

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

OCEANA, INC.,
Plaintiff,
v.
WILBUR L. ROSS, et al.,
Defendants.

Case No. 19-CV-03809-LHK

**ORDER REGARDING MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 59, 63, 64

Plaintiff Oceana, Inc. (“Plaintiff”) brings this action against Defendant Wilbur Ross, in his official capacity; Defendant National Oceanic and Atmospheric Administration (“NOAA”); and Defendant National Marine Fisheries Service (“NMFS”) (collectively, “Government Defendants”). On August 23, 2019, the Court granted California Wetfish Producers Association and Monterey Fish Company Inc.’s (“Intervenor-Defendants”) unopposed motion to intervene. ECF No. 27.

Before the Court are Plaintiff’s motion for summary judgment, Intervenor-Defendants cross-motion for summary judgment, and Government Defendants’ cross-motion for summary judgment. ECF Nos. 59, 63, and 64. Having considered the parties’ submissions, the relevant law, and the record in this case, the Court GRANTS in part and DENIES in part Plaintiff’s motion

1 for summary judgment and Intervenor-Defendants’ and Government Defendants’ cross-motions
2 for summary judgment.

3 **I. BACKGROUND**

4 **A. Statutory and Regulatory Background**

5 **1. Magnuson-Stevens Fishery Conservation and Management Act**

6 In response to overfishing concerns, Congress enacted the Magnuson-Stevens Fishery
7 Conservation and Management Act of 1976 (“Magnuson-Stevens Act” or “MSA”) to promote the
8 long-term biological and economic sustainability of marine fisheries in U.S. federal waters. *See*
9 16 U.S.C. § 1801(a)–(b). The Magnuson-Stevens Act created eight Regional Fishery
10 Management Councils and requires the Councils to create fishery management plans (“FMPs”)
11 aimed at preventing overfishing, along with any amendments to the FMPs. *Id.* §§ 1852(h)(1),
12 1801(b)(4), 1854(a)(3).

13 Councils submit FMPs and amendments to the Secretary of Commerce (“Secretary”), who
14 reviews them to determine whether they are consistent with the Magnuson-Stevens Act and other
15 applicable law. *Id.* §§ 1851(a), 1854(a)(1)(A). The Secretary must publish notice of a Council’s
16 proposed FMP or amendment in the Federal Register and solicit public comment. *Id.*
17 §§ 1854(a)(1)(B), 1854(a)(5). Within 30 days of the close of the public comment period, the
18 Secretary must either “approve, disapprove, or partially approve [the FMP] or amendment . . . by
19 written notice to the Council.” *Id.* § 1854(a)(3). If the Secretary does not notify the Council of
20 the Secretary’s decision, the FMP or amendment takes effect as if approved. *Id.*

21 FMPs and amendments “do not themselves have any regulatory effect—implementing
22 regulations must also be enacted in order to effectuate them.” *N. Carolina Fisheries Ass’n, Inc. v.*
23 *Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008). The Magnuson-Stevens Act therefore requires
24 Councils to submit proposed regulations implementing an FMP or amendment to the Secretary for
25 approval. 16 U.S.C. § 1853(c)(1). The Secretary evaluates whether the proposed regulations are
26 consistent with the FMP, amendment, the Magnuson-Stevens Act, and any other applicable law.
27 *Id.* § 1854(b)(1). If the Secretary determines the proposed regulations are consistent, the Secretary

1 must “publish such regulations in the Federal Register . . . for a public comment period of 15 to 60
 2 days.” *Id.* § 1854(a)(1)(A)). The Secretary then “promulgate[s] final regulations within 30 days
 3 after the end of the comment period.” *Id.* § 1854(b)(3). In practice, the NMFS carries out the
 4 Secretary’s duty to review FMPs, amendments, and regulations because the Secretary has
 5 delegated his responsibilities under the Magnuson-Stevens Act to the NMFS. *Pac. Dawn LLC v.*
 6 *Pritzker*, 831 F.3d 1166, 1170 (9th Cir. 2016).¹

7 Chief among the Magnuson-Stevens Act requirements that FMPs, amendments, and
 8 regulations must satisfy are the Magnuson-Stevens Act’s ten “national standards for fishery
 9 conservation and management.” 16 U.S.C. § 1851(a) (setting out the ten National Standards).
 10 This action centers on National Standard One and National Standard Two. *Id.* §§ 1851(a)(1)
 11 (National Standard One), 1851(a)(2) (National Standard Two).

12 National Standard One requires that “[c]onservation and management measures shall
 13 prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery
 14 for the United States fishing industry.” 16 U.S.C. § 1851(a)(1). The term “overfishing” means “a
 15 rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum
 16 sustainable yield on a continuing basis.” *Id.* § 1802(34). Maximum sustainable yield (“MSY”) is
 17 “the largest long-term average catch or yield that can be taken from a stock or stock complex
 18 under prevailing ecological, environmental conditions and fishery technological characteristics.”
 19 50 C.F.R. § 600.310(e)(1)(i)(A). Thus, overfishing is “a rate of fishing which would jeopardize
 20 the capacity of a fishery to produce the [MSY] on a continuing basis.” *Oceana, Inc. v. Bryson*,
 21 940 F. Supp. 2d 1029, 1036 (N.D. Cal. 2013).

22 “Congress, however, recognized that a certain amount of scientific uncertainty in
 23 predicting a stock’s overfishing level is inevitable,” and as a result, National Standard One
 24 guidelines “operate to ensure that there is no greater than a 50% probability that overfishing will
 25 occur.” *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 128 (D.D.C. 2011) (citing 50 C.F.R.

27 ¹ The NMFS is a subagency of NOAA, which is part of the Department of Commerce.
 28 *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 889 (9th Cir. 2010).

1 § 600.310(f)); *Massachusetts v. Pritzker*, 10 F. Supp. 3d 208, 213 (D. Mass. 2014) (“The objective
2 of the control rule is to provide a buffer between OFL [overfishing limit] and ABC [acceptable
3 biological catch] such that there is less than a 50% chance that overfishing will occur.”); 50 C.F.R.
4 § 600.310(f)(2)(i) (implementing regulations for National Standard One stating that ABC “could
5 be based on an acceptable probability (at least 50 percent) that catch equal to the stock’s ABC will
6 not result in overfishing”). Moreover, in adopting the National Standard One guidelines, the
7 NMFS explicitly found that “the focus is on producing MSY in the long-term” and that “[s]mall
8 amounts of excess effort or catch in a single year may not jeopardize a stocks’ ability to produce
9 MSY over the long term.” 81 Fed. Reg. 71858, 71859 (Oct. 18, 2016).

10 National Standard Two requires that “[c]onservation and management measures shall be
11 based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). However, “[t]he
12 fact that scientific information concerning a fishery is incomplete does not prevent [regulation].”
13 50 C.F.R. § 600.315(b). On the contrary, “by specifying that decisions be based on the best
14 scientific information *available*, the Magnuson-Stevens Act recognizes that such information may
15 not be exact or totally complete.” *Midwater Trawlers Coop. v. Dep’t of Commerce*, 393 F.3d 994,
16 1003 (9th Cir. 2004) (emphasis in original).

17 **2. Magnuson-Stevens Fishery Conservation and Management Reauthorization Act**

18 The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of
19 2006 (“MSRA”), “impose[s] additional requirements for fishery management plans intended to
20 strengthen the role of science and account for uncertainty in fishery management.” *Bryson*, 940 F.
21 Supp. 2d at 1037. In relevant part, the MSRA requires that each FMP “establish a mechanism for
22 specifying annual catch limits in the plan . . . at a level such that overfishing does not occur in the
23 fishery, including measures to ensure accountability.” 16 U.S.C. § 1853(a)(15). The annual catch
24 limits (“ACLs”) “may not exceed the fishing level recommendations of [the Council’s] scientific
25 and statistical committee.” *Id.* § 1852(h)(6).

26 ACLs are set with reference to the overfishing limit (“OFL”) and the acceptable biological
27 catch (“ABC”). The OFL is a quantifiable factor that is “used to determine if overfishing has

1 occurred, or if the stock or stock complex [of a fishery] is overfished.” 50 C.F.R.
 2 § 600.310(e)(2)(i)(A). Determining when overfishing has occurred involves a degree of scientific
 3 uncertainty, so in the course of setting an OFL, Councils are also instructed to establish an ABC,
 4 which is “a level of a stock or stock complex’s annual catch that accounts for the scientific
 5 uncertainty in the estimate of OFL and any other scientific uncertainty.” *Id.* § 600.310(f)(2)(ii)
 6 Because the ABC is the OFL after the OFL has been reduced to account for scientific uncertainty,
 7 a fishery’s ABC is likely to be lower than the fishery’s OFL. *Bryson*, 940 F. Supp. 2d at 1037; 50
 8 C.F.R. § 600.310(f)(3) (“While the ABC is allowed to equal OFL, [the Service] expects that in
 9 most cases ABC will be reduced from OFL to reduce the probability that overfishing might occur
 10 in a year.”); *Locke*, 831 F. Supp. 2d at 128 (ABC must be set “to ensure that there is no greater
 11 than a 50% probability that overfishing will occur.”); 50 C.F.R. § 600.310(f)(2)(i) (ABC “could be
 12 based on an acceptable probability (at least 50 percent) that catch equal to the stock’s ABC will
 13 not result in overfishing”). In turn, the ACL “is a limit on the total annual catch of a stock or stock
 14 complex,” which may be equal to but “cannot exceed the ABC.” 50 C.F.R. § 600.310(f)(1)(iii);
 15 *see also id.* § 600.310(f)(4)(i) (“If a Council recommends an ACL which equals ABC, and the
 16 ABC is equal to OFL, the Secretary may presume that the proposal would not prevent overfishing,
 17 in the absence of sufficient analysis and justification for the approach.”).

