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10 **THE UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 OCEANA, INC.,

13 *Plaintiff,*

14 v.

15 WILBUR ROSS, in his official capacity as
16 Secretary of Commerce; NATIONAL
17 OCEANIC AND ATMOSPHERIC
18 ADMINISTRATION; and NATIONAL
MARINE FISHERIES SERVICE,

19 *Defendants,*

20 CALIFORNIA WETFISH PRODUCERS
ASSOCIATION and MONTEREY FISH
21 COMPANY, INC.,

22 *Intervenor-Defendants.*

Case No. 19-cv-03809-LHK

**PLAINTIFF’S MOTION TO COMPEL
COMPLIANCE**

Date: June 3, 2021
Time: 1:30 p.m.
Location: Courtroom 8 – 4th Floor
Judge: Hon. Lucy H. Koh

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NOTICE OF MOTION TO COMPEL COMPLIANCE

1
2 Please take notice that the following Motion to Compel Compliance will be heard by the
3 Honorable Lucy H. Koh of the United States District Court for the Northern District of
4 California on June 3, 2021, at 1:30 p.m. in Courtroom 8, 4th Floor of the Robert F. Peckham
5 Federal Building, 280 South 1st Street, San Jose, California. To the extent that it would foster
6 efficient and earlier resolution of the motion, Plaintiff respectfully requests that the Court
7 resolve this motion on the papers without an oral hearing.

8 Plaintiff Oceana moves to find Defendants in contempt and compel Defendants'
9 compliance with the Court's September 2, 2020 Order and Judgment granting summary
10 judgment to Plaintiff and vacating and remanding the National Marine Fisheries Service's
11 ("NMFS") 2019 Catch Rule. This motion is based upon the Court's previous Orders and
12 Judgment, the pleadings and administrative record on file in this case, the points and authorities
13 herein, and the declaration of Andrea A. Treece submitted herewith.

MOTION TO COMPEL COMPLIANCE

14
15 On September 2, 2020, this Court held that NMFS's 2019 Catch Rule for the central
16 subpopulation of northern anchovy, including the annual catch limit ("ACL") it established as
17 well as the inflated, unchanging values for the overfishing limit ("OFL") and acceptable
18 biological catch ("ABC") on which the ACL was based, violated the Magnuson-Stevens Fishery
19 Conservation and Management Act and the Administrative Procedure Act ("APA"). ECF 77,
20 *Oceana, Inc. v. Ross*, No. 19-CV-03809-LHK, 2020 WL 5232566 (N.D. Cal. Sept. 2, 2020)
21 ("Order"). The Court vacated the 2019 Catch Rule and ordered NMFS to promulgate a new
22 rule that complies with the law and its Order within 120 days. NMFS, however, spent the next
23 several months resisting compliance with the Court's directions rather than complying with this
24 Order. The agency repeatedly tried to unilaterally extend the Court's deadline for a new rule,
25 slow-walked issuance of the proposed rule, and set a truncated 2-week comment period on the
26 proposed rule that encompassed the Thanksgiving holiday and stifled public participation. The
27 Court denied the agency's final eleventh-hour motion to extend its deadline on December 28,
28

1 2020, ECF No. 86, and NMFS issued the 2020 Catch Rule on December 31, 2020.

2 NMFS's 2020 Catch Rule violates the Court's clear holdings that studies by MacCall
3 (2016) and Thayer *et al.* (2017) constitute the best available science regarding low anchovy
4 abundance in 2009–2015 and overall anchovy population fluctuations; that NMFS's application
5 of the formulas in the Coastal Pelagic Species Fisheries Management Plan ("CPS FMP") to
6 anchovy and refusal to limit the effective period of unchanging catch limits fail to prevent
7 overfishing of this drastically fluctuating population; and that NMFS may not set catch limits
8 based on data selected solely from years in which the population was increasing. All in all,
9 NMFS's new rule openly violates the Court's directive that the agency promulgate a new rule
10 consistent with the Court's Order and the requirements of the law. Oceana must again turn to
11 this Court to remedy the agency's willful failure to do what the law so plainly requires. Oceana
12 respectfully requests that the Court find the agency in contempt of the September 2, 2020 Order,
13 direct NMFS to withdraw the illegal 2020 Catch Rule, and issue a proposed rule that corrects
14 the flawed OFL, ABC, and ACL for the central subpopulation of northern anchovy consistent
15 with the Order within 60 days and to adopt a final rule that complies with the Magnuson-
16 Stevens Act no later than 120 days after the Court's decision on this motion.

17 INTRODUCTION

18 Oceana finds itself before the Court yet again because the National Marine Fisheries
19 Service does not seem to understand or accept that the Court's "orders" are just that—
20 mandatory directives, not mere suggestions. For the second time in three years, the Court
21 issued a clear, specific order detailing the ways in which NMFS's management of anchovy
22 violates the law. For the second time in three years, Oceana is forced to bring a motion to
23 compel compliance with the Court's clear and specific order. Enough is enough.

24 During the course of litigation over the 2016 Catch Rule and 2019 Catch Rule, NMFS
25 has displayed consistent disregard for the Court's orders, its time, and its resources. The agency
26 has feigned misunderstanding of the Court's holdings, delayed complying with them, and
27 attempted to cut the public off from its right to participate in decisions about the conservation of
28 a resource that is critical to the West Coast marine ecosystem. With the 2020 Catch Rule,

