

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 GRANTING MOTION TO  
ENFORCE THE JUDGMENT**

Re: Dkt. No. 72

Plaintiff Oceana, Inc. (“Plaintiff”) brought this suit 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”). On January 18, 2018, the Court granted Plaintiff’s motion for summary judgment and entered judgment. ECF Nos. 61, 62. On June 13, 2018, the Court granted in part and denied in part Defendants’ motion to alter or amend judgment. ECF No. 68. Before the Court is Plaintiff’s motion to enforce the judgment. ECF No. 72 (“Mot.”). Having considered the parties’ submissions, the relevant law, and the record in this case, the Court GRANTS Plaintiff’s motion to enforce the judgment.

1 **I. BACKGROUND**

2 **A. Procedural History**

3 On November 11, 2016, Plaintiff filed its complaint. ECF No. 1. Plaintiff challenged the  
4 Service's 2016 Catch Rule for the central subpopulation of northern anchovy and alleged that the  
5 Service's 2016 Catch Rule violated the Magnuson-Stevens Fisher Conservation and Management  
6 Act ("Magnuson-Stevens Act") and the Administrative Procedure Act ("the APA").<sup>1</sup> *See id.*  
7 Plaintiff sought declaratory relief as well as to vacate the Catch Rule and remand to the Service to  
8 complete a new rule within no more than three months from the date of the entry of judgment. *Id.*  
9 Plaintiff also requested, among other things, that the Court maintain jurisdiction over the action  
10 until the Defendants were in compliance with the Magnuson-Stevens Act, the APA, and every  
11 order of the Court. *Id.* On February 17, 2017, Defendants filed their answer. ECF No. 25.

12 On September 1, 2017, Plaintiff filed a motion for summary judgment. ECF No. 51. In its  
13 motion, Plaintiff reiterated its request that the Court "hold that the Catch Rule violates the  
14 Magnuson[-Stevens] Act and the APA." *Id.* at 25. Plaintiff further requested "that the Court vacate  
15 the Catch Rule and remand it to [the Service to] complete a new rule that complies with the law  
16 within no more than 90 days from the date of this Order." *Id.* On October 13, 2017, Defendants  
17 filed a combined cross-motion for summary judgment and opposition to Plaintiff's motion for  
18 summary judgment. ECF No. 52. In their cross-motion, Defendants argued in the alternative that if  
19 the Court were to find that the Service unlawfully approved the 2016 Catch Rule, the Court should  
20 limit the remedy to a remand without vacatur. *See id.* at 24–25. Defendants recognized that  
21 Plaintiff requested vacatur of the Rule and a new rule within 90 days. *Id.* at 25. Defendants' only  
22 objection to the 90-day deadline was the following one sentence: "Such a remedy would not allow  
23 sufficient time for public comment and for [the Service] to recommend any changes to the [Pacific  
24 Fishery Management] Council [{"Council"}], consistent with the Council's role under the"  
25 Magnuson-Stevens Act. *Id.* at 25. Defendants did not contest the remedy of a remand.

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27 <sup>1</sup> For a more detailed factual summary, see the Court's January 18, 2018 order on the motion and  
28 cross-motion for summary judgment. *See* ECF No. 61.

1 On November 11, 2017, Plaintiff filed its combined opposition to Defendants’ motion for  
2 summary judgment and reply in support of Plaintiff’s motion for summary judgment. ECF No. 56.  
3 In its reply, Plaintiff again requested that the Court “set aside the Catch Rule’s provisions  
4 governing the central subpopulation of northern anchovy and order [the Service] to promulgate a  
5 new rule that applies the best available science and complies with the Magnuson[-Stevens] Act’s  
6 mandate to prevent overfishing and achieve optimum yield by accounting for ecosystem needs  
7 within 90 days.” *Id.* at 25. On December 8, 2017, Defendants filed their reply brief in support of  
8 Defendants’ cross-motion for summary judgment. ECF No. 57. As to the remedy, Defendants  
9 challenged only whether vacatur would be appropriate. *See id.* at 14–15.

