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For a thriving New England

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Good afternoon, your honor.

It all comes down to this:

- All those thousands of people who participated in the Amendment 16 process in good faith
- All those tens of thousands of pages of administrative record
- those hundreds of thousands of hours spent debating and analyzing and debating again
- those untold and unpaid hours fishermen spent in the darkened cabs of their pickup trucks traveling pre-dawn or late evening to distant council or committee meetings to be part of the process

It all comes down to these motions.

This is a very important case that ultimately goes to the integrity of the fishery mgmt council system and its processes.

This comment may be unnecessary if your Honor has considered reviewed other Magnuson-Stevens Act challenges and decisions, but there is nothing "typical" about the Magnuson Act fishery management process—it is a truly unique way of managing the nation's public fish resources

This is at least the 4th judicial review of a New England groundfish management plan and won't be the last: FMP development is an inherently conflictual process. Whether one is coming from a harvesters or processors perspective or a conservation perspective or both, there are always many more ideas and alternatives that fall by the wayside than there are ideas that succeed.

The important questions are: Was the process fair? Was it rational? Was it legal?

With Amendment 16, the answers to all those questions are in the affirmative.

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I have often heard the litigation advice that when you don't have good facts, you should argue the law, and if you don't have good law, you should argue the facts.

But what about the dilemma a plaintiff is in who doesn't have either good facts or good law?

I believe that is the situation the plaintiffs are in with this judicial review.

Here the plaintiffs and their *amici* allies advance wide sweeping claims and innuendo:

- Claims that are both unsubstantiated and unfounded.
- Claims that are both un-tethered to the administrative record and often to the truth.
- Claims that plaintiffs' representatives on the council itself never fought for during the Amendment 16 process or even fight for today as the Council continues its work to improve and fine tune Amendment 16.

It is like the Plaintiffs would have us be in two parallel universes that barely even reference each other—this court process and the council process.

There, in the Council process, we have <u>all</u> the many interests involved and all the pushing and pulling and compromises that were entailed in developing Amendment 16 and its environmental reviews.

Here, in the court process, we have the political leadership of the top grossing port in the nation and the top two ports in the region—fueled by local reporting and editorializing that have long since given up any pretext of advancing the truth—asking this Court to give them what the duly constituted fishery management council, the science review peer groups, and NMFS would not and could not give them in the Amendment 16 process: **more fish**.

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Your Honor, many of New England's fish populations continue to be in dire straits. Some, like the southern New England winter flounders are in such bad shape that the scientists were considering closing those stock areas to all fishing gear that could harvest a flounder. Amendment 16 didn't start the rebuilding process; it has been going along in fits and starts for some of these species for more than 15 years since they were declared to be overfished.

Species in some cases that conceivably could have been restored to health in 5-6 years if fishing pressure had been properly stopped. These were fish populations that reached their all-time record lows in abundance—and we are talking about centuries of data, not years—in the mid-1990s.

It took an act of Congress in 2006 to make the point that federal courts around the country had already made repeatedly: **the conservation objectives of fishery management are the first imperative**. Abundant, diverse fish populations are the platform on which healthy, thriving fishing communities are built. In 2006, Congress severely reduced the council's discretion and flexibility in order to ensure that objective.

The government and defendants' briefing on the legal and factual issues in this case have been thorough and I won't repeat them here. I would like to highlight a few issues with the Court's permission.

First, the primary and overriding objective of Amendment 16 was to implement the new statutory requirements of the MS Reauthorization Act with respect to setting risk-based, scientifically-derived annual catch limits for all stocks managed as part of the New England groundfish complex with appropriate accountability measures for any fishing overages.

A key part of this first objective was following through on earlier votes that the Council had taken to change the system in New England from an input-regulated system –where harvest levels were attempted to be controlled by controlling how

many days a fishermen could spend at sea fishing—the DAS system—to an output-based system, where the harvest limits are directly based on how many fish a fisherman caught, also known as a hard quota system.

The second objective was to follow through on another earlier Council decision, which was to expand the pilot program that was launched in Amendment 13 that allowed fishermen to voluntarily cooperate with each other, to form sectors. The concept here was that the sectors, not the member fishermen, would be accountable for the total harvest efforts of their members and the individual members would have more flexibility as to when and where and how they fished so long as the sector's total catch at the end of the year was within the annual catch entitlement for that sector.

