

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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

Case No. 16-CV-06784-LHK

**ORDER RE: MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 51, 52, 56, 57

Plaintiff Oceana, Inc. (“Plaintiff”) brings this action against Defendant Wilbur Ross, in his official capacity, Defendant National Oceanic and Atmospheric Administration (“NOAA”), and Defendant National Marine Fisheries Service (“the Service”) (collectively, “Defendants”). Before the Court are Plaintiff’s motion for summary judgment, and Defendants’ cross-motion for summary judgment. ECF No. 51; ECF No. 52. Having considered the parties’ submissions, the relevant law, and the record in this case, the Court GRANTS Plaintiff’s motion for summary judgment and DENIES Defendants’ cross-motion for summary judgment.

I. BACKGROUND

A. Regulatory Background

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

2 In response to overfishing concerns, Congress enacted the Magnuson-Stevens Fishery
3 Conservation and Management Act of 1976 (“Magnuson-Stevens Act”) to promote the long-term
4 biological and economic sustainability of marine fisheries in U.S. federal waters. *See* 16 U.S.C. §
5 1801(a)–(b). The Magnuson-Stevens Act created eight Regional Fishery Management Councils
6 and requires the Councils to create fishery management plans (“FMPs”) aimed at preventing
7 overfishing, along with any amendments to the FMPs. *Id.* §§ 1852(h)(1), 1801(b)(4), 1854(a)(3).
8 Councils submit FMPs and amendments to the Secretary of Commerce (“Secretary”), who reviews
9 them to determine whether they are consistent with the Magnuson-Stevens Act and other
10 applicable law. *Id.* §§ 1851(a), 1854(a)(1)(A). The Secretary must publish notice of a Council’s
11 proposed FMP or amendment in the Federal Register and solicit public comment. *Id.* §§
12 1854(a)(1)(B), 1854(a)(5). Within 30 days of the close of the public comment period, the
13 Secretary must either “approve, disapprove, or partially approve [the FMP] or amendment ... by
14 written notice to the Council.” *Id.* § 1854(a)(3). If the Secretary does not notify the Council of the
15 Secretary’s decision, the FMP or amendment takes effect as if approved. *Id.*

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18 FMPs and amendments “do not themselves have any regulatory effect—implementing
19 regulations must also be enacted in order to effectuate them.” *N. Carolina Fisheries Ass’n, Inc. v.*
20 *Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008). The Magnuson-Stevens Act therefore requires
21 Councils to submit proposed regulations implementing a FMP or amendment to the Secretary for
22 approval. 16 U.S.C. § 1853(c)(1). The Secretary evaluates whether the proposed regulations are
23 consistent with the FMP, amendment, the Magnuson-Stevens Act, and any other applicable law.
24 *Id.* § 1854(b)(1). If the Secretary determines the proposed regulations are consistent, the Secretary
25 must “publish such regulations in the Federal Register ... for a public comment period of 15 to 60
26 days.” *Id.* § 1854(a)(1)(A)). The Secretary then “promulgate[s] final regulations within 30 days
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1 after the end of the comment period.” *Id.* § 1854(b)(3). In practice, the Service carries out the
 2 Secretary’s duty to review FMPs, amendments, and regulations because the Secretary has
 3 delegated his responsibilities under the Magnuson-Stevens Act to the Service. *Pac. Dawn LLC v.*
 4 *Pritzker*, 831 F.3d 1166, 1170 (9th Cir. 2016).¹

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

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

20 Optimum yield is the yield from a fishery that “will provide the greatest overall benefit to
 21 the Nation, particularly with respect to food production and recreational opportunities, and taking
 22 into account the protection of marine ecosystems.” 16 U.S.C. § 1802(33)(A). In turn, because
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 27 ¹ The Service is a subagency of NOAA, which is part of the Department of Commerce.
 28 *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 889 (9th Cir. 2010).

1 optimum yield accounts for more than just how much a fishery can yield for human consumption,
 2 it is calculated by using MSY as a starting point and then reducing MSY “by any relevant social,
 3 economic, or ecological factor.” *Id.* § 1802(33)(B); *Bryson*, 940 F. Supp. 2d at 1036 (optimum
 4 yield is “the maximum sustainable yield from the fishery as reduced by any relevant social,
 5 economic, or ecological factor”).

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

13 14 15 **2. Magnuson-Stevens Fishery Conservation and Management Reauthorization Act**

16 The Magnuson–Stevens Fishery Conservation and Management Reauthorization Act of
 17 2006 (“MSRA”), “impose[s] additional requirements for fishery management plans intended to
 18 strengthen the role of science and account for uncertainty in fishery management.” *Bryson*, 940 F.
 19 Supp. 2d at 1037. In relevant part, the MSRA requires that each FMP “establish a mechanism for
 20 specifying annual catch limits in the plan ... at a level such that overfishing does not occur in the
 21 fishery, including measures to ensure accountability.” 16 U.S.C. § 1853(a)(15). The annual catch
 22 limits (“ACLs”) “may not exceed the fishing level recommendations of [the Council’s] scientific
 23 and statistical committee” *Id.* § 1852(h)(6).

24 ACLs are set with reference to the overfishing limit (“OFL”) and the acceptable biological
 25 catch (“ABC”). The OFL is a quantifiable factor that is “used to determine if overfishing has
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1 occurred, or if the stock or stock complex [of a fishery] is overfished.” 50 C.F.R. §
2 600.310(e)(2)(i)(A). Determining when overfishing has occurred involves a degree of scientific
3 uncertainty, so in the course of setting an OFL, Councils are also instructed to establish an ABC,
4 which is “a level of a stock or stock complex’s annual catch that accounts for the scientific
5 uncertainty in the estimate of OFL and any other scientific uncertainty.” *Id.* § 600.310(f)(2)(ii).
6 Because the ABC is the OFL after the OFL has been reduced to account for scientific uncertainty,
7 a fishery’s ABC is likely to be lower than the fishery’s OFL. *Bryson*, 940 F. Supp. 2d at 1037; 50
8 C.F.R. § 600.310(f)(3) (“While the ABC is allowed to equal OFL, [the Service] expects that in
9 most cases ABC will be reduced from OFL to reduce the probability that overfishing might occur
10 in a year.”). In turn, the ACL “is a limit on the total annual catch of a stock or stock complex,”
11 which may be equal to but “cannot exceed the ABC.” 50 C.F.R. § 600.310(f)(1)(iii); *see also id.* §
12 600.310(f)(4)(i) (“If a Council recommends an ACL which equals ABC, and the ABC is equal to
13 OFL, the Secretary may presume that the proposal would not prevent overfishing, in the absence
14 of sufficient analysis and justification for the approach.”).

15 16 17 **B. Factual Background**

18 **1. Northern Anchovy**

19 The northern anchovy (“anchovy”) is a small fish that is typically found in schools near the
20 ocean’s surface. AR 7:146, 174. Anchovy are relatively-short lived and their populations tend to
21 fluctuate significantly over time. AR 7:294; AR 29:831. Anchovy are valuable food sources to a
22 wide variety of predators, including fish, birds, and mammals. AR 7:146; AR 45:1161 (noting that
23 diet studies of 32 marine predators found anchovy was the most important forage fish in the
24 California Current Ecosystem). The anchovy is also fished commercially, with an average of 7,300
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metric tons (“mt”) harvested per year. 81 Fed. Reg. 74309, 74309 (Oct. 26, 2016).²

2. Coastal Pelagic Species Fisheries Management Plan

The Pacific Fishery Management Council (“Pacific Council”) is one of the eight Councils created by the Magnuson-Stevens Act. 16 U.S.C. § 1852(a)(1)(F). The Pacific Council is responsible for Pacific Ocean fisheries off the coasts of California, Oregon, and Washington. *Id.* The Pacific Council’s Coastal Pelagic Species Fishery Management Plan (“CPS FMP”) governs Pacific sardine, Pacific mackerel, anchovy, market squid, and krill. 81 Fed. Reg. at 74309.³ The CPS FMP divides the anchovy into two subpopulations, the northern subpopulation and the central subpopulation. *Id.* This suit concerns the central subpopulation, so future references to “anchovy” refer to the central subpopulation unless otherwise noted.