10 On January 18, 2018, the Court granted Plaintiff’s motion for summary judgment and  
11 denied Defendants’ cross-motion for summary judgment. ECF No. 61 (“MSJ Order”). The Court  
12 held that the Service’s 2016 Catch Rule for the central subpopulation of northern anchovy,  
13 including the annual catch limit (“ACL”) it established, violated the Magnuson-Stevens Act and  
14 the APA. The Court also found that the outdated values for the overfishing limit (“OFL”) and  
15 acceptable biological catch (“ABC”) on which the ACL was based were arbitrary and capricious.  
16 In particular, the Court found that “the OFL, ABC, and ACL are arbitrary and capricious because  
17 Plaintiff has presented substantial evidence that the OFL, ABC, and ACL are not based on the best  
18 scientific information available.” *Id.* at 29. The Court also found that “it was arbitrary and  
19 capricious for the Service to fail to consider whether the OFL, ABC, and ACL still prevented  
20 overfishing in light of their direct reliance on a [maximum sustainable yield] estimate from a 1991  
21 study that evidence in the administrative record indicated was out of date.” *Id.* at 32.

22 After finding for Plaintiff, the Court considered next the appropriate remedy. *See id.* at 32–  
23 33. The Court acknowledged that Defendant had argued that even if the Court finds the Catch  
24 Rule arbitrary and capricious, the Court should not vacate. *See id.* at 32. In particular, Defendant  
25 had argued that “the Court should not vacate the ACL because a new acoustic trawl survey from  
26 2016 (“2016 Survey”) indicates the anchovy population is recovering.” *Id.* The Court considered  
27 but explicitly “reject[ed] Defendants’ claim that vacatur is inappropriate” for two reasons. First,  
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1 the Court found that the “2016 Survey results are not persuasive enough to overcome the  
2 presumption that a court shall ‘set aside an agency rule that a court finds, arbitrary, capricious, an  
3 abuse of discretion, or otherwise not in accordance with the law.’” *Id.* (quoting *Nat. Res. Def.*  
4 *Council, Inc. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002)). Second, the  
5 Court found inapplicable the single case Defendants cited in support of their argument that the  
6 Court can consider evidence outside the administrative record in determining a remedy. *Id.* at 32–  
7 33. The Court therefore “reject[ed] Defendants’ claim that vacatur is inappropriate.” *Id.* On  
8 January 18, 2018, the Court entered judgment in favor of Plaintiff. ECF No. 62.

9 On February 15, 2018, Defendants filed a motion to alter judgment pursuant to Federal  
10 Rule of Civil Procedure 59(e). ECF No. 64. In the motion, Defendants asked for clarification on  
11 what the Court vacated. *See id.* In particular, Defendants asked the Court to clarify that the  
12 reference points established in the rule for stocks not at issue in this litigation—“the northern  
13 subpopulation of northern anchovy, jack mackerel, and krill”—had not been vacated. *Id.* at 2–3.  
14 Defendants also asked the Court to clarify that it did not vacate the OFL and ABC for the central  
15 subpopulation of northern anchovy because, according to Defendants, the Court’s MSJ Order only  
16 referred to vacatur of the Catch Rule, or ACL. *Id.* at 3–5. Defendants explained that they sought  
17 “this clarification because it affects an ongoing [Service] rulemaking.” *Id.* at 4. Particularly,  
18 Defendants complained that “[v]acatur of OFL and ABC would . . . require a more extended  
19 Council and [Service] process to formulate and promulgate through a notice-and-comment process  
20 of new OFL and ABC, even if [the Service] determines that doing so is not necessary.” *Id.* at 4.

21 Plaintiff opposed on March 1, 2018. ECF No. 64. Defendants replied on March 8, 2018.  
22 ECF No. 66. In reply, Defendants argued that “the Court did not clearly exercise its equitable  
23 power to vacate OFL and ABC, and indicated only that the Rule or ACL for the stock had been  
24 vacated.” *Id.* at 2.

