

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**THE CITY OF NEW BEDFORD, and
THE CITY OF GLOUCESTER, et al.,**

Plaintiffs,

v.

GARY LOCKE, et al.,

Defendants.

Case No. 1:10-CV-10789-RWZ

JAMES LOVGREN, et al.,

Plaintiffs,

v.

GARY LOCKE, et al.,

Defendants.

**MOTION OF DEVAL PATRICK, AS THE GOVERNOR OF
THE COMMONWEALTH OF MASSACHUSETTS,
AND PAUL DIODATI, AS THE DIRECTOR
OF THE DIVISION OF MARINE FISHERIES FOR THE COMMONWEALTH,
TO PARTICIPATE AS AMICI CURIAE**

Deval Patrick, the Governor of the Commonwealth of Massachusetts (“Governor Patrick”), and Paul Diodati, the Director of the Division of Marine Fisheries (“Director Diodati”) (collectively, the “State Amici”), hereby move for leave of court to participate in this matter as amici curiae, and to file the accompanying brief in that capacity.

In support of this motion, and as grounds therefor, the State Amici state as follows:

1. The plaintiffs Cities of New Bedford and Gloucester (“Port Plaintiffs”) filed an Amended Complaint on June 24, 2010, challenging the promulgation of Amendment 16, *i.e.*, 75 Fed. Reg. 18262-53,¹ by the defendant Gary Locke, Secretary of Commerce, United States Department of Commerce and the National Oceanic and Atmospheric Administration (“Secretary”), which extended fishery-wide a catch-share or sector-based management system in the Northeast Multispecies Fishery. Among other things, the Port Plaintiffs argue that the Secretary violated the Magnuson-Stevens Act, 16 U.S.C. § 1851, *et seq.*

2. The Port Plaintiffs filed a motion for summary judgment on November 22, 2010. That same day, the amici Representatives Barney Frank (D-MA) and John Tierney (D-MA) (“Representative Amici”) filed an amicus brief supporting the Port Plaintiffs’ summary judgment motion. The State Amici now submit the accompanying amicus brief setting forth their view of the Port Plaintiffs’ motion for summary judgment and the Representative Amici’s amicus brief.

3. In the accompanying amicus brief, the State Amici argue that the Secretary’s promulgation and implementation of a sector-based system, which was accomplished via Amendment 16, violates at least four national standards, One, Two, Six and Eight, under the Magnuson-Stevens Act, 16 U.S.C. § 1851, *et seq.*, and the related

¹While the plaintiffs’ Amended Complaint, dated June 24, 2010, challenges Amendment 16, this Court’s review of Amendment 16, *i.e.*, 75 Fed. Reg. 18262-53 includes Framework 44, *i.e.*, 75 Fed. Reg. 18356-75, a later supplement to Amendment 16. *See Gulf Fishermen’s Ass’n v. Guitierrez*, 529 F.3d 1321, 1323 (2003) (recognizing that timely petition for judicial review includes review of regulation and any subsequent action taken by the Secretary under that regulation) (relying on *Oregon Trollers Ass’n v. Guitierrez*, 452 F.3d 1104, 1113 (9th Cir. 2006); *see also* 75 Fed. Reg. 18356 (“FW 44 is implemented in this rule in conjunction with approved Amendment 16 measures”). Accordingly, the State Amici’s references to “Amendment 16,” incorporate both the regulation and Framework 44.

regulations, 50 C.F.R. §§ 600.310, 600.315, 600.335, 600.345. See 75 Fed. Reg. 18262-53 (April 9, 2010); Administrative Record (“AR”) 56485-56577; see also 75 Fed. Reg. 18356-75 (April 9, 2010); AR 56715-35. The State Amici argue that the Secretary set unreasonably and unnecessarily low annual catch limits (“ACLs”) that prevent Massachusetts commercial fishermen from achieving optimum yield (“OY”) in accordance with National Standards One, Two, Six and Eight of the Magnuson-Stevens Act.

4. The State Amici are uniquely positioned to address these issues:
 - a. The Division² is charged with enforcing federal fishing regulations and promulgating and enforcing state fishing regulations to manage commercial fishing in the waters off the Commonwealth’s shores. See M.G.L. c. 130. In addition, the Division licenses and continues to regulate commercial fishing vessels of which approximately 500 vessels are subject to the new regulatory scheme imposed by Amendment 16. See A Report on Economic and Scientific Conditions in the Massachusetts Multispecies Groundfishery, dated November 5, 2010, attached as Exhibit (“Ex.”) A to the accompanying amicus brief (“MA Economic and Scientific Report”), at 6. By the Secretary’s own count, there are at least twenty nine (29) fishing communities³ and

²In the Commonwealth of Massachusetts, marine fisheries laws are administered by the Division, an agency within the Department of Fish and Game (the “Department”), Executive Office of Energy and Environmental Affairs. M.G.L. c. 130, § 1A. The Division is administered by Director Diodati.