1 NMFS has moved from apparent disregard for the Court’s orders and its basic legal duties to
 2 open contempt. In response to the Court’s September 2, 2020 Summary Judgment Order
 3 directing NMFS to correct specific, plain violations of the Magnuson-Stevens Fishery
 4 Conservation and Management Act and Administrative Procedure Act, NMFS published a
 5 notice telling the public that the Court’s holdings are wrong and adopting a rule that is virtually
 6 identical in substance, approach, and rationale to the one the Court vacated just a few months
 7 ago. NMFS’s actions make clear that the agency will not halt this nauseating carousel ride of
 8 illegal rules unless the Court pulls the plug. Oceana respectfully requests that the Court find
 9 that NMFS’s 2020 Catch Rule violates its clear and specific Order, vacate the 2020 Catch Rule,
 10 and order NMFS to promulgate a new rule within 120 days that corrects each of the errors the
 11 Court has identified. To put an end to NMFS’s insistence on following unlawful management
 12 framework dictated by the Coastal Pelagic Species Fishery Management Plan instead of
 13 following the law, Oceana further requests that the Court order NMFS to amend CPS FMP to
 14 correct each of the errors the Court has identified in the management framework it applies to
 15 anchovy.¹

16 ARGUMENT

17 **I. The Court Has Inherent Authority to Enforce Its Own Orders, Including through Contempt**

18 As this Court already held, it has broad inherent authority to enforce the orders it issues.
 19 *See Oceana, Inc. v. Ross I*, 359 F. Supp. 3d 821, 826 (N.D. Cal. 2019) (discussing cases). “A
 20 primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct
 21 which abuses the judicial process.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991). *See*
 22

23 ¹ Because the Magnuson-Stevens Act requires plaintiffs to file challenges to final rules within
 24 30 days, Oceana is contemporaneously filing a separate complaint challenging the 2020 Catch
 25 Rule. As with its challenge to the 2019 Catch Rule, Oceana will file an administrative motion
 26 to relate that case to this pending litigation as it satisfies the criteria outlined in Civ. L.R. 3-
 27 12(a). *See Oceana v. Ross I*, No. 16-CV-06784-LHK, ECF No. 91 (motion) and ECF No. 95
 28 (Order Granting Plaintiff’s motion). While this motion and the complaint both seek similar
 relief, finding NMFS in contempt of this Court’s Order would conserve both the Court’s and the
 parties’ resources and obviate the need to conduct yet another round of full summary judgment
 briefing on the legality of the 2020 Catch Rule in that related litigation.

1 *also id. at 42–44* (reciting courts’ broad inherent powers, including contempt, necessary to
2 ensure “submission to their lawful mandates” and to punish “disobedience to the orders of the
3 Judiciary” (citations omitted)); *United States v. Baroid Corp.*, 346 F. Supp. 2d 138, 142 (D.D.C.
4 2004) (“There is ‘no doubt’ that federal courts have continuing jurisdiction to protect and
5 enforce their judgments[.]”) (citations omitted). This includes the power “to set enforceable
6 deadlines both of an ultimate and an intermediate nature,” *Sierra Club v. Johnson*, 444 F. Supp.
7 2d 46, 52 (D.D.C. 2006) (*quoting Nat. Res. Def. Council v. Train*, 510 F.2d 692, 705 (D.C. Cir.
8 1974)), and extends, if necessary, to holding violators in contempt. *See Shillitani v. United*
9 *States*, 384 U.S. 364, 370 (1966) (“There can be no question that courts have inherent power to
10 enforce compliance with their lawful orders through civil contempt.”).

11 To demonstrate that an agency is in contempt, a “plaintiff must present clear and
12 convincing evidence of non-compliance with a specific and definite order of the Court.” *Forest*
13 *Serv. Emp. For Env’t Ethics v. U.S. Forest Serv.*, 530 F. Supp. 2d 1126, 1129 (D. Mont. 2008).
14 After that demonstration, the “burden then shifts to the contemnors to demonstrate why they
15 were unable to comply.” *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999)
16 (citation omitted). In determining whether a party has violated an order, “the focus ‘is not on
17 the subjective beliefs or intent of the contemnors in complying with the order, but whether in
18 fact their conduct complied with the order at issue.’” *In re Dyer*, 322 F.3d 1178, 1190–91 (9th
19 Cir. 2003) (*quoting Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)).
20 Where a party’s noncompliance amounts to “willful disobedience of a Court order,” or its
21 actions were reckless or frivolous and “tantamount to bad faith,” courts have inherent authority
22 to levy sanctions. *Barnes v. Sea Hawai’i Rafting, LLC*, 444 F. Supp. 3d 1215, 1225–27 (D.
23 Haw. 2020) (discussing cases).

24 Oceana respectfully requests that the Court exercise its inherent authority, find the
25 agency in contempt of its Order, and require the agency to issue a proposed rule that corrects the
26 flawed OFL, ABC, and ACL for the central subpopulation of northern anchovy within 60 days
27 and to adopt a final rule that complies with the Magnuson-Stevens Act not later than 120 days
28 after the Court’s decision on this motion. To ensure that NMFS does not continue to apply

1 provisions of the CPS FMP that are not based on best available science and fail to prevent
2 overfishing of anchovy, Oceana further requests that the Court order NMFS to amend the CPS
3 FMP and promulgate implementing regulations within one year of a decision on this motion.

4 **II. NMFS Has Exhibited a Pattern of Recalcitrance and Failure to Willingly Comply
with this Court's Orders**

5 Throughout the litigation over the 2016 Catch Rule and 2019 Catch Rule, NMFS has
6 demonstrated a marked unwillingness to comply with the law in general and this Court's orders
7 in particular. A brief history of NMFS's intransigence underscores the time and resources the
8 agency has wasted on resisting these orders and the harm it has done to efficient proceedings as
9 well as the interests of justice and sustainable fishery management.

