

INTRODUCTION

1
2 1. Plaintiff Oceana challenges a final rule that allows commercial fishing for anchovy at
3 levels that threaten the viability of the anchovy population and the marine ecosystem that relies on it.
4 The rule sets an annual catch limit of 25,000 metric tons for the central subpopulation of anchovy
5 (“northern anchovy” or “anchovy”), even though the best available estimates of the population size
6 since 2009 have ranged from around 15,000 to 32,000 metric tons. The National Marine Fisheries
7 Service violated the law by failing to articulate the scientific basis for this catch limit, failing to base
8 the catch limit and related management measures on the best scientific information available, and
9 failing to ensure or explain how these measures would prevent overfishing and account for the need
10 to protect the base of the West Coast marine ecosystem’s food web.

11 2. Specifically, Oceana challenges the final rule promulgated on October 26, 2016, by
12 Defendants Secretary of Commerce Penny Pritzker, the National Oceanic and Atmospheric
13 Administration, and the National Marine Fisheries Service (hereinafter “Defendants” or “Fisheries
14 Service”) entitled *Fisheries off West Coast States; Coastal Pelagic Species; Multi-Year*
15 *Specifications for Monitored and Prohibited Harvest Species Stock Categories*, 81 Fed. Reg. 74309-
16 13 (Oct. 26, 2016) (“Specification Rule”). In promulgating the Specification Rule, the Fisheries
17 Service violated the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-
18 Stevens Act”) and the Administrative Procedure Act (“APA”). This action challenges the rule’s
19 annual catch limit, which sets the maximum amount of fish that the commercial fishing vessels are
20 allowed to catch every year, as well as other biological “reference points” used to derive the annual
21 catch limit. Together, the annual catch limit and the other reference points are supposed to prevent
22 overfishing and ensure that enough anchovy are left in the water to feed other fish and wildlife.

23 3. The northern anchovy population has declined precipitously since 2009; multiple
24 sources of scientific information show that anchovy remain at very low abundance today.
25 Independent researchers and agency scientists have estimated anchovy biomass to be between about
26 15,000 and 32,000 metric tons since 2009. Despite these estimates, the Specification Rule allows
27 commercial fishing vessels to catch 25,000 metric tons of anchovy every year, essentially
28 authorizing the fishery to catch most if not all of the northern anchovy population.

1 4. Northern anchovy are important for the health of the ocean ecosystem. The California
2 Current Ecosystem, a rich ocean ecosystem extending from Baja California to British Columbia, is
3 known as the “Blue Serengeti” for its diversity and abundance of wildlife and productive fisheries.
4 Northern anchovy are one of the most important forage species in the California Current Ecosystem,
5 providing food for rockfish, halibut, tuna, swordfish, and salmon, and thereby supporting valuable
6 commercial and recreational fisheries off the U.S. West Coast.

7 5. A host of wildlife species in this ecosystem depend on northern anchovy for food.
8 Anchovy constitute a critical part of the diets of numerous marine predators, including salmon,
9 bluefin tuna, brown pelicans, California sea lions, dolphins, humpback whales, and many others.
10 The recent collapse of the northern anchovy population has contributed to reproductive failures,
11 starvation, and mass die-offs in brown pelicans, California sea lions, common murre, and other
12 predators. These effects are especially acute because other important forage species, such as Pacific
13 sardine, have also declined and are thus unavailable as alternative food sources. Notwithstanding
14 these documented effects on the marine ecosystem, the Fisheries Service set the annual catch limit
15 for northern anchovy at a level nearly equal to (and possibly greater than) the estimated size of the
16 population.

17 6. The Specification Rule fails to comply with multiple legal requirements. First, the
18 Fisheries Service violated the Magnuson-Stevens Act and the APA by failing to use the best
19 scientific information available in setting the annual catch limit, as well as the related acceptable
20 biological catch and overfishing limit reference points, for northern anchovy. Second, the Fisheries
21 Service violated the APA by failing to articulate any rational basis for the annual catch limit value of
22 25,000 metric tons. Third, the Fisheries Service violated the Magnuson-Stevens Act and the APA by
23 failing to demonstrate how its decision to set an annual catch limit and related reference points that
24 approach or exceed the size of the population prevents overfishing. Fourth, the Fisheries Service
25 violated the Magnuson-Stevens Act and the APA by failing to consider the needs of the ecosystem,
26 including the needs of predators, and by failing to demonstrate how setting an annual catch limit that
27 could swallow all the anchovy available will account for the needs of marine predators, including
28 commercially and recreationally targeted fish species that rely on anchovy for food. By committing

1 each of these actions and omissions, the Fisheries Service failed to comply with the statutory
2 requirements of the Magnuson-Stevens Act and acted in a manner that was arbitrary, capricious, an
3 abuse of discretion, or otherwise not in accordance with the law, in violation of the APA. The
4 Fisheries Service's actions and failures to act have harmed Oceana's members' interest in rebuilding
5 and maintaining a healthy and sustainable population of northern anchovy and a healthy ocean
6 ecosystem. This harm will continue in the absence of action by the Court.

