



to file an *amicus* brief challenging the very fishery management plan that the *amicus* voted to approve. *Id.* While CLF does not oppose the Governor's motion to participate as *amicus curiae*, CLF does have concerns with respect to several aspects of the motion and its accompanying materials: timeliness, the length the proposed memorandum, the scope of the motion's argument, and the extra-record and post-record materials it seeks to introduce into this matter.

#### **A. Timeliness**

The original complaint in the nature of a petition for review was filed on May 9, 2010 with respect to an agency action that took place in April 2010. Plaintiffs stated the review to be a matter of great urgency that should be advanced for hearing "at the earliest opportunity." *E.g.*, Uncaptioned Petition on Behalf of New Bedford *et al.* for Review at 1, Docket No. 1. The plaintiffs' summary judgment papers were filed on November 22, 2010, *see* Docket Nos. 56, 61, 63, as required by this Court's order of November 17, 2010. Docket No. 52. The motion and supporting briefs filed by the other *amici* seeking to support the position of the plaintiffs were also filed on November 22, 2010. Docket Nos. 59 & 62. The Patrick *Amicus* Motion and proposed supporting memorandum and materials were filed January 12, 2011, almost eight weeks after plaintiffs' filing deadline.

Although CLF is not aware of any specific rules on this point in the U.S. District Court for the District of Massachusetts, it is customary for *amici* to file their submissions on the same schedule as the party whose position they are seeking to support. *See* Fed. R. App. P. 29(e) (must be filed within 7 days of principal brief of side being supported); Mass. R. App. P. 17(same time as position being supported). The Patrick *Amicus* Motion provides no explanation why the Court should accept such a delayed filing. These timing rules seek to ensure that the parties to the case have a fair opportunity to respond to the position of the *amicus* party whose perspective, unlike

those of the parties, is being heard for the first time. CLF's concerns with the timeliness of the Patrick motion are compounded by the fact that, as discussed in more detail below, the motion raises new claims that have not been advanced by the Plaintiffs in this case. If the Court does allow Governor Patrick to participate as a friend of the court, in accord with the Governor's stipulation, CLF requests that it be given additional time to respond to the issues raised in the Governor's materials. *See Patrick Amicus Motion* at 8, Docket No. 68.

### **B. Length of memorandum**

By order of the Court, the parties to this matter are limited to 30 pages for their principal briefs. Minute Order entered December 1, 2010. Under federal appellate practice, the length of an *amicus* brief is limited to one-half the length of the principal brief it is supporting without leave of court. Fed. R. App. P. 29(d). The memorandum filed in connection with the Patrick *Amicus Motion* is 34 pages, longer than the briefs of any of the parties that it is supporting.

### **C. Scope of *Amicus* Filing**

As noted above, this is an unusual situation where the Commonwealth of Massachusetts appears to be finding fault with the very fishery management plan that its representatives on the New England Fisheries Management Council ("NEFMC") helped design, voted for, and requested that the National Marine Fisheries Service and Department of Commerce to approve. As unusual as that is, Governor Patrick is also using his *amicus* filing to speak to issues that have not been raised by the parties. CLF can find no precedent for or logic to allowing an *amicus* to raise matters outside the issues raised by the parties.

Specifically, Governor Patrick argues that Amendment 16 violates National Standard 6, 16 U.S.C. § 1851(a)(6), for purportedly failing to include a contingency mechanism for revising the catch limits on the basis of future changes in the underlying science. Brief, *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 at 21-25, Docket No. 69 (“Patrick *Amicus* Brief”). While there is no basis in fact or law for the Governor’s argument on this point, CLF would note that neither the plaintiffs nor the prospective plaintiff-intervenor has raised any challenge to Amendment 16’s compliance with National Standard 6 to this issue. It is both inappropriate and too late for a prospective *amicus* to raise that issue now.

#### **D. Extra-record materials**

Finally, CLF would note to the Court that the Patrick *Amicus* Motion appears to be little more than an effort to pack the record with new evidentiary materials that are not in the administrative record of the agency decision that is before the Court. The principal document relied on in the *amicus* brief -- “A Report on Economic and Scientific Conditions in the Massachusetts Multispecies Groundfishery,” by the Massachusetts Marine Fisheries Institute, Docket No. 69-1 -- is dated November 5, 2010, months after the administrative record closed and long since the final agency action at issue in this appeal. The document has not been reviewed by the New England Fishery Management Council (“Council”) or by the Council’s Science and Statistical Committee, which is charged by law with developing the scientific advice for the Council. 16 U.S.C. § 1852(g)(1)(requirement for and jurisdiction of Council’s science and statistical committee). The Patrick *Amicus* Brief also refers to, and includes, correspondence that is dated November 5, 2011 (Docket No. 69-2), and January 7, 2011 (Docket Nos. 69-3 and 69-5). The Patrick *Amicus* Brief also points to other substantive reports and materials that were in existence during the Amendment 16 process but that the Commonwealth’s representatives

apparently did not make part of the record for Amendment 16 that they were responsible for assembling as Council members.<sup>1</sup>

As already argued extensively to this Court in connection with various matters of extra-record discovery that plaintiffs were pursuing, the matter before the Court is primarily a record review case<sup>2</sup> and must be decided on the basis of the administrative record relied on by the agency. *E.g.*, *Town of Winthrop v. F.A.A.*, 535 F.3d 1, 14 (1st Cir. 2008). There are limited exceptions relating to the frustration of judicial review, *Id.*, 535 F.3d at 15, or bad faith or improper conduct. *E.g.*, *Olsen v. United States*, 414 F.3d 144, 155 (1st Cir. 2005). Governor Patrick fails to provide any basis for availing himself of those exceptions. Indeed, given that the Commonwealth of Massachusetts helped put this record together and voted for the Amendment 16 decision that is under review through its delegates and appointees on the New England Fishery Management Council, it is difficult to understand how the Governor *could* make such a case.

CLF believes that all the materials attached to or connected with the Governor Patrick *Amicus* Motion that postdate the administrative record or are not part of the administrative record should not be included in the record of this case, should not be referenced in the Patrick *Amicus* Brief, and should not form the basis of the Court's decision on the parties' dispositive motions. If the Court concludes otherwise, CLF would request the opportunity to conduct limited discovery on the November 5, 2010 Marine Fisheries Institute document and its authors.

---

<sup>1</sup> At least, no record references to these documents are provided in their proffered brief. The reports to which CLF refers are the [federal Commerce] Secretary's Fishing Communities of the United States, 2006, *e.g.*, Patrick *Amicus* Brief at 3, and [federal Commerce] Secretary's Report on Fishery Economics of the United States, 2008, *e.g.*, Patrick *Amicus* Brief at 4.

<sup>2</sup> CLF notes that Lovgren plaintiffs have pled issues beyond the scope of the Administrative Procedures Act review. Those issues, to the extent they may become ripe in the future, are not addressed in this filing.

Dated: January 18, 2011

Respectfully Submitted,

/s/ Peter Shelley  
Peter Shelley, Senior Attorney  
MA BBO # 544334  
Conservation Law Foundation  
62 Summer Street  
Boston, MA 02110  
Telephone: (617) 350-0990  
pshelley@clf.org

Greg Cunningham, Senior Attorney  
ME BOB #7718  
Conservation Law Foundation  
47 Portland Street  
Portland, ME 04101  
Telephone: 207-210-6439  
gcunningham@clf.org

**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 January 18, 2011.

/s/ Peter Shelley  
Peter Shelley, Esq.