STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 19, 2022)

DAVID BENSON, *Appellant,*	:	
v.	:	**C.A. No. PC-2020-06786**
STATE OF RHODE ISLAND, DEPARTMENT OF ENVIRONMENTAL MANAGEMENT and TERRENCE GRAY[1], Director of DEM in his Official Capacity *Appellees.*	:	

DECISION

MONTALBANO, J. This matter is before the Court on the Complaint of David Benson (Appellant) seeking judicial review of a Decision of the Administrative Adjudication Division (AAD) of the Rhode Island Department of Environmental Management (RIDEM) dated September 1, 2020. *See* AAD Decision. The AAD Hearing Officer found Appellant violated G.L. 1956 § 20-2.1-4 and 250 RICR. 90-00-3.10.2(B)(2).[2] According to the AAD Decision, no monetary penalties were imposed, but Appellant's twenty-day license suspension contained in the Notice of Violation (NOV) was upheld pursuant to § 20-2.1-4(i)(1) and 250 RICR 80-00-6.6, as was the RIDEM's seizure and disposal of the summer flounder pursuant to G.L. 1956 § 20-1-8(5). The matter is before this Court on administrative appeal pursuant to G.L. 1956 § 42-35-15. For

[1] At the time this Complaint was filed, Janet L. Coit was the director of the Department of Environmental Management. Since this action has begun, Terrence Gray has become the new director.

[2] The finfish regulation enacted under the above-mentioned statutes was in effect from April 12, 2018 until August 15, 2018. The finfish regulation has since been reorganized by the Secretary of State, but the finfish regulation in effect in 2018 can be found on the Secretary of State website.

the reasons set forth herein, this Court affirms the AAD Decision dated September 1, 2020.

I

Facts and Travel

On June 21, 2018, RIDEM Environmental Police Officer (EPO) Jeffrey Mercer (Officer Mercer) was on patrol by boat near Narragansett Bay and the Sakonnet River to ensure recreational and commercial fishing compliance. (AAD Decision 3.) Officer Mercer observed that Appellant's trawling vessel,[3] the "Slacker," was about a half-mile off the mouth of the Sakonnet River. *Id.* Because the vessel's home port was Point Judith, Officer Mercer thought it was "odd" that the vessel was "all the way in the eastern part of the State waters." (RIDEM Hr'g Tr. at 40:11-18, Jan. 14, 2020 (Jan. 14, 2020 Tr.).) Along with fellow officer Jacqueline Peterson (Officer Peterson), Officer Mercer "pulled up. . . portside of [Appellant's] vessel and . . . tried to hail the captain on [the Coast Guard Hailing Channel]." *Id.* at 42:9-11. After receiving no response, Officer Mercer briefly "hit the lights and siren[,]" and Appellant came out of the wheelhouse. *Id.* at 42:12-13.

Officer Mercer asked Appellant if he had fluke[4] on board, to which Appellant responded he had 300 pounds. *Id*. at 42:19-21. Officer Mercer then told Appellant he would be boarding Appellant's vessel. *Id*. at 42:21-22. Once aboard Appellant's vessel, Officer Mercer observed that there were three totes[5] of summer flounder on the vessel, with each tote capable of holding "approximately 100 to 120 pounds of flat fish." *Id*. at 47:5-14.

Officer Mercer then asked Appellant for his licenses and permits. *Id.* at 54:1-3. Appellant had a National Marine Fisheries Service Vessel Operator Card, required for most federal permits for commercial fishing; a state landing license, which allows the holder to fish in federal waters

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[3] A trawling vessel is a type of commercial fishing vessel. (AAD Decision 3.)
[4] Fluke and summer flounder, types of flatfish, are used interchangeably.
[5] A tote is a plastic container used to hold fish. Jan. 14, 2020 Tr. at 47:8-20.

and land them in Rhode Island; and a State of Rhode Island commercial fishing license with a non-restricted finfish endorsement, which allows the holder to fish in state waters for nonrestricted fish, but prohibits the holder from "fish[ing] for or land[ing] restricted fish caught in Rhode Island waters[,]" including "[b]oth. . . summer flounder and scup."[6] (AAD Decision 3; Jan. 14, 2020 Tr. at 56:9-13.) Appellant also had a sea scallop permit, requiring the vessel to have a vessel monitoring system (VMS), which transmits global positioning system (GPS) coordinates every half hour to the National Marine Fisheries Service. (AAD Decision 4.)

As of June 21, 2018, the Rhode Island daily limit for summer flounder was fifty pounds. *See* 250 RICR 90-00-3.10.2(B)(2) (2018). Officer Mercer instructed Appellant that he was over the fifty-pound limit, to which Appellant responded that he had caught the summer flounder in federal waters and was on his way to sell the fish in Westport, Massachusetts. (AAD Decision 4); *see* Jan. 14, 2020 Tr. at 63:12-16; 21-24.

Appellant's location and the type of vessel he was operating raised Officer Mercer's suspicions. He later testified that "since [Appellant's] location [was] so close to shore at Sakonnet Point, and [considering] the direction of travel [of his vessel], I wanted to confirm that he . . . was fishing in Federal waters on that day[.]" (Jan. 14, 2020 Tr. at 64:3-7; 19-24.) Officer Mercer returned to his patrol boat and opened the "V-Track," a VMS application developed by the National Marine Fisheries Service, in order to view the VMS data on a map or Excel spreadsheet on his cellphone. (AAD Decision 4.)

[6] During the AAD hearing, Appellant argued the term "to fish" was incorrect because no one could know what could come up in the net. However, Officer Mercer explained his understanding of "fishing" in the context of this license was "to take, harvest, hold, transport, offload or unload . . . fish for commercial sale." Jan. 14, 2020 Tr. at 60:8-11. In Officer Mercer's opinion, a commercial fisherman possessing, holding, or transporting nonrestricted finfish on the vessel would be a violation. *Id.* at 60:12-19.

At the time of the incident, Officer Mercer had been an EPO with the RIDEM for four years, working as an EPO in the marine fisheries division, focusing on recreational and commercial fishing and boating safety. (AAD Decision 2; AAD Decision Ex. 3.) Prior to enrolling in the police academy and working as an EPO, he received a master's degree in marine science and was working toward a Ph.D. in oceanography. (AAD Decision 2; AAD Decision Ex. 3.) Officer Mercer further testified he had received training for boarding vessels. (AAD Decision 2; AAD Decision Ex. 3.)

Officer Mercer testified that pursuant to the agreement between the RIDEM and the National Marine Fisheries Service, Officer Mercer was deputized and able to access the VMS information. (Jan. 14, 2020 Tr. at 77:9-13.) Officer Mercer explained that as part of his duties, he had reviewed VMS many times, having "view[ed] [VMS data] multiple times a week." *Id.* at 92:5-8. At the AAD Hearing, Officer Mercer testified that he located the VMS data for the vessel from midnight to the time of his boarding, later printing this information out with the computer-generated map. (AAD Decision 5; AAD Decision Ex. 7.) The VMS data, which pinpoints a vessel's location every thirty minutes, indicated to Officer Mercer that Appellant never left Rhode Island waters in the VMS's thirty-minute windows. (AAD Decision 5.) Officer Mercer later testified that based on his education, knowledge, and training as an EPO, it would have been "nearly impossible" for Appellant to go full throttle from state waters into federal waters, catch over three hundred pounds of fluke, and then return to the location in state waters. *Id.*; RIDEM Hr'g Tr. at 120:11-20, Jan. 27, 2020 (Jan. 27, 2020 Tr.).