Although the CPS FMP dates back to 1978, it has been amended a number of times over the ensuing years. *Bryson*, 940 F. Supp. 2d at 1038. Amendment 8 and Amendment 13 are particularly relevant to this case, as is a 2016 action establishing an ACL for the anchovy.

Amendment 8 was implemented on January 1, 2000. AR 30:890. Amendment 8 divided the fish stocks covered by the CPS FMP into two main categories: actively managed stocks, and monitored stocks. AR 30:892. The “active” category is for “stocks and fisheries with biologically

² The final rule (“Catch Rule”) that gave rise to this case appears in the administrative record. AR 198:3223–3228. Unfortunately, some pages are missing. In APA cases like this one, judicial review is usually limited to the administrative record. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014). However, “a reviewing court may consider extra-record evidence where admission of that evidence (1) is necessary to determine ‘whether the agency has considered all relevant factors and has explained its decision,’ (2) is necessary to determine whether ‘the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.’” *Id.* (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)). The missing pages of the Catch Rule are necessary to determine whether the Service considered all relevant factors and explained its decision, so the Court will consider the entire Catch Rule as published in the Federal Register. Subsequent citations to the Catch Rule will be to the Federal Register version.

³ “Pelagic” species live in the water column as opposed to near the sea floor, and are generally found between the ocean’s surface and 1,000 meters below the surface. AR 29:831.

1 significant levels of catch, or biological or socioeconomic considerations requiring relatively
2 intense harvest management procedures.” AR 30:892–93. Stocks that do not require intense
3 harvest management procedures, for instance because they are not heavily fished, fall in the
4 “monitored” category. *Id.* The anchovy is in the monitored category. AR 7:459. Amendment 8
5 specified that the MSY for the anchovy was 100,000 mt and that the anchovy’s ABC was 25,000
6 mt. AR 7:459–60. The anchovy’s ABC was set based on a default rule that set ABC as 25 percent
7 of a stock’s MSY. AR 7:459.

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9 Amendment 13 was implemented on November 14, 2011. AR 31:933–35. Amendment 13
10 was a response to the MSRA’s requirement that FMPs incorporate ACLs. AR 31:933; 16 U.S.C. §
11 1853(a)(15) (requiring FMPs to establish mechanisms for specifying ACLs). Amendment 13
12 implemented “a default management framework” for setting ACLs. 81 Fed. Reg. at 74309. The
13 default framework set a monitored stock’s OFL as equal to the stock’s MSY. *Id.* at 74310, AR
14 31:933–34. The anchovy’s MSY was already set at 100,000 mt, so the anchovy’s OFL was
15 likewise set at 100,000 mt. 81 Fed. Reg. at 74310. The default framework also retained the
16 existing formula for setting a monitored stock’s ABC, such that “ABC equals 25 percent of
17 OFL/MSY.” AR 31:933. Consequently, the anchovy’s ABC remained set at 25,000 mt. 81 Fed.
18 Reg. at 74311. Finally, by default ACLs were set equal to ABC. AR 30:891.

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20 On November 20, 2015, the Service published a proposed rule in the Federal Register to
21 set an ACL for the anchovy and other stocks managed by the CPS FMP. AR 88:1968. In line with
22 Amendment 13, the proposed rule would set the anchovy’s ACL equal to the anchovy’s 25,000 mt
23 ABC. AR 88:1968–69. On October 26, 2016, the Service published a final rule in the Federal
24 Register (“Catch Rule”) that set the anchovy’s ACL at 25,000 mt, equal to the ABC. 81 Fed. Reg.
25 at 74310.

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27 **C. Procedural History**

1 On November 11, 2016, Plaintiff filed the complaint challenging the Catch Rule. ECF No.
 2 1. On June 21, 2017, United States Magistrate Judge Susan van Keulen issued an order granting in
 3 part and denying in part Plaintiff's motion to compel completion of the administrative record. ECF
 4 No. 39. On August 15, 2017, this Court issued an order denying Defendants' motion for relief
 5 from Judge van Keulen's order. ECF No. 48.

6 On September 1, 2017, Plaintiff filed a motion for summary judgment. ECF No. 51
 7 ("Plaintiff's MSJ"). On October 13, 2017, Defendants filed the combined cross-motion for
 8 summary judgment and opposition to Plaintiff's motion for summary judgment. ECF No. 52
 9 ("Defendants' MSJ"). On November 11, 2017, Plaintiff filed its combined opposition to
 10 Defendants' motion for summary judgment and reply in support of Plaintiff's motion for summary
 11 judgment. ECF No. 56 ("Plaintiff's Reply"). On December 8, 2017, Defendants filed their reply
 12 brief in support of Defendants' cross-motion for summary judgment. ECF No. 57 ("Defendants'
 13 Reply").
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15 **II. LEGAL STANDARD**

16 **A. Administrative Procedure Act Review**

17 The Magnuson-Stevens Act adopts the Administrative Procedure Act's ("APA") "standard
 18 for judicial review of agency action set forth in 5 U.S.C. § 706(2)(A)." *Or. Trollers Ass'n v.*
 19 *Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006) (citing 16 U.S.C. § 1855(f)(1)).
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21 Under the APA, courts must set aside an agency action where the action is "arbitrary,
 22 capricious, an abuse of discretion, or otherwise not in accordance with law" or was taken "without
 23 observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). This review is deferential.
 24 *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007). Courts should overturn agency
 25 action "only when the agency has relied on factors which Congress has not intended it to consider,
 26 entirely failed to consider an important aspect of the problem, offered an explanation for its
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1 decision that runs counter to the evidence before the agency, or is so implausible that it could not
 2 be ascribed to a difference in view or the product of agency expertise.” *Pac. Coast Fed’n of*
 3 *Fishermen’s Ass’ns, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001)
 4 (internal quotation marks and citations omitted).

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

11 **B. Summary Judgment**

12 In general, summary judgment is appropriate if, viewing the evidence and drawing all
 13 reasonable inferences in the light most favorable to the nonmoving party, there are no genuine
 14 disputes of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P.
 15 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986).

16 In an APA case, however, a district court’s function at summary judgment is not to resolve
 17 disputed facts and make de novo factual determinations, but rather “to determine whether or not as
 18 a matter of law the evidence in the administrative record permitted the agency to make the
 19 decision it did.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir. 1985); accord *Nw.*
 20 *Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (explaining that
 21 because “this case involves review of a final agency determination under the Administrative
 22 Procedure Act, ... resolution of this matter does not require fact finding on behalf of this court”). A
 23 court’s review is therefore limited to the administrative record in all but a few exceptional
 24 circumstances. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir.
 25 2014).

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III. DISCUSSION

Plaintiff claims that the Catch Rule violates the Magnuson-Stevens Act in three ways. First, Plaintiff claims the Catch Rule violates National Standard Two because it is not based on the best scientific information available. Second, Plaintiff claims the Catch Rule violates National Standard One because it does not prevent overfishing. Third, Plaintiff claims the Catch Rule violates National Standard One by failing to account for the needs of anchovy predators. Defendants dispute all three of Plaintiff’s claims, and argue as a threshold matter that Plaintiff cannot challenge the OFL and ABC values from which the ACL derives because any challenge to the OFL and ABC is untimely. Defendants also contend that even if Plaintiff prevails on summary judgment, the Court should not vacate the Catch Rule because the anchovy population has recently recovered.

The Court first considers and rejects Defendants’ threshold argument that Plaintiff cannot challenge the OFL and ABC. The Court then turns to Plaintiff’s merits arguments. The Court finds that Plaintiff prevails on the best scientific information available argument and the overfishing argument, and thus does not reach Plaintiff’s claim that the Catch Rule does not account for the needs of anchovy predators. Finally, the Court rejects Defendants’ argument that the Court should not vacate the Catch Rule because the anchovy population has recently recovered.