7 **JURISDICTION AND VENUE**

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

10 8. This Court has jurisdiction over this action pursuant to the Magnuson-Stevens Act,
11 which provides that “[t]he district courts of the United States shall have exclusive jurisdiction over
12 any case or controversy arising under” the Magnuson-Stevens Act. 16 U.S.C. § 1861(d). The
13 Magnuson-Stevens Act also provides that actions taken by the Secretary of Commerce under
14 regulations implementing a fishery management plan shall be subject to judicial review “if a petition
15 for such review is filed within 30 days after the date on which the regulations are promulgated or the
16 action is published in the Federal Register, as applicable.” 16 U.S.C. § 1855(f). The Fisheries
17 Service published the Specification Rule on October 26, 2016 in the Federal Register. Oceana is
18 filing this Complaint within 30 days of publication of the Specification Rule.

19 9. This Court, further, has jurisdiction over this action pursuant to the APA, which
20 provides that final agency action is subject to judicial review. 5 U.S.C. §§ 701-706. The Fisheries
21 Service's issuance of its Specification Rule is a “final agency action” subject to judicial review
22 under the APA.

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

28 11. This Court has the authority to grant declaratory relief pursuant to the Declaratory

1 Judgment Act, 28 U.S.C. §§ 2201–02, and may also grant relief pursuant to the Magnuson-Stevens
2 Act, 16 U.S.C. §§ 1861(d) and 1855(f), as well as the APA, 5 U.S.C. § 706.

3 12. Venue is properly vested in this judicial district under 28 U.S.C. § 1391(e), because a
4 substantial part of the events and omissions which gave rise to this action occurred in this district.

5 **INTRADISTRICT ASSIGNMENT**

6 13. This action should be assigned to the San Francisco or Oakland Division pursuant to
7 Civil L.R. 3-2(d) because a substantial part of the events or omissions giving rise to the claim
8 occurred in San Francisco County.

9 **PARTIES**

10 14. Plaintiff OCEANA is a non-profit international advocacy organization dedicated to
11 protecting and restoring the world’s oceans through policy, advocacy, science, law, and public
12 education. Oceana has over 575,000 members worldwide, including 108,912 members in California,
13 Oregon, and Washington. Oceana maintains an office in Monterey, California. Ensuring the
14 conservation and sound management of anchovy and other forage species, such as the species
15 managed under the Specification Rule, is a central focus of Oceana’s work. Oceana devotes
16 considerable resources to studying and communicating the ecological and economic importance of
17 sound management of forage species in the California Current Ecosystem off the U.S. West Coast.

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

1 California Current Ecosystem. Oceana commented on the proposed catch limit in December 2015,
2 describing the scientific evidence indicating a collapse of the stock. On May 2-5, 2016, the Council
3 and the Fisheries Service sponsored a workshop to provide recommendations for conducting stock
4 assessments for northern anchovy. Oceana staff attended the meeting and provided public comment,
5 highlighting the importance of an updated biomass estimate using the available information.

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

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

22 18. The Defendants in this action are:

23 a. PENNY PRITZKER. Ms. Pritzker is sued in her official capacity as Secretary
24 of Commerce. She is ultimately responsible for overseeing the proper administration and
25 implementation of the Magnuson-Stevens Act in connection with federal fisheries management
26 actions, including provisions related to the duty to end and prevent overfishing and achieve optimum
27 yield and base all conservation and management measures on the best available science.

1 b. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION. The
2 National Oceanic and Atmospheric Administration is an agency of the United States Department of
3 Commerce with supervisory responsibility for the National Marine Fisheries Service. The Secretary
4 of the Department of Commerce has delegated responsibility to ensure compliance with the
5 Magnuson-Stevens Act to the National Oceanic and Atmospheric Administration, which in turn has
6 sub-delegated that responsibility to the National Marine Fisheries Service.

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

15 **LEGAL BACKGROUND**

16 **Magnuson-Stevens Fishery Conservation and Management Act**

17 19. The Magnuson-Stevens Act governs the conservation and management of fisheries in
18 the United States territorial waters and in the exclusive economic zone, which extends from the
19 boundaries of state waters (typically 3 miles from shore) to 200 miles offshore or to an international
20 boundary with neighboring countries. 16 U.S.C. §§ 1801(b)(1); 1802(11). The Magnuson-Stevens
21 Act creates eight regional Fishery Management Councils and requires them to prepare fishery
22 management plans for all fisheries under their authority that require conservation and management.
23 16 U.S.C. § 1852(h)(1).

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

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

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

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

17 24. Fisheries Service regulatory guidelines define “maximum sustainable yield” as “the
18 largest long-term average catch or yield that can be taken from a stock...*under prevailing*
19 *ecological, environmental conditions* and fishery technological characteristics...and the distribution
20 of catch among fleets.” 50 C.F.R. § 600.310(e)(1)(i)(emphasis added).