10 First, during litigation over the 2016 Catch Rule administrative record, NMFS refused to
11 produce drafts of its own report on its 2015 acoustic trawl survey abundance estimate, which
12 showed the anchovy population was barely above the annual catch limit of 25,000 metric tons
13 NMFS set in its 2016 Catch Rule. NMFS initially attested that it did not "even begin work on
14 this requested estimate until Mid-October," just before it issued the 2016 Catch Rule. *Oceana,*
15 *Inc. v. Ross*, No. 16-CV-06784-LHK ("*Oceana v. Ross I*"), ECF No. 40 at 3. After the
16 Magistrate ordered NMFS to complete the record with drafts of the report (and after NMFS
17 sought to overturn that ruling), NMFS was forced to submit a second sworn declaration
18 admitting that this statement was "in error" and drafts of the report had been available and
19 received internal review starting in June 2016. *Oceana v. Ross I*, ECF No. 42 (Correction to
20 Motion for Relief) and 42-1 (Second DiNardo Declaration). The agency ultimately produced
21 the report after this Court rejected its efforts to shield it from disclosure.

22 Second, NMFS employed a series of tactics to delay and ultimately resist complying with
23 the Court's January 18, 2018 Summary Judgment Order vacating the 2016 Catch Rule, and
24 requiring NMFS to promulgate a new rule within 90 days. On February 15, 2018, NMFS filed a
25 Motion to Alter or Amend the Judgment in which it argued that the Court had not really vacated
26 the catch limits in the rule and asked the Court to "clarify" that issue. *Oceana v. Ross I*, ECF
27 No. 63. On June 13, 2018, the Court responded with an order clarifying that it had indeed
28

1 vacated those catch limits. *Oceana v. Ross I*, ECF No. 68 at 2. Nonetheless, NMFS failed to
2 take any action whatsoever in the next 90 days to develop a new catch rule. On September 21,
3 2018, Oceana filed a motion to enforce the Court’s judgment. *Oceana v. Ross I*, ECF No. 72.
4 In response, NMFS acknowledged that the anchovy fishery was operating without any catch
5 limits due to the vacatur but denied the Court had set any deadline for promulgating new ones,
6 denied it had any responsibility do so, and argued its appeal of the Court’s summary judgment
7 order, judgment, and order on the motion to alter judgment, filed August 10, 2018, deprived the
8 Court of jurisdiction to set a deadline. *Oceana v. Ross I*, ECF No. 76 at 14.

9 On January 18, 2019, the Court granted the Motion to Enforce. In its order, the Court
10 noted that NMFS had missed its 90-day deadline by 275 days, had not taken any steps towards
11 complying, and offered no valid explanation for the delay. *Oceana v. Ross I*, ECF No.79 at 9–
12 11. The Court ordered NMFS to promulgate a new rule by April 18, 2019. *Id.* at 13. The Court
13 also ordered the parties to provide a “joint status update within one month of this Order
14 explaining Defendants’ plan to comply with the Magnuson-Stevens Act and the APA and what
15 progress Defendants have made to that end.” *Id.* at 10. NMFS responded with a schedule that
16 eliminated any opportunity for public comment on the proposed rule based on its own
17 manufactured impracticability, forcing Oceana to fight for the public’s right to participate in the
18 rulemaking process. *Oceana v. Ross I*, ECF No. 81. On February 25, 2019, the Court issued an
19 Order Compelling Defendants’ Compliance. *Oceana v. Ross I*, ECF No. 82. In that Order, the
20 Court summarized NMFS’s pattern of evading compliance and warned the agency not to
21 continue it:

22 Defendants have had over thirteen months to comply with the 1/18/18 Order.
23 However, the record is devoid of any evidence of diligence on the part of the
24 Defendants to comply with the 1/18/18 Order. Instead, Defendants have required
25 Plaintiff to seek to enforce this order. ... Defendants now appear to have adopted a
26 new strategy to evade the APA’s proposed rule and public comment requirements.
27 A finding that the Defendants are acting in bad faith may be appropriate.
28 Defendants have waited over a year since the 1/18/18 Order to begin the rulemaking
process and now are seeking to use their own delay to evade full compliance with
the Court’s 1/18/19 Order and the applicable statutes. If Defendants engage in a
pattern of bad faith behavior, the Court may invite a motion for sanctions.

1 *Oceana v. Ross I*, ECF No. 82 at 5.

2 NMFS nonetheless resumed its pattern of evasion shortly after the Court vacated the
3 2019 Catch Rule and ordered the agency to promulgate a new rule within 120 days (by
4 December 31, 2020). *Oceana, Inc. v. Ross*, No. 19-CV-03809-LHK (“*Oceana v. Ross II*”),
5 2020 WL 5232566, ECF No. 77 (Sept. 2, 2020). In its Order, the Court directed the parties to
6 provide a joint statement proposing a schedule for promulgating the new rule compliant with 16
7 U.S.C. § 1855(d) and the APA. *Id.* at *20. Instead of setting forth a proposal for meeting the
8 Court’s December 31, 2020 deadline, NMFS proposed to issue a final rule by February 18,
9 2021, unilaterally adding about 49 days to the 120 days the Court gave it. *Oceana v. Ross II*,
10 ECF No. 79 at 2. *Oceana* indicated its willingness to agree to a 15-day extension of the 120-day
11 time period and requested NMFS provide a 21-day public comment period instead of the 15-day
12 period the agency suggested within its otherwise protracted schedule. *Id.* at 6–7. The Court did
13 not take action on these proposals, and thus did not alter its 120-day deadline for promulgating
14 the new rule. In an October 28, 2020 case management statement, NMFS stated that it
15 “expect[ed] to be able to submit a final rule to the Federal Register by February 11, 2021 (one
16 week earlier than the originally proposed date of February 18, 2021).” *Oceana v. Ross II*, ECF
17 No. 80 at 3. The agency indicated that it would publish a proposed rule by November 25, 2020
18 and was amenable to providing a 21-day comment period. *Id.* *Oceana* restated its opposition to
19 the excessive delay, and requested that NMFS issue the proposed rule by November 16 at the
20 latest in order to provide for review by the Council and adequate opportunity for public
21 comment. *Id.* at 5. Once again, the Court did not alter its 120-day deadline for the final rule.