A. Plaintiff Can Challenge the Overfishing Limit and Acceptable Biological Catch

Defendants argue that Plaintiff cannot challenge the OFL and ABC because the OFL and ABC were established years before the Catch Rule. Plaintiff has two responses. First, Plaintiff claims that the OFL and ABC were in fact set in the Catch Rule and that Plaintiff’s challenge to them is therefore timely. Second, Plaintiff claims that even if the OFL and ABC were set before the Catch Rule, Plaintiff’s timely challenge to the Catch Rule also allows Plaintiff to challenge the

1 OFL and ABC. The Court is unpersuaded by Plaintiff's first claim, but agrees that Plaintiff's
2 challenge to the Catch Rule allows Plaintiff to challenge the OFL and ABC.

3 Some background is necessary to understand the parties' dispute. In 2000, Amendment 8
4 set the anchovy's maximum sustainable yield ("MSY") at 100,000 metric tons ("mt"). AR 30:890.
5 MSY is the largest long term catch or yield a stock can produce. 50 C.F.R. § 600.310(e)(1)(i)(A).

6 In 2011, Amendment 13 set the anchovy's overfishing limit ("OFL") equal to the
7 Amendment 8 MSY value, meaning that OFL was likewise set at 100,000 mt. AR 29:827; AR
8 31:933–35. OFL is a catch level beyond which overfishing will occur. 50 C.F.R. §
9 600.310(e)(2)(i)(A). Amendment 13 also set the anchovy's acceptable biological catch ("ABC") at
10 25 percent of OFL, meaning that ABC was 25,000 mt. AR 31:933; *see* AR 30:924. The ABC is a
11 catch level that accounts for scientific uncertainty around the OFL estimate, and is therefore
12 usually a lower number. 50 C.F.R. §§ 600.310(f)(2)(ii), 600.310(f)(3); *Bryson*, 940 F. Supp. 2d at
13 1037. Amendment 13 also established a framework for setting annual catch limits ("ACLs"),
14 which the Catch Rule is implementing. AR 31:933 ("Amendment 13 modified this framework to
15 include new specification reference points such as annual catch limit").

16 In 2016, the Catch Rule set the anchovy's ACL based on the framework set in Amendment
17 13. 81 Fed. Reg. at 74309. The Catch Rule set the ACL at 25,000 mt, and justified this decision on
18 the grounds that the ABC set by Amendment 13 is also 25,000 mt. *Id.* at 74311 (stating ACL is
19 "set equal to its ABC value of 25,000 mt" and that it is "not necessary to further reduce the ACL
20 from the ABC" because ABC was "approved by [the Service] as best available science and
21 determined to appropriately account for uncertainty and protect the stock from overfishing."). The
22 ACL is an annual limit on the catch of a stock which can be equal to ABC, but cannot exceed
23 ABC. 50 C.F.R. § 600.310(f)(1)(iii). To sum up, OFL must be greater than or equal to ABC,
24 which must be greater than or equal to ACL.

1 The Magnuson-Stevens Act provides that challenges to regulations and actions must be
2 filed within 30 days after “the date on which the regulations are promulgated or the action is
3 published in the Federal Register.” 16 U.S.C. § 1855(f)(1). The Catch Rule was published on
4 October 26, 2016. 81 Fed. Reg. at 74309. Plaintiff filed its complaint on November 11, 2016. ECF
5 No. 1. Plaintiff’s challenge to the Catch Rule is therefore timely. By the same token, Plaintiff’s
6 suit is untimely as to the 2000 Amendment 8 and the 2011 Amendment 13. AR 31:933; AR
7 30:890. The Court now turns to Plaintiff’s two arguments as to why Plaintiff can still challenge
8 Amendment 13.

9
10 Plaintiff’s first argument is that Plaintiff can challenge the OFL and ABC because they
11 were in fact set by the Catch Rule. The Court disagrees. Amendment 8 set MSY at 100,000 mt,
12 and Amendment 13 set OFL equal to MSY. Thus, Amendment 13 set OFL at 100,000 mt. In turn,
13 because Amendment 13 set ABC as 25 percent of OFL, Amendment 13 set ABC at 25,000 mt.
14 The Catch Rule expressly states that the OFL and ABC were previously set, and that the Catch
15 Rule does not revisit the OFL or ABC. 81 Fed. Reg. at 74310 (“OFL and ABC specifications ...
16 are set in the FMP; [the Service] is not establishing or revising them by this action.”); *id.*
17 (“[C]hanges to the OFL or ABC levels or revisiting these values or the default ABC control rule
18 for monitored stocks was not being proposed in this rulemaking.”). The Court agrees with this
19 reading, especially given the deference owed to an agency’s interpretation of its own regulations.
20 *Turtle Island Restoration Network v. United States Dep’t of Commerce*, 2017 WL 6598627, at *5
21 (9th Cir. 2017); *see Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1447 (9th
22 Cir. 1990) (rejecting challenge to agency’s interpretation of FMP amendment). In turn, because
23 the OFL and ABC were set by Amendment 13 in 2011, this action falls well outside the 30 day
24 window for challenging them.

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27 Plaintiff’s second argument is that even if the OFL and ABC were set by Amendment 13,

1 Plaintiff's timely challenge to the Catch Rule also permits Plaintiff to challenge the OFL and
2 ABC. Although Amendment 8 established the underlying MSY figure, Amendment 13 reaffirmed
3 it and established the OFL and ABC based on Amendment 8's MSY. AR 29:827; AR 31:933; AR
4 30:924. Thus, the regulation at issue here is Amendment 13.

5 The key case on this issue is *Oregon Trollers*, 452 F.3d 1104. *Oregon Trollers* held that
6 under section 1855(f)(1), "a petition filed within 30 days of the publication of an action may
7 challenge both the action *and the regulation under which the action is taken.*" *Or. Trollers*, 452
8 F.3d at 1113 (emphasis added); *Gulf Fishermen's Ass'n v. Gutierrez*, 529 F.3d 1321, 1323 (11th
9 Cir. 2008) (adopting *Oregon Trollers* analysis); *Bryson*, 940 F. Supp. 2d at 1048 (noting that
10 under *Oregon Trollers* "plaintiffs [may] challenge regulations after the 30 day period through a
11 suit challenging an action taken under the regulation.").

12
13 "Actions" are defined as "actions that are taken by the Secretary under regulations which
14 implement a fishery management plan" 16 U.S.C. § 1855(f)(2); *see Or. Trollers*, 452 F.3d at
15 1112–16 (discussing definition of "action"). Actions must also be published in the Federal
16 Register. *Or. Trollers*, 452 F.3d at 1112 (citing 16 U.S.C. § 1855(f)(1)).

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18 The Catch Rule satisfies the definition of "Actions" because the Catch Rule implements
19 ACLs pursuant to Amendment 13 and because the Catch Rule was published in the Federal
20 Register. AR 31:933 (final rule for Amendment 13 noting that it sets a process for establishing
21 ACLs); *see also* 81 Fed. Reg. at 74309–12 (repeatedly referring to the Catch Rule as "this
22 action"). Plaintiff therefore argues that Plaintiff's timely challenge to the Catch Rule (the action)
23 also allows Plaintiff to challenge Amendment 13 (the regulation).
24

25 *Oregon Trollers* stemmed from a 1989 amendment to the FMP that managed Pacific
26 salmon fisheries, including the Klamath River fall chinook. 452 F.3d at 1108–09. A 1989
27 amendment to the FMP sought to address declining Klamath chinook numbers by establishing an
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1 annual “escapement goal” that at least 35,000 spawning adults would survive so that they could
2 reproduce. *Id.* at 1109. In 2005, the National Marine Fisheries Service (“the Service”) determined
3 that allowing normal fishing during the upcoming fishing season would result in less than 35,000
4 salmon surviving to reproduce. *Id.* at 1110–11. The Service therefore placed significant
5 restrictions on the salmon fishing season. *Id.*

6 Plaintiffs, primarily fishermen and fishing-related businesses, brought a suit challenging
7 the fishery restriction (the action) and the 1989 amendment (the regulation) in federal court. *Id.* at
8 1108, 1112. Plaintiffs’ suit was commenced within 30 days of the 2005 fishery restrictions’
9 publication in the Federal Register. *Id.* at 1111. The Service therefore did not dispute that the
10 plaintiffs’ suit was timely as to the fishery restrictions. Instead, the Service argued that plaintiffs’
11 suit was untimely as to the underlying 1989 amendment because “under § 1855(f)(1) plaintiffs
12 should have filed their challenge within thirty days of the promulgation of [the 1989 amendment],
13 and ... their suit is therefore sixteen years too late.” *Id.* at 1112. The Ninth Circuit rejected this
14 argument, and held that section 1855(f)(1)’s plain language and legislative history demonstrated
15 that plaintiffs were entitled to challenge both the action and the underlying regulation. *Id.* at 1112–
16 13.