21 25. To determine optimum yield in the context of protecting marine ecosystems, the
22 Fisheries Service must consider, among other things, “maintaining adequate forage for all
23 components of the ecosystem.” 50 C.F.R. § 600.310(e)(3)(iii)(A)(3). Ecological factors that the
24 Fisheries Service is supposed to consider when determining the appropriate level for optimum yield
25 include the fishery’s “impacts on ... forage fish stocks, other fisheries, predator-prey or competitive
26 interaction, marine mammals, threatened or endangered species, and birds”
27 *Id.* § 600.310(e)(3)(iii)(B)(3). In addition, the regulatory guidelines advise fishery managers to
28 consider managing forage stocks to leave a larger proportion of the population to feed marine

1 predators rather than the smaller proportion they would leave unfished if they managed only to attain
2 maximum sustainable yield. *Id.*

3 26. In 2006, Congress enacted the Magnuson-Stevens Reauthorization Act, which among
4 other things established a system of interrelated management measures and reference points intended
5 to prevent and end overfishing. Of particular relevance here, this system includes establishing and
6 revising overfishing limits, acceptable biological catches, and annual catch limits.

7 27. To avoid overfishing, the Fisheries Service must first establish an “overfishing limit”
8 that estimates the catch level (expressed in numbers or weight of fish) above which overfishing will
9 occur. 50 C.F.R. § 600.310(e)(2)(i)(D). The overfishing limit corresponds to the estimate of the
10 maximum amount of fishing mortality a stock can experience, in light of the stock’s abundance,
11 without jeopardizing its capacity to produce maximum sustainable yield on a continuing basis (i.e.,
12 without experiencing overfishing). *Id.* § 600.310(e)(2)(i)(B)-(D).

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

20 29. The function of acceptable biological catch is to ensure that any error in estimating
21 the overfishing limit does not result in an excessive annual catch limit that would allow overfishing
22 to occur. The acceptable biological catch level must therefore be set below the stock’s overfishing
23 limit in order to prevent overfishing from occurring. 50 C.F.R. § 600.310(f)(3).

24 30. Each fishery management plan must “establish a mechanism for specifying annual
25 catch limits in the plan (including a multiyear plan), implementing regulations, or annual
26 specifications, at a level such that overfishing does not occur in the fishery, including measures to
27 ensure accountability.” 16 U.S.C. § 1853(a)(15).

28 31. The annual catch limit for a stock cannot exceed the acceptable biological catch for

1 that stock. 50 C.F.R. §600.310(f)(1)(iii).

2 32. The Fisheries Service’s regulatory guidelines also recommend further reducing the
3 annual catch limit from the acceptable biological catch level to account for ecological, economic,
4 and social factors. The guidelines specifically recommend reducing the annual catch limit to address
5 the “needs of forage fish” such as the northern anchovy. 50 C.F.R. § 600.310(f)(4)(iv).

6 33. The Magnuson-Stevens Act requires the Fisheries Service to determine when a fish
7 population is overfished – or approaching an overfished condition – and to promulgate measures that
8 will prevent or end overfishing and rebuild the population to a healthy population level. 16 U.S.C.
9 §§ 1853(a)(10); 1802(33)(C) (optimum yield for an overfished fishery provides for rebuilding the
10 population); 1854(e) (requirements to identify overfished fisheries, to end overfishing immediately,
11 and to rebuild overfished fisheries as soon as possible).

12 34. National Standard Two of the Magnuson-Stevens Act requires that “[c]onservation
13 and management measures shall be based upon the best scientific information available.” 16 U.S.C.
14 § 1851(a)(2). “Conservation and management measures” include “all rules, regulations, conditions,
15 and other measures” to “rebuild, restore, or maintain ... the marine environment,” including annual
16 catch limits, acceptable biological catch, and objective and measurable criteria for determining when
17 a stock is overfished, such as the overfishing limit. *Id.* §§ 1802(5); 1853(a)(1), 1853(a)(10),
18 1853(a)(15).

19 35. The Act does not require that scientific information be approved or adopted by a
20 Council’s Scientific and Statistical Committee, a Council, or by the Fisheries Service in order to be
21 the “best available.”

22 36. The Secretary may only approve a fishery management plan or fishery management
23 plan amendment if such plan or amendment complies with the provisions of Magnuson-Stevens Act
24 and all other applicable law. 16 U.S.C. § 1854(a)(1).

25 37. The Secretary has the responsibility to carry out any fishery management plan or plan
26 amendment approved or prepared by her in accordance with the Magnuson-Stevens Act. 16 U.S.C.
27 § 1855(d). The Secretary may promulgate such regulations, pursuant to APA rulemaking
28 procedures, as may be necessary to discharge this responsibility or to carry out any other provisions

1 of the Magnuson-Stevens Act. *Id.*

2 **FACTUAL ALLEGATIONS**

3 **Role of Northern Anchovy in California Current Ecosystem**

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

10 39. Northern anchovy are preferred prey due to their high fat content, small body size,
11 tendency to school (which makes them easier to catch), and superior nutritional value. Some marine
12 predators are highly dependent on anchovy abundance for their survival and reproductive success.
13 For example, northern anchovy availability within foraging distance of brown pelican breeding
14 colonies is among the most important factors influencing pelican breeding success. While the brown
15 pelican was listed under the Endangered Species Act, the anchovy fishery was required to account
16 for brown pelican forage needs in setting catch limits. When the U.S. Fish and Wildlife Service
17 delisted the brown pelican in 2009, it did so partly on the assumption the Coastal Pelagic Species
18 Fishery Management Plan ("FMP") would provide adequate forage for the bird. Since that time,
19 however, brown pelicans have experience unprecedented die-offs and multi-year breeding failure
20 due to lack of adequate forage – particularly, anchovy and Pacific sardine (also managed under the
21 Coastal Pelagic Species FMP).