18 **B. Factual Background**

19 **1. Northern Anchovy**

20 The northern anchovy (“anchovy”) is a small fish that is typically found in schools near the
 21 ocean’s surface. 2016 AR 7:146, 174. Anchovy are relatively short-lived, and their populations
 22 tend to fluctuate significantly over time. 2016 AR 7:294; 2016 AR 29:831. Anchovy are valuable
 23 food sources to a wide variety of predators, including fish, birds, and mammals. 2016 AR 7:146;
 24 2016 AR 45:1161 (noting that diet studies of 32 marine predators found anchovy was the most
 25 important forage fish in the California Current Ecosystem).

26 **2. Coastal Pelagic Species Fisheries Management Plan**

27 The Pacific Fishery Management Council (“Pacific Council”) is one of the eight Councils

1 created by the Magnuson-Stevens Act. 16 U.S.C. § 1852(a)(1)(F). The Pacific Council is
2 responsible for Pacific Ocean fisheries off the coasts of California, Oregon, and Washington. *Id.*
3 The Pacific Council’s Coastal Pelagic Species Fishery Management Plan (“CPS FMP”) governs
4 Pacific sardine, Pacific mackerel, anchovy, market squid, and krill. AR 292:13858.² The CPS
5 FMP divides the anchovy into two subpopulations, the northern subpopulation and the central
6 subpopulation. *Id.* This suit concerns the central subpopulation, so future references to “anchovy”
7 refer to the central subpopulation unless otherwise noted.

8 Although the CPS FMP dates back to 1978, it has been amended a number of times over
9 the ensuing years. *Bryson*, 940 F. Supp. 2d at 1038. Amendment 8 and Amendment 13 are
10 particularly relevant to this case, as is a 2019 action establishing an ACL for the anchovy.

11 Amendment 8 was implemented on January 1, 2000. 2016 AR 30:890. Amendment 8
12 divided the fish stocks covered by the CPS FMP into two main categories: actively managed
13 stocks and monitored stocks. 2016 AR 30:892. The “active” category is for “stocks and fisheries
14 with biologically significant levels of catch, or biological or socioeconomic considerations
15 requiring relatively intense harvest management procedures.” 2016 AR 30:892–93. Stocks that
16 do not require intense harvest management procedures, for instance because they are not heavily
17 fished, fall in the “monitored” category. *Id.*

18 The anchovy is in the monitored category. 2016 AR 7:459. Amendment 8 specified that
19 the MSY for the anchovy was 100,000 mt and that the anchovy’s ABC was 25,000 mt. 2016 AR
20 7:459–60. The anchovy’s ABC was set based on a default rule that set ABC as 25 percent of a
21 stock’s MSY. 2016 AR 7:459.

22 Amendment 13 was implemented on November 14, 2011. 2016 AR 31:933–35.
23 Amendment 13 was a response to the MSRA’s requirement that FMPs incorporate ACLs. 2016
24 AR 31:933; 16 U.S.C. § 1853(a)(15) (requiring FMPs to establish mechanisms for specifying
25 ACLs). Amendment 13 implemented “a default management framework” for setting ACLs. 81

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27 ² “Pelagic” species live in the water column as opposed to near the sea floor, and are generally
28 found between the ocean’s surface and 1,000 meters below the surface. AR 29:831.

1 Fed. Reg. 74309, 74309 (Oct. 26, 2016); AR 264:16388. The default framework set a monitored
2 stock's OFL as equal to the stock's MSY. 84 Fed. Reg. at 74310; 2016 AR 31:933–34. The
3 anchovy's MSY was already set at 100,000 mt, so the anchovy's OFL was likewise set at 100,000
4 mt. 81 Fed. Reg. at 74310. The default framework also retained the existing formula for setting a
5 monitored stock's ABC, such that “ABC equals 25 percent of OFL/MSY.” 2016 AR 31:933.
6 Consequently, the anchovy's ABC remained set at 25,000 mt. 81 Fed. Reg. at 74311. Finally, by
7 default ACLs were set equal to ABC. 2016 AR 30:891.

8 **3. The 2016 Catch Rule and *Oceana I***

9 On November 20, 2015, the Service published a proposed rule in the Federal Register to
10 set an annual catch limit (“ACL”) for the anchovy and other stocks managed by the Coastal
11 Pelagic Species Fishery Management Plan (“CPS FMP”). AR 88:1968. In line with Amendment
12 13, the proposed rule would set the anchovy's ACL equal to the anchovy's 25,000 mt acceptable
13 biological catch (“ABC”). AR 88:1968–69. On October 26, 2016, the Service published a final
14 rule in the Federal Register (“the 2016 Catch Rule”) that set the anchovy's ACL at 25,000 mt,
15 equal to the ABC. 81 Fed. Reg. at 74310.

16 On November 11, 2016, Plaintiff filed a complaint challenging the 2016 Catch Rule
17 (“*Oceana I*”). There were no intervenor defendants in *Oceana I*. The only defendants were
18 government defendants. Plaintiff and Defendants filed cross-motions for summary judgment, and
19 on January 18, 2018, the Court granted Plaintiff's motion for summary judgment and denied
20 Defendants' motion for summary judgment. *Oceana, Inc. v. Ross*, No. 16-CV-06784-LHK, 2018
21 WL 1989575, at *4 (N.D. Cal. Jan. 18, 2018) (“*Oceana I*”).

22 The Court held that Plaintiff's challenge to the overfishing limit (“OFL”) and acceptable
23 biological catch (“ABC”) were timely. *Id.* at *6–8. Proceeding to the merits, the Court next
24 concluded that the OFL, ABC, and ACL set by the NMFS were not based on the best scientific
25 information available, in violation of National Standard Two. *Id.* at *9. Specifically, the OFL,
26 ABC, and ACL were “based on a 1991 study by Jon Conrad (‘Conrad Study’)” and the Conrad
27 Study was based on higher estimates of the anchovy's long-term average biomass. *Id.* at *10.

1 Importantly, however, the Court concluded that “recent scientific information indicate[d] that the
2 anchovy has collapsed below the levels found by the [Conrad Study], and thus that the Conrad
3 Study’s [estimates were] no longer accurate.” *Id.* at *11. The NMFS’s unjustified dismissal of the
4 more recent evidence, as well as its continued adherence to the outdated Conrad Study, rendered
5 its actions arbitrary and capricious. *Id.* at *15.

6 Finally, the Court determined that the OFL, ABC, and ACL set in the 2016 Catch Rule
7 violated National Standard One because the limits did not prevent overfishing. *Id.* at *15.
8 Because the 2016 Catch Rule adopted Amendment 13’s 100,000 mt OFL based on the Conrad
9 Study’s outdated estimates, “it was at minimum arbitrary and capricious for [the NMFS] to fail to
10 consider whether the OFL estimate still prevented overfishing in light of its reliance on the Conrad
11 study.” *Id.* “It followe[d] that it was also arbitrary and capricious for [the NMFS] to fail to
12 consider whether the ABC and ACL could prevent overfishing in light of its reliance on the OFL.”
13 *Id.* at *16. “[I]n other words, [the problem] [was] that the ABC [was] justified solely in terms of
14 the OFL and therefore ignore[d] the crucial variable: anchovy abundance. Reducing an outdated
15 OFL by a fixed percentage without considering whether the anchovy population might have
16 changed since 1991 ignores the most important aspect of the problem—the size of the anchovy
17 population.” *Id.* (quotation marks omitted). Accordingly, the Court vacated the anchovy OFL,
18 ABC, and ACL set in the 2016 Catch Rule.

19 On February 15, 2018, Defendants filed a motion to alter or amend the Court’s judgment.
20 *Oceana, Inc. v. Ross*, No. 16-CV-06784-LHK, ECF No. 63 (N.D. Cal. Feb. 2018). Defendants
21 requested clarification that the Court’s vacatur only applied to the central population of the
22 northern anchovy. Defendants also requested that the Court clarify whether it vacated only the
23 ACL set in the 2016 Catch Rule and not the OFL or ABC on which the ACL was based. Plaintiff
24 opposed the motion on March 1, 2018, *id.*, ECF No. 64, and Government Defendants replied on
25 March 8, 2018, *id.*, ECF No. 66.

26 On June 13, 2018, the Court granted in part and denied in part the motion to alter or amend
27 judgment. *Id.*, ECF No. 68. The Court noted that “[t]he parties have only ever litigated the

1 reference points set for the central population of the northern anchovy” and that “the Court’s 33-
2 page summary judgment order nowhere discusses the other stocks.” *Id.* at 2. Therefore, the Court
3 “clarifie[d], if doing so was necessary, that its judgment did not vacate the reference points the
4 Catch Rule set for stocks other than the central population of the northern anchovy.” *Id.* As to
5 Defendants’ second request, the Court clarified that it “did vacate the OFL and ABC in this case
6 for the central population of the northern anchovy.” *Id.*

7 On August 10, 2018, the Defendants appealed the Court’s decision to the Ninth Circuit.
8 *Id.*, ECF Nos. 69, 70.

9 On September 21, 2018, Plaintiff filed a motion to enforce the judgment. *Id.*, ECF No. 72.
10 Plaintiff noted that more than eight months after the Court issued its January 18, 2018 order
11 granting Plaintiff’s motion for summary judgment and denying Defendants’ cross-motion for
12 summary judgment, Defendants had still not issued a new catch rule and that commercial catch of
13 anchovy had continued without regulation. *Id.* at 1. Plaintiff requested that the Court direct the
14 NMFS to issue a proposed rule within 90 days after the Court’s decision. *Id.* at 1–2. Defendants
15 opposed the motion on October 26, 2018, *id.*, ECF No. 76, and Plaintiff filed a reply on November
16 9, 2018, *id.*, ECF No. 77.

