

I. INTRODUCTION

This case involves Plaintiffs' challenges, in two consolidated cases¹ to an action known as Amendment 16, a final rule issued by the Secretary of Commerce ("Secretary"), acting through the NOAA Administrator, and promulgated as a regulatory amendment to the Northeast Multispecies Fishery Management Plan ("Groundfish FMP") on April 9, 2010.² The National Marine Fisheries Service ("NMFS") approved Amendment 16 in order to accomplish two critical goals: 1) to meet a 2007 statutory mandate to implement Annual Catch Limits ("ACLs") and related Accountability Measures, which are measures intended to end overfishing and rebuild overfished stocks in all U.S. fisheries; and 2) to implement 17 additional "sectors" in the fishery and related revisions to the existing rules for sectors. *See* 75 Fed. Reg. 18262 (April 9, 2010).

"Sectors" are groups of fishermen who have voluntarily entered into a contract between each other and with NMFS committing themselves to fish within specific annual catch limits in exchange for an allocation of the total allowable catch ("TAC") of one or more stocks of fish in the fishery, along with substantial relief from certain regulatory requirements. The expanded number of sectors available to fishermen in New England is viewed by fisheries managers as a primary "tool" available to them to help ensure compliance with the new Annual Catch Limit requirements. Plaintiffs have directly challenged the legality of Amendment 16's changes to the Groundfish FMP's sector rules.

For the last six years, the Fixed Gear Sector fishermen have successfully operated the only two sectors in New England. These sectors were formed under rules implemented in 2004

¹ *The City of New Bedford, et al.* filed this action on May 9, 2010. On August 3, 2010, this case was consolidated with *Lovgren v. Locke*, which had been pending in the New Jersey District Court and was transferred to this Court.

² In order to implement Amendment 16 three related rules were issued simultaneously: (i) 2010 Sector Operations Plans and Contracts, and Allocation of Northeast Multispecies Annual Catch Entitlements (75 Fed. Reg. 18113-18132 (Apr. 9, 2010)); (ii) Amendment 16 to the NEFMP (75 Fed. Reg. 18262-18353 (Apr. 9, 2010)); and (iii) Framework Adjustment 44 (75 Fed. Reg. 18356-18375 (Apr. 9, 2010)). Hereinafter, the rules will collectively be referred to as "Amendment 16."

in Amendment 13 to the Groundfish FMP. Because Amendment 16 provides a number of positive benefits for fishery management, the Fixed Gear Sector generally supports the Defendants in their cross-motions for summary judgment. However, the issues related to Amendment 16 are complex, and the Fixed Gear Sector has different interests and a different perspective from the federal Defendants and Intervenor-Defendant Conservation Law Foundation. Thus, the Fixed Gear Sector is uniquely positioned to assist the Court as *amicus curiae* in understanding and resolving the issues presented by the parties.

Federal district courts have the inherent authority to permit a non-party to participate as *amicus curiae* and participation has been permitted on numerous prior occasions in this district. *See, e.g., Tutein v. Daley*, 116 F. Supp. 2d 205, 209 (D. Mass. 1999) (inviting non-party to file motion for *amicus curiae*); *Resolution Trust Corp. v. Boston*, 150 F.R.D. 449, 455 (D. Mass. 1993) (same); *Animal Protection Inst. v. Martin*, 2007 WL 647567, at *3 (D. Me. 2007) (granting leave to participate and stating that while *amicus* participation should be permitted judiciously, “it is preferable to err on the side of granting leave”) (internal quotations and citations omitted). Federal courts have broad discretion to decide whether to permit such participation; however, absent a well-grounded objection the court should fully and seriously consider an *amicus* brief.

Indeed, other *amici* are participating in this case. United States Representatives Barney Frank and John Tierney are participating in support of Plaintiffs and Plaintiff-Intervenor on cross-motions for summary judgment. Massachusetts Governor Deval Patrick and Paul Diodati (Director of the Massachusetts Division of Marine Fisheries) have also submitted a brief in support of certain Plaintiffs including the Cities of New Bedford and Gloucester and *amici* Frank and Tierney.

