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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

OCEANA, Inc.,

Plaintiff,

v.

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

Defendants.

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) Case No.
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) **COMPLAINT FOR DECLARATORY**
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INTRODUCTION

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2 1. Above all else, the Magnuson-Stevens Fishery Conservation and Management Act
3 requires the National Marine Fisheries Service to manage federal fisheries based on the best
4 scientific information available to prevent overfishing and protect the marine ecosystem. This suit
5 challenges the Fisheries Service's continued failure to comply with these bedrock requirements in its
6 May 31, 2019 Catch Rule and the Coastal Pelagic Species Fishery Management Plan provisions that
7 rule implements. The agency's insistence on setting unchanging catch limits that do not reflect the
8 status of the anchovy population and are not subject to any regular review or adjustment fails to
9 account for the well-known "boom and bust" cycle of the central subpopulation of northern anchovy
10 (hereinafter, "anchovy") and its vital importance to the West Coast marine ecosystem.

11 2. In 2018, this Court held that the Fisheries Service, *et al.*,¹ must apply the best
12 available science and issue a new rule that prevents overfishing of anchovy. *Oceana v. Ross*, 5:16-
13 cv-06784, 2018 WL 1989575 (N.D. Cal. Jan. 18, 2018). The Court determined that the agency's
14 2016 annual catch limit, acceptable biological catch, and overfishing limit (collectively, "catch
15 limits") were unlawfully based on decades-old data about the size of the anchovy population, did not
16 bear any relationship to the actual size of that population, and thus could not prevent overfishing of
17 this population. The decision explicitly recognized that in order to prevent overfishing, catch limits
18 must be based on the size of the anchovy population. Anchovy populations naturally experience
19 rapid changes in abundance, meaning management must be responsive to the fluctuating population
20 and cannot rely on unchanging catch limits to prevent overfishing. In the new rule challenged in this
21 Complaint,² the Fisheries Service doubles down on its previous unlawful approach and attempts to
22 lock in catch limits for an indefinite period that fail to account for the fact that the anchovy
23 population undergoes frequent and rapid declines.

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26 ¹ Federal Defendants include Wilbur Ross in his official capacity as Secretary of Commerce, the
27 National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service. They
will be referred to collectively in this Complaint as "the Fisheries Service," "the Service," or "the
agency."

28 ² *Fisheries off West Coast States; Coastal Pelagic Species Fisheries; Multi-Year Harvest
Specifications for the Central Subpopulation of Northern Anchovy*, 84 Fed. Reg. 25196-25202 (May
31, 2019) ("2019 Catch Rule")

1 3. Specifically, the 2019 Catch Rule establishes values for three interrelated limits: the
2 overfishing limit, the acceptable biological catch, and the annual catch limit. Together, these three
3 provisions are supposed to prevent overfishing and ensure that enough anchovy are left in the water
4 to feed other fish and wildlife.

5 4. Despite the well-documented decline of anchovy during the past decade, and the
6 biological fact that the anchovy population fluctuates widely and sometimes rapidly, the 2019 Catch
7 Rule allows commercial fishing vessels to catch 23,573 metric tons of anchovy every year,
8 regardless of the size of the anchovy population. In other words, the new rule would allow 23,573
9 metric tons of catch regardless of whether the population rapidly declines to very small levels, was at
10 its historic average size, or was in a boom period. This unchanging catch limit ignores the agency's
11 legal duties to apply the best available science to anchovy management, and its non-discretionary
12 duty to adjust the catch limits based on best available science to prevent overfishing in the down
13 years.

14 5. The Magnuson-Stevens Act requires that the annual catch limit also account for the
15 needs of the myriad other marine predators that depend on anchovy. The best available science
16 demonstrates the intertwined fates of these predators and their prey: when anchovy populations
17 decline, predators like brown pelicans and California sea lions suffer starvation, breeding failures,
18 and death.

19 6. The Fisheries Service claims its approach to setting catch limits without looking at
20 how the anchovy population changes each year is consistent with the Coastal Pelagic Species
21 Fishery Management Plan's approach to managing anchovy and other so-called "monitored" fish
22 populations. But the agency's application of that approach here serves only to highlight that the Plan
23 itself violates the Magnuson-Stevens Act.

24 7. The Plan's "monitored stock" provisions purport to allow the agency to set all three
25 catch limits once, when the rule is issued, without requiring the agency to periodically check them
26 against new data as the stock fluctuates over time. While the Plan indicates that the agency has
27 discretion to revise the catch limits in light of new data in a new rule – and the agency itself
28 routinely collects data on anchovy abundance – the Plan does not require the agency to do so.

1 Accordingly, the Plan, like the 2019 Catch Rule that applies it, is inconsistent with the mandatory
2 Magnuson-Stevens Act duties to use the abundance information the Service collects every year to
3 update its understanding of the population status and review the catch limits to ensure that they
4 reflect the size of the population, prevent overfishing of that population, and account for the needs of
5 marine predators. Oceana challenges the Fisheries Service’s 2019 Catch Rule, and the provisions of
6 the Plan it applies, because they fail to use the best available science, will not prevent overfishing,
7 and fail to protect this vital population of anchovy at the base of the West Coast marine ecosystem’s
8 food web on an ongoing basis.

9 8. The 2019 Catch Rule and the Plan provisions it purports to implement fail to comply
10 with multiple legal requirements. First, the Fisheries Service violated the Magnuson-Stevens Act
11 and the Administrative Procedure Act (“APA”) by setting unchanging, long-term catch limits—the
12 annual catch limit, as well as the related acceptable biological catch and overfishing limit—without
13 regard for the dramatic annual fluctuations in the size of the anchovy population and without
14 explaining how they would prevent overfishing when the anchovy population declines to low levels.
15 Second, the Fisheries Service violated the Magnuson-Stevens Act and the APA by failing to
16 demonstrate how its unchanging annual catch limit accounts for the needs of marine predators when
17 the anchovy population declines. Third, the Fisheries Service violated the Magnuson-Stevens Act
18 and the APA by applying the Plan’s “monitored stock” approach to set unchanging long-term limits
19 unresponsive to the annually fluctuating anchovy population.

20 9. In the alternative, assuming that it did not violate the Magnuson-Stevens Act by
21 setting unchanging catch limits without regard to the fluctuating population size, the 2019 Catch
22 Rule is still arbitrary and capricious. The agency irrationally cherry-picked three recent years of data
23 showing high abundance and used that to set unchanging catch limits that will remain in place
24 indefinitely without any rational explanation for why it disregarded other available and reliable
25 information from low abundance years.

26 10. By committing each of these actions and omissions, the Fisheries Service failed to
27 comply with the statutory requirements of the Magnuson-Stevens Act and acted in a manner that was
28 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in violation

1 of the APA. The Fisheries Service’s actions and failures to act have harmed Oceana’s members’
2 interest in rebuilding and maintaining a healthy and sustainable population of anchovy and a healthy
3 ocean ecosystem. This harm will continue in the absence of action by the Court.

4 **JURISDICTION AND VENUE**

5 11. This action arises under the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1884, and the
6 APA, 5 U.S.C. §§ 701-706.

7 12. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act,
8 which provides that “[t]he district courts of the United States shall have exclusive jurisdiction over
9 any case or controversy arising under” the Magnuson-Stevens Act. 16 U.S.C. § 1861(d). The
10 Magnuson-Stevens Act also provides that actions taken by the Secretary of Commerce under
11 regulations implementing a fishery management plan shall be subject to judicial review “if a petition
12 for such review is filed within 30 days after the date on which the regulations are promulgated or the
13 action is published in the Federal Register, as applicable.” 16 U.S.C. § 1855(f). The Fisheries
14 Service published the 2019 Catch Rule on May 31, 2019 in the Federal Register. Oceana is filing
15 this Complaint within 30 days of publication of the 2019 Catch Rule.

16 13. This Court, further, has jurisdiction over this action pursuant to the APA, which
17 provides that final agency action is subject to judicial review. 5 U.S.C. §§ 701-706. The Fisheries
18 Service’s issuance of the 2019 Catch Rule is a “final agency action” subject to judicial review under
19 the APA.