After accessing and reading the VMS data,[7] Officer Mercer prepared a summons for

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[7] During the AAD Hearing, Officer Mercer explained how to read VMS data, testifying that his understanding of VMS data was based on his knowledge and experience gained as a RIDEM officer. (AAD Decision and Order 5.) Specifically, the Hearing Officer stated Officer Mercer was permitted to testify "as an EPO, as to his knowledge of the DEM rules and regulations and the Federal rules and regulations regarding commercial fishing." (Jan. 14, 2020 Tr. at 74:13-17.)

Appellant for exceeding the daily limit of summer flounder and returned to the vessel, read Appellant his *Miranda* rights, and asked Appellant if he could look at the vessel's GPS. (AAD Decision 5.) Officer Mercer could not determine any information from the vessel's GPS due to the amount of "tracks on it." *Id.* Officer Mercer gave Appellant the summons and explained the administrative procedures to him. *Id.* at 6. Officer Mercer then seized the fish, and Appellant helped him transfer the fish from the vessel to the patrol boat. *Id.* Officer Mercer and Appellant then went to Narragansett Bay Lobsters[8] with the seized 360 pounds of summer flounder to be weighed and sold. *Id.* at 6, 32.

RIDEM Officer Mark Saunders (Officer Saunders) subsequently prepared the NOV and imposed a twenty-day suspension of Appellant's license.[9] *Id.* at 2. RIDEM Police Chief F. Dean Hoxsie signed the NOV, dated July 20, 2018, and mailed the NOV to Appellant. *Id.* at 31; *see* AAD Decision Ex. 1. Appellant filed a timely request for a hearing before the AAD. *See* AAD Decision Ex. 2. The AAD hearing was held on January 14 and 27, and February 5, 2020. AAD Decision at 32.

On September 1, 2020, Chief Hearing Officer Catherine Warren (Hearing Officer) issued the AAD Decision, which contained the following findings of fact:

> 1) On June 21, 2018, Appellant held a Rhode Island commercial fishing license with a nonrestricted endorsement, and he did not have a valid license to possess summer flounder. *Id.* at 32.
> 2) RIDEM boarded Appellant's vessel while in state waters. *Id.*
> 3) While in state waters, Appellant possessed 360 pounds of summer flounder, which Appellant caught, harvested, held, and transported for sale, in state waters, without the appropriate license. *Id.*
> 4) On June 21, 2018, RIDEM Officer Mercer seized the summer flounder and brought the summer flounder to Narragansett Bay Lobsters to be weighed and sold. *Id.*

[8] Narragansett Bay Lobsters is a seafood market in Narragansett, Rhode Island.
[9] The RIDEM has agreed to stay the twenty-day suspension pending this Court's decision.

A

Applicable Law

In the AAD Decision, the Hearing Officer made the following conclusions of law. The Hearing Officer first determined that Appellant violated § 20-2.1-4(a), which provides, in pertinent part:

> "It shall be unlawful for any person in Rhode Island or the waters of the state: (1) To take, harvest, possess, hold, or transport for sale in Rhode Island any marine species without a license issued under the provisions of this title[.]" Section 20-2.1-4(a).

The Hearing Officer further determined that Appellant was engaged in commercial fishing on June 21, 2018 and possessed several licenses, including a nonrestricted finfish endorsement, which provides, in pertinent part:

> "(A)(1)(f) Fishery endorsement categories shall include: . . . Restricted Finfish: scup (only from May 1 through October 31; scup shall be considered nonrestricted from January 1 through April 30, and from November 1 through December 31), summer flounder, tautog, striped bass, and black sea bass . . . ." 250 RICR 90-00-2.7.1.

Because Appellant was in possession of 360 pounds of summer flounder without the proper license on June 21, 2018, Hearing Officer Warren found Appellant to be in violation of 250 RICR 90-00-3.10.2(B)(2), which provides:

> "2. May 1 – September 15 (Summer) . . .
>
> "(b) Possession Limit
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> "(2) Vessels that do not possess a valid Exemption Certificate: Fifty (50) pounds per vessel per calendar day . . . ." 250 RICR 90-00-3.10.2(B)(2).[10]

Accordingly, given these violations, the Hearing Officer found that the RIDEM's seizure

[10] The Rhode Island Secretary of State has reformatted the Rhode Island Code of Regulations several times since the June 2018 event, but the relevant code provided here is the version that was in effect from April 12, 2018 until August 15, 2018.

and disposal of the flounder was allowed pursuant to § 20-1-8(a)(5), which provides, in pertinent part:

> "(a) The director and each conservation officer shall have the power:
>
> " . . .
>
> > "(5) To seize and take possession of all fish . . . in possession, or under control of, any person . . . 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. . ."

Ultimately, the Hearing Officer upheld the NOV and Appellant's twenty-day license suspension pursuant to § 20-2.1-4(i)(1) and 250 RICR 80-00-6.6.[11] AAD Decision 33. The statutes on which the Hearing Officer relied are:

> "(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 20.2.1-4(i)(1).
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> "250 RICR 80-00-6 Rules and Regulations Governing the Suspension/Revocation of Commercial and Recreational Fishing Licenses
> "6.6 Regulations
> "A. Commercial Fishing License:
>
> > "1. Any individual who has violated the provisions of R.I. Gen. Laws Chapters 20-1, 20-2, 20-2.1, 20-2.2, 20-3, 20-4, 20-4.1, 20-5, 20-6, 20-7, 20-8.1, and 20-10; 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

[11] The original regulation the RIDEM relied upon was "The Rules and Regulations Governing the Suspension/Revocation of Commercial Marine Fisheries, Shellfish Buyer, Lobster Dealer, Finfish Dealer, and Multipurpose Dealer, Licenses Issued Pursuant to Title 20 of R.I.G.L. 'FISH AND WILDLIFE'" was effective from December 31, 2001 through July 30, 2018. This regulation is now found in 250 RICR 80-00-6.6. (AAD Decision and Order 28 fn.30.)

> discretion determines, for the time periods listed as follows unless otherwise addressed in R.I Gen. Laws § 20-7-7:
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> > "a. First violation – up to thirty (30) days' suspension."

B

Issues on Appeal

Appellant challenges the constitutionality of the search and seizure and the admissibility of the VMS testimony and VMS data introduced during the AAD Hearing. Appellant suggests the AAD Decision should be vacated and the seized funds returned because the AAD Decision is:

> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

1. Appellant's Arguments

Appellant argues that the AAD Decision violated his Fourth Amendment rights under the U.S. Constitution as well as article 1, sections 6 and 9 of the Rhode Island Constitution. Specifically, Appellant contends that commercial fishing is not a closely regulated industry and therefore obtaining a business license cannot be conditioned on a consent to search. Consequently, Appellant asserts that Officer Mercer was required to obtain a warrant prior to searching Appellant's vessel and seizing his catch. Appellant also challenges the admissibility of Officer Mercer's testimony concerning the VMS, the VMS data, and the related cellphone data. Appellant argues the VMS data should have been validated prior to being introduced in the AAD Hearing and that Officer Mercer was not qualified to testify as an expert on VMS. Finally, Appellant raises

the argument that the Hearing Officer was biased during the AAD Hearing and in the AAD Decision.

