STATE OF RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION
235 PROMENADE STREET
PROVIDENCE, RHODE ISLAND

Re: David Benson	:	**AAD No. 18-007/ENE**
Notice of Violation	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to a Notice of Violation ("NOV") dated July 20, 2018 and issued by the Department of Environmental Management ("Department") to David Benson ("Respondent") and the Respondent's timely request for a hearing. Pursuant to R.I. Gen. Laws § 20-2.1-1 *et seq*., the Respondent holds a commercial fishing license ("License"). A hearing was held on January 14 and 27, and February 5, 2020.[1] The parties were represented by counsel and all briefs were filed by July 28, 2020.

II. JURISDICTION

The Administrative Adjudication Division ("AAD") has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-17.1-1 *et seq*., R.I. Gen. Laws § 42-17.7-1 *et seq*., R.I. Gen. Laws § 42-35-1 *et seq*., and the *Rules and Regulations for the Administrative Adjudication Division*, 250-RICR-10-00-1. *Infra*.

III. ISSUES

Whether the Respondent violated R.I. Gen. Laws § 20-2.1-4 by unlawfully catching, harvesting, holding, or transporting for sale, any marine finfish without a license and/or whether

[1] The undersigned heard this matter pursuant to a delegation of authority dated November 27, 2019 by Chief Hearing Officer David Kerins.

the Respondent violated § 3.10.2(B)(2) of the *Marine Fisheries Finfish Regulation*, 250-RICR-90-00-3 ("Finfish Regulation")[2] by possessing summer flounder over the daily limit that day of 50 pounds, and if so, what should be the sanction.

IV. TESTIMONY AND MATERIAL FACTS

Office Mark Saunders ("Saunders") testified on behalf of the Department. He testified he has been an Environmental Police Officer since 1986, and he prepared the NOV. Department's Exhibit One (1) (NOV). He testified that when he prepares notices of violations, he reviews the officer's narrative and drafts a notice for the police chief to sign. He testified that the NOV seeks a total of a 20 day suspension of the Respondent's License since it is the Respondent's first violation. He testified that he always seeks a 20 day suspension of a license for a first violation.

On cross-examination, Saunders testified that the decision to proceed administratively in this matter was initially made by Officer Mercer and then by the police chief when he signed the NOV. He testified that when he saw the Respondent's fish had been seized, he did not schedule an immediate hearing on whether the seizure was lawful or constitutional, and his practice is never to schedule such a hearing regarding the seizure of a catch. He testified that on the day in question, the quota for summer flounder which is also known as fluke was 50 pounds.

Officer Jeffrey Mercer ("Mercer") testified on behalf of the Department. He testified that he has been an Environmental Police Officer for four (4) years and prior to that worked in the marine fisheries section and received a master's in marine science and was working toward a Ph.D. in oceanography before going to the police academy. Department Exhibit's Three (3) (resume). He testified that he has received training for boarding vessels and works in the marine fisheries division focusing on recreational and commercial fishing and boating safety. He testified that on

[2] This is the regulation at the time of the incident. It was effective from April 12, 2018 to August 15, 2018.

June 21, 2018, he was on patrol by boat with another officer near Narragansett Bay and the Sakonnet River to ensure recreational and commercial fishing compliance. He testified that the State waters are three (3) miles from shore, and he was in State waters while on patrol.

Mercer testified that he observed the Respondent's vessel ("Vessel"), the Slacker, a trawling vessel, about a half-mile off the mouth of the Sakonnet River. He testified that a trawling vessel is a commercial fishing vessel and its deck has a reel with a net that is put overboard to catch fish. He testified that the Slacker's home port was Point Judith, and it was in an area not usually associated with trawling vessels and it seemed odd the Slacker was in the eastern part of State waters. He testified that he made his way toward the Slacker and pulled up portside and contacted the Respondent. He testified that he asked the Respondent if he had any fish on board and the Respondent said yes and he then asked if the Respondent had fluke, and the Respondent said he had 300 pounds. He testified that he then told the Respondent that he would be boarding. He testified that he knew his own location based on his boat's chart plotter and radar.

Mercer testified that he boarded the Slacker and there were three (3) totes of summer flounder. He testified that each fish tote holds about 100 to 120 pounds of flat fish. Department's Exhibit Five (5) (photograph of the three (3) totes). The Respondent stipulated that the Respondent was on board the Slacker that day. Mercer testified that he asked the Respondent for his licenses. He testified that the Respondent had a National Marine Fisheries Service vessel operator card which is required for most Federal permits for commercial fishing. He testified that the Respondent had a State landing license that allows the holder to fish in Federal waters and land them in Rhode Island [e.g. sell the fish at a dock]. He testified that the Respondent had a State commercial fishing license with a nonrestricted finfish endorsement which allows the holder to fish in State waters for nonrestricted fish and at that time of the year that would not include summer

flounder, black sea bass, striped bass, or scup. He testified that summer flounder is a restricted fish so the Respondent could not fish for it at that time with his type of license.[3] Department's Exhibit Four (4) (Respondent's licenses).

Mercer testified that after he saw the flounder and the Respondent's licenses, he told the Respondent that he was over the 50 pound limit and the Respondent told him that he had caught the summer flounder in Federal waters and was on his was to Westport, Massachusetts to sell the fish. He testified that the Rhode Island limit for flounder that day was 50 pounds but the Respondent did not have the correct license to land 50 pounds of flounder so his limit was zero because he could not possess flounder in State waters. He testified that if a person had been fishing in Federal waters and then planned to land the fish at Westport, it would be unusual for that vessel to be where the Slacker was, a half mile offshore, traveling due east rather than northeast.

Mercer testified that the Respondent's Federal permit allowed him to take summer flounder from Federal waters. He testified that the Respondent also had a Federal sea scallop permit for the Slacker and that requires a vessel to have a vessel monitoring system ("VMS") that transmits GPS coordinates every half hour to the National Marine Fisheries Service. He testified that after speaking to the Respondent, he returned to his vessel and opened up the "V track," the VMS application, on his cell phone. He testified that V track was developed by the National Marine Fisheries Service to view the data on a map or Excel spreadsheet. He testified that when he initially obtained his log-in and password for the program, he spoke to a representative at National Oceanic and Atmospheric Administration about how the program worked. He testified the data is shown on a map and can be put in an Excel spreadsheet.

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[3] The Respondent argued that the term "to fish" was incorrect because the Respondent or anyone would not know what fish would come up in a fishing net. Mercer testified that he was using the term in the context of the definition of fishing: to harvest, hold, transport, offload. *Infra*. In other words, Mercer was testifying that the Respondent could not possess the summer flounder.

Mercer testified that he located the data for the Slacker from midnight to the time of boarding and later printed this information out and the computer generated the map. Department's Exhibit Seven (7) (map and Excel spreadsheet of VMS data for the Slacker on June 21, 2018). He testified the GPS is transmitted in universal time (UTC) so was four (4) hours ahead of eastern standard time (on that day). He testified that he views VMS data multiple times a week. He testified that the lines showing the Vessel's course on the map are extrapolated between the GPS coordinates so that Slacker's exact location is shown at a "triangle" on the map which is marked every 30 minutes. He testified that the Excel spreadsheet contained the map data in columns and also showed the nation of the vessel, vessel permit number, and declaration code which here showed the Respondent declared he was commercial fishing. He testified that the chart shows the longitude and latitude taken every 30 minutes of the Vessel by the "ping" of the VMS. He testified that the blue triangles on the map correspond with the information on the spreadsheet showing the longitude and latitude every 30 minutes. He testified that the green line on the map represents State waters and the location of the Slacker was located by the VMS every 30 minutes and it never left Rhode Island waters. Department's Exhibit 7(1). He testified that based on his experience, it would have been nearly impossible for the Respondent to go full throttle from State waters into Federal waters and catch 360 pounds of fluke and then return to his location in State waters.