17 The Court granted Plaintiff’s motion to enforce the judgment on January 18, 2019. *Id.*,
18 ECF No. 79. The Court noted that Plaintiff’s summary judgment motion had requested that the
19 Court remand the 2016 Catch Rule to the NMFS to complete a new rule that complies with the
20 law within no more than 90 days from the date of the Court’s MSJ Order. *Id.* at 9. “Therefore,
21 pursuant to the Court’s January 18, 2018 MSJ Order, Defendants had 90 days to complete a new
22 rule that complie[d] with the Magnuson-Stevens Act and the APA.” *Id.*

23 The Court then concluded that Defendants’ appeal of the merits decision did not absolve it
24 from its duty to comply with the Court’s order. *Id.* Defendants did not seek a stay to relieve
25 themselves of the requirements of the Court’s order, *id.* at 10, and therefore, Defendants had not
26 complied with the Court’s order. The Court therefore granted Plaintiff’s motion to enforcement
27 the judgment and ordered the parties to file a joint status update within a month of the order

1 explaining Defendants’ plan to comply with the Magnuson-Stevens Act and the APA and what
2 progress Defendants made to that end. *Id.* The Court also ordered Defendants to promulgate a
3 new rule in compliance with the Magnuson-Stevens Act and the APA within 90 days of the order.
4 *Id.* at 13.

5 On February 19, 2019, the parties filed a joint status update regarding compliance with the
6 Court’s order. *Id.*, ECF No. 82. The parties disputed Defendants’ proposed rulemaking process,
7 as Defendants stated that they intended to skip the proposed rule and public comment steps in
8 issuing a new Catch Rule. *Id.* at 2–8.

9 On February 25, 2019, the Court issued an order compelling Defendants’ compliance. *Id.*,
10 ECF No. 82. The Court held that its establishment of a deadline for the NMFS to issue a final rule
11 did not excuse the NMFS from issuing a proposed rule and soliciting public comment. *Id.* at 4.
12 The Court also explained that Defendants “have manufactured alleged impracticability” because
13 Defendants “had over thirteen months to comply with” the Court’s January 18, 2018 order.
14 “Instead, Defendants have required Plaintiff to seek to enforce this order” and Defendants have
15 “adopted a new strategy to evade the APA’s proposed rule and public comment requirements.” *Id.*
16 at 5. The Court noted that “[a] finding that the Defendants are acting in bad faith may be
17 appropriate” and that “[i]f Defendants engage in a pattern of bad faith behavior, the Court may
18 invite a motion for sanctions.” *Id.* The Court then ordered the parties to file a joint statement
19 proposing a schedule for notice and comment rulemaking. *Id.*

20 On March 1, 2019, the parties filed a joint schedule. *Id.*, ECF No. 83. Pursuant to the
21 parties’ joint schedule, the Court filed an order that same day requiring the NMFS to submit a
22 proposed rule to the Office of the Federal Register for publication by April 5, 2019; provide a 15-
23 day public comment period from the date of publication of the proposed rule in the Federal
24 Register; and no later than May 28, 2019, submit a final rule to the Office of the Federal Register
25 for publication. *Id.*, ECF No. 84.

26 **4. The 2019 Catch Rule**

27 On April 8, 2019, the NMFS published a proposed rule in the Federal Register to set an

1 ACL for the anchovy and other stocks managed by the CPS FMP. AR 292:17233–17236. The
2 NMFS proposed an OFL of 94,290 mt, and pursuant to Amendment 13’s framework to set ABC
3 values at 25 percent of OFL for “a 75-percent scientific uncertainty buffer,” proposed an ABC of
4 23,573 mt and an ACL of 23,573 mt. *Id.* at 17233–17234.

5 On May 31, 2019, the NMFS published a final rule in the Federal Register (“the 2019
6 Catch Rule”). AR 264:16386–16392. The 2019 Catch Rule averaged anchovy abundance
7 estimates from the three most recent years (2016–2018) and arrived at an average biomass of
8 394,519 mt. *Id.* at 16387–16388. The 2019 Catch Rule did not rely on the 100,000 mt default
9 maximum sustainable yield (“MSY”) value to set the overfishing limit (“OFL”), and instead, the
10 NMFS calculated a new OFL by multiplying the average biomass from 2016–2018 by an estimate
11 of the rate of fishing mortality for anchovy at MSY (0.239). *Id.* at 16387. This yielded an MSY
12 and OFL of 94,290 mt. *Id.* at 16387–16388. The NMFS then calculated an acceptable biological
13 catch (“ABC”) of 23,573 by reducing the OFL by 75% pursuant to Amendment 13. *Id.* The
14 NMFS then set the annual catch limit (“ACL”) to equal the ABC at 23,573 mt. *Id.*

15 **C. Procedural History**

16 On June 28, 2019, Plaintiff filed a complaint that challenged the OFL, ABC, and ACL set
17 in the 2019 Catch Rule as well as Amendments 8 and 13 to the CPS FMP. ECF No. 1. On July
18 18, 2019, the Court related the instant action to the Court’s prior action involving the 2016 Catch
19 Rule. ECF No. 15.

20 On August 23, 2019, the Court granted California Wetfish Producers Association and
21 Monterey Fish Company Inc.’s (“Intervenor-Defendants”) unopposed motion to intervene. ECF
22 No. 27.

23 On January 31, 2020, United States Magistrate Judge Susan van Keulen issued an order
24 granting in part and denying in part Plaintiff’s motion to compel completion of the administrative
25 record. ECF No. 49. On February 12, 2020, the Court denied Defendant’s motion for relief from
26 Judge van Keulen’s order. ECF No. 57.

27 On May 5, 2020 Judge van Keulen issued another order granting in part and denying in
28

1 part Plaintiff's motion to compel production of documents withheld from the second supplemental
2 administrative record. ECF No. 69.

3 On March 17, 2020, Plaintiff filed a motion for summary judgment. ECF No. 59
4 ("Plaintiff's MSJ"). On April 20, 2020, Intervenor-Defendants filed their cross-motion for
5 summary judgment and opposition to Plaintiff's motion for summary judgment. ECF No. 63
6 ("Intervenor-Defendants' MSJ"). That same day, Government Defendants also filed their cross-
7 motion for summary judgment and opposition to Plaintiff's motion for summary judgment. ECF
8 No. 64 ("Government MSJ"). On May 22, 2020, Plaintiff filed its combined opposition to
9 Defendants' motions for summary judgment and reply in support of Plaintiff's motion for
10 summary judgment. ECF No. 71 ("Plaintiff's Reply"). On June 11, 2020, Intervenor-Defendants
11 and Government Defendants filed their own reply briefs in support of their cross-motions for
12 summary judgment. ECF No. 72 ("Intervenor-Defendants' Reply"); ECF No. 73 ("Government
13 Reply").

14 **II. LEGAL STANDARD**

15 **A. Administrative Procedure Act Review**

16 The Magnuson-Stevens Act adopts the Administrative Procedure Act's ("APA") "standard
17 for judicial review of agency action set forth in 5 U.S.C. § 706(2)(A)." *Or. Trollers Ass'n v.*
18 *Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006) (citing 16 U.S.C. § 1855(f)(1)).

19 Under the APA, courts must set aside an agency action where the action is "arbitrary,
20 capricious, an abuse of discretion, or otherwise not in accordance with law" or was taken "without
21 observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). This review is deferential
22 and narrow, and "[t]he court is not empowered to substitute its judgment for that of the agency."
23 *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Sierra Club v.*
24 *Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007) (quoting *Citizens to Pres. Overton Park, Inc.*, 401
25 U.S. at 416). Courts should overturn agency action "only when the agency has relied on factors
26 which Congress has not intended it to consider, entirely failed to consider an important aspect of
27 the problem, offered an explanation for its decision that runs counter to the evidence before the

1 agency, or is so implausible that it could not be ascribed to a difference in view or the product of
 2 agency expertise.” *Pac. Coast Fed’n of Fishermen’s Ass’ns, Inc. v. Nat’l Marine Fisheries Serv.*,
 3 265 F.3d 1028, 1034 (9th Cir. 2001) (internal quotation marks and citations omitted).

4 Nonetheless, “to withstand review the agency must articulate a rational connection
 5 between the facts found and the conclusions reached.” *Bosworth*, 510 F.3d at 1023 (brackets and
 6 internal quotation marks omitted). Courts “will defer to an agency’s decision only if it is ‘fully
 7 informed and well-considered.’” *Id.* (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717
 8 (9th Cir. 1988)).

9 **B. Summary Judgment**

10 In general, summary judgment is appropriate if, viewing the evidence and drawing all
 11 reasonable inferences in the light most favorable to the nonmoving party, there are no genuine
 12 disputes of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P.
 13 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986).

14 In an APA case, however, a district court’s function at summary judgment is not to resolve
 15 disputed facts and make de novo factual determinations, but rather “to determine whether or not as
 16 a matter of law the evidence in the administrative record permitted the agency to make the
 17 decision it did.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir. 1985); accord *Nw.*
 18 *Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (explaining that
 19 because “this case involves review of a final agency determination under the Administrative
 20 Procedure Act, . . . resolution of this matter does not require fact finding on behalf of this court”).
 21 A court’s review is therefore limited to the administrative record in all but a few exceptional
 22 circumstances. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir.
 23 2014).

24 **III. DISCUSSION**

25 Plaintiff argues that the overfishing limit (“OFL”), acceptable biological catch (“ABC”),
 26 and annual catch limit (“ACL”) set in the 2019 Catch Rule are unlawful in three ways. First,
 27 Plaintiff asserts that the 2019 Catch Rule violates National Standard Two because it is not based

1 on the best scientific information available. Second, Plaintiff contends that the 2019 Catch Rule
2 violates National Standard One because it does not prevent overfishing. Third, Plaintiff argues
3 that the 2019 Catch Rule violates National Standard One by failing to account for the needs of
4 anchovy predators.

5 Plaintiff also argues that Amendment 13 to the Pacific Council’s Coastal Pelagic Species
6 Fishery Management Plan (“CPS FMP”) is unlawful. Specifically, Plaintiff challenges
7 Amendment 13 both directly and as applied in the 2019 Catch Rule.