25 On June 13, 2018, the Court granted in part and denied in part Defendants’ motion to alter  
26 judgment. ECF No. 68 (“Motion to Alter Order”). The Court first clarified that “its judgment did  
27 not vacate the reference points the Catch Rule set for stocks other than the central population of  
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1 the northern anchovy,” such as the jack mackerel. *Id.* at 2. Second, the Court clarified that it  
2 vacated not only the ACL set in the Catch Rule, but also the OFL and ABC for the central  
3 population of the northern anchovy. *Id.*

4 On August 10, 2018, Defendants filed a notice of appeal to the United States Court of  
5 Appeals for the Ninth Circuit. ECF No. 69. Defendants appealed the Court’s January 18, 2018  
6 MSJ Order, the January 18, 2018 judgment, and the June 13, 2018 Motion to Alter Order. *See id.*  
7 (citing ECF Nos. 61, 62, & 68).

### 8 **B. Plaintiff’s Instant Motion to Enforce Judgment**

9 On September 21, 2018, Plaintiff filed the instant motion to enforce judgment. *See Mot.*  
10 Plaintiff explains that it filed its motion to enforce because “the agency has still not issued a new  
11 catch rule correcting the legal violations this Court found in January [2018].” *Id.* at 1. Plaintiff  
12 “requests that the Court direct the [Service] to issue a proposed rule that corrects the flawed OFL,  
13 ABC, and ACL for the central subpopulation of northern anchovy” within 90-days after the  
14 Court’s decision on the instant motion. *Id.* at 1–2. In support, Plaintiff explains that it reads this  
15 Court’s MSJ Order as having granted Plaintiff’s requested deadline of 90 days for the Service to  
16 promulgate the new rule and that the Service has failed to follow that timeline. *Id.* at 3. Plaintiff  
17 continues, “[r]egardless of whether the [MSJ] Order set a precise deadline, however, it is now  
18 clear that the agency has no plan for compliance and that fishing is continuing without any  
19 regulation in place.” *Id.*

20 Defendants opposed on October 26, 2018. ECF No. 76 (“Opp’n”). In their opposition,  
21 Defendants acknowledge that they agree “that as long as ACL, ABC, and OFL remain vacated, the  
22 Council must work toward and ultimately propose new values and then [the Service] must approve  
23 or disapprove them consistent with the Magnuson[-Stevens] Act.” *Id.* at 14. Nonetheless, the  
24 Defendants argue that the Court’s MSJ Order did not include a 90-day deadline for the new OFL,  
25 ABC, and ACL. *Id.* at 1. Moreover, given the pending appeal, Defendants argue that the Court no  
26 longer has jurisdiction to establish a deadline, and in any event, “the Court should not impose a  
27 specific timeline and procedure for [the Service] to follow.” *Id.* at 14.

1 Plaintiff replied on November 9, 2018. ECF No. 77 (“Reply”).

2 **II. DISCUSSION**

3 **A. A District Court’s Jurisdiction During an Appeal**

4 The general rule is that once a notice of appeal is filed it confers jurisdiction on the court of  
 5 appeals and divests the district court of jurisdiction with respect to matters involved with the  
 6 appeal. *See, e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982); *McClatchy*  
 7 *Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982). As  
 8 the Ninth Circuit has explained, this is a “judge-made” rule, and “its purpose is to promote judicial  
 9 economy and avoid the confusion that would ensue from having the same issues before two courts  
 10 simultaneously.” *Nat. Resources Def. Council, Inc. v. S.W. Marine, Inc.*, 242 F.3d 1163, 1166 (9th  
 11 Cir. 2001).

