/Georges Bank stock is at near record high abundance, above the abundance threshold, and overfishing is not occurring"), ECF No. 1-1, *MLU v. Raimondo*, D. Me. Docket No. 1:21-cv-00-275-LEW.

law or regulation.” *Condon*, 961 F. Supp. at 331. “To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (cleaned up).

For the reasons expressed above, the MDMR rule is both a violation of fundamental constitutional rights and an unlawful agency action. Beyond that, it is a dangerous precedent. If an agency can mandate the installation of an electronic tracker on a fishing vessel as a condition of licensure, regardless of the activity the vessel is engaged in, then the Government’s ability to surveille private citizens appears to have no limits. In the abstract, the Government always can identify some salutary objective that might benefit from data on the minute-by-minute movements of its citizens. But does that justify, for example, requiring every individual driving on an interstate highway to install a vehicle tracker in order to enforce traffic laws? Does it justify requiring cell phone providers to record all international calls in order to monitor illegal narcotics trafficking? Of course not. Because the MDMR Rule unconstitutionally imposes virtually unfettered individual surveillance on Maine’s federally permitted lobster fishermen as a condition to engaging in their vocation, it must be enjoined immediately.

VI. CONCLUSION

In the end, the MDMR Rule is a drastic overreach. While Maine lobstermen have and will continue to make every effort to conserve their fishery and protect the endangered species that inhabit it, dynamic management of the fishery’s resources cannot come at the expense of its participants’ constitutional rights. This is particularly true when fishermen already self-report the very data that the electronic tracker purports to collect. A workable solution exists whereby MDMR can collect the data it needs while protecting the constitutional rights of fishermen. Collecting data at a less granular level, anonymous tracking, surveillance limited to those engaged in fishing effort in federal waters, user access to the information, etc., are all options that must be considered. But around the clock surveillance of every single vessel movement must be enjoined.

WHEREFORE, the Plaintiffs respectfully request that the Court preliminarily enjoin the Maine Department of Marine Resources from enforcing the so-called “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab Holders.”

Dated at Portland, Maine this 12th day of January, 2024.

/s/ Thimi R. Mina
Thimi R. Mina

/s/ Alfred C. Frawley IV
Alfred C. Frawley IV

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afrawley@lawmmc.com

Attorneys for Plaintiffs Frank Thompson, Joel Strout, Jason Lord, Chris Smith and Jack Cunningham

CERTIFICATE OF SERVICE

I, Alfred C. Frawley IV, hereby certify that on this 12th day of January, 2024, I filed the foregoing **MOTION FOR PRELIMINARY INJUNCTION** with the CM/ECF system, which shall send notification of such filing to counsel of record for all parties.

Dated at Portland, Maine, this 12th day of January, 2024.

/s/ Alfred C. Frawley IV
Alfred C. Frawley IV

McCLOSKEY, MINA, CUNNIFF & FRAWLEY, LLC
12 City Center
Portland, Maine
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Fax: 207.879.9375
afrawley@lawmmc.com

EXHIBIT A

MAPA-4

NOTICE OF AGENCY RULE-MAKING ADOPTION

AGENCY: Department of Marine Resources

CHAPTER NUMBER AND TITLE: Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders

ADOPTED RULE NUMBER:
(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

CONCISE SUMMARY:

This rule-making incorporates the requirements in Addendum XXIX (American Lobster) and Addendum IV (Jonah crab) that were approved by the Atlantic States Marine Fisheries Commission (ASMFC) in March 2022. Specifically, for compliance with the Interstate Fisheries Management Plans, this regulation requires all federally-permitted lobster and Jonah crab license holders with commercial trap gear area permits to have approved electronic tracking devices. This requirement applies to all federally-permitted lobster and crab license holders with commercial trap gear for Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, and the Outer Cape Cod.

EFFECTIVE DATE:
(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

AGENCY CONTACT PERSON: Deirdre Gilbert
AGENCY NAME: Department of Marine Resources
ADDRESS: 21 State House Station
Augusta, Maine 04333
WEB SITE: <http://www.maine.gov/dmr/rulemaking/>
E-MAIL: dmr.rulemaking@maine.gov
TELEPHONE: (207) 624-6553
FAX: (207) 624-6024
TTY: 207-624-6500 (Deaf/Hard of Hearing)

Please approve bottom portion of this form and assign appropriate MFASIS number.

APPROVED FOR PAYMENT _____	DATE: _____				
FUND	AGENCY	S-UNIT	APP	OBJT	AMOUNT
010	13A	1120	10	4946	regulations

Please forward invoice to: Natural Resource Service Center, 155 SHS, Augusta

DEPARTMENT OF MARINE RESOURCES

Chapter 25: LOBSTER AND CRAB REGULATIONS

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- 25.02 Definitions
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- 25.12 Alternative Bait Labeling
- 25.15 V-notching Lobsters
- 25.20 Protected Resources (*see Chapter 75*)
- 25.40 Green Crabs
- 25.45 Crab Fishing Limitations
- 25.50 Closed Season Regulation on Fishing for Crabs in Sheepscot River
- 25.55 Closed Season on Fishing for Crabs in Damariscotta River
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- 25.98 Electronic Tracking Requirements for Federally-Permitted Lobster and Jonah Crab License
Holders

25.98 Electronic Tracking Requirements for Federally-Permitted Lobster and Jonah Crab License Holders

Effective December 15, 2023, the following electronic tracking device requirements apply to all federally permitted lobster and crab license holders, as defined in section A.

A. Definitions

1. Approved Tracking Device means an electronic device that meets all the specifications outlined in Section 3.1 of the Atlantic States Marine Fisheries Commission Addendum XXIX to the American Lobster Fishery Management Plan and which has been approved for use by the Atlantic States Marine Fisheries Commission.
2. Federally permitted lobster and crab fishing license holder means an individual who is eligible for a commercial Maine state license or who is licensed to fish commercially for lobster and crab under 12 MRS 6421 or 12 MRS 6302-A who also holds a federal lobster and crab commercial trap gear permit for any of the Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, or the Outer Cape Cod on the vessel identified on their lobster and crab fishing license.

B. Electronic Tracking Device Requirements

1. Prior to their first lobster and crab fishing trip following December 15, 2023, federally permitted lobster and crab fishing license holders are required to install an approved tracking device.
2. Federally permitted lobster and crab fishing license holders are required to certify to the Department of Marine Resources when they have completed the installation of the approved tracking device. To submit their certification, federally permitted lobster and crab fishing license holders must complete an electronic form available through the Department of Marine Resources publicly accessible website.

C. Prohibitions

Unless a federally permitted lobster and crab fishing license holder has made notification to the Department as provided in (E.) the following prohibitions apply.

1. It is unlawful for a federally permitted lobster and crab fishing license holder to fish for, take, possess, or land lobster or Jonah crab taken with trap gear without having an approved tracking device installed aboard the permitted vessel listed on their license.
2. It is unlawful for a federally permitted lobster and crab fishing license holder to remove or have removed the approved tracking device from the permitted vessel listed on their license without written approval from the Department of Marine Resources.
3. It is unlawful for a federally permitted lobster and crab fishing license holder to allow the permitted vessel listed on their license to be operated in the coastal waters of the State without the approved tracking device being powered by an external power source at all

times; an exception to this requirement exists when the vessel is moored or docked at berth.

4. The approved tracking device must remain in an operational condition, minimally powered by an internal battery, when a permitted vessel is docked, moored, or removed from the water. The license holder shall notify the Department of Marine Resources prior to an approved tracking device being rendered inoperative in instances where the permitted vessel is removed from the coastal waters for an extended period of time or for purposes of repairing or replacing an approved tracking device.
5. It is unlawful for a person to tamper with an approved tracking device or device signal; tampering includes any activity that may affect the unit's ability to operate or signal properly or to accurately compute or report the vessel's position. Tampering with an approved tracking device is not considered to occur in circumstances where an approved tracking device is being repaired or replaced provided the license holder has written approval from the Department of Marine Resources.

D. Exemptions

The following federally permitted lobster and crab fishing license holders are exempt from the electronic tracking requirements.

1. A federally permitted license holder who holds a federal commercial trap gear permit that has been placed in confirmation of permit history (CPH), a permit status for when a vessel with limited access permits has sunk, been destroyed, or has been sold to another person without its permit history.
2. A federally permitted license holder who holds a federal lobster commercial trap gear permit that does not fish trap gear at any point in the fishing year (i.e., only fishes other gear under a federal lobster commercial/non-trap permit, charter/party non-trap permit, and/or does not fish any trap gear at any point in the fishing year).

E. Device Failure

In the event of an electronic tracking device failure, a violation of the prohibitions in section (C) shall not exist when the federally permitted lobster and crab fishing license holder makes notification of the failure to the Department by phone, text message, or email prior to beginning a fishing trip with the inoperable device. The license holder must work with the Department in good faith and in a timely manner to restore device operability as soon as possible. It is unlawful for a license holder to begin subsequent fishing trips with an inoperable device without written approval from the Department.

In circumstances where a federally permitted lobster and crab fishing license holder has reported frequent or repeated tracking device failures aboard a permitted vessel, a Marine Patrol Officer, after having given notice to that license holder, may require that license holder to obtain written approval from the Department prior to beginning a fishing trip with an inoperable tracking device.

Basis Statement:

This rule-making incorporates the requirements in Addendum XXIX (American Lobster) and Addendum IV (Jonah crab) that were approved by the Atlantic States Marine Fisheries Commission (ASMFC) in March 2022. Specifically, for compliance with the Interstate Fisheries Management Plans, this regulation requires all federally-permitted lobster and Jonah crab license holders with commercial trap gear area permits to have approved electronic tracking devices. This requirement applies to all federally-permitted lobster and crab license holders with commercial trap gear for Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, and the Outer Cape Cod. The regulation identifies the specific requirements, as well as prohibitions and exemptions to the requirement. The regulation was amended from the original proposal in the following ways:

- It was amended in response to a comment requesting greater clarity regarding the ability of a federally permitted license holder to proceed with a fishing trip in the event of a device failure, and that this will not result in a violation;
- The definition of a “federally permitted lobster and crab fishing license holder” was amended to include a person who is eligible to purchase a commercial license, so that an individual who has not yet purchased their license for the year remains subject to the requirements;
- The definition of a “federally permitted lobster and crab fishing license holder” was amended to specify a commercial license, so that individuals with a federal permit but only a noncommercial lobster license would not be subject to the requirement to have an electronic tracking device.

Summary of Comments:

Notice of this proposed rulemaking appeared on September 13, 2023 in the 5 major daily newspapers as published by the Secretary of State. Also on September 13, 2023 the rule was posted on the DMR website, and electronic messages were sent to individuals who subscribe to DMR notices. The public hearing was held on October 5, 2023 at 5:00 pm in person at the DMR offices at the Marquardt Building, 32 Blossom Lane, Augusta, Maine and remotely via Microsoft Teams. The comment period closed October 16, 2023.

Attendance at the Public Hearing:

Members of the Public	DMR Staff
Virginia Olsen, Matthew Gilley, Alan Poland, Nick Morley, Patrice McCarron, Rebecca Nuzzi, Amalia Harrington, Chris Cash, Ashley, Joseph Fessenden, Anonymous	Commissioner Patrick Keliher, Deputy Commissioner Meredith Mendelson, Deirdre Gilbert, Megan Ware, Jeff Nichols, William DeVoe, Lorraine Morris
<i>Note: The names listed above reflect the information the participant provided when they signed into the remote proceeding. Some</i>	

<i>participants did not provide a last name or other identifying information.</i>	
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Thomas Boudin, submitted via email, September 14, 2023

This requirement will be very costly and put additional burdens on the industry.

Without evidence that rope entanglement is a severe threat to the Whale population I feel this requirement is overkill and very harmful to the Lobster industry that is already being threatened by global warming and other issues.