22 40. 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 recent study led by the Fisheries Service found that availability of northern anchovy and
25 Pacific sardine is especially important for breeding California sea lions, and that the lack of adequate
26 supplies of anchovy and sardine in recent years is the primary factor in mass starvation and die-offs
27 among California sea lion pups in 2013, 2014, 2015, and 2016.

28 41. A number of threatened and endangered species rely on northern anchovy as a

1 preferred prey. These species include populations of threatened and endangered Chinook salmon;
2 sea birds such as the endangered California least tern, and threatened marbled murrelet; and marine
3 mammals such as threatened and endangered humpback whales.

4 42. Because northern anchovy provide an essential food source for whale, sea lion, sea
5 bird, and other wildlife populations, anchovy are critical to supporting the tourism associated with
6 seeking and watching these animals. In Monterey Bay alone, whale watch business owners have
7 estimated that a single ton of anchovy left in the water to feed a humpback whale can bring in \$1,000
8 to \$3,000 in direct whale watching ticket revenue. At a larger scale, ocean-based tourism and
9 recreation are estimated to have contributed over 400,000 jobs and \$29 billion in Gross Domestic
10 Product to California, Oregon, and Washington in 2013.

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

14 44. Anchovy populations naturally experience significant population fluctuations,
15 particularly in response to changes in ocean conditions. Warming ocean conditions like those
16 recently prevalent off the West Coast are generally thought to reduce anchovy productivity.

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

21 46. Even relatively moderate changes in fishing levels can result in significant changes in
22 forage species abundance and their local availability to predators, particularly during times when the
23 species' productivity is already low due to environmental conditions. These effects can also be
24 magnified by long-term changes in ocean conditions caused by climate change and ocean
25 acidification.

26 47. Because forage species are so ecologically important, scientific studies recommend
27 that fishery managers set catch limits that leave a large proportion of a forage species' mean
28 unfished biomass (the level of biomass that would exist without any fishing) in the ecosystem to

1 provide for the needs of predators, minimize risk of stock collapse, and maintain ecosystem health.
2 Many studies recommend not allowing fishing on forage fish stocks when their population drops
3 below one half of their mean unfished levels.

4 **Anchovy Management in the Context of Declines in Multiple Species of Forage Fish**

5 48. The northern anchovy population is managed in concert with other forage species.
6 The Coastal Pelagic Species FMP governs management of northern anchovy as well as several other
7 forage species, including Pacific sardine and Pacific mackerel.

8 49. In 2012, Fisheries Service scientists published a peer-reviewed study warning that the
9 agency was allowing too much fishing on an already declining Pacific sardine stock, and that this
10 excessive fishing pressure would lead to a collapse in the Pacific sardine population. Despite
11 warnings from its own scientists and others, the Fisheries Service continued to authorize the
12 maximum catch limits permissible under the Coastal Pelagic Species FMP framework for Pacific
13 sardine.

14 50. In April 2015, the Fisheries Service realized that it had made errors in its prior stock
15 assessments that had led to overestimates of the sardine population. The corrected assessment
16 revealed that the Pacific sardine stock was well below the minimum level to sustain the fishery. As
17 a result, the Fisheries Service closed the Pacific sardine fishery for the remainder of the 2015 season
18 (April-June 30) and the July 1, 2015-June 30, 2016 fishing year. The Pacific sardine population
19 failed to recover in the following year. As a result, fishing was suspended again for the July 1, 2016-
20 June 30, 2017 fishing year.

21 51. Other key forage species, including Pacific mackerel, which are managed under the
22 Coastal Pelagic Species FMP, and Pacific herring, have also declined to low numbers in recent
23 years. While many predators are adapted to switch prey sources in response to changes in relative
24 availability, this simultaneous decline in multiple preferred forage species leaves marine predators
25 with few high-energy prey alternatives and forces them to switch to relatively low nutrition food
26 sources. As a result, multiple predators dependent on species managed under the Coastal Pelagic
27 Species FMP are experiencing decreased reproductive success and starvation.

1 Northern Anchovy Fishery Management

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

5 53. The market value of northern anchovy is relatively low. In 2015, fishermen reported
6 selling their anchovy catch for only \$100 per ton (5 cents per pound). Anchovy are generally
7 exported and used to produce fish meal or oil for agricultural or aquaculture feed or as bait.

