TO: Joint Committee on Marine Resources

FROM: Kim Ervin Tucker on behalf of the Maine Lobstering Union

DATE: April 29, 2015

RE: L.D. 1233 – Proposed Amendments to 12 MRSA §6306, sub-§1, ¶A

The Department of Marine Resources has proposed several amendments to existing law in L.D. 1233. This Memorandum addresses one of those amendments which raises constitutional issues of substantive and procedural Due Process and concerns the Fourth Amendment implications of amending 12 M.R.S.A. § 6306, sub-§1, ¶A to permit the warrantless installation of electronic surveillance equipment on lobster license holders' watercraft and vehicles, by re-defining such installations as within the consent that license holders have given for regulatory "inspections" conducted by DMR as part of an inspection pursuant to 12 M.R.S.A. § 6306, sub-§ 1(A).

The proposed amendment violates the Fourth Amendment to the United States Constitution and would subject lobstermen to unreasonable searches, in the absence of probable cause and a warrant. Conditioning the receipt of a commercial fishing license on the waiver of such constitutional protections and rights is contrary to the Constitution and controlling U.S. Supreme Court precedent. While there is an exemption in Fourth Amendment case law that sanctions routine, regulatory inspections in highly or pervasively regulated industries like commercial fishing, the proposed amendment goes well beyond the parameters that this exemption envisions.

Covert installation of electronic surveillance equipment on watercraft or vehicles used by licensed lobstermen should only be permitted where there is probable cause to support the need for such monitoring and be done after obtaining a warrant. If any clarification is needed in current statute, it is the clarification that covert installations such as that proposed can only occur with probable cause and a warrant.

SUMMARY OF APPLICABLE LEGAL PRINCIPLES AND AUTHORITIES

Specifically, 12 M.R.S.A. § 6306, currently states that:

§6306. Consent to inspection; violation

1. Consent to inspection. Any person who signs an application for a license or aquaculture lease or receives a license or aquaculture lease under this Part has a duty to submit to inspection and search for violations related to the licensed activities by a marine patrol officer under the following conditions.

> A. Watercraft or vehicles and the equipment located on watercraft or vehicles used primarily in a trade or business requiring a license or aquaculture lease under this Part may be searched or inspected at any time.

B. Any other location where activities subject to this Part are conducted may be inspected or searched during the hours when those activities occur.

C. A location specified in paragraph B may be inspected at any time if a marine patrol officer has a reasonable suspicion of a violation of this Part.

D. No residential dwelling may be searched without a search warrant unless otherwise allowed by law.

12 M.R.S. § 6025(4) (2009) provides that:

4. Search powers. Any marine patrol officer, in uniform, may search without a warrant and examine any watercraft, aircraft, conveyance, vehicle, box, bag, locker, trap, crate or other receptacle or container for any marine organism ***when he has probable cause to believe that any marine organism taken, possessed or transported contrary to law is concealed thereon or therein.***

Thus, current law authorizes warrantless searches with probable cause in limited circumstances (i.e. *when a marine patrol officer has* ***probable cause*** *to believe that* ***any marine organism*** *taken, possessed or transported contrary to law* ***is concealed on or in*** *any watercraft, aircraft, conveyance, vehicle, box, bag, locker, trap, crate or other receptacle or container).*

Current law also contemplates that license holders have provided an implied consent to regulatory inspections by marine patrol officers within the time, place and scope limitations describes in § 6306. These inspections are both routine and need not be based on probable cause.

Through the amendment to 12 M.R.S.A. § 6306, sub-§ 1(A) proposed in L.D. 1233, DMR seeks to re-define the scope of regulatory inspections, for which no probable cause or warrant is required or needed, and for which consent is impliedly given through filing an application for a license as a commercial fishermen, as including covert electronic surveillance – including *covert* installation on watercraft and vehicles of GPS devices. This proposal represents a significant expansion of DMR's power and expands the concept of "inspections" to a point where it is instead authorizing warrantless searches without probable cause, as well as repeated trespasses on the property of fishermen to install and/or remove electronic surveillance devices (including GPS).