20 14. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
21 question jurisdiction), which grants the district courts “original jurisdiction of all civil actions arising
22 under the . . . laws . . . of the United States,” and 28 U.S.C. § 1361, which grants the district courts
23 “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of
24 the United States or any agency thereof to perform a duty owed to the plaintiff.”

25 15. This Court has the authority to grant declaratory relief pursuant to the Declaratory
26 Judgment Act, 28 U.S.C. §§ 2201–02, and may also grant relief pursuant to the Magnuson-Stevens
27 Act, 16 U.S.C. §§ 1861(d) and 1855(f), as well as the APA, 5 U.S.C. § 706.

28 16. Venue is properly vested in this judicial district under 28 U.S.C. § 1391(e), because a

1 substantial part of the events and omissions which gave rise to this action occurred in this district.

2 **INTRADISTRICT ASSIGNMENT**

3 17. This action should be assigned to the San Jose Division pursuant to Civil L.R. 3-2(e)
4 because a substantial part of the events or omissions giving rise to the claim occurred in Santa Cruz
5 County and Monterey County.

6 18. This case challenges a final rule promulgated in direct response to a previous ruling
7 from U.S. District Court Judge Lucy H. Koh of the San Jose Division in, *Oceana v. Ross*, 5:16-cv-
8 06784-LHK, concerns the same parties and the same subject matter at issue in that ongoing matter,
9 and is related to that case pursuant to Civil L.R. 3-12(a).

10 **PARTIES**

11 19. Plaintiff OCEANA is a non-profit international advocacy organization dedicated to
12 protecting and restoring the world's oceans through policy, advocacy, science, law, and public
13 education. Oceana has over 850,000 members worldwide, including 117,109 members in California,
14 Oregon, and Washington. Oceana maintains an office in Monterey, California. Ensuring the
15 conservation and sound management of anchovy and other forage species, such as the species
16 managed under the Catch Rule, is a central focus of Oceana's work. Oceana devotes considerable
17 resources to studying and communicating the ecological and economic importance of sound
18 management of forage species in the California Current Ecosystem off the U.S. West Coast.

19 20. Oceana and others have urged the Pacific Fishery Management Council ("Council")
20 and the Fisheries Service to fulfill their legal obligations to sustainably manage northern anchovy.
21 For nearly a decade, Oceana and others have specifically requested that the Fisheries Service and the
22 Council consider updated abundance estimates for northern anchovy; establish a scientifically based
23 and annual catch limit, acceptable biological catch, and overfishing limit; conduct a full stock
24 assessment of northern anchovy; and develop an ecosystem-based management framework for
25 managing the stock. These requests were made in letters to the Council in June 2010, June and
26 October 2013, March and September 2014, June and October 2015, and September 2016. In
27 February 2015, Oceana submitted comments to the Fisheries Service on Amendment 14 to the
28 Coastal Pelagic Species fishery management plan, requesting that the Fisheries Service conduct an

1 updated stock assessment and develop an annual catch limit that reflects anchovy's importance to
2 marine predators in the California Current Ecosystem. Oceana commented on the Fisheries
3 Service's proposed 2016 Catch Rule in December 2015, describing the scientific evidence indicating
4 a collapse of the stock. Oceana subsequently challenged the 2016 Catch Rule, which this Court set
5 aside for violations of the Magnuson-Stevens Act and APA. Oceana continued to advocate for
6 scientifically valid management of anchovy after the Court's ruling. On April 7, 2018 and April 12,
7 2019, the Pacific Fisheries Management Council considered anchovy management. Oceana staff
8 attended both meetings and provided public comment, highlighting the importance of a new
9 overfishing limit, acceptable biological catch, and annual catch limit. Most recently, Oceana
10 commented on the proposed 2019 Catch Rule, describing the rule's failure to use the best available
11 science and prevent overfishing as well as the numerous scientific and legal problems with the
12 agency's "monitored stock" management approach.

13 21. Oceana's members use and enjoy the oceans for numerous activities, including
14 fishing, wildlife observation, scuba diving, snorkeling, boating, swimming, beach walking, research,
15 and study. Oceana's members value and depend upon a healthy marine environment for these
16 activities. Oceana's members also consume seafood caught in the California Current Ecosystem.
17 They are concerned about and directly affected by environmental injury caused by unsustainable
18 fishing in the U.S. West Coast fisheries resulting in depletion of northern anchovy and the larger
19 predatory fish and wildlife that rely on northern anchovy to grow and thrive. Injuries to Oceana's
20 members include injuries to their consumption and recreational and commercial use of fish
21 populations, as well their interest in healthy populations of sea lions, brown pelicans, humpback
22 whales, and other wildlife.

23 22. The above-described aesthetic, conservation, recreational, commercial, scientific,
24 educational, and other interests of Oceana and its members have been, are being, and, unless the
25 relief prayed for in this Complaint is granted, will continue to be adversely affected and irreparably
26 injured by the Fisheries Service's failure to protect northern anchovy through the unlawful 2019
27 Catch Rule. These injuries are actual and concrete and would be redressed by the relief Oceana
28 seeks here. Oceana has no adequate remedy at law.

1 23. The Defendants in this action are:

2 a. WILBUR ROSS. Mr. Ross is sued in his official capacity as Secretary of
3 Commerce. He is ultimately responsible for overseeing the proper administration and
4 implementation of the Magnuson-Stevens Act in connection with federal fisheries management
5 actions, including provisions related to the duty to end and prevent overfishing and achieve optimum
6 yield and base all conservation and management measures on the best available science.

7 b. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION. The
8 National Oceanic and Atmospheric Administration is an agency of the United States Department of
9 Commerce with supervisory responsibility for the National Marine Fisheries Service. The Secretary
10 of the Department of Commerce has delegated responsibility to ensure compliance with the
11 Magnuson-Stevens Act to the National Oceanic and Atmospheric Administration, which in turn has
12 sub-delegated that responsibility to the National Marine Fisheries Service.

13 c. NATIONAL MARINE FISHERIES SERVICE. The National Marine
14 Fisheries Service is an agency of the United States Department of Commerce that has been delegated
15 the primary responsibility to ensure that the requirements of the Magnuson-Stevens Act and other
16 applicable laws are followed and enforced, including the requirements to prevent and end
17 overfishing, account for the needs of the ecosystem in order to achieve optimum yield, and set
18 rational annual catch limits and other reference points based on best available science. In that
19 capacity, the Fisheries Service must review fishery management plans and amendments to those
20 plans, and issue implementing regulations.

21 **LEGAL BACKGROUND**

22 **Magnuson-Stevens Act Framework for Preventing Overfishing**

23 24. The Magnuson-Stevens Act governs the conservation and management of fisheries in
24 the United States territorial waters and in the exclusive economic zone, which extends from the
25 boundaries of state waters (typically 3 miles from shore) to 200 miles offshore or to an international
26 boundary with neighboring countries. 16 U.S.C. §§ 1801(b)(1); 1802(11). The Magnuson-Stevens
27 Act creates eight regional Fishery Management Councils and requires them to prepare fishery
28 management plans for all fisheries under their authority that require conservation and management.

1 16 U.S.C. § 1852(h)(1).

2 25. All fishery management plans and amendments developed by the Councils and
3 regulations implementing fishery management plans and amendments are subject to final review and
4 approval by the Fisheries Service to ensure that they comply with the requirements of the
5 Magnuson-Stevens Act, as well as with other applicable laws and requirements. 16 U.S.C. §
6 1854(a), (b).

7 26. The Magnuson-Stevens Act requires that fishery management plans, fishery
8 management plan amendments, and any regulations promulgated to implement such fishery
9 management plans, must be consistent with the “National Standards” for fishery conservation and
10 management, and certain other requirements. 16 U.S.C. § 1851(a).

11 27. The Magnuson-Stevens Act establishes a common-sense approach to prevent
12 overfishing, requiring that the Fisheries Service assess the condition of each fish population it
13 manages using the best scientific information available and base management measures such as
14 catch limits on the current size of the population. In other words, the Act requires the Fisheries
15 Service to determine as best it can how many fish are in the water and ensure that its catch limits
16 leave enough fish in the water to prevent overfishing and protect the marine ecosystem.