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19 This case mirrors *Oregon Trollers*. Amendment 13 created a process for setting ACLs. 81
20 Fed. Reg. at 74309 (noting Amendment 13 “modified the framework process used to set and
21 adjust fishery specifications and for setting ACLs”). The Catch Rule complies with Amendment
22 13 by setting ACLs for the anchovy, and does so in explicit reliance on the 100,000 mt and 25,000
23 mt values for OFL and ABC that Amendment 13 established. 81 Fed. Reg. at 74310–11 (noting
24 ACL is “derived from the default OFL specification and ABC”). In *Oregon Trollers*, the 2005
25 fishery restrictions complied with the 1989 amendment’s instruction to meet the escapement goal,
26 and does so in explicit reliance on the 1989 amendment’s 35,000 mt value for that escapement
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1 goal. See *Gulf Fishermen's*, 529 F.3d at 1322–23 (citing *Oregon Trollers* to hold plaintiff could
2 challenge prior FMP amendment through a subsequent Service action setting deadline to comply
3 with the FMP amendment); *Glacier Fish Co. LLC v. Pritzker*, 2015 WL 71084, at *2 (W.D. Wash.
4 Jan. 6, 2015), *rev'd on other grounds*, 832 F.3d 1113 (9th Cir. 2016) (citing *Oregon Trollers* to
5 allow plaintiff to use Service action setting rules for cost recovery program to challenge
6 regulations establishing cost recovery program).

7
8 *Oregon Trollers*' applicability is underscored by the Catch Rule's reliance on Amendment
9 13 to justify the ACL. The Catch Rule's explanation for why the ACL complies with National
10 Standard One's overfishing requirements and National Standard Two's science requirements is
11 that the Service previously found OFL and ABC complied with those requirements in approving
12 Amendment 13. *Id.* at 74311 (asserting it is "not necessary to further reduce the ACL from the
13 ABC" because the OFL and ABC were previously "approved by [the Service] as best available
14 science and determined to appropriately account for uncertainty and protect the stock from
15 overfishing."). The ACL's direct descent from Amendment 13 indicates that the Catch Rule is an
16 action implementing Amendment 13, and thus that Plaintiff can challenge Amendment 13 through
17 Plaintiff's challenge to the Catch Rule.

18
19 Defendants' response is that even if Plaintiff could challenge Amendment 13 through the
20 Catch Rule, Plaintiff has only challenged the Catch Rule in this suit and *Oregon Trollers* therefore
21 does not apply. Defendants "failed to raise the argument prior to [their] reply brief, [so] the Court
22 declines to consider this argument." *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 918 (N.D. Cal.
23 2013); *Avendano-Ruiz v. City of Sebastopol*, 2016 WL 3017534, at *9 (N.D. Cal. 2016) ("Parties
24 may not raise new arguments in reply briefs, and consideration of such arguments is improper.").
25

26 Moreover, Defendants' argument would be unpersuasive even if the Court were to
27 consider it. Defendants maintain that Plaintiff's suit is a challenge to the OFL and ABC, and that
28

1 Plaintiff's suit therefore fails because the OFL and ABC were set in Amendment 13. Defendants'
 2 MSJ at 20 ("At bottom, Plaintiff is arguing that *the OFL set in the FMP* is not based on the 'best
 3 information available.'" (emphasis in original)); *id.* at 8 ("In the complaint, Plaintiff claims that
 4 [the Service] unlawfully 'set' values for OFL, ABC, and ACL"). Defendants' position is therefore
 5 that Plaintiff is challenging the OFL and ABC, but is not challenging the regulation that set them.
 6 This attempt to have it both ways is a stretch at best, and Defendants' strained reading of
 7 Plaintiff's allegations is at odds with the flexible approach to section 1855(f)(1) adopted in
 8 *Oregon Trollers* and its progeny. *Or. Trollers*, 452 F.3d at 1114 (considering section 1855(f)(1)
 9 argument even though plaintiffs only raised the issue during oral argument on summary
 10 judgment); *Gulf Fishermen's*, 529 F.3d at 1324 n. 1 (finding a challenge solely to the action also
 11 qualified as a challenge to the underlying regulation).

12
 13 In sum, the Court finds that Plaintiff's timely challenge to the Catch Rule also allows
 14 Plaintiff to challenge Amendment 13, and in particular the OFL and ABC values that Amendment
 15 13 established.

16
 17 **B. The Overfishing Limit, Acceptable Biological Catch, and Annual Catch Limit
 18 Are Not Based on the Best Scientific Information Available**

19 Plaintiff and Defendants dispute whether the Catch Rule complies with National Standard
 20 Two's requirement that actions be "based upon the best scientific information available." 16
 21 U.S.C. § 1851(a)(2). Plaintiff argues that the Service failed to rely on the best scientific
 22 information available because Plaintiff presented scientific information showing that OFL, ABC,
 23 and ACL were based on outdated information. Defendants advance three arguments in response.
 24 First, Defendants argue that section 1851(a)(2)'s best scientific information requirement does not
 25 require the Service to accept any particular piece of scientific information as fact. Second,
 26 Defendants argue that the scientific information Plaintiff presented was unreliable, and thus that it
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Northern District of California

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was reasonable for the Service to reject it. Third, and flowing from the second, Defendants argue that the Service reasonably relied on the existing OFL and ABC values because Plaintiff’s more recent scientific evidence was unreliable. The Court agrees with Defendants’ first argument, but rejects Defendants’ second and third arguments.

1. The Meaning of Best Scientific Information Available

Defendants interpret National Standard Two’s science requirement as requiring that the Service must *consider* scientific information, but that the Service is not required to *accept* any particular piece of scientific information. Plaintiff replies that the Service is required to base its decisions on the best scientific information available. The Court finds that both sides are correct.

National Standard Two of the Magnuson-Stevens Act requires that “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2). Regulations defining National Standard Two further specify that fishery management measures “must take into account the best scientific information available at the time of preparation,” 50 C.F.R. § 600.315(b)(2), which includes “biological, ecological, environmental, economic, and sociological scientific information,” *id.* § 600.315(a)(1).

Defendants are correct that the Service need not accept any particular item of scientific information as fact. National Standard Two instead requires the Service to review the evidence and determine what constitutes the best available science. *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 195 (D.D.C. 2014) (noting National Standard Two requires a “a thorough review of all the relevant information available at the time.”); 50 C.F.R. § 600.315(a)(1) (“Successful fishery management depends, in part, on the thorough analysis of this [scientific] information.”); *id.* § 600.315(a)(2) (“Scientific information that is used to inform decision making should include an evaluation of its uncertainty and identify gaps in the information.”).