Such an expansion of DMR's authority to conduct searches and seizures of watercraft and vehicles used by license holders engaged in commercial fishing operations in Maine can only be permitted if the expansion satisfies the 3-part test established by the U.S. Supreme court in *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

In *Burger,* the U.S. Supreme Court established the limits of warrantless searches in the context of administrative inspections, like those authorized by 12 M.R.S.A. § 6306. The Court held that where the privacy interests of the business owner/license holder are weakened and the government interests in regulating particular businesses are concomitantly heightened, as is the case with "pervasively regulated industries" like commercial fishing, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment. A warrantless inspection in the context of a pervasively regulated business, will be deemed to be reasonable *only so long as three criteria are met.*

1) First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made.

2) Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." *Donovan v. Dewey,* 452 U.S., at 600, 101 S.Ct., at 2539.

3) Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *Ibid.* In other words, the regulatory statute must perform 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. See *Marshall v. Barlow's, Inc.,* 436 U.S., at 323, 98 S.Ct., at 1826; see also *id.,* at 332, 98 S.Ct., at 1830 (STEVENS, J., dissenting). To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey,* 452 U.S., at 600, 101 S.Ct., at 2539. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope." *United States v. Biswell,* 406 U.S., at 315, 92 S.Ct., at 1596.

Here, there is a substantial government interest that informs the regulation of the commercial lobster fishery (as well as other fisheries in Maine), and warrantless inspections *as traditionally conceived* further that substantial interest; however, DMR cannot demonstrate any necessity for warrantless, covert installation of electronic surveillance equipment (including GPS devices), in the absence of any showing of probable cause, to further that interest. Rather, if there is time to covertly install such a device, there is time to get a warrant.

Relevant Facts and Legal Principles:

- In the absence of this amendment there is no doubt that the covert installation of electronic surveillance equipment is outside the definition of an administrative "inspection" that is authorized by 12 M.R.S.A. § 6306, sub-§ 1(A).
- DMR's installation of a GPS device on a fishermen's vessel or vehicle, and use of that device to monitor the vessel's or vehicle's movements, constitutes a "search" under the Fourth Amendment.
- The use of a GPS device on a target's vehicle (or vessel) constitutes a search because it requires a "common-law trespass" on the target's property to install such a device, even though commercial fishermen may have a diminished expectation of privacy because they are in a "pervasively regulated industry" and are on notice that they are subject to inspection while engaged in the business of commercial fishing. *United States v. Jones*, 132 S. Ct. 945 (2012).[1]

[1] In January of 2012, in ***United States v. Jones***, 132 S. Ct. 945 (2012), all nine Supreme Court Justices agreed that Jones was *searched* (within the meaning of the Fourth Amendment) when the police attached a Global Positioning System (GPS) device to the undercarriage of his car and tracked his movements for four weeks. The Court, however, splintered on what constituted the search: the attachment of the device or the long-term monitoring. The majority held

- There can be a search and a violation of the Fourth Amendment even when there is no reasonable expectation of privacy in the effect that is searched, when a trespass is needed to install an electronic surveillance device to the "effect" (e.g. a GPS or listening device installed on a vehicle or vessel).
- Neither commercial fishers nor other business people can be required to surrender their constitutionally protected rights in exchange for the privilege of doing business. However, anyone engaged in the commercial fishing business must be prepared to submit to reasonable regulations and, consequently, to diminished expectations of privacy. *Tallman v. Dep't of Natural Resources,* 421 Mich. 585, 629, 365 N.W.2d 724, 744 (1984); *State v. Nobles*, 107 N.C.App. 627, 635, 422 S.E.2d 78, 84 (N.C.App., 1992); see also, *Koontz v.*

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that the *attachment of the GPS device* ***without a warrant*** and an attempt to obtain information was the violation; Justice Alito, concurring, argued that the monitoring was a violation of Jones's reasonable expectation of privacy; and Justice Sotomayor, also concurring, agreed with them both, but would provide further Fourth Amendment protections.