17 28. National Standard One of the Magnuson-Stevens Act requires that “[c]onservation
18 and management measures shall prevent overfishing while achieving, on a continuing basis, the
19 optimum yield from each fishery” 16 U.S.C. § 1851(a)(1).

20 29. National Standard Two of the Magnuson-Stevens Act requires that “[c]onservation
21 and management measures shall be based upon the best scientific information available.” 16 U.S.C.
22 § 1851(a)(2). “Conservation and management measures” include “all of the rules, regulations,
23 conditions, methods, and other measures” to “rebuild, restore, or maintain . . . the marine
24 environment,” including annual catch limits, acceptable biological catch, and objective and
25 measurable criteria for determining when a stock is overfished, such as the overfishing limit. *Id.* §§
26 1802(5); 1853(a)(1), 1853(a)(10), 1853(a)(15); 50 C.F.R. § 600.310(e)(2)(A), (D).

27 30. Because the first step to preventing overfishing and achieving optimum yield is to
28 understand the status of the fish population, the Magnuson-Stevens Act requires each fishery

1 management plan to “assess and specify the present and probable future condition of, and the
2 maximum sustainable yield and optimum yield from, the fishery, and include a summary of the
3 information utilized in making such specification.” 16 U.S.C. § 1853(a)(3). The status of the
4 population must inform the catch limits described below.

5 31. In 2006, Congress enacted the Magnuson-Stevens Reauthorization Act, which among
6 other things established a system of interrelated management measures and reference points intended
7 to prevent and end overfishing. Pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1851(b), the
8 Fisheries Service has promulgated guidelines that reflect the agency’s interpretation of the Act’s
9 requirements to prevent overfishing and rely on the best available science. 50 C.F.R. §
10 600.305(a)(3). These guidelines provide further details on how required measures are established
11 and work as part of a system to prevent and end overfishing. Of particular relevance here, this
12 system includes establishing and revising the key measures: overfishing limits, acceptable
13 biological catches, and annual catch limits.

14 32. To avoid overfishing, the Fisheries Service must first establish an “overfishing limit”
15 that estimates the catch level (expressed in numbers or weight of fish) above which overfishing will
16 occur. 50 C.F.R. § 600.310(e)(2)(i)(D).

17 33. The Fisheries Service must then specify the “acceptable biological catch” for each
18 stock, which provides an upper limit on annual catch that accounts for scientific uncertainty in
19 estimating the overfishing limit, as well as any other scientific uncertainty. 50 C.F.R. §
20 600.310(f)(1)(ii). Fishery managers “must articulate how [acceptable biological catch] will be set
21 compared to the [overfishing limit] based on the scientific knowledge about the stock . . . and taking
22 into account scientific uncertainty” and “should consider reducing fishing mortality as stock size
23 declines...and scientific uncertainty increases.” *Id.* § 600.310(f)(2)(ii).

24 34. The function of acceptable biological catch is to ensure that any error in estimating
25 the overfishing limit does not result in overfishing.

26 35. Each fishery management plan must “establish a mechanism for specifying annual
27 catch limits in the plan (including a multiyear plan), implementing regulations, or annual
28 specifications, at a level such that overfishing does not occur in the fishery, including measures to

1 ensure accountability.” 16 U.S.C. § 1853(a)(15).

2 **Fishery Management Measures Must Protect the Marine Ecosystem**

3 36. The Magnuson-Stevens Act and its implementing regulations emphasize the
4 importance of protecting marine ecosystems and making decisions about fisheries in the context of
5 the health and long-term sustainability of the marine environment. The Act requires that fisheries be
6 managed to achieve “optimum yield,” 16 U.S.C. § 1801(b)(4), which is defined as the amount of fish
7 that “will provide the greatest overall benefit to the Nation, particularly with respect to food
8 production and recreational opportunities, and taking into account the protection of marine
9 ecosystems,” and “is prescribed as such on the basis of the maximum sustainable yield from the
10 fishery, as reduced by any relevant social, economic, or *ecological* factor.” 16 U.S.C.
11 § 1802(33)(A)-(B) (emphasis added).

12 37. To determine optimum yield in the context of protecting marine ecosystems, the
13 Fisheries Service must consider, among other things, “maintaining adequate forage for all
14 components of the ecosystem.” 50 C.F.R. § 600.310(e)(3)(iii)(A)(3). Ecological factors that the
15 Fisheries Service is supposed to consider when determining the appropriate level for optimum yield
16 include the fishery’s “impacts on ... forage fish stocks, other fisheries, predator-prey or competitive
17 interaction, marine mammals, threatened or endangered species, and birds”
18 *Id.* § 600.310(e)(3)(iii)(B)(3). In addition, the regulatory guidelines advise fishery managers to
19 consider managing forage stocks to leave a larger proportion of the population to feed marine
20 predators rather than the smaller proportion they would leave unfished if they managed only to attain
21 maximum sustainable yield. *Id.*

22 38. The Fisheries Service’s interpretation of Magnuson-Stevens Act requirements states
23 that the annual catch limit should be reduced below the acceptable biological catch level to account
24 for ecological, economic, and social factors. It also specifically states that annual catch limit should
25 be reduced to address the “needs of forage fish” such as anchovy. 50 C.F.R. § 600.310(f)(4)(iv).

26 39. The Secretary has the responsibility to carry out any fishery management plan or plan
27 amendment approved or prepared by him in accordance with the Magnuson-Stevens Act. 16 U.S.C.
28 § 1855(d).

FACTUAL BACKGROUND

Role of Anchovy in California Current Ecosystem

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3 40. Anchovy are a keystone forage species in the California Current Ecosystem off the
4 U.S. West Coast. They are preyed upon by a wide variety of marine wildlife, including
5 commercially and recreationally valuable fish, mammals, and sea birds. Studies of predator diets
6 show that anchovy are among the most important forage fish throughout the California Current
7 Ecosystem in terms of the number of predators they support and the importance in predators'
8 respective diets.

9 41. Anchovy are preferred prey due to their high fat content, small body size, tendency to
10 school (which makes them easier to catch), and superior nutritional value. Some marine predators
11 are highly dependent on anchovy abundance for their survival and reproductive success, and suffer
12 food-related reproductive failures when anchovy are not readily available, even if other prey are
13 available. For example, northern anchovy availability within foraging distance of brown pelican
14 breeding colonies is among the most important factors influencing pelican breeding success. While
15 the brown pelican was listed under the Endangered Species Act, the anchovy fishery was required to
16 account for brown pelican forage needs in setting catch limits. When the U.S. Fish and Wildlife
17 Service delisted the brown pelican in 2009, it did so partly on the assumption the Coastal Pelagic
18 Species Fishery Management Plan would provide adequate forage for the bird. Since that time,
19 however, brown pelicans experienced unprecedented die-offs and multi-year breeding failures from
20 2008 to 2015 due to lack of high quality forage – particularly, anchovy and Pacific sardine (also
21 managed under the Plan).

22 42. In addition to supporting many species of sea birds and predatory fish, anchovy also
23 support many species of marine mammals, including seals, sea lions, dolphins, porpoises, and
24 whales. A study led by the Fisheries Service found that availability of northern anchovy and Pacific
25 sardine is especially important for breeding California sea lions, and that the lack of adequate
26 supplies of anchovy and sardine in recent years was the primary factor in mass starvation and die-
27 offs among California sea lion pups in 2013, 2014, 2015, and 2016. This was the case even though
28 other prey items, such as rockfish and squid, were locally available because these alternative prey

1 species lack the energy content sea lion mothers need to successfully feed and wean their pups.

2 43. A number of threatened and endangered species rely on northern anchovy as a
3 preferred prey. These species include populations of threatened and endangered Chinook salmon;
4 sea birds such as the endangered California least tern and threatened marbled murrelet; and marine
5 mammals such as threatened and endangered populations of humpback whales.

6 44. Because anchovy provide an essential food source for whale, sea lion, sea bird, and
7 other wildlife populations, anchovy are critical to supporting the tourism associated with seeking and
8 watching these animals. In Monterey Bay alone, whale watch business owners have estimated that a
9 single ton of anchovy left in the water to feed a humpback whale can bring in \$1,000 to \$3,000 in
10 direct whale watching ticket revenue.