2. Appellees' Argument

Appellees contend that commercial fishing is a closely regulated industry, and, as such, no warrant was required before Officer Mercer searched Appellant's vessel and seized the catch. The Appellees argue that since commercial fishing is a closely regulated industry, the search and seizure pursuant to the Rhode Island statutory scheme was reasonable under *New York v. Burger*, 482 U.S. 691 (1987). Appellees further contend that the Hearing Officer did not err in permitting Officer Mercer to testify about the VMS and related data during the AAD Hearing. Finally, the Appellees argue that the Hearing Officer was not biased simply because she decided in favor of RIDEM and overruled many of the objections raised by counsel for the Appellant.

II

Standard of Review[12]

When reviewing the decisions of an administrative agency, the Court "sits as an appellate court with a limited scope of review." *Mine Safety Appliances Co. v. Berry*, 620 A.2d 1255, 1259 (R.I. 1993). The Court's review is governed by the Rhode Island Administrative Procedures Act (APA), G.L. 1956 chapter 35 of title 42. *See Iselin v. Retirement Board of Employees' Retirement System of R.I.*, 943 A.2d 1045, 1048 (R.I. 2008) (citing *Rossi v. Employees' Retirement System of R.I.*, 895 A.2d 106, 109 (R.I. 2006)); *see also Vito v. Department of Environmental Management*, 589 A.2d 809, 810 (R.I. 1991). Section 42-35-15(g) provides, in pertinent part:

"The court shall not substitute its judgment for that of the agency as

[12] Throughout the proceedings in this matter, Appellant has maintained that the June 21, 2018 enforcement action was a search and seizure in the context of a criminal case as opposed to an administrative matter. However, this Court reiterates that the instant appeal is an administrative matter, and, therefore, the Court shall apply the applicable standard of review.

> to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" *Auto Body Association of Rhode Island v. State of Rhode Island Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Rhode Island Publication Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 484 (R.I. 1994)). When reviewing a decision under the APA, the Court may not substitute its judgment for that of the agency on questions of fact. *See Johnston Ambulatory Surgical Associates v. Nolan*, 755 A.2d 799, 805 (R.I. 2000). The Court defers to the administrative agency's factual determinations, provided that they are supported by legally competent evidence. *See Arnold v. Rhode Island Department of Labor and Training Board of Review,* 822 A.2d 164, 167 (R.I. 2003). The Court cannot "weigh the evidence [or] pass upon the credibility of witnesses [or] substitute its findings of fact for those made at the administrative level." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977).

Accordingly, the Court will '"reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record."' *Baker v. Department of Employment and Training Board of Review*, 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, 272 (R.I. 1981)). The Court is free to

conduct a *de novo* review of determinations of law made by an agency. *See Arnold*, 822 A.2d at 167 (citing *Johnston Ambulatory Surgical Associates*, 755 A.2d at 805). The Court is limited to the certified record in its determination as to whether legally competent evidence exists to support the agency's decision. *Barrington School Committee v. Rhode Island State Labor Relations Board,* 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

A. The Constitutionality of the Search and Seizure

To determine whether the search and seizure of Appellant's vessel and catch were constitutional under the United States and Rhode Island Constitutions, this Court must analyze whether a warrant was required or whether the administrative inspection exception to the warrant requirement justifies the warrantless search. Determination of this issue requires an analysis of commercial fishing in Rhode Island in light of the decision in *New York v. Burger*, 482 U.S. 691.

1. Is Commercial Fishing a "Closely Regulated Industry" and Potentially Subject to a Warrantless Administrative Inspection?

The Supreme Court in *Burger* likened a search of a "closely regulated" industry to other "special need" searches, and concluded "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Burger*, 482 U.S. at 702. In *Burger*, the Supreme Court found the "expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar

expectation [of privacy] in an individual's home," and further found that this expectation is "particularly attenuated in commercial property employed in 'closely regulated' industries." *Burger*, 482 U.S. at 699 (citing *Donovan v. Dewey,* 452 U.S. 594, 598-99 (1981)). Because the owner or operator of commercial premises in a "closely regulated industry" has "a reduced expectation of privacy," the warrant and probable cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, are "lessened . . . in this context." *Id*. at 702 (citing *O'Connor v. Ortega*, 480 U.S. 709, 741 (1987)).

i. What is a "Closely Regulated Industry?"

The Supreme Court did not define "closely regulated industry" with specificity in *Burger*, although it did hold that the automobile junkyard at issue was "closely regulated," owing to the long history of pervasive regulation of junkyards. The Supreme Court found that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *Burger*, 482 U.S. at 699 (citing *Katz v. U.S.,* 389 U.S. 347, 351-52 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)) (noting that certain industries, such as liquor and firearms, were "industries of this type," and noting when an entrepreneur embarks upon such a business, "he has voluntarily chosen to subject himself to a full arsenal of governmental regulation"). "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Marshall,* 436 U.S. at 313. The "central difference" between "closely regulated industries" and other businesses "is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade[.]" *Id.* The Supreme Court in *Burger* held that automobile junkyards were a "closely regulated industry" because the regulatory scheme required

junkyard owners to get licenses and registration numbers from the state, display the registration numbers prominently at the businesses, keep books recording purchases and sales of autos and auto parts, and make the books and autos available for inspection. *Burger*, 482 U.S. at 704. Further, junkyard owners could also be subject to criminal penalties, license revocation, and civil fines for failure to comply. *Id.* at 704-05.

In 2015, the Supreme Court considered whether the hotel industry is a "closely regulated industry" and whether motel operators needed to comply with a municipal code requiring them to provide police with guest registries containing particular information about guests. *See generally City of Los Angeles v. Patel*, 576 U.S. 409 (2015). Ultimately, the Supreme Court held that the hotel industry was not a "closely regulated industry," and, in doing so, noted that "[o]ver the past [forty-five] years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor [of] . . . such an enterprise[.]'" *Patel*, 576 U.S. at 424 (internal citation omitted).[13] Although *Patel* did not go as far as to say that *only* those four industries are "closely regulated," the Court did underscore that designation as "closely regulated" was the "exception." *Id.* The *Patel* Court did note that requiring a hotel to have a license to operate was not sufficient to categorize the hotel industry as a "closely regulated industry," nor did the regulations applicable to hotels, such as changing linens in between guests, create a "'comprehensive' scheme that puts hotel owners on notice that their 'property will be subject to periodic inspections undertaken for specific purposes.'" *Patel*, 576 U.S. at 424 (quoting *Burger*, 482 U.S. at 705 n.16). Further, the Court in

[13] Prior to *Patel*, the Supreme Court had previously identified four industries as being closely regulated: 1) liquor sales (*Colonnade Catering Corp. v. United States*, 397 U.S. 72, 80 (1970)); 2) firearms dealing (*United States v. Biswell*, 406 U.S. 311, 311-12 (1972)); 3) mining (*Donovan v. Dewey,* 452 U.S. 594 (1981)); and 4) running an automobile junkyard (*New York v. Burger*, 482 U.S. 691 (1987)). *See City of Los Angeles v. Patel*, 576 U.S. 409 (2015).