The majority decision in *U.S. v. Jones*, written by Justice Scalia, joined by Justices Thomas, Roberts, Kennedy and Sotomayor, departed from prior Fourth Amendment case law – which has focused on the individual's "expectation of privacy" and whether that expectation was "reasonable" (i.e. would a reasonable person have an expectation of privacy in the same circumstances). According to the majority opinion, authored by Justice Scalia, the use of a GPS device on a target's vehicle constitutes a search because it is a "common-law trespass" on the target's property. *Id.* at 949–50.[FN21] In so holding, the Court rejected the view that the reasonable expectation of privacy test, articulated in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), necessarily governs the existence of a search under the Fourth Amendment. *See id.* at 353, 88 S.Ct. 507 (holding that defendant was protected from warrantless eavesdropping on phone call because he "justifiably relied" upon privacy of phone booth); *id.* at 361, 88 S.Ct. 507 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' ").[FN22] According to the *Jones* majority, *Katz* did not "narrow the Fourth Amendment's scope." 132 S.Ct. at 951. The Court explained: "[T]he *Katz* reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common law trespassory test." *Id.* at 952 (emphasis in original). In contrast, Justice Alito, joined by Justices Ginsberg, Breyer, and Kagan, disagreed with the majority's trespass test, but agreed that a search had occurred under the reasonable-expectation-of-privacy test formulated in *Katz*. *Id.* at 957–64 (Alito, J., concurring in the judgment).

Specifically, the majority opinion in U.S. v. Jones reaffirmed the prior holdings of the Supreme Court, which until the latter half of the 20th century was tied to common law trespass as a foundation for Fourth Amendment analysis. The majority opinion noted that later cases, which have deviated from that exclusively property-based approach, have applied the analysis of Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, which said that the Fourth Amendment protects a person's "reasonable expectation of privacy," *id.*, at 360, 88 S.Ct. 507. The Court in Jones declined to address the Government's contention that Jones had no "reasonable expectation of privacy," because the Court concluded that Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. Instead the Court held that, at bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94. Further, the Court emphasized that *Katz* did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. Rather, the Jones majority concluded that he *Katz* ***"reasonable-expectation-of-privacy" test has been added to, but not substituted for, the common-law trespassory test.*** See *Alderman v. United States*, 394 U.S. 165, 176, 89 S.Ct. 961, 22 L.Ed.2d 176; *Soldal v. Cook County*, 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450; *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55, and *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530—post-*Katz* cases rejecting Fourth Amendment challenges to "beepers," electronic tracking devices representing another form of electronic monitoring—do not foreclose the conclusion that a search occurred here.

St. Johns River Water Management Dist., ___ U.S. ___, 133 S.Ct. 2586, 2595-2596 (U.S., 2013).

- Government regulations that mandate searches or seizures are subject to the Fourth Amendment's strictures. *See, e.g., Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995) (school district policy for testing student athletes' drug use); *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602 (1989) (Federal Railroad Administration regulations requiring collection of employees' blood and urine).

- Court's have upheld the constitutionality of regulatory requirements that mandate that *all licensees engaged in a heavily regulated industry (e.g. taxicab industry) install or have installed GPS devices,* pursuant to specific regulations, and all persons engaged in that industry are required to transmit their location, number of passengers and fares at all times that they are engaged in their work on duty. This is true even though it is acknowledged that the collection of GPS data by a government agency is a search and seizure by the government. *Buliga v. New York City Taxi Limousine Com'n,* Not Reported in F.Supp.2d, 2007 WL 4547738 *2 f.n. 3 (S.D.N.Y. 2007). However, in the cases where this **uniform** GPS requirement was upheld, the GPS system was installed *with the knowledge of the taxicab owners* and *all taxicab drivers are required to follow (Taxicab and Limousine Commission) TLC regulations which mandate the use of the TTS system* (see *Alexandre,* 2007 WL 2826952 at *4). The rationale for upholding such a uniform practice is that: "Adults who choose to participate in a heavily regulated industry, such as the taxicab industry, have a diminished expectation of privacy, particularly in information related to the goals of the industry regulation." (*Buliga,* 2007 WL 4547738 at *2); see also *Carniol v. New York City Taxi and Limousine Com'n*, 42 Misc.3d 199, 975 N.Y.S.2d 842, 848, 2013 N.Y. Slip Op. 23358 (N.Y.Sup., 2013).

- However, "where warrantless searches relating to the fishing industry are at issue, courts must balance the public interest against the privacy interests of commercial fishers in deciding the reasonableness of warrantless inspections."