However, Plaintiff is correct that the Magnuson-Stevens Act requires, as it expressly states,

1 that “[c]onservation and management measures shall be based upon the best scientific information
2 available.” 16 U.S.C. § 1851(a)(2). *Compare Midwater Trawlers Co-operative v. Dep’t of*
3 *Commerce*, 282 F.3d 710, 720 (9th Cir. 2002) (overturning Service rule as it was not based on the
4 best scientific information available) *with Or. Trollers*, 452 F.3d at 1120 (upholding Service’s
5 fishery restrictions because plaintiffs had pointed to no scientific information better than the
6 information on which the Service relied). Accordingly, “[the Service] may not disregard superior
7 data” and section 1851(a)(2) challenges may prevail if “there is some indication that superior or
8 contrary data was available and that the agency ignored such information.” *Guindon*, 31 F. Supp.
9 3d at 195 (internal quotations and citation omitted). Nor is it enough for the Service to simply note
10 contrary scientific evidence’s existence without providing a reason for rejecting it. The Service
11 “cannot rely on reminders that its scientific determinations are entitled to deference in the absence
12 of reasoned analysis to cogently explain why its ... measures satisfied” the Magnuson-Stevens
13 Act. *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 755–56 (D.C. Cir. 2000) (rejecting
14 Service action under Magnuson-Stevens Act); *see WildEarth Guardians v. U.S. E.P.A.*, 759 F.3d
15 1064, 1073 (9th Cir. 2014) (“Stating that a factor was considered ... is not a substitute for
16 considering it.”)

17
18
19 **2. Defendants Were Not Permitted to Disregard the Scientific**
20 **Information Plaintiff Highlights**

21 Defendants’ next argument is that Plaintiff’s scientific evidence is so flawed that the
22 Service could disregard it in favor of relying on the OFL and ABC set by Amendment 13. Some
23 background is necessary to understand the parties’ dispute, so the Court first describes the
24 scientific underpinnings of the OFL, ABC, and ACL, and then turns to Defendants’ criticisms of
25 Plaintiff’s scientific evidence.

26
27 **a. The Overfishing Limit, Acceptable Biological Catch, and**
28 **Annual Catch Limit Derive From the Conrad Study**

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The Catch Rule’s 25,000 metric ton (“mt”) annual catch limit (“ACL”) is based on the overfishing limit (“OFL”) and the acceptable biological catch (“ABC”). 81 Fed. Reg. at 74311. (“The ACL ... is currently set equal to its ABC value of 25,000 mt, which is 75,000 mt lower than its OFL.”). Reflecting this, the Catch Rule states that because “the existing OFL and ABC values ... [were] approved by [the National Marine Fisheries Service (“the Service”)] as the best available science. ... [I]t is not necessary to further reduce the ACL from the ABC for precautionary reasons regarding scientific uncertainty in the level of catch intended to prevent overfishing.” *Id.* Necessarily then, the ACL is only based on the best scientific information available if the OFL and ABC are based on the best scientific information available.

The OFL and ABC are based on a 1991 study by Jon Conrad (“Conrad Study”). AR 5:40–79 (Jon Conrad, *A Bioeconomic Analysis of the Northern Anchovy* (1991)). The Conrad Study estimated that the anchovy’s long-term average biomass was 733,410 mt and that the anchovy’s maximum sustainable yield (“MSY”) was 123,336 mt. AR 5:54; AR 7:148. The Conrad Study relied on data collected from 1964 to 1990, a period during which anchovy biomass reached as high as 1,611,800 mt and never fell below 299,410 mt. AR 5:71.⁴

In 2000, Amendment 8 relied on the Conrad Study’s MSY estimate to set the anchovy’s MSY at 100,000 and the anchovy’s ABC at 25,000, *i.e.* 25 percent of MSY. AR 7:345 (“[MSY] for northern anchovy in the central subpopulation is estimated to be 123,000 mt per year at a total biomass level of about 733,000 mt (Conrad 1991).”); Defendants’ Reply at 6 (noting MSY was

⁴ Defendants briefly argue that the Conrad Study is not the sole basis for the MSY, citing background discussion preceding the MSY in Amendment 8. AR 7:148. This is wholly unpersuasive. The Conrad Study’s MSY estimate is 123,336 mt, and its biomass estimate is 733,410 mt. AR 5:54. Amendment 8 expressly cites the Conrad Study as the basis for establishing an MSY of 123,000 mt and a biomass estimate of 733,000 mt. AR 7:148. Moreover, the alternative assessment prepared in advance of Amendment 13 lists the only “Source” for the anchovy’s OFL, ABC, and ACL as “Conrad (1991) 123,000 FMSY [fishing rate expected to produce MSY over the long term] at biomass of 733,000 mt.” AR 11:680.

1 “obtained from Conrad (1991) and adopted in Amendment 8 to the FMP.”). Amendment 8
 2 reached the 100,000 mt MSY by pro-rating the Conrad Study’s 123,336 mt estimate for the entire
 3 anchovy stock by the portion of the anchovy stock (82 percent) that resided in U.S. waters. AR
 4 7:345; AR 5:54.

5 In 2011, Amendment 13 set the anchovy’s OFL equal to Amendment 8’s Conrad Study-
 6 based MSY. AR 11:653, 680 (2010 document prepared in anticipation of Amendment 13 listing
 7 overall MSY as 123,000 and citing Conrad Study as basis). Consequently, OFL and MSY both
 8 rely on the Conrad Study’s MSY estimate. *Id.* Amendment 13 also retained the existing 25,000 mt
 9 ABC level, setting it at “25 percent of OFL/MSY.” AR 31:933; AR 30:924 (“ABC” for monitored
 10 stocks equals “OFL * 0.25”). Amendment 13 set these levels despite concerns from the Pacific
 11 Council’s Scientific and Statistical Committee, a statutorily created advisory body, that the
 12 underlying anchovy biomass estimates were “quite dated.” AR 14:703.

13 In 2016, the Catch Rule established the ACL based on the OFL and ABC values set in
 14 Amendment 13. 81 Fed. Reg. at 74311. Accordingly, the ACL derives from Amendment 13’s
 15 OFL and ABC values, which derive from the MSY set in Amendment 8 in 2000, which derives
 16 from the 1991 Conrad Study. The Court now turns to the evidence Plaintiff argues shows the
 17 Conrad Study’s estimate no longer constitutes the best scientific information available.
 18

19
 20 **b. Defendants Fail to Discredit Plaintiff’s Evidence**

21 Plaintiff argues that the Service failed to set the ACL based on “the best scientific
 22 information available” because recent scientific information indicates that the anchovy has
 23 collapsed below the levels found by the 1990 Conrad Study, and thus that the Conrad Study’s
 24 MSY estimate (and the OFL, ABC, and ACL that derive from it) is no longer accurate. 16 U.S.C.
 25 § 1851(a)(2). Plaintiff’s argument relies on three main pieces of evidence: a 2015 peer-reviewed
 26 study of the anchovy population, a 2015 survey of anchovy abundance conducted by the Service,
 27

1 and findings by the U.S. Fish and Wildlife Service (“FWS”) and NOAA that anchovy predators
2 are experiencing food shortages. Defendants argue that each piece of evidence is unreliable, and
3 that the Service therefore reasonably disregarded Plaintiff’s evidence. The Court considers each
4 piece of evidence in turn, and concludes that none of Defendants’ criticisms justify disregarding
5 Plaintiff’s evidence.

6 Plaintiff’s first piece of evidence is a 2015 peer-reviewed study led by former Service
7 scientist Alec MacCall (“MacCall Study”) who produced prior anchovy stock estimates and co-
8 authored the Northern Anchovy Fishery Management Plan (“FMP”), which was later expanded
9 into the current Coastal Pelagic Species Fishery Management Plan (“CPS FMP”). AR 90:1998–
10 2005 (Alec MacCall, et al., *Recent Collapse of Northern Anchovy Biomass Off California*, 175
11 Fisheries Research 87–94 (2015)); AR 5:51; AR 5:68; AR 30:889–90. The MacCall Study found
12 that anchovy biomass averaged around 15,000 mt between 2009 and 2011, that anchovy biomass
13 had declined by 99 percent since 2005, and that “anchovy biomasses estimated for 2009–2011 are
14 the lowest seen in 60 years.” AR 90:2003–04. Put otherwise, the MacCall Study found that the
15 anchovy population collapsed after 2005. MacCall subsequently extended the MacCall Study’s
16 analysis through 2015. AR 175:2998–3004 (Alec MacCall, et al., *California Anchovy Population*
17 *Remains Low, 2012-2015* (2016)). The updated analysis was in line with the initial MacCall
18 Study, and found that the anchovy stock “remains low after a collapse after 2005” and that
19 anchovy biomass averaged 18,200 between 2012 and 2015. AR 175:2998; AR 163:2861. The
20 updated analysis also found that preliminary data from 2016 indicated that “there has been no
21 substantial recovery in 2016.” AR 175:2999. Consequently, the MacCall Study supports Plaintiff’s
22 argument because the MacCall Study suggests that the Conrad Study’s 733,410 mt biomass
23 estimate is far too high, and thus that the OFL, ABC, and ACL that derive from the Conrad Study
24 are also far too high. Indeed, the MacCall study’s biomass estimate, if accurate, means that the
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1 25,000 mt ACL would allow commercial fishing to harvest the entire anchovy stock.