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

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

20 56. The Coastal Pelagic Species FMP as amended through Amendment 15 (i.e. the
21 current version of the FMP in effect at the time of rulemaking) contains formulas for calculating
22 annual catch limits for the anchovy stock, as well as acceptable biological catch levels, based on the
23 estimated overfishing limit for the stock. Under these formulas, the acceptable biological catch is set
24 to 25 percent of the overfishing limit; this buffer between the overfishing limit and acceptable
25 biological catch is supposed to account for scientific uncertainty in the actual level of anchovy
26 biomass, which fluctuates widely within short periods of time. The annual catch limit is set equal to
27 acceptable biological catch “or reduced by [optimum yield] considerations.” Coastal Pelagic
28 Species FMP as Amended through Amendment 15 at 40.

1 57. The FMP also provides that annual catch limits, as well as acceptable biological catch
2 and overfishing limits, may be revised based on the best available science through the annual
3 specification process. Coastal Pelagic Species FMP as Amended through Amendment 15 at 40.

4 58. The current Coastal Pelagic Species FMP does not specify a numeric overfishing
5 limit or numeric acceptable biological catch for northern anchovy.

6 59. The Coastal Pelagic Species FMP categorizes northern anchovy as a “monitored”
7 stock. “Monitored” is not a category recognized by the Magnuson-Stevens Act or implementing
8 regulations. The FMP states that “‘monitored’ management involves tracking trends in landings and
9 qualitative comparison to available abundance data, but without periodic stock assessments, or
10 periodic adjustments to target harvest levels.” Coastal Pelagic Species FMP as Amended through
11 Amendment 15 at 9. A stock assessment is a scientific analysis of the status of a fish stock,
12 including its overall biomass.

13 60. The Fisheries Service has not conducted a stock assessment for northern anchovy
14 since 1995 and, before issuing the 2016 Specification Rule, had not promulgated an annual catch
15 limit specification for northern anchovy since 1999.

16 **Northern Anchovy Population Decline and Effects on Dependent Predators**

17 61. At the time it promulgated the Specification Rule with an annual catch limit of 25,000
18 metric tons, the Fisheries Service had before it numerous sources of scientific information showing
19 that anchovy abundance had declined steeply since 2009 to historically low levels. That information
20 includes all of the information discussed below.

21 62. In 2016, independent researchers published a peer-reviewed study that compiled and
22 analyzed available data on anchovy abundance. The MacCall et al (2016) study found that “anchovy
23 biomasses estimated for 2009-2011 are the lowest seen in 60 years,” and that, based on egg and
24 larval surveys conducted since 2011, “there has been no substantial recovery of the anchovy
25 population as of 2015.” MacCall, A. D., W. J. Sydeman, P. C. Davison, J. A. Thayer. 2016. Recent
26 Collapse of Northern Anchovy Biomass off California. Fisheries Research. 175:87-94.

27 63. That study estimated that between 2009 and 2011, anchovy biomass averaged around
28 15,000 metric tons – 10,000 metric tons lower than the annual catch limit authorized in the Fisheries

1 Service's Specification Rule – and that the biomass had declined by 99 percent since 2005.

2 64. Researchers updated the analysis conducted in the peer-reviewed MacCall et al
3 (2016) study to include anchovy abundance data collected through 2015. The updated analysis
4 calculated that between 2009 and 2015, estimates for anchovy biomass averaged about 20,700
5 metric tons. Researchers estimated that anchovy biomass averaged around 24,300 metric tons
6 between 2012 and 2015.

7 65. Data from acoustic trawl surveys available to the Fisheries Service at the time it was
8 developing the Specification Rule showed that in 2015, anchovy biomass remained very low.
9 Shortly after promulgating the Specification Rule, the agency released an abundance estimate based
10 on the acoustic trawl survey information in the amount of 31,427 metric tons.

11 66. Multiple sources of data demonstrate that the anchovy population has declined more
12 than 90 percent since the 1990s, when the Fisheries Service last produced an estimate of anchovy
13 abundance. According to the Fisheries Service's own abundance indices, which measure relative
14 changes in anchovy abundance, anchovy biomass has declined by 91 to 98 percent since the 1980s,
15 with no evidence of a significant recovery in 2016.

16 67. Multiple surveys to detect anchovy eggs, larvae, and adults have shown steep declines
17 in anchovy abundance. Aerial and vessel surveys conducted off southern California by the
18 California Department of Fish and Wildlife and the fishing industry in 2012-2014 found only small
19 schools of anchovy, as well as mixed anchovy and sardines, ranging from 490-5,000 tons per school.
20 The surveys produced a maximum total estimate of anchovy biomass in the study area of 14,532
21 metric tons. No anchovy were observed in aerial surveys conducted by these same entities in 2015.

22 68. On-the-water surveys conducted by the Fisheries Service's Southwest Fishery
23 Science Center detected no anchovy eggs in 2010, 2012, and 2013, and detected very low numbers
24 in 2011, suggesting a downward trend in abundance. Surveys sampling anchovy eggs in 2015 found
25 eggs only within a small nearshore area, in small numbers, indicating that the anchovy population
26 was not recovering.