In sum, DMR is asking the Legislature to compel lobstermen to consent to the warrantless, covert installation of GPS devices on their watercraft and vehicles, in the absence of any probable cause, merely because these individuals have a commercial lobster license. In authorizing such a redefinition of the scope of permissible, regulatory "inspections" by marine patrol officers, the Legislature would be stating that it is necessary to the protection of the lobster fishery in this State to subject lobstermen to a level of government intrusion in their private property, by conducting warrantless searches and seizures, that the U.S. Supreme Court (in an opinion authored by Justice Scalia) determined violated the Fourth Amendment rights of a known cocaine dealer by trespassing on his property, a trespass that would have violated the Fourth Amendment at the time of the Constitution's adoption by the Founders, and which would violate the Fourth Amendment even if the subject of the search had no reasonable expectation of privacy because his vehicle was on a public street.

Respectfully, the lobstermen of the Maine Lobstering Union submit that such a violation of their constitutional rights under the Fourth Amendment is not warranted and that requiring DMR to obtain a warrant, based on the existence of demonstrated probable cause, prior to covertly installing GPS or other electronic surveillance equipment is sufficient to protect the

State's interest in the protection of the fishery and the definition of regulatory inspections for which consent is provided through filing an application for a commercial fishing license should not be perverted to include the covert installation of GPS or other electronic surveillance devices. We hope that the Legislature agrees that Maine's lobstermen should be entitled to *at least* the level of Fourth Amendment protections from covert warrantless installation of GPS devices as a majority of the Supreme Court has determined that cocaine dealers are entitled...

L.D. 1233 Additional Case Precedents
Kim Ervin Tucker on behalf of the MLU

The Maine Supreme Judicial Court detailed the U.S. Supreme Court's precedents on the Fourth Amendment's exception to the warrant requirement for administrative inspections of pervasively regulated industries in *State v. Ntim*,:

> FN2. To be considered reasonable pursuant to the Fourth Amendment, *New York v. Burger* requires that a warrantless administrative inspection of a pervasively regulated industry meet the following criteria: (1) "there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) it "must be necessary to further [the] regulatory scheme"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." 482 U.S. 691, 702-03, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (alterations in original) (quotation marks omitted). We have analyzed and found constitutional, in the context of commercial trucking, the statutory and regulatory scheme pursuant to which designated agents conduct warrantless administrative inspections of commercial motor vehicles. *See State v. Melvin,* 2008 ME 118, ¶¶ 10-12, 955 A.2d 245. Designated agents also derive their authority to inspect buses from the same Federal Motor Carrier Safety Regulations evaluated in *Melvin* but additional regulations apply. 29-A M.R.S. § 555 (2012; 49 C.F.R. Ch. III, Subch. B (2012); *see, e.g.,* 49 C.F.R. § 374.313(b) (2012) (requiring buses to have clean, functional restrooms on board).

State v. Ntim, 76 A.3d 370, 373 f.n. 2, 381-382, 2013 ME 80, f.n. 2 (Me., 2013).

> [¶ 33] . . . [A]n administrative safety inspection may not be conducted primarily for detecting ordinary criminal activity. "In the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations." *New York v. Burger,* 482 U.S. 691, 724, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (Brennan, J., dissenting) (citing, *inter alia, Michigan v. Clliford,* 464 U.S. 287, 292, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984); *Michigan v. Tyler,* 436 U.S. 499, 508, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *Donovan v. Dewey,* 452 U.S. 594, 598 n. 6, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981); *Camara v. Mun. Ct. of San Francisco,* 387 U.S. 523, 539, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *see also Abel v. United States,* 362 U.S. 217, 226, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960) ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts."). To determine whether the safety inspection was conducted to detect ordinary criminal activity, we examine the intent of the investigating officers.