The potential sector contribution—PSC—which is featured so extensively in plaintiffs' briefs, was not conceived of or designed as a ITQ or IFQ share but as an accounting term: the amount of fish that the SECTOR could use to calculate its overall annual catch entitlement. The Council debated various ways of determining that PSC and settled on the same approach that had been used to calculate the quota allowances of the two pilot sectors that had been set up several years before on Cape Cod.

Sectors seem to be an important tool. Most fishermen have already decided: 95% of the active fishermen took advantage of this option by the start of the fishing year and I understand that that number is now up toward 98% of the active fishermen.

Second, I wanted to comment a bit about this unique NMFS/council process under the Magnuson-Stevens Act.

Fishery management plan approval is a form of consistency review by NMFS:

"Consistent" is an interesting word—meaning "free from variation or contradiction"—which implies that Congress intended NMFS to allow a relatively infinite number of regional approaches to solving fishery management problems as long as they weren't directly at variance or in contradiction to any of the performance metrics or mandates set forth specifically in the Act.

National Standard 1, considered the prime directive of the Magnuson Act, is a good example of the inherent tension and challenge in meeting in the Act's objectives: on the one hand and very explicitly throughout the Act—councils and NMFS must "prevent overfishing" while on the other hand, they must "achiev[e] on a continuing basis the optimum yield of the fisheries." Conservation and economic development in the same sentence. The council process was deemed to be the best way by which those two, sometimes conflicting, objectives could be best reconciled.

NMFS doesn't write the FMP; it doesn't write the NEPA documents. It does have final word on both and is ultimately accountable for both. But its function—beyond its active role in the plan development process as a participant—is explicitly and strictly a review and guidance function rather than an original author function.

Amendment 16 is the New England Council's plan that NMFS has signed on to and made law. Even if NMFS concluded that a plan is inconsistent with Magnuson or some other law, it does not have the power to rewrite the plan; it has to send it back to the Council to fix, much like the APA process with which this Court is very familiar.

Third, with respect to whether Amendment 16 establishes LAP or a type of LAP program called an ITQ or IFQ program, it does not. Amendment 16 is not about "circumventing" the LAPP provisions in the Magnuson Act; it is about explicitly setting up a program that does not qualify as or trigger those provisions. The

Council and NMFS do not intend Amendment 16 to be a LAPP program, it does not meet the legal requirements of one, and it does not function as one.

LAPP programs are properly viewed with great concern by the fishing community because they establish permanent privileges in a selected group of fishermen or communities. They are characterized by the issuance of a **permit** that gives an exclusive right to a fisherman or a community to a certain quantity of fish. You **can** take **that** IFQ permit to the bank!

Amendment 16's PSCs are important but they are just a different currency for the same access and fishing rights fishermen had before Amendment 16 and were not intended to effect any permanent long-term changes.

The easiest way to demonstrate this is by examining how the plan treats these PSCs for purposes of establishing someone's fishing history.

Next to a fisherman's actual yearly landings of fish, the most important element of any fisherman's investment in the fishery is her or his **fishing history.** A permit or boat with fishing history has value. A permit or boat without fishing history has little value. Fishing history issues, for example, seem to underlie most of plaintiff Lovgren's problems with Amendment 16.

PSC's and the buying or selling of permits with PSC's or the buying or selling or trading of portions of a sector's ACE under Amendment 16 are **not** fishing history. The Council clearly signaled its intention that it wasn't doing anything permanent or exclusive with sectors or PSCs by stating that the fishing history under Amendment 16 **would not count** toward a fisherman's future fishing history.

Whether the Council will move in the direction of a LAPP or an IFQ system in the future, who knows. An amendment is under way even today that is looking at some of the subsidiary economic and social issues associated with that decision. If it does, the Council will have to follow all the procedures outlined in section 303A.

But Amendment 16 is **not** that decision: sectors and PSCs are neither LAPPs nor IFQs.

Fourth, allocation formulas. Allocation formulas—probably more than any other fishery issue—are always contentious, always winners and losers. Here we have the two biggest ports in New England who **got a lot** under Amendment 16, demanding even bigger slices.