2 Defendants criticize the MacCall Study on two grounds. First, Defendants note that 17,286
3 mt of anchovy were fished in U.S. waters in 2015 and that animal predation would have consumed
4 an even larger quantity of anchovy.⁵ AR 196:3168. An internal analysis by the Service found the
5 MacCall Study's claim that anchovy biomass averaged around 15,000 mt between 2009 and 2011
6 was likely inaccurate as "the combined removal of anchovy due to predation and fishing almost
7 certainly exceeded 15,000 MT every year since 2008." AR 196:3168. Second, the same Service
8 analysis found the California Cooperative Oceanic Fisheries ("CalCOFI") survey, which provided
9 the data for the MacCall Study's biomass estimates, might understate the anchovy population
10 because the CalCOFI survey occurs during a limited time window (usually January and April) and
11 in a limited area (San Diego, California to Point Reyes, California). AR 159:2783; AR 196:3160,
12 3171. The Service therefore concluded that the CalCOFI survey data "are not suitable for
13 estimating the biomass of the anchovy stock." AR 196:3166.

14
15
16 Defendants' arguments fail to discredit the MacCall Study. The predation claim fails
17 because the MacCall Study estimates spawning adult anchovy biomass, whereas the fishery
18 landings to which Defendants point include both adult and juvenile biomass, thereby inflating the
19 amount of biomass relative to the MacCall Study. AR 90:1998. Moreover, Defendants ignore the
20 facts that the MacCall Study reports that *average* biomass for 2009 to 2011 is 15,000 mt, and that
21 anchovy biomass in a given year might exceed the annual average.

22
23 In turn, Defendants' criticism of the MacCall Study's use of the CalCOFI survey data fails
24 because it also applies to the Conrad Study on which the Catch Rule relies. The MacCall Study
25 and the Conrad Study both use data from the CalCOFI survey, which has been in place since 1951.

26
27 ⁵ Defendants claim the amount of anchovy consumed by predation may exceed the amount fished
28 by as much as seven times. However, the evidence on which Defendants rely refers to predation of
coastal pelagic species in general instead of predation of anchovy. AR 196:3168.

1 AR 196:3159. The MacCall Study used CalCOFI data from 1951 to 2011 to produce an anchovy
2 biomass estimate for 2009 to 2011. AR 90:1998. MacCall’s follow-up analysis relies on CalCOFI
3 data from 1951 to 2015 to produce an anchovy biomass estimate for 2011 to 2015. AR 175:2998.
4 For its part, the Conrad Study relies on biomass estimates from 1964 to 1990 from a 1991 study
5 led by Larry Jacobson (“Jacobson Study”) that Defendants do not dispute employed CalCOFI
6 data. AR 5:68 (Larry Jacobson et al., *Spawning Biomass of the Northern Anchovy in 1991* (1991)).
7 Defendants’ Reply at 7; *see* AR 200:3239 (subsequent study by authors of Jacobson Study using
8 CalCOFI data).
9

10 Defendants argue that because the Jacobson Study combined CalCOFI data with other
11 information, the Jacobson Study’s use of the CalCOFI data is unproblematic. However,
12 Defendants have not identified these other sources of information, and the Jacobson Study is not
13 in the administrative record. The Court is therefore faced with two studies that rely on CalCOFI
14 data, with the distinction that the Conrad Study is based on data from 1964 to 1990, whereas the
15 MacCall Study is based on data from 1951 to 2011 and, through MacCall’s subsequent update,
16 through 2015. The Court therefore rejects Defendants’ claim that the MacCall Study could be
17 disregarded.
18

19 Plaintiff’s second piece of evidence is a Service technical memorandum (“Acoustic Trawl
20 Survey”) that estimated anchovy abundance based on data from acoustic trawl surveys completed
21 during the summer of 2015. AR 274:3640–54 (copy of Acoustic Trawl Survey). The Acoustic
22 Trawl Survey employed “echosounders” which “transmit sound pulses down beneath the ship and
23 receive echoes from animals and the seabed in the path of the sound waves. The backscattered
24 signal, i.e. the sound that is scattered back ... provid[es] an indication of the numbers and physical
25 properties of the targets in the water column.” AR 247:3689. The Acoustic Trawl Survey
26 estimated that the anchovy’s biomass was 31,427 mt. AR 247:3688. The estimate remained the
27

1 same even after the Acoustic Trawl Survey was reviewed by other Service employees. AR
2 251:3735–49 (estimate as of August 2016 with same 31,427 mt figure); AR 239:3639 (email
3 noting internal review of survey); AR 253:3767 (same). Although the Acoustic Trawl Survey’s
4 31,427 mt biomass estimate exceeds the MacCall Study’s estimate, it still supports Plaintiff’s
5 challenge to the OFL, ABC, and ACL because it is far below Amendment 13’s 100,000 mt OFL
6 and the underlying Conrad Study’s 733,410 mt average biomass estimate.

7
8 Defendants criticize the Acoustic Trawl Survey on two grounds. First, Defendants note the
9 Acoustic Trawl Survey was not final when the Catch Rule was completed, and thus argue its
10 contents could be disregarded. Defendants point in particular to *Fishermen’s Finest*, 593 F.3d at
11 897, which held that a Council was not arbitrary and capricious in failing to consider data that
12 only became available a month before the Council issued recommendations to the Service.
13 Second, Defendants argue that the Acoustic Trawl Survey was unreliable because it did not
14 include anchovy in inshore areas or surface waters. AR 159:2782. Defendants point in particular to
15 a report from a Service and Pacific Council workshop (“Workshop Report”), which recommended
16 against using Acoustic Trawl Survey to estimate overall anchovy biomass until methods could be
17 devised to account for the gaps in the survey’s coverage. AR 159:2782 (“[T]he present [Acoustic
18 Trawl] [S]urvey data cannot be used to provide estimates of relative or absolute abundance for
19 northern anchovy.”). As those methods were not yet complete, the Workshop Report concluded
20 the Acoustic Trawl Survey should be “restricted to providing an estimate of abundance only for
21 the area and the portion of the water column surveyed.” AR 159:2782.
22

23
24 Defendants’ claim that the Acoustic Trawl Survey could be disregarded because it was not
25 yet final is unpersuasive. “[B]y specifying that decisions be based on the best scientific
26 information *available*, the Magnuson–Stevens Act recognizes that such information may not be
27 exact or totally complete.” *Midwater Trawlers*, 393 F.3d at 1003 (emphasis in original).
28

1 Consequently, “[i]t is well settled ... that the Secretary can act when the available science is
2 incomplete or imperfect, even where concerns have been raised about the accuracy of the methods
3 or models employed.” *Category Scallop Fishermen v. Sec’y, U.S. Dep’t of Commerce*, 635 F.3d
4 106, 115 (3d Cir. 2011) (citation omitted) (ellipses in original). A complete draft of the Acoustic
5 Trawl Survey was available by June 2016, and its biomass estimate did not change during the
6 Service’s internal review. ECF No. 48 at 8; AR 251:3741 (survey as of August 2016 with same
7 31,427 mt figure). Thus, the Service had an in-house biomass estimate and supporting analysis
8 four months before the Catch Rule was issued in October 2016. This distinguishes *Fishermen’s*
9 *Finest*, 593 F.3d at 897, because in the instant case the Service had a complete draft instead of raw
10 data and the Service had four months to consider the information instead of just one. *See Bryson*,
11 940 F. Supp. 2d 1029, 1050–51 (holding Council’s failure to incorporate new MSY estimate into
12 draft FMP amendment was arbitrary and capricious, where MSY estimate was created in
13 November 2010 and the Council sent the draft amendment to the Service in January 2011).