Is there any research information about the effect of prop strikes on whales?

Andrew Taylor, submitted via email, September 14, 2023

This rule is completely ridiculous , there is really nothing to be gained by this and is yet another great inconvenience to fisherman and senseless cost to the government. I have been fishing for over 40 years and with each of these new rules I'm closer to the end . There is also noththing to be gained by the mandatory reporting that isn't already known also . Seems marine patrol is out there and can tell you where everyone is fishing , it's not a big secret . We also already report landings to dealers . Just redundant info and great inconvenience to fisherman. NO NEED FOR ANY OF THIS!!!!!!!

Myles Bierman, submitted via email, September 14, 2023

Good afternoon, as a gulf of maine federal lobsterman I would like to let it be known that I am FIRMLY against any sort of vessel tracking, I believe it to be a serious invasion of privacy. We as fisherman in the state already have daily harvester reporting that show fishing effort and location of said efforts. I am not entirely sure what vessel tracking would accomplish besides be a complete invasion of privacy. Please consider these points, Have a good day
Thank you

Walter Willey, submitted via email, September 14, 2023

Tracking I am not goin to buy a tracking device, I have had my permit since Early 80 , you are asking too much from the fishermen !!!!!!!!!!!!! If you can see what you have done to our fishing bottom out side side of Crie heaven 😞

Wade Faulkingham, submitted via email, September 15, 2023

No black box tracking system. We don't need big brothers help period.

cocoandjace@aol.com, submitted via email, October 2, 2023

I'm a third generation fisherman from Cushing Maine. I have 5 sons who are planning to be lobsterman one who is 3 yrs old w a play boat and a trap in the yard trying to be like his family. I ask when does this end? You first start w whale regulations we comply w then and still have been zero fault proven yet we are continued to comply w new regulations why? Zero data against us. You then make us report our catch daily when the buyer already does this again why? There

is a new ceiling in effect if we see a reduction in catch out of ventless traps we will have a measure increase again why? Those traps also are no deeper then 35 fathom to my knowledge we all know the waters are warming n the stock is deeper again why? This to me seems like more regulation and more government control on our industry while I think some people may over fish this to me seems no more then days to be used by the government to be put against us. I am opposed to a tracker because every other fishery that has complied w this is now a dying industry. We have complied w everything asked n this is not something we need to do. Why? Because as I stated above my five boys hope to have a living at sea as our whole family has we already report our dealers report DMR can track boats already w no warrant so I see zero advantage for fisherman in this proposal. I hope the Maine lobsterman have a bite on what happens to Maine lobsterman but I'm sure we won't. For you bureaucrats I say this if you keep allowing them to restrict us guess what you'll be the next profession w no job. Maine lobstering will regulate itself it always has if there's no profit we won't go stop regulating us this is more unnecessary regulation

Wade Faulkingham, submitted via email, October 2, 2023

Big brother doesn't need to know every move we make. I would say this garbage we are getting shoved down our throats is due to future closures in the lobster/ crab fisheries. Leave us alone.

Roger Chipman, submitted via email, October 3, 2023

We do not need anything like this we are doing a lot now that another

Kate O, submitted via email, October 5, 2023

I just want to say for one it says I can log on remotely to see the meeting, but it will not give me a link. And you absolutely do not need to have a tracker in anybody's votes. It's not a law it's a rule nobody needs to do it. If it's not a law and nobody will do it. It's absolutely ridiculous.

Virginia Olsen (Stonington), Public Hearing, October 5, 2023

I guess my comment is fishermen are frustrated with looking at gear modifications. Three years later, we've got to pay again. Everything that we catch is costing us more money and we're not able to get it on the other end. So it's a lot of frustration in, you know, looking at gauge changes and vent changes, adding a cell program or a satellite program after the three years which from what I hear it's about three years, they seem to get out of the gear, the unit. So we would then need to buy a unit on our own and pay for that time. The information that we hold dear is how we fish and where we fish. So just the idea of giving that to somebody else is very difficult to do, especially when we feel like it's going to be used for siting offshore wind and none of us approve of offshore wind. It's just sad that we've come to this point, that we have to go down this route when for hundreds of years Maine has been harvesting sustainably. I feel like we're the gold standard of sustainability, but now doing reports everything we have to do if it takes time, it costs money and we're like we just can't get that out of the other end. Thank you.

Matthew Gilley, Public Hearing, October 5, 2023

I wanted to echo some of what Ginny said. This is, I've spent my entire life figuring out what I figured out out there. I still don't even have it all figured out. You guys are just asking to hand over a multimillion-dollar business. There's this, there's no way that this can be. I wish we had more money because if we did, we'd sue you in court. This can't be constitutionally legal. I mean, we're being treated like we're criminals at this point. The only people I know that are tracker people are people that have broken the law. We haven't broken any law. And we're gonna be followed everywhere we go now. I mean, I've already doubled it with the reporting, you know, I know I'm gonna deal with it with the vessel tracker thing when I decide to go out there tuna fishing. And then I get a phone call because I don't have a report for that day because I wasn't lobstering out there, I was tuna fishing. It's, like Ginny said. That's more time out of my thing. Out of my day, that's time out of my business. I spend more time at these hearings, and just, we just wanna go fishing and be left alone.

We leave the whales alone. We don't like, it's just so redundant at this point. It's becoming sickening.

I can go on and on, but I'm sure there's others that echo the same sentiments.

Thank you.

Alan Poland (Cushing), Public Hearing, October 5, 2023

There's one word I keep hearing that just aggravates me every day. When I do that report online, compliance. I gotta keep compliant. Compliant. Where are we? China, Russia? What is this? Compliant - always got to be compliant. It's frustrating. I don't tell nobody what to do, but I get told what to do all the time. Do this. Do this. Do this. Do this. Getting old. Well, that's all I got to say, yeah. I've said what I need to say earlier. Good.

Nicholas Morley (Boothbay), Public Hearing, October 5, 2023

I guess my like big thing from all of this is just like if we start getting this data and it's enough, then lets get rid of the harvesting data just if we can make it as easy on us as possible at this point, it seems like everything like exactly he said would comply, comply, comply if the tracking device gets me out of having to report at the end of the day. It's not great, but it's better than where we're at now.

Virginia Olsen, Public Hearing, October 5, 2023

Follow up with one more thing. A lot of us live in island communities and have you know, we go to Vinal Haven. We go to Isle Au Haut, we go to Matinicus, we do that with our families. It just feels like such an invasion of my privacy to know every time I start up that boat that I pay the payments on every month someone else knows what I'm doing. It just feels wrong.

Anonymous, Public Hearing (remote individual who did not provide name), October 5, 2023

I think you guys are going to regret doing this because you have so much bad data with one minute pings. I mean, your lines are going to be squiggly and there's, you know, like that guy says set and drift. I mean, there's all kinds of things going on out there, but that one question I had is, is this actually a law? Because I keep hearing rule, mandate. Those aren't laws, like is this actually a law? And it is it gonna be a law by December 15?

Jeff Putnam, submitted via email, October 8, 2023

Dear Deirdre Gilbert,

I am writing to comment on the proposed rule Chapter 25.98, electronic tracking. I am in favor of electronic tracking for federally permitted lobster boats, but I feel that there has been an omission in the proposed language in regards to the inevitable equipment malfunctions.

My reason for supporting the tracking is that the spatial data benefit lobstermen in the long term ocean planning conversation. We have long stated that the islands and coastal towns maritime heritage depend on access to the waters of the gulf of Maine, this is where we make our living. Offshore wind and conservation groups have used the lack of lobstering data to their advantage in the ocean planning process. Accurate data will be a tool to better our case that we cannot have fishing exclusion areas. I have trialed a tracker for the past year and a half and have found that it is not a burden.

My concern is the rigidity of the language under C: Prohibitions number 3. Tracking has been discussed many times at the various lobster zone and advisory councils over the past few years. At every opportunity, lobstermen have stated that we cannot be prohibited from going lobstering if there is a malfunction with the equipment. Every time this was brought up DMR has agreed and ensured us that we would still be able to fish if the tracker was not operational. I have personally seen boats that are required to have VMS for NGOM or groundfish permits not be able to go out when their federally required boxes stopped working. That is unacceptable for this Maine rule. It is unfortunate that given all of the time DMR has had to plan for this implementation, this was not covered in the language.

Most lobstermen have extensive electronics that we depend on daily, and most of us have had failures in one piece or another. It is no fun to go out when the autopilot stops working, or the chart plotter doesn't turn on, but in general if the fishing is hot we can get by and get the day in. It is inevitable that there will be power failures or hardware failures with the trackers, but we cannot be prohibited from fishing because of it.

The department could have an internal policy that states that if a tracker malfunctions and the Captain emails or leaves a voicemail then there won't be a violation if they do go fishing, but I don't believe that is a strong enough assurance for lobstermen. I think there has to be language included in the rule that allows for a certain number of days per year that we can haul if the tracker is not operational. My recommendation is to include language under D exemptions that states; up to once per quarter, federally permitted lobster and crab fishing license holders may fish for, take, possess, or land lobster without an operational tracking device if they have notified the Department in writing or by phone that the tracker or power supply has malfunctioned. In this instance the license holder will have two business days to have the unit replaced or the power issue fixed.

Thank you for considering this recommendation.

Sincerely yours,
Jeff Putnam

Carl Guyton, submitted via email, October 10, 2023

hi there im writing in regards to the "trackers" you are trying to mandate me to have on my vessel. Firstly this mandate is completely 100% unconstitutional!!!!!!! second mandating me to give up my business proprietary information to a government authority without a warrant is unprecedented third other than figuring out exactly where i go and where i place my traps what will you gain from this i am already required to report daily where i fish. This is an absolute intrusion into my privacy on the flip side i firmly believe all government employees should be required to have an ankle monitor on at all times so that the public can have some accountability from rouge gov employees

Michael Gagnon, submitted via email, October 12, 2023

Here we go again. The government complains of massive deficits and they go out of thee way to waist more money. I'm a72 year lobsterman with a federal permit attached to my boat. I don't lobster in federal waters federal waters I don't even lobster outside of the exemption zone. I have very few years of lobstering left in me. I kept the permit in order to enhance the value of my boat. You well know that with all the failed ideas that have been presented to us in the last few have done nothing to change the mortality of Right whales considering there hasn't been any in the Gulf of Maine. We have jut started to report every trip location, landings, buoy, end lines, old shell, new shell , even soak times its absolutely ridiculous. You have succeeded to devaluate our permits and our lobster boat values by more than fifty percent. We thank you for that. If you are so concerned about putting us out of business why don't you just buy us out. The Biden administration not long ago just released six billion dollars to Iran. go figure and look what there using it for now. I'm only trying to supplement my retirement income and big brother just keeps on taking. I'm positive that I'm far from the only Maine lobsterman in my predicament. In closing why put so much burden on our ability to keep our heads above water financially when you are inventing a cure for a non existent malady. What a waist time, money, and effort.

Michael A. Gagnon

Chip Johnson, submitted via email, October 13, 2023

Hello.

I do not think tracking data given to gov officials at all times is anywhere near appropriate, or legal for that matter. The line has been crossed with this one. This is the United States of America. This type of thing is over reach, too much has already slipped by to date. This data will be used for driving agendas contrary to fishing and feeding Americans, and keeping a local economy alive. Yes I have heard all the excuses. This communist move lines right up with all the rest of the Anti Capitalist and Anti Independent agendas of late. Read the Constitution and you will understand.

Chip Johnson

Jarod Bray, submitted via email, October 14, 2023

You should allow lobsterman to call into state or federal departments and declare “not fishing” if they are not using their permit. That would stop them from having to use the tracker if they don't intend to be offshore for the year. The lobsterman should be allowed to reverse that decision given an appropriate amount of time.