³ Under the Guidelines for National Standard Eight, a “fishing community” is defined as:

ports in the Commonwealth that have been and continue to be economically and socially impacted by Amendment 16. See Secretary's Fishing Communities of the United States, 2006 ("2006 Social Report") at 35.⁴

- b. At the federal level, the Secretary, through the National Marine Fisheries Service ("NMFS") and the New England Fishery Management Council (the "Council"), which includes a Massachusetts representative, controls the fisheries in New England and develops and implements fishery management plans ("FMPs"), including Amendment 16. See 16 U.S.C. § 1801(b)(4)-(5); 16 U.S.C. § 1854(e)(2); 50 C.F.R. § 310(2)(2). While the Division's delegate to the Council ultimately voted in favor of the adoption of Amendment 16, that is, to support a transition to a catch-share or sector-based management system, the Division and other Massachusetts officials consistently and repeatedly raised the issues set forth in this amicus brief, including that the Secretary is required under the National Standards of the Magnuson-Stevens Act to set reasonable ACLs so

a community that is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew, and fish processors that are based in such communities. A fishing community is a social or economic group whose members reside in a specific location and share a common dependency on commercial, recreational, or subsistence fishing or on directly related fisheries-dependent services and industries (for example, boatyards, ice suppliers, tackle shops).

50 C.F.R. § 600.345(b)(3).

⁴This report is located at:
http://www.st.nmfs.noaa.gov/st5/publication/communities/NE_ALL_Communities.pdf

that Massachusetts commercial fishermen can achieve OY. See 75 Fed. Reg. at 18365, cols. 1-3 (AR 56725); AR 56998.

- c. Historically, the Division has been a consistent proponent of the issues before this Court. In Commonwealth of Massachusetts, et al. v. Gutierrez, et al., the Division, as co-plaintiff with the New Hampshire Division of Marine Fisheries, convinced this Court that federal regulators did not “seriously consider and analyze” the Mixed-Stock exception before promulgating Framework 42, the most recent suite of regulatory measures governing the Northeast groundfish fishery; the plaintiffs persuaded the Court that the Mixed-Stock exception, had the Secretary invoked it, would have resulted in ACLs that allowed for the overfishing of some “choke stocks” in exchange for the harvesting of other “healthy” stocks, thereby permitting fishermen to achieve OY, as is required by National Standard One. See Massachusetts v. Gutierrez, 594 F.Supp.2d 127 at *4 (D. Mass. 2009) (Harrington, J.). In that litigation, the Division also argued that the Secretary’s failure adequately to consider the social and economic impacts of Framework 42 threatened the viability of Massachusetts commercial fishermen and fishing communities. See id.
- d. On November 5, 2010, after the promulgation of Amendment 16, Director Diodati, who co-chairs the Massachusetts Marine Fisheries Institute (“MFI”), which is based at the University of Massachusetts School of Marine Science and Technology, published “A Report on

Economic and Scientific Conditions in the Massachusetts Multispecies Groundfishery” (“MA Economic and Scientific Report”). “The report provide[d] an analysis and evaluation of the current economy and overall economic viability of the Massachusetts sector groundfish fleet resulting from the unforeseen consequences of unnecessarily low ACLs and market failure in trading under the new catch shares system, and what scientifically valid alternatives exist to increase ACLs.” Id. at 4. In doing its analysis, MFI primarily relied on data that was available to the Secretary before he promulgated Amendment 16. Id. Moreover, the report corroborates the State Amici’s arguments that the Secretary’s promulgation of Amendment 16 violated at least four National Standards under the Magnuson-Stevens Act, 16 U.S.C. § 1851, et seq.

- e. On November 5, 2010, Governor Patrick forwarded a copy of the MA Economic and Scientific Report to the Secretary, under a cover letter requesting the Secretary, for the reasons documented in the report, to (a) prospectively raise ACLs for certain species; and (b) issue emergency financial relief to certain Massachusetts fishermen who were displaced from the groundfish fishery as a result of Amendment 16’s draconian ACLs. See Letter from Governor Patrick to Secretary Locke, dated November 5, 2010, attached as Ex. B to the amicus brief.
- f. By letter dated January 7, 2011, the Secretary denied both of Governor Patrick’s requests, in their entirety. See Letter from Secretary Locke

to Governor Patrick, dated January 7, 2011, attached as Ex. C to the amicus brief. As grounds for this denial, the Secretary reasoned that most of the scientific data set forth in the report was not new, but instead was available to (and, apparently, disregarded by) the Secretary at the time he promulgated Amendment 16. See id. The Secretary also suggested in his letter that, even as the ultimate promulgator of Amendment 16, he lacked the authority to contravene any choice that the Council made between conflicting sets of data, and is therefore powerless to revisit such choices, irrespective of whether they complied with the National Standards set forth in the Magnuson-Stevens Act. See id.