Patel noted the relevance of an industry's history in determining whether that industry is closely regulated. *Patel*, 576 U.S. at 424 (citing *Burger*, 482 U.S. at 707).[14]

Since *Patel*, the Supreme Court has not revisited the definition of "closely regulated industry." However, lower federal courts have applied the "closely regulated industry" analysis after *Patel* was decided, including two decisions where commercial fishing was held to be a "closely regulated industry." *See Mexican Gulf Fishing Co. v. U.S. Department of Commerce*, No. 20-2312, 2022 WL 594911, *33 (E.D. La. Feb. 28, 2022) *appeal filed* March 5, 2022; and *Goethel v. Pritzker*, No. 15-cv-497-JL, 2016 WL 4076831, *9 (D.N.H. July 29, 2016). In 2021, the Ninth Circuit applied the *Burger* test in *Killgore v. City of South El Monte*, 3 F.4th 1186 (9th Cir. 2021). In that case, the Ninth Circuit noted that other industries in addition to the four cited by the Supreme Court in *Patel* were "closely regulated industries," and held in *Killgore* that the massage industry was also a closely regulated industry. *Killgore*, 3F.4th at 1189. The First Circuit in *Rivera-Corraliza v. Morales,* 794 F.3d 208 (1st Cir. 2015) found that adult entertainment machines used for gambling was also a closely regulated industry. *Rivera-Corraliza,* 794 F.3d at 219.

ii. When Is a Warrantless Search Permissible in a "Closely Regulated Industry?"

After establishing that an industry is "closely regulated," the *Burger* Court articulated the following three-prong test for determining whether a warrantless search is *reasonable* in that particular "closely regulated industry." First, there must be a "'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Burger*, 482 U.S. at 702.[15] Second, the warrantless search must be "'necessary to further [the] regulatory scheme.'"

[14] In *Patel*, the Supreme Court noted that there was an important privacy consideration countervailing the warrantless administrative inspection; namely, that individual hotel guests had a reasonable expectation of privacy in their hotel rooms.

[15] The Supreme Court listed specific industries where there was a substantial federal interest—the health and safety in the mining industry, the regulation of firearms to prevent violent crimes, and

Id. (internal quotation omitted). Third, "'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.'" *Id*. at 703 (internal quotation omitted). Under this prong, the regulatory statute must perform two of the basic functions of a warrant. The statute must advise the owner of the commercial premises that a search is being made pursuant to the law and has a properly defined scope, and the statute must limit the discretion of the inspecting officers. *Id.* (citing *Marshall*, 436 U.S. at 323). The Supreme Court explained that "[t]o perform this first function, the statute must be 'sufficiently comprehensive and defined [so] that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" *Burger*, 482 U.S. at 703 (quoting *Donovan*, 452 U.S. at 600). Additionally, "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.'" *Id*. (quoting *United States v. Biswell*, 406 U.S. 311, 315 (1972)).

In *Keeney v. Vinagro*, 656 A.2d 973 (R.I. 1995), the Rhode Island Supreme Court adopted the three-prong *Burger* test in a case where the RIDEM conducted a search of a commercial premises pursuant to the federal Clean Air Act. *Keeney*, 656 A.2d at 974-75. The Court did not explicitly state how it was applying the *Burger* test but held that the search pursuant to the Clean Air Act was constitutional. *See id.*

iii. Is Commercial Fishing a "Closely Regulated Industry?"

A pivotal issue in this case is whether commercial fishing in Rhode Island is a "closely regulated industry," subjecting fishermen in Rhode Island to a diminished expectation of privacy

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the federal interest in protecting revenue against various types of fraud. *See Donovan*, 452 U.S. at 602; *Biswell*, 406 U.S. at 315; *Colonnade Corp*., 397 U.S. at 75.

in their vessels, catch, and other fishing instrumentalities. *See Burger*, 482 U.S. at 702. As set forth in *Burger*, and subsequently by the First Circuit in *Rivera-Corraliza*, the criteria for whether an industry is considered "closely regulated" is whether "the state's regulatory presence is so pervasive that business owners cannot help but know that their commercial properties may be periodically inspected for specific purposes." *Rivera-Corraliza*, 794 F.3d at 217.

Several federal and state courts, both before and after the Supreme Court decided *Patel*, have analyzed whether commercial fishing is a "closely regulated industry" and have concluded that commercial fishing is a "closely regulated industry," due to a long history of "close" or "pervasive" regulation. Post-*Patel* federal courts have held that commercial fishing is a "closely regulated industry." *See, e.g., Mexican Gulf Fishing Co.*, 2022 WL 594911, at *33 *appeal filed* March 5, 2022; and *Goethel*, 2016 WL 4076831, at *9. Several pre-*Patel* federal court decisions also hold that commercial fishing is a "closely regulated industry," including *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991) (litigant conceded commercial fishing a "closely regulated industry"); *Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986) (fishing dock operators); *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir. 1984) (commercial tuna fishing); *U.S. v. Kaiyo Maru No. 53*, 699 F.2d 989 (9th Cir. 1983) (commercial fishing); and *United States v. Raub*, 637 F.2d 1205 (9th Cir. 1980) (commercial salmon fishing). In addition, several state courts, following similar analyses, have held that commercial fishing is a "closely regulated industry," including *State v. Boyer*, 42 P.3d 771 (Mont. 2002) (commercial fishing is a "highly regulated activity"); *State v. Nobles*, 422 S.E.2d 78 (N.C. Ct. App. 1992) (same); *State v. Rome*, 736 P.2d 709 (Wash. App. Ct. 1987) (same); *Tallman v. Department of Natural Resources*, 365 N.W.2d 724 (Mich. 1984) (same). In addition, the Minnesota Supreme Court has held that recreational fishing is a "highly regulated and licensed privilege." *State v. Colosimo*, 669 N.W.2d 1, 5 (Minn. 2003).

In *Riley v. Rhode Island Department of Environmental Management*, 941 A.2d 198 (R.I. 2008), the Rhode Island Supreme Court recounted the historical background of the right to fish and regulations regarding the fishing industry. *Riley*, 941 A.2d at 207. The Court also addressed constitutional challenges to the regulation of commercial fishing. *Id.* The Supreme Court noted the right of fishery in Rhode Island has "deep historical roots[,]" traceable to 1639. *Id.* at 207. In 1843, the right of fishery was incorporated into the Rhode Island Constitution and, later, this right was modified with an amendment entitled "Conservation" in 1970.[16] *Id.* at 208. The Court reiterated that it is the General Assembly's province to foster care of the fisheries of Rhode Island and to make laws regulating and governing pisciculture and public and private fisheries. *Id.* at 209 (quoting *Opinion to the Senate*, 87 R.I. 37, 39-40 137 A.2d 525, 526 (1958)). Pursuant to G.L. 1956 chapter 1 of title 20 and chapter 17.1 of title 42, and the relevant regulations of the Marine Fisheries Regulations, the General Assembly has given the RIDEM authority to enforce all laws, rules, and regulations of this state pertaining to "fish . . . ." Section 20-1-8.

When applying for any license to fish in Rhode Island waters, whether for fish, crustacean, or other wildlife, an applicant is made aware that he or she is subject to "close government supervision." *Burger,* 482 U.S. at 700. Section 20-2.1-4(a)(1) makes it unlawful for any person in Rhode Island or its waters "[t]o take, harvest, possess, hold, or transport for sale in Rhode Island any marine species without a license . . . ." Further, subsection (a)(2) provides that commercial

[16] The *Riley* Court notes the Rhode Island Constitution was ratified in 1842; however, the Rhode Island Constitution was ratified in 1843. *See generally* Rhode Island Constitution, Introduction; *Riley*, 941 A.2d at 208.

fishing vessels be declared as such pursuant to § 20-2.1-5(3)[17] and have "a decal affixed to it or is displaying a plate."

