UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THE CITY OF NEW BEDFORD, et al., Plaintiffs, v. GARY LOCKE, et al., Defendants.	CIVIL ACTION NO. 10-10789-RWZ
LOVGREN, et al., Plaintiffs, v. GARY LOCKE, et al., Defendants.	

INTERVENOR CONSERVATION LAW FOUNDATION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY AND COMPLETION OR SUPPLEMENTATION OF THE RECORD

Intervenor-Defendant Conservation Law Foundation (CLF) hereby submits this memorandum, pursuant to D. Mass. R. 7.1(b) and Fed. R. Civ. P. 7, in opposition to the Plaintiffs' First Motion for Discovery and Completion or Supplementation of the Record (Docket # 39) (*Pls.' Mot.*).

I. INTRODUCTION

The Plaintiffs' consolidated appeal seeks to invalidate regulations implementing Amendment 16 to the Northeast Multispecies Fishery Management Plan (Amendment 16). Despite the presence of a full and comprehensive administrative record supporting the decision

to implement Amendment 16, the Plaintiffs seek to supplement the record with deposition discovery and other "newly available information." *Pls.' Mot.* at 1. In order for the Court to consider the proposed extra-record evidence, however, the Plaintiffs must overcome two strong and long-held legal presumptions. First, the law presumes that the record on review of an administrative case is limited to the record before the reviewing agencies. Second, the law presumes on review that the agencies acted properly in executing their administrative responsibilities. To succeed, Plaintiffs' motion must overcome these presumptions. As set forth below, Plaintiffs fail to do so and their motion must be dismissed.

II. ARGUMENT

The parties' motion practice on this issue is extensive and CLF confines its present opposition to the Plaintiffs' instant motion.[1] The administrative record supporting Amendment 16 is an extremely robust and complete history of the massive and transparent scientific, public, and regulatory process leading up to the New England Fishery Management Council's (New England Council) adoption of Amendment 16 and the agency's subsequent review and approval process.

In the instant Motion, the Plaintiffs seek to invoke two "exceptions" to the rule against allowing parties to supplement the administrative record with additional discovery or with information not before the agency when it made its decision. First, the Plaintiffs argue that *Frontier Fishing Corp. v. Evans*, 429 F. Supp. 2d 316 (D. Mass 2006) recognizes an exception to

[1] While Plaintiffs' motion is styled as their "first" motion for discovery, in fact the City of New Bedford and the Lovgren plaintiffs have each separately filed prior similar motions. *See Mem. In Support re 1st Mot. for Discovery by City of New Bedford* (Docket # 30); *Mot. for Discovery and Depositions by James Lovgren* (Docket # 33). CLF filed opposition to the New Bedford motion and the Federal Defendants opposed both motions. *Opp. re 1st Mot. for Discovery by Conservation Law Found.* (Docket # 29); *Opp. re 1st Mot. for Discovery by Gary Locke* (Docket # 28); *Opp. re Mot. for Discovery by Gary Locke* (Docket # 44). The present discovery motion appears to merge and largely reiterate the requests and bases for the prior motions. To the extent relevant, CLF incorporates by reference all its previous arguments made in its Opposition to the City of New Bedford's First Motion for Discovery in this opposition (Docket # 29).

the record rule for post decisional evidence in cases involving the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). Plaintiff's [sic] Memorandum in Support of Their First Motion For Discovery and Completion or Supplementation of the Administrative Record (Docket #40)(*Pls.' Mem.)* at 4-6. As support, Plaintiffs attempt to transform dicta from a footnote in the District Court's *Frontier Fishing* opinion into an exception to the record rule that would allow post-decisional materials to be added to the record in NEPA cases. *Id.* at 4 (citing *Frontier Fishing*, 429 F. Supp. 2d at 325 n.10).