Mercer testified that after he obtained the information from the VMS (Department's Exhibit Seven (7)), he prepared a summons for the Respondent for exceeding the daily limit of summer flounder and for possession of summer flounder and then returned to the Slacker from his patrol boat and read the Respondent his Miranda rights and asked the Respondent if he could look at his GPS. He testified that he could not determine any information from the Respondent's GPS since it had a lot of tracks on it and its history had not been erased. He testified that he gave the

Respondent the summons and explained the administrative procedures to him. He testified that he then seized the fish and the Respondent helped him transfer the fish from the Slacker to the patrol boat and they went to Narragansett Bay Lobsters in Point Judith with the flounder (and other seized fish). He testified he seized 360 pounds of summer flounder (fluke). Department's Exhibit Eight (8) (weigh out of said fish by Narragansett Bay Lobsters).

On cross-examination, Mercer testified that as a police officer, he is covered by the police officers' Bill of Rights and carries a firearm. He testified that when he saw the Vessel, he did not have information the Respondent was involved in illegal activity. He testified that he did not include in his incidence report that the Slacker was traveling west to east or the area being the type not to have much fishing. He testified that it is legal to fish in that area. He testified that he has never applied for a warrant to stop a fishing boat that he has boarded. He testified that in his police report he wrote the "boat [Slacker] was not actively fishing and the net was stowed on the reel," and he should have more accurately written that it was not actively trawling. Respondent's Exhibit One (1) (police report). He testified he issued a summons and when a summons is issued, an arrest number is pulled which is on the report. He testified that it is a crime for someone not to heave-to when asked to heave-to and that Respondent was not free to go once the Respondent told him (Mercer) that he had fluke. He testified that the Slacker's net was not covered in burlap or another covering that would have made it legally stowed when he boarded and there was no liner on the net. He testified that the Respondent had a Federal license that allowed him to catch fluke.

Mercer testified that in some circumstances, it would have been legal for Respondent to have 300 pounds of fluke. He testified that the Respondent could have caught fluke in Rhode Island waters on that day if he threw them back and the Federal permit allowed him to possess that amount of fluke. He testified that under Department rules, a Federally permitted vessel may transit

through Rhode Island waters to land fish when Rhode Island quotas are closed, but Rhode Island quotas were not closed on that day. He testified that the Department will generally allow Federally caught fish to transit State waters but under the regulation, it has to be when State quotas are closed. He testified that it was significant to him whether the fish were caught in Federal waters.

Mercer testified that he read Miranda rights to the Respondent, and he will read those before an arrest. He testified that the Respondent was unable to leave at that point. He testified he confirmed that the Slacker had Massachusetts' landings. He testified that his search on that day from the time he boarded to time he released the Slacker was no different than what would have done for a criminal search versus an administrative search. He testified that he read the Respondent his Miranda rights out of caution since he was going to ask the Respondent to show him his GPS. He testified that the typical trawling speed for fishing is 2½ to 3 knots. He testified it was highly unlikely that the Respondent could go eight (8) knots into Federal waters and then trawl for 300 pounds of fish and then go eight (8) knots to get back into State waters in 30 minutes.

Mercer testified that when he went to look at the VMS, he suspected the flounder may have come from State waters based on the Vessel's location and direction. He testified that the Respondent did not have time to go from his VMS location to the Federal waters identified by the Respondent as where he went and then return to his VMS location. He testified that the Department would not usually charge a violation for transiting from Federal waters through a little corner of State waters to land elsewhere. He testified that the Department will charge someone with a violation for fishing for 300 pounds of fluke in State waters when the quota is 50 pounds. He testified that the fish were illegal when he saw them but if they had been taken from Federal waters, he probably would not have charged that violation. He testified that the search of the VMS data was to see where the Respondent caught the fish and the request for GPS data was to confirm

or contradict the VMS information. He testified that at eight (8) knots, it would take seven-and-a-half minutes to go one (1) mile, and Respondent was one (1) mile from the line for the State waters. He testified he does not think it was possible for the Respondent to leave State waters and go into Federal waters and return in the 30 minutes. He testified that the fish were weighed by the dock manager at Narragansett Bay Lobsters and he was given a weigh out slip as the price would be determined later at auction.

On redirect examination, Mercer testified that stowed is common terminology for a net wrapped around the reel (as stated in his police report) but for actively transiting fish, the net would need to be covered in material such as canvas and even if the nets were covered, the Slacker still could not have been transiting from Federal waters because the quotas were not closed in State waters. Department's Exhibit Six (6) (photograph of Slacker showing nets).

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, "the Court must interpret the statute literally andm must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the

legislative intent must be considered. *Providence Journal Co. v. Rodgers,* 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Standard of Review for an Administrative Hearing

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, Administrative Law Treatise § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Certain Relevant Statutes and Regulation

R.I. Gen. Laws § 20-2.1-4 provides in part as follows:

> Licenses – General provisions governing licenses issued. (a) Licenses and vessel declarations required. It shall be unlawful for any person in Rhode Island or the waters of the state: (1) To catch, harvest, or to hold or transport for sale in Rhode Island any marine finfish, crustacean, or shellfish without a license issued under the provisions of this title; provided, however, that marine finfish, crustaceans, or shellfish may be transported by a duly licensed dealer if the marine finfish, crustaceans, or shellfish have previously been sold by a duly licensed person; or (2) To engage in commercial fishing from a vessel unless the vessel has been declared a commercial fishing vessel as provided in § 20-2.1-5(2) and has a decal affixed to it or is displaying a plate.
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> ***
>
> (i) *Revocation of licenses.*
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> (1) *License revocation.* The license of any person who has violated the provisions of this chapter; or rules adopted pursuant to the provisions of this chapter; or rules and regulations that pertain to commercial fishing and reporting issued

pursuant to this title, may be suspended or revoked by the director as the director shall determine by regulation. Any person aggrieved by an order of suspension or revocation may appeal this order in accordance with the provisions of the Administrative Procedures Act, chapter 35 of title 42.

Section 3.10.2(B)(2) of the Finfish Regulation provides as follows:

> 3.10 Sumer Flounder
> ***
> 3.10.2 Commercial
> ***
> B. Seasons, allocations, and possession limits:
> ****
> 2. May 1 - September 15 (Summer):
> a. Target allocation: 35% of the annual quota.
> b. Possession limit:
> (1) Vessels that possess a valid Exemption Certificate: Fifty (50) pounds per vessel per calendar day. The fishery is closed Friday, Saturday, and Sunday each week.
> (2) Vessels that do not possess a valid Exemption Certificate: Fifty (50) pounds per vessel per calendar day. The fishery is closed Friday, Saturday, and Sunday each week. 3. September 16 – December 31 (Fall):

R.I. Gen. Laws § 20-1-3 provides in part as follows:

> Definitions.
> (a) When used in this title, the following words and phrases shall have the following meanings, unless the context indicates another meaning:
> ***
> (2) "Commercial fishing" means to take, harvest, hold, transport, load, or off-load, marine species for sale or for intended sale.

D. Arguments

The parties' argument will be discussed in the pertinent sections of this decision.[4]

[4] The Department filed its brief on April 17, 2020, and the Respondent filed his brief on June 3, 2020. The Department filed a response brief on July 7, 2020, and the Respondent filed a response brief on July 28, 2020. In the Respondent's reply brief, he argued that based on *Stebbins v. Wells*, 818 A.2d 711(R.I. 2003) the Department waived certain issues by not addressing them in its briefs. *Stebbins* relied on Supreme Court appellate rules in terms of the applicability of the waiver of issues. See Sup. Ct. Rules, Art. I, Rule 16. This is an administrative hearing – *infra* – so the Supreme Court appellate rules do not apply. Furthermore, the Department relied on its briefs as well as memoranda it filed in this matter prior to hearing. The Department's prior memoranda included its objection to the Respondent's motions to suppress evidence, for a post-deprivation hearing (on the seized fish), to restore proceeds (from the seized fish), and for a jury trial. In addition, many of the Respondent's arguments were ruled on (after objection by the Department) at hearing and then repeated in his briefs. *Infra*. The Respondent's argument that the Department waived its objections to any of the Respondent's arguments is without merit.