I hope the tracker doesn't need to be on 24/7 and only needs to be powered up when the boat is on. I have several friends with VMS who end up with dead batteries in the winter when they don't use their boat for weeks.

-Jarod Bray

Bob Jr., submitted via email, October 14, 2023

These tracking devices are totally unnecessary! A violation of privacy. It's government overreach. Would they like it if we put trackers on their cars or on their persons to make sure they're going to work at their federal job on our tax dollars? They might hit an endangered owl with their car on their way to work ! Haha totally ignorant . It's not good for a Maine !!! It's more government control on Maine fisherman to try and shut us down like they've been doing. I strongly protest against it ! Not good for a Maine!

Thomas Bell, submitted via email, October 14, 2023

I am writing in opposition to the proposed rule, making federal lobster/crab fishing vessels required to have a tracking device.

This rule feels completely unnecessary considering the same information on vessel activity is available now via 100% reporting requirements.

This seems like regulation redundancy that is unwarranted for a fishery that is already being battered from every angle.

I know this is basically a done deal, but I hope this is taken into consideration.

Thank you

Sincerely,
Thomas W. Bell
B.S. Maine Maritime Academy '14
Vessel Operations & Technology
454 South Gouldsboro Road
Gouldsboro, ME 04607
(207) 479-1720
thomas.bell1280@gmail.com

Darren Turner, submitted via email, October 14, 2023

Dear Deirdre,

Please add these comments to the public hearing for Chapter 25.98, Tracking of Federally Permitted Lobster and Jonah Crab License Holders:

This proposal is unnecessary. It will not save whales. It is another expensive program for tax payers. And is most likely a violation of privacy and unconstitutional.

There is no justification for tracking vessels in the lobster fishery. The recent court case ruling (MLA/State of Maine vs NMFS), stated that the NMFS used data that was not in line with reality. Why should we give them more information to twist and use against us. The judicial system is a check and balance on your power and has already ruled the agency can and will abuse power by manipulating data to support their agenda. The NMFS did not even follow the law (ESA) when developing right whale regulations. ASMFC and Maine should back off this issue and not pass this tracking rule.

I have dealt with tracking systems before and they are a nuisance. I'm a sure all of you bureaucrats would not like to deal with checking in and being tracked every day you go to work.

Darren Turner

badpenny.ew@gmail.com, submitted via email, October 15, 2023

I'm actually in disbelief that lobstering has actually come down being watched by the government all the time you're on your boat. I can't believe that this is even legal since I do more than just lobster outside of 3 miles in MY boat that I worked and paid for. Makes me sick that I will be watched while scalloping, tuna fishing, pogy fishing and recreational fishing. How is any of that anybody else's business? Especially the state and federal government? This is the biggest pile of b.s. i have heard yet. Best way I can think of to make people feel like criminals is to treat them as such. What is next? Ankle bracelets? Chips for I.d.? How about some serial numbers tattooed on the forearm? If at all possible I will be consulting a lawyer to seek compensation for the loss of my rights as a u.s. citizen. Congratulations on making me hate a job I used to love.

DMR Response to Comments

Concerns on Cost of the Device and Data Plan:

Several commenters stated their concerns on the cost of the electronic tracking device and data plan. In March 2022, the Department was allocated \$4 million through a congressional appropriation to assist with the expenses related to the use of trackers. The Department used these funds to purchase Particle TrackerOne vessel tracking devices, and three years of cellular data service for all federally permitted lobster and crab fishing license holders. It is possible there could be additional funds available in the future, but at this time a minimum of three years of costs associated with this requirement will be covered for permit holders. Costs are relatively modest for this type of system, with the tracking unit currently costing approximately \$150 and

the annual data plan costing ~\$130 per participant. Requirements to allow for monitoring of vessel movements (e.g. VMS) is very common in other federally managed species, and it is typically the responsibility of the permit holder to cover those costs.

Unnecessary Data Collection:

Several commenters stated that these data are not necessary, and the requirement to provide it represents government overreach. This requirement was established in the Atlantic States Marine Fisheries Commission (ASMFC) Addendum XXIX to the Lobster Fishery Management Plan (FMP). States are required to maintain compliance with the FMP. A finding of non-compliance jeopardizes a state's ability to engage in interstate commerce for that species. In addition, there will be a federal regulation establishing this same requirement for federal permit holders.

The reason for this requirement is to collect high resolution spatial and temporal data to characterize effort in the federal American lobster and Jonah crab fisheries for management and enforcement needs. These data will improve stock assessment, inform discussions and management decisions related to protected species and marine spatial planning, and enhance offshore enforcement. Several commenters expressed that the fishery is not impacting whales, and should not have to submit to this requirement. The data collected is intended to help the Department better represent the industry in management discussions and ensure that any management measures are appropriately targeted. The lack of spatial data for this fishery is currently a challenge in representing the industry in management discussions.

These data are better resolution than the spatial data currently provided through harvester reports, so are not duplicative of data that the Department is already receiving. As this system is implemented, the Department will be looking for opportunities to streamline harvester reporting in consideration of the spatial data provided through the trackers, as suggested in one comment.

Invasion of Privacy and Confidentiality:

Several commenters stated that where and how they fish is proprietary data. The Department understands this position, but it is a common requirement of federal fisheries permitting to provide spatial data associated with the vessel activities for management and enforcement purposes. The Atlantic Coastal Cooperative Statistics Program (ACCSP) maintains the confidentiality of trip and location data that have been submitted to ACCSP via API. Data is accessible to the appropriate state or federal entities with confidential data access. The spatial information collected through the electronic tracking devices is designated as confidential through Maine law and regulation.

Lobster Fishing vs. Other Activities/Fishing:

Several commenters stated their concern of having the electronic tracking device continuing to collect data during times they are fishing for other species, or activities not related to lobstering. The ping rate of the electronic tracking device while the vessel is underway (1 ping per minute) allows the ability to distinguish between different activities such as a vessel steaming or setting/hauling traps. While the vessel is at berth and no longer moving, the ping rate will switch

to one ping every six hours. In addition, there are reporting requirements for other fisheries. The harvester reports will allow the Department to determine days at sea and which fishery was targeted. It is important to note that given the volume of data produced by this requirement, these data will typically be used in aggregate analyses, and the Department would use harvester reports to exclude tracking data from non-fishing days.

Tracking Device Technical Concerns:

Several commenters stated concerns that they will be prohibited from fishing if their electronic tracking device malfunctions. In preparation to meet this requirement, the Department began a pilot program to test the functionality of these types of trackers in the Maine lobster fishery in 2019. To date, we have worked with 25 fishermen to test devices and learn what problems can occur. Based on that work, we believe that the trackers should generally be reliable, provided they are consistently connected to the external power source.

In addition, the Department has established a hotline and email that will be monitored daily. In the event there are technical difficulties with the electronic tracking device, a fisherman can call, text or email this hotline to notify Department staff of their device's issue. It has never been the Department's intent that a fisherman be prohibited from fishing if their device malfunctions through no fault of their own. The rule has been amended from the original proposal to clearly specify that this situation will not result in a violation for the permit holder, provided they notify the Department and work in good faith with Department staff to have the device restored to operability.

If a fisherman expects the tracking device to be powered down due to not fishing and or the vessel needs to be removed from the water for maintenance, the Department has developed a form for fisherman to fill out that will be provided on the Department's website. "Powered down" is defined as the electronic tracking device not receiving external power from the vessel for longer than 1 month.

Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

Deirdre Gilbert, Department of Marine Resources, 21 State House Station, Augusta, Maine 04333-0021 Telephone: (207) 624-6553; web address: <http://www.maine.gov/dmr/rulemaking/>

CHAPTER NUMBER AND RULE: Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders

STATUTORY AUTHORITY: 12 MRS 6171

DATE AND PLACE OF PUBLIC HEARING(S): October 5, 2023: 5:00 pm in person at the DMR offices at the Marquardt Building, 32 Blossom Lane, Augusta, Maine and remotely via Microsoft Teams. Remote Access information is posted to the DMR's website under "Meetings"

COMMENT DEADLINE: October 16, 2023

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [*see* §8057-A(1)(A)&(C)] This rule is proposed to ensure compliance with Addendum XXIX (American Lobster) and Addendum IV (Jonah crab) that were approved by the Atlantic States Marine Fisheries Commission (ASMFC) in March 2022. Specifically, for compliance with the Interstate Fisheries Management Plans, this regulation would require all federally-permitted lobster and Jonah crab license holders with commercial trap gear area permits to have electronic tracking devices. This requirement extends to all federally-permitted license holders with commercial trap gear for Lobster Conservation Management Areas (LCMAs) 1, 2, 3, 4, 5, and the Outer Cape Cod.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? ___YES_X___ NO [§8056(1)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [*see* §8057-A(1)(B)&(D)] Maine lobster and crab fishing license holders who also hold a federal permit to fish for lobster and Jonah crab with trap gear will be required to install and keep operational an approved tracking device.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [*see* §§8057-A(1)(E) & 8063-B]: ADDENDUM XXIX TO AMENDMENT 3 TO THE AMERICAN LOBSTER FISHERY MANAGEMENT PLAN; ADDENDUM IV TO THE JONAH CRAB FISHERY MANAGEMENT PLAN and input from Maine Marine Patrol.

ESTIMATED FISCAL IMPACT OF THE RULE: [*see* §8057-A(1)(C)]

Enforcement of these proposed amendments will not require additional activity in this agency. Existing enforcement personnel will monitor compliance during their routine patrols.

EXHIBIT B

UNITED STATES DISTRICT COURT DISTRICT OF MAINE

FRANK THOMPSON, JOEL STROUT,)
JASON LORD, CHRISTOPHER SMITH, and)
JACK CUNNINGHAM,)

Plaintiffs,)

v.)

Docket No. 1:24-cv-00001-JAW

PATRICK KELIHER, in his official capacity as)
COMMISSIONER, MAINE DEPARTMENT)
MARINE RESOURCES,)

Defendant.)

DECLARATION OF FRANK THOMPSON

I, **Frank Thompson**, hereby depose and state as follows:

1. My name is Frank Thompson. I am a resident of Vinalhaven, Maine, I am over 18 years of age, and I am a Plaintiff in the above-captioned civil action. I make this Declaration in support of the Plaintiffs’ *Motion for Preliminary Injunction*, which seeks to enjoin the enforcement of a rule issued by the Maine Department of Marine Resources’ (“MDMR”) that compels federally permitted Maine lobstermen to install a Particle TrackerOne device on their vessels.

2. I am a lobster fisherman that possesses both State of Maine and federal lobster fishing permits. I have been lobstering in the waters off the coast of Vinalhaven for over 55 years. I presently fish 800 number of traps in federal waters known as the so-called “Exclusive Economic Zone.”

3. I am also the co-owner with my wife, Jean Thompson, of Fox Island Lobster Company, LLC (“FILCO”), a wholesale lobster dealer. FILCO purchases lobsters from other Vinalhaven fishermen and then transports these lobsters (a process known as “smacking”) to Rockland for sale to processors and other wholesale buyers. I often use my lobster fishing vessel

to smack these lobsters. I also use my vessel for activities unrelated to lobster fishing, including but not limited to day trips with my family, tuna fishing, menhaden fishing, and scallop fishing. Additionally, I need to travel on my vessel when equipment repairs become necessary.