Second, the Plaintiffs seek to invoke the exception to the record rule that applies when a party makes a strong showing that the agency acted in bad faith during an administrative procedure. According to the Plaintiffs, agencies that "[f]ail[] to submit a complete administrative record, withhold[] clearly relevant documents from the administrative record, and withhold[] relevant records to skew the record in favor of the agency's decision" have acted in bad faith. *Pls. Mem.* at 3 (citing *Maritime Management v. United States*, 242 F.3d 1326, 1334-35 n.9, n.11, n.14 (11th Cir. 2001); *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010) (citing *Environmental Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978)). The Plaintiffs claim the agency committed all such acts in compiling the administrative record in this case. As set forth below, the Plaintiffs are wrong with respect to the law to be applied and the underlying facts.

A. The Plaintiffs Misstate the Circumstances under which Courts in this Circuit may Consider Extra-Record Evidence.

1. A Party Can Only Supplement the Administrative Record Under Limited Circumstances.

When a court reviews an agency decision under the APA, it confines its review to the record before the agency at the time it made its decision. 5 U.S.C. § 706(2)(D); *Town of*

Winthrop v. F.A.A., 535 F.3d 1, 14 (1st Cir. 2008) (explaining "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). There is a "strong presumption that the record on review is limited to the one before the administrator." *Liston v. Unum Corp. Officer Severance Plan*, 330 F.3d 19, 23 (1st Cir. 2003). Parties attacking an agency decision, therefore, are not "ordinarily entitled to augment the agency's record with either discovery or testimony presented in the district court." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1707 (2010) (quoting *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)). Exceptions to this general rule apply only in limited circumstances. *Town of Winthrop*, 535 F.3d at 15.

In the First Circuit, only two such exceptions exist. First, a court may permit a party to supplement the record "where there is a 'failure to explain administrative action as to frustrate effective judicial review.'" *Olsen v. United States*, 414 F.3d 144, 155-56 (1st Cir. 2005) (quoting *Camp*, 411 U.S. at 142-43); *see also Town of Winthrop*, 535 F.3d at 15. Even "[i]n the event the administrative record is found inadequate for judicial review," the general rule, "except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Olsen*, 414 F.3d at 155 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

Second, a district court " 'may' (although it is not required to) supplement the record where there is 'a strong showing of bad faith or improper behavior' by agency decision makers." *Olsen*, 414 F.3d at 155 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*), 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1458-59 (1st Cir. 1992).

Such showing requires "specific evidence that the agency acted in bad faith." *United States v. JG-24, Inc.*, 478 F.3d 28, 34 (1st Cir. 2007); *Town of Norfolk*, 968 F.2d at 1458-59.

2. *Frontier Fishing Corp.* Does Not Create a New Exception

Frontier Fishing Corp. does not change this firm rule by adding an exception for post-decisional evidence in NEPA cases. Although other circuits have allowed additional exceptions that permit district courts to consider extra-record evidence when reviewing informal, non-adjudicatory agency decisions, the "First Circuit has not adopted this list." *Frontier Fishing Corp.*, 429 F. Supp. 2d at 325. It is well settled in this Circuit that the rule limiting judicial review of an agency's decision to the record before the agency applies to informal agency decisions. *Murphey v. Comm'r of I.R.S.*, 469 F.3d 27, 31 (1st Cir. 2006); *Olsen*, 414 F.3d at 155 (citing *Lorion*, 470 U.S. at 744).

Neither the First Circuit, nor any of its district courts, has ever cited *Frontier Fishing Corp.*'s dicta discussing the possibility of an exception to the record rule in NEPA cases for post-decisional evidence, and the Plaintiffs cite to no authority within this Circuit that follows this approach. Indeed, the First Circuit's intentions in *Frontier Fishing Corp.* were entirely clear as it plainly refused to consider "more than the information before the Secretary at the time [of the] ... decision [because doing so] risks our requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations." *Id.* at 324 (citing *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1993)).