E. The AAD has Jurisdiction over this Matter

The Respondent argued that the AAD lacked jurisdiction because this was in reality a criminal prosecution[5] since Mercer was a police officer, the Respondent was not free to go when his Vessel was boarded, and he knew he was subject to a misdemeanor criminal statute, R.I. Gen. Laws § 20-1-16. The Environmental Police Department conduct criminal investigations <u>and</u> regulatory investigations. R.I. Gen. Laws § 20-1-8. *Infra*. While Mercer is a police officer, that fact does not make the Department's action against the Respondent's License a criminal matter.[6] The Respondent argued that he was not free to go when stopped so that fell under the definition of an arrest in *State v. Bailey*, 417 A.2d 915 (R.I. 1980). Even if the inability to leave was the only factor actually considered in *Bailey* in order to determine whether someone was arrested and the Respondent had been arrested, it does not follow that the Department's action against the Respondent's License is a criminal prosecution.[7]

The Respondent cited to *Board of License Commissioners of Tiverton v. Pastore*, 463 A.2d 161 (R.I. 1983) *cert. granted* 468 U.S. 1216 (1984); *cert. dismissed* 469 U.S. 238 (1985) to argue this action is in sum and substance a criminal action. The Respondent argued that the Department's requested penalty of a 20 day suspension of License as well as the forfeited flounder was unduly harsh and ostensibly equivalent to a revocation of License.[8] In *Tiverton*, the police executed a

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[5] The Respondent's motion for a jury trial filed prior to hearing was denied by the AAD on October 23, 2019.

[6] The Respondent noted that the police report had an arrest number. Respondent's Exhibit One (1). The police report has a summons number: "18-30-AR." However, Mercer's narrative stated that a summons for the Department's administrative court was issued relating to not having a restricted finfish endorsed license while possessing restricted finfish and exceeding the daily limit of summer flounder. See also Footnote 20.

[7] A review of *Bailey* shows that several factors are to be considered when determining if there has been an arrest after the police had probable cause to arrest a defendant. *Id.*, at 917-918.

[8] The Respondent also raised the issue that if the Respondent is found in violation as charged and his License suspended, the suspension would be used to prevent him from participating in the *Research Pilot Aggregate Program for Summer Flounder*, 250 RICR-90-00-12. However, that is not before the undersigned in this matter.

search warrant at a licensed liquor establishment and found stolen property on the premises. In the criminal proceedings that arose from that search, the search was found illegal and no criminal conviction was obtained against anyone associated with the liquor license. The liquor license was revoked on the basis of the criminal activity, and the revocation was subsequently overturned by the State Liquor Control Administrator.[9]

The facts in *Tiverton* are not similar to this matter. The Department's action is not based on a violation of criminal law for which there was no criminal conviction due to an illegal search. Indeed, *Tiverton* specifically distinguished its type of criminal search from a search conducted for the purposes of enforcing the statutes and regulations related to licensed liquor establishments. *Id.* at 166.[10]

This matter is a "contested case" as defined in the Administrative Procedures Act ("APA"), R.I. Gen. Laws § 42-35-1(5).[11] The Department seeks to sanction the Respondent's License and pursuant to the APA, R.I. Gen. Laws § 42-35-14(c),[12] the Department sent the Respondent notice

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[9] In *Tiverton*, the Rhode Island Supreme Court relied on *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965) to find that the revocation of a liquor license was quasi-criminal in character so that the exclusionary rule of the illegally found evidence should apply. While *Tiverton* is not relevant, the Rhode Island Supreme Court in *State v. 1990 Chevrolet Corvette VIN 1G1YY3388L5111488*, 695 A.2d 502, 507 (R.I. 1997) discussed that *Tiverton's* finding was based on *One 1958 Plymouth* which was now of "dubious authority" in light of *United States v. Ursery*, 518 U.S. 267 (1996). *Ursery* found that a civil forfeiture proceeding was not a criminal prosecution and thus raised no concerns in terms of double jeopardy.

[10] *Tiverton* "recognize[d] that the criteria for searches of regulated premises are less stringent than those applicable to other structures" which is the type of search conducted on the Vessel. *Id.* at Footnote Two (2). *Infra.*

[11] Said statute provides for the following definition: "'Contested case' means a proceeding, including but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing."

[12] R.I. Gen. Laws § 42-35-14(c) provides as follows:

> [n]o revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency sent notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.

by the NOV that it sought to suspend his License. Pursuant to R.I. Gen. Laws § 42-17.7-2,[13] this office has jurisdiction over all contested licensing proceedings at the Department.

F. Evidence Re: Stop and Search

The Respondent argued at hearing (and was overruled) and again in his brief that the admitted evidence should be suppressed because of an illegal stop and seizure.

R.I. Gen. Laws § 20-1-8 provides in part as follows:

> Enforcement powers of director and conservation officers.
> (a) The director and each conservation officer shall have the power:
> (1) To enforce all laws, rules, and regulations of this state pertaining to:
> (i) Fish, wildlife, and all vertebrates, invertebrates, and plants;
> ***
> (5) To seize and take possession of all fish, shellfish, crustaceans, marine mammals, amphibians, reptiles, birds, and mammals in possession, or under control of, any person or that have been shipped, or are about to be shipped, at any time, in any manner, or for any purpose contrary to the laws of this state, and dispose of them at the discretion of the director;
> ***
> (7)(i) To go on board any boat or vessel engaged, or believed to be engaged, in fishing and examine any fishing, shellfish, scallop, lobster, multipurpose, or other license issued under this title;
> (ii) To go on board any boat or vessel engaged, or believed to be engaged, in fishing and to inspect that boat or vessel for compliance with the provisions of this title and any rules relative to the taking of fish, shellfish, crustaceans, marine mammals, amphibians, and reptiles. In the absence of probable cause to believe that a crime relative to the taking of these marine species has been, or is being, committed, any evidence obtained as the result of a boarding (other than for the purpose of examining a license) or of an inspection may not be used in a criminal prosecution.

R.I. Gen. Laws § 20-2.1-4 provides in part as follows:

> Licenses – General provisions governing licenses issued.
> ***
> (d) *Reporting and inspections condition of license.* All persons granted a license under the provisions of this chapter are deemed to have consented to the reporting requirements applicable to commercial fishing actively that are established pursuant to

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[13] R.I. Gen. Laws § 42-17.7-2 provides in part as follows:

> Adjudication of environmental licenses and violations – Informal resolution. All contested enforcement proceedings, all contested licensing proceedings, and all adjudicatory proceedings under chapter 17.6 of title 42 shall be heard by the division of administrative adjudication pursuant to the regulations promulgated by the director of environmental management. ***

this title and to the reasonable inspection of any boat, vessel, net, rake, bullrake, tong, dredge, trap, pot, vehicle, structure, or other contrivance used regularly for the keeping or storage of fish, shellfish, or crustaceans, and any creel, box, locker, basket, crate, blind, fishing, or paraphernalia used in conjunction with the licensed activity by persons duly authorized by the director. The provisions of § 20-1-8(a)(7)(ii) shall apply to these inspections.

(e) *Possession, inspection, and display of license.* Every person holding a license issued under this chapter shall have that license in his or her possession at all times while engaged in the licensed activity and shall present the license for inspection on demand by any authorized person. Any person who shall refuse to present a license on demand shall be liable to the same punishment as if that person were fishing without a license.

In addition, *Commercial and Recreational Saltwater Fishing Licensing Regulations*, 250-RICR-90-00-2[14] provides in part as follows:

2.7.6 Data Reporting

A. Required:

1. The holder of any type of commercial fishing license, dealer license, or landing permit shall be deemed to have consented to providing such fishery-related information as the Department may require, including but not limited to, catch, effort, and areas fished.

The United States Supreme Court has held that any expectation of privacy in commercial premises is less than a similar expectation in an individual's home. *New York v. Burger,* 482 U.S. 691 (1987). Furthermore, certain "closely regulated" industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor. Essentially, administrative inspections without court orders are often necessary to further an important state regulatory scheme. As the Court found, "[i]f an inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Id.* at 710 (citation omitted). Relying on *Burger,* the Rhode Island Supreme Court in *Keeney v. Vinagro*, 656 A.2d 973 (R.I. 1995) found that a warrantless search of a pervasively regulated business is reasonable if the following three (3) criteria are met:

[14] This regulation was effective at the time of the stop of the Respondent's vessel. It was effective from January 1, 2018 to December 18, 2018. A similar provision is in the current regulation.