2. Intent of the Investigating Officers

> [¶ 34] Generally, safety inspections of commercial motor vehicles in interstate travel are permitted without a warrant or prior suspicion. *See State v. Melvin,* 2008 ME 118, ¶ 7, 955 A.2d 245. However, to determine whether the primary purpose of a purported administrative safety inspection is actually for general criminal investigation, we examine the subjective intent of the investigating officers. *See Ashcroft v. al-Kidd,* ___ U.S. ___, 131 S.Ct. 2074, 2080-81, 179 L.Ed.2d 1149 (2011). Although we have observed in some Fourth Amendment cases that the subjective intentions of individual officers are irrelevant, *see State v. Cilley,* 1998 ME 34, ¶ 7, 707 A.2d 79, searches conducted for administrative purposes or pursuant to a special law enforcement need are longstanding exceptions to that rule. *See al-Kidd,* 131 S.Ct. at 2080 ("Fourth Amendment reasonableness is predominately an objective inquiry .... Two limited exceptions to this rule are our special-needs and administrative-search cases, where actual motivations do matter." (quotation marks and alterations omitted)).
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> [¶ 35] An inspection is pretextual when investigating officers use their legal authority to conduct administrative inspections in order to gain access to persons or places absent a warrant or prior suspicion in order to conduct ordinary law enforcement investigations. *See Whren v. United States,* 517 U.S. 806, 811, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (quoting *Burger,* 482 U.S. at 716-17 & n. 27, 107 S.Ct. 2636); *cf. Johnson,* 2009 ME 6, ¶¶ 14-16, 962 A.2d 973. When the officers conduct a pretextual administrative inspection, their actions are "invalid *ab initio* and our analysis ... end[s] there." *See Johnson,* 2009 ME 6, ¶¶ 14-16, 962 A.2d 973.
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> [¶ 38] When the officers of the Commercial Vehicle Unit stepped foot on the bus under the guise of a safety inspection with the clear intention to look for drugs, they violated the Fourth Amendment. *See, e.g., al-Kidd, 131 S.Ct. at 2080-81; Whren,* 517 U.S. at 811-12, 116 S.Ct. 1769. The Commercial Vehicle Unit's use of a drug dog is evidence of their intent not to conduct a safety inspection, but to interdict drugs. Further, the officers clearly testified that they conducted the inspection for the purpose of inspecting passengers' luggage for drugs, which compels me to conclude that the primary purpose was a general interest in crime control, and thus the inspection violates the Fourth Amendment.

State v. Ntim, 76 A.3d 370, 381-382, 2013 ME 80, ¶¶ 33-35, 38 (JABAR, J., dissenting).

Since its decision in *United Stated v. Jones*, the United States Supreme Court issued several additional opinions that further explained the scope of the Fourth Amendment:

> [I]n *Florida v. Jardines,* 569 U.S. ___, ___-___, 133 S.Ct. 1409, 1413-1414, 185 L.Ed.2d 495 (2013), where we held that having a drug-sniffing dog nose around a suspect's front porch was a search, because police had "gathered ... information by physically entering and occupying the [curtilage of the house] to engage in

> conduct not explicitly or implicitly permitted by the homeowner." See also *id.*, at ___, 133 S.Ct., at 1417 (a search occurs "when the government gains evidence by physically intruding on constitutionally protected areas"). In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.
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> In concluding otherwise, the North Carolina Court of Appeals apparently placed decisive weight on the fact that the State's monitoring program is *civil in nature.* See *Jones,* ___ N.C.App., at ___, 750 S.E.2d, at 886 ("the instant case ... involves a civil SBM proceeding"). "It is well settled," however, "that the Fourth Amendment's protection extends beyond the sphere of criminal investigations," [*City of*]*Ontario* [*Cal.*] *v. Quon,* 560 U.S. 746, 755, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010), and the government's purpose in collecting information does not control whether the method of collection constitutes a search. A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment. See *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (housing inspections are "administrative searches" that must comply with the Fourth Amendment).
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> The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. See, *e.g., Samson v. California,* 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed. 564 (1995) (random drug testing of student athletes was reasonable).

Grady v. North Carolina, 135 S.Ct. 1368, 1370-1371 (2015).