22 NMFS published the proposed 2020 Catch Rule on November 18, 2020. 85 Fed. Reg.
23 73446, attached as Ex. A to the Declaration of Andrea A. Treece (“*Treece Decl.*”).² Despite its
24 earlier representation that it was willing to provide a 21-day comment period, it provided only a
25 15-day comment period on the proposed rule, part of which fell over the Thanksgiving holiday.

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² For the Court’s convenience, *Oceana* is attaching copies of the proposed 2020 Catch Rule,
Oceana’s comments on it, and the final 2020 Catch Rule.

1 As a result, the agency received only two public comments on the proposed rule—one from
2 Oceana and one from the California Wetfish Producers Association. The proposed rule was
3 remarkably similar to the 2019 Catch Rule the Court vacated and remanded: an overfishing
4 limit of 119,153 mt, acceptable biological catch of 29,788 mt, and annual catch limit of 25,000
5 mt. 85 Fed. Reg. at 73446. Similar to the 2019 Catch Rule, NMFS based these values on
6 anchovy abundance estimates from recent years with relatively high anchovy abundance (2016,
7 2017, 2018, and 2019) and omitted data from years reflecting much lower abundance (2009–
8 2015). 85 Fed. Reg. at 73450. NMFS stated that it was “considering limiting the effectiveness
9 of the ACL in this rule to 3 or 4 years.” 85 Fed. Reg. at 73452. However, NMFS also specified
10 that if it did not decide to limit the effective period, “these reference points will remain in place
11 until changed conditions necessitate revisions to the FMP framework or changes to the
12 reference points pursuant to the existing framework.” 85 Fed. Reg. at 73450.

13 On December 16, 2020, three and half months after the Court ordered it to promulgate a
14 new rule by December 31, 2020, NMFS finally decided to ask the Court for permission to delay
15 its compliance and filed a Motion for Administrative Relief to extend its deadline to January 15,
16 2021. *Oceana v. Ross II*, ECF No. 84. Oceana opposed the motion, noting that the agency had
17 created its own problem and stifled public participation by ignoring the Court’s Orders and
18 slow-walking the issuance of the rule. *Oceana v. Ross II*, ECF No. 85. The Court denied
19 NMFS’s motion on December 28, 2020. *Oceana v. Ross II*, ECF No. 86. NMFS published the
20 final 2020 Catch Rule on December 31, 2020—finally bowing to the Court’s deadline but
21 otherwise flouting the Court’s specific, substantive holdings. 85 Fed. Reg. 86855 (Dec. 31,
22 2020), attached as Ex. B to Treece Decl.

23 **III. The 2020 Catch Rule Violates This Court’s Specific and Definite Order and the** 24 **Court Should Compel NMFS to Comply with the Law**

25 The Court’s September 2, 2020 Order identified several clear errors in the 2019 Catch
26 Rule. First, the Court held that NMFS ignored the best available science on recent anchovy
27 abundance estimates and anchovy population fluctuations. The Court rejected NMFS’s
28 attempts to discredit these studies by pointing to potential sources of uncertainty or error. The

1 Court also explained that “[w]ithout any competing information to rely upon, the NMFS could
2 not have concluded that Thayer *et al.* (2017) and its estimates for 2009 to 2014 were not the
3 best scientific information available.” *Oceana v. Ross II*, 2020 WL 5232566 at *13. “Instead,
4 the Court concludes that MacCall (2016) and Thayer *et al.* (2017) constitute the best scientific
5 information available regarding recent anchovy abundance estimates and anchovy population
6 fluctuations.” *Id.* at *14.

7 Second, the Court found that the 2019 Catch Rule ignored the best available information
8 on both recent anchovy abundance levels and the fact that the anchovy population can drop by
9 as much as 90% in just two years. The Court explained,

10 [B]y averaging anchovy biomass estimates and setting unchanging OFL, ABC, and
11 ACL values for an indefinite period of time, the 2019 Catch Rule entirely fails to
12 account for drastic anchovy population fluctuations that are only documented by
13 MacCall (2016) and Thayer *et al.* (2017). The 2019 Catch Rule’s framework fails
14 to consider its effects on the anchovy population when the best scientific
15 information available establishes that the anchovy population can drop by as much
16 as 77% in a single year, 90% over two years, or even 99% over four years.

17 *Id.* at *15. *See also id.* (“the fact that the NMFS calculated unchanging OFL, ABC, and ACL
18 values for an indefinite period of time based on data from 2016 to 2018—years in which the
19 anchovy population was drastically increasing—demonstrates that the NMFS did not consider
20 the best scientific information available from MacCall (2016) and Thayer *et al.* (2017)”).

21 Third, the Court held that NMFS’s decision to set unchanging catch limits based on data
22 that do not reflect the full variability of the anchovy population fails to prevent overfishing:

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

Id. at *19 (citation omitted). *See also id.* at *16 (decision to set “the OFL, ABC, and ACL
values in the 2019 Catch Rule by averaging anchovy biomass from only three years with
relatively high anchovy abundance (2016 to 2018) and ignoring data from years with low

1 anchovy abundance” was arbitrary and capricious and not based on best available science).