8 The Intervenor Defendants and the Government Defendants make overlapping summary
9 judgment arguments, so the Court refers to them collectively as “Defendants.” The Court first
10 considers Defendants’ threshold argument that Plaintiff’s direct challenge to Amendment 13 is
11 untimely. The Court then considers Plaintiff’s argument that in directly challenging Amendment
12 13, Plaintiff may rely on information that post-dated Amendment 13’s promulgation in 2011. The
13 Court concludes that Plaintiff’s challenge to Amendment 13 is timely, but that based on
14 controlling Ninth Circuit precedent, the relevant administrative record is the one compiled at the
15 time the NMFS promulgated Amendment 13. Because Plaintiff does not point to any evidence
16 from that 2011 administrative record, Plaintiff’s direct challenge to Amendment 13 to the CPS
17 FMP fails.

18 The Court then turns to the merits of Plaintiff’s arguments regarding the 2019 Catch Rule.
19 As before, in *Oceana I*, Plaintiff may challenge Amendment 13 *as applied* in the 2019 Catch Rule.
20 *Oceana I*, 2018 WL 1989575, at *8 (permitting challenge to Amendment 13 as applied in the 2016
21 Catch Rule). The Court finds that Plaintiff prevails on the best scientific information available
22 argument and the overfishing argument, and thus does not reach Plaintiff’s claim that the 2019
23 Catch Rule does not account for the needs of anchovy predators.

24 **A. Plaintiff’s Direct Challenge To Amendment 13 To The CPS FMP Is Timely**

25 Defendants argue that Plaintiff cannot directly challenge Amendment 13 to the CPS FMP
26 because Amendment 13 was promulgated in 2011, and any challenge is therefore untimely.
27 Plaintiff argues that it can directly challenge Amendment 13 because the 2019 Catch Rule is an

1 action taken under Amendment 13, and therefore, its challenge is timely. Plaintiff’s MSJ at 21.

2 In 2011, Amendment 13 set the anchovy’s acceptable biological catch (“ABC”) at 25% of
3 overfishing limit (“OFL”). AR 196:13956. The ABC is a catch level that accounts for scientific
4 uncertainty around the OFL estimate, and is therefore usually a lower number. 50 C.F.R. §§
5 600.310(f)(2)(ii), 600.310(f)(3); *Bryson*, 940 F. Supp. 2d at 1037. Amendment 13 also established
6 a framework for setting annual catch limits (“ACLs”), AR 196:13956, which the 2019 Catch Rule
7 is implementing. Specifically, under Amendment 13, “ACLs would likely be specified for
8 multiple years until such time as the species becomes actively managed or new scientific
9 information becomes available.” *Id.*

10 In other words, the 2019 Catch Rule implements Amendment 13’s “ABC control rule . . . ,
11 which provides for a 75 percent reduction to the OFL.” AR 264:16390. The 2019 Catch Rule
12 then “sets the ACL equal to the ABC per the framework in the FMP,” as “[t]he CPS FMP states
13 that the ACL for stocks in the monitored management category are set equal to their ABC or lower
14 if it is determined necessary to prevent overfishing or for other [optimum yield] considerations.”
15 *Id.* at 16387. Finally, pursuant to Amendment 13, the 2019 Catch Rule permits the ACL to
16 “remain in place until new scientific information becomes available to warrant changes.” *Id.* at
17 16386.

18 The Magnuson-Stevens Act provides that challenges to regulations and actions must be
19 filed within 30 days after “the date on which the regulations are promulgated or the action is
20 published in the Federal Register.” 16 U.S.C. § 1855(f)(1). The 2019 Catch Rule was published
21 on May 31, 2019. AR 264:16386. Plaintiff filed its complaint on June 28, 2019. ECF No. 1.
22 Plaintiff’s challenge to the 2019 Catch Rule is therefore timely. By the same token, Plaintiff’s suit
23 is untimely as to Amendment 13, which was promulgated in 2011. AR 31:933; AR 30:890.

24 However, as the Court previously concluded in *Oceana I* with respect to the 2016 Catch
25 Rule, *Oregon Trollers* permits plaintiffs to challenge regulations after the 30-day period through a
26 suit challenging an action taken under the regulation. *Oceana I*, 2018 WL 1989575, at *7.
27 Specifically, *Oregon Trollers* held that under section 1855(f)(1), “a petition filed within 30 days of

1 the publication of an action may challenge both the action *and the regulation under which the*
 2 *action is taken.*” *Or. Trollers*, 452 F.3d at 1113 (emphasis added); *Gulf Fishermen’s Ass’n v.*
 3 *Gutierrez*, 529 F.3d 1321, 1323 (11th Cir. 2008) (adopting *Oregon Trollers* analysis); *Bryson*, 940
 4 F. Supp. 2d at 1048 (noting that under *Oregon Trollers* “plaintiffs [may] challenge regulations
 5 after the 30 day period through a suit challenging an action taken under the regulation.”).

6 “Actions” are defined as “actions that are taken by the Secretary under regulations which
 7 implement a fishery management plan” 16 U.S.C. § 1855(f)(2); *see Or. Trollers*, 452 F.3d at
 8 1112–16 (discussing definition of “action”). Actions must also be published in the Federal
 9 Register. *Or. Trollers*, 452 F.3d at 1112 (citing 16 U.S.C. § 1855(f)(1)).

10 The 2019 Catch Rule satisfies the definition of “Actions” because the Catch Rule
 11 implements ACLs pursuant to Amendment 13 and because the Catch Rule was published in the
 12 Federal Register. AR 196:13956 (final rule for Amendment 13 noting that it sets a process for
 13 establishing ACLs); *see also* AR 264:16386–16392 (repeatedly referring to the 2019 Catch Rule
 14 as “this action”). Plaintiff therefore argues that Plaintiff’s timely challenge to the 2019 Catch Rule
 15 (the action) also allows Plaintiff to challenge Amendment 13 (the regulation).

16 *Oregon Trollers* stemmed from a 1989 amendment to the FMP that managed Pacific
 17 salmon fisheries, including the Klamath River fall chinook. 452 F.3d at 1108–09. A 1989
 18 amendment to the FMP sought to address declining Klamath chinook numbers by establishing an
 19 annual “escapement goal” that at least 35,000 spawning adults would survive so that they could
 20 reproduce. *Id.* at 1109. In 2005, the NMFS determined that allowing normal fishing during the
 21 upcoming fishing season would result in less than 35,000 salmon surviving to reproduce. *Id.*
 22 1110–11. The Service therefore placed significant restrictions on the salmon fishing season. *Id.*
 23 Thus, in *Oregon Trollers*, the 2005 fishery restrictions complied with the 1989 amendment’s
 24 instruction to meet the annual “escapement goal” that at least 35,000 spawning adults would
 25 survive so that they could reproduce. *See Gulf Fishermen’s*, 529 F.3d at 1322–23 (citing *Oregon*
 26 *Trollers* to hold plaintiff could challenge prior FMP amendment through a subsequent Service
 27 action setting deadline to comply with the FMP amendment); *Glacier Fish Co. LLC v. Pritzker*,

28

1 2015 WL 71084, at *2 (W.D. Wash. Jan. 6, 2015), *rev'd on other grounds*, 832 F.3d 1113 (9th
 2 Cir. 2016) (citing *Oregon Trollers* to allow plaintiff to use NMFS action setting rules for cost
 3 recovery program to challenge regulations establishing cost recovery program).

4 The *Oregon Trollers* plaintiffs, primarily fishermen and fishing-related businesses, brought
 5 a suit challenging the 2005 fishery restriction (the action) and the 1989 amendment (the
 6 regulation) in federal court. *Id.* at 1108, 1112. Plaintiffs' suit was commenced within 30 days of
 7 the 2005 fishery restrictions' publication in the Federal Register. *Id.* at 1111. The Service
 8 therefore did not dispute that the plaintiffs' suit was timely as to the fishery restrictions. Instead,
 9 the Service argued that plaintiffs' suit was untimely as to the underlying 1989 amendment because
 10 "under § 1855(f)(1) plaintiffs should have filed their challenge within thirty days of the
 11 promulgation of [the 1989 amendment], and . . . their suit is therefore sixteen years too late." *Id.*
 12 at 1112. The Ninth Circuit rejected this argument and held that section 1855(f)(1)'s plain
 13 language and legislative history demonstrated that plaintiffs were entitled to challenge both the
 14 action and the underlying regulation. *Id.* at 1112–13.

15 The instant case mirrors *Oregon Trollers*. In the instant case, Amendment 13 created a
 16 process for setting annual catch limits ("ACLs"). AR 196:13956 ("The purpose of Amendment 13
 17 is to amend the CPS FMP to comply with . . . the new requirement to establish a process for
 18 setting ACLs . . ."). The 2019 Catch Rule complies with Amendment 13 by implementing
 19 Amendment 13's "ABC [acceptable biological catch] control rule . . ., which provides for a 75
 20 percent reduction to the OFL [overfishing limit]." AR 264:16390. Furthermore, pursuant to
 21 Amendment 13, the 2019 Catch Rule "sets the ACL [annual catch limit] equal to the ABC
 22 [acceptable biological catch] per the framework in the FMP [fishery management plan]," as "[t]he
 23 CPS FMP [Coastal Pelagic Species Fishery Management Plan] states that the ACL [annual catch
 24 limit] for stocks in the monitored management category are set equal to their ABC [acceptable
 25 biological catch] or lower if it is determined necessary to prevent overfishing or for other
 26 [optimum yield] considerations." *Id.* at 16387. Finally, pursuant to Amendment 13, the 2019
 27 Catch Rule permits the ACL [annual catch limit] to "remain in place until new scientific

1 information becomes available to warrant changes.” *Id.* at 16386.

2 In sum, the Court finds that Plaintiff’s timely challenge to the 2019 Catch Rule also allows
3 Plaintiff to directly challenge Amendment 13. In particular, Plaintiff may directly challenge
4 Amendment 13’s decision to set the anchovy’s acceptable biological catch (“ABC”) and annual
5 catch limit (“ACL”) at 25% of overfishing limit (“OFL”) and the ability to set annual catch limits
6 (“ACLs”) “for multiple years until such time as the species becomes actively managed or new
7 scientific information becomes available.” AR 196:13956. Furthermore, Plaintiff may also timely
8 challenge Amendment 13 as applied in the 2019 Catch Rule.