1) "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made."

2) "the warrantless inspections must be necessary to further the regulatory scheme."

3) "the statute's inspection program, in terms of the certainty and regularity of its application," must provide "a constitutionally adequate substitute for a warrant." *Keeney*, at 975. See also *Burger*, 482 U.S. at 702-03.[15]

The Department has regulatory authority over the Respondent's License. Pursuant to R.I. Gen. Laws § 20-2.1-1, there is a strong public interest in the conservation of State's natural resources including its marine fisheries, and the State regulates the harvesting, taking, landing, and selling of marine finfish, crustaceans, and shellfish for the benefit of the people of the State. Thus, there is a strong government interest that informs the regulatory scheme pursuant to which inspections can be made. It is for those reasons that *Keeney* adopted *Burger* regarding warrantless inspections for closely regulated businesses. *Burger* found that for regulatory inspections to be effective and serve as a deterrent, unannounced, even frequent, inspections are essential.

The Respondent argued that the Department's *Administrative Inspection Guidelines*, 250-RICR-20-00-3 ("Inspection Regulation") required a warrant and cited to § 1 that speaks of "reasonable private property interests guaranteed by the Federal and State Constitutions" and § 3.10 that provides that "[i]nspectors must be aware that performing an unlawful warrant-less inspection could prevent any evidence gathered . . . from being used in any legal proceedings."[16]

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[15] *Vinagro v. Reitsma*, 260 F.Supp.2d 425 (D. R.I. 2003) declined to extend this exemption from warrant requirements when a regulatory agency conducted an inspection in conjunction with a criminal investigation. This matter was not one where a regulatory inspection was being conducted along with a separate criminal investigation.

[16] The Inspection Regulation provides in part as follows:

> 3.1 Purpose
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> A. The purpose of these Guidelines is to describe the general procedures for administrative inspections undertaken by employees of the Rhode Island Department of Environmental Management (herein after referred to as "DEM" or the "Department"). These Guidelines are promulgated to balance the State's interests in protecting the environment and enforcing environmental laws and regulations with reasonable private property interests guaranteed by the Federal and State Constitutions and to promote awareness of DEM regulations involving private property. More specifically, these Guidelines:
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> ***

3.3 Administrative Findings
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B. To the extent that the law authorizes the Department to conduct inspections on private property, such inspections should be conducted with respect for the rights and privacy of property owners, consistent with the protections afforded by the United States and Rhode Island Constitutions, as interpreted and applied by the courts. Inspections are the primary method available to DEM to enforce and determine compliance with environmental statutes and regulations administered by DEM. Both announced and unannounced inspections are vital compliance assurance tools in the Department's ongoing effort to protect the environment. ***

3.4 Application *** These Guidelines: ***

3. are not to be interpreted as changing existing laws and regulations and do not limit or expand DEM's existing legal authority to conduct regulatory inspections;

4. are not intended to limit or expand the rights or privacy expectations of property owners already specified by law or declared by the courts;

5. do not address, or propose that a criminal search warrant shall be required for regulatory inspections; and

6. shall not limit or restrict the legal methods or procedures by which DEM may seek to secure access to private property for the purpose of conducting inspections.
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3.5 Definitions ***

A. For the purposes of these Guidelines, the following terms shall have the following meanings:
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4. "Closely regulated industry" means a business or business-related activity, facility, structure or property for which a permit, license or other approval has been issued by DEM, or a business or business-related activity, facility, structure or property that is otherwise subject to pervasive governmental supervision such that any person who chooses to engage in that business or activity is deemed to have voluntarily subjected him/herself to full regulation.
***

3.10 Protocol for Warrant-Less Inspections

A. In addition to those situations where consent to inspect is properly obtained from an appropriate party, there are certain other limited circumstances where an inspection may be conducted without seeking an administrative inspection warrant or other court ordered access. These circumstances include inspections of closely regulated industries, emergencies, open fields, and conditions that are in plain view. In some instances the scope of the inspection that is allowed under these circumstances will be more limited than that which might be agreed to by consent or approved through an administrative inspection warrant. Warrant-less inspections should be conducted in accordance with § 3.7 of this Part to the extent practicable and consistent with the circumstances under which the inspection is conducted. Note: Inspectors must be aware that performing an unlawful warrant-less inspection could prevent any evidence gathered during the inspection or any evidence that is later gathered as a result of information learned during the unlawful inspection from being used in any legal proceedings.

1. Closely Regulated Industries - Closely regulated industries are subject to warrant-less administrative inspections without consent, court order or prior notification. Inspections of closely regulated industries should be limited in scope to those areas, structures, activities, conditions, items, materials, processes, property, records, information or equipment covered by DEM's license, permit or controlling environmental regulations. Industries, businesses or activities that are not closely regulated may still be subject to warrant-less inspections under one of the other categories of warrant-less inspections discussed in this section (e.g. § 3.10(A)(3) of this Part, the Open Fields Doctrine). Some examples of closely regulated industries include, but are not limited to:

a. Businesses or other activities that have obtained or are required to obtain a permit, license, or other approval from DEM that is necessary for them to conduct their activity, such as a wastewater discharge permit; air permit; hazardous waste treatment, storage or disposal permit; or solid waste license.

The Respondent argued that the Department's case is one of unlawful inspection and under *City of Los Angeles, California v. Patel*, 576 U.S. 409 (2015), any statute or regulation authorizing a search without a warrant is facially unconstitutional absent consent.

The Inspection Regulation is consistent with *Burger* and *Keeney* and the Department's statutory grant of authority regarding closely regulated industries in R.I. Gen. Laws § 42-17.1-2(20).[17] As provided for in § 3.3 of said regulation, the Department is authorized to conduct searches with and without warrants. As provided for in § 3.4, the regulation does not create any new rights or expand any statutory provisions and does not propose that a criminal search warrant shall be required for regulatory inspections. The regulation provides for guidance for inspections made pursuant to the applicable law, e.g constitutional, statutory, and regulatory. The regulation does not provide that the failure to have a warrant makes a legal proceeding invalid. Instead, it mentions that if the inspection is unlawful that the information gathered could be excluded. Section 3.10 speaks of warrantless searches for closely regulated industries and defines closely regulated industries in § 3.5(A)(4) and § 3.10(A)(1)(a) as businesses or other activities that have obtained or are required to obtain a permit, license, or other approval from the Department that is necessary for them to conduct their activity. Section 3.5(A)(4) further defines it so those people engaging in such businesses have voluntarily subjected themselves to full regulation.

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[17] R.I. Gen. Laws § 42-17.1-2(20) provides in part as follows:

> Powers and duties.
> The director of environmental management shall have the following powers and duties:
> ***
> (20) To enter, examine, or survey, at any reasonable time, places as the director deems necessary to carry out his or her responsibilities under any provision of law subject to the following provisions:
> ***
> (ii)(A) All administrative inspections shall be conducted pursuant to administrative guidelines promulgated by the department in accordance with chapter 35 of title 42;
> (B) A warrant shall not be required for administrative inspections if conducted under the following circumstances, in accordance with the applicable constitutional standards:
> (I) For closely regulated industries.

Patel found that hotels were not a closely regulated business for which warrantless administrative searches were allowed by *Burger*. Thus, *Patel* overturned a municipal ordinance allowing warrantless inspections of hotel registers. In this matter, the Respondent was engaged in an activity – commercial fishing - for which there is a substantial governmental interest (*supra*) and for which he needed permission from the Department and for which warrantless and regulatory inspections as a closely regulated business is provided for by applicable statutes and regulations.[18]

Mercer did not need probable cause to stop the Vessel. R.I. Gen. Laws § 20-2.1-4(d) speaks of being subject to reasonable inspections as a condition of licensing.[19] The Department is allowed to stop and inspect a vessel believed to be engaged in fishing for the purpose of ensuring

[18] The Respondent also cited to *See v. Seattle*, 387 U.S. 541 (1965) to argue that a warrant was required. In *See*, the plaintiff was criminally convicted when he did not allow a warrantless search of his warehouse to inspect for fire code compliance. As noted by *Wyman v. James*, 400 U.S. 309 (1967) both *See* and its companion case, *Camara v. Municipal Court*, 387 U.S. 532 (1967) (residential building) arose in a criminal context and the Court found in those cases that the Fourth Amendment barred prosecution for refusal to permit the desired warrantless inspection. However, *Wyman* upheld a warrantless home inspection that was a condition of the receipt of Aid to Dependent Families and Children benefits finding that there was no criminal consequence for the refusal to allow the inspection. Similarly, *Patel* and *Burger* provide for the warrantless search of a closely regulated business for the purposes of enforcing the statutory and regulatory requirements of that business.