11 45. Healthy anchovy populations are also crucial to the productivity and sustainability of
12 other commercially and recreationally important fish species, including swordfish, salmon, bluefin
13 tuna, and groundfish species like rockfish, lingcod, and halibut.

14 **The Rapidly Fluctuating, “Boom and Bust” Pattern of the Anchovy Population**

15 46. Anchovy populations naturally experience rapid changes in abundance, particularly in
16 response to changes in ocean conditions. Analyses of anchovy abundances over the last 30 years
17 show a pattern of periodic, brief spikes to high levels followed by dramatic drops in abundance, after
18 which the population remains at significantly lower levels for prolonged periods. These data show
19 that the anchovy population can decline by more than 90 percent over a two-year period and did so
20 most recently between 2005 and 2007.

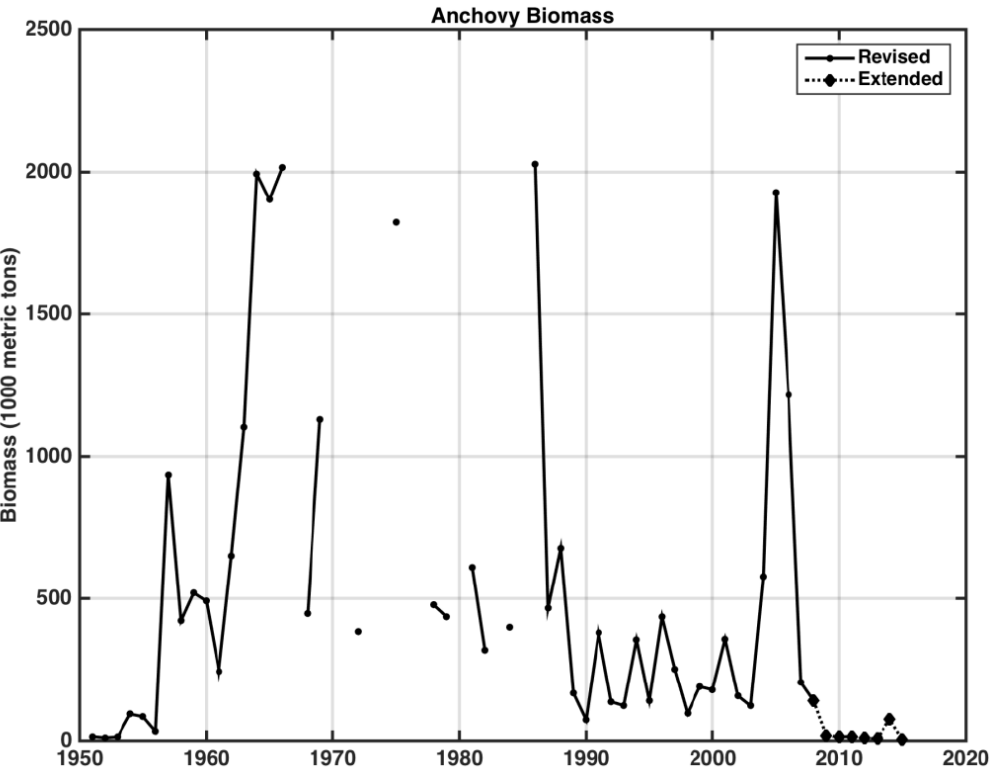


Figure 1: Central Subpopulation of Northern Anchovy biomass in the U.S. and Mexico from 1951 to 2015. From Thayer et al. 2017.³

47. Even more so than other species, schooling forage fish like anchovy are highly vulnerable to overfishing and collapse. Recent studies of forage species around the world, including northern anchovy, found that fishing forage species during a decline can increase the rate and magnitude of population collapses, and delay population recovery after a collapse.

48. Population fluctuations can also be magnified by long-term changes in ocean conditions caused by climate change and ocean acidification. Even relatively moderate changes in fishing levels can result in significant changes in forage species abundance and their local availability to predators, particularly during times when the species’ productivity is already low due to environmental conditions.

49. Multiple scientific studies have concluded that setting a constant, unchanging catch limit for a species with a naturally fluctuating population results in more severe population collapses and harms the population’s ability to recover.

³ Thayer et al. 2017. California anchovy population remains low, 2012-2016. CalCOFI Rep., Vol. 58, 2017. Figure 3.

1 50. Because forage species are so ecologically important, scientific studies recommend
2 that fishery managers set catch limits that leave a large proportion of a forage species' mean
3 unfished biomass (the level of biomass that would exist without any fishing) in the ecosystem to
4 provide for the needs of predators, minimize risk of stock collapse, and maintain ecosystem health.
5 Many studies recommend not allowing fishing on forage fish stocks when their population drops
6 below one half of their mean unfished levels to protect their role in the ecosystem.

7 **Need for a Robust Anchovy Population in the Context of Declines in Multiple Forage Fish**
8 **Species**

9 51. The central subpopulation of northern anchovy is managed in concert with other
10 forage species. The Coastal Pelagic Species Fishery Management Plan governs management of this
11 anchovy population as well as several other forage species, including Pacific sardine and Pacific
12 mackerel.

13 52. In 2012, Fisheries Service scientists published a peer-reviewed study warning that the
14 agency was allowing too much fishing on an already declining Pacific sardine stock. Despite
15 warnings from its own scientists and others, the Fisheries Service continued to authorize the
16 maximum catch limits permissible under the Plan's framework for Pacific sardine.

17 53. In April 2015, the Fisheries Service realized that it had made errors in its prior stock
18 assessments that had led to overestimates of the sardine population. The corrected assessment
19 revealed that the Pacific sardine stock was well below the minimum level to sustain the fishery. As
20 a result, the Fisheries Service closed the Pacific sardine fishery for the remainder of the 2015 season
21 (April-June 30) and the July 1, 2015-June 30, 2016 fishing year. The Pacific sardine population has
22 failed to recover since that time. The Fisheries Service's most recent stock assessment in April 2019
23 revealed that the stock had declined to less than 28,000 metric tons and is overfished.

24 54. Other key forage species, including Pacific mackerel, which are managed under the
25 Plan, and Pacific herring, have also declined to low numbers in recent years. While many predators
26 are adapted to switch prey sources in response to changes in relative availability, this simultaneous
27 decline in multiple preferred forage species leaves marine predators with fewer high-energy prey
28 alternatives and can force them to switch to relatively low nutrition food sources. The longer-term
decline of other prey sources makes it all the more vital that management measures promote a robust

1 anchovy population and protect the remaining forage base for predators.

2 **Management of Anchovy under the Coastal Pelagic Species Fishery Management Plan**

3 55. Fishing for anchovy is managed under the Coastal Pelagic Species Fishery
4 Management Plan. Commercial fishing vessels targeting northern anchovy operate off the
5 California coast using large nets such as purse seines that surround schools of fish near the surface.

6 56. The market value of northern anchovy is relatively low. In 2018, fishermen reported
7 selling their anchovy catch for only \$100 per ton (5 cents per pound). Anchovy are generally
8 exported and used for agricultural or aquaculture feed or as bait.

9 57. Prior to 2000, the northern anchovy fishery operated under a much more intensive
10 management plan. Under the Northern Anchovy FMP, fishery managers conducted annual
11 assessments of the spawning and total biomass of anchovy and adjusted optimum yield
12 specifications and catch levels accordingly. Fishery managers noted that the “inherent variability of
13 anchovy populations suggests that any fixed annual harvest would be too large in some years and too
14 low in others. Thus an optimum yield formula, which relates allowable annual harvest to the current
15 population size, is superior to a fixed [optimum yield].” Northern Anchovy FMP, Amendment 5 at 5
16 (1983).

17 58. In 2000, the Fisheries Service changed the name of the fishery management plan to
18 “Coastal Pelagic Species Fishery Management Plan” and removed the system of frequent
19 adjustments to catch levels and safeguards for maintaining high levels of anchovy biomass in the
20 water that had existed under the prior management regime.

21 59. In 2006, Congress amended the Magnuson-Stevens Act to require annual catch limits
22 for all federally managed fish stocks, as well associated measures for preventing overfishing,
23 including the overfishing limit and acceptable biological catch.