9 **B. Plaintiff May Only Rely Upon Evidence That Was Presented To The NMFS In 2011
10 In Directly Challenging Amendment 13 To The CPS FMP**

11 The Court next considers what evidence Plaintiff may rely upon in directly challenging
12 Amendment 13. Plaintiff argues that it may rely upon evidence compiled after the 2011
13 promulgation of Amendment 13—specifically, the administrative record in the instant case.
14 Defendants contend that the relevant administrative record is the one compiled at the time the
15 NMFS promulgated Amendment 13. Plaintiff’s Reply at 32–33. Notably, Plaintiff’s challenge to
16 Amendment 13 is based entirely on evidence compiled after the 2011 promulgation of
17 Amendment 13. Therefore, if the relevant administrative record is the one compiled in 2011—
18 when the NMFS promulgated Amendment 13—Plaintiff’s challenge to Amendment 13
19 necessarily fails.

20 “Judicial review of an agency decision typically focuses on the administrative record in
21 existence at the time of the decision” *Sw. Ctr. For Biological Diversity v. U.S. Forest Serv.*,
22 100 F.3d 1143, 1450 (9th Cir. 1996). Generally speaking, “[p]arties may not use ‘post-decision
23 information as a new rationalization either for sustaining or attacking [an] [a]gency’s decision.’”
24 *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006)
25 (quoting *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811–12 (9th Cir. 1980)). “When a
26 reviewing court considers evidence that was not before the agency, it inevitably leads the
27 reviewing court to substitute its judgment for that of the agency.” *San Luis & Delta-Mendota*

1 *Water Auth.*, 747 F.3d at 602 (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)).
2 Again, the Ninth Circuit’s decision in *Oregon Trollers* is relevant and decisive for resolving what
3 evidence Plaintiff may utilize in challenging Amendment 13.

4 In *Oregon Trollers*, after the Ninth Circuit concluded that the plaintiffs’ challenge to the
5 1989 regulation to the FMP was timely, the Ninth Circuit addressed the merits. 452 F.3d at 1117.
6 The *Oregon Trollers* plaintiffs brought three challenges, but the most relevant for current purposes
7 was the plaintiffs’ second challenge that the 1989 regulation was not based on the best scientific
8 information available. *Id.* at 1117, 1119–120. The Ninth Circuit noted that the *Oregon Trollers*
9 plaintiffs “did not introduce any evidence to dispute the scientific basis for the [1989] escapement
10 goal” and “plaintiffs frame their argument purely in terms of statutory interpretation.” *Id.* at 1119.
11 According to the Plaintiff in the instant case, this fact distinguishes *Oregon Trollers* from the
12 instant case because here, Plaintiff introduces considerable evidence to challenge Amendment 13.
13 Plaintiff, however, misreads *Oregon Trollers*.

14 Although the Ninth Circuit did in fact note that the *Oregon Trollers* plaintiffs did not
15 introduce any new evidence, the court did not stop its analysis there. Rather, the Ninth Circuit
16 explicitly concluded that “[e]ven if plaintiffs had attacked the evidentiary basis for the escapement
17 goal established in the 1989 regulation, . . . [t]he relevant administrative record for these purposes
18 is the record compiled in 1989 to support the FMP amendment that established the escapement
19 goal.” 452 F.3d at 1120 (citing 50 C.F.R. § 600.315(b)(2) (providing that an FMP “must take into
20 account the best scientific information available at the time of preparation”)). Because evidence
21 from the 1989 administrative record supported the agency’s decision, the Ninth Circuit rejected
22 the plaintiffs’ argument. *Id.* Therefore, contrary to Plaintiff’s assertions, the Ninth Circuit stated
23 that in challenging an older regulation upon which a newer action was based, a plaintiff can only
24 rely on the record compiled at the time the older regulation was promulgated. *Id.*

25 This explicit holding from *Oregon Trollers* is dispositive. Here, Plaintiff may timely
26 challenge Amendment 13, which was promulgated in 2011, because the 2019 Catch Rule’s
27 overfishing limit (“OFL”), acceptable biological catch (“ABC”), and annual catch limit (“ACL”)

1 values are based on Amendment 13. In doing so, however, “[t]he relevant administrative record
 2 for these purposes is the record compiled in” 2011 to support Amendment 13. *Id.* As a result,
 3 because Plaintiff’s challenge to Amendment 13 is based entirely on evidence compiled after the
 4 2011 promulgation of Amendment 13, Plaintiff’s direct challenge to Amendment 13 necessarily
 5 fails.

6 The Court therefore GRANTS Intervenor-Defendants’ and Government Defendants’ cross-
 7 motions for summary judgment and DENIES Plaintiff’s motion for summary judgment with
 8 respect to Plaintiff’s direct challenge to Amendment 13 to the Coastal Pelagic Species Fishery
 9 Management Plan (“CPS FMP”).

10 The Court notes, however, that Defendants do not dispute that Plaintiff may challenge
 11 Amendment 13 as applied in the 2019 Catch Rule and that Plaintiff may rely upon the instant
 12 case’s administrative record to do so. Government Reply at 13–14. Similarly, in *Oceana I*, the
 13 Court held that Plaintiff could challenge Amendment 13 as applied in the 2016 Catch Rule based
 14 on the evidence then before the Court. *Oceana I*, 2018 WL 1989575, at *8 (permitting challenge
 15 to Amendment 13 as applied in the 2016 Catch Rule). Thus, although Plaintiff’s direct challenge
 16 to Amendment 13 fails, Plaintiff may still challenge Amendment 13 as applied in the 2019 Catch
 17 Rule and Plaintiff may rely on the instant case’s administrative record to do so. With this
 18 clarification in mind, the Court next proceeds to the merits of Plaintiff’s challenge to the 2019
 19 Catch Rule.

20 **C. The 2019 Catch Rule Violates National Standard Two’s Requirement That Actions
 21 Be Based Upon The Best Scientific Information Available**

22 Plaintiff and Defendants dispute whether the 2019 Catch Rule complies with National
 23 Standard Two’s requirement that actions be “based upon the best scientific information available.”
 24 16 U.S.C. § 1851(a)(2). Plaintiff argues that the 2019 Catch Rule unlawfully set the overfishing
 25 limit (“OFL”), acceptable biological catch (“ABC”), and annual catch limit (“ACL”) based only
 26 on average abundance data from 2016 to 2018, a timeframe when the anchovy population was
 27 increasing. According to Plaintiff, in setting those limits, the NMFS effectively ignored two

1 recent studies, MacCall (2016) and Thayer *et al.* (2017), which purportedly demonstrate that
2 anchovy abundance fluctuates widely such that setting the OFL, ABC, and ACL based only on
3 2016 to 2018 is not based on the best scientific information available. Instead, Plaintiffs contend
4 that the NMFS had to also consider MacCall (2016) and Thayer *et al.* (2017), which analyze
5 anchovy abundance data from 1951 to 2015 and are the only studies showing anchovy biomass
6 estimates from 2009-2014, when anchovy abundance was particularly low.

7 Defendants primarily advance two arguments in response. First, Defendants argue that the
8 NMFS could reasonably reject the MacCall (2016) and Thayer *et al.* (2017) studies based on
9 methodological uncertainties present in the studies. Second, Defendants contend that in any event,
10 the NMFS did consider the scientific information in MacCall (2016) and Thayer *et al.* (2017) and
11 found that the evidence was consistent with the limits set in the 2019 Catch Rule. The Court
12 addresses each of Defendant's arguments in turn and finds that neither is persuasive. The Court
13 therefore concludes that MacCall (2016) and Thayer *et al.* (2017) are the best scientific
14 information available and that Defendants improperly failed to address this evidence in violation
15 of National Standard Two.

16 **1. The NMFS Fails to Discredit Plaintiff's Evidence**

17 Defendants' first argument is that Plaintiff's scientific evidence is so flawed that the
18 NMFS could wholly disregard it. Plaintiff claims that its scientific evidence is the best scientific
19 information available, and therefore the NMFS had to consider it.

20 National Standard Two of the Magnuson-Stevens Act requires that "[c]onservation and
21 management measures shall be based upon the best scientific information available." 16 U.S.C.
22 § 1851(a)(2). Regulations defining National Standard Two further specify that fishery
23 management measures "must take into account the best scientific information available at the time
24 of preparation," 50 C.F.R. § 600.315(b)(2), which includes "biological, ecological, environmental,
25 economic, and sociological scientific information," *id.* § 600.315(a)(1). As the Court previously
26 explained, the NMFS "'may not disregard superior data' and section 1851(a)(2) challenges may
27 prevail if 'there is some indication that superior or contrary data was available and that the agency

1 ignored such information.”” *Oceana I*, 2018 WL 1989575, at *9 (quoting *Guindon v. Pritzker*, 31
2 F. Supp. 3d 169, 195 (D.D.C. 2014)).

3 Plaintiff’s scientific evidence concerns two studies, MacCall (2016) and Thayer *et al.*
4 (2017). MacCall (2016) is a 2016 peer-reviewed study led by former NMFS scientist Alec
5 MacCall, who produced prior anchovy stock estimates and co-authored the Northern Anchovy
6 Fishery Management Plan, which was later expanded into the current Coastal Pelagic Species
7 Fishery Management Plan (“CPS FMP”). AR 417: 19372–19379 (Alec MacCall, et al., *Recent*
8 *collapse of northern anchovy biomass off California*, 175 Fisheries Research 87–94 (2016)).