4. By virtue of my status as both a lobster fisherman and a lobster dealer, I closely follow and am familiar with regulations governing the American lobster fishery in the Gulf of Maine, including plans, guidelines and recommendations issued by the Atlantic States Marine Fishery Commission (“ASMFC”), as well as rules and regulations issued by MDMR. Accordingly, I have read and am familiar with the ASMFC’s “Addendum XXIX to Amendment 3 to The American Lobster Fishery Management Plan; Addendum IV to The Jonah Crab Fishery Management Plan” (the “Addendum”) as well as the MDMR rule entitled “Chapter 25.98 Electronic Tracking Requirements for Federally Permitted Lobster and Jonah Crab License Holders” (the “MDMR Rule”). I have received a Particle TrackerOne tracking device, as well as installation instructions for the tracker provided by MDMR. The written materials accompanying the TrackerOne informed me that I was required to install the device on my fishing vessel by December 15, 2023 in order to maintain my federal lobstering permit.

5. MDMR requires that my vessel be monitored by the TrackerOne device 24 hours a day, 7 days a week while my vessel is operational and every 6 hours when it is not. MDMR has informed me that I will need to have my tracking device powered on at all times, even when I am fishing in state waters, when I am engaged in other fishing-related activities such as scalloping or smacking, or even when it is being used for exclusively recreational activities. I was also informed that I am responsible for diligently checking that the TrackerOne is actively reporting my vessel’s location on a minute-by-minute basis while my vessel is operating. I understand that my vessel will be tracked at all times, even when I am using it for exclusively personal purposes and not

fishing in federal lobster areas. Specifically, MDMR has informed me that the “vessel tracker must remain powered and transmitting when the vessel is in the water regardless of landing state, trip type, location fished or target species.” I further understand that the tracker will monitor my vessel’s movements at a “ping” rate of once per minute even when the vessel is not fishing in federal waters or is not fishing for lobster.

6. This tracking requirement stands in stark contrast to the tracking requirement for scallop fishing vessels, which also must have a tracker installed on board. My understanding is that the scallop vessel operator, however, is only required to activate the tracker once the vessel leaves port for federal scallop waters, and once activated, the tracker only “pings” once every hour. By requiring tracking only to the extent necessary, the scallop tracker allows for monitoring and enforcement of the scallop fishery (which, unlike the lobster fishery, has specific quotas) without infringing on the vessel operator’s rights to privacy when they are not scallop fishing. Nor does the tracking program for scallop fishermen reveal the precise location of their fishing efforts, information that is proprietary to each fisherman, only the general location of the vessel.

7. Although I understand that if I do not comply with the tracking requirement, I face potential sanctions or adverse impacts to my federal lobster fishing license, I am unclear as to penalties that can be imposed or how the tracking requirement will be enforced. MDMR has simply informed fishermen such as myself that if a device malfunctions, the license holder must notify MDMR and work to restore the device to operability in a timely manner before embarking on any subsequent fishing trips. Otherwise, failure to maintain the device in operating condition is “unlawful.” Based on that minimal guidance, I am unclear as to whether the penalty provisions applicable to the scallop tracking program will apply with equal force to the lobster vessel tracker or whether there are new penalties for the “unlawful” conduct described by the MDMR Rule. I

am also unclear as to whether there are any warnings that will be issued to first time violators, or whether the consequences of an intentional violation will be different from an unintentional violation where, for example, a fisherman is unaware his device is malfunctioning and therefore fails to notify MDMR. I am also unclear as to how MDMR will handle situations where the tracking device malfunctions before leaving port and a fisherman is unable to repair it in advance of a planned fishing trip. To my knowledge, MDMR does not identify any specific penalties for non-compliance or suggest how non-compliance will be handled by the department when a fisherman fails to follow those instructions or is unable to restore operation of their tracking device despite best efforts. I also have not received information on any rights I may have to appeal a perceived violation of the electronic tracking policy.

8. I have serious concerns that the mandated data collection and accompanying enforcement actions will negatively affect my business operations. For example, I have received no privacy agreement or user access information that would enable me to see what data will be collected, how that data will be used, or the circumstances under which that data can be shared. Without user access, I am unable to view this information or understand what data the tracker is collecting. I have learned through my online research and into the TrackerOne device and review of the TrackerOne data sheet that is available on Particle's website that, in addition to determining a user's GPS coordinates, the device is capable of collecting audio information and appears to have a predictive algorithm that can anticipate vessel movements. I also understand that it is Bluetooth and Wifi compatible. I am concerned about how my trip information is being protected by MDMR, if at all.

9. I am a fifth-generation lobster fisherman. Decisions concerning the placement of my traps are the result of hard work and knowledge that has been passed down to my family over

decades. In the context of the lobster industry, this knowledge is, in every sense of the term, the equivalent of a trade secret having great monetary value. It is essential that my trip information remain confidential so that I can retain an important business advantage. To date, I have not been told how long data of my commercial fishing trips will be retained by MDMR, what agencies will have this data accessible, whether the data can be used to enforce other lobstering regulations, whether it can be subpoenaed by third parties or other law enforcement agencies, the manner in which the data is being stored, or any of the other information one would typically expect to be informed of in a customary privacy and security disclosure statement or agreement.

Dated at Vinalhaven, Maine this 10th day of January, 2024.

/s/ Frank Thompson
Frank Thompson

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Privacy Policy

EXHIBIT C

Last updated: October 4, 2022

Overview

At Particle, we believe that everyone has the general right to Privacy, and specifically, should be able to exercise fine-grained control over how their personal information is used by an organization. To this end, Particle aspires to not only meet the requirements of the various privacy legislation that applies to our global customer and employee base, but also extend a common set of rights which exceeds these requirements to everyone who interfaces with Particle.

This document describes how we do this, and how users of Particle products and services can exercise those rights.

Scope

This policy applies to the entire Particle organization, including its products and services. There are no exceptions.

‘Particle’ refers to the legal entity, Particle Industries Inc, headquartered at 325 9th Street, San Francisco, 94103, USA, and our wholly owned subsidiary companies listed in the subsidiaries section of this policy. ‘Products and services’ are defined as any application developed by Particle for use by our customers, such as the Particle Web IDE, the Particle Device Cloud, or any physical hardware products shipped by Particle that connect to these services.

Particle’s Role

Depending on the nature of the relationship between an individual and Particle, Particle’s classification in regards to its role in data privacy can change, and this can alter how Particle responds to requests for information. It does not, however, alter our commitment to safeguarding personal information that we’ve been entrusted with during the course of business.

Particle as a data collector

If Particle collects personally identifiable information from you directly, for example, if you register for an account on the Particle platform, or purchase a Particle product from our store, our relationship with you is as a data collector.

- Under the EU General Data Protection Regulation (GDPR) this classification is known as a data controller.

Particle as a data processor

Particle can also serve as a third-party data processor. This situation occurs when an entity that leverages Particle's products and services to deliver their own product or service to their customers.

- Under the EU General Data Protection Regulation (GDPR) this classification is known as a data processor.
- Under the California Consumer Privacy Act (CCPA) this classification is known as a service provider.

What does this mean?

Any individual can make a request to Particle directly regarding privacy of personally identifiable information (as described in this policy), but it is important to remember Particle will always respond to such requests in its capacity as a data collector. For various legal, contractual and technical reasons, Particle cannot respond directly to individuals with regards to personally identifiable information collected in its role as a data processor. Instead, Particle works with our enterprise customers to align with their own privacy programs and practices, and establishes mechanisms for timely response to such requests.

So in summary, if you have a third party relationship with Particle through another business, you should make your personally identifiable information privacy request through that business's published channels. Behind the scenes Particle will be working with them to ensure we do our part to provide relevant information.

Legal basis for collection of personally identifiable information

Particle collects personally identifiable information only where it has a legal basis to do so. Typically, this is because you've expressed an interest in, or decided to purchase a Particle product, service, or event, and therefore we need to ship it to you, provide support, perform other general e-commerce functions, send you registration

information, and other service provider functions. Particle will not intentionally gather information from children under the age of 13.

Types of personally identifiable information collected

Particle may collect the following types of personally identifiable information:

- General personal information, such as full name, email address, mailing and billing addresses.
- Technical identifiers, such as usernames, device IDs, SIM card ID and IP address.
- Geolocation information, such as GPS coordinates.
- Browser identifiers, such as user agent strings.

How Particle collects personally identifiable information

There are three ways in which Particle may collect personally identifiable information:

- Directly, and voluntarily, from you as a consumer of our products and services - through our websites and stores.
- Directly, and autonomously, from your browser or device through visits to Particle websites or while using Particle applications.
- Indirectly, through third party entities, who provide data to Particle during the course of normal business operations. This typically means Particle enterprise customers, but could also include service providers with which Particle has contracted to deliver a specific function, for example, a payment service provider.

How Particle uses personally identifiable information

There are two ways in which Particle uses information collected:

- To provide the service or product that you have signed up for. By sending you important information about your account, and perform billing functions.
- To provide additional information about Particle services, events, new and upcoming products that may be of interest to you.

In both cases listed above, the information is used directly by Particle, and not accessible to any third parties.

Disclosure of personal information

Particle does not ‘sell’ personally identifiable data for direct financial benefit. Particle may share personally identifiable information with its chosen service providers in support of its principal business operations, but all such relationships are governed by contractual agreements with those service providers and are routinely vetted to ensure they meet our strict security and privacy requirements.

In relation to Particle’s role as a data processor, Particle will receive and process data on behalf of our customers, before passing the data back to them. Particle stores only the minimum amount of data required to deliver the service reliably, such as device identifiers and IP addresses, and does not make a habit of storing more data than is absolutely necessary.

Our subprocessors

Name	Address	Processing Purpose
Amazon Web Services, Inc.	410 Terry Avenue North, Seattle, WA 98109, United States	Hosting infrastructure
MongoDB, Inc.	229 W. 43rd Street, 5th Floor, New York, NY 10036	Hosting infrastructure
Stripe, Inc.	354 Oyster Point Blvd South San Francisco, CA 94080	Payment processing
Google, LLC (Google Workspace + Google Analytics)	1600 Amphitheatre Parkway, Mountain View, CA 94043, United States	Corporate email hosting and website analytics
Adobe, Inc. (Marketo)	345 Park Avenue San Jose, CA 95110-2704	Marketing automation

Name	Address	Processing Purpose
Zendesk, Inc.	1019 Market Street San Francisco, CA 94103 USA	Support ticket tracking
Snowflake, Inc.	Suite 3A, 106 East Babcock Street, Bozeman, Montana 59715, USA	Data warehousing
Twilio, Inc. (Segment)	375 Beale St Suite 300, San Francisco, CA 94105	Website analytics
Outreach Corporation	333 Elliott Ave W #500, Seattle, WA 98119	Email automation
Salesforce.com, Inc.	Salesforce Tower, 415 Mission Street, 3rd Floor, San Francisco, CA 94105	Customer relationship management

Responding to legal requests for information

Particle may disclose personally identifiable information as is necessary:

- To comply with a subpoena or court order.
- Cooperate with law enforcement or other government agencies.
- Establish or exercise our legal rights.
- Protect the property or safety of our company and employees, contractors, vendors, suppliers, and customers.
- Defend against legal claims.
- Help with internal and external investigations.

Security of personally identifiable information

Particle has a dedicated information security team that works to ensure that appropriate safeguards and controls are applied to any data collected by Particle. The security team has input into all aspects of Particle’s operations, including the

development of hardware and software products, as well as setting company-wide policies and performing operational security monitoring. Particle is a SOC 2 Type II compliant entity, and undergoes an annual third party audit against this standard.

When collecting personal information over the Internet via our websites, all transmissions occur via connections encrypted with Transport Layer Security (TLS).

All communication between Particle hardware devices and the Particle cloud is encrypted in transit using an appropriately strong, and modern, set of cryptographic ciphers.

The Particle Device Cloud is hosted in a leading Infrastructure-as-a-Service environment, which is routinely audited against a variety of data security and compliance standards, including SOC II, and ISO 27001.

Payment card data is processed by a third party service provider that has been audited against the Payment Card Industry Data Security Standard (PCI-DSS).