24 60. The Coastal Pelagic Species Fishery Management Plan as amended through
25 Amendment 16 (i.e. the current version of the Plan in effect at the time of rulemaking) contains
26 formulas for calculating annual catch limits for the anchovy stock, as well as acceptable biological
27 catch levels, based on the estimated overfishing limit for the stock. Under these formulas, the
28 acceptable biological catch is set to 25 percent of the overfishing limit; this buffer between the

1 overfishing limit and acceptable biological catch is supposed to account for scientific uncertainty in
2 the actual level of anchovy biomass, which fluctuates widely within short periods of time. The
3 annual catch limit is set equal to acceptable biological catch “or reduced by [optimum yield]
4 considerations.” Coastal Pelagic Species FMP at 40.

5 61. The Plan currently categorizes anchovy as a “monitored” stock.⁴ “Monitored” is not
6 a category or management approach recognized by the Magnuson-Stevens Act or its implementing
7 regulations. The Plan’s “monitored stock” management approach lacks a number of features that are
8 standard in other fishery management plans and required by the Magnuson-Stevens Act. Of most
9 relevance here, it does not require the Fisheries Service to use the anchovy abundance data it collects
10 every year to assess the current size or condition of the population or require the agency or Council
11 to revisit and update catch limits on any regular basis based on the current size of the population,
12 even if available data show the population has declined significantly.

13 62. The Plan states that “‘monitored’ management involves tracking trends in landings
14 and qualitative comparison to available abundance data, but without periodic stock assessments, or
15 periodic adjustments to target harvest levels.” Coastal Pelagic Species FMP at 9. The Plan therefore
16 monitors the amount of anchovy caught (or landed) to determine whether landings remain under the
17 annual catch limit itself, and though it provides for a qualitative comparison between landings and
18 abundance data, it does not provide a mechanism to ensure that the catch limits that are supposed to
19 prevent overfishing are updated or adjusted based on the current size of the population.

20 63. The Plan also does not require regular assessments of the condition of the stock,
21 either through stock assessments or annual abundance estimates derived from ongoing surveys. A
22 stock assessment is a scientific analysis of the status of a fish stock, including its overall biomass.
23 The Fisheries Service has not conducted a stock assessment for northern anchovy since 1995.

24 64. However, the agency does collect anchovy abundance data every year through its
25 annual acoustic trawl survey and the CalCOFI survey. The Fisheries Service’s Southwest Fisheries
26 Science Center stated in a recent report that its experts “strongly feel that the most efficient scientific
27

28 ⁴ At its June 2019 meeting, the Pacific Fishery Management Council voted to remove the term
“monitored” from the Coastal Pelagic Species Fishery Management Plan, but explicitly stated that
the management approach currently called “monitored” would remain unchanged.

1 assessment for regularly advising management regarding the status (abundance) of any member of
2 the [Coastal Pelagic Species] assemblage is the [acoustic trawl] survey-based approach.” These
3 experts also noted that a 2018 report “concluded that [acoustic trawl] data represented the best
4 scientific information available on an annual basis for assessing abundance of all members of the
5 [Coastal Pelagic Species] assemblage (except Pacific herring).” Crone, P.R., *et al*, May 2019,
6 *Pacific mackerel (Scomber japonicus) stock assessment for U.S. management in the 2019-20 and*
7 *2020-21 fishing years*, Pacific Fishery Management Council, at 2. The Fisheries Service has
8 produced annual anchovy abundance estimates based on this data since at least 2015.

9 65. The Plan states that annual catch limits for “monitored” stocks are “specified for
10 multiple years until such time as the species becomes actively managed or new scientific information
11 becomes available.” Coastal Pelagic Species FMP at 40. The Plan does not specify any time frame
12 or schedule for revisiting catch limits relative to available abundance information; nor does it require
13 the Council or Fisheries Service to revise catch limits when available scientific information shows
14 that a species’ abundance has dropped significantly.

15 **Previous Anchovy Population Decline and Court Rejection of 2016 Catch Rule**

16 66. The anchovy population collapsed between 2009 and 2015. At the time, numerous
17 sources of scientific information showed that anchovy abundance had declined steeply since 2009 to
18 historically low levels. These included peer-reviewed, published studies on anchovy abundance,
19 abundance estimates derived by the Fisheries Service itself, survey data on anchovy eggs, larvae,
20 and adults, and evidence of extreme food shortages among marine predators known to rely and
21 anchovy and sardine.

22 67. The effects of the decline in anchovy abundance shown in scientific analyses and
23 surveys were particularly apparent in marine predators. For example, in the U.S. and Mexico during
24 2009-2015, brown pelicans experienced die-offs, anomalous feeding behavior such as the predation
25 of common murre chicks, and poor reproductive success. The U.S. Fish and Wildlife Service, the
26 federal agency responsible for managing brown pelicans, repeatedly expressed grave concern
27 regarding the pelican’s lack of food, unprecedented reproductive failures, and the need for fishery
28 managers to lower fishing pressure on anchovy.

1 68. California sea lions experienced large-scale die-offs in 2013, 2014, 2015, and 2016
2 linked to low anchovy and sardine abundance. A study led by Fisheries Service scientists concluded
3 that the increased mortality and starvation of California sea lion pups born at the Channel Islands
4 was directly related to the decline of high quality forage – sardine and anchovy – available to
5 breeding female California sea lions.

6 69. In the fall of 2015, common murre chicks experienced an unprecedented die-off.
7 Northern anchovy and Pacific sardine normally comprise about half of the common murre chicks’
8 diet. Researchers believe that limited prey abundance or availability was a primary cause of the die-
9 off.

10 70. A 2016 study pointed out that low anchovy numbers could be harming West Coast
11 salmon fisheries in two ways: by limiting the number of anchovy directly available to salmon as
12 food and by increasing predation pressure on salmon smolts by common murre trying to find
13 alternative food.

14 71. By the Fisheries Service’s own estimate, the anchovy population weighed in at
15 31,427 metric tons in the summer of 2015. Estimates produced by independent experts indicated the
16 population was even lower, averaging around 24,300 metric tons between 2012 and 2015.

17 72. Notwithstanding this evidence, the Fisheries Service promulgated the 2016 Catch
18 Rule on October 26, 2016 specifying an annual catch limit and acceptable biological catch of 25,000
19 metric tons and overfishing limit of 100,000 metric tons. 81 Fed. Reg. 74309 (October 26, 2016).
20 Rather than apply the most recent evidence about the size of the anchovy population, the agency in
21 the 2016 Catch Rule adopted these values based on estimates derived from anchovy abundance data
22 from 1964-1990, when anchovy biomass ranged as high as 1,611,800 metric tons and never fell
23 below 299,401 metric tons.

24 73. On November 23, 2016, Oceana challenged the 2016 Catch Rule for the Fisheries
25 Service’s failure to use the best scientific and commercial data available about the size of the
26 anchovy population in establishing the overfishing limit, acceptable biological catch, and annual
27 catch limit; its failure to demonstrate that its 25,000 metric ton catch limit would prevent overfishing
28 when the anchovy population ranged from just above to just below that limit; and its failure to

1 account for the needs of predators and the marine ecosystem when setting an annual catch limit that
2 could allow the fishery to catch most (and potentially all) of the northern anchovy remaining in the
3 central subpopulation.

4 74. The Court granted Oceana's motion for summary judgment on January 18, 2018.
5 *Oceana v. Ross*, 2018 WL 1989575 at *16. The Court first rejected the agency's argument that the
6 Court lacked jurisdiction to consider Oceana's challenges to the overfishing limit and the acceptable
7 biological catch because "Plaintiff's timely challenge to the Catch Rule also allows Plaintiff to
8 challenge Amendment 13, and in particular the OFL and ABC values that Amendment 13
9 established." *Id.* at *8. The Court reviewed the record and held that that all three of values set in the
10 2016 Catch Rule were arbitrary and capricious and "not based on the best scientific information
11 available" because the Fisheries Service arbitrarily "ignore[d] the most important aspect of the
12 problem – the size of the anchovy population." *Id.* at *15-16; 11-14. The Court also agreed that all
13 three levels were "too high to prevent overfishing" and determined that the agency failed to consider
14 whether these levels "still prevented overfishing in light of their direct reliance on a MSY estimate
15 from a 1991 study that evidence in the administrative record indicated was out of date." *Id.* at *15-
16 16.