9 Thayer *et al.* (2017) is a 2017-peer reviewed study that builds on the analysis of MacCall
10 (2016) and extends anchovy abundance estimates past 2011. AR 388:18917–18924 (J.A. Thayer,
11 *et al.*, *California Anchovy Population Remains Low*, 58 CalCOFI Rep. 69–76 (2017)). Thayer *et*
12 *al.* (2017)’s lead author is Julie Thayer, one of the co-authors of MacCall (2016). *Id.* The
13 remaining co-authors for Thayer *et al.* (2017) are the same co-authors as MacCall (2016),
14 including Alec MacCall. *Id.*

15 MacCall (2016) and Thayer *et al.* (2017) provide analyses of anchovy abundance data from
16 1951 to 2015 and reveal that anchovy abundance has fluctuated far more dramatically than
17 previous studies showed. AR 417: 19372–19379; AR 388:18917–18924. For example, Thayer *et*
18 *al.* (2017) concluded that anchovy biomass dropped 77% in a single year (1986 to 1987), dropped
19 90% over a two-year period (2005 to 2007), and dropped by 99% over a four-year period (2005 to
20 2009). AR 282:16459–60, 1611–12, 16614; AR 388:18920, 18924. In light of this evidence,
21 Plaintiff contends that the catch limits in the 2019 Catch Rule are insufficient to prevent
22 overfishing “when abundance levels drop by more than 90 percent below the average biomass NM
23 FS assumed as the basis for its catch limits.” Plaintiff’s MSJ at 9. Indeed, according to the
24 scientific evidence, anchovy abundance levels remained historically low through 2014. AR
25 388:18924.

26 Defendants contend that the NMFS did not have to take these scientific studies into
27 account when promulgating the 2019 Catch Rule because these scientific studies were so flawed

1 that the NMFS could wholly disregard them. AR 264:16388–16389; Government MSJ at 6.
2 Specifically, Defendants argue that “Thayer [*et al.* (2017)] (which extends the [MacCall (2016)]
3 estimates beyond 2011) calculated the anchovy abundance in 2015 [at] only 5,300 [mt]” but then
4 updated their 5,300 mt estimate for 2015 to 92,100 mt. Government MSJ at 6. Defendants argue
5 that this is proof that Thayer *et al.* (2017) is unreliable, and that because MacCall (2016) and
6 Thayer *et al.* (2017) failed to update their comparatively low biomass estimates from 2009 to
7 2014, the NMFS could properly disregard estimates from those years.

8 The Court disagrees. First, Defendants’ central contention—namely, that Thayer *et al.*
9 (2017) is inaccurate and unreliable because the scientific study updated its anchovy abundance
10 estimates for 2015, yet failed to “correct” its estimates for 2009 to 2014—fails on the facts. As
11 Plaintiff points out, Thayer *et al.* (2017) provided anchovy abundance estimates for 1951 to 2015
12 based on data collected from annual California Cooperative Oceanic Fisheries Investigation
13 (“CalCOFI”) surveys that count anchovy eggs and larvae. AR 388:18917–18919. Generally, two
14 CalCOFI surveys occur every year, one in the spring and one in the winter. However, in 2015,
15 only data from the earlier 2015 survey was available at the time Thayer *et al.* (2017) prepared its
16 preliminary abundance estimate for 2015. AR 388:18919. Indeed, the 2015 preliminary
17 abundance estimate in Thayer *et al.* (2017) explicitly noted that “[a]s of this analysis, January data
18 were not yet available for 2015.” *Id.* When the authors of Thayer *et al.* (2017) updated their 2015
19 estimates in 2018, they explained that “as new CalCOFI data . . . bec[ame] available,” the authors
20 of Thayer *et al.* (2017) then updated their 2015 anchovy abundance estimates. AR 350:17991.
21 Nowhere did Thayer *et al.* (2017) make any suggestion that estimates from 2009 to 2014 needed
22 “updating” or “correcting,” as those estimates already reflected data from all spring and winter
23 surveys for those years.

24 Defendants entirely fail to respond to Plaintiff’s explanation about the update to 2015
25 anchovy abundance estimates in Thayer *et al.* (2017). Not surprisingly, Defendants’ reply briefs
26 abandon their argument that Plaintiff’s proffered evidence was unreliable and could therefore be
27 disregarded.

1 Second, the NMFS does not present any alternative abundance estimates for 2009 to 2014,
 2 the years in which Thayer *et al.* (2017) estimate historically low anchovy abundance. Without any
 3 competing information to rely upon, the NMFS could not have concluded that Thayer *et al.* (2017)
 4 and its estimates for 2009 to 2014 were not the best scientific information available. *See Or.*
 5 *Trollers*, 452 F.3d at 1120 (upholding the NMFS’s fishery restrictions because plaintiffs had
 6 pointed to no scientific information better than the information on which the NMFS relied);
 7 *Midwater Trawlers Coop.*, 393 F.3d at 1003 (“[B]y specifying that decisions be based on the best
 8 scientific information *available*, the [MSA] recognizes that such information may not be exact or
 9 totally complete.” (emphasis in original)).

10 Instead, the Court concludes that MacCall (2016) and Thayer *et al.* (2017) constitute the
 11 best scientific information available regarding recent anchovy abundance estimates and anchovy
 12 population fluctuations.

13 **2. The Overfishing Limit, Acceptable Biological Catch, and Annual Catch Limit**
 14 **Were Not Based On The Best Scientific Information Available**

15 In the alternative, Defendants contend that even if MacCall (2016) and Thayer *et al.* (2017)
 16 constitute the best scientific information available, the NMFS did not disregard these scientific
 17 studies in crafting the 2019 Catch Rule. According to Defendants, though the NMFS only utilized
 18 data from 2016 to 2018 to set the OFL, ABC, and ACL, the average biomass from 2016 to 2018
 19 was generally in line with the average biomass estimates from MacCall (2016) and Thayer *et al.*
 20 (2017), such that the Court should find that the NMFS did consider the best scientific information
 21 available.

22 Specifically, as noted above, the 2019 Catch Rule set the OFL, ABC, and ACL by
 23 analyzing anchovy abundance estimates from 2016 to 2018, which were years where the anchovy
 24 population was rapidly increasing. AR 264:16387–16388. With anchovy abundance estimates of
 25 151,558 mt (2016), 308,173 mt (2017), and 823,826 mt (2018), the 2019 Final Rule calculated an
 26 average biomass of 394,519 mt. *Id.* at 16388. The NMFS then multiplied this average by an
 27 estimate of the rate of fishing mortality for anchovy at MYS (0.239), which yielded an OFL of

1 94,290 mt. *Id.* The NMFS then calculated an ABC of 23,573 by reducing the OFL by 75%
 2 pursuant to Amendment 13 and set the ACL to equal the ABC at 23,573 mt. *Id.*

3 In crafting the 2019 Catch Rule, the “NMFS note[d] . . . that if one were to compare the
 4 MacCall and Thayer time series of biomass estimates to the information that [the] NMFS used to
 5 calculate the OFL in this final rule, the range of estimates . . . are actually fairly similar.” AR
 6 264:16389. According to the NMFS, “the Thayer papers actually produce[] an average biomass
 7 value of 425,000 mt[], which is higher than the average of the three years used by NMFS.” *Id.*

8 Defendants’ argument fails because this simple comparison does not demonstrate that the
 9 NMFS actually considered the specific scientific information in MacCall (2016) and Thayer *et al.*
 10 (2017). “Stating that a factor was considered . . . is not a substitute for considering it.” *Beno v.*
 11 *Shalala*, 30 F.3d 1057, 1075 (9th Cir. 1994) (quotation marks and citation omitted). Together,
 12 MacCall (2016) and Thayer *et al.* (2017)) provide analyses of anchovy abundance data from 1951
 13 to 2015 and reveal that anchovy abundance has fluctuated far more dramatically than previous
 14 studies showed. AR 417: 19372–19379; AR 388:18917–18924. For example, Thayer *et al.*
 15 (2017) concluded that anchovy biomass dropped 77% in a single year (1986 to 1987), dropped
 16 90% over a two-year period (2005 to 2007), and dropped by 99% over a four-year period (2005 to
 17 2009). AR 282:16459–60, 1611–12, 16614; AR 388:18920, 18924.

18 This data is especially probative. In 2005, the anchovy population reached nearly 2
 19 million mt before plummeting to less than 20,000 mt by 2009. AR 388:18924. Then, from 2009
 20 to 2014, the anchovy population never exceeded 20,000 mt except for a single year. *Id.*
 21 Moreover, MacCall (2016) and Thayer *et al.* (2017) demonstrate that in recent years, drastic
 22 population increases typically last for shorter periods while the periods of low abundance
 23 following such population booms tend to last for longer periods. *Id.* at 18920 (figure showing that
 24 since 1990, population increases typically last for shorter periods while subsequent periods of low
 25 abundance can last longer periods).

26 The evidence in the record does not demonstrate that NMFS considered any of this
 27 evidence in promulgating the 2019 Catch Rule. Rather, the NMFS first attempted to discredit this

1 evidence, and when that failed, merely asserted that it considered this evidence because the long
2 term averages from MacCall (2016) and Thayer *et al.* (2017), which analyzed anchovy abundance
3 data from 1951 to 2015, approximated the average anchovy biomass estimates from 2016 to 2018.
4 But by averaging anchovy biomass estimates and setting unchanging OFL, ABC, and ACL values
5 for an indefinite period of time, the 2019 Catch Rule entirely fails to account for drastic anchovy
6 population fluctuations that are only documented by MacCall (2016) and Thayer *et al.* (2017).
7 The 2019 Catch Rule’s framework fails to consider its effects on the anchovy population when the
8 best scientific information available establishes that the anchovy population can drop by as much
9 as 77% in a single year, 90% over two years, or even 99% over four years. AR 388:18924.

10 Faced with this information, the Court concludes that the OFL, ABC, and ACL as set in
11 the 2019 Catch Rule are arbitrary and capricious because the NMFS has “offered an explanation
12 for its decision that runs counter to evidence before the agency.” *Pac. Dawn*, 831 F.3d at 1173.
13 Put differently, the Court finds that the NMFS acted arbitrarily and capriciously because the 2019
14 Catch Rule fails to “articulate a rational connection between the facts found and the conclusions
15 reached.” *Bosworth*, 510 F.3d at 1023.