The Respondent also relied on *Patel* which discussed (and cited to *Marshall v. Barlow's Inc.*, 436 U.S. 378 (1978)) that the U.S. Supreme Court had only identified four (4) industries with a history of governmental oversight where there is no reasonable expectation of privacy to argue that commercial fishing is not a closely regulated industry. While *Marshall* found that closely regulated industries are an exception, it further found as follows:

> Finally, the Secretary urges that requiring a warrant for OSHA inspectors will mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are also constitutionally infirm. The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply. *Marshall*, at 321.

Subsequent to *Marshall*, *Burger* reviewed the various cases discussed in *Marshall* and provided a three (3) part test for how to find whether something is a closely regulated industry. Indeed, *Patel* applied the *Burger* test. As *Marshall* found, a business is not a closely regulated business simply because it is in interstate commerce, but a closely regulated business is also not just the four (4) industries discussed in *Patel*. Rather the *Burger* test is to be applied in order to determine whether something is a closely regulated industry. While the Respondent argued that the Rhode Island Supreme Court has never found commercial fishing to be closely regulated, it does not need to. The Rhode Island Supreme Court adopted the *Burger* test to determine whether an industry is closely regulated. See *Keeney*. See also *P&P Auto Body*, 2007 WL 1108552 (R.I. Super.) (applying *Burger* and *Keeney* to automobile body repair shops).

[19] *Thompson v. Town of East Greenwich*, 512 A.2d 837 (R.I. 1986) ("reasonable" is a permissible standard for a grant of authority to an agency).

compliance. As the Respondent was engaged in fishing and was holding and transporting fish intended for sale, he was engaged in fishing as defined by R.I. Gen. Laws § 20-1-3 and was subject to be boarded to ensure compliance with State law and regulation regarding fishing.[20]

The various arguments relating to criminal procedure as well as objections based on the inspection being without probable cause and without a warrant are without merit. There was no illegally seized evidence and no fruits of the poisonous tree.

G. Evidence: Expert Testimony

In terms of the rule of evidence at an administrative hearing, R.I. Gen. § 42-35-10 provides in part as follows:

> Rules of evidence – Official notice.
> In contested cases:
> (1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

[20] The Respondent often brought up the fact that Mercer was a police officer to argue that this made the matter a criminal matter. That fact has no bearing on the allowed search. *Burger*, at 717-718 found as follows:

> Finally, we fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the § 415–a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. See *People v. De Bour,* 40 N.Y.2d 210, 218, 352 N.E.2d 562, 568 (1976) ("To consider the actions of the police solely in terms of arrest and criminal process is an unnecessary distortion"); (citation omitted). As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. (footnote omitted). In sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

Thus, in an administrative hearing the court rules of evidence are not always followed. See *DePasquale v. Harrington*, 599 A.2d 314 (R.I. 1991).[21] The Respondent relied on *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) to object to Mercer's testimony on the VMS and to argue that Mercer was not an expert[22] so his testimony regarding the VMS and the VMS evidence was inadmissible. While Rhode Island has not adopted *Daubert*, the testimony regarding the VMS is not a novel scientific or complex technical evidence.[23]

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[21] The reasons for the relaxed rules of evidence in administrative hearings was discussed by the Rhode Island Supreme Court in *DePasquale*. In allowing hearsay, the Court found as follows:

> This is a somewhat imprecise standard of competency, but it is a realistic one. An expert administrative tribunal concerned with advancing the public welfare should not be rigidly governed by rules of evidence designed for juries. The Rhode Island Rules of Evidence are to provide the usual and most helpful standard for a hearing officer in adjudging the competency of evidence. However, a hearing officer may take into account evidence that would be excluded from a trial by jury if it would be prudent to do so, given the requirements of the statute being enforced. Such a balancing between inherent reliability and requisite efficiency, as embodied in § 42-35-10(a), is sensible in light of everyday experience. Prudent persons regularly rely upon hearsay information in determining matters of their most important private concerns. The provisions of § 42-35-10(a) entrust the hearing officer with both the ability to exercise prudence in considering evidence and the reliability that must condition its admissibility. *Id.*, at 317.

R.I. Gen. Laws § 42-35-10 also allows character evidence that would otherwise be excluded under Rules of Evidence 404(b). See *Aubin v. Gifford, DOH*, 2007 WL 197109 (R.I. Super.).

[22] The Respondent also relied on Rule 702 of the Rules of Evidence regarding expert testimony. It provides that for testimony by an expert, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion."

[23] In *Owens v. Silvia*, 838 A.2d 881, 890-892 (R.I. 2003), the Court held as follows:

> In *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677, 686 (R.I.1999), this Court discussed the standard for admitting expert scientific testimony that should govern the trial court's decision about whether to allow the jury to hear this type of evidence. Although we declined to expressly adopt the standards outlined in the United States Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), we drew guidance from the principles of that case. *DiPetrillo*, 729 A.2d at 686.
>
> When a party seeks to introduce, through expert testimony, novel scientific or complex technical evidence, it is proper for the trial justice to exercise a gatekeeping function. *Id.* at 685. This is because novel scientific or complex technical evidence can be difficult to understand and evaluate and, therefore, it runs the risk of being " 'both powerful and quite misleading.' " *Id.* at 688. Because expert witnesses are permitted to testify by giving their opinions—despite their frequent lack of any first-hand knowledge or observations of the factual circumstances at issue—their testimony lacks the conventional personal knowledge that is generally required of lay witnesses. *Daubert*, 509 U.S. at 592. The primary function of the trial justice's gate-keeping role is to assure that the proposed expert testimony, presented as a scientifically valid theory, is not mere "junk science." *See Gallucci v. Humbyrd*, 709 A.2d 1059,

The VMS is required by the Federal government to be used by certain licensed fishing vessels. Certainly, it is not a new or novel scientific theory. The VMS is GPS (global positioning system) for vessels as opposed to a GPS navigation system used for directions when driving a car. Mercer testified that the Respondent was required to have a VMS under his Federal fishing license and that the VMS tracked the Vessel and pinged it every 30 minutes. He testified that as part of his duties he has reviewed VMS many times, and he used the application to download and print the map and spreadsheet. For the purposes of the VMS program, Mercer laid the foundation for its admissibility due to his professional experience and job responsibilities. Neither *Daubert* nor *Owens* is applicable to such testimony as it is not highly technical or complex. Further, if either case was applicable, the testimony - by a witness whose job it is to use this common technology in the course of his professional duties and which technology is required for certain Federal fishing licenses - is admissible under R.I. Gen. Laws § 42-35-10 as VMS is GPS which is commonly relied on by reasonably prudent people.

The Respondent also relied on *State v. Mancino*, 340 A.2d 128 (R.I. 1975) to argue the evidence regarding the VMS should not be allowed since Mercer was not qualified as an expert and there needs to be a minimal foundation of a "device" used and tested against another "device." What the Respondent referred to as a device in his brief was in actuality an arresting officer's speedometer. *Mancino* merely reaffirmed a prior holding that the speedometer used to clock a defendant was to be tested against another speed-testing standard and was operating properly at the time of the alleged violation. The VMS is not a speedometer. This is not a criminal case. The VMS is not a speedometer that needs to be tested against a speed-testing standard.