12 A district court may, however, “retain[ ] jurisdiction during the pendency of an appeal to  
 13 act to preserve the status quo.” *Id.*; *see also Hoffman v. Beer Drivers & Salesmen’s Local Union*  
 14 *No. 888*, 536 F.2d 1268, 1276 (9th Cir.1976). This exception is codified in former Federal Rule of  
 15 Civil Procedure 62(c), now Rule 62(d).<sup>2</sup> Rule 62(d) allows a district court to “suspend, modify,  
 16 restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s  
 17 rights,” while an appeal is pending. This Rule grants a district court “no broader power than it has  
 18 always inherently possessed to preserve the status quo during the pendency of an appeal.” *S.W.*  
 19 *Marine*, 242 F.3d at 1166. This Rule “does not restore jurisdiction to the district court to  
 20 adjudicate anew the merits of the case.” *McClatchy Newspapers*, 686 F.2d at 734. Therefore, any  
 21 action taken pursuant to Rule 62(d) “may not materially alter the status of the case on appeal,”  
 22 *S.W. Marine*, 242 F.3d at 1166 (quoting Allan Ides, *the Authority of a Federal District Court to*  
 23 *Proceed After a Notice of Appeal Has Been Filed*, 143 F.R.D. 307, 322 (1992)), nor may the  
 24 district court take actions that alter any substantial rights of the parties on appeal not decided in its  
 25 original disposition of the case. *See McClatchy Newspapers*, 686 F.2d at 735; *see also In re TFT–*

26 \_\_\_\_\_  
 27 <sup>2</sup> The most recent amendments to the Federal Rules of Civil Procedure went into effect on  
 28 December 1, 2018. *See* <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>.

1 *LCD (Flat Panel) Antitrust Litig.*, No. C-07-01827 SI, 2013 WL 6055079, at \*1 (N.D. Cal. Nov.  
2 13, 2013) (“[W]hile an appeal is pending, the district court . . . may not take any action that would  
3 change the core issues before the appellate court or that could not later be undone on appeal.”).

4 Further, although the Court does not have jurisdiction to decide the merits of the issue that  
5 is currently on appeal, “a district court has continuing jurisdiction in support of its judgment, and  
6 until the judgment has been properly stayed or superseded, the district court may enforce  
7 it.” *Armstrong v. Brown*, 857 F. Supp. 2d 919, 948–49 (N.D. Cal. 2012), *order enforced* (Aug. 28,  
8 2012), *order aff’d, appeal dismissed*, 732 F.3d 955 (9th Cir. 2013) (quotation marks and citations  
9 omitted); *see also Lara v. Secretary of Interior*, 820 F.2d 1535, 1543 (9th Cir.1987) (“The district  
10 court may issue orders pending appeal to enforce its judgment.”); *Hoffman v. Beer Drivers &*  
11 *Salesmen’s Local No. 888*, 536 F.2d 1268 (9th Cir.1976) (“Where the court supervises a  
12 continuing course of conduct and where as new facts develop additional supervisory action by the  
13 court is required, an appeal from the supervisory order does not divest the district court of  
14 jurisdiction to continue its supervision, even though in the course of that supervision the court acts  
15 upon or modifies the order from which the appeal is taken.”).

#### 16 **B. Plaintiff’s Motion to Enforce the Judgment**

17 Plaintiff’s motion to enforce the judgment requests that the Court enforce the Court’s  
18 previously imposed 90-day deadline for Defendants to promulgate a new rule in compliance with  
19 the Magnuson-Stevens Act and the APA. Because Defendants, on August 10, 2018, appealed the  
20 Court’s January 18, 2018 MSJ Order, the January 18, 2018 judgment, and the June 13, 2018  
21 Motion to Alter Order, the Court can only grant Plaintiff’s motion if doing so does not materially  
22 alter the status of the case on appeal or alter any substantial rights of the parties. *S.W. Marine*, 242  
23 F.3d at 1166 (explaining that the district court has no power to materially alter the status of the  
24 case on appeal); *McClatchy Newspapers*, 686 F.2d at 735 (explaining that the district court may  
25 not take actions that alter any substantial rights of the parties on appeal).

26 Below, the Court first identifies the status of the case on appeal. Second, the Court  
27 discusses Defendants’ failure to promulgate a new rule in compliance with the Magnuson-Stevens

1 Act and the APA. Third, the Court analyzes whether Plaintiff's motion requests a material  
2 alteration of the status of the case on appeal or alteration of any substantial rights of the parties.