Section 20-2.1-4(d) provides that "[a]ll 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 this title *and to the reasonable inspection of any vessel* . . . ." (Emphasis added.) Moreover, commercial fishermen in Rhode Island are required to abide by the laws set out in chapter 2.1 of title 20 of the Rhode Island General laws as well as the rules set forth in the Marine Fisheries Regulations. Fishermen who violate these laws and regulations may face punishment for doing so, including having his or her license suspended or revoked under § 20-2.1-4(i).[18]

The General Assembly has had a pervasive regulatory presence in the right to fisheries since the colonial days of Rhode Island. *See Riley*, 941 A.2d at 207-08. The provisions regulating the activity of commercial fishing in Rhode Island are extensive. In Rhode Island, commercial fishing, and fishing in general, is an industry where commercial fishermen accept the burdens and the benefits of the trade. *See Burger*, 482 U.S. at 702. Similarly to the regulations which the auto

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[17] Section 20-2.1-5 governs the various types of licenses and endorsements the RIDEM director may establish, including commercial fishing licenses, and discusses vessel requirements and fees to be paid to obtain the desired license.

[18] Section 20-2.1-4(i) provides:

> "(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."

junkyard operators in *Burger* were subjected, Rhode Island commercial fishermen must obtain licenses to fish, must display the registration (a plate) on their vessels while fishing, are on notice that the vessels are open to reasonable inspection, and may face license suspension or revocation, among other penalties, for fishing in violation of the rules and regulations of Rhode Island's regulatory scheme. *See id.* at 704; *see also* §§ 20-2.1-4 and 20-2.1-5.

Accordingly, given Rhode Island's extensive history and tradition of closely supervising and regulating the fishing of all waterways, as well as the fact that commercial fishermen are aware of such supervision when applying for and using their respective fishing licenses, this Court finds that commercial fishing is a "closely regulated industry." As such, the three-prong test set forth in *Burger* will be applied by this Court in order to determine whether a warrantless search under the regulatory scheme is reasonable, thus comporting with the Fourth Amendment. *Burger*, 482 U.S. at 702.

iv. Applying the *Burger* Test to Rhode Island's Statutory and Regulatory Scheme

a. Whether There is a "Substantial" Government Interest that Informs the Regulatory Scheme Pursuant to Which the Inspection Was Made

The regulatory scheme to which Appellant is subject includes a wide range of statutes and regulations, including chapter 1 of title 20, chapter 17.1 of title 42, and the Marine Fisheries Regulations, which work in tandem to define the licensure of and conditions imposed on commercial fishermen in Rhode Island, as well as defining the RIDEM's powers to enact and enforce the various laws and regulations related to commercial fishing activities. Section 20-2.1-2 sets forth the General Assembly's legislative intent as follows:

> "(1) Preserve, enhance, and allow for any necessary regeneration of the fisheries of the state, for the benefit of the people of the state, as an ecological asset and as a source of food and recreation;
> "(2) Provide Rhode Islanders who wish to fish commercially the opportunity to do so and end the moratorium on issuance of new

> commercial fishing licenses so that new licenses may be issued . . .;
> "(3) Allow residents who have fished commercially to sell their vessels and gear in a manner that first, facilitates up-grading license levels among residents already in the fishery; that second, provides lateral movement among residents who are holders of commercial fishing licenses to other types of fishing; and that third, enables new entrants into new commercial fishing;
> "(4) Respect the interests of residents who fish under licenses issued by the state and wish to continue to fish commercially in a manner that is economically viable; provided, it is specifically not a purpose of this chapter to establish licensing procedures that eliminate the ability to fish commercially of any resident as of the date of enactment who validly holds commercial fishing license and who meets the application renewal requirements set forth herein;
> "(5) Preserve and enhance full-time commercial fishing, with a high degree of participation by owner-operated vessels, as a way of life and as a significant industry in Rhode Island;
> "(6) Establish principles, for a system of adaptive management . . .;
> "(7) Provide a licensure system that facilitates data collection and management so that marine fisheries can be managed more efficiently and effectively . . . ." Section 20-2.1-2.

Under the statutory scheme, the RIDEM director is given the powers and duties to enact and carry out the various functions, powers, and duties vested in the RIDEM. Section 42-17.1-2. Such powers include those found in chapter 2.1 of title 20 of the Rhode Island General Laws.

Succinctly, the regulatory scheme was enacted to preserve, enhance, and allow for the regeneration of fisheries of the state for the benefit of Rhode Islanders, and to allow for residents in the state to fish commercially under a licensure system allowing for the efficient and effective management of marine fisheries. Section 20-2.1-2. Clearly, a substantial government interest informs the regulatory scheme pursuant to which inspections are made. *See Burger*, 482 U.S. at 702. Likewise, § 42-17.1-2 vests the RIDEM director with the power to supervise and control the protection, development, planning, and utilization of the natural resources of the state, including fish and shellfish. *See* § 42-17.1-2(1). Moreover, as a part of the regulatory scheme, 250 RICR 90-00-2 states "[t]he purpose of [the regulation regarding commercial marine fishing licenses and

landing permits] is to establish a process for managing marine fisheries . . . .”

Together, these statutes and regulations make clear that the government, in this case the State of Rhode Island, has a substantial interest that informs the regulatory scheme behind which inspections are made. This Court finds that the first prong of the *Burger* test is met in this case.

b. Whether the Warrantless Search is Necessary to Further the Regulatory Scheme

Having established that the first prong of *Burger* is met, the Court must consider whether the warrantless search was necessary to further the regulatory scheme. *Burger*, 482 U.S. at 702. In *Donovan, ante*, which involved the mining industry, the Supreme Court observed that had the mining inspectors been required to obtain a warrant before their inspections, the mine operators or owners would have been alerted to the inspection, thereby frustrating the purpose of the Mine Safety and Health Act. *Donovan*, 452 U.S. at 603. Other courts have reached similar conclusions regarding a warrant requirement for inspections related to commercial fishing.

One such court was the North Carolina Court of Appeals in *Nobles*, which discussed an administrative inspection of a licensed fish dealership. *Nobles*, 422 S.E.2d at 78. The *Nobles* court highlighted that “‘[t]he logistical problems in establishing a successful inspection program requiring warrants are insurmountable’ in the fishing industry.” *Id*. at 82 (quoting *Kaiyo Maru*, 699 F.2d at 996). The *Nobles* court continued that

> “[f]ishing is a highly variable activity, and with respect to fish being possessed on boats, at docks, in trucks, and even in markets, procuring a warrant is often impractical. Fishing itself is an ongoing process which fluctuates based on variables such as the weather. It follows then, that the transportation of fish and the eventual arrival of fish at wholesale and retail fish dealerships also varies. Requiring a warrant to inspect boats, docks, trucks, and for purposes of this case, the fish houses, would frustrate the effectiveness of the inspections.” *Id.*

The *Nobles* court further reasoned that

> "imposing a warrant requirement renders the inspections meaningless. If fishermen or fish dealers have knowledge of upcoming checks, the probability of violations would be low, since violators would circumvent the law by concealing unlawful activity. '[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential.'" *Id.* at 82 (quoting *Biswell*, 406 U.S. at 316).