1064 (R.I.1998). As a result, the trial justice must ensure that the parties present to the trier of fact only expert testimony that is based on ostensibly reliable scientific reasoning and methodology. *DiPetrillo*, 729 A.2d at 690; *see Daubert*, 509 U.S. at 592–93.

H. Evidence: "Cropped" Map and Cell Phone

Mercer testified that the map showed the spreadsheet's data until the 13:57 entry when it was cut off, and the first ping on the map was not labeled with the longitude and latitude. The Respondent argued that the admission of the incomplete map deprived him of a fair hearing. He relied on *Tancrelle v. Friendly Ice Cream Corporation*, 756 A.2d 744 (R.I. 2000) to argue that an inference be made that the missing evidence would be unfavorable to the Department. *Tancrelle* provides that a negative inference can be made due to a party's failure to respond to discovery or to preserve evidence in contravention of corporate policy. If the Department had not produced the map in discovery, one could infer that it might show negative evidence. However, the map and the spreadsheet were produced. While the map does not show all the spreadsheet data, all data including the pings are contained in the spreadsheet. The map is in UTC (plus four (4) hours from Eastern Standard Time) and states the Vessel was boarded at 13:36 UTC (during cross-examination, Mercer testified that the Vessel was boarded at 9:36 a.m. EST). The boarding time explains why the Vessel's average speed decreased after that time for the next three (3) data points. Department's Exhibit 7(3). The longitude and latitude for 13:27 is on the map and the extrapolated course for the Vessel carries on past 13:27 with a triangle (for the next ping) and the beginning of that triangle's label ("2018" for year and "41°2" for latitude). While all the data is not on the map, there is no basis to make a negative inference from the map that the Slacker was not in State waters.

The Respondent also argued that he was deprived of the ability to cross-examine Mercer as to the VMS that Mercer saw on his cell phone and later printed out. The undersigned declined to have Mercer try to pull up the data on his cell phone during the hearing. Unduly repetitious evidence may be excluded. Here, Mercer authenticated the map and chart as to what he printed except for the extra yellow on the bottom of the map. The extra yellow is not relevant. The

Respondent was able to cross-examine Mercer about the data he saw on his cell phone because that data was what he printed: the Slacker's VMS and its printed data was what was introduced by Department to show the Slacker's location. The Respondent was not deprived of his right to cross-examine Mercer on the VMS data.

I. Whether the Respondent violated R.I. Gen. Laws § 20-2.1-4 and § 3.10.2(B)(2) of the Finfish Regulation

i. Whether the Respondent violated R.I. Gen. Laws § 20-2.1-4 by unlawfully catching, harvesting, holding, or transporting for sale, any marine finfish without a license

R.I. Gen. Laws § 20-2.1-1 *et seq.* provides for the licensing of commercial fishing for various fish species including finfish which includes summer flounder. Further licensing requirements are set forth in *Commercial and Recreational Saltwater Fishing Licensing Regulations*, 250-RICR-90-00-2 ("Licensing Regulation"). R.I. Gen. Laws § 20-2.1-4 provides that it is a statutory violation to catch, harvest, hold, or transport for sale any marine finfish without a license.

It was undisputed that on June 21, 2018, the Respondent did not hold the proper State license to hold or possess for sale summer flounder while in State waters. Based on Mercer's testimony as to his patrol vessel's location and the Slacker's location and the VMS evidence, the Vessel was in State waters when stopped by Mercer.

The issue of whether the flounder could have been caught in Federal waters came up because the Respondent could have legally caught the 360 pounds of flounder in Federal waters. However, he could not transit the flounder through State waters because the quotas were open.[24]

[24] Section 1.6(C)(1) of *Marine Fisheries Definitions and General Provisions*, 250-RICR-90-001 provides for finfish and during the closure of Rhode Island fishery quota, a Federally permitted vessel fishing may transit State waters in order to land that species in another state provided the vessel is in compliance with its Federal permit and vessel nets are stowed. The regulation in effect at that time (January 4, 2018 to August 5, 2018) has been amended since then but this provision is still the same.

Mercer testified that often the Department would overlook that violation if the fish had been caught in Federal waters and were being transited briefly through Rhode Island waters to be offloaded.

Nonetheless, even if the fish had been caught in Federal waters, the Respondent violated R.I. Gen. Laws § 20-2.1-4 since he was holding and transporting the flounder through State waters. The Respondent pointed out that one could catch flounder without a license as it would be unknown what fish would be caught but then the flounder would have to be thrown back in the water. The Respondent was not charged with accidentally catching flounder but with possession of the flounder. The statute provides that holding and transporting the fish for sale without a license is a violation. The Respondent had 360 pounds of flounder in totes. Department's Exhibit Eight (8).[25] The Department seized his flounder. The Respondent protested that the Department illegally obtained the monetary proceeds of his catch. The Respondent never argued he was about to throw the flounder back in and certainly the flounder was in the totes and the Vessel was moving through the water so that the Respondent was holding the fish and transporting them for sale.

The Department did not need to prove that the flounder was caught in Federal or State waters to prove this statutory violation. The Vessel was stopped and boarded and there were 360 pounds of summer flounder in totes for which the Respondent did not have a State license and which he was <u>holding</u> and <u>transporting for sale</u> in Rhode Island waters. As the Respondent did not have the proper Rhode Island license to possess the flounder (up to 50 pounds), he violated R.I. Gen. Laws 20-2.1-4. It is irrelevant whether the flounder was caught in Federal waters or not as he cannot hold the fish and transport them for sale in State waters without the appropriate license on that date (and was over the licensed limit if he had held such a license).

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[25] During the hearing, 300 pounds of flounder was discussed several times in discussing applicable statutes and/or regulations. However, the actual amount seized from the Respondent was 360 pounds.

The Respondent argued there was no evidence the fish were caught in Rhode Island waters and even if they had been caught in Rhode Island waters, they were legal under a preemption doctrine. The Respondent cited to *State v. Sterling*, 448 A.2d 785 (R.I. 1982) which held that the Rhode Island regulation on yellowtail flounder caught, possessed, and transported by a Rhode Island fisherman that was legal under Federal law but not under Department regulation was invalid as it conflicted with the Federal law. In *Sterling*, the Court found that Rhode Island had an interest in preventing the depletion of the nearby yellowtail flounder population and that interest was sufficiently strong to justify extraterritorial enforcement of a regulation consistent with Federal law. However, the Court found that the Rhode Island yellowtail flounder law conflicted with Federal policies governing yellowtail flounder. But the Court further found that if no Federal regulations regarding certain species of fish apply, a state may regulate fishing of that species by its citizens beyond its boundaries when a legitimate state interest in served by the regulation. The Respondent did not point to a specific Federal law on flounder that is in conflict with the relevant Rhode Island regulation. Indeed, the evidence was that Respondent would have been allowed to catch 360 pounds of flounder in Federal waters. Rhode Island waters are open to transit flounder from Federal waters when the Rhode Island flounder quota is closed. That case is irrelevant.

In terms of the argument that the flounder was caught in Federal waters and was being transported through Rhode Island waters to offload in Massachusetts, such an argument could go to the mitigation of the sanction for the statutory violation since that type of transiting violation would not appear to be as serious as a statutory violation where the flounder was caught in State waters when not licensed to do so.

In terms of where the flounder was caught, the evidence from Mercer and the VMS is that the Vessel was in State waters between when it left the harbor and was stopped. The Respondent

implied that the Vessel could have gone full throttle into Federal waters, quickly caught 360 pounds of fluke, and returned to State waters in 30 minutes (to be inside the 30 minute increments of the VMS). However, Mercer's testimony demonstrates that is extremely unlikely since it would have taken the Respondent at least 15 minutes to go to and return from the Federal waters at full throttle (eight (8) knots) to the Vessel's location let alone have time to fish and catch the flounder in between coming and going. Mercer testified that the typical towing speed of nets for a trawling vessel (e.g. when fishing) was 2½ to 3 knots. Mercer's testimony and the VMS evidence established that the Respondent was in State waters, and he did not have time to leave and catch 360 pounds of summer flounder in Federal waters.