2 Yet, instead of promulgating a new rule to bring anchovy catch limits into compliance
3 with the Magnuson-Stevens Act and APA, consistent with the Court’s order, NMFS issued a
4 virtual carbon copy of the rule the Court vacated. Much as it did in the 2019 Catch Rule,
5 NMFS derives its 2020 catch limit values by averaging abundance estimates from the most
6 recent four years, 2016–2019, which reflect the highest abundance levels the population has
7 seen in nearly 15 years. 85 Fed. Reg. at 86860–61. These estimates include three derived from
8 its acoustic trawl survey for 2016 (151,558 metric tons), 2018 (723,826 metric tons), and 2019
9 (810,634 metric tons) and one estimate derived from its “daily egg production method” survey
10 for 2017 (308,173 metric tons). *Id.* The agency calculates the overfishing limit of 119,153
11 metric tons by averaging these four abundance estimates to arrive at a value of 498,548 metric
12 tons and multiplying that average by an estimate of the rate of fishing mortality for anchovy at
13 maximum sustainable yield (0.239). *Id.* Just as it did in the 2016 Catch Rule and 2019 Catch
14 Rule, NMFS calculates the acceptable biological catch of 29,788 metric tons by reducing the
15 overfishing limit by 75%, as provided by the framework in the CPS FMP. 85 Fed. Reg. at
16 86861. NMFS set the annual catch limit at 25,000 metric tons because this was the maximum
17 ACL that previous environmental analyses had considered. *Id.* As it did in the 2019 Catch
18 Rule, the agency declined to set any expiration date for the 2020 Catch Rule. *Id.* Instead, it
19 stated its “intent” to work with the Pacific Fishery Management Council to replace the catch
20 limits “sometime within the next two years,” while also asserting “NMFS cannot require the
21 Council to take action” and “a subsequent rule may not necessarily result in reference points
22 that are different from those being implemented in this final rule.” *Id.*

23 In justifying this approach, NMFS again (1) refuses to use information on recent anchovy
24 abundance and population fluctuations from MacCall (2016) and Thayer *et al.* (2017); (2) sets
25 unchanging catch limits for an indefinite period of time; (3) bases those limits on only recent
26 years of data reflecting high anchovy abundance and ignores data from earlier years with much
27 lower abundance; and (4) assumes that the approximately 75% buffer between the OFL and
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1 ACL will prevent overfishing despite the best available science showing anchovy can drop by
2 up to 90% in just two years.

3 Instead of applying the Court’s holding that MacCall (2016) and Thayer *et al.* (2017)
4 constitute the best available science on recent anchovy abundance and anchovy population
5 fluctuations, NMFS attempts to refute it. Notably, NMFS does not offer new, competing data or
6 abundance estimates. Instead, it invents a new reason to rely on its own, 25-year-old data to the
7 exclusion of all competing, more recent data. NMFS’s argument suffers from at least two fatal
8 flaws. First, it is irrelevant—absent a different result on appeal, the agency is bound by the
9 Court’s holding. The law of the case doctrine “generally preclude[s] [courts] from
10 reconsidering an issue previously decided by the same court, or a higher court in the identical
11 case.” *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). “For
12 the doctrine to apply, the issue in question must have been ‘decided explicitly or by necessary
13 implication in [the] previous disposition.’” *United States v. Lummi Indian Tribe*, 235 F.3d 443,
14 452 (9th Cir. 2000) (citing *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir.1982)).
15 In its Order, this Court—after a full and fair opportunity for all parties to present facts and
16 arguments on this identical issue—expressly held that MacCall (2016) and Thayer *et al.* (2017)
17 constitute the best available science on anchovy abundance and population fluctuations.
18 *Oceana v. Ross II*, 2020 WL 5232566 at *14. There can be no legitimate dispute that this
19 determination was an explicit and necessary part of the Court’s ruling. While NMFS may
20 disagree with that conclusion, that disagreement is based on interpretation of evidence that was
21 available to it in the prior rulemaking and in the prior litigation, not on any new intervening
22 facts or information. *See, e.g.*, 85 Fed. Reg. at 86857-58 (explaining NMFS’s similar
23 consideration of the same evidence for the 2019 Catch Rule). This is now NMFS’s third
24 examination of this same science and its third attempt to discredit it; exactly the kind of endless
25 and wasteful loop that preclusive doctrines are intended to prevent. *Milgard Tempering, Inc.*,
26 902 F.2d at 715 (explaining that the “law of the case doctrine is a judicial invention designed to
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1 aid in the efficient operation of court affairs.”).³

2 Second, like the arguments the Court has already rebuffed, NMFS’s latest objection to
3 the best available science runs counter to the evidence before the agency—including
4 conclusions in the record by NMFS’s own scientists. In the new rule, NMFS attempts to argue
5 with the Court’s holding that the MacCall (2016) and Thayer *et al.* (2017) estimates are the
6 “best scientific information available” for recent abundance estimates and for understanding the
7 magnitude of population fluctuations by pointing to differences between these estimates and
8 NMFS’s own estimates for earlier decades. NMFS states that abundance estimates it produced
9 in its 1995 stock assessment for 1961–1994 showed less dramatic fluctuation in anchovy
10 numbers than the estimates Thayer *et al.* (2017) and MacCall (2016) produced for the same
11 years. NMFS argues that the 1995 estimates “had been” determined to be best available science
12 and that the differences between these 25-year-old estimates and MacCall and Thayer estimates
13 justify ignoring the latter data sets. 85 Fed. Reg. at 86858, 86860. What the agency does not
14 disclose is that NMFS’s own scientists found that the stock assessment values NMFS seeks to
15 rely on suffer from a fundamental error, not those of MacCall (2016) or Thayer *et al.* (2017). In
16 a 2016 report that is part of the record for the 2019 Catch Rule, the Southwest Fisheries Science
17 Center explained:

18 The MacCall *et al.* (2016) study also identified a potential bias in previous egg
19 production estimates of anchovy abundance that used CalCOFI data. The bias is
20 caused by [the] fact that CalCOFI stations have been weighted equally and treated
21 as if they were obtained from a simple random sample in previous egg-production
22 estimates. Stations in the CalCOFI survey are fixed and spaced more closely in the
near shore portion of the sampling grid than they are offshore. This creates a
“hyperstability” bias because anchovy tend to occur at greater densities near shore.