Storage of and transfer of personally identifiable information

All personally identifiable information collected by Particle is processed and stored in the United States.

Retention of information

Generally speaking, the data collected by Particle when delivering its services exchanged in real time. The Particle platform is primarily a conduit for passing that information between Particle hardware and Particle customers. Therefore, by design, there isn't a great deal of 'retention' that happens intrinsically.

Retention of certain financial and transactional records associated with Particle generally happens for financial reporting reasons, or to allow us to identify the owner of a given device to provide support. In these cases, such records are retained for 7 years.

Your rights in regards to personally identifiable information

Particle extends a common set of rights to everyone in regards to how we leverage personally identifiable information. These rights are as follows:

- **Right to access** - you can request a copy of your personally identifiable information held by Particle. Upon appropriately validating your identity, Particle will submit a copy, in a legible format, of all personally identifiable data collected in the preceding 12 month period within 30 days of receiving the request.
- **Right to rectification** - in addition to being able to update your Particle user account directly, you can make a written request to Particle to update personally identifiable information held about you.
- **Right to erasure (or right to be forgotten)** - you can request that Particle erase ('delete') personally identifiable elements of data from our systems, and we will do so with consideration for any overriding local, state or federal laws. The most likely outcome of this right is to no longer receive Particle marketing materials. Particle does retain the right to remember that we've been asked to forget you.
- **Right to restrict processing** - You have the right to request that Particle restrict the processing of your personally identifiable information, under certain conditions.
- **Right to object to processing** - You have the right to object to Particle processing your information, under certain conditions.
- **Right to data portability** - you have the right to request that Particle transfer your data directly to you, or to another entity. Particle will do so providing we can do so securely.

Making a privacy request

In order to make a request to exercise any of the rights listed above, you must contact Particle's privacy team via email to privacy@particle.io.

Particle will respond to any privacy requests received here within 30 calendar days. Particle will not disclose, update, or otherwise alter personally identifiable information, unless it can satisfactorily authenticate and identify the subject making the request.

Contacting Particle’s Data Privacy Officer

Please use the following to contact Particle’s Data Privacy Officer (DPO) directly:

By email: privacy@particle.io.

By mail: Privacy Officer, Particle Industries, 325 9th Street, San Francisco, CA 94103, USA.

Privacy request stats

Here is a summary of the privacy requests handled by Particle’s privacy team during the last 2 years.

Year	Deletion	Access	Opt-out	Average time to respond
2021	21	1	0	48 hours
2020	3	2	1	48 hours

Our subsidiaries

Name	Address	Processing Purpose
Particle Industries Europe Limited	4th Floor, St. James House, St. James Square, Cheltenham, England, GL50 3PR	Service delivery and technical support
Particle Industries (Hong Kong) Limited	Suite 603, 6/F Laws Comm Plaza, 788 Cheung Sha Wan Road, Kowloon, Hong Kong	Service delivery and technical support
Padikeji Shenzhen Technology Co.	Room 201, Building A, No. 1 Qianwan First Road, Qianhai Shenzhen-Hongkong	Service delivery and technical support

Name	Address	Processing Purpose
	Cooperation Zone, Shenzhen, China	

Notice regarding use of Cookies

Particle, like many other organizations, will store session information (often called “Cookies”) in your browser that will help Particle to identify information such as browsing activity, IP addresses and page view order. You do have the option to not use these Cookies; the majority of browsers will have a “help” tool that will help you to prevent Cookies if you want to, but Particle recommends you keep Cookies active as it will provide a better user experience on Particle’s Websites. You can also use the ‘Cookies’ link in the footer of www.particle.io to set marketing cookie preferences.

Notice to European Union Residents

Particle operates in accordance with the the General Data Protection Regulation (GDPR), and as such, this privacy policy has been designed to incorporate the specific requirements laid out within the GDPR.

We’re committed to protecting the rights of EU residents who leverage the Particle platform, and encourage EU residents to contact us to exercise those rights using the mechanism described in the ‘making a privacy request’ section above.

Participation in EU-U.S. and Swiss-U.S. Privacy Shield

Particle complies with the EU-U.S. and Swiss-U.S. Privacy Shield Frameworks as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information transferred from the European Union (EU), United Kingdom (UK) and Switzerland to the United States, in reliance on the Privacy Shield framework. Particle has certified to the Department of Commerce that it is compliant with the Privacy Shield principles. If there is any conflict between the terms in this privacy policy and the Privacy Shield Principles, the Privacy Shield Principles shall govern. To

learn more about the Privacy Shield program, and to view our certification, please visit <https://www.privacyshield.gov/>.

EU/UK Standard Contractual Clauses

In response to the Schrems II case, which invalidated the EU-US Privacy Shield from a legal perspective, Particle leverages the Standard Contractual Clauses to provide assurance of protection to data transferred from the EEA to Particle in the United States.

The 2021 Standard Contractual Clauses, approved by the European Commission in decision 2021/914, will apply to data transfers from the European Economic Area to Particle. They will apply in the following manner:

Module One (Controller to Controller) will apply where Customer is a controller of customer data and Particle is a controller of customer data - for example, geo-location data.

Module Two (Controller to Processor) will apply where Customer is a controller of customer data and Particle is a processor of customer data.

Module Three (Processor to Processor) will apply where Customer is a processor of customer data and Particle is a sub-processor of customer data.

To the extent there is any conflict between the Standard Contractual Clauses and any other terms in this policy, the provisions of the Standard Contractual Clauses will prevail.

Transfer to the United States of European Personal Data

Information submitted to Particle by users of our service is stored on servers located in the United States, and may be transferred by us to third parties who may also be situated in the United States. The United States does not have similar data protection laws to the European Union, and you should be aware in particular that the law and practice in the United States in respect of law enforcement authority access to data is

significantly different from Europe. Where we transfer your information we will take all reasonable steps to ensure that your privacy rights continue to be protected consistent with our obligations under local law and the Privacy Shield Framework. By submitting information to Particle, you agree to this storing, processing and/or transfer.

Accountability for onward transfers

Particle is responsible for the processing of Personal Data it receives, under the Privacy Shield Framework/Standard Contractual Clauses, and subsequently transfers to a third party acting as an agent on its behalf. Particle complies with the EU Standard Contractual Clauses applicable to all onward transfers of Personal Data from the EU, UK and Switzerland, including the onward transfer liability provisions.

Enforcement

With respect to Personal Data received or transferred pursuant to the Privacy Shield Framework, Particle is subject to the regulatory enforcement powers of the U.S. Federal Trade Commission. In certain situations, we may be required to disclose Personal Data in response to lawful requests by public authorities, including to meet national security or law enforcement requirements.

Resolution of Privacy-Shield Related Queries and Complaint Mechanism

In compliance with the Privacy Shield Principles, Particle commits to resolve any complaints about the collection, or use of personal data. EU residents with inquiries or complaints regarding our Privacy Shield policy should contact Particle's privacy officer, via email to privacy@particle.io, or via mail to: Privacy Officer, Particle Industries, 325 9th Street, San Francisco, CA 94103, USA.

If you have an unresolved privacy or data use concern that we have not addressed satisfactorily, please contact our U.S.-based third party dispute resolution provider (free of charge) using this form: <https://www.verasafe.com/privacy-services/dispute-resolution/submit-dispute/>. As further explained in the Privacy Shield Principles, a

binding arbitration option also be made available to you in order to address residual complaints not resolved by any other means.

Notice to California Residents

Particle operates in accordance with the California Consumer Privacy Act (CCPA), and as such, this policy has been designed to incorporate the specific requirements laid out within the CCPA.

We're committed to protecting the rights of California residents who leverage the Particle platform, and encourage California residents to contact us to exercise those rights using the mechanism described in the 'making a privacy request' section above.

Particle will not discriminate against individuals who exercise their rights under the CCPA.

Categories of personal information collected

Particle collects the following categories of information, as defined under the CCPA:

- Identifiers
- Commercial Information
- Geolocation data
- Inferences about personal preferences and attributes drawn from profiling

Do not sell my information

Since Particle is not involved in the sale of personal information to third parties for financial gain, we do not maintain a separate opt-out page, in accordance with the CCPA.

Information disclosed for business purposes

Over the preceding 12 months, Particle has disclosed personally identifiable information to its service providers to support the following business activities:

- Auditing

- Advertising analytics
- Auditing legal and regulatory compliance
- Security
- Debugging
 - Identifying and fixing technical errors
- Short-term uses
 - Contextual ad customization that does not involve or contribute to profiling
 - Performing services
- Account maintenance
 - Customer service
 - Processing transactions
 - Marketing

Notice to Particle Employees and Contractors

Particle maintains an internally accessible addendum to this policy that includes specific provisions regarding additional data that is collected during the course of employment at Particle.

Updates to this policy

Particle may update this privacy policy from time to time and is committed to ensuring the latest version of it is publicly available. Please refer to the 'last updated' date at the beginning of this policy.

Platform-as-a-Service
Device OS
Particle Connectivity
Particle Cloud
Particle Devices
Shop IoT Devices
Supply Secure

Solutions

Light Electric Vehicles
Smart Energy
HVAC
Emissions Monitoring
Industrial Equipment Monitoring

Documentation
Quickstart
Tutorials
Reference
Device OS
Web IDE
Desktop IDE
SDKs
REST API
CLI
Console
Bug Bounty Program
Referral Program

Company

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EXHIBIT D

Terms of Use Agreement

Last updated: May 22, 2023

PLEASE READ THIS TERMS OF USE AGREEMENT ("**TERMS OF USE**") CAREFULLY. BY CLICKING THE "ACCEPT" BUTTON OR ACCESSING OR USING THE PARTICLE PLATFORM (AS DEFINED BELOW) AND/OR CLICKING "I ACCEPT", YOU REPRESENT THAT (1) YOU HAVE READ AND AGREE TO BE BOUND BY THIS TERMS OF USE, (2) YOU ARE OF LEGAL AGE TO FORM A BINDING CONTRACT WITH PARTICLE INDUSTRIES, INC. ("**PARTICLE OR WE**"), AND (3) YOU HAVE THE AUTHORITY TO ENTER INTO THESE TERMS OF USE PERSONALLY OR ON BEHALF OF THE ENTITY YOU REPRESENT AND, IF ON BEHALF OF AN ENTITY, TO BIND THAT ENTITY TO THESE TERMS OF USE. THE TERM **YOU** REFERS

TO THE INDIVIDUAL OR LEGAL ENTITY, AS APPLICABLE, IDENTIFIED AS THE USER WHEN THE REGISTRATION PROCESS IS COMPLETED. IF YOU DO NOT AGREE TO ALL OF THE TERMS OF THIS TERMS OF USE, YOU MUST NOT ACCESS OR USE THE PARTICLE PLATFORM. Particle and You may be referred to individually as a **Party** and collectively as the "**Parties**".

PLEASE NOTE THAT THESE TERMS OF USE ARE SUBJECT TO CHANGE BY PARTICLE IN ITS SOLE DISCRETION AT ANY TIME. When changes are made, Particle will make a new copy of these Terms of Use available at: www.particle.io/legal/terms-of-service (the "**Website**"). We will also update the "Last Updated Date" at the top of these Terms of Use. If we make any material changes, and you have registered with us to create a Self-Service Account (as defined in Section 1.2.1, below), we will also send an email to you at the last email address you rprovidedprovided to us pursuant to these Terms of Use. Any changes to these Terms of Use will be effective immediately for new users of the Particle Platform and will be effective thirty (30) days after posting notice of such changes on the Website for existing users. Particle may require You to provide consent to the updated Terms of Use in a specified manner for further use of the Particle Platform to be permitted. If You do not agree to any change(s) after they are posted or otherwise notified to You, you should stop using the Particle Platform. Otherwise, Your continued use of the Particle Platform constitutes Your acceptance of such change(s). Your use of certain services (each a "**Supplemental Service**") may be subject to additional terms ("**Supplemental Terms**") and such Supplemental Terms will either be listed in these Terms of Use or will be presented to You for your acceptance when you sign up to use the Supplemental Service. If these Terms of Use are inconsistent with the Supplemental Terms, the Supplemental Terms shall control with respect to the Supplemental Service. These Terms of Use and any applicable Supplemental Terms are referred to herein as the "**Agreement**".