Furthermore, this is not a case where the Court must consider extra-record evidence in order to "ensure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives." *Id.* at 325 n.10 (quoting *County of Suffolk v. Sec'y of Interior*, 562 F.3d 1368, 1384 (2d Cir. 1977)). For more than two years of multiple

public motions, votes, and other public procedures, the New England Council, its subcommittees, its Science and Statistical Committee, its advisory panels and staff worked on the terms, conditions and systems to be implemented by Amendment 16. The New England Council published a draft version of the amendment, along with a draft Environmental Impact Statement (DEIS) pursuant to NEPA, and made both available for public comment. *Notice of Final Rule* at 18263. After receiving public comment, revising the proposed amendment and finalizing the DEIS, the New England Council adopted Amendment 16 as well as a final Environmental Impact Statement (FEIS) in June 2009 and transmitted it to NMFS for review and approval. *Id.* NMFS sought public comment on the New England Council's management recommendations and on the FEIS. *Id.*[2]

The FEIS provided a full analysis of the environmental impacts of Amendment 16. The impacts discussed included biological impacts, essential fish habitat impacts, impacts on endangered and other protected species, economic impacts, social impacts, and the cumulative effects of the Amendment. New England Fishery Mgmt. Council, Final Amendment 16 To the Northeast Multispecies Fishery Mgmt. Plan Including an Envtl. Impact Statement and Initial Regulatory Flexibility Analysis, at 11-17 (2009). Also included in the FEIS was a lengthy discussion of the proposed alternative measures considered in the Amendment 16 process, as well as the corresponding impacts that these alternatives would likely have if adopted.[3]

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[2] As part of its approval process and pursuant to section 604 of the Regulatory Flexibility Act, 5 U.S.C. *et seq*. (RFA), NMFS also prepared a final regulatory flexibility analysis (FRFA). *Notice of Final Rule* at 18305. The FRFA includes a summary of the issues raised by the public, the agency's responses to these comments, the changes the comments provoked, a description of the parties affected by the Amendment, a description of the compliance requirements the Amendment imposes on affected parties, and the mitigating steps the agency took to minimize the economic impact of Amendment 16. *Id.* at 18305-18308.

[3] Among the alternatives considered was a no-action alternative, pursuant to which annual catch limits, sector management policies, and the allocation scheme that New Bedford now disputes would not have been adopted. *Id.* at 17-18. Another alternative would have utilized an alternative

Contrary to the Plaintiffs' contentions, there is more than adequate evidence currently in the administrative record for the Court to "ensure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives." *Frontier Fishing Corp.*, 429 F. Supp. 2d at 325 n.10 (citation omitted).

Even if this Circuit recognized an exception to the record rule for post-decisional documents in NEPA cases, which it does not, the reasons for allowing such an exception are not present here because there is an extensive environmental review currently in the record. Consequently, Plaintiffs are left to argue only that this Court should consider post-decisional and extra-record evidence based upon the bad faith exception. "In the absence of bad faith . . . , it is normally not for a court to substitute its judgment for that of the administrative agency in determining what otherwise appropriate and relevant data is particularly helpful in fulfilling the agency's statutory responsibilities, or in defining the most effective means in acquiring it." *9 to 5 Org. for Women Office Workers v. Bd. Of Governors of Fed. Reserve Sys.*, 721 F.2d 1, 10 (1st Cir. 1983).

B. The Documents the Plaintiffs Wish to Include in the Record do not Demonstrate a Showing of Bad Faith.

In order for the Plaintiffs to be eligible to supplement the record or to obtain discovery for purposes of supplementing the record, they must present specific evidence that strongly demonstrates bad faith or improper behavior by the Federal Defendants. An agency that supplies a detailed decision that is "reasonably supported by the administrative record" is not easily susceptible to an allegation of bad faith. *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d

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allocation method for certain species, using the period between 1996 and 2006 as the basis for allocation. *Id.* Although the preferred alternative in Amendment 16 would impact some commercial fishing negatively, the FEIS ultimately concluded that the other alternatives in Amendment 16 would "delay or perhaps prevent rebuilding" entirely. *Id*. at 20. The agency concluded that the long-term economic gains to be had by implementing Amendment 16 would likely outweigh any short-term economic loss. *Id*.

1438, 1459 (1st Cir. 1992). Furthermore, "[a]n agency does not 'skew' the administrative record when it does not include agency documents that were not used in making its decision." *Salazar*, 616 F.3d at 515. To the contrary, "where an agency's analysis of a controversial application is detailed and thorough . . . [courts] will not readily conclude that it is infected by bad faith." *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008).