27 69. A 2013 report on the status of the Southern California Current ecosystem determined that
28 "larval anchovy abundance continued a declining trend over the last thirty years to the lowest

1 abundance since 1951.” Wells, B. K. et al. 2013. CCIEA Phase III Report 2013: Ecosystem
2 Components, Fisheries – Coastal Pelagic and Forage Fishes, at C-12. In May 2016, scientists from
3 the Fisheries Service’s Southwest Fisheries Science Center presented an updated analysis of fish
4 larvae data that showed continued low anchovy abundance through the summer of 2015.

5 70. The declines in anchovy abundance shown in scientific analyses and surveys have
6 also been apparent in the effects on marine predators. For example, brown pelicans experienced die-
7 offs, anomalous feeding behavior such as the predation of common murre chicks, and poor
8 reproductive success in the U.S. and Mexico from 2009-2015. The U.S. Fish and Wildlife Service,
9 the federal agency responsible for managing brown pelicans, has repeatedly expressed grave concern
10 regarding the pelican’s lack of food, unprecedented reproductive failures, and the need for fishery
11 managers to lower fishing pressure on anchovy.

12 71. In the fall of 2015, common murre chicks experienced an unprecedented die-off.
13 Northern anchovy and Pacific sardine normally comprise about half of the common murre chicks’
14 diet. Researchers believe that limited prey abundance or availability was a primary cause of the die-
15 off.

16 72. Recently published analyses of seabird and forage fish distribution and abundance in
17 the California Current Ecosystem show that a substantial decline in seabird abundance north of Point
18 Conception, California – a rate of decline of 2.2 percent per year from 1987 to 2011 – is attributable
19 to declines in anchovy abundance and availability.

20 73. California sea lions experienced large-scale die-offs in 2013, 2014, 2015, and 2016
21 linked to low anchovy and sardine abundance. A recent study led by Fisheries Service scientists
22 concluded that the increased mortality and starvation of California sea lion pups born at the Channel
23 Islands is directly related to the decline of high quality forage – sardine and anchovy – available to
24 breeding female California sea lions.

25 74. Declines in anchovy have likely affected predatory fish populations, including
26 commercially exploited species. A 2015 study suggested that an observed decline in fish
27 populations off southern California was driven largely by declines in commercially exploited forage
28 fish species, including anchovy and sardine.

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

5 76. Oceana and others presented all of the information above to the Fisheries Service and
6 Pacific Fishery Management Council in written comments as well as oral testimony before the
7 Fisheries Service finalized its rule. Oceana also pointed to the multiple means available under the
8 Coastal Pelagic Species FMP and established fishery management methodologies to calculate a
9 science-based annual catch limit, acceptable biological catch, and overfishing limit for northern
10 anchovy.

11 **Fisheries Service’s Specification Rule**

12 77. On October 26, 2016, eleven months after issuing its proposed rule and less than one
13 month before the Pacific Fishery Management Council was scheduled to consider adjustments to
14 anchovy management measures based on updated abundance data, the Fisheries Service issued the
15 Specification Rule. 81 Fed. Reg. 74309.

16 78. Notwithstanding multiple sources of information showing that the biomass of the
17 entire central subpopulation of northern anchovy was very low – with biomass estimates ranging
18 from between 15,000 and 32,000 metric tons, the Fisheries Service promulgated its Specification
19 Rule establishing an annual catch limit of 25,000 metric tons per year. 81 Fed. Reg. 74309.

20 79. In the rule, the Fisheries Service specified numeric values for the overfishing limit
21 (100,000 metric tons) and acceptable biological catch (25,000 metric tons). The Fisheries Service
22 relied on these values to derive the annual catch limit.

23 80. Though it has the discretion to set an annual catch limit as low as zero, the Fisheries
24 Service failed to consider lowering the annual catch limit below 25,000 metric tons based on the
25 current scientific evidence concerning anchovy abundance.

26 81. The Fisheries Service acknowledged that northern anchovy “did likely go through a
27 decline in the recent past and abundance may still be at some relatively low state.” 81 Fed. Reg. at
28 74311.

1 82. However, the Fisheries Service refused to use the MacCall et al (2016) abundance
2 estimate, which analyzed anchovy abundance data through 2011, on the basis that the estimate could
3 be “outdated” and the stock could fluctuate. The agency did not acknowledge MacCall et al’s
4 updated analysis showing that anchovy abundance averaged around 20,000 to 25,000 metric tons
5 between 2012 and 2015.

6 83. The Fisheries Service did not disclose in the Final Rule that data from the 2015
7 acoustic trawl survey produced an estimate of anchovy abundance of 31,427 metric tons.

8 84. The agency also failed to analyze other studies and sources of scientific information
9 on anchovy abundance, and declined to use that data to specify an up-to-date annual catch limit,
10 acceptable biological catch limit, or overfishing limit.

11 85. In its comments on the proposed rule, Oceana pointed out that the values the Fisheries
12 Service specified for the annual catch limit, acceptable biological catch, and overfishing limit
13 appeared to be based on pre-1990s anchovy abundance data.