3 **1. The Status of the Case on Appeal**

4 The current status of the case on appeal is as follows. The January 18, 2018 MSJ Order,  
5 the January 18, 2018 judgment, and the June 13, 2018 Motion to Alter Order collectively held that  
6 the Catch Rule, including the ACL, as well as the OFL and ABC violated the Magnuson-Stevens  
7 Act and the APA; vacated the OFL, ABC, and ACL; and remanded for the Service to issue a new  
8 rule that corrects the OFL, ABC, and ACL. Both Plaintiff and Defendants agree that the Court's  
9 orders required at least this much. *See* Mot. at 1; Opp'n at 14 ("[The Service] agrees that as long  
10 as ACL, ABC, and OFL remain vacated, the Council must work toward and ultimately propose  
11 new values and then [the Service] must approve or disapprove them consistent with the  
12 Magnuson[-Stevens] Act.").

13 Indeed, the Court's MSJ Order held that the Service's 2016 Catch Rule for the central  
14 subpopulation of northern anchovy, including the ACL it established, as well as the outdated  
15 values for the OFL and ABC on which the ACL was based, violated the Magnuson-Stevens Act  
16 and the APA. *See* MSJ Order. In particular, the Court found that "the OFL, ABC, and ACL are  
17 arbitrary and capricious because Plaintiff has presented substantial evidence that the OFL, ABC,  
18 and ACL are not based on the best scientific information available." *Id.* at 29. The Court also  
19 found that "it was arbitrary and capricious for the Service to fail to consider whether the OFL,  
20 ABC, and ACL still prevented overfishing in light of their direct reliance on a [maximum  
21 sustainable yield] estimate from a 1991 study that evidence in the administrative record indicated  
22 was out of date." *Id.* at 32. The Court then vacated the OFL, ABC, and ACL for violation of the  
23 Magnuson-Stevens Act and the APA and required a new rule that complies with those statutes. *Id.*  
24 at 33; Motion to Alter Order at 2; *see, e.g., Sierra Club v. EPA*, 850 F. Supp. 2d 300, 303 (D.D.C.  
25 2012) ("When a court vacates an agency's rules, the vacatur restores the status quo before the  
26 invalid rule took effect and the agency must initiate another rulemaking proceeding." (internal  
27 quotation marks and citations omitted)).

1 The parties disagree, however, on whether the Court imposed a deadline for Defendants to  
2 propose the new rule. *See* Mot. at 1 (Plaintiff asserting that the Court’s order required the agency  
3 to promulgate a new rule within 90-days); Opp’n at 2, 14 (Defendants arguing that the Court did  
4 not impose a 90-day deadline and stating that “the Court should not impose a specific timeline and  
5 procedure for [the Service] to follow”).

6 Plaintiff’s summary judgment motion had requested that the Court find that the Catch Rule  
7 violates the Magnuson-Stevens Act and the APA, but also that the Court vacate the Catch Rule  
8 and remand it to the Service to complete a new rule that complies with the law within no more  
9 than 90 days from the date of the Court’s MSJ Order. ECF No. 51 at 32. Contrary to Defendant’s  
10 assertion otherwise, the Court granted Plaintiff’s motion for summary judgment in full. *See* MSJ  
11 Order. Therefore, pursuant to the Court’s January 18, 2018 MSJ Order, Defendants had 90 days to  
12 complete a new rule that complies with the Magnuson-Stevens Act and the APA.

13 In sum, the current status of the case on appeal is the January 18, 2018 MSJ Order, the  
14 January 18, 2018 judgment, and the June 13, 2018 Motion to Alter Order, which collectively held  
15 that the OFL, ABC, and ACL violated the Magnuson-Stevens Act and the APA; vacated the OFL,  
16 ABC, and ACL; and remanded for the Service to issue a new rule in compliance with the  
17 Magnuson-Stevens Act and the APA within a 90-day deadline from the Court’s January 18, 2018  
18 MSJ Order.

19 **2. Defendants’ Failure to Promulgate a New Rule in Compliance with the**  
20 **Magnuson-Stevens Act and the APA**

21 To the extent Plaintiff argues that Defendants have not complied with their obligations  
22 under the Magnuson-Stevens Act and the APA, the Court agrees. Indeed, “[t]he agency’s appeal  
23 of the merits decision [ ] does not resolve it from its duty to comply with the Order.” Mot. at 6;  
24 *see, e.g., Maness v. Meyers*, 419 U.S. 449, 459 (1975) (“If a person to whom a court directs an  
25 order believes that order is incorrect[,], the remedy is to appeal, but, absent a stay, he must comply  
26 promptly with the order pending appeal.”).