14
15
16 Defendants’ argument that the Acoustic Trawl Survey should be disregarded because it did
17 not incorporate inshore areas and surface waters is also unpersuasive. The Court agrees with
18 Defendants that the Workshop Report shows the Service reasonably concluded that the Acoustic
19 Trawl Survey could not provide an estimate of total anchovy biomass until methods to account for
20 the inshore and surface water gaps in its coverage were in place. AR 159:2782. Yet the Workshop
21 Report also states that the Acoustic Trawl Survey “can provide adequate information to develop an
22 estimate of absolute biomass for the [anchovy] within the surveyed area” and its 31,427 mt low
23 biomass estimate supports Plaintiff’s claim that the anchovy population has declined below the
24 levels on which the OFL, ABC, and ACL are premised. The Court notes too that CalCOFI survey
25 data that the Conrad Study employs covers a smaller area than the Acoustic Trawl Survey.

26
27 *Compare* AR 159:2783 (CalCOFI survey extends from San Diego to Point Reyes) *with* AR

1 251:3740 (“The summer [Acoustic Trawl] occurred over 80 days ... from San Diego to the
2 northern end of Vancouver Island.”). It is thus unclear why Defendants believe the gaps in
3 CalCOFI surveys do not preclude their use while gaps in the Acoustic Trawl Survey coverage
4 preclude its use.

5 Plaintiff’s third piece of evidence consists of reports indicating that anchovy predators
6 were being adversely affected by the anchovy stock’s decline. A 2016 Service report found that
7 anchovies and sardines “remained at very low levels in 2015, where they have been since 2009.”
8 AR 143:2681. The same report noted that prey shortages had caused “unusual mortality events”
9 among California sea lions in 2013, 2014, and 2015. AR 143:2684–85; *see* AR 42:1139 (noting
10 California sea lion pups were starving due to lack of sardines and anchovy). Similarly, FWS sent a
11 series of letters to the Pacific Council (on which the Service sits) explaining that anchovy
12 predators were experiencing food shortages due to a lack of anchovy. AR 42:1137–39 (May 2015
13 letter); AR 64:1306–07 (November 2015 letter); AR 161:2818 (October 2016 letter). FWS noted
14 that a 25-year decline in overall seabird abundance, large-scale cormorant starvation, and
15 California sea lion deaths all “point[] to the generally reduced availability of northern anchovy to
16 marine predators.” AR 42:1139. FWS was particularly concerned about “unusual mortality events
17 and a multi-year decline in breeding success” among California brown pelicans because the
18 withdrawal of Endangered Species Act protections from the California brown pelican had
19 expressly assumed the CPS FMP would ensure an adequate food supply. AR 42:1138. This
20 evidence led FWS to suggest that absent “a recent biomass estimate, it is unknown whether the
21 25,000 metric ton Annual Catch Limit ... serves a protective function for the [anchovy] ... or for
22 the marine mammals, birds, and fish that depend on it.” AR 47:1139.

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26 Defendants argue this evidence can be ignored. First, Defendants argue the evidence could
27 simply reflect declines in other fish anchovy predators consume, such as sardines. AR 143:2680.

1 However, Defendants' support for this claim is the same report by the Service that notes anchovies
 2 have been at low levels since 2009. *Id.* Second, Defendants argue that anchovy may simply have
 3 moved out of some areas in which predators are located. AR 87:1965–66. Yet Defendants'
 4 evidence in support of this assertion is that the anchovy's spawning range contracted inshore in
 5 2012 and 2013, which is a sign of low anchovy population and therefore supports Plaintiff's
 6 theory that the Conrad Study's MSY estimate no longer constitutes the best science available. AR
 7 90:1999 ("The habitat utilized by spawning anchovies expands into the offshore region in times of
 8 high abundance and contracts into nearshore core areas when abundances are lower."); AR 7:165;
 9 AR 26:792.

10
 11 In sum, Defendants have failed to explain why the evidence to which Plaintiff points could
 12 be disregarded.

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

15 Defendants' final argument is that the flaws to which Defendants point in Plaintiff's
 16 evidence means that the OFL, ABC, and ACL were based on the best scientific information
 17 available, despite their reliance on the Conrad Study. The Court disagrees, and finds that it was
 18 arbitrary and capricious for the Service to find that the OFL, ABC, and ACL were based on the
 19 best scientific information available in light of the more recent evidence that Plaintiff highlights.

20
 21 The Magnuson-Stevens Act's National Standard Two mandates that "[c]onservation and
 22 management measures shall be based upon the best scientific information available." 16 U.S.C. §
 23 1851(a)(2). "[B]y specifying that decisions be based on the best scientific information *available*,
 24 the Magnuson–Stevens Act recognizes that such information may not be exact or totally
 25 complete." *Midwater Trawlers*, 393 F.3d at 1003 (emphasis in original).

26
 27 At bottom, Defendants' argument is that it was reasonable for the Service to rely on the

1 1991 Conrad Study’s MSY estimate because Plaintiff’s more recent evidence was so flawed that it
2 could be disregarded. Yet the Court has previously explained that the flaws to which Defendants
3 point do not justify disregarding Plaintiff’s evidence. Moreover, even if the Service could have
4 reasonably disregarded part of Plaintiff’s evidence, Defendants have not responded to Plaintiff’s
5 compelling point that in the aggregate, recent evidence strongly suggests that the anchovy
6 population has declined well below the 733,410 mt value on which the OFL, ABC, and ACL are
7 based. Instead, the Catch Rule continues to rely on the Conrad Study while simultaneously
8 acknowledging that “[the Service] agrees there is evidence that [the anchovy] did likely go
9 through a decline in the recent past and abundance may still be at some relatively low state.” 81
10 Fed. Reg. at 74311.

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12 Nor is the Court persuaded by Defendants’ reiteration that the Service’s scientific
13 judgments are entitled to deference. “The Service cannot rely on reminders that its scientific
14 determinations are entitled to deference in the absence of reasoned analysis to cogently explain
15 why its . . . measures satisfied” the Magnuson-Stevens Act. *Daley*, 209 F.3d at 755 at 755–56
16 (quotation marks and citation omitted). Here, the Service’s sole basis for the OFL, ABC, and ACL
17 is the Conrad Study, and the Court has previously explained why the Conrad Study is insufficient.
18 Indeed, the only piece of recent evidence Defendants provide suggesting the anchovy population
19 has not declined is an acoustic trawl survey from the summer of 2016, which Defendants concede
20 is not in the administrative record and cannot be considered in evaluating the Service’s action.
21 *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

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23
24 The Court is thus left with Defendants’ acknowledgment that the anchovy population has
25 likely declined, Defendants’ continued reliance on the 1991 Conrad Study for the OFL, ABC, and
26 ACL, and a substantial body of recent scientific information—including a 2016 study that relies
27 on more recent CalCOFI data than the Conrad Study—that indicates the Conrad Study is no longer

1 accurate. *Compare Oregon Trollers*, 452 F.3d at 1120 (upholding the Service’s reliance on 1986
2 and 1988 studies to impose fishery restrictions in 2005 because plaintiff’s challenge to the fishery
3 restrictions was “[b]ereft of any contrary science.”) *with Nat. Res. Def. Council, Inc. v. Evans*, 168
4 F. Supp. 2d 1149, 1153–54, *vacated in part on other grounds*, 316 F.3d 904 (9th Cir. 2003)
5 (rejecting the Service’s reliance on 15-year old bycatch estimates in light of evidence indicating
6 bycatch rates had risen in recent years). Faced with this information, the Court concludes that the
7 OFL, ABC, and ACL are arbitrary and capricious because the Service has “offered an explanation
8 for its decision that runs counter to evidence before the agency.” *Pac. Dawn*, 831 F.3d at 1173.
9 Framed differently, the Court finds that the Service acted arbitrarily and capriciously because the
10 Catch Rule fails to “articulate a rational connection between the facts found and the conclusions
11 reached.” *Bosworth*, 510 F.3d at 1023.