14 86. In the notice for the final rule, the agency asserted that the annual catch limit is not
15 based on a 1995 stock assessment of anchovy (the last stock assessment it completed) “or any single
16 estimate of biomass,” but did not explain what information the specified value of the annual catch
17 limit is based on. 81 Fed. Reg. at 74311.

18 87. The Fisheries Service asserted that the annual catch limit formula in the Coastal
19 Pelagic Species FMP is precautionary because it reduces the overfishing limit by 75 percent to
20 specify acceptable biological catch.

21 88. The agency did not explain how this 75 percent buffer is precautionary in light of
22 evidence that anchovy abundance fluctuates by much more than 75 percent. The MacCall et al
23 (2016) study found that anchovy abundance declined by 99 percent between 2005 and 2009. The
24 Fisheries Service’s own data show that in recent years the anchovy population has fallen by more
25 than 90 percent since the 1980s.

26 89. The Fisheries Service asserted that its annual catch limit, which according to the most
27 recent abundance estimates could allow the fishery to catch most (if not all) of the northern anchovy
28 remaining in the central subpopulation, would not affect marine predators. It did not acknowledge

1 the declines in abundance of alternative food sources like Pacific sardine and Pacific mackerel, or
2 discuss how the cumulative lack of high-quality forage affects marine predators.

3 90. The Fisheries Service did not address its own findings that the lack of sardines and
4 anchovy was a primary cause of the multi-year die-off among California sea lions, or the U.S. Fish
5 and Wildlife Service's concerns that low anchovy and sardine abundance, along with continued
6 fishing pressure, may be contributing to multi-year reproductive failures and starvation among
7 brown pelicans.

8 91. The Specification Rule "announces the [annual catch limits] for the calendar year
9 2017 only," but also states that the annual catch limits "would remain in place for each subsequent
10 calendar year until new scientific information becomes available to warrant changing them, or if
11 landings increase and consistently reach the [acceptable biological catch]/[annual catch limit] level."
12 81 Fed. Reg. at 74310. Without new information accepted by the agency, the catch level will remain
13 unchanged.

14 **FIRST CLAIM FOR RELIEF**

15 **Violation of the Magnuson-Stevens Act and the APA – Failure to Base Annual Catch Limit, 16 Acceptable Biological Catch, and Overfishing Limit on the Best Available Science (16 U.S.C. § 1851(a)(2))**

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

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

21 94. The Fisheries Service failed to use or, in some cases, consider multiple sources of
22 scientific information that showed that current anchovy abundance is very low, with available
23 estimates ranging from approximately 15,000 metric tons to 32,000 metric tons. The Fisheries
24 Service unlawfully refused to base the annual catch limit on the best available science from recent
25 peer-reviewed studies, multiple scientific surveys reflecting anchovy abundance through at least the
26 summer of 2015, and evidence of starvation and breeding failures among anchovy-dependent
27 predators such as brown pelicans, California sea lions, and common murrens.

1 95. The agency unlawfully failed to use this updated scientific information to specify a
2 scientifically sound overfishing limit or acceptable biological catch.

3 96. As a result of the Fisheries Service’s failure to use current scientific information, the
4 Specification Rule establishes an annual catch limit that could allow the fishery to catch most (if not
5 all) of the northern anchovy remaining in the central subpopulation in a given year.

6 97. The Fisheries Service’s failure to analyze or apply the significant and available
7 information it did have demonstrating the current low abundance of anchovy violates both the
8 Magnuson-Stevens Act requirement to 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 98. The Fisheries Service’s Specification Rule is arbitrary and capricious and otherwise
13 not in accordance with the Magnuson-Steven Act and its implementing regulations, and is
14 reviewable under the APA, 5 U.S.C. §§ 701-706.

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

18 **SECOND CLAIM FOR RELIEF**

19 **Violation of the Administrative Procedure Act – Failure to Articulate a Rational Basis for the**
20 **Annual Catch Limit, Acceptable Biological Catch, and Overfishing Limit**
21 **5 U.S.C. § 706**

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

24 101. The Administrative Procedure Act requires that the Fisheries Service rationally
25 explain the basis for its decision to specify an annual catch limit of 25,000 metric tons and that it
26 draw a rational connection between the evidence before the agency and the decision it made.

27 102. The agency did not explain what data it used to specify the numeric value of 25,000
28 metric tons for the annual catch limit and acceptable biological catch.

1 103. The agency did not explain what data it used to specify the numeric value of 100,000
2 metric tons for the overfishing limit.

3 104. In fact, the Fisheries Service specifically asserted that it did not base its annual catch
4 limit on a 1995 stock assessment of anchovy “or any single estimate of biomass” and refused to base
5 the annual catch limit on more recent data.

6 105. The Fisheries Service’s actions and failures to act are arbitrary and capricious, and are
7 reviewable under the APA, 5 U.S.C. §§ 701-706.

8 106. The Fisheries Service’s violations of law are causing irreparable injury to the Plaintiff
9 for which it has no adequate remedy at law.