1. Overview

1.1 *Our Service*. Particle provides an integrated Internet-of-Things ("**IoT**") solution, enabling businesses to quickly build, connect and manage their internet-enabled products and services. Particle's offering (the "**Particle IoT Solution**") consists of one or more of the following:

- A proprietary cloud-based infrastructure and device integration system, including fleet management, data routing, and over-the-air software updates (the "**Particle Platform**")
- Hardware products that are sold by Particle and have been provisioned to access the Particle Platform (each, a "**Device**") using Particle's proprietary system firmware (the "**Particle Firmware**")
- Access to third party cellular service, where applicable ("**Cellular Service**")

Your access to the Particle Platform is governed by the Agreement and is limited with respect to the following metrics:

- "**Metered Devices**", which are Devices (a) that, with respect to Sandbox Accounts, are claimed by You, or (b) that, with respect to Growth Accounts, are claimed by You and have connected to the Particle Platform at least once and, for cellular and asset tracker Devices, have activated SIMs.
- "**Data Operations**", which are actions executed on Your data payload. Such actions, as well as actions that are not considered to be Data Operations are described at the "Particle Pricing Page" (as defined below).
- "**Cellular Service Allowance**" is the monthly allowance of cellular data transmissions through the Cellular Service available to the Self-Service Account.

The "**Particle Pricing Page**" set forth at www.particle.io/pricing sets forth the current metrics and pricing with respect to Self-Service Accounts, and may be updated from

time to time to reflect the addition of new features and functionality and changes in Particle's business and pricing model.

1.2 Accounts.

1.2.1 *Sandbox and Growth Accounts.* In order to use the Particle Platform under these Terms of Use, You must register for a Self-Service Account with Particle (a "**Self-Service Account**"). We offer two types of Self-Service Accounts: a free version ("**Sandbox Account**") and a paid version ("**Growth Account**"). Users with Sandbox Accounts and Growth Accounts are able to use the Particle Platform on a limited basis, as the amount of Metered Devices that may access the Particle Platform, the number of Data Operations that may be performed and the Cellular Service Allowance are limited as set forth on the Particle Pricing Page.

1.2.2 *Registration Information.* You represent and warrant that: (i) all required registration information You submit is truthful and accurate; (ii) You will maintain the accuracy of such information; and (iii) You will not register for more than a single Self-Service Account, except that You are permitted to retain a single Sandbox Account if You create a Growth Account or an Enterprise Account. Particle may suspend or terminate Your Self-Service Account if You breach any of the terms of this Agreement. You are responsible for maintaining the confidentiality of Your Self-Service Account login information and are fully responsible for all activities that occur under Your Self-Service Account. You agree to immediately notify Particle of any unauthorized use, or suspected unauthorized use, of Your Self-Service Account, or any other breach of security. Particle will not be liable for any loss or damage arising from Your failure to comply with the above requirements.

2. Licensed Uses and Restrictions

2.1 *Subscription Term.* Particle hereby grants You a non-exclusive, non-transferable right to access the Particle Platform in connection with Your use of Devices as part of

the Particle IoT solution during the Subscription Term (as defined below), in each case subject to payment of any applicable Subscription Fee (as defined below) and Your compliance with any usage metrics and limitations and any restrictions set forth in this Agreement, including as provided in Section 2.7.

2.2 Provision of Service. Particle will provide You with access to the Particle Platform, including certain tools, availability of licenses to its application programming interfaces ("**APIs**")and software development kits, access codes, connectivity standards, protocols and relevant procedures (collectively, the "**Particle Platform Guides**") to allow You to access and use the Particle Platform as described in this Agreement. The Particle Platform Guides also include certain terms relating to the Cellular Services made available by the applicable broadband and telecommunications providers ("**Cellular Terms**"). You will integrate with and use the Particle Platform in accordance with the Particle Platform Guides, as updated by Particle and its third-party service providers from time to time. Particle may take reasonable actions to limit the impact of any failure by You to comply with the Particle Platform Guides. Particle will not be responsible for any delay, limitations or Particle Platform performance issues resulting from Your failure to comply with the Particle Platform Guides.

2.3 Data. As between the parties, You own the data and any other content transmitted and processed through Your Self-Service Account ("**Your Data**"). Particle will process Your Data only as described in this Agreement and as necessary to provide the Particle Platform, and will maintain appropriate administrative, technical and physical security measures to protect Your Data against unauthorized access, disclosure and loss. You are solely responsible for creating backup copies of any of Your Data at Your sole expense. Notwithstanding any provision in this Agreement to the contrary, You agree that Particle may use Service Data in connection with the development, maintenance, improvement and provision of any of Particle's service offerings. "**Service Data**" means

any non-personal operational data derived by or on behalf of Particle based on the use of the Devices and Particle Platform under Your Self-Service Account.

2.4 Usage Limitations. You may not perform more than the number of Data Operations per month, exceed the monthly Cellular Service Allowance or use the Particle Platform in connection with more Metered Devices than permitted for Your type of Self-Service Account, as set forth on the Particle Pricing Page. Particle may utilize technical measures to prevent over-usage and stop access to the Particle Platform after any usage limitations are exceeded or may suspend Your access to the Particle Platform, in each case with or without notice to You.

2.5 Legal Compliance. You will comply with all laws, rules and regulations ("**Applicable Laws**") in any territory in which You offer, sell distribute or otherwise provide use of any product or service that incorporates any Devices or accesses the Particle Platform (each a "**Product**") in connection with Your activities hereunder and the provision and use of Your Products. If applicable, You will collect, process and store data in accordance with the terms of Your privacy policy and ensure that Your privacy policy is readily accessible to users and provides accurate disclosures concerning Your data practices. In addition, You will prominently display and comply with a privacy policy on Your Products that includes a full, accurate and clear disclosure regarding Particle's collection, use and distribution of personal information collected via the Particle Platform in accordance with our Privacy Policy, available at www.particle.io/legal/privacy/. You will not permit any other party to use the Particle Platform to harvest, collect, gather or assemble information or data regarding other Particle subscribers without their consent. You are solely responsible for obtaining any consents or registrations required in connection with the activities described in this Agreement, and for verifying that Your use of the Devices and Particle Platform is in compliance with Applicable Laws in any territory in which You offer, sell distribute or otherwise provide use of any Product. You are solely responsible for the performance

of Your obligations under any end-user, reseller or other third-party agreements relating to the offering, sale, distribution and use of Products.

2.6 Access to Service. You will make the Particle Platform available only to those affiliates, employees, contractors and agents who have a legitimate reason to access and use the Particle Platform solely in connection with Your activities under this Agreement. You will not interfere with the integrity or performance of the Particle Platform, including circumvention of any access or use restrictions or use of the Particle Platform through connection by any device or hardware other than those Devices made available to You by Particle. You will respond immediately to any reasonable request by Particle in the event of any actual or anticipated interference with the Particle Platform by You, Your Products or Your users. You will be solely responsible for all use of the Particle Platform under Your Self-Service Account, including all acts and omissions of Your users and the users of Products that you deploy. You will notify Particle immediately if You become aware of any unauthorized use or other compromise of Your Self-Service Account.

2.7 Additional Use Restrictions. You will not resell or otherwise distribute any standalone Devices. You will not distribute, resell, lease, license or otherwise provide access to the Particle Platform to third parties. If you purchase devices from a 3rd party, unapproved distributor, all Particle return policies and warranties will be void. You will not reverse engineer, disassemble or decompile any component of the Devices or Particle Platform. You will not use or permit others to use the Particle Platform in connection with any of the following unauthorized applications: life support applications, devices or systems; the operation of nuclear facilities; aircraft navigation systems; aircraft communication systems; air traffic control; direct life support machines; weapons systems; military or space equipment requiring radiation hardened components; enhanced 911 or E911 emergency calling system; commission of intentional physical harm to persons or animals (whether or not fatal); non-consensual

surveillance; facilitation of incarceration or criminal investigation; transport of weapons of any type; facilitation of sales or distribution of DEA Schedule 1 substances or substances known to cause harm without known benefits; or uses that are criminal or otherwise unlawful.

3. Products

3.1 Product Policy. You are solely responsible and liable for Your Products, and for supporting Your Products. You represent and warrant that Your Products will not: (i) violate any third-party right, including any copyright, trademark, patent, trade secret, moral right, privacy right, right of publicity, or any other intellectual property or proprietary right; (ii) violate any laws or regulations (including any privacy laws) or any obligations or restrictions imposed by any third party; (iii) be harassing, abusive, tortious, threatening, harmful, invasive of another's privacy, vulgar, defamatory, false, intentionally misleading, trade libelous, pornographic, obscene, or patently offensive, or promote racism, bigotry, hatred, or physical harm of any kind against any group or individual, or be otherwise objectionable; (iv) be harmful to minors in any way; (v) contain any computer viruses, worms, or any software intended to damage or alter a computer system or data; (vi) send unsolicited or unauthorized advertising, promotional materials, junk mail, spam, text messages, chain letters, pyramid schemes, or any other form of duplicative or unsolicited messages, whether commercial or otherwise; or (vii) offer or promote services that may be damaging to, disparaging of, or otherwise detrimental to Particle or its licensors, licensees, affiliates and partners.

3.2 Refusal of Products. Particle will have the right, in its sole discretion, to refuse to permit your use of the Particle Platform with a particular Product. Unless Particle states otherwise, such rejection will not terminate this Agreement with respect to any other Product. Particle will have no liability to You for such refusal.

3.3 *Monitoring.* You agree to provide us with access to Your Products and other materials related to Your use of the Particle Platform as reasonably requested by us to verify Your compliance with this Agreement.

4. Ownership

4.1 *Ownership.* As between You and Particle, Particle owns all right, title and interest in and to the Particle Platform. Except for the rights granted in Section 2.1, this Agreement grants You no right, title, or interest in any intellectual property owned or licensed by us, including the Particle Platform and the intellectual property in and related to Devices. You agree to abide by all applicable proprietary rights laws and other laws, as well as any additional copyright and intellectual property notices and restrictions contained in this Agreement.

5. Relationship

5.1 *Marketing.* We may publicly refer to you, orally or in writing, as a Particle Platform licensee of Particle (including in a directory of our developers) and we may publish your name and logo on the Particle website or promotional materials without prior written consent. You grant us all necessary rights and licenses to do so.

5.2 *Support.* We may provide you with support, upgrades, or modifications for the Particle Platform in accordance with our service level agreement and in the manner set forth on the Particle Pricing Page. In the event we provide any support, it will be considered part of the Particle Platform for purposes of Section 9 (Disclaimer and Limitation of Liability) and Section 10 (Indemnification) below, and we may terminate the provision of such support or modifications to you at any time without notice or liability to you. You understand and agree that you are solely responsible for providing user support and any other technical assistance for Your Products. We may redirect

users and potential users of Your Products to your email address on file for purposes of answering general Product inquiries and support questions.

5.3 Independent Development; Feedback. You acknowledge and agree that Particle may be independently creating applications, content and other products and services that may be similar to or competitive with Your Products and content, and nothing in this Agreement will be construed as restricting or preventing Particle from creating and fully exploiting such applications, content and other items, without any obligation to you. If you elect to provide us with any comments, suggestions, or feedback related to our Particle Platform or Devices, you assign all right, title and interest in and to such comments, suggestions and feedback to us, and acknowledge that we will be entitled to use, implement and exploit any such feedback in any manner without restriction, and without any obligation of confidentiality, attribution, accounting, or compensation or other duty to account.