In this instance, the Plaintiffs have presented some 21 documents or categories of documents that they claim demonstrate the bad faith of the Federal Defendants. In fact, a review of this material demonstrates that none of this extra-record and post-decisional evidence serves Plaintiffs to meet their high burden, let alone shining even the faintest light on any inappropriate or improper behavior by any decision-maker involved in the Amendment 16 process.

1. Plaintiffs' Proposed Douments or Categories of Documents

(1) September 2010 Office of the Inspector General ("OIG") Report, referencing NOAA's use of a "flawed database. [Ex.1 to *Pls. Mem.*]

Contrary to Plaintiffs' claim, *Pls.' Mem.* at 3, there is nothing in Exhibit 1 to Plaintifffs' Memorandum that mentions NOAA's use of a "flawed database." There *is* reference to the use of a "flawed database" in Appendix A to that report, which Plaintiffs did not include, that does reference one incident of a NOAA enforcement agent relying on "a flawed database used by NOAA) sometime in December 2006. There is no indication that the database reference in the OIG Report has any bearing on the Amendment 16 decision, let alone evidence any bad faith with respect to the entire NOAA review and approval process by which Amendment 16 was approved.

(2) Amendment 13, including landings and economic projections.

Plaintiffs' stated position on these documents is that the Federal Defendants have included relevant documents in the Administrative Record, but to the extent that additional

documents under this category have not been included, Plaintiffs request these be included in the Administrative Record. *Pls. Mem. at 6.* In other words Plaintiffs concede that they are aware of no relevant documents pertaining to Amendment 13 that have not been included in the Record and have no evidence that relevant documents have been excluded. Plaintiffs provide no demonstration or argument what specifically is or even could be contained in these documents that demonstrates the showing of bad faith that is the condition precedent to their review by this Court.

(4) September 28, 2010 Management Review Announcements. [Ex. 2]

An agency commitment to advance a management review process issued months after the administrative action under scrutiny here does not indicate or imply by its terms or intent bad faith associated with the decision made with respect to Amendment 16.

(5) Agency documents regarding changes in Pollock allocation, including Federal Register listings and ACE Modifications.

Plaintiffs appear to deliberately misrepresent the context and basis underlying the pollock re-assessment. There is nothing in those documents—and Plaintiffs point to nothing in those documents—that supports their claim that the pollock assessment in Amendment 16 was based on "grievous errors" or "unreasonably flawed scientific and statistical information…." *Pls.' Mem.* at 7.

(6) Common Pool Adjustments, including Federal Register listings and underlying Agency documents.

Plaintiffs do not even attempt to explain how the common pool adjustments that happened after Amendment 16 was approved relate to the agency's alleged bad faith in approving Amendment 16.

(7) All Amendment 16 post-implementation Agency documents regarding sector

matters, including by-catch, observer, and dockside monitoring issues.

Again, Plaintiffs attempt to shed their burden of coming forward with concrete and relevant evidence with respect to the agency's alleged bad faith onto the parties and the Court by arguing that somewhere in the sea of post-decisional documents sought by this category of documents there is something that might pertain to that issue. Plaintiffs' use of the phrase: "wreckage in the wake of the Amendment 16 disaster" is made without the benefit of any evidentiary support or basis. *Pls. Mem.* at 8.

(8) February 2009 Presentation by Pomeroy and Pollnack to NEFMC regarding review of catch share policy. [Ex. 3]

There is no demonstration of any bad faith with respect to the content or treatment of this document in the final agency action or its conclusion (or not) in the administrative record. If it did not form the basis of the agency decision, there is no requirement to include it. The question of Amendment 16's compliance with the national standards—which Plaintiffs seem to be raised to explain the relevance of this document-- must turn on the adequacy of the administrative record that was before the agency.