10 **THIRD CLAIM FOR RELIEF**
11 **Violation of the Magnuson-Stevens Act and the APA – Failure to Prevent Overfishing by**
12 **Specifying Scientifically Based Annual Catch Limit, Acceptable Biological Catch, and**
13 **Overfishing Limit**
14 **(16 U.S.C. §§ 1851(a)(1), 1853(a)(3))**

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

17 108. 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).

20 109. As a result of the Fisheries Service’s refusal to use the best scientific information
21 currently available, the Specification Rule establishes an annual catch limit that could be as large as
22 the entire central subpopulation of northern anchovy. The best available estimates of the recent
23 anchovy population size between 2009 and 2015 range from around 15,000 to 32,000 metric tons.

24 110. The Fisheries Service did not explain how setting an annual catch limit that
25 approaches or exceeds the size of the population will prevent overfishing.

26 111. The Fisheries Service refused to specify values for the overfishing limit and
27 acceptable biological catch based on the best available science. That science shows that the
28 overfishing limit set in the Specification Rule is likely about three to five times the biomass of the
entire anchovy population, and that the acceptable biological catch could exceed the biomass of the
population. The best science available to the agency also shows that the anchovy population has

1 declined by over 90 percent since the 1980s, well in excess of the 75 percent buffer used by the
2 Coastal Pelagic Species FMP, and invoked by the Fisheries Service in the Specification Rule, to
3 account for uncertainty in estimating the anchovy overfishing limit.

4 112. The Fisheries Service failed to explain how basing its management on acceptable
5 biological catch and overfishing limit values that approach or exceed the size of the entire anchovy
6 population will prevent overfishing.

7 113. The Fisheries Service's decision to set an annual catch limit and acceptable biological
8 catch that are as large or almost as large as the current total size of the anchovy population and an
9 overfishing limit that is several times the size of the anchovy population violates the Magnuson-
10 Stevens Act requirement that all fishery conservation and management measures "shall prevent
11 overfishing while achieving on a continuing basis, the optimum yield from each fishery..." 16
12 U.S.C. § 1851(a)(1), and the fundamental APA requirement that the Fisheries Service consider all
13 relevant factors and draw a rational connection between the facts in the record and its decision.

14 114. The Fisheries Service's Specification Rule is arbitrary and capricious and otherwise
15 not in accordance with the Magnuson-Stevens Act and its implementing regulations, and is
16 reviewable under the APA, 5 U.S.C. §§ 701-706.

17 115. The Fisheries Service's actions and failures to act are arbitrary and capricious, violate
18 the Magnuson-Stevens Act and the APA, and are causing irreparable injury to the Plaintiff for which
19 it has no adequate remedy at law.

20 **FOURTH CLAIM FOR RELIEF**
21 **Violation of the Magnuson-Stevens Act and the APA – Failure to Achieve Optimum Yield by**
22 **Specifying Scientifically Based Annual Catch Limit**
(16 U.S.C. §§ 1851(a)(1), 1853(a)(3))

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

25 117. National Standard One of the Magnuson-Stevens Act requires that "[c]onservation
26 and management measures shall prevent overfishing while achieving on a continuing basis, the
27 optimum yield from each fishery..." 16 U.S.C. § 1851(a)(1). In establishing "optimum yield," the
28 Fisheries Service must, among other things, "tak[e] into account the protection of marine

1 ecosystems,” and “any relevant economic, social, or ecological factor.” *Id.* § 1802(33)(A)-(B).

2 118. As a result of the Fisheries Service’s refusal to use the best scientific information
3 currently available, the Specification Rule establishes an annual catch limit that could leave few if
4 any anchovy in the ocean to feed marine predators. The best available estimates of the recent
5 anchovy population size between 2009 and 2015 range from around 15,000 to 32,000 metric tons.
6 Thus, the annual catch limit of 25,000 metric tons could allow most or all of the population to be
7 caught in a given year.

8 119. The Fisheries Service failed to consider and account for scientific information before
9 it indicating that low anchovy abundance has contributed to harm to marine ecosystems, including
10 the mass die-offs, starvation, and breeding failures of brown pelicans since 2009 and California sea
11 lions since 2013. The Fisheries Service also failed to consider scientific information showing that
12 low anchovy abundance has likely adversely affected common murre, Chinook salmon, and other
13 marine predators.

14 120. The Fisheries Service’s failure to explain how setting an annual catch limit that
15 approaches or even exceeds the size of the anchovy population can account for the needs of marine
16 predators violates the Magnuson-Stevens Act requirements that all fishery conservation and
17 management measures shall “achiev[e] on a continuing basis, the optimum yield from each
18 fishery...,” 16 U.S.C. § 1851(a)(1), “taking into account the protection of marine ecosystems,”
19 *id.* § 1802(33)(A), 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.

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

24 122. The Fisheries Service’s actions and failures to act are arbitrary and capricious,
25 violate the Magnuson-Stevens Act and the APA, and are causing irreparable injury to the Plaintiff
26 for which it has no adequate remedy at law.
27
28

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 Specification 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. Vacate the Specification Rule;

C. Remand the Specification Rule to Defendants for completion of a new rule that replaces the Specification 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;

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

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

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

DATED: November 23, 2016

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