II. INTEREST OF THE AMICUS FIXED GEAR SECTOR

The fishermen members of the Fixed Gear Sector earn their living by catching cod and other groundfish. They operate small, “day-boat” sink gillnet and hook-and-line (benthic tub trawl and rod-and-reel) fishing vessels. Historically these fishermen have been highly reliant on Georges Bank cod--one of 20 managed stocks of groundfish in the Groundfish FMP--for their economic survival; however they are increasingly dependent upon other species of groundfish as well. They formed the first two sectors in New England, also referred to as “harvesting cooperatives,” and participated in the development of the related regulations for their operation. Fixed Gear Sector fishermen live in fishing communities including Chatham and Harwich Port, on Cape Cod, Massachusetts, that depend upon healthy populations of groundfish and fishing-related businesses for their economic survival.

Over 10 years ago, the Fixed Gear Sector members decided to take the initiative to confront the negative impacts to groundfish populations and their livelihoods that were being caused by continued overfishing and the ineffective fishery management regulations in place at that time. These regulations relied on “input controls” – rules that consisted primarily of limits on the amount of fishing effort, such as the number of days each fisherman was allowed to fish (the so-called “Days-at-Sea” approach) or the amount of fish that could be caught on each fishing trip. It was plain to the Fixed Gear fishermen that continuing the failed “Days-at-Sea” approach to management was likely to result in economic ruin to their businesses, the region’s fishing infrastructure, and their fishing communities. There were many reasons for the failure of the Days-at-Sea approach, but important among them were the failure of the system to provide accountable means of limiting catch to scientifically sustainable levels, the ineffective

monitoring of catch, trip limits that forced fishermen to discard fish that were already dead or dying, the ineffective enforcement of fishing rules, and the Days-at-Sea “clock” that resulted in inefficient operations as fishermen were forced to race against time on every fishing trip they took. *See e.g.*, 71 Fed. Reg. 64941 (Nov. 6, 2006) (Notice of Intent to prepare SEIS for Amendment 16 and consider changes in the current Days-at-Sea approach in order to comply with rebuilding requirements of Amendment 13 and the Magnuson-Stevens Act); AR 20 at 004570.

As a result, the fishermen organized themselves, formed a sector, and made a voluntary agreement with NMFS to operate within a hard total allowable catch (hard TAC), or quota, of Georges Bank cod. In exchange for this commitment, they received relief from the suffocating and inefficient regulatory constraints to their businesses that were inherent in the Days-at-Sea approach. The hard TAC was based on peer-reviewed federal science that set the catch at a level projected to minimize the impacts of their fishing on the efforts to rebuild the overfished Georges Bank cod population. The binding obligation to stop fishing once the hard TAC was reached made the Fixed Gear Sector members the first New England fishermen committed to live within scientifically-determined catch limits. This was not the case for the fishermen who remained outside of the sector in the “common pool,” where catch targets were regularly exceeded. *See* Final A16 EIS; AR 773 at 047763-65 (overfishing still occurring on 12 stocks).

The first sector established by these fishermen, the Hook Sector, was set up for fishermen using hooks to catch fish and was implemented in 2004 as part of Amendment 13 to the Groundfish Management Plan. *See* 69 Fed. Reg. 22906 (April 27, 2004). In 2006 the New England Fishery Management Council and NMFS added a new Fixed Gear Sector through Framework Adjustment 42 to the Groundfish Management Plan. *See* 71 Fed. Reg. 62156

(October 23, 2006). This Fixed Gear Sector is comprised of fishermen using both hooks and gillnets. For the 2010 fishing year, the two sectors combined their operations as all of the fishermen from both sectors joined the Fixed Gear Sector, however, the Hook Sector continues to exist as a legal entity and may resume operations in the future. There are currently 56 members of the Fixed Gear Sector who operate 42 active vessels, and hold 99 permits to participate in the groundfish fishery. Through forming the Hook and Fixed Gear Sectors, these fishermen have been able to contribute to restoring the fisheries resource they depend upon while reducing the economic costs associated with the burdensome and inefficient input controls that were ruining New England's legendary groundfish fishery. *See e.g.*, 75 Fed. Reg. at 18292; AR 997 at 56516 (sectors were able to increase efficiency of their operations and realize higher vessel revenue streams).

The Fixed Gear Sector's accountable, efficient and effective means of fishing allows its fishermen members to work cooperatively to maximize the profitability of their fishing businesses, and meet the biological and socio-economic goals of the Magnuson-Stevens Act. As the only fishermen who have operated a sector since 2004, the Fixed Gear Sector members have a strong interest in preserving the sectors and the baseline allocations received under Amendment 13 because they have invested and planned around this allocation, and maintaining it unchanged will promote stability in their fishing businesses. Based on their successful experience in the Fixed Gear Sector, sector fishermen also have a strong interest in seeing the allocations of other groundfish stocks preserved, and in seeing expanded participation in sectors throughout the fishery, which in their view will help to rebuild and sustain all groundfish populations, benefit fishermen, and help to preserve New England's fishing communities.