(9) August 5, 2009 NOAA Report by Julie Olson regarding literature review of fleet consolidation issues, incorporated into Amendment 15. [Ex. 4]

There is no demonstration of any bad faith with respect to the content or treatment of this document in the final agency action or its conclusion (or not) in the administrative record. If it did not form the basis of the agency decision, there is no requirement to include it. Therefore, the question of Amendment 16's compliance with the national standards—which Plaintiffs seem to

be raised to explain the relevance of this document-- must turn on the adequacy of the administrative record that was before the agency.

(10) September 20, 2010 Presentation by Jane Lubchenco at ICES 2010 conference in Nantes, France, comparing catch shares to ITQ's, including Power Point slides, notes and transcripts.

There is no demonstration of any bad faith with respect to Dr. Lubchenko's presentation.

(13) All documents listed in Administrative Record withheld due to purported attorney client privilege.

CLF defers to the Federal Defendants to respond to this category of documents.

(14) Any and all social economic analyses of the Amendment 16 plan and/or statements and opinions that said analyses were not required or necessary.

Plaintiffs' stated position on these documents is that the Federal Defendants have included relevant documents in the Administrative Record, but to the extent that additional documents under this category have not been included, Plaintiffs request these be included in the Administrative Record. *Pls. Motion at 12.* In other words Plaintiffs concede that they are aware of no relevant documents pertaining to social economic analyses of the Amendment 16 plan that have not been included in the Record and have no evidence that relevant documents have been excluded.

(15) Internal emails regarding drafting, review and implementation of Amendment 16.

Plaintiffs make no showing that bad faith warrants incorporation of this category of documents. CLF defers to the Federal Defendants to object to this category of documents.

(16) Internal draft decisional documents regarding Amendment 16 not already produced in the Administrative Record.

Plaintiffs make no showing that bad faith warrants incorporation of this category of documents. CLF defers to the Federal Defendants to object to this category of documents.

(18) Any and all documents regarding assessment of the NMFS dealer and VTR database and the database's adequacy or inadequacy for determining individual vessel allocations.

There is no *prima facie* showing of bad faith or misconduct with respect to the databases used to develop allocations in Amendment 16 and the existing record already contains documents relating to this issue

I. Zinser, Todd, "Review of NOAA Fisheries Enforcement Programs and Operations," January 21, 2010.

See response at page 13 of CLF's Opposition to City of New Bedford's First Motion for Discovery and Completion or Supplementation of the Record (Docket #29).

IV. Cape Cod Commercial Hook Fishermen's Association Press Release, "National Marine Fisheries Service Announces Changes to Commercial Harvesting Levels for Atlantic Pollock," dated June 16, 2010.

See response at page 16-17 of CLF's Opposition to City of New Bedford's First Motion for Discovery and Completion or Supplementation of the Record (Docket #29).

V. All files containing audio and/or video recordings of (a) NEFMC meetings and related workshops, presentations and conferences regarding catch shares, sectors, and Amendment 16, and (b) all presentations, workshops, and conferences regarding catch shares, sectors and Amendment 16 held, sponsored, or participated in by NOAA/NMFS staff, including but not limited to any such materials cited or linked by internet reference in the Administrative Record filed September 1, 2010.

These documents, taken individually or collectively, do not evidence a strong showing of impropriety or bad faith on the part of the agencies that rebuts the presumption of regularity. There is no indication that the agency used or relied on any of these recordings or other presentations. As a result, the Court should not allow the Administrative Record to be supplemented to include this extraneous evidence.

C. The Plaintiffs Should not be Allowed to Depose Agency Decisionmakers

The Plaintiffs' claims that agency bad faith similarly justifies the taking of discovery are equally misguided. Despite their naked assertions, Plaintiffs point to no evidence of any impropriety on behalf of the agency. Because there is no evidence of improper actions, the Plaintiffs seek, through discovery, to recreate the history of the Amendment 16 process by deposing the agency decisionmakers in hopes that their version of events will better suit Plaintiffs' claims. There is no precedent for permitting Plaintiffs to develop the basis for deposing the administrative officials—and for supplementation of the record—only after they have deposed them. As can be seen by the multiple references to their arguments in favor of deposition, the Plaintiffs in large part seek to establish the bad faith required to supplement the record based on these depositions. That is not the law.