23 ³ Even in new litigation between the parties, “a right, question, or fact distinctly put in issue,
24 and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be
25 disputed in a subsequent suit between the same parties or their privies.” *S. Pac. R. Co. v. United*
States, 168 U.S. 1, 48–49 (1897). This related doctrine of issue preclusion forecloses
26 relitigation of “issues of fact or law that were actually litigated and necessarily decided by a
27 valid and final judgment between the parties, whether on the same or a different claim.” *Segal*
v. Am. Tel. & Tel. Co., Inc., 606 F.2d 842, 844–845 (9th Cir. 1979). The doctrine “reflects the
28 fundamental principle that courts should not revisit factual matters that a party previously
litigated and another court actually decided.” *Miller v. Nichols*, 586 F.3d 53, 60 (1st Cir. 2009)
 (“Issue preclusion (citing Wright, Miller & Cooper.)

1 Previous studies may have overestimated anchovy abundance when the population
2 size was small and underestimated the population size when it was large.

3 *Oceana v. Ross II*, AR 412:0019264. In other words, NMFS’s own scientists found that the
4 older abundance estimates NMFS seeks to rely on *underrepresented* the fluctuations in anchovy
5 abundance.

6 Oceana explained this point in its comments on the proposed rule (Treece Decl., Ex. C),
7 but NMFS fails to acknowledge, let alone grapple with these infirmities. The agency again fails
8 to offer any alternative data for recent years in which the anchovy population plummeted to
9 historic lows, or any better data on the magnitude of anchovy populations over the long-term.⁴

10 Moreover, NMFS’s entire approach to setting catch limits in the 2020 Catch Rule rests on
11 its rejection of best available science. The agency relies on its assertion that the MacCall and
12 Thayer estimates are, despite the Court’s holding, “not the best scientific information available
13 on the historical annual biomass estimates of anchovy in any given year to be used for
14 management” to justify repeating each of the errors the Court identified. 85 Fed. Reg. at 86860.

15 In sum, having woven a new excuse to ignore scientific reality, NMFS openly rejects the
16 Court’s findings that setting unchanging catch limits over an indefinite period, based on data
17 that reflect only recent, high abundance years, fails to prevent overfishing. The agency does not
18 even feign enough respect for the Court’s holdings to try to come up with a reasoned retort.
19 The agency simply repeats its familiar mantra that, notwithstanding the Court’s holdings to the
20 contrary, “NMFS has determined that the OFL, in combination with the ABC and ACL
21 finalized in this rule, are sufficient to prevent overfishing over the long term and are based on
22 the best scientific information available.” 85 Fed. Reg. at 86861.

24 ⁴ Beyond this spurious new twist on NMFS’s old argument, NMFS merely reiterates the same
25 criticisms it lodged against the MacCall and Thayer estimates during litigation. Namely, NMFS
26 “reexamined” critiques of MacCall (2016) and cited evidence that the number of anchovy
27 fishermen caught in 2013 exceeded the Thayer *et al.* (2017) abundance estimate that year. 85
28 Fed. Reg. 86859. The Court already examined these arguments and found they failed to
discredit these studies. *Oceana v. Ross I*, 2018 WL 1989575 at *11–13 (N.D. Cal. Jan. 18,
2018); *Oceana v. Ross II*, 2020 WL 5232566 at *13.

1 Indeed, instead of taking action consistent with the Court’s Order and bringing itself into
2 compliance with the law, NMFS uses the 2020 Catch Rule to dispute the Court’s holdings.
3 While NMFS condescendingly states that it “reexamined” the MacCall and Thayer estimates
4 “out of a desire to be deferential to the Court’s decision,” 85 Fed. Reg. at 86862, the agency’s
5 discussion demonstrates more defiance than deference. NMFS uses its so-called reexamination
6 of data to justify flouting the Court’s conclusion that these studies constitute the best available
7 science. The agency openly states that, “even if NMFS were to consider that information as
8 best scientific information available, it would not change NMFS’ determination” that relying on
9 the most recent four years of anchovy data and applying the CPS FMP’s 75% buffer between
10 the OFL and ABC “result in reference points that are consistent with the dual mandates of
11 National Standard 1.” 85 Fed. Reg. at 86861. *See also, e.g.*, 85 Fed. Reg. at 86859 (“NMFS
12 originally raised the point of the revised 2015 estimate to the Court because it changed the
13 narrative of how low the stock may have has been, and for how long, and the importance of
14 having accurate estimates, not, as the Court suggested, because it made other estimates
15 unreliable.”). In other words, NMFS simply isn’t convinced by the Court’s orders that it needs
16 to change its approach to anchovy management. What NMFS fails to grasp is that the Court
17 already carefully considered NMFS’s objections, found them baseless, found its approach
18 unlawful, and *ordered* NMFS to correct the flaws the Court identified. It is not the Court’s
19 responsibility to continually convince the agency to comply with its orders; it is NMFS’s duty
20 to comply with them.

21 NMFS even goes so far as to blame the Court for its carbon-copy approach to
22 rulemaking. *See e.g.*, 85 Fed. Reg. at 86860 (“with such limited time available to develop and
23 analyze more complex approaches ... the most appropriate path ... is to use the same method as
24 in the 2019 Rule....”); *id.* at 86861 (complaining that “under the timelines the Court imposed
25 promulgating both this rule and the 2019 Rule it replaced, it was not possible to thoroughly
26 engage the Council”); *id.* (complaining of the “compressed timelines under which NMFS had to
27 promulgate” the 2019 and 2020 rules). NMFS even suggests that it is Oceana’s responsibility to
28 convince the Pacific Fishery Management Council to fix the errors in the CPS FMP so that

1 NMFS will stop repeating them. 85 Fed. Reg. at 86862 (“NMFS encourages Oceana and
2 Earthjustice to continue bringing concerns over the central anchovy management framework to
3 the Council.”). In point of fact, Oceana has repeatedly brought these concerns before NMFS
4 and the Council for nearly a decade and secured two Court orders directing NMFS to address
5 them. NMFS’s incessant attempts to lay responsibility at the feet of the Court, the Council, and
6 Oceana represent an utter abdication of its responsibility to ensure that its rules and the CPS
7 FMP those rules implement comply with the Magnuson-Stevens Act and all other applicable
8 law.