The *Nobles* court held that "[w]arrantless inspections . . . are needed to provide close regulation of the fishing industry—regulation which is necessary to promote [North Carolina's] interests in preserving a natural resource." *Id*. Ultimately, a warrant requirement was found to impede the specific enforcement needs of the statutory scheme. *See generally Nobles,* 422 S.E.2d 78.

Similarly, in Rhode Island, if the RIDEM were required to obtain a warrant for every inspection related to commercial fishing, the regulatory scheme would be significantly frustrated. As noted in *Nobles*, and in *Biswell*, inspections would be rendered "meaningless" if fishermen or fish dealers had advance knowledge of any upcoming checks. *See Nobles,* 422 S.E.2d at 82 (citing *Biswell*, 406 U.S. at 316). Fishermen fishing in violation of the Rhode Island General Laws or Marine Fisheries Regulations would be able to circumvent the law by concealing any prohibited activity. *Id.* Thus, if warrants were required, the regulatory scheme would fail to be effective and would not serve as a credible deterrent of violative activity. *See Nobles*, 422 S.E.2d at 82 (citing *Biswell*, 406 U.S. at 316).

Accordingly, this Court finds the second prong of *Burger* is met. Warrantless searches are necessary to further the regulatory scheme of commercial fishing in Rhode Island.

c. Whether the Regulatory Statute Facilitates the Two Basic Functions of a Warrant: 1) Advising the Owner of the Commercial Premises that a Search Could Be Made Pursuant to the Law and Has a Properly Defined Scope; and 2) Limits the Discretion of the Officers.

Finally, Rhode Island's regulatory scheme must satisfy both parts of the third prong in *Burger*. First, the regulatory scheme must advise the owner of the commercial premises that a search is being made pursuant to the law and has a properly defined scope. *Burger*, 482 U.S. at 703. The Supreme Court explained that "[t]o perform this first function, the statute must be 'sufficiently comprehensive and defined [so] that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" *Id.* (quoting *Donovan*, 452 U.S. at 600).

It is apparent that under Rhode Island's statutory scheme, whether under the provisions of the General Laws of Rhode Island or the Marine Fisheries Regulations, commercial fishermen are aware they are subject to inspections. Under the version of 250 RICR 90-00-2.7.6(A)(1) that was in effect in June 2018, the regulation provided "[t]he holder of any type of commercial fishing license . . . 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." Further, § 20-2.1-4(d) informs commercial fishing license holders of the various reporting and inspection conditions of a license, including those allowed pursuant to § 20-1-8(a)(7)(ii). More specifically, § 20-2.1-4(d) provides that all persons granted a license pursuant to the statutory scheme are deemed to have consented to the "reasonable inspection of any vessel . . . or other contrivance used regularly for the keeping or storage of [fish]. . . ."

Other closely regulated industries, such as firearms in *Biswell* and mining in *Donovan*, have upheld the principle that when one participates in a closely regulated industry, the individual does so with the knowledge that he or she could be subject to inspection. *See Biswell,* 406 U.S. at

316; *see also Donovan,* 452 U.S. at 600. Such implied consent in the commercial fishing industry was upheld in *Tallman*. *See Tallman*, 365 N.W.2d 724. In *Tallman*, the Michigan court held that "anyone engaged in the commercial fishing business must be prepared to submit to reasonable regulations and, consequently, to diminished expectations of privacy." *Id.* at 744. The *Tallman* court reasoned that the licenses issued to the plaintiffs, commercial fishermen, gave the fishermen "direct notice that warrantless searches of their business premises could be performed . . . as a condition of their receiving the license." *Id.* at 744.

This Court finds that the Rhode Island statutory scheme provides clear notice to commercial fishermen that a vessel used for commercial fishing, as well as the catch, may be subject to periodic inspections undertaken for specific purposes. *See Burger*, 482 U.S. at 702 (quoting *Donovan*, 452 U.S. at 600). Section 20-2.1-4(d) specifically lists the various instrumentalities of commercial fishing that may be subject to reasonable inspection. These purposes are defined clearly throughout the statutory scheme. Accordingly, the first part of prong three is met.

The third prong's second requirement is that the discretion of the inspecting officers be limited and "in defining how a statute limits the discretion of the inspectors, [the Supreme Court has] observed that it must be 'carefully limited in time, place, and scope.'" *Burger*, 482 U.S. at 703 (quoting *Biswell*, 406 U.S. at 315)). In a footnote, the Supreme Court noted that these limitations of time, place, and scope were factors in the analysis, but not determinative, "so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers." *Burger*, 482 U.S. at 711 n.21. Rhode Island's regulatory scheme clearly limits the discretion of the officers. Under § 20-1-8(7)(ii), officers are only permitted to board vessels "engaged, or believed to be engaged, in fishing . . ." Further, § 20-1-8(7)(ii) provides that inspections are to be

conducted only to ensure compliance with the provisions of title 20 and any rules relating to the taking of fish. In conducting such an inspection, an officer's discretion to search is limited in scope to vessels engaged in or believed to be engaged in fishing and for purposes of complying with title 20. As such, this Court finds that the second part of prong three of the *Burger* test is met by the regulatory scheme in Rhode Island. Rhode Island's statutory scheme clearly limits the discretion of the officers as to which vessels may be searched and clearly defines the scope of the inspection.

Accordingly, having found that commercial fishing in Rhode Island is a "closely regulated industry," and that the statutory scheme contemplating an administrative inspection of Appellant's vessel and the subsequent seizure of the fish satisfied the three criteria in *Burger*, this Court finds that the warrantless search of Appellant's vessel and catch was reasonable under the Fourth Amendment.

B. The Admissibility of Officer Mercer's Testimony Regarding VMS Data

The second issue this Court must determine is whether the Hearing Officer properly admitted Officer Mercer's testimony regarding VMS data. This issue requires this Court to analyze the admissibility of the VMS testimony and data under § 42-35-10, or, should the statute not apply, the relevant Rhode Island Rules of Evidence.

1. Analysis under § 42-35-10

Section 42-35-10(1) provides:

> "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[.]" (Emphasis added.)

In *DePasquale v. Harrington*, 599 A.2d 314 (R.I. 1991), the Rhode Island Supreme Court discussed the admissibility of hearsay evidence in administrative proceedings. *DePasquale*, 599 A.2d at 316. The *DePasquale* Court noted that traditionally the rules of hearsay in jury trials were meant to prevent juries from hearing unreliable or confusing testimony and rendering a verdict based on such evidence. *Id.* The *DePasquale* Court further reasoned that "[s]uch protection is far less necessary when evidence is presented to a judge sitting without a jury or, as in this case, a hearing officer with substantial expertise in the matters falling within his or her agency's jurisdiction." *Id.* In the context of hearsay, the *DePasquale* Court stated

> "the provisions of § 42-35-10(a) limit the sort of hearsay evidence admissible in administrative proceedings to that necessary to ascertain facts not reasonably susceptible of proof under [the rules of evidence as applied in civil cases in the Superior Courts of Rhode Island] *if it is a type commonly relied upon by reasonably prudent men in the conduct of their affairs.*" *Id.* at 316-17. (Emphasis in original.)(Internal quotation omitted.)