27 As discussed, the Court’s January 18, 2018 MSJ Order and June 13, 2018 Motion to Alter

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1 Order remanded for the Service to issue a new rule in compliance with the Magnuson-Stevens Act  
2 and the APA. The Court finds that enforcing that obligation is within the Court’s jurisdiction  
3 while the case is on appeal because, as it is part of the Court’s orders, doing so will not materially  
4 alter the status of the case. *See S.W. Marine*, 242 F.3d at 1166; *see also, e.g., Stein v. Wood*, 127  
5 F.3d 1187, 1189 (9th Cir. 1997) (“A district court may, for example, retain jurisdiction . . . in aid  
6 of execution of a judgment that has not been superseded.”); *Sierra Club*, 850 F. Supp. 2d at 304  
7 (stating that where vacated “regulations do not discharge” the agency’s statutory duties, the  
8 agency “remains in violation of its nondiscretionary duty to issue those regulations.”).

9 Further, as Plaintiff observes, Defendants did not seek a stay to relieve themselves of the  
10 requirements of the Court’s orders. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1364  
11 (9th Cir. 1987) (“Absent a stay, all orders and judgments of courts must be complied with  
12 promptly.” (citation and quotation marks omitted)). Moreover, Defendants admit “that as long as  
13 ACL, ABC, and OFL remain vacated, the Council must work toward and ultimately propose new  
14 values and then [the Service] must approve or disapprove them consistent with the Magnuson[-  
15 Stevens] Act.” Opp’n at 14. Despite this, a year after the Court’s MSJ Order issued on January 18,  
16 2018, Defendants have failed to offer any specific plan to comply with the Magnuson-Stevens Act  
17 and the APA. *See, e.g., Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54–55 (finding that the Service’s  
18 responsibility to ensure fishery management plan is consistent with Magnuson-Stevens Act  
19 includes ensuring compliance with 16 U.S.C. § 1852(h)).

20 Therefore, to the extent Plaintiff contends that the Defendants have not complied with the  
21 Magnuson-Stevens Act and the APA on remand, the Court GRANTS Plaintiff’s motion to enforce  
22 the judgment. The parties shall file a joint status update within one month of this Order explaining  
23 Defendants’ plan to comply with the Magnuson-Stevens Act and the APA and what progress  
24 Defendants have made to that end. *See Hoffman*, 536 F.2d at 1276 (“We believe the rule should  
25 be, and we so hold that, in the kinds of cases where the court supervises a continuing course of  
26 conduct and where as new facts develop additional supervisory action by the court is required, an  
27 appeal from the supervisory order does not divest the district court of jurisdiction to continue its

1 supervision, even though in the course of that supervision the court acts upon or modifies the order  
 2 from which the appeal is taken.”); *see also A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091,  
 3 1099 (9th Cir. 2002) (“The district court properly exercised its power under Rule 62(c) to continue  
 4 supervision of [defendant’s] compliance with the injunction.”).

5 **3. No Material Alteration of the Status of the Case on Appeal or Alteration of Any**  
 6 **Substantial Rights of the Parties**

7 As discussed, the Court on January 18, 2018 granted Plaintiff’s summary judgment  
 8 motion, including the 90-day deadline request, in full. *See* MSJ Order; Motion to Alter Order.  
 9 Therefore, Defendant is incorrect to assert that the Court’s order did not impose a 90-day deadline.

10 Furthermore, the parties’ briefs and attachments demonstrate that Defendants have not  
 11 complied with the 90-day deadline. The Court’s MSJ Order was issued on January 18, 2018. 90-  
 12 days from January 18, 2018 was April 18, 2018. Therefore, as of January 18, 2019, Defendants’  
 13 new rule is 275 days past due.

14 Even if the Court gives the Defendants the benefit of the doubt and starts the 90-day time  
 15 period at the time of the June 13, 2018 Motion to Alter Order, 90-days from that date was  
 16 September 11, 2018. Therefore, at the time of writing the instant Order, Defendants’ new rule is at  
 17 least 129 days past due.