1. Discovery is Rarely Allowed in Aid of A Party's Interest in Supplementing an Administrative Record.

As a general rule, courts do not permit parties seeking judicial review of an agency decision to conduct discovery. Discovery "is not allowed in an action for judicial review upon an administrative record for the same reasons that supplementation is generally not permitted." *Frontier Fishing Corp.*, 429 F. Supp. 2d at 326 (citing *Olsen*, 414 F.3d at 155-56). Because "at

least some very good reason is needed to overcome the strong presumption that the record on review is limited to the record before the administrator," courts that allow parties to conduct discovery at this stage do so only under limited circumstances. *Liston*, 330 F.3d at 23. In some situations, for example, discovery may be needed when the agency makes a decision using procedures not designed to produce a record. *Id. See generally Overton Park*, 401 U.S. at 415-16. In other cases, "certain kinds of claims—*e.g.*, proof of corruption—may in their nature or timing take a reviewing court to materials outside the administrative record." *Liston*, 330 F.3d at 23.

2. A Party Can Depose Administrative Decisionmakers Only Under Rarest of Circumstances.

Before a court is permitted to inquire into the thought processes of the administrative decisonmakers, "there must be a strong showing of impropriety or no explanation of the administrative decision on the record." *Normile v. McFague*, 685 F.2d 9, 13 (1st Cir. 1982); *In Re Subpoena Duces Tecum Served on Office of Comptroller of the Currency* (*In re Subpoena*), 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (stating that "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law—unless there is a showing of bad faith or improper behavior"). The high burden is appropriate because "such inquiry into the mental processes of administrative decisionmakers is usually to be avoided." *Overton Park*, 401 U.S. at 420. Instead, a "presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (U.S. 1926).

Although courts have not defined with particularity what constitutes a "strong showing" of bad faith, it is clear is that "naked assertions of bad faith will not suffice to open the door to discovery in an APA action." *New York v. Salazar*, 701 F. Supp. 2d 224 (N.D.N.Y. 2010); *see*

also Tafas v. Dudas, 530 F. Supp. 2d 786, 797 (E.D. Va. 2008) (quoting *Mullins v. U.S. Dep't of Energy*, 50 F.3d 990, 993 (Fed. Cir. 1995) (stating that "mere allegations of 'bad faith' are inadequate to overcome the presumption that government officials have acted 'properly and in good faith'")). Courts have held that evidence must strongly support motivations of illegal "political pressure or any kind of unseemly influence" on the administrative decision, *Town of Norfolk*, 968 F.2d at 1459 (internal quotation marks omitted) (citing *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1249 (D.C. Cir. 1971), *cert. denied* 405 U.S. 130 (1972)), while recognizing that "[s]ome political influence on the administrative process is legitimate[.]" *Salazar*, 701 F. Supp. 2d 224 (quoting *Schaghticoke Tribal Nation v. Norton*, No. 3:06CV81 PCD, 2007 WL 867987, at *6 (D. Conn. Mar. 19, 2007)). It is abundantly clear that a "party cannot overcome th[e] presumption [of regularity] with a mere showing that an official 'has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.'" *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007) (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980)).

3. The Plaintiffs Have Not Made the Requisite Strong Showing of Impropriety or Bad Faith.

Plaintiffs continue to pursue depositions of the NOAA Administrator, a special advisor to the NOAA Administrator, the NMFS Regional Administrator, the Chair of the New England Council and a member of the New England Council. The bases cited for taking the depositions of these agency officials and fishery council members are that Amendment 16 constitutes an improperly adopted "individual fishing quota" (IFQ) program, that the Amendment 16 adoption and implementation process was flawed, and that Amendment 16 was based upon a "flawed database." In support of their request, Plaintiffs adopt the positions taken by the City of New

Bedford in its first discovery motion and cite to attenuated circumstances and isolated statements that they attempt to characterize as being reflective of bad faith or improper behavior in the Amendment 16 process. To the extent that Plaintiffs seek to recast the arguments put forth in the City of New Bedford's original discovery motion, CLF hereby adopts in response the content of its opposition to that motion. As to the remaining allegations, they lack entirely the substance, relevance and persuasiveness that are the essence of the exception to the rule that requires strong and specific evidence of bad faith or improper behavior *before* discovery can be allowed. *Town of Norfolk*, 968 F.2d at 1458-59.