The *DePasquale* Court found that "[a]n expert administrative tribunal concerned with advancing the public welfare should not be rigidly governed by rules of evidence designed for juries" *Id.* at 317. While the Rhode Island Rules of Evidence provide a standard for the hearing officer to adjudge the competency of evidence, "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." *Id.*

The *DePasquale* Court underscored that § 42-35-10(1) "entrust[s] the hearing officer with both the ability to exercise prudence in considering evidence and the reliability that must condition

its admissibility." *Id.* Accordingly, in light of the language in § 42-35-10(1) and the Rhode Island Supreme Court's holding in *DePasquale*, in administrative hearings, the hearing officer is permitted to admit evidence that may ordinarily be excluded under the Rhode Island Rules of Evidence where it is prudent to do so, or "when necessary to ascertain facts not reasonably susceptible of proof under those rules[.]" *See* § 42-35-10(1); *see also DePasquale,* 599 A.2d at 316-17. Such evidence may be admitted "if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs." *See* § 42-35-10(1); *see also DePasquale,* 599 A.2d at 316-17.

Thus, the question is whether the Hearing Officer exercised the requisite prudence in admitting the testimony regarding the VMS data and whether Officer Mercer's testimony about the VMS data was of the type "commonly relied upon by reasonably prudent men and women in the conduct of their affairs." *See* § 42-35-10(1). Ordinarily, in a civil proceeding, such testimony would be subject to a determination of whether Officer Mercer was permitted to testify as a layperson under Rule 701 of the Rhode Island Rules of Evidence or if Rule 702 of the Rhode Island Rules of Evidence requiring expert testimony would apply. The analysis under the Rhode Island Rules of Evidence is required only if § 42-35-10(1) is not applicable.

In the AAD Decision, the Hearing Officer stated that VMS is required by the federal government to be used by certain licensed fishing vessels. (AAD Decision 21.) "The VMS is GPS (global positioning system) for vessels . . . ." *Id.* According to the National Oceanic and Atmospheric Administration (NOAA), VMS is a:

> "satellite surveillance system primarily used to monitor the location and movement of commercial fishing vessels within U.S. jurisdiction and treaty areas. The system uses satellite and cellular based communications from onboard transceiver units, which certain vessels are required to carry. The transceiver units send position reports that include vessel identification, time, date, and

> location, and are mapped and displayed on the end user's computer screen. VMS is used to support law enforcement initiatives and to prevent violations of laws and regulations. VMS also helps enforcement personnel focus their time on areas with the highest potential for significant violations. It is used as evidence in the prosecution of many environmental laws and regulations including regional fishing quotas . . . ." *What is the vessel monitoring system?*, NOAA FISHERIES, https://www.fisheries.noaa.gov/node/696 (last visited March 8, 2022, 10:26 AM).

Appellant was required to have a VMS on his vessel due to his scallop license. Under 250 RICR 90-00-12.9(A), VMS devices and other reporting applications are required be maintained in operational order and actively engaged at all times while fishing.[19] According to the NOAA Fisheries, the very purpose of VMS data is to support law enforcement initiatives and to prevent violations of laws or regulations, such as the laws and regulations to which Appellant was subject, whether he was in federal or Rhode Island waters.

Appellant, citing *State v. Mancino*, 115 R.I. 54, 58, 340 A.2d 128, 132 (1975) argues that the RIDEM should not have been permitted to present VMS data, which was relied upon by the Hearing Officer in making her decision, without the proper foundation, i.e., that a showing be made, as part of the RIDEM's prima facie case, "that [the measuring device] was tested against another[.]" *Id.* Instead, the Hearing Officer, citing *State v. Mosley*¸ No. P1-2016-2491, Aug. 30, 2019, Krause J,[20] analogized the VMS technology to that of GPS technology, in that it "is a proven

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[19] The purpose of 250 RICR 90-00-12.1 is to "establish a pilot program to authorize aggregate possession limits for commercial black sea bass and summer flounder as a means to gather data on the effect of aggregate limits in the commercial management of these species."

[20] In *State v. Mosley*, a Superior Court criminal case, the trial justice discussed the use of GPS data in settings, focusing on the way in which GPS works, including wifi based and cellular based GPS. *State v. Mosley*¸ No. P1-2016-2491, Aug. 30, 2019, Krause J. The trial justice did analyze whether an officer may testify as an expert under Rule 702 of the Rhode Island Rules of Evidence, but it is unclear how the issue was presented. *Id.* It should be noted that the trial justice did highlight how the subject matter of GPS is "so common and well understood" that the required foundation to testify can be easily laid while the expert is testifying. *Id. Mosley*, however, dealt with a criminal trial, and is an unpublished Superior Court case. While persuasive, the case is not binding.

Government methodology which relies on satellites for positioning, navigation and timing." *Id.* Based on the prevalence of GPS in the modern era, GPS itself and the data it provides is "of the type commonly relied upon by reasonably prudent men in the conduct of their affairs." *See* § 42-35-10(1). It follows, then, that VMS and its data, similar to GPS, is also "of [the] type commonly relied upon by reasonably prudent men . . . in the conduct of their affairs." *Id.*

Appellant was required by federal regulation to have VMS on his vessel, the RIDEM has a joint enforcement agreement with the NOAA to access and use VMS, and Officer Mercer was deputized and trained to access such information pursuant to the joint enforcement agreement. (Jan. 14, 2020 Tr. at 77:9-14.) Consequently, the Hearing Officer was "entrust[ed] . . . with both the ability to exercise prudence in considering evidence and the reliability that must condition its admissibility." *DePasquale*, 599 A.2d at 317. This Court finds that the Hearing Officer appropriately exercised her discretion when she allowed Officer Mercer to testify about VMS data during the AAD hearing.

2. Analysis Under the Rhode Island Rules of Evidence

An analysis of the Rhode Island Rules of Evidence would lead to the same result in this case. The Hearing Officer was within the bounds of the Rhode Island Rules of Evidence in permitting Officer Mercer to testify about VMS data.

Rule 701 of the Rhode Island Rules of Evidence provides:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." R.I. R. Evid. 701.

A lay witness must have had an opportunity to observe the person or matter at issue and must give the concrete details on which an inference or description is based. *State v. Gomes*, 604 A.2d 1249,

1259 (R.I. 1992) (internal citation omitted). Rule 701 does not allow lay witness opinions on subjects that require expertise. *See ADP Marshall, Inc. v. Brown University*, 784 A.2d 309, 315 (R.I. 2001).

Rule 702 of the Rhode Island Rules of Evidence provides:

> "If 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." R.I. R. Evid. 702.

Before admitting expert testimony, a trial justice must conclude that the evidence is "relevant, within the witness's expertise, and *based on adequate factual foundation*." *Kurczy v. St. Joseph Veterans Association*, 820 A.2d 929, 940 (R.I. 2003)(internal quotation omitted). In *DiPetrillo v. Dow Chemical Company,* 729 A.2d 677 (R.I. 1999), *the* Rhode Island Supreme Court, guided by the standard set in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S 579 (1993), ruled that the trial justice is to act as gatekeeper. *See DiPetrillo*, 729 A.2d at 685-91. In *DiPetrillo*, the Rhode Island Supreme Court laid out four nonexclusive factors that the trial justice may use to assess the reliability of an expert's proposed testimony:

> "(1) whether the proffered knowledge can be or has been tested;
> "(2) whether the theory or technique has been subjected to peer review and publication;
> "(3) the known or potential rate of error; and
> "(4) whether the theory or technique has gained general acceptance in the relevant scientific field." *DiPetrillo*, 729 A.2d at 689.