Based on the evidence, the Department established by a preponderance of evidence that the Respondent had not caught the fish in Federal waters and therefore, he was in violation of R.I. Gen. Laws § 20-2.1-4 by catching, harvesting, holding, or transporting for sale any marine finfish in State waters without a license.[26] [27]

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[26] The Respondent also argued that the fact that Mercer read the Respondent his Miranda rights after Mercer reviewed the VMS made this a criminal matter. The reading of the Miranda rights does not turn this action against the Respondent's License into a criminal prosecution. However, it should be noted that the information that Mercer obtained after he read the Miranda rights – the Vessel's GPS did not show where the Vessel had been – is not needed by the Department to prove its case.

[27] In the Respondent's brief, he argued that no one testified as to where the Slacker caught the fluke. That is true. However, based on Mercer's testimony on where he saw the Vessel when he boarded and what he saw on the Vessel and the VMS evidence, it was established by a preponderance of evidence that 1) the Respondent was holding and transporting flounder for sale in Rhode Island waters; and 2) the Respondent caught and harvested the flounder from State waters and not Federal waters. *Supra.*

Thus, a negative inference from Respondent's failure to testify is not needed to find the Department proved by a preponderance of evidence the alleged violations. However, the drawing of a negative inference from the Respondent's failure to testify is supported by the "Empty Chair Doctrine" which can be invoked in a civil matter but not in a criminal proceeding. *State v. Taylor*, 581 A.2d 1037 (R.I. 1990). It is a rule of jurisprudence that states that a litigant's unexplained failure to produce an available witness who would be expected to give material testimony on the litigant's behalf permits, but does not compel, a factfinder to draw an inference that had the witness testified, the testimony would have been adverse to the litigant. *Retirement Board of Employees' Retirement System v. DiPrete*, 845 A.2d 270 (R.I. 2004); *Aravista v. Alosio*, 672 A.2d 887 (R.I. 1996); and *Belanger v. Cross*, 488 A.2d 410 (R.I. 1985). See also *Benevides v. Canario*, 301 A.2d 75 (R.I. 1973) (doctrine to be applied with caution so that a condition precedent to its invocation is a showing of the missing witness's availability to the person who would be expected to produce the witness). In contrast, see *Anderson v. Friendship Body and Radiator Works*, 311 A.2d 288 (R.I. 1973) (if the witness is equally accessible to both parties, no inference can spring from the failure of either party to call him).

ii. Whether the Respondent violated § 3.10.2(B)(2) of the Finfish Regulation by possessing summer flounder over the daily limit that day of 50 pounds

The Respondent had a State commercial fishing license with a nonrestricted finfish endorsement. Section 2.7.1(A)(1)(g) of the Licensing Regulation provides for nonrestricted finfish license. With that license, the Respondent could not possess summer flounder.[28] If the Respondent had a restricted endorsement, he could have only possessed 50 pounds of flounder on the day at issue. Therefore, the Respondent is in violation of the regulation because he possessed flounder without the appropriate license. He is not allowed to possess any flounder so is in violation of the limits on flounder on that day.[29]

J. What is the Appropriate Sanction

R.I. Gen. Laws § 20-2.1-4(i)(1) provides that violations of said chapter or regulations regarding commercial fishing may result in a license suspension. *Supra.* In furtherance of that statute, the *Rules and Regulations Governing the Suspension/Revocation of Commercial Marine Fisheries, Shellfish Buyer, Lobster Dealer, Finfish Dealer, and Multipurpose Dealer, Licenses*

The Respondent did not testify regarding the summer flounder found on his Vessel that the Department argued was taken from State waters and which the Respondent argued the Department could not prove was taken from State waters (and implied could have been taken from Federal waters). While the Department met its burden of proof, a negative inference might have been able to be drawn from the Respondent's failure to testify as he was the one fishing and the one on the Vessel and in possession of first hand knowledge of a material fact in this matter (where flounder caught). Of course, the Respondent was in statutory violation just by being in possession of the flounder in State waters, but he had first-hand knowledge of where he caught the flounder. Therefore, as this is an administrative proceeding, such a doctrine could have applied and if it had applied would have only served to further support the findings – that have been made without making this negative inference - of the Respondent's statutory violations.

[28] Section 2.7.1(A)(a)(f) of the Licensing Regulation provides for the endorsement for a restricted finfish license with restricted finfish being summer flounder, tautog, striped bass, black sea bass, and scup (at certain parts of the year).

[29] In his brief, the Respondent requested attorney's fees. R.I. Gen. Laws § 42-92-1 *et seq.*, the Equal Justice Act, provides for the award of "reasonable litigation expenses" in "adjudicatory proceedings" to the prevailing party unless the agency was "substantially justified" in its actions leading to the proceedings. The Respondent was not the prevailing party so he is not entitled to attorney's fees.

Issued Pursuant to Title 20 of R.I.G.L. "FISH AND WILDLIFE" ("Penalty Regulation")[30] provide in part as follows:

> Rule 6. Regulations
> As follows:
> 1. Commercial Fishing License
> Any individual who has violated the provisions of Title 20 "Fish and Wildlife", (sic) Chapters 1 "General Provisions" . . . "Licensing" . . . 4 "Commercial Fisheries" . . . of the Rhode Island General Laws or who has violated any rule or regulation adopted pursuant thereto, may have their Commercial Fishing License and the privileges to participate in the commercial fisheries, suspended or revoked as the Director or his/her designee in his/her discretion determines, for the time periods listed as follows:
> 1) First violation - up to thirty (30) days suspension;
> 2) Second violation - up to ninety (90) days suspension;
> 3) Third violation - up to three hundred and sixty-five days suspension; and
> 4) Fourth and successive violations - revocation.

The Department seeks a 20 day suspension as this is the Respondent's first violation. The regulation provides that a first violation can merit up to a 30 day license suspension. In *Re: Neil Hayes*, AAD 17-003/ENE (2/15/19), the respondent held a license that permitted a daily possession of 50 pounds of sea bass. That respondent was found to be in possession of 100 pounds of black sea bass when he unloaded his fish at a dock in Rhode Island. This office imposed a 20 day suspension on that license for the violation. In *Brian K. Loftes*, AAD 00-001/ENE (5/30/01), the respondent was found to be in possession of summer flounder over the limit allowed. In that matter, a 30 day suspension was imposed because the respondent had prior violations, landed almost three (3) times the limit allowed, and used a smaller net than allowed by regulation.

In determining the appropriate sanction for the Respondent's violations, it is relevant to consider the Respondent's disciplinary history and the severity of his violations as well as what would be an effective and appropriate sanction. While this is Respondent's first violation, he was

[30] This regulation was effective from December 31, 2001 through July 30, 2018. Under the recodification of Rhode Island regulations, this regulation is now *Rules and Regulations Governing the Suspension/Revocation of Commercial and Recreational Fishing Licenses*, 250-RICR-80-00-6.

not just over the flounder quota allowed but rather he caught the flounder in State waters when he did not hold such a license and if he had held such a license, he was seven (7) times over the quota allowed. The regulation allows a 30 day suspension to be imposed for a first violation. In this matter, the Respondent violated the statute not just by holding and possessing but also by catching and harvesting the flounder in State waters. The penalty is allowed by regulation and appropriate for the Respondent's violations. His violations were not just a lesser transiting violation.[31]

K. Seizure of the Flounder

Prior to hearing, the Respondent moved to restore proceeds of fish seized or to have an immediate post-deprivation hearing. At the start of the hearing, the undersigned indicated the issue of the seized flounder would be addressed at hearing. R.I. Gen. Laws § 20-1-8(5) and (6)[32] (*supra*) provides for the seizure of fish by the Department as well as of implements and equipment used in violation of the law or regulation to fish and hunt, etc. While the Respondent argued that the

[31] By regulation, the Department has adopted progressive discipline for these kinds of violations. See *Pakse Market Corp. v. McConaghy*, 2003 WL 1880122 (R.I. Super.) (purpose of progressive discipline is to impose reasonable sanctions to deter the licensee from repeated violations and when after the imposition of progressive discipline, a licensee fails to conform with the law, revocation is justified).