6. Fees and Payment Terms

6.1 Payment. You agree to pay all fees or charges to your Self-Service Account in accordance with the applicable fees, charges and billing terms in effect at the time a fee or charge is due and payable, as set forth on the Particle Pricing Page. You must provide Particle with valid credit card (Visa, MasterCard, or any other issuer accepted by us) ("**Payment Provider**"). Your Payment Provider agreement governs use of the designated credit card account, and You must refer to that agreement and not the terms of this Agreement to determine Your rights and responsibilities with respect to such payment. By providing Particle with your credit card number and associated payment information, you agree that we are authorized to immediately invoice your Account for all fees and charges due and payable to Particle hereunder and that no additional consent is required. You agree to immediately notify us of any change in your billing address or credit card used for payment hereunder. We reserve the right at

any time to change our prices and billing methods, either immediately upon posting on the Particle Pricing Page or by e-mail delivery to you.

6.2 Subscription Fees and Automatic Renewal. All subscriptions to access the Particle Platform are made on a monthly basis (each a "**Subscription Term**"). If you select a Growth Account, you will be charged a monthly subscription fee to access the Particle Platform, as set forth on the Particle Pricing Page ("**Subscription Fee**"). The initial monthly Subscription Fee will be charged at the time you create your Self-Service Account. Your subscription will automatically renew for additional one (1) month periods until terminated as provided under Section 7. The Subscription Fee will be charged monthly, in advance, at Particle's then-current price for such subscription. All Subscription Fees are non-refundable. In the event that You wish to increase the number of Data Operations or Metered Devices beyond the maximum number of Data Operations, Metered Devices or Cellular Service Allowance available for your Self-Service Account or for which the Subscription Fee has been paid, you shall be required to pay additional fees associated with the increased number of Data Operations, Metered Devices or Cellular Service Allowance, as provided in the Particle Pricing Page.

6.3 Taxes. Particle's fees are net of any applicable sales or use tax ("**Sales Tax**"). If any payment made under this Agreement is subject to Sales Tax in any jurisdiction and you have not remitted the applicable Sales Tax to Particle, you will be responsible for the payment of such Sales Tax and any related penalties or interest to the relevant tax authority.

7. Term and Termination

7.1 Term. This Agreement will be effective upon the date on which You accept this Agreement and will continue until terminated as provided in this Section 7.

7.2 Suspension and Termination. We may change, suspend, or discontinue the availability or any functionality of the Particle Platform, or any aspect of Your use of and

access to the Particle Platform, at any time without notice to You and without incurring any liability to You. We may also impose limits on certain features and services or restrict your access to part or all of the Particle Platform without notice to You and without incurring any liability to You. Furthermore, Particle may limit, suspend, or terminate Your access to the Particle Platform (and your rights under this Agreement) at any time. This Agreement will terminate automatically and without notice immediately upon any breach of the terms of this Agreement by You.

7.3 Your Termination. You may terminate this Agreement for any reason or no reason at all, at your convenience, by ceasing Your use of the Particle Platform, and, with respect to Growth Accounts, providing at least thirty (30) days prior written notice to Particle.

7.4. Effect on Termination. Upon termination of this Agreement: (i) all rights and licenses granted will terminate immediately; (ii) any and all payment obligations, if any, will be due; and (iii) each Party will promptly return to the other Party all Confidential Information of such Party in its possession, custody, or control. Neither Party will be liable to the other party for damages of any sort resulting solely from the termination of this Agreement. Notwithstanding clause 7.4(i), Particle's sole obligation as it relates to copies of, or references or links to, your Product will be to, upon written request from you, make reasonable efforts, as determined in its sole discretion, to remove all such references and links.

7.5 Deletion of Data. Particle will use reasonable efforts to delete your salted and hashed password, name, credit card information and all related information associated with or inside your Self-Service Account (or any part thereof), excluding data related to past transactions, upon termination of this Agreement or upon Your request.

7.6 Survival. Sections 2.3, 2.7, 3.1, 4.1, 5.3, 7.4, 7.5, 7.6, and 8 through 11 will survive any termination of this Agreement.

8. Confidentiality

8.1 *Ownership.* **Confidential Information** means all written and oral information, disclosed by either Party to the other, related to the operations of either Party or a third party that has been identified as confidential or that by the nature of the information or the circumstances surrounding disclosure ought reasonably to be treated as confidential. The Parties acknowledge that during the performance of this Agreement, each Party will have access to certain of the other Party's Confidential Information. All Confidential Information is proprietary to the disclosing Party or such third party, as applicable, and will remain the sole property of the disclosing Party or such third party. Each Party agrees as follows: (i) to use the Confidential Information only for the purposes described herein; (ii) that such Party will not reproduce the Confidential Information and will hold in confidence and protect the Confidential Information from dissemination to, and use by, any third party; (iii) that, except as required in performance of a Party's obligations under this Agreement, neither Party will create any derivative work from Confidential Information disclosed to such Party by the other Party; (iv) to restrict access to the Confidential Information to such of its personnel, agents and consultants, if any, who have a need to have access and who have been advised of and have agreed in writing or are otherwise bound to treat such information in accordance with the terms of this Agreement; and (v) to return or destroy all Confidential Information of the other Party in its possession upon termination or expiration of this Agreement. In the event of any unauthorized disclosure or loss of Confidential Information, the receiving Party will notify the disclosing Party as soon as possible.

8.2 *Exceptions.* The foregoing provisions will not apply to Confidential Information that: (i) is or becomes generally publicly available or enters the public domain through no fault of the receiving Party; (ii) is rightfully communicated to the receiving Party by persons not bound by confidentiality obligations with respect thereto; (iii) is already in the receiving Party's possession free of any confidentiality obligations with respect thereto at the time of disclosure; (iv) is independently developed by the receiving Party

without use or reference to the Confidential Information of the disclosing Party; or (v) is approved for release or disclosure by the disclosing Party without restriction. Notwithstanding the foregoing, the receiving Party may disclose Confidential Information of the disclosing party to the limited extent required (1) to comply with the order of a court or other governmental body or applicable law, provided the Party receiving Party will, to the extent lawfully permitted, first have given reasonable written notice to the disclosing Party, so that the disclosing Party may seek a protective order or other appropriate relief; or (2) to establish a Party's rights under this Agreement.

9. Disclaimer and Limitation of Liability

9.1. *Disclaimer.* THE PARTICLE PLATFORM IS PROVIDED "AS IS", WHERE IS, WITH ALL FAULTS AND WITH NO WARRANTY, EXPRESS OR IMPLIED, OF ANY KIND. PARTICLE EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES AND CONDITIONS, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AVAILABILITY, SECURITY, TITLE AND/ NON-INFRINGEMENT. SOME ASPECTS OF THE PARTICLE PLATFORM ARE EXPERIMENTAL AND HAVE NOT BEEN TESTED. PARTICLES DOES NOT REPRESENT, WARRANT, OR MAKE ANY CONDITION THAT THE PARTICLE PLATFORM IS FREE OF INACCURACIES, ERRORS, BUGS, OR INTERRUPTIONS, OR IS RELIABLE, ACCURATE, OR COMPLETE. PARTICLE IS NOT RESPONSIBLE FOR ANY CONTENT OR OTHER MATERIAL DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE USE OF THE PARTICLE PLATFORM, ALL OF WHICH IS OBTAINED AT YOUR OWN DISCRETION AND RISK. YOUR USE OF THE PARTICLE PLATFORM IS AT YOUR OWN DISCRETION AND RISK, AND YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE THAT RESULTS FROM USE OF THE PARTICLE PLATFORM, INCLUDING, BUT NOT LIMITED TO, ANY DAMAGE TO YOUR COMPUTER SYSTEM OR LOSS OF DATA. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM US OR THROUGH OR FROM THE PARTICLE

PLATFORM WILL CREATE ANY WARRANTY OR CONDITION NOT EXPRESSLY STATED IN THE USER AGREEMENT.

9.2 *Limitation of Liability.* PARTICLE WILL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO YOU FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, PUNITIVE, SPECIAL, OR RELIANCE DAMAGES RELATED TO THIS AGREEMENT OR THE Particle Platform. CONSEQUENTIAL DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOST PROFITS, LOST REVENUES AND LOST BUSINESS OPPORTUNITIES, WHETHER YOU WERE OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF THESE DAMAGES. IN NO EVENT WILL PARTICLE'S AGGREGATE LIABILITY UNDER THIS AGREEMENT OR RELATED TO THE PARTICLE PLATFORM EXCEED THE LESSER OF (A) AMOUNTS PAID BY YOU TO PARTICLE DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRECEDING THE ACT(S) GIVING RISE TO LIABILITY HEREUNDER, AND (B) \$2,000. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE PARTIES HAVE NEGOTIATED THIS AGREEMENT WITH DUE REGARD FOR THE BUSINESS RISK ASSOCIATED WITH THE ARRANGEMENTS DESCRIBED IN THIS AGREEMENT.

10. Indemnification

10.1 *By You.* You will defend, indemnify and hold harmless Particle and its affiliates, and their respective directors, officers, agents, licensors, and other partners and employees from and against any third-party claim arising from or in any way related to your Product, your use of the Particle Platform, or your breach of any obligation herein, including any liability or expense arising from all claims, losses, damages (actual and consequential), suits, judgments, litigation costs and attorneys' fees, of every kind and nature.

10.2 *By Particle.* Particle will, at its expense, defend or, at its option, settle any claim, action or allegation brought against any user with a Growth Account by a third party

alleging that the Particle Platform infringes any copyright, United States patent or misappropriates a trade secret of that third party and will pay any final judgments assessed thereon or any settlements to which Particle agrees. You will give prompt written notice to us of such a claim and You will give us the exclusive right to defend any such claim, action, or allegation and or to make settlements thereof at our discretion. You will give such assistance and information as Particle may reasonably require to settle or to oppose such claims. This Section 10.2 provides your exclusive remedy for any infringement claims or remedies. This indemnification obligation will not apply if the infringement arises as a result of (i) any use of the Particle Platform in a manner other than as specified in this Agreement, (ii) any use of the Particle Platform in combination with other products, equipment, devices, systems, or data not supplied by Particle (including the use of Your Data) to the extent such claim is directed against such combination, or (iii) any alteration, modification, or customization of the Particle Platform made by any party other than Particle or its authorized representative, if such infringement would not have occurred without such alteration, modification or customization. In the event any infringement claim, action or allegation regarding the Particle Platform is brought or threatened, Particle may, at its sole option and expense: (i) procure for You the right to continue use of the Particle Platform or infringing part thereof; (ii) modify or amend the Particle Platform or infringing part thereof, or replace the Particle Platform or infringing part thereof with similar functionality; or (iii) if neither of the preceding is commercially practicable, terminate the Agreement and the rights granted herein.

11 General

11.1 *Entire Agreement; Amendment.* This Agreement constitutes the entire agreement between you and Particle and governs your use of the Particle Platform. If, through accessing or using the Particle Platform, you utilize or obtain any product or service from a third party, you may additionally be subject to such third party's terms and

conditions applicable thereto, and this Agreement will not affect your legal relationship with such third party.

11.2 *Relationship of Parties.* The Parties hereto are independent contractors. Nothing in this Agreement will be deemed to create an agency, employment, partnership, fiduciary, or joint venture relationship between the Parties. Neither Party is the representative of the other Party for any purpose and neither Party has the power or authority as agent, employee, or in any other capacity to represent, act for, bind, or otherwise create or assume any obligation on behalf of the other Party for any purpose whatsoever.