17 75. The Court vacated the Catch Rule and remanded the matter to the agency to adopt
18 new values for an overfishing limit, acceptable biological catch, and annual catch limit that relied on
19 the best available science and prevented overfishing within three months. *Id.* at 16.

20 76. On September 21, 2018, after it became clear that the Fisheries Service was not
21 taking any action to develop a new rule to remedy its outdated measures, Oceana moved to enforce
22 the January 18, 2018 summary judgment Order. The Court granted the motion to enforce on January
23 19, 2019. *Oceana v. Ross*, 359 F.Supp.3d 821(N.D. Cal. 2019). The enforcement order reiterated
24 that the Court's original summary judgment Order "impose[d] a 90-day deadline" and determined
25 that "Defendants have not complied with the 90-day deadline." *Id.* at 829-830. The Court ordered
26 the agency to promulgate a new rule no later than 90 days after the Order. *Id.* at 831.

27 77. When the agency subsequently clarified that it would not comply with the notice and
28 comment requirements of the APA in developing this new rule, the Court ordered the Fisheries

1 Service to publish and accept comment on a proposed rule. *Oceana v. Ross*, 5:16-cv-06784, ECF
2 No. 82 at 5 (Feb. 25, 2019). The parties subsequently agreed to, and the Court entered, a schedule
3 that required the Fisheries Service to submit a proposed rule for publication in the Federal Register
4 by April 5, 2019 and a final rule no later than May 28, 2019. *Id.*, ECF No. 84 (Mar. 1, 2019).

5 **The Fisheries Service's 2019 Catch Rule**

6 78. On May 31, 2019, the Fisheries Service published the 2019 Catch Rule establishing
7 new values for the overfishing limit, acceptable biological catch, and annual catch limit for the
8 central subpopulation of northern anchovy. The agency specified a value of 94,290 metric tons for
9 the overfishing limit and 23,573 metric tons for the acceptable biological catch and annual catch
10 limit.

11 79. The Fisheries Service stated that “[t]hese reference points will remain in place until
12 changed conditions necessitate revisions to the FMP or changes to the reference points pursuant to
13 the existing framework.” 84 Fed. Reg. at 25,197.

14 80. In comments on the proposed rule, *Oceana* and others emphasized that establishing
15 constant, unchanging catch limits for anchovy and leaving them in place indefinitely was contrary to
16 basic science about anchovy populations, which has long shown that the species fluctuates
17 significantly and rapidly, and that setting unchanging catch limits that remain in place indefinitely
18 for fluctuating populations makes them more prone to collapse. *Oceana* and others also emphasized
19 that setting unchanging catch limits based on a relatively robust population level will fail to prevent
20 overfishing when the population drops to significantly lower levels.

21 81. Despite the best available science and the Court’s holding in *Oceana v. Ross* that
22 catch limits must be related to size of the anchovy population in order to meet the Magnuson-
23 Stevens Act requirement to prevent overfishing, the Fisheries Service maintained that it can set
24 unchanging catch limits that will remain in place indefinitely and simply monitor landings of
25 anchovy against those unchanged limits—rather than monitoring actual abundance of anchovy and
26 annually adjusting the annual catch limit based on the size of the population.

27 82. The Fisheries Service derived its new catch limit values by averaging abundance
28 estimates from the most recent three years, which reflect the highest abundance levels the population

1 has seen in the past decade: estimates derived from its acoustic trawl survey for 2016 (151,558
2 metric tons) and 2018 (723,826 metric tons), and an estimate derived from its “daily egg production
3 method” survey for 2017 (308,173 metric tons). The agency calculated the overfishing limit of
4 94,290 by averaging these three abundance estimates to arrive at a value of 394,519 metric tons and
5 multiplying that average by an estimate of the rate of fishing mortality for anchovy at maximum
6 sustainable yield (0.239).

7 83. The best available science shows that in the past decade the only years that anchovy
8 population weighed in above 394,519 metric tons were 2017 and 2018. For much of the past
9 decade—2009 through 2015—the population measured less than 100,000 metric tons.

10 84. As it did in the 2016 Catch Rule, the Fisheries Service calculated the acceptable
11 biological catch of 23,573 metric tons by reducing the overfishing limit by 75 percent, as specified in
12 the Plan.

13 85. The Fisheries Service rejected recommendations to reduce the annual catch limit
14 below the acceptable biological catch in order to account for the anchovy’s importance as a vital
15 food source for numerous marine predators. Instead, it set the annual catch limit equal to the
16 acceptable biological catch (23,573 metric tons).

17 86. The Fisheries Service asserted that it did not need to reduce the annual catch limit to
18 account for the needs of marine predators, citing information on sardine predators from the 1950s
19 through the 1980s, but omitting any mention of documented predator die-offs and breeding failures
20 linked to low anchovy and sardine abundance in recent years.

21 87. Even apart from problems associated with setting unchanging, long-term catch limits
22 based on average biomass assumptions, the average biomass that the Fisheries Service calculated
23 relied on a narrow subset of abundance data that does not represent the “boom and bust” cycle of the
24 anchovy population. The Fisheries Service based the 2019 Catch Rule of three years of data
25 reflecting an increasing anchovy population while omitting multiple anchovy abundance estimates
26 from years prior to 2016 during which the anchovy population was significantly lower. Notably, the
27 agency omitted its own abundance estimate for 2015 derived from the acoustic trawl survey, which
28 estimated the population at 31,427 metric tons.

1 88. The Fisheries Service also refused to use peer-reviewed, published average
2 abundance estimates from independent experts or readily available estimates of maximum
3 sustainable yield to inform their catch limits. Unlike the average abundance value relied upon in the
4 2019 Catch Rule, these estimates of average abundance and maximum sustainable yield included
5 years in which the anchovy population was low as well as more recent years when the population
6 rebounded. In comments on the proposed 2019 Catch Rule, Oceana showed that using any of more
7 than half a dozen alternative average abundance estimates available to the Fisheries Service would
8 have produced lower overfishing limits and acceptable biological catch values – ranging from
9 74,492 metric tons and 18,623 metric tons, respectively, down to just 6,487 metric tons and 1,622
10 metric tons, respectively. These are significantly lower limits than those resulting from the
11 circumscribed selection of data the Fisheries Service chose to rely on.

12 89. The Fisheries Service took nearly 16 months after the Court’s initial order on
13 summary judgment to promulgate the 2019 Catch Rule and did so only after the court issued
14 multiple orders compelling it to do so. *See supra* ¶¶ 74-77. Nonetheless, the Fisheries Service
15 attempted to justify its decision to use very limited data by asserting that it had “limited time
16 available to review and analyze more complex approaches for setting these reference points.” 84
17 Fed. Reg. at 25,196.

18 90. The Fisheries Service expressly implemented the Plan’s “monitored” stock approach
19 to management through the 2019 Catch Rule, including its establishment of constant catch limits that
20 remain in place indefinitely and its approach of monitoring landings of anchovy against the catch
21 limits instead of revisiting and revising the annual catch limit, acceptable biologic catch, and
22 overfishing limits based on the actual abundance of anchovy in a given year.

23 **FIRST CLAIM FOR RELIEF**

24 **Violation of the Magnuson-Stevens Act and the APA – 2019 Catch Rule Fails to Base Annual**
25 **Catch Limit, Acceptable Biological Catch, and Overfishing Limit on the Best Available Science**
26 **and Fails to Prevent Overfishing**
(16 U.S.C. § 1851(a)(1)-(2), 1853(a)(3))

27 91. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in
28 the preceding paragraphs.

92. The Magnuson-Stevens Act requires the Fisheries Service to base the 2019 Catch

1 Rule “upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

2 93. The Magnuson-Stevens Act requires that “[c]onservation and management measures
3 shall prevent overfishing while achieving on a continuing basis, the optimum yield from each
4 fishery...” 16 U.S.C. § 1851(a)(1).

5 94. The Magnuson-Stevens Act requires that the Coastal Pelagic Species Fishery
6 Management Plan “establish a mechanism for specifying annual catch limits..., implementing
7 regulations, or annual specifications, at a level such that overfishing does not occur in the fishery,
8 including measures to ensure accountability.” 16 U.S.C § 1853(a)(15).