[32] R.I. Gen. Laws § 20-1-8 provides in part as follows:

> Enforcement powers of director and conservation officers.
> (a) The director and each conservation officer shall have the power:
> ***
>
> (5) To seize and take possession of all fish, shellfish, crustaceans, marine mammals, amphibians, reptiles, birds, and mammals in possession, or under control of, any person or that have been shipped, or are about to be shipped, at any time, in any manner, or for any purpose contrary to the laws of this state, and dispose of them at the discretion of the director.
>
> (6) To seize all fishing tackle, firearms, shooting and hunting paraphernalia, hunting, fishing, or trapping licenses, traps, decoys, tongs, bullrakes, dredges, or other implements or appliances used in violation of any law, rule, or regulation relating to fish, shellfish, crustaceans, marine mammals, amphibians, reptiles, birds, and mammals, or any equipment, materials, tools, implements, samples of substances, or any other item used in the violation of any other law, rule, or regulation enumerated in subsection (a)(9), when making an arrest as found in the execution of a search warrant, and hold the seized item or items at the owner's expense until the fine and costs imposed for the violation have been paid in full.

Attorney General should be involved in the seizure of the flounder, it is the seizure of equipment (etc.) that is to be disposed of by the Attorney General pursuant to R.I. Gen. Laws § 20-1-8.1.[33]

Pursuant to R.I. Gen. Laws § 20-1-8(5), the Department seized the flounder in the possession (under the control) of the Respondent contrary to R.I. Gen. Laws § 20-2.1-4 (laws of this State) and disposed of them at the discretion of the director. In this matter, the flounder was seized that day in order to be sold. The seizure and selling of fish possessed (or caught) illegally by the Department is not a new procedure as the same procedure was used in 2001 in *Re: Brian Loftes*. While the selling of the fish is not explicitly provided for by statute, it certainly is within the discretion of the director to dispose of seized fish that way. It is reasonable to seize and sell the fish, and it is better to do so than throw out the fish. If a licensee challenges an alleged violation and succeeds, the licensee could then request the funds from a seized catch be returned.

The Respondent argued that the summer flounder were seized on the spot and sold to a private party without regard for the fair market value necessary for a constitutional taking of private property for a private purpose. However, that is an eminent domain argument and those facts are not present in this matter.[34] Instead the seizure is better compared to an emergency

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[33] R.I. Gen. Laws § 20-1-8.1 provides in part as follows:

> Procedures for seizure and forfeiture. (a) Any vessel, boat, fishing tackle, guns, shooting and hunting paraphernalia, traps, decoys, or any other implements, appliances, or equipment used in violation of any law, rule, or regulation relating to fish and wildlife, that, by provision of any section of this title, is subject to forfeiture to the state, shall be seized pursuant to § 20-1-8(a)(6) and forfeited under the provisions of this section.
>
> (b) The attorney general shall proceed pursuant to §§ 12-21-23 – 12-21-32, to show cause why the vessel, boat, fishing tackle, guns, shooting and hunting paraphernalia, traps, decoys, or any other implements, appliances, or equipment used in the knowing and willful violation of any law, rule, or regulation relating to fish and wildlife that, by provision of any section of this title, is subject to forfeiture to the state, may be forfeited to the use of or the sale of the department on producing due proof that the vessel, fishing tackle, guns, shooting and hunting paraphernalia, traps, decoys, or any other implements, appliances, or equipment was used in this violation.

[34] The Respondent cited to *M.S. Alper and Son, Inc. v. Dept. of Public Works*, 200 A.2d 583 (R.I. 1964), an eminent domain matter.

suspension of license in certain situations as provided for in R.I. Gen. Laws § 42-35-14(c). In such situations, a post-deprivation hearing satisfies due process requirements. *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 210-11 (R.I. 1997).[35] See *Matthews v. Eldridge*, 424 U.S. 319 (1976) (fundamental requirement is the opportunity to be heard at a meaningful time and in a meaningful manner).

Based on the foregoing, the seizure and disposal of the flounder is allowed by R.I. Gen. Laws § 20-1-8(5).

L. Constitutional Issues

To the extent the Respondent seeks a finding that the Department's statutory authority regarding inspections and/or boarding of fishing vessels is unconstitutional under either the United States or Rhode Island Constitutions, the determination of unconstitutionality of a statute is a not an issue that is properly before an administrative agency. *Easton's Point Association et al v. Coastal Resources Management Council et al.,* 522 A.2d 199 (R.I. 1987). The undersigned has assumed all statutes are constitutional and discussed all arguments on the basis of United States Supreme Court decisions, Rhode Island Supreme Court decisions, and the relevant statutes and regulations.

VI. FINDINGS OF FACT

1. A Notice of Violation was issued to the Respondent by the Department on July 20, 2018.

[35] *L.A. Ray Realty* found that the plaintiffs' due process rights were violated in a zoning matter, but the facts in that case (e.g. falsified documents) are not present in this matter. In this matter, the flounder was seized to be sold with a record kept of the amount seized. The Respondent challenged the NOV which alleged certain violations by the Respondent which had caused the flounder to be seized, and a three (3) day hearing was held and briefs and response briefs filed. The Respondent had a pre-deprivation hearing regarding the alleged violations and the proposed sanction (20 day License suspension) which also allowed for a hearing on the issue of the seized flounder (post-seizure).

2. A hearing was held on January 14 and 27, 2020 and February 5, 2020 before the AAD which has jurisdiction over this matter. All briefs were timely filed by July 28, 2020.

3. On June 21, 2018, the Respondent held a Rhode Island Commercial Fishing License with a nonrestricted endorsement.

4. On June 21, 2018, the Respondent did not have valid State license to possess summer flounder (which is a restricted finfish).

5. On June 21, 2018, when the Department boarded the Respondent's Vessel, the Vessel was in State waters.

6. On June 21, 2018, the Respondent was in possession of 360 pounds of flounder.

7. On June 21, 2018, the Respondent caught, harvested, held, and transported for sale 360 pounds of summer flounder in State waters without the appropriate license.

8. On June 21, 2018, the summer flounder was seized by the Department and brought to Narragansett Bay Lobsters to be weighed and sold.

9. The facts contained in Section IV and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

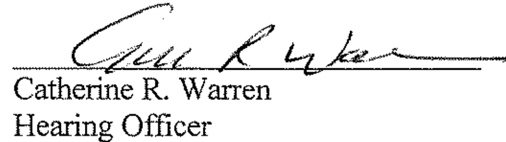
Based on the foregoing, the Respondent violated R.I. Gen. Laws § 20-2.1-4 by unlawfully catching, harvesting, holding, and transporting for sale 360 pounds of summer flounder (restricted finfish) without an appropriate license in State waters.

Based on the foregoing, the Respondent violated § 3.10.2(B)(2) of the Finfish Regulation by being in possession of summer flounder over the permitted amount on that day.

The seizure and disposal of the flounder by the Department on that day was allowed pursuant to R.I. Gen. Laws § 20-1-8(5).

Pursuant to R.I. Gen. Laws § 20-2.1-4(i)(1) and the Penalty Regulation, the Respondent's License shall be suspended for a period of 20 days that shall start on the 31st day after the execution of this decision.

Dated: September 1, 2020



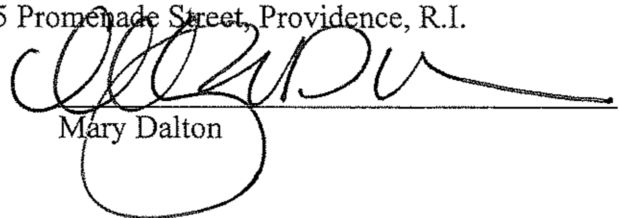
Catherine R. Warren
Hearing Officer

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 1 day of September, 2020 that a copy of the within Decision was sent by first class mail, postage prepaid and by electronic delivery to the following: Merlyn O'Keefe, Esquire, 309 Larkin Pond Road, North, West Kingston, R.I. 02882 and Robert J. Rahill, Esquire, 238 Robinson Street, Wakefield, R.I. 02879 and by electronic delivery to Tricia Quest, Esquire, Department of Environmental Management, 235 Promenade Street, Providence, R.I.



Mary Dalton