Proposed Amendments to L.D. 1233 Submitted by Kim Ervin Tucker
on Behalf of the Maine Lobstering Union

PLEASE NOTE: Legislative Information ***cannot*** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

An Act To Improve Enforcement of Maine's Marine Resources Laws

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 MRSA §6210, sub-§2, as amended by PL 2013, c. 485, §1, is further amended to read:

2. Initiation and notice. If the Chief of the Bureau of Marine Patrol delivers to the commissioner a written statement under oath that the chief has probable cause to suspect that a violation of section 6575-K or section 6864, subsection 7-A has been committed, the commissioner shall immediately examine the statement and determine whether to conduct an adjudicatory proceeding for the purpose of imposing an administrative penalty under this section. If the commissioner determines that the imposition of a penalty is necessary, the commissioner shall immediately notify the person who is alleged to have violated the law ~~in accordance with Title 5, section 9052~~. The notice must state that the person may request a hearing in writing within 10 days of receipt of the notice. ~~The notice is deemed received 3 days after the mailing.~~ [1]For the purposes of this paragraph, the time when the notice is received is the date when the person actually receives that notice. A post office department certificate of mailing to the person is conclusive proof of receipt on the 3rd calendar day after mailing.[2]

Sec. 2. 12 MRSA §6210, sub-§7 is enacted to read:

7. Renewal of licenses. If a holder of a license issued under section 6302-A, 6505-A or 6864 fails to make payment of a pecuniary gain penalty assessed under this section, the commissioner may refuse to renew that holder's license until the holder complies with the payment requirements.

Sec. 3. 12 MRSA §6306, sub-§1, ¶A, as amended by PL 2009, c. 229, §14, is further amended to read:

> A. Watercraft or vehicles and the equipment located on watercraft or vehicles used primarily in a trade or business requiring a license or aquaculture lease under this Part may be searched or inspected at any time~~. This inspection includes covert electronic surveillance to monitor and enforce any law or rule relating to the deployment or retrieval of lobster gear.~~ The inspection permitted by this subsection shall not include covert electronic surveillance to monitor and enforce any law or rule relating to the deployment or retrieval of lobster gear.

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[1] We would strike the proposed addition and substitute the language above.

[2] See same language in existing 14 M.R.S.A. § 6111, sub-§ 3(B).

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on Behalf of the Maine Lobstering Union

Sec. 4. 12 MRSA §6374, sub-§1, as enacted by PL 2011, c. 311, §4, is amended to read:

1. Initiation and notice. If the Chief of the Bureau of Marine Patrol delivers to the commissioner a written statement under oath that the chief has probable cause to suspect that a violation of marine resources law has been committed, the commissioner shall immediately examine the affidavit and determine if a suspension is necessary. If the commissioner determines based on a preponderance of the evidence that a suspension is necessary, the commissioner shall immediately notify in writing the person who violated the law by e-mail if an e-mail address is provided on the application by mailing the notice to the person at the last known address provided in the department's marine resources licensing and enforcement database, or by serving the notice in hand. The notice must state that there is an opportunity for a hearing, if the person requests the hearing in writing within 10 days of receipt of the notice. The notice is deemed received 3 days after the mailing, unless returned by postal authorities.[3] For the purposes of this paragraph, the time when the notice is received is the date when the person actually receives that notice. A post office department certificate of mailing to the person is conclusive proof of receipt on the 3rd calendar day after mailing.[4]

Sec. 5. 12 MRSA §6374, sub-§2, as amended by PL 2011, c. 598, §20, is further amended to read:

2. Hearing. A hearing requested under subsection 1 must be held within 30 business days after receipt by the commissioner of a request for hearing except that a hearing may be held more than 30 business days after the request if the delay is requested by the person requesting the hearing. If the hearing is continued, it must be held no later than 60 days after the original notice, and any further continuance must be with the consent of both parties. The hearing must be held in accordance with the Maine Administrative Procedure Act, except that:

A. Notwithstanding Title 5, section 9057, issues of the hearing are limited to whether the person requesting the hearing had a license and whether that person committed a violation of marine resources law; and

B. Notwithstanding Title 5, section 9061, the decision of the presiding officer under Title 5, section 9062 must be made not more than 10 business days after completion of the hearing.

Sec. 6. 12 MRSA §6404, as amended by PL 2007, c. 201, §3, is further amended to read:

§ 6404.Revocation based on conviction of scrubbing lobsters

The commissioner shall ~~suspend~~ revoke the lobster and crab fishing license, wholesale seafood license and the commercial fishing license of any license holder or the

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[3] See this same language in 29-A M.R.S.A. § 2482.