"Satisfaction of one or more of these factors may suffice to admit the proposed evidence and the trial justice need not afford each factor equal weight." *Morabit v. Hoag,* 80 A.3d 1, 12 (R.I. 2013). In addition to these nonexclusive factors, a trial justice may consider an expert's qualifications in determining the reliability of the underlying evidence, including "evidence of the witness's education, training, employment, or prior experiences." *State v. D'Alessio*, 848 A.2d 1118, 1123

(R.I. 2004). Although a foundation must be laid for an expert to testify, the *DiPetrillo* Court held that "[i]f the expert's evidence is not novel, then the foundation need not be novel either." *DiPetrillo*, 729 A.2d at 688 (internal quotation omitted).

In *Mosley,* when discussing "fixing the location of cell phones" through methods such as GPS, the trial justice held this practice was "simply not novel intellection." *Mosley*, No. P1-2016-2491, at *9. The *Mosley* trial justice found that "a preliminary hearing may not even be necessary if the subject matter is 'so common and well understood' that the necessary foundation to testify can be just as easily laid by qualifying the witness as an expert during the trial." *Id.* at *8.

In this case, the Hearing Officer was not required to hold a separate hearing to determine whether the appropriate foundation was laid for Officer Mercer to testify about the VMS data. Officer Mercer's "expert evidence," the VMS testimony and data, was not novel, and therefore the foundation for him to testify did not need to be novel. *See DiPetrillo*, 729 A.2d at 688.

Officer Mercer's testimony provided the Hearing Officer with a sufficient foundation allowing her to qualify him as an expert in VMS during the hearing. Appellant was required by federal regulation to have VMS on his vessel, the RIDEM has a joint enforcement agreement with the NOAA to access and use VMS, and Officer Mercer was deputized and trained to access such information pursuant to the joint enforcement agreement. (Jan. 14, 2020 Tr. at 77:9-14.) The scope of Officer Mercer's duties includes reviewing and analyzing the VMS data. *See id.* Officer Mercer testified that as a part of his duties, he had reviewed VMS many times, having "view[ed] [VMS data] multiple times a week." *Id.* at 92:5-8.

This Court finds that Officer Mercer's training, education, and job responsibilities clearly establish his reliability and credibility as an expert in analyzing and interpreting VMS data. At the time of the incident, Officer Mercer had been an EPO with the RIDEM for four years. (AAD

Decision 2; AAD Decision Ex. 3.) Prior to enrolling in the police academy and working as an EPO, he received a master's degree in marine science and was working toward a Ph.D. in oceanography. (AAD Decision 2; AAD Decision Ex. 3.) Officer Mercer testified that he had received training for boarding vessels and worked as an EPO in the marine fisheries division focusing on recreational and commercial fishing and boating safety. (AAD Decision 2; AAD Decision Ex. 3.)

Based on Officer Mercer's analysis of the VMS data, he was able to testify that, in his *expert* opinion, it was nearly impossible for Appellant to have travelled from federal waters to state waters. *See* AAD Decision 5. Officer Mercer's conclusion was based on his education, knowledge, and training as an EPO and the nature of VMS, which pinpoints a vessel's location every thirty minutes. *Id.; see* Jan. 27, 2020 Tr. at 120:11-20. At the AAD Hearing, Officer Mercer testified it would have been "nearly impossible" for Appellant to go full throttle from state waters into federal waters, catch over three hundred pounds of fluke, and then return to the location Officer Mercer found Appellant in in state waters. *See* AAD Decision 5; Jan. 27, 2020 Tr. at 120:11-20.

C. Bias of the Hearing Officer

Appellant has claimed that the Hearing Officer was biased in this case. Appellant asserts the Hearing Officer took on the role of advocate for the Appellees when, for example, she considered caselaw not cited by either the Appellees or Appellant in making the AAD Decision. Appellant specifically takes issue with the Hearing Officer having relied upon fifteen cases neither discussed nor briefed by either party in making her decision.

In *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427 (R.I. 2010), the Rhode Island Supreme Court held "adjudicators in administrative agencies enjoy 'a presumption of honesty and integrity.'" *Champlin's,* 989 A.2d at 443 (quoting *Davis v. Wood*, 444 A.2d 190, 192 (R.I. 1982)). Such a presumption may be overcome through evidence that "'the same person(s) involved in

building one party's adversarial case is also adjudicating the determinative issues' or if 'other special circumstances render the risk of unfairness intolerably high.'" *Id.* (quoting *Kent County Water Authority v. State Department of Health*, 723 A.2d 1132, 1137 (R.I. 1999) (quoting *La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights*, 419 A.2d 274, 285 (R.I. 1980)).) "Significantly, an agency adjudicator must not become an 'advocate or participant.'" *Id.* (quoting *Davis v. Wood*, 427 A.2d 332, 337 (R.I. 1981)).

Here, the Appellant has failed to present any credible evidence to overcome the presumption of the Hearing Officer's honesty and integrity. His claim that by performing her own research, the Hearing Officer somehow took on the role of advocate or participant is without merit. There is simply no evidence presented in the record suggesting that the Hearing Officer was biased in favor of the Appellees, either during the AAD Hearing or when making her decision. The argument that the Hearing Officer was limited to considering only the cases cited and/or briefed by the parties is without merit. The Hearing Officer is permitted to conduct her own research in order to assist her in making her decision and to ensure that her decision is consistent with the relevant statutory and case law. *See United States v. Davis*, 183 F.3d 231, 252 (3rd Cir. 1999) ("[T]he trial court cannot leave everything to the lawyers. The judge has an immanent obligation to research the law. . . ."); *see also Universe Sales Co. v. Silver Castle, Ltd.,* 182 F.3d 1036, 1038 (9th Cir. 1999) ("[C]ourts may do their own research in order to ascertain foreign law.").

This Court finds, therefore, that Appellant's claim that the Hearing Officer was biased in favor of the Appellees in this case is completely without merit.

IV

Conclusion

After review of the entire record, this Court finds that the Hearing Officer's Decision, issued September 1, 2020, was supported by reliable, probative, and substantial evidence on the record and was not clearly erroneous or affected by error of law. Appellees' warrantless search and seizure of Appellant's vessel and catch on June 21, 2018 was consistent with the Fourth Amendment to the United States Constitution and with article I, section 6 of the Rhode Island Constitution because it falls under the administrative inspection exception to the warrant requirement. Additionally, the Hearing Officer did not err in allowing Officer Mercer to testify about the VMS data collected on the day of the incident, because § 42-35-10(1) allowed her the discretion to do so. In addition, Rule 702 of the Rhode Island Rules of Evidence allowed the Hearing Officer to permit Officer Mercer to testify as an expert regarding VMS data. Finally, this Court finds no evidence to support Appellant's claim that the Hearing Officer was biased against the Appellant when making her decision in this case.

Accordingly, this Court affirms the AAD Decision as issued September 1, 2020. Counsel shall prepare and present an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**David Benson v. State of Rhode Island, Department of Environmental Management, et al.**
CASE NO:	**PC-2020-06786**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 19, 2022**
JUSTICE/MAGISTRATE:	**Montalbano, J.**
ATTORNEYS:	
For Plaintiff:	**Robert J. Rahill, Esq.** **Merlyn P. O'Keefe, Esq.**
For Defendant:	**Tricia A. Quest, Esq.**