16 The Court also concludes that the NMFS’s dismissal of MacCall (2016) and Thayer *et al.*
17 (2017) is arbitrary and capricious because it is “so implausible that it could not be ascribed to a
18 difference in view or the product of the agency’s expertise.” *Pac. Dawn*, 831 F.3d at 1173. The
19 NMFS dismisses these two peer-reviewed scientific studies on the basis that one of them, Thayer
20 *et al.* (2017) updated its anchovy estimate for 2015. But as the Court explained, Defendants’
21 argument fails because Thayer *et al.* (2017) explicitly noted that its update to the 2015 data was
22 due to the unavailability of a winter 2015 survey that counts anchovy eggs and larvae and that
23 updates for other years were unnecessary because the survey data was available for the other
24 years.

25 Moreover, the fact that the NMFS calculated unchanging OFL, ABC, and ACL values for
26 an indefinite period of time based on data from 2016 to 2018—years in which the anchovy
27 population was drastically increasing—demonstrates that the NMFS did not consider the best

1 scientific information available from MacCall (2016) and Thayer *et al.* (2017).

2 In sum, the Court concludes that the OFL, ABC, and ACL are arbitrary and capricious
3 because the OFL, ABC, and ACL are not based on the best scientific information available.

4 **D. The 2019 Catch Rule Violates National Standard One’s Requirement to Prevent
5 Overfishing**

6 Plaintiff next argues that the OFL, ABC, and ACL violate National Standard One because
7 they do not prevent overfishing. 16 U.S.C. § 1851(a)(1). Specifically, Plaintiff argues that the
8 NMFS’s decision to set static OFL, ABC, and ACL values for an indefinite period of time will not
9 prevent overfishing because (1) anchovy abundance is known to drop well below those limits, and
10 (2) the 75% buffer between the OFL and the ABC and ACL fails to account for the drastic
11 population variability evidence in the record.

12 National Standard One requires that “[c]onservation and management measures shall
13 prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery
14 for the United States fishing industry.” *Id.* Overfishing is a rate of fishing “that jeopardizes the
15 capacity of a fishery to produce [MSY] on a continuing basis.” *Id.* § 1802(34). MSY is “the
16 largest long-term average catch or yield that can be taken from a stock.” Consequently,
17 overfishing is “a rate of fishing which would jeopardize the capacity of a fishery to produce the
18 [MSY] on a continuing basis.” *Bryson*, 940 F. Supp. 2d at 1036.

19 The preceding discussion of the best scientific information largely resolves this dispute.
20 As discussed above, Plaintiff has provided substantial evidence that the anchovy population is
21 prone to drastic population fluctuations and has done so in recent years. Nonetheless, the NMFS
22 crafted the OFL, ABC, and ACL values in the 2019 Catch Rule by averaging anchovy biomass
23 from only three years with relatively high anchovy abundance (2016 to 2018) and ignoring data
24 from years with low anchovy abundance. Again, the 2019 Catch Rule set the OFL, ABC, and
25 ACL by analyzing anchovy abundance estimates from only 2016 to 2018, which were years where
26 the anchovy population was rapidly increasing. AR 264:16387–16388. With anchovy abundance
27 estimates of 151,558 mt (2016), 308,173 mt (2017), and 823,826 mt (2018), the 2019 Final Rule

1 calculated an average biomass of 394,519 mt. *Id.* at 16388. This value was drastically higher than
 2 anchovy abundance estimates from 2009 to 2014, where estimates typically placed the anchovy
 3 population at no more than 20,000 mt. The NMFS then multiplied the 394,519-mt average by an
 4 estimate of the rate of fishing mortality for anchovy at MYS (0.239), which yielded an OFL of
 5 94,290 mt. *Id.* The NMFS then calculated an ABC of 23,573 by reducing the OFL by 75%
 6 pursuant to Amendment 13 and set the ACL to equal the ABC at 23,573 mt. *Id.*

7 The NMFS then set the ACL's 23,573 mt limit for an indefinite period of time without a
 8 mechanism to respond to significant changes in anchovy abundance, even though the best
 9 scientific information available established that anchovy population fluctuations are common and
 10 extreme. Given this backdrop, it was at minimum arbitrary and capricious for the NMFS to fail to
 11 consider whether the OFL, ABC, and ACL would still prevent overfishing, especially given that
 12 the anchovy population will fluctuate again in the future.

13 Furthermore, though the NMFS reduced the OFL by 75% to calculate the ABC and ACL,
 14 such reductions will again be insufficient in years when the anchovy population drastically
 15 declines. Again, as an example, Thayer *et al.* (2017) concluded that anchovy biomass dropped
 16 77% in a single year (1986 to 1987), dropped 90% over a two-year period (2005 to 2007), and
 17 dropped by 99% over a four-year period (2005 to 2009). AR 282:16459–60, 1611–12, 16614; AR
 18 388:18920, 18924. The precautionary 75% buffer between the OFL and the ABC and ACL would
 19 not prevent overfishing when the anchovy population similarly decreases in the future.

20 Defendants offer three arguments in response. First, Defendants argue that the recent
 21 anchovy population increases demonstrate that overfishing will not occur. Second, Defendants
 22 claim that evidence in the record supports the NMFS's decision to set unchanging OFL, ABC, and
 23 ACL values for an indefinite period of time. Third, Defendants argue that because anchovy
 24 population fluctuations are the result of changing environmental conditions and not fishing, setting
 25 the 2019 Catch Rule's OFL, ABC, and ACL at historical values will not lead to overfishing. The
 26 Court addresses each in turn and finds that none is persuasive.

27 **1. Recent Increases In The Anchovy Population Do Not Establish That The 2019**

Catch Rule Will Prevent Overfishing

1 First, Defendants contend that even if the anchovy stock declined to similarly low levels as
2 calculated in MacCall (2016) and Thayer *et al.* (2017), overfishing is unlikely to occur because
3 following the “relatively lower levels [of anchovy biomass]” from 2009 to 2015, “fishing
4 continued at historical levels and the stock recovered very substantially in the immediately
5 following years according to all of the available biomass estimates.” AR 264:16390–16391.
6

7 Put differently, Defendants’ argument is that though the anchovy population drastically
8 declined from 2009 to 2015, fishing continued apace, and in the immediate years, the anchovy
9 population rebounded such that fishing from 2009 to 2015 was not at a rate that “jeopardize[d] the
10 capacity of [the] fishery to produce the [MYS] on a continuing basis.” *See Bryson*, 940 F. Supp.
11 2d at 1036. Therefore, because the NMFS seeks to set OFL, ABC, and ACL values similar to
12 those from 2009 to 2015, the NMFS argues that it will necessarily prevent overfishing.

13 This argument is misleading. Defendants consistently argue that overfishing did not occur
14 even during years of low abundance because “fishing continued at historical levels through that
15 whole period.” Government MSJ at 2, 16. However, fishing at historical levels has never
16 approximated the actual limits set in the ACL. As Intervenor-Defendants acknowledge, and the
17 evidence supports, “[s]ince 1983[,] the average catch of norther anchovy . . . has been ~7,000
18 metric tons.” 2016 AR 62:1278; Intervenor-Defendants’ MSJ at 2 (“[C]atch levels declined
19 precipitously and have remained low—approximately 7000 MT on average since 1982.”). Indeed,
20 the 2019 Catch Rule itself notes that “[t]he annual average harvest from 2009 to 2018 for central
21 anchovy was 7,020 mt.” AR 264: 16392. In other words, anchovy fishing has “remained well
22 below [its] respective ABC/ACL levels [of 25,000 mt] since implementation of the CPS FMP in
23 2000.” 2016 AR 165:2879; *see also id.*, fig. 2 (comparing annual catches of anchovy to ACL of
24 25,000 mt). This is particularly true for 2009 to 2013, when fishing levels were even lower.
25 Supp. AR 11:19868 (2,668 mt in 2009; 1,026 mt in 2010; 2,601 mt in 2011; 2,488 mt in 2012; and
26 6,019 mt in 2013).

27 Therefore, the recent increases do not establish that the current 23,573-mt ACL limit will

1 prevent overfishing. As such, Defendants' first argument fails.

2 **2. Defendants' Single Piece of Proffered Evidence Does Not Demonstrate That**
 3 **Setting Static OFL, ABC, and ACL Values For an Indefinite Period of Time Will**
 4 **Prevent Overfishing**

5 Defendants' second argument is that evidence in the record shows that setting static OFL,
 6 ABC, and ACL values for an indefinite period of time is more than 50% likely to prevent
 7 overfishing as is required by National Standard One. As previously discussed, "Congress
 8 . . . recognized that a certain amount of scientific uncertainty in predicting a stock's overfishing
 9 level is inevitable," and as a result, National Standard One guidelines "operate to ensure that there
 10 is no greater than a 50% probability that overfishing will occur." *Oceana, Inc. v. Locke*, 831 F.
 11 Supp. 2d 95, 128 (D.D.C. 2011) (citing 50 C.F.R. § 600.310(f)); *Massachusetts v. Pritzker*, 10 F.
 12 Supp. 3d 208, 213 (D. Mass. 2014) ("The objective of the control rule is to provide a buffer
 13 between OFL and ABC such that there is less than a 50% chance that overfishing will occur.").
 14 50 C.F.R. § 600.310(f)(2)(i) states that ABC "could be based on an acceptable probability (at least
 15 50 percent) that catch equal to the stock's ABC will not result in overfishing."