- g. In the State Amici's view, the position taken by the Secretary in his January 7, 2011 letter demonstrates that no meaningful avenue exists for stakeholders, including the Commonwealth of Massachusetts, to secure prospective relief for Massachusetts fishermen and fishing communities from excessively restrictive ACLs and other inconsistencies between Amendment 16 and the Magnuson-Stevens Act.⁵ Thus, to the extent that a stakeholder maintains (as the State Amici do) that the legal flaws in Amendment 16 have existed from the

⁵ Indeed, the Secretary's letter appears to suggest that (a) adjustments to ACLs cannot be effected on an emergency basis; and (b) adjustments to ACLs can therefore be made only in reliance upon scientific information that has become available after the promulgation of Amendment 16, and that has been fully peer-reviewed by scientists in the appropriate field. For a proponent of alternative scientific data to meet these requirements would take longer than the expected lifespan of a fishery management plan.

time of its promulgation, the only forum where it can give voice to these concerns is in the instant litigation.⁶

5. While no rule of court governs the participation of amici curiae in a trial court action, caselaw establishes that such participation lies within the sound discretion of the District Court. Strasser v. Dorley, 432 F.2d 567, 569 (1st Cir. 1970). While courts in this circuit have had no occasion to enumerate the factors that a District Court should consider in weighing the proffered assistance of a friend of the court, it is well-established that such participation should be permitted where prospective amici “provide helpful analysis of the law, . . . have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.” Tafas v. Dudas, 511 F.Supp.2d 652, 659 (E.D.Va. 2007), quoting Bryant v. Better Business Bureau, 923 F.Supp. 720, 727 (D.Md. 1996). Given the State Amici’s unique perspective on Amendment 16, they respectfully requests that this Court exercise its discretion to allow them to file the accompanying brief as a friend of the court.

6. To the extent that any party is prejudiced by the State Amici’s request for participation at this time, the State Amici expressly assent to any reasonable enlargement to the existing briefing schedule, to permit such party ample time, if it so chooses, to respond to the arguments put forth by the State Amici.

⁶ The State Amici do not suggest that the Secretary’s denial of the Governor’s request for prospective relief is within the scope of the instant litigation, or is subject to remedy by this Court. Rather, the State Amici raise the issue merely to illustrate that they seek participation here only as a last resort, and only after finding all avenues to administrative relief to be foreclosed to them.

WHEREFORE, the State Amici respectfully moves that this Court (a) grant them leave to participate as an amici curiae in this matter, with such participation expressly limited to the instant request for relief that this Court remand the matter to the Secretary with instructions that he recalculate higher ACLs consistent with the MA Economic and Scientific Report, so as to enable Massachusetts commercial fishermen to achieve OY in accordance with National Standards One, Two, Six and Eight of the Magnuson-Stevens; and (b) accept for filing their Brief of Amicus Curiae, filed herewith.

Respectfully submitted,

The COMMONWEALTH OF
MASSACHUSETTS, by and
through DEVAL PATRICK, as the
GOVERNOR, and PAUL
DIODATI, as the DIRECTOR of the
DIVISION OF MARINE
FISHERIES,

By their attorneys,

MARTHA COAKLEY
ATTORNEY GENERAL

/s/ Christine A. Baily
Christine Baily (BBO # 643759)

/s/ Daniel J. Hammond
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January 11, 2011

CERTIFICATE OF SERVICE

I, Christine A. Baily, hereby certify that a true and accurate copy of this Motion and the Brief of the Amici Curiae, filed by Attorney General Martha Coakley on behalf of Deval Patrick, as the Governor of the Commonwealth Of Massachusetts, and Paul Diodati, as the Director of the Division Of Marine Fisheries for the Commonwealth, was served electronically upon all parties listed on this Court's ECF system on January 12, 2011.

/s/ Christine A. Baily
Christine A. Baily, BBO# 643759
Assistant Attorney General

January 12, 2011

CERTIFICATION PURSUANT TO LOCAL RULE 7.1

Pursuant to Local Rule 7.1(a)(2), I hereby certify that I have consulted with counsel for the plaintiffs and counsel for the defendants about this Motion via telephone conversations on January 11, 2011.

/s/ Christine A. Baily
Christine A. Baily, BBO # 643759
Assistant Attorney General

January 11, 2011