[4] See 14 M.R.S.A. § 6111, sub-§ 3(B).

nonresident lobster and crab landing permit of a permit holder convicted in court of violating section 6438-A. ~~The suspension must be for one year from the date of conviction.~~

Sec. 7. 12 MRSA §6412, sub-§3, as amended by PL 2013, c. 468, §13, is further amended to read:

3. Process for suspension for failing to comply with monthly reporting. If the commissioner determines that a person who holds a license or certificate under this Part has failed to comply with a monthly reporting requirement established by rule pursuant to section 6173, the commissioner shall notify the person ~~at~~ the telephone number provided on the application for the license or certificate and by e-mail if an e-mail address is provided on the [5]application and by mailing the notice to the person at the last known address provided in the department's marine resources licensing and enforcement database, or by serving the notice in hand. If the license or certificate holder has not complied with the reporting requirements within 45 days after the commissioner has provided the notice, the commissioner shall mail a notice of suspension to the license or certificate holder. The notice is deemed received 3 days after the mailing, unless returned by postal authorities.[6] For the purposes of this paragraph, the time when the notice is received is the date when the person actually receives that notice. A post office department certificate of mailing to the person is conclusive proof of receipt on the 3rd calendar day after mailing.[7] The notice must:

A. Describe the information that the license or certificate holder is required to provide pursuant to this Part that the department has not received; and

B. State that, unless all the information described in paragraph A is provided to the department or the license or certificate holder requests a hearing, the license or certificate will be suspended in 3 business days after the license or certificate holder's receipt of the notice.

If the license or certificate holder has not complied with the reporting requirements or requested a hearing within 3 business days after receipt of the notice, the commissioner shall suspend the license or certificate.

Sec. 8. 12 MRSA §6025, sub-§4, as amended by PL 1981, c. 433, §2, is further amended to read:

4. Search powers. Any marine patrol officer, in uniform, may search without a warrant and examine any watercraft, aircraft, conveyance, vehicle, box, bag, locker, trap, crate or other receptacle or container for any marine organism when he has probable cause to believe that any marine organism taken, possessed or transported contrary to law is concealed thereon or therein. Any search conducted through use

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[5] The DMR has suggested removing this language but we believe that this language should remain as in the statute; we have no objection to adding a mailed notice, however.

[6] See this same language in 29-A M.R.S.A. § 2482.

[7] See 14 M.R.S.A. § 6111, sub-§ 3(B).

of electronic surveillance requires probable cause and a warrant be obtained prior to installation.

SUMMARY

This bill amends the laws governing the enforcement of the marine resources laws in the following ways.

1. It specifies that notices of penalties and hearings are deemed received 3 days after they are mailed.

2. It authorizes the Commissioner of Marine Resources to deny the renewal of a license for an elver harvester or elver dealer who has not paid a pecuniary gain fine assessed to that harvester or dealer for buying or selling elvers in excess of that harvester's or dealer's quota.

3. It ~~amends~~ clarifies that the consent to inspection provision does not allow covert electronic surveillance by the Bureau of Marine Patrol, including allowing the bureau to place electronic surveillance equipment on lobster vessels for the purpose of determining if a lobster and crab fishing license holder is fishing over the trap limit. This clarification is based upon the U.S. Supreme Court's decision in United States v. Jones, ___ U.S. ___, 132 S. Ct. 945 (2012) and related case authorities prohibiting conditioning obtaining a license upon waiver of constitutional protections against unreasonable, warrantless searches and seizures without probable cause. *Tallman v. Dep't of Natural Resources,* 421 Mich. 585, 629, 365 N.W.2d 724, 744 (1984); *State v. Nobles*, 107 N.C.App. 627, 635, 422 S.E.2d 78, 84 (N.C.App., 1992); see also, *Koontz v. St. Johns River Water Management Dist.*, ___ U.S. ___, 133 S.Ct. 2586, 2595-2596 (U.S., 2013).

4. It imposes a time limit of up to 60 days for an administrative hearing on a license suspension to be held, in order to prevent an individual from continually delaying a license suspension.

5. It changes the penalty for scrubbing egged lobsters from a one-year license suspension to license revocation.

6. It specifies that notice of failure to comply with monthly reporting requirements must be by mail or by serving the notice in hand and not by e-mail or telephone.

7. It specifies that probable cause and a warrant are required prior to installation and use of any electronic surveillance devices by marine patrol officers conducting a search pursuant to 12 M.R.S.A. § 6025, sub-§ 4.