9 It is difficult to conceive of a more direct conflict between a clear and specific order of
10 the court and the agency’s action to support a finding of contempt. In *Forest Serv. Emp. For*
11 *Env’t. Ethics v. U.S. Forest Serv.*, 530 F. Supp. 2d at 1129, the court found the record supported
12 a finding of contempt where the court’s previous order broadly “required the Forest Service
13 to comply with NEPA.” Here, the Court’s order was far more specific, making specific legal
14 determinations and directing NMFS to produce a new rule “consistent with the order” and “in
15 compliance with the Magnuson-Stevens Act and the APA.” *Oceana v. Ross II*, 2020 WL
16 5232566 at *19–20. NMFS instead produced a rule that openly flouts that Order and denies the
17 Court’s legal findings. The district court in *Forest Serv. Emp. For Env’t Ethics* considered a
18 similar multi-year pattern of delay and recalcitrance (although over an even shorter period of
19 time), and observed that the agency had “throughout these proceedings, evidenced a strategy of
20 circumventing, rather than complying with” the law, a pattern which the court concluded
21 “suggests a strategy of looking for ways to avoid the law’s mandate as opposed to looking for a
22 means of complying with the law.” 530 F. Supp. 2d at 1127. This Court made similar
23 observations when NMFS dragged its heels in issuing the 2019 Catch Rule and attempted to use
24 its own “manufactured alleged impracticality” as a basis to avoid compliance with the law.
25 *Oceana I*, ECF 82 at 4; *see also id.* at 5 (“Defendants now appear to have adopted a new
26 strategy to evade the APA’s proposed rule and public comment requirements. A finding that the
27 Defendants are acting in bad faith may be appropriate.”). NMFS’s deliberate decision to once
28 again peddle the same justifications to reject the best available science and use the same

1 approach the Court held unlawful in the 2020 Catch Rule underscores that NMFS simply will
2 not comply with the law absent relief from this Court.

3 **IV. The Appeal Does Not Affect the Court’s Jurisdiction**

4 The agency’s appeal of the merits decision does not absolve it from its duty to comply
5 with the Order. The “general rule” that a district court loses jurisdiction after a notice of appeal
6 has been filed is narrow; it “refers discretely to a loss of jurisdiction over those aspects of the
7 case involved in the appeal, and is a ‘judge-made doctrine designed to avoid the confusion and
8 waste of time that might flow from putting the same issues before two courts at the same time.’”
9 *Cal. Dep’t. of Toxic Substances Control v. Com. Realty Projects, Inc.*, 309 F.3d 1113, 1120–21
10 (9th Cir. 2002) (citation omitted). “The divestment rule, therefore, is a rule of judicial economy
11 and not one that strips the district court of subject matter jurisdiction.” *Id.* at 1121. The rule
12 exists to ensure that two courts are not addressing the same issues at the same time. *Nat. Res.*
13 *Def. Council, Inc. v. S.W. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001).

14 That is why, even after an appeal is filed, district courts retain jurisdiction to enforce their
15 orders where doing so would “not materially alter the status of the ... appeal” and would leave
16 “unchanged the core questions before the appellate panel.” *Id.* at 1167. *See also Lara v. Sec’y*
17 *of Interior*, 820 F.2d 1535, 1543 (9th Cir.1987) (“The district court may issue orders pending
18 appeal to enforce its judgment.”). *See also Oceana v. Ross I*, 359 F. Supp. 3d at 829–31
19 (summarizing cases and concluding that *Oceana*’s previous motion to enforce did “not
20 materially alter the status of the case on appeal or alter any substantial rights of the parties”
21 because it merely asked the Court to enforce its “orders and judgment as they are”).

22 This motion to enforce does not implicate any of the issues before the Ninth Circuit.
23 First, it involves a distinct agency action—the 2020 Catch Rule—that is not at issue in the
24 appeal. Whether this new action complies with the Court’s previous Order does not require the
25 Court to reconsider, modify, or in any way alter the Order. “Where the court supervises a
26 continuing course of conduct and where as new facts develop additional supervisory action by
27 the court is required, an appeal from the supervisory order does not divest the district court of
28 jurisdiction to continue its supervision, even though in the course of that supervision the court

1 acts upon or modifies the order from which the appeal is taken.”). *Hoffman v. Beer Drivers*
 2 *Salesmen’s Local No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976).⁵ Indeed, just like a ruling
 3 issued on summary judgment in the contemporaneous related challenge to the 2020 Catch Rule,
 4 the Court could grant this motion and the appeal of the 2019 Catch Rule could continue. While
 5 Oceana would of course prefer that NMFS focus its resources on fixing the longstanding
 6 underlying problems with anchovy management rather than continuing with its appeal,
 7 determining the validity of the 2020 Catch Rule does not interfere with the agency’s ability to
 8 make that decision.

9 REMEDY

10 To remedy NMFS’s continued pattern of legal violations, Oceana requests that the Court
 11 find NMFS in contempt, vacate 2020 Catch Rule and order NMFS to produce a new rule that
 12 complies with each and every holding of the Court’s Order, including the following:

- 13 a. To prevent NMFS from dismissing “the best scientific information available
 14 regarding recent anchovy abundance estimates and anchovy population
 15 fluctuations,” order that NMFS must use the information presented in MacCall
 16 (2016) and Thayer *et al.* (2017) as part of its analysis and establishment of a new
 17 OFL, ABC, and ACL, unless the agency offers *new*, superior data on anchovy
 18 abundance and population fluctuations covering the same years. *See Oceana v.*
 19 *Ross II*, 2020 WL 5232566 at *14, 16.
- 20 b. To prevent NMFS from setting catch limits that remain in effect for an indefinite
 21 number of years, order that NMFS must specify the time period for which the
 22 catch limits will remain in effect and require promulgation of new catch limits
 23 when they expire. *See Oceana v. Ross II*, 2020 WL 5232566 at *19.