11.3 *Governing Law.* This Agreement will be governed in accordance with the laws of the State of California without reference to its conflicts of law principles.

11.4 *Arbitration.* Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in San Francisco, CA before one arbitrator. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration, including a temporary restraining order or preliminary injunction, from a court of appropriate jurisdiction.

11.5 *Severability.* If any term or provision of this Agreement is determined to be illegal, unenforceable, or invalid in whole or in part for any reason, such term or provision will be changed and interpreted to accomplish the objectives of such provision to the greatest extent possible under applicable law and the remaining provisions will continue in full force and effect.

11.6 *Assignment.* You may not assign this Agreement or any of Your rights or obligations hereunder, to a third party without Particle's written consent, including in connection

with a change in control. Any assignment in violation of the foregoing is null and void. This Agreement inures to the benefit of and is binding upon the Parties hereto and their successors and assigns.

11.7 *Waiver*. Failure to enforce or a waiver by either Party of one default or breach of the other Party will not be considered to be a waiver of any subsequent default or breach.

11.8 *Notices*. All notices required or permitted hereunder will be in writing, delivered personally, by email (if sent by Particle to you), or by nationally recognized overnight courier (e.g., FedEx). If a notice is given to You by Particle it will be sent to the address provided in connection with Your registration for a Self-Service Account or to such address as you subsequently provide to Particle as a notice given in accordance with Section 11.9. If you give a notice to Particle it will be sent to Particle Industries, Inc., Attn: Legal, 325 9th St., San Francisco, CA 94103, with a copy sent to legal@particle.io. All notices will be deemed effective upon personal delivery, or when received if sent by email or overnight courier. You agree that Particle may send any privacy or other notices, disclosures, reports, documents, communications and other records regarding the Service (collectively, "**Service Notices**") in electronic form to: (1) the email address that you provided during registration, or (2) by posting the Service Notice on the Platform. The delivery of any Service Notice is effective when posted to the Platform or sent by Particle (whichever first occurs), regardless of whether You read the Notice when You receive it or whether You actually receive the delivery. You can withdraw your consent to receive Service Notices electronically by canceling your Account. You must give notice to us in writing via email to legal@particle.io or another address provided by Particle.

11.9 *Force Majeure*. Neither party will be liable to the other for failure to fulfill obligations hereunder if such failure is due to causes beyond its control, including acts of God, earthquake, fire, flood, embargo, catastrophe, sabotage, utility, unavailability of public utilities, disruption or unavailability of the internet or cellular service,

transmission failures, governmental prohibitions or regulations, national emergencies, insurrections, riots or war.

11.10 *Government End Users.* The Particle Platform constitutes "commercial computer software" and any associated documentation constitutes "commercial computer software documentation", pursuant to DFAR Section 227.7202 and FAR Section 12.212, as applicable. Any use, modification, reproduction, release, performance, display, or disclosure of the Particle Platform or such documentation by the United States Government will be governed solely by the terms of this Agreement.

11.11 *Export Control Policy.* Particle is committed to compliance with all U.S. export, import, customs and economic sanctions, laws, regulations, rules, and orders (collectively "Trade Control Laws") to which products purchased from Particle apply. (i) Particle will not sell or ship to embargoed countries or individuals and entities who are restricted by a) the U.S. Treasury Office of Foreign Asset Control ("OFAC") list of Specially Designated Nationals, including entities that are owned 50% or more by such individuals or entities; b) the U.S. Commerce Department's Bureau of Industry and Security ("BIS") Denied Persons List, Entity List, Unverified List, and Military End User list, or for military end use in China, Russia, Venezuela, Burma, and Cambodia; and c) Department of State's AECA Debarred List, among others. Particle will not export Products prohibited by the Export Administration Regulations ("EAR"). (ii) Customer agrees not to export, re-export, or transfer, directly or indirectly, any technical data acquired from Particle, or any products utilizing such data, in violation of the United States export control laws, including the Export Administration Regulations and the International Traffic in Arms Regulations, or in violation of any foreign law, regulation or rule. You shall be responsible for any breach of this Section by Your affiliates, employees, agents, distributors, resellers or other service providers.

11.12 *Remedies.* All rights and remedies of the Parties, under this Agreement, in law or at equity, are cumulative and may be exercised concurrently or separately. The exercise

of one remedy will not be an election of that remedy to the exclusion of other remedies. A Party's breach or threatened breach of any of its covenants or agreements in this Agreement may cause irreparable injury that is inadequately compensable in monetary damages.



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EXHIBIT E

UNITED STATES DISTRICT COURT DISTRICT OF MAINE

FRANK THOMPSON, JOEL STROUT,)
JASON LORD, CHRISTOPHER SMITH, and)
JACK CUNNINGHAM,)

Plaintiffs,)

v.)

Docket No. 1:24-cv-00001-JAW

PATRICK KELIHER, in his official capacity as)
COMMISSIONER, MAINE DEPARTMENT)
MARINE RESOURCES,)

Defendant.)

DECLARATION OF MARK WALICK

I, **Mark Walick**, hereby depose and state as follows:

1. My name is Mark Walick. I am a resident of Sunnyvale, California, and I am over 18 years of age. I make this Declaration in support of the Plaintiffs’ *Motion for Preliminary Injunction*, which seeks to enjoin the enforcement of a rule issued by the Maine Department of Marine Resources’ (“MDMR”) that compels federally permitted Maine lobstermen to install a Particle TrackerOne device on their vessels.

2. My professional background spans 25 years in the online payments industry, most recently at Google where I have focused on payments, fraud, and user privacy for over a decade. Prior to Google, I worked at Apple where I built the fraud prevention application and assisted in the identity protection products for iTunes, AppStore and iCloud. At both of these companies, I have championed consumer privacy and data protection because user trust is built on it. I work extensively with our Privacy Working Group at Google for every product I work on to determine what data is collected, for what purpose, what the minimum amount of data is needed for my

purposes, how to inform users, how it complies with local regulations, where the data is stored and for how long, who has access to it, and how the data is maintained. Every product I launch must be reviewed and approved by both Payments Security engineering and Privacy Counsel to conform to Google's and regulator's standards and expectations. Put simply data governance is an everyday part of my life.

3. I am currently employed as a Group Product Manager at Google. In connection with that role, one of my responsibilities is to oversee payment processing of over \$100 billion in transactions across 230 countries. Based on my employment in that capacity, as well as on previous professional experiences during which I was responsible for maintaining data privacy, I know that having a clear data governance policy is critical to the success of, and trust in, any product. It is equally critical that these governance and data privacy policies are communicated to the consumers that use our products before we collect any of their data.

4. Given my professional background and training, I was curious about the vessel monitoring policy and did some research into the tracking rule. More specifically, I evaluated the privacy concerns and issues associated with the so-called the Particle TrackerOne device in the context of its deployment and data collection in the absence of an accompanying governance safeguard or any explanation as to how its data will be stored, used or leveraged.

5. I reviewed the "Addendum XXIX to Amendment 3 to the American Lobster Fishery Management Plan" (the "Addendum") issued by the Atlantic States Marine Fisheries Commission ("ASMFC") and compared the data policy, or lack thereof, in that Addendum to traditional privacy safeguards that are considered industry standards for data collectors. I then identified several areas where the Addendum fails to provide lobster fishermen with adequate explanation on how their data will be stored and used.

6. For example, the Addendum is silent about data encryption, meaning there is no information about how the confidentiality of the data will be maintained throughout the collection and storage process. Data collection policies and user privacy agreements typically are explicit in how the data collected will be encrypted, but in the case of the Addendum, there is no such encryption policy whatsoever. Accordingly, it is unclear whether the data is to be encrypted prior to its delivery to the Atlantic Coastal Cooperative Statistics Program (the “ACCSP”), or if it is encrypted upon receipt by that entity, if at all. In fact, the word “encryption” does not appear once in the entire Addendum, despite the fact that data encryption is a standard practice when collecting commercially sensitive information.

7. There is also no description or mention of access control in the Addendum. Accordingly, it is not clear who will actually review the data that is being collected, what data beyond GPS data is being collected (I understand that the Particle One tracker can collect various types of data beyond GPS coordinates, including voice data, if certain settings on the device are enabled), where the data will be stored and viewed, or how the data will be used after it is collected. It is my understanding that the flow of data from the fishermen will come from two sources: the self-reported trip information and the electronic data transmitted by the TrackerOne. Although the Addendum says the ACCSP will be responsible for filtering the electronic data so it aligns with the self-reported trip information, and any discrepancies will be identified, the Addendum does not say specifically who will be responsible for detecting such discrepancies or how access to the data set will be limited, if at all. This is inconsistent with typical data governance policies.

8. The Addendum, which I understand serves as guidance for MDMR, identifies four objectives for this “24/7” tracking requirement: 1) to improve information available to fishery managers and stock assessment scientists, 2) to support risk reduction efforts due to Atlantic Large

Whale Take Reduction Plan, 3) to support the development of offshore renewable energy and the conservation of U.S. waters, and 4) to promote improved fishery management and offshore enforcement of federal lobster fisheries in the Exclusive Economic Zone. There is limited discussion in the Addendum detailing what sort of testing was done to determine the minimum necessary tracking to accomplish the four listed objectives, and there is no evidence that minute by minute granular location changes (as opposed to changes occurring every 5 minutes, every 30 minutes, or every hour) are necessary in order to accomplish the purposes of the Rule. In my experience, good data collection policy minimizes the data collected to the bare minimum necessary to achieve an end goal.

9. Typical data governance policies also make clear the format that any data reports will use and provide the explicit purposes for which those reports are to support (meaning, in this case, whether the reports are prepared for spatial planning forecast or enforcement efforts). Such guidelines are necessary so that the data reported is limited to only that which will further the explicit purposes of the report. This ensures that individual privacy rights are protected to the fullest extent possible. For example, should MDMR desire to overlay whale migration paths with the data retrieved by the mandated Particle TrackerOne devices, the data collected must be limited to that purpose and the fisherman assured of that limited use. MDMR currently does not place any limits on the individuals and organizations with whom the data can be shared, or limit how long it can be retained. The rule also does not place any limitations on how MDMR can use the data set and states only that it will use the data collected for spatial planning and offshore enforcement. MDMR does not identify what data fields or data points will be used in pursuit of those purposes, or whether it will change the types of data collected as its purposes evolve. Nor does MDMR reveal which individuals will be filtering and reviewing the data.

10. In conjunction with my review of the Addendum, I also reviewed the specifications of the Particle TrackerOne that MDMR has sent to lobster fisherman. Based on my review, I understand that the Particle Tracker One device connects to an online dashboard that would enable the user to view the data being collected and reported. It is my understanding that the lobster fishermen currently have no access to their own dashboard. Accordingly, they are unable to determine and monitor the information being collected from them. This is important because the device itself is capable of gathering more fields beyond the GPS coordinates identified in the Addendum. Moreover, the device can be updated by the user (who is not the individual fishermen in this context because they lack a user profile connected to the device) to gather different fields of information. It is also my understanding that the lobster fishermen are not provided with any opportunity to consent to (or even review) the device's terms of service. Therefore, the device is susceptible to enhancement in order to gather even more sophisticated tracking information without their awareness or permission. There is no indication who or what is the official "user" of the device with access to these settings.

11. There also is no clarity over who, if anyone, is actively monitoring the system and/or what safeguards will be taken if the system were to go offline or its transmission interrupted for any period of time. This seems unusual, given that MDMR proposes to penalize lobster a fisherman whose device fails to "ping" at any time he or she is on the water.

12. In sum, there is a general lack of specificity and needless risk exposure with the Addendum's policy in the context of best privacy practices.

Dated at Sunnyvale, California this 10th day of January, 2024.

/s/ Mark Walick
Mark Walick