16 Here, Defendants point to an analysis conducted by Dr. Andre E. Punt of the University of
 17 Washington for the Pacific Council's Scientific and Statistical Committee. AR 309:17390; AR
 18 310:17408. The analysis shows that less frequent adjustments to OFL can protect against
 19 overfishing where there is a large buffer or reduction from OFL to ABC. AR 310:17409.
 20 Specifically, Dr. Punt states that the probability of the stock being overfished is 20.5% for annual
 21 OFLs, 27.5% for two-year OFLs, 38.7% for five-year OFLs, and 38.8% for ten-year OFLs. AR
 22 310:17409. Based on this, Defendants assert that "[w]hile longer-term OFLs were associated with
 23 higher risk, the level of risk with a constant OFL over several years was still well below the 50%
 24 risk level allowed by the MSA." Intervenor-Defendants MSJ at 6.

25 As Plaintiff points out, Dr. Punt's analysis is not relevant to the 2019 Catch Rule. Most
 26 importantly, Dr. Punt's analysis does not rely on the 2019 Catch Rule's MSY. Instead, the
 27 analysis relies on far lower long-term MSY values. Specifically, Dr. Punt's analysis relies on
 28 MSY values ranging from 18,000 mt to 61,000 mt, AR 309:17398, but the 2019 Catch Rule

1 utilizes an MSY of 94,290 mt. AR 264:25196 (2019 Catch Rule explaining that “OFLs are set
2 equal to estimates of MSY” and setting OFL at 94,290 mt). The 2019 Catch Rule never utilizes
3 Dr. Punt’s MSY values in setting the OFL, ABC or ACL. To reiterate, MSY—or maximum
4 sustainable yield—is important because overfishing is “a rate of fishing which would jeopardize
5 the capacity of a fishery to produce the [MSY] on a continuing basis.” *Bryson*, 940 F. Supp. 2d at
6 1036; 16 U.S.C. § 1802(34) (defining overfishing as “a rate or level of fishing mortality that
7 jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing
8 basis”).

9 Defendants do not engage with the substance of Plaintiff’s argument or attempt to explain
10 how Dr. Punt’s analysis remains relevant in light of these stark differences. Government Reply at
11 8–9. Instead, Defendants conclusorily state that these are mere methodological objections and
12 should be discounted. *Id.* As a result, Defendants fail to adequately respond to Plaintiff’s
13 argument that Dr. Punt’s analysis is not pertinent to the OFL, ABC, and ACL values as set in the
14 2019 Catch Rule. The Court therefore rejects Defendant’s second argument.

15 **3. The Fact That Environmental Conditions Drive Anchovy Population Fluctuations**
16 **Does Not Support The NMFS’s Position That The 2019 Catch Rule Will Prevent**
17 **Overfishing**

18 Defendant’s final argument is that fishing at current levels is not responsible for anchovy
19 population declines and that instead, environmental conditions are largely driving the drastic
20 anchovy population fluctuations. Therefore, Defendants assert that historical catch limits have a
21 limited effect on the anchovy population, which will rebound as environmental conditions return
22 to normal. As a result, Defendants assert that the 2019 Catch Rule’s limits, which are largely
23 consistent with prior limits, will prevent overfishing and that the NMFS did not need to consider
24 how fishing levels may interact with environmental conditions to impact the anchovy population.
25 Government Reply at 6 (“[A]s NMFS found in adopting the guidelines, a decline in biomass in a
26 given year due to temporary environmental factors while fishing continues does not mean that
27 . . . there is ‘overfishing.’”).

28 Defendants’ position contradicts the NMFS’s own regulatory guidelines, which require the

1 NMFS to consider environmental conditions in setting catch limits. To begin, MSY is itself
 2 defined as “the largest long-term average catch or yield that can be taken from a stock or stock
 3 complex under prevailing ecological, environmental conditions and fishery technological
 4 characteristics.” 50 C.F.R. § 600.310(e)(1)(i)(A). Elsewhere, the governing guidelines recognize
 5 that management measures consider and address environmental changes. For example, the
 6 regulations state that “Councils should consider the management objectives of their FMPs and
 7 their management framework to determine the relevant social, economic, and ecological factors
 8 used to determine [optimum yield].” *Id.* § 600.310(e)(3)(iii)(B). In giving examples of ecological
 9 factors that should be considered, the regulations explicitly recognize that “ecological or
 10 environmental conditions that stress marine organisms or their habitat, such as natural and
 11 manmade changes,” are “[a]lso important.” *Id.* § 600.310(e)(3)(iii)(B)(3). In sum, to simply state
 12 that anchovy abundance is largely driven by environmental conditions does not absolve the NMFS
 13 from its responsibility to take those environmental conditions into account when setting the OFL,
 14 ABC, and ACL.

15 Moreover, the need to account for environmental conditions alongside fishing is all the
 16 more salient because evidence indicates that fishing can exacerbate natural declines in the anchovy
 17 population. Defendants repeatedly cite to a 2018 study authored by Sam McClatchie of the
 18 NOAA Fisheries Service, Southwest Fisheries Science Center, Fisheries Resources Division, and
 19 others. AR 348:17975–17977 (S. McClatchie, R.D. Vetter, and I.L. Hendy, *Forage fish, small
 20 pelagic fisheries and recovering predators: managing expectations*, 21 *Animal Conservation* 445–
 21 47 (2018)); *see* Government MSJ at 14, 21 (citing McClatchie (2018)); Government Reply at 7
 22 (same). Defendants rely on McClatchie (2018) for its statement that “it is well documented that
 23 forage fish populations collapse repeatedly and these collapses are a common feature of sardine
 24 and anchovy population dynamics, even in the absence of commercial fishing.” AR 348:17976.
 25 However, McClatchie (2018) also notes that “it is recognized that fishing pressure on pelagic
 26 forage fish [such as anchovy] can increase the probability, and even the rate of stock collapse.” *Id.*

27 Other evidence confirms this finding. For example, an October 2018 letter from Dr. Simon

1 Dedman of the Farallon Institute that was sent to the Pacific Council noted that “[t]he high
2 efficiency of commercial fishing has scope to combine catastrophically with anchovy’s habit of
3 pooling in high densities inshore when their total abundance is low, such that an inappropriately
4 high ACL could presage a population crash.” AR 366:18233 (quoting multiple studies). Indeed, a
5 peer-reviewed 2015 study analyzing “small pelagic fish, such as herrings, anchovies, and
6 sardines,” noted that fishing can “exacerbate naturally caused collapses, because shifts in
7 populations’ spatial distributions coupled with fish schooling behavior allows fisheries to be
8 economically viable even when abundance is low.” AR 282:16523 (Timothy E. Essington et al.,
9 *Fishing amplifies forage fish population collapses* (2015)).

10 Defendants attempt to discredit this 2015 peer-reviewed study because the study analyzed
11 fishing populations that were subject to high levels of fishing—sometimes in excess of 60% of
12 biomass. *See id.* at 16525. What Defendants fail to recognize, however, is that in the years when
13 the anchovy population drastically declines—such as when the anchovy population declined 90%
14 from 2005 to 2007—fishing could reach similar levels as a proportion of total biomass. Indeed, as
15 noted previously, MacCall (2016) and Thayer *et al.* (2017) noted that from 2009 to 2014, the
16 anchovy population crashed and stayed below 20,000 mt for a prolonged period. Fishing at levels
17 permissible under the 2019 Catch Rule—specifically, the ACL of 23,573 mt—would have
18 resulted in high levels of fishing—the type which the aforementioned study noted could
19 “exacerbate naturally caused collapses.” AR 282:16523.

20 Accordingly, the NMFS was required to consider the substantial evidence in the record
21 indicating that fishing could exacerbate population fluctuations and declines, even if the
22 population fluctuations were largely driven by environmental factors.

23 In sum, it was arbitrary and capricious for the NMFS to set static OFL, ABC, and ACL
24 values for an indefinite period of time because the evidence did not demonstrate that those limits
25 would prevent overfishing. Instead, evidence demonstrated that anchovy abundance is known to
26 drop below the limits set in the 2019 Catch Rule and that the 75% buffer between the OFL and the
27 ABC and ACL does not account for drastic anchovy population variability. As a result, the NMFS

1 has “offered an explanation for its decision that runs counter to evidence before the agency.” *Pac.*
2 *Dawn*, 831 F.3d at 1173.

3 Accordingly, the Court GRANTS Plaintiff’s motion for summary judgment and DENIES
4 Intervenor-Defendants’ and Government Defendants’ cross-motions for summary judgment with
5 respect to Plaintiff’s challenge to the 2019 Catch Rule.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court GRANTS Intervenor-Defendants’ and Government
8 Defendants’ cross-motions for summary judgment and DENIES Plaintiff’s motion for summary
9 judgment with respect to Plaintiff’s direct challenge to Amendment 13 to the CPS FMP. The
10 Court GRANTS Plaintiff’s motion for summary judgment and DENIES Intervenor-Defendants’
11 and Government Defendants’ cross-motions for summary judgment with respect to Plaintiff’s
12 challenge to the 2019 Catch Rule.

13 The Court therefore VACATES the 2019 Catch Rule and remands the 2019 Catch Rule for
14 further action consistent with this order. The Court declines Plaintiff’s invitation to “require” the
15 NMFS to “issue a new catch rule [that] ensure[s] . . . annual limits are adjusted annually.”
16 Plaintiff’s Reply at 38. The Court will not dictate the substance of any new catch rule on remand.
17 *Asarco*, 616 F.2d at 1160 (“If the court determines that the agency’s course of inquiry was
18 insufficient or inadequate, it should remand the matter to the agency for further consideration and
19 not compensate for the agency’s dereliction by undertaking its own inquiry into the merits.”).

20 Defendants shall promulgate a new rule in compliance with the Magnuson-Stevens Act
21 and the APA within 120 days of the Court’s instant order. The Court also orders the parties to
22 meet and confer to propose a schedule compliant with 16 U.S.C. § 1855(d) and the APA. The
23 parties shall file a joint statement that does not exceed eight pages and that proposes such a
24 schedule by September 11, 2020. The parties shall also identify any areas of agreement or
25 disagreement. For areas of disagreement, the parties shall provide a brief justification for their
26 separate proposals.

27 **IT IS SO ORDERED.**

1 Dated: September 2, 2020

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

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