- Were certain aspects of the recreational fishery and the existing sectors treated differently under the Council's allocation formula? **Yes.**
- Were the reasons for doing so debated and explained in the record? **Yes**.
- Could there have been different outcomes? **Yes.**
- Does that matter for purposes of this court's review? **No**, so long as the basis for the decision was adequately explained in the record and consistent with the law.
- The answer to that question is also **yes.**

Fifth, the criticism that Amendment 16 does not produce the optimum yield of the multispecies groundfish "fishery."

"Fishery" is an umbrella term that encompasses both stock complexes and single stocks; it is not restrictive or defining phrase in the sense that plaintiffs want to use it. All the mandatory MSA provisions on rebuilding, on the other hand, do use specific defining terms and they speak to fish "stocks." The science as well is all based on stocks, not fisheries.

Even OY—optimum yield—in "the context of the yield of a fishery" is measured in the context of the existing stock rebuilding imperatives: OY is the MSY as **reduced** by any social, economic—plaintiffs would have you stop there—**or** ecological factors. Rebuilding overfished stocks are clearly such am ecological factor.

Finally, plaintiffs make a number of claims relative to the social or economic analysis in Amendment 16 although they all acknowledge that Amendment 16

and its EIS do explicitly anticipate and acknowledge the potential short-term economic and social adverse effects of which they seem to be complaining.

These potential economic and social costs are not costs that the Council or NMFS are wishing on the fishing community. No rational person who participated or observed the proceedings could ever come to that conclusion. But the council and NMFS did feel obliged to project that these were risks that could materialize for some with Amendment 16.

Nonetheless, 15 out of the 16 people on the Council who came from all perspectives and walks of life and NMFS officials up to the highest levels in the Commerce Department decided that that these short-term risks and potential costs were offset by the long term benefits from the amendment.

As government as explained, plaintiffs conflate the economic and social pain that would inevitably be associated with finally stopping overfishing and rebuilding all the stocks in the complex—

and the Court should know that the scientists are not talking about rebuilding fish back to some imaginary "pre-industrial age nirvana" but only to a minimum of 50% of the biomass that is estimated to produce the MSY—

Plaintiffs are conflating that rebuilding pain with the impacts of management tools that the council and NMFS made available to try to mitigate and reduce that pain: the sectors.

If the Council and NMFS hadn't created sectors and figured out how to make them work even at a rudimentary level, there would have been **true short-term economic disaster** as the historic "race to fish" that characterized the old DAS program would have brought safety compromises, low prices, and early closed fishing year.

The sectors have allowed over 95% of the region's fishermen to decide how, where, and—most importantly—when they want to fish without regard to

another fisherman's behaviors. They have also provided incentives for cooperation so that members of a sector can communicate with each other about where to fish to avoid bycatch of the scarcer, rebuilding fish populations.

In summary,

Amendment 16 is not about

- Conspiracies of conservation groups and the federal government
- Hidden political agendas
- Circumventing the LAPP requirements.

Amendment 16 is about what the Council did. New Bedford's interests were directly represented in those lengthy deliberations at all times by one of its most prominent and respected fishermen, Rodney Avila, and the Commonwealth of Massachusetts participated actively in both the Amendment 16 science decision making and the policy development. These representatives continue to serve on the Council today and make no moves there to fundamentally change the directions or intents of Amendment 16.

CLF supports the approval of the New England Council's Amendment 16

- Not because it is perfect
- Not because it is the last word on groundfish management, but
- Because it represents a **reasonable decision**, reached after an extended **transparent public debate**, that reasonably **meets the MSA and NEPA** requirements while attempting to provide some added **flexibility** to fishermen in the region so they could fish more efficiently and profitably if they want to.

The judicial question is not whether Amendment 16 is perfect or even ideal; it is whether it is—as the First Circuit has held—"irrational, mindless or whimsical manner." Associated Fisheries of Maine v. Daly, 127 F.3d 104, 110 (1997).

What we have learned over the past fifteen years, is that strong and effective management of this important public resource coupled with some degree of luck with Mother Nature can restore fish populations to high levels and support a vital and stable domestic fishing industry. Amendment 16 is designed to accomplish that objective and is consistent with the Magnuson Act. The agency's action with respect to Amendment 16 should be affirmed.