24 ⁵ The Court’s Order is controlling and valid unless and until the agency either obtains a stay or
 25 prevails on appeal. NMFS has done neither. “If a person to whom a court directs an order
 26 believes that order is incorrect, the remedy is to appeal, but, absent a stay, he must comply
 27 promptly with the order pending appeal.” *Maness v. Meyers*, 419 U.S. 449, 458 (1975). *See*
 28 *also Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) (“If EPA disagrees with this
 court’s interpretation of the Clean Air Act, it should seek rehearing *en banc* or file a petition for
 a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and
 interpreted by this court.”). NMFS did not—and at this late date, cannot—seek a stay and, as of
 the date of this filing, has not yet decided whether it will even continue with its appeal. Unless
 and until the Ninth Circuit rules otherwise, NMFS must comply with the Order and this Court
 can enforce it.

- 1 c. To ensure that NMFS prevents overfishing in years with low anchovy abundance,
2 order that NMFS must demonstrate based on current, best available data that the
3 OFL, ABC, and ACL will prevent overfishing during all years for which the catch
4 limits are to remain in effect, taking into account the best available science
5 showing that anchovy can drop by 90% in two years and 99% in four years rather
6 than rely on the CPS FMP's 75% buffer between OFL and ABC/ACL to prevent
7 overfishing. *Oceana v. Ross II*, 2020 WL 5232566 at *15.
- 8 d. To prevent NMFS from relying on average anchovy biomass from only years with
9 relatively high anchovy abundance and ignoring data from years with low
10 anchovy abundance, order NMFS to demonstrate and ensure that abundance
11 numbers used to set catch limits reflect the capacity of the population to fluctuate
12 over short time periods, as demonstrated by the best available science. *Oceana v.*
13 *Ross II*, 2020 WL 5232566 at *15–16.

14 Oceana respectfully requests that the Court order NMFS to produce a proposed rule
15 within 60 days of a ruling on this motion, provide 30 days for public comment, and issue a final
16 rule that complies with the statute and the Court's order no later than 120 days of a ruling on
17 this motion.

18 While Oceana recognizes that the Court did not explicitly rule that the CPS FMP itself
19 violated the law, it made clear that the “monitored” stock framework in the CPS FMP that
20 NMFS has once again relied on to set the limits in the 2020 Catch Rule cannot be lawfully
21 applied to anchovy. Specifically, the Court held that setting unchanging multi-year ACL, based
22 on a formulaic 75% reduction from the OFL cannot apply the best available science on anchovy
23 population fluctuations and cannot prevent overfishing as required by the Magnuson-Stevens
24 Act. *See supra* at 9–10. Yet, in the 2020 Catch Rule, NMFS continues to insist that it is
25 *required* by the CPS FMP to set a multi-year ACL, derived according to the formula in the
26 FMP. 85 Fed. Reg. at 86857 (“NMFS also determined that a new OFL and ABC that
27 significantly deviated from the management approach set in the CPS FMP for stocks in the
28 monitored category would not be in accordance with the CPS FMP”). *See also* 84 Fed. Reg.
13858, 13859–60 (Apr. 8, 2019) (2019 proposed rule characterizing “the management approach
set in the FMP” as “dictat[ing] how the OFL and ABC can be set, thereby limiting the
alternatives for these values.”). The Magnuson-Stevens Act, however, requires NMFS to ensure
that FMPs, FMP amendments, and any proposed regulations implementing them comply with

1 the Act and other applicable law. 16 U.S.C. §§ 1854(a)(1), (b)(1). Even after this Court has
2 twice held that NMFS's continued application of the CPS FMP management framework to
3 anchovy violates the Magnuson-Stevens Act, neither NMFS nor the Council has amended the
4 FMP to correct that management framework, and NMFS continues to prioritize consistency
5 with the unlawful FMP framework over compliance with the law. Amending the CPS FMP is
6 essential to bring the management framework into compliance with the law and eliminate the
7 root of the conflict NMFS has manufactured and maintained between the management approach
8 in the CPS FMP and what the law requires.

9 To ensure that NMFS does not continue to rely on a management framework the Court
10 has already deemed illegal—and specifically contrary to the Magnuson-Stevens Act—in its
11 application to anchovy, Oceana respectfully requests that the Court order NMFS to amend the
12 CPS FMP and promulgate implementing regulations within one year that cure each and every
13 defect the Court identified with respect to the CPS FMP provisions as applied to the 2019 and
14 2020 Catch Rules. Specifically, these include:

- 15 a. Setting catch limits for indefinite periods of time;
- 16 b. Failing to ensure that catch limits reflect the actual, current status of the
17 anchovy population;
- 18 c. Failing to incorporate the best available science on the magnitude of anchovy
19 population fluctuations; and
- 20 d. Failing to prevent overfishing when the anchovy population drops to very low
21 levels

22 CONCLUSION

23 NMFS has made it clear that it will continue to do the same thing over and over again
24 unless this Court breaks the circuit. We ask that the Court intervene to reject NMFS's latest
25 offering and vacate the facially non-compliant 2020 Catch Rule. To ensure that NMFS meets
26 its legal duty to prevent overfishing of the anchovy population, Oceana respectfully requests
27 that the Court require NMFS to develop and publish a proposed rule establishing an OFL, ABC,
28 and ACL that prevents overfishing, is based on the best available scientific information, and

1 includes a date-certain expiration, within 60 days of the Court’s order on this motion, provide
2 30 days for public comment, and to adopt a final rule establishing values for each of these limits
3 no later than 120 days from the date of that order. Oceana further requests that this Court
4 require NMFS to amend the CPS FMP and promulgate implementing regulations that together
5 cure the defects in the existing framework and can be lawfully applied to anchovy within one
6 year of this Court’s order on this motion.

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Respectfully submitted this 29th day of January, 2021.

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