12
13 The Court also finds that the Service’s dismissal of the MacCall Study is arbitrary and
14 capricious because it is “so implausible that it could not be ascribed to a difference in view or the
15 product of the agency’s expertise.” *Pac. Dawn*, 831 F.3d at 1173. The Catch Rule dismisses the
16 MacCall Study because it “does not provide analysis for years past 2011” and is based on data
17 from “surveys that are best at providing regional indices of relative availability and variability of
18 the stock, but are not estimates of overall biomass.” 81 Fed. Reg. at 74311. That criticism is not
19 plausible, as the Conrad Study MSY value the Catch Rule relies upon uses the same survey data.
20 The “outdated” argument is also not credible because the Catch Rule is rejecting a study based on
21 data from 1951 to 2011 in favor of a study based on data from 1964 to 1990.

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24 In sum, the Court finds that the OFL, ABC, and ACL are arbitrary and capricious because
25 Plaintiff has presented substantial evidence that the OFL, ABC, and ACL are not based on the best
26 scientific information available.

27 **C. The Service Should Have Considered Whether Relying on the Conrad Study**

Would Prevent Overfishing

1
2 Plaintiff next argues that the OFL, ABC, and ACL violate National Standard One because
3 they do not prevent overfishing. 16 U.S.C. § 1851(a)(1). Specifically, Plaintiff argues the
4 overfishing limit (“OFL”) is too high to prevent overfishing because it is based on the Conrad
5 Study’s maximum sustainable yield (“MSY”) and thus the Conrad Study’s 733,410 mt biomass
6 estimate, and the evidence indicates that the Conrad Study’s biomass estimate is now inaccurate.
7 In turn, Plaintiff argues the acceptable biological catch (“ABC”) is too high to prevent overfishing
8 because it derives directly from the OFL, and argues that the annual catch limit (“ACL”) is too
9 high because it simply copies the ABC. The Court agrees.
10

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

19 The preceding discussion of the best available science resolves this dispute. The 100,000
20 mt OFL derives from the Conrad Study’s MSY estimate, and thus from the Conrad Study’s
21 733,410 mt biomass estimate. AR 5:54 (Conrad Study MSY estimate); AR 7:148 (Amendment 8
22 adopting Conrad Study MSY estimate); AR 29:827 (noting Amendment 13 set OFL equal to the
23 existing MSY value); AR 11:680 (citing Conrad Study as source for OFL value). As discussed
24 above, Plaintiff has provided substantial evidence that the anchovy population has declined well
25 below the 733,410 mt biomass level found in the Conrad Study. Indeed, the McCall Study
26 estimates that anchovy biomass has been between 15,000 mt and 18,200 mt from 2009 to 2015,
27

1 which means the OFL would have exceeded anchovy biomass by over 80,000 mt. AR 90:2003;
2 AR 175:2999. Underscoring the point, the Catch Rule itself acknowledges that “there is evidence
3 that [the anchovy] did likely go through a decline in the recent past and abundance may still be at
4 some relatively low state.” 81 Fed. Reg. at 74311; *see* AR 143:2681 (2016 Service report finding
5 anchovy and sardine stocks “remained at very low levels in 2015, where they have been since
6 2009.”). Given this backdrop, it was at minimum arbitrary and capricious for the Service to fail to
7 consider whether the OFL estimate still prevented overfishing in light of its reliance on the Conrad
8 Study. *Pac. Coast*, 265 F.3d at 1034 (“Agency action should be overturned ... when the agency
9 has ... entirely failed to consider an important aspect of the problem.”).

11 It follows that it was also arbitrary and capricious for the Service to fail to consider
12 whether the ABC and ACL could prevent overfishing in light of its reliance on the OFL. The
13 Service maintains the 25,000 mt ABC prevents overfishing because it is a 75 percent reduction
14 from the 100,000 mt OFL. 81 Fed. Reg. at 74311 (“OFL was set equal to its MSY value and its
15 ABC level was reduced from this OFL by 75 percent to account for scientific uncertainty in the
16 OFL and to prevent overfishing, among other considerations.”). This presumes the OFL is
17 accurate, which in turn presumes the accuracy of the MSY value derived from the Conrad Study’s
18 biomass estimate of 733,410. AR 5:54 AR 7:148; AR 29:827; AR 11:680. The problem, in other
19 words, is that the ABC is justified solely in terms of the OFL and therefore “ignores the critical
20 variable: anchovy abundance.” Plaintiff’s MSJ at 17. Reducing an outdated OFL by a fixed
21 percentage without considering whether the anchovy population might have changed since 1991
22 ignores the most important aspect of the problem—the size of the anchovy population. That is
23 arbitrary and capricious. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 184 F. Supp. 3d 861,
24 894 (D. Or. 2016) (“Without identifying ‘rough’ recovery abundance levels and time frames, [the
25 Service] cannot logically conclude that” an action will not harm salmon population). It follows
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27
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1 that it was arbitrary and capricious to simply set ACL equal to ABC without inquiring whether the
 2 anchovy population had changed since the Conrad Study was published. 81 Fed. Reg. at 74311
 3 (“The ACL for the [anchovy] is currently set equal to its ABC value of 25,000 mt, which is 75,000
 4 mt lower than its OFL.”)

5 In sum, it was arbitrary and capricious for the Service to fail to consider whether the OFL,
 6 ABC, and ACL still prevented overfishing in light of their direct reliance on a MSY estimate from
 7 a 1991 study that evidence in the administrative record indicated was out of date.

8
 9 **D. Vacatur is the Appropriate Remedy**

10 Defendants argue that even if the Court finds the Catch Rule is arbitrary and capricious, the
 11 Court should not vacate the ACL because a new acoustic trawl survey from 2016 (“2016 Survey”)
 12 indicates the anchovy population is recovering.

13 There are two problems with Defendants’ argument. First, the 2016 Survey results are not
 14 persuasive enough to overcome the presumption that a court shall “set aside an agency rule that a
 15 court finds arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the
 16 law.” *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal.
 17 2002). The 2016 Survey estimates that the anchovy stock is at 151,558 mt, which Defendant
 18 stresses is far higher than the estimates Plaintiff provides. However, the 2016 Survey estimate is
 19 still well below the Conrad Study’s 733,410 mt estimate, which is the figure from which the MSY,
 20 OFL, ABC, and ACL are derived. Thus, even if the 2016 Survey is correct, it is unclear how the
 21 2016 Survey can justify the OFL, ABC, and ACL.
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23
 24 Second, Defendants’ only support for their argument that the Court can consider evidence
 25 outside the administrative record in determining a remedy is a district court decision that discusses
 26 preliminary injunctions, which are not at issue here. *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of*
 27 *Engineers*, 817 F. Supp. 2d 1290, 1300 (D. Or. 2011). Given that United States Magistrate Judge
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United States District Court
Northern District of California

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Susan van Keulen explicitly excluded the 2016 Survey from the record because it was created after the Catch Rule, the Court finds Defendants’ citation inadequate and declines to consider the 2016 Survey. ECF No. 39 at 10.

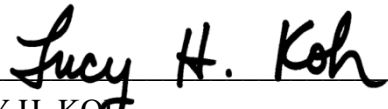
In sum, the Court rejects Defendants’ claim that vacatur is inappropriate.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff’s motion for summary judgment and DENIES Defendants’ cross-motion for summary judgment.

IT IS SO ORDERED.

Dated: January 18, 2018



LUCY H. KOH
United States District Judge