18 Moreover, the Court is not convinced by Defendants’ explanation for the delay. The  
 19 Service need not wait for new data to promulgate an updated OFL, ABC, and ACL because the  
 20 Service need only use the best scientific information available. The Court’s MSJ Order did not  
 21 require the Service to wait for new data. The Court’s MSJ Order merely found that it was arbitrary  
 22 and capricious for the Service to use a 1991 study because the 1991 study was not the best  
 23 scientific information available. Specifically, the following evidence demonstrated that the 1991  
 24 study was out of date: a 2015 peer-review study of the anchovy population, a 2015 survey of  
 25 anchovy abundance conducted by the Service, and findings by the U.S. Fish and Wildlife Service  
 26 (“FWS”) and NOAA that anchovy predators are experiencing food shortages. *Id.* at 20–21, 29, 32.

27 Ninth Circuit law supports this Court’s enforcement of the 90-day deadline this Court

1 imposed one year ago. In *S.W. Marine*, for instance, the district court had issued an injunction  
2 requiring the defendant to conduct water testing “at the surface” and to take steps to capture storm  
3 water runoff from piers in “a reasonably expeditious manner.” *S.W. Marine*, 242 F.3d at 1166.  
4 While the injunction was on appeal, the district court modified the order clarifying the phrases “at  
5 the surface” and “reasonably expeditious” by substituting “testing of the surface ‘microlayer’ for  
6 testing ‘at the surface’” and by substituting an 18-month deadline for the requirement of  
7 “reasonably expeditious.” *Id.* at 1165. The Ninth Circuit found that the modifications made by the  
8 district court “did not materially alter the status of the consolidated appeal,” and that such  
9 alterations were proper pursuant to the former Rule 62(c) (now Rule 62(d)). *Id.* at 1167. The Ninth  
10 Circuit further explained that the modifications “left unchanged the core questions before the  
11 appellate panel deciding the” appeal: “Whether the district could permissibly: (1) require any  
12 water column testing, including testing ‘at the surface,’ or (2) require the construction of a pier  
13 storm water capture facility.” *Id.* These core questions were left unchanged because “[i]f the core  
14 requirements of water column testing and pier storm water capture were ultimately reversed on  
15 appeal, the ‘microlayer’” requirement and the 18-month deadline would also “effectively be  
16 reversed, leaving none of Southwest Marine’s substantial rights affected after the conclusion of the  
17 consolidated appeal.” *Id.*

18 The Court’s jurisdiction on appeal in the instant case is even clearer than the district  
19 court’s jurisdiction in *S.W. Marine* because in the instant case, the Court previously granted  
20 Plaintiff’s motion for summary judgment, including the specific 90-day deadline. Therefore,  
21 Plaintiff’s instant motion does not even request a modification. Instead, Plaintiff asks the Court to  
22 enforce the orders and judgment as they are; granting such request would thus not materially alter  
23 the status of the case on appeal or alter any substantial rights of the parties.

24 Further, it bears repeating that Defendants did not seek a stay to relieve themselves of the  
25 requirements of the Court’s orders. “[A] district court is not deprived of power to require action by  
26 a fixed date simply because that date may arrive before appeals are exhausted. If compliance with  
27 the injunction threatens to deprive a party of the benefit of a successful appeal, it is up to that party

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to obtain a stay of the judgment.” *S.W. Marine*, 242 F.3d at 1168 (citing *Holloway v. United States*, 789 F.2d 1372, 1373–74 (9th Cir. 1986)).

Therefore, the Court GRANTS Plaintiff’s motion to enforce the judgment.

**III. CONCLUSION**

For the foregoing reasons, the Court GRANTS Plaintiff’s motion to enforce the judgment. Defendants shall promulgate a new rule in compliance with the Magnuson-Stevens Act and the APA within 90-days of the Court’s instant Order, which is Thursday, April 18, 2019.

**IT IS SO ORDERED.**

Dated: January 18, 2019

  
\_\_\_\_\_  
LUCY H. KOH  
United States District Judge