The Plaintiffs' challenges to the science-based annual catch limits, the expanded number of sectors in the fishery, and the allocations implemented in Amendments 16 and 13 are deeply flawed, but if successful are a direct threat to the Fixed Gear Sector, its fishermen, and their fishing communities. If the reforms contained in Amendment 16 are rolled back, the groundfish fishery could face a chaotic return to the "Days-at-Sea" management, which lacked accountability and the tools necessary to limit catch to scientifically recommended levels. The Fixed Gear Sector has a strong interest in the outcome of this case and could be directly and adversely affected by changes to their sector, their longstanding allocation of Georges Bank cod, their allocations of other groundfish stocks received through Amendment 16, or to the fishery as a whole that would undermine the progress made in Amendment 16 toward fishing within science-based annual catch limits.

III. REASONS WHY PERMITTING THE FIXED GEAR SECTOR TO FILE A BRIEF AS AMICUS CURIAE IS DESIRABLE

In circumstances such as those presented here, participation of the Fixed Gear Sector as *amicus curiae* is warranted. As members of an operational sector implemented more than six years ago, Fixed Gear Sector participants have legally cognizable interests that differ from the federal Defendants and Intervenor-Defendant Conservation Law Foundation. Their participation in this matter would assist the court as they have special familiarity and knowledge of sector operations that Defendants do not. Counsel for the Fixed Gear Sector have attempted to limit the burden on this court and all parties by making a timely filing within one week of the parties that it supports, consistent with Fed. R. App. Proc. 29, by limiting their *amicus curiae* memorandum to no more than 20 pages, and they have narrowed the focus of the memorandum by addressing only those issues most directly related to sector fishermen. This Court has also not yet heard oral argument on the matter, nor issued any rulings on summary judgment motions.

Further, there are no well-grounded objections to the Fixed Gear Sector's participation in this case. The only objection that was at all explained was based on the opinion provided by counsel for the City of New Bedford, et. al., that the Secretary exceeded an agreed to page limit in its most recent filing. This is wholly unrelated to the particular interests of the Fixed Gear Sector in this case, or the knowledge of the issues and unique perspective the Fixed Gear Sector can offer the Court. When a non-party has a special interest in litigation, familiarity and knowledge of the issues raised, or a unique perspective that could help the court, a court will generally grant the non-party permission to participate as *amicus curiae*. See *Ellsworth Associates, Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996).

As discussed above, the Fixed Gear Sector fishermen have a unique interest in this litigation, which manifests itself in several ways. For example, not only are Plaintiffs challenging the Amendment 16 changes to the sector rules for the fishery overall, but they also have specifically challenged the Fixed Gear Sector's baseline allocation of Georges Bank cod by claiming it is based on a "shorter qualifying timeframe, which significantly and inequitably increased their relative allocations" in violation of the Magnuson-Stevens Act. See NB Mem. Supp. Summ. J. at 8, 15-16. New Bedford's claim is not only legally flawed but it is also inaccurate in at least two ways -- it both suggests that the Fixed Gear Sectors' allocation was somehow increased in Amendment 16, and asserts that the shorter qualifying period applies to all of the groundfish allocations made to the Fixed Gear Sector in Amendment 16, instead of solely to the longstanding Georges Bank cod allocation made years ago in Amendment 13. Without the participation of the Fixed Gear Sector fishermen as *amicus curiae*, their specific interest in their sector allocations will not be adequately represented in issues such as this, and their familiarity and knowledge of sector-related issues will not be available to the Court.

Fixed Gear Sector fishermen can also provide a unique perspective and knowledge of the issues in this case because they are the only fishermen in New England who have already invested in, participated in, and successfully managed a sector in the groundfish fishery. They also were active participants in the rulemaking processes related to the development of Amendment 16, and in particular in the sector rule changes it contains. For these reasons, these fishermen possess familiarity and knowledge of sector management and issues related to the sector regulations that are not otherwise represented by the current parties or *amici*. Accordingly, participation by the Fixed Gear Sector as *amicus curiae* would assist the Court in understanding and resolving the full range of issues presented in this case.

IV. CONCLUSION

For all the reasons set forth above, the Georges Bank Cod Fixed Gear Sectors' motion to participate as *amicus curiae* should be granted.

Respectfully submitted,

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