9 95. The Fisheries Service failed to base the 2019 Catch Rule on the best available science
10 regarding anchovy population dynamics, which shows that the anchovy population fluctuates
11 significantly year to year and can drop by more than 90 percent over just two years, as it did most
12 recently between 2005 and 2007. Instead, the agency promulgated indefinite catch limits based on
13 an average biomass estimate of 394,519 metric tons calculated from only three most recent years of
14 data showing high abundance and failed to establish any mechanism for reassessing and adjusting
15 those limits if and when the anchovy population falls significantly below that level, as it did for most
16 of the last decade.

17 96. The Fisheries Service failed to demonstrate how setting an unchanging annual catch
18 limit for an indefinite period of time will prevent overfishing when the anchovy population falls
19 significantly below the level the agency used as the basis to calculate the overfishing limit,
20 acceptable biological catch, and annual catch limit.

21 97. The Fisheries Service also failed to demonstrate how basing its management on
22 unchanging overfishing limit and acceptable biological catch values that do not reflect the fact that
23 the anchovy population can and does drop below its assumed average abundance—and even below
24 its overfishing limit—will prevent overfishing.

25 98. The Fisheries Service’s decision to establish an unchanging overfishing limit,
26 acceptable biological catch, and annual catch limit for an indefinite period of time violates both the
27 Magnuson-Stevens Act requirement to base its regulation “upon the best scientific information
28 available,” 16 U.S.C. § 1851(a)(2), and the fundamental APA requirement that the Fisheries Service

1 consider all relevant factors and draw a rational connection between the facts in the record and its
2 decision.

3 99. The Fisheries Service’s decision to set catch limits that do not account for the
4 tendency of the anchovy population to fluctuate rapidly and significantly violates the Magnuson-
5 Stevens Act requirements that all fishery conservation and management measures “shall prevent
6 overfishing while achieving on a continuing basis, the optimum yield from each fishery...” 16
7 U.S.C. § 1851(a)(1), that the annual catch limit be specified in manner such that “overfishing does
8 not occur,” *id.* at § 1853(a)(15), and the fundamental APA requirement that the Fisheries Service
9 consider all relevant factors and draw a rational connection between the facts in the record and its
10 decision.

11 100. The Fisheries Service’s 2019 Catch Rule is arbitrary and capricious and otherwise not
12 in accordance with the Magnuson-Steven Act and its implementing regulations, and is reviewable
13 under the APA, 5 U.S.C. §§ 701-706.

14 101. The Fisheries Service’s actions and failures to act violate the Magnuson-Stevens Act
15 and the APA, and are causing irreparable injury to the Plaintiff for which it has no adequate remedy
16 at law.

17 **SECOND CLAIM FOR RELIEF**

18 **Violation of the Magnuson-Stevens Act and the APA – 2019 Catch Rule Fails to Achieve** 19 **Optimum Yield by Specifying Scientifically Based Annual Catch Limit that Accounts for** 20 **Needs of Marine Predators** 21 **(16 U.S.C. §§ 1851(a)(1), 1853(a)(3))**

22 102. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in
23 the preceding paragraphs.

24 103. National Standard One of the Magnuson-Stevens Act requires that “[c]onservation
25 and management measures shall prevent overfishing while achieving on a continuing basis, the
26 optimum yield from each fishery...” 16 U.S.C. § 1851(a)(1). In establishing “optimum yield,” the
27 Fisheries Service must, among other things, “tak[e] into account the protection of marine
28 ecosystems,” and “any relevant economic, social, or ecological factor.” *Id.* § 1802(33)(A)-(B).

104. The Coastal Pelagic Species Fishery Management Plan provides that the annual catch
limit for anchovy may be set equal to acceptable biological catch “or reduced by [optimum yield]

1 considerations.” Coastal Pelagic Species FMP at 40. The 2019 Catch Rule set the annual catch limit
2 equal to acceptable biological catch. It did not reduce the acceptable biological catch to account for
3 optimum yield factors or provide any mechanism to trigger revision of the annual catch limit to
4 account for optimum yield factors when scientific information shows that anchovy numbers are low
5 or that anchovy predators are experiencing food shortages.

6 105. As a result of the Fisheries Service’s decision to establish an unchanging annual catch
7 limit that does not account for ecological or socioeconomic factors, the 2019 Catch Rule establishes
8 an annual catch limit that could leave few anchovy in the ocean to feed marine predators when the
9 anchovy population declines to low levels.

10 106. The Fisheries Service fails to explain how setting an unchanging annual catch limit
11 accounts for the needs of marine predators when it could allow for much of the anchovy population
12 to be caught when the population drops to low levels. In doing so, it violates the Magnuson-Stevens
13 Act requirements that all fishery conservation and management measures shall “achiev[e] on a
14 continuing basis, the optimum yield from each fishery...,” 16 U.S.C. § 1851(a)(1), “taking into
15 account the protection of marine ecosystems,” *id.* § 1802(33)(A), and the fundamental APA
16 requirement that the Fisheries Service consider all relevant factors and draw a rational connection
17 between the facts in the record and its decision.

18 107. The Fisheries Service’s 2019 Catch Rule is arbitrary and capricious and otherwise not
19 in accordance with the Magnuson-Stevens Act and its implementing regulations, and is reviewable
20 under the APA, 5 U.S.C. §§ 701-706.

21 108. The Fisheries Service’s actions and failures to act are arbitrary and capricious,
22 violate the Magnuson-Stevens Act and the APA, and are causing irreparable injury to the Plaintiff
23 for which it has no adequate remedy at law.

24 **THIRD CLAIM FOR RELIEF**

25 **Violation of the Magnuson-Stevens Act and the APA – Coastal Pelagic Species Fishery** 26 **Management Plan that 2019 Catch Rule Implements Is Not Based on Best Available Science,** 27 **Fails to Prevent Overfishing, and Fails to Achieve Optimum Yield** **(16 U.S.C. §§ 1851(a)(1), 1853(a)(3))**

28 109. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in
the preceding paragraphs.

1 110. National Standard One of the Magnuson-Stevens Act requires that “[c]onservation
2 and management measures shall prevent overfishing while achieving on a continuing basis, the
3 optimum yield from each fishery...” 16 U.S.C. § 1851(a)(1).

4 111. The Magnuson-Stevens Act requires that the Coastal Pelagic Species Fishery
5 Management Plan “establish a mechanism for specifying annual catch limits..., implementing
6 regulations, or annual specifications, at a level such that overfishing does not occur in the fishery,
7 including measures to ensure accountability.” 16 U.S.C § 1853(a)(15).

8 112. The Magnuson-Stevens Act requires the Fisheries Service to base all conservation
9 and management measures, including fishery management plan provisions, “upon the best scientific
10 information available.” 16 U.S.C. § 1851(a)(2).

11 113. By this action, Oceana challenges the 2019 Catch Rule and the Coastal Pelagic
12 Species Fishery Management Plan provisions and regulations it implements. *See* 50 C.F.R. §
13 660.511(k)(1); 50 C.F.R. §§ 660.502, 660.508, 660.517.

14 114. The 2019 Catch Rule implements provisions of the Coastal Pelagic Species Fishery
15 Management Plan that apply to several fish populations currently labeled as “monitored stocks.”
16 The Plan states that, under this management approach, annual catch limits are “specified for multiple
17 years until such time as the species becomes actively managed or new scientific information
18 becomes available.” CPS FMP at 40. The Plan does not specify any time frame or schedule for
19 revisiting catch limits relative to available abundance information; nor does it require the Council or
20 Fisheries Service to revise catch limits when available scientific information shows that a species’
21 abundance has dropped significantly, such that the catch limits no longer bear a reasonable
22 relationship to the actual size of the population and as a result may not prevent overfishing.

23 115. Instead, the Plan only requires the agency to track landings of anchovy against the
24 annual catch limit and make some “qualitative comparison” between landings and abundance data.
25 Tracking landings provides a means to monitor the fishery’s compliance with the annual catch limit
26 but does nothing to ensure that the annual catch limit prevents overfishing. Nor does the Plan
27 provide a mechanism to ensure that the catch limits that are supposed to prevent overfishing are
28 updated or adjusted based on current abundance data.