Plaintiffs attempt to suggest, based upon a single quote from the NOAA Administrator Dr. Jane Lubchenco that is contained in a document that is not in this administrative record, that Amendment 16 established an "individual fishing quota" (IFQ) program and therefore was required to be approved by means of a referendum vote of eligible permit holders pursuant to Section 303A(6)(D)(i) of the Magnuson Act. *See Pls. Mem.* at 14-15. To support these charges, Plaintiffs do not dissect the terms and provisions of Amendment 16 and compare them to the Section 303A criteria that characterize an IFQ program. Indeed, Plaintiffs make no effort to provide any substantive proof of this claim. Instead, it is suggested that because Administrator Lubchenco once mistakenly referred to Amendment 16 as involving "individual quotas," then Amendment 16 must be an IFQ program in disguise, and that only deposition discovery will uncover the truth of the matter.

This simply is not the case. Whether Amendment 16 is an IFQ program that should have been approved by a referendum vote or a sectors program for which a referendum is not required is a question of law when and if it is properly raised by Plaintiffs; Plaintiffs provide no rationale why the issue could not be resolved on the current administrative record without resort to

exceptional procedures such as discovery. Even if Plaintiffs' arguments established an issue of fact, the evidence that they have presented does not exhibit bad faith nor is it sufficient to overcome the presumption that the process in this rulemaking was valid.

Similarly, flimsy innuendo is presented to support a claim that the database used to establish catch limits is flawed. As noted above, Plaintiffs suggest that a generic reference, in the September 2010 report of the United States Department of Commerce Office of Inspector General's (OIG) "Final Report-Review of NOAA Fisheries Enforcement Programs and Operations," to NOAA's use of a "flawed database" in its enforcement efforts amounts to strong evidence that the allocation database at issue in this case is flawed. At the outset, it is worth highlighting again that this report is from an OIG investigation that examined the practices of the enforcement programs of NMFS and has nothing to do with the Amendment 16 catch limit or allocation process. Moreover, the evidence presented by the Plaintiffs does not indicate which NMFS database the OIG deemed to be flawed, how it was flawed or whether that flaw was in any way related to, or otherwise affected, the Amendment 16 process. The OIG report simply references a single agent in December 2006 and "a flawed database." Evidence of the existence of an unspecified flawed database within NMFS is simply not adequate to open the door to discovery in this case.

Finally, Plaintiffs attempt to characterize a December 2009 letter written by New England Council Chair John Pappalardo to the Secretary of Commerce as evidence of serious and urgent concerns regarding the NMFS regulatory process. While there can be no doubt that the Pappalardo letter and its request "to evaluate our current system, identify inefficiencies, and implement appropriate solutions," was a call for review and change in the manner in which the New England Council and NMFS interact, the letter does not raise any concerns with the

Amendment 16 process or otherwise suggest that the matters raised in the letter had any implications for the legitimacy or validity of that process or the bad faith of the reviewing agency. To infer from this letter any negative meaning relative to the Amendment 16 process would be a gross over-reading of the letter and its intent, particularly given that the New England Council approved virtually all aspects Amendment 16 unanimously and NMFS implemented Amendment 16 without substantial change.

Not a piece of the evidence offered by the Plaintiffs approaches a strong or proper showing of impropriety or bad faith. As a result, the Court should deny Plaintiffs' request to take depositions in this case.

III. CONCLUSION

For the reasons set forth above, Intervenor-Defendant Conservation Law Foundation respectfully requests that the Court deny the Plaintiffs' Motion for Discovery and Completion or Supplementation of the Record (Docket # 39).

Dated: October 27, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified in the Notice of Electronic Filing and paper copies will be sent to those indicated as non registered participants on September 23, 2010.

/s/ Peter Shelley
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