1 116. The best available science and recent experience demonstrate that anchovy
2 experience significant, rapid population fluctuations and setting unchanging catch limits for these
3 species greatly increases the risk of overfishing in low abundance years, as well as the risk that
4 fishing will suppress population growth and recovery and deplete food sources for marine predators.

5 117. Accordingly, the Coastal Pelagic Species Fishery Management Plan’s authorization,
6 applied in the 2019 Catch Rule, of an unchanging overfishing limit, acceptable biological catch, and
7 annual catch limit that will remain in place indefinitely violates both the Magnuson-Stevens Act
8 requirement that the Fisheries Service base its regulation “upon the best scientific information
9 available,” 16 U.S.C. § 1851(a)(2), and the fundamental APA requirement that the Fisheries Service
10 consider all relevant factors and draw a rational connection between the facts in the record and its
11 decision.

12 118. The Coastal Pelagic Species Fishery Management Plan’s authorization, applied in the
13 2019 Catch Rule, of an unchanging overfishing limit, acceptable biological catch, and annual catch
14 limit that will remain in place indefinitely fails to prevent overfishing in years when the anchovy
15 population declines to low levels and thus violates the Magnuson-Stevens Act requirement that all
16 fishery conservation and management measures “shall prevent overfishing while achieving on a
17 continuing basis, the optimum yield from each fishery...,” 16 U.S.C. § 1851(a)(1), that the plan
18 establish a mechanism for specifying annual catch limits such that “overfishing does not occur,” *id.*
19 at § 1853(a)(15), and the fundamental APA requirement that the Fisheries Service consider all
20 relevant factors and draw a rational connection between the facts in the record and its decision.

21 119. The Coastal Pelagic Species Fishery Management Plan’s authorization, applied in the
22 2019 Catch Rule, of an unchanging annual catch limit that does not account for the dietary needs of
23 marine predators, despite the Plan’s admission that these species provide a critical food source to the
24 ecosystem, violates the Magnuson-Stevens Act requirements that all fishery conservation and
25 management measures shall “achiev[e] on a continuing basis, the optimum yield from each
26 fishery...,” 16 U.S.C. § 1851(a)(1), “taking into account the protection of marine ecosystems,” *id.* §
27 1802(33)(A), and the fundamental APA requirement that the Fisheries Service consider all relevant
28 factors and draw a rational connection between the facts in the record and its decision.

1 120. The Coastal Pelagic Species Fishery Management Plan and regulations being
2 implemented through the 2019 Catch Rule are arbitrary and capricious and otherwise not in
3 accordance with the Magnuson-Steven Act and its implementing regulations, and are reviewable
4 under the APA, 5 U.S.C. §§ 701-706.

5 121. The Fisheries Service's actions and failures to act violate the Magnuson-Stevens Act
6 and the APA, and are causing irreparable injury to the Plaintiff for which it has no adequate remedy
7 at law.

8 **FOURTH CLAIM FOR RELIEF**
9 **Violation of Violation of the Magnuson-Stevens Act and the APA – Failure to Use Best**
10 **Available Science and Articulate a Rational Basis for the Annual Catch Limit, Acceptable**
11 **Biological Catch, and Overfishing Limit**
12 **5 U.S.C. § 706**

13 122. Plaintiff re-alleges, as if fully set forth herein, each and every allegation contained in
14 the preceding paragraphs.

15 123. In addition to the fundamental problems with basing unchanging catch limits on an
16 assumed average biomass detailed in the Claims above, the agency's selective use of only favorable
17 data from the most recent three years to set long-term catch limits is arbitrary and capricious and
18 violates the Magnuson-Stevens Act's requirement to base management measures on the best
19 scientific information available.

20 124. The Magnuson-Stevens Act requires the Fisheries Service to base the 2019 Catch
21 Rule "upon the best scientific information available." 16 U.S.C. § 1851(a)(2).

22 125. The Administrative Procedure Act requires that the Fisheries Service rationally
23 explain the basis for its decision to base the 2019 Catch Rule on only three years of anchovy
24 abundance data while omitting other available scientific data on anchovy abundance as well as
25 available estimates of maximum sustainable yield.

26 126. The Fisheries Service set the values for the overfishing limit, acceptable biological
27 catch, and annual catch limit in the 2019 Catch Rule based on anchovy abundance estimates from
28 2016, 2017, and 2018. It omitted its own abundance estimate from 2015, which showed far lower
abundance. It also omitted peer-reviewed, published abundance estimates from independent experts
that provided abundance data for 2008 through 2017.

1 127. The Fisheries Service also declined to consider or use estimates of maximum
2 sustainable yield calculated by scientists from the agency itself and an expert from the Council's
3 scientific and statistical committee to inform the values set in the 2019 Catch Rule.

4 128. The Fisheries Service set unchanging catch limits intended to be in place for an
5 indefinite period of time and to take effect in low abundance as well as high abundance years.

6 129. The best available science shows that the anchovy population experiences a "boom
7 and bust" pattern, increasing to large numbers and rapidly declining to lower numbers. The
8 Fisheries Service based the 2019 Catch Rule on abundance data from only the three most recent
9 years that reflected a period of increasing abundance and excluded data from prior years when
10 anchovy had experienced dramatically lower abundance. The agency also chose not to use readily
11 available estimates of maximum sustainable yield that more fully reflected both low and high
12 anchovy abundance over time. The agency thus established inflated catch limits by relying only on
13 data that reflected the "boom" part of the anchovy's "boom and bust" population cycle.

14 130. The agency's decision to base catch limits intended to be in place for an indefinite
15 period, during periods of both low and high abundance, only on data reflecting higher anchovy
16 abundance is arbitrary and capricious and not based on the best available science.

17 131. The Fisheries Service's failure to offer a rational, lawful explanation why it chose to
18 use a narrow subset of abundance data only from the three most recent years when anchovy were
19 more abundant but chose to exclude data from prior years when anchovy were far less abundant, and
20 why it chose not to use readily available estimates of maximum sustainable yield, violates the
21 Magnuson-Stevens Act and APA.

22 132. The Fisheries Service's 2019 Catch Rule is arbitrary and capricious and otherwise not
23 in accordance with the Magnuson-Stevens Act and its implementing regulations, and is reviewable
24 under the APA, 5 U.S.C. §§ 701-706.

25 133. The Fisheries Service's actions and failures to act violate the Magnuson-Stevens Act
26 and the APA, and are causing irreparable injury to the Plaintiff for which it has no adequate remedy
27 at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Declare that Defendants have violated the Magnuson-Stevens Act and the APA as described above because the 2019 Catch Rule is not based on the best scientific information available, fails to prevent overfishing and achieve optimum yield, and is arbitrary and capricious and not in accordance with law;

B. Declare that Defendants have violated the Magnuson-Stevens Act and the APA as described above because the Coastal Pelagic Species Fishery Management Plan provisions applied in the 2019 Catch Rule are not based on the best scientific information available, fail to prevent overfishing and achieve optimum yield, and are arbitrary and capricious and not in accordance with law;

C. Vacate the 2019 Catch Rule;

D. Vacate the Coastal Pelagic Species Fishery Management Plan provisions and regulations that the 2019 Catch Rule implements;

E. Remand the 2019 Catch Rule to Defendants for completion of a new rule that replaces the 2019 Catch Rule and complies with the Magnuson-Stevens Act and the APA within no more than three months from the date of the entry of judgment;

F. Remand the Coastal Pelagic Species Fishery Management Plan to Defendants for completion of a fishery management plan amendment that eliminates the Coastal Pelagic Species Fishery Management Plan provisions applied in the 2019 Catch Rule and brings the Plan into full compliance with the Magnuson-Stevens Act and the APA within no more than one year from the date of the entry of judgment.

G. Maintain jurisdiction over this action until Defendants are in compliance with the Magnuson-Stevens Act, the APA, and every order of this Court;

H. Award Plaintiff its costs of litigation, including reasonable attorney and expert witness fees.

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I. Grant Plaintiff such further and additional relief as the Court may deem just and proper.

DATED: June 28, 2019

/s/ Andrea A. Treece
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