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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

OCEANA, INC.,  
Plaintiff,  
v.  
PENNY PRITZKER, et al.,  
Defendants.

Case No. 16-CV-06784-LHK

**ORDER DENYING DEFENDANTS’  
MOTION FOR RELIEF FROM  
NONDISPOSITIVE PRETRIAL ORDER  
OF MAGISTRATE JUDGE**

Re: Dkt. No. 40

Plaintiff Oceana, Inc. (“Plaintiff”) challenges a final rule setting annual catch limits for the central subpopulation of the northern anchovy, which was promulgated by the National Marine Fisheries Service (“NMFS”). Defendants in the instant suit are Penny Pritzker<sup>1</sup> in her official capacity as Secretary of Commerce, National Oceanic and Atmospheric Administration, and NMFS (collectively, “Defendants”). On February 17, 2017, Defendants filed an Administrative Record (“AR”) for NMFS’s final rule. On April 21, 2017, Plaintiff filed a Motion to Compel Completion of the Administrative Record (“Motion to Complete”). ECF No. 36 (“Mot. to Complete”). On June 21, 2017, Magistrate Judge Susan van Keulen (the “Magistrate Judge”)

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<sup>1</sup> Penny Pritzker is no longer the Secretary of Commerce.

1 granted in part and denied in part Plaintiff’s Motion to Compel Completion of the Administrative  
2 Record. ECF No. 39, *Oceana, Inc. v. Pritzker*, 2017 WL 2670733 (N.D. Cal. June 21, 2017)  
3 (“Original Order”).

4 On July 3, 2017, Defendants filed a Motion for Relief from Nondispositive Pretrial Order  
5 of Magistrate Judge. ECF No. 39 (“Mot.”). Having considered the parties’ briefing the relevant  
6 law and the record in this case, the Court DENIES Defendants’ Motion for Relief from  
7 Nondispositive Pretrial Order of Magistrate Judge

8 **I. BACKGROUND**

9 On November 20, 2015, NMFS published a proposed rule entitled *Fisheries Off West*  
10 *Coast States; Coastal Pelagic Species Fisheries; Multi-Year Specifications for Monitored and*  
11 *Prohibited Harvest Species Stock Categories* in the Federal Register (the “Catch Rule”), and  
12 requested public comments. AR 88. The public comment period closed on December 31, 2015.  
13 *Id.* On September 30, 2016, NMFS approved the Catch Rule. AR 186. On October 26, 2016, the  
14 Catch Rule was published in the Federal Register. 81 Fed. Reg. 74309. The Catch Rule set  
15 annual catch limits and other reference points for various species of fish, including an annual catch  
16 limit of 25,000 metric tons for the central subpopulation of northern anchovy. *Id.* at 74310.

17 Plaintiff brings this challenge to the Catch Rule under the Administrative Procedure Act  
18 (“APA”), 5 U.S.C. § 701 *et seq.*, and the Magnuson-Stevens Fishery Conservation and  
19 Management Act (“Magnuson Act”), 16 U.S.C. § 1801 *et seq.* The Court may set aside an  
20 agency’s action under the APA if it is “arbitrary, capricious, an abuse of discretion, or otherwise  
21 not in accordance with law.” 5 U.S.C. § 706(2)(A). ECF 1, Complaint (“Compl.”). When a  
22 challenge is brought under the APA, the relevant agency is charged with preparing and filing a  
23 complete administrative record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 n.  
24 30 (1971) (limiting appeals of agency decisions to the administrative record before the agency). In  
25 the original April 21, 2017 Motion to Complete, Plaintiff sought to add three sets of documents  
26 and data that Plaintiff contends should have been part of the administrative record, but were

1 excluded. *See* Mot. to Complete at 2. On May 12, 2017, Defendants filed an opposition to  
2 Plaintiff’s Motion to Complete. ECF No. 36. On May 26, 2017, Plaintiff filed a reply. ECF No.  
3 37.

4 First, Plaintiff’s Motion to Complete sought the inclusion of data collected through  
5 acoustic trawl sampling during the summer of 2015, analyses of that data, correspondence  
6 discussing or conveying such analyses, and drafts of the paper entitled “The Distribution and  
7 Biomass of the Central-Stock Northern Anchovy during Summer 2015, Estimate from Acoustic-  
8 Trawl Sampling,” which NMFS presented to the Pacific Fishery Management Council (the  
9 “Council”) in November 2016 (collectively, the “2015 Trawl Survey”).

10 Second, Plaintiff’s Motion to Complete sought the inclusion of a NMFS report entitled  
11 “Review and Re-evaluation of Minimum Stock Size Thresholds for Finfish in the Coastal Pelagic  
12 Species Fishery Management Plan for the U.S. West Coast” (August 22, 2016), prepared by the  
13 agency’s Southwest Fisheries Science Center (the “Finfish Report”).

14 Finally, Plaintiff’s Motion to Complete sought the inclusion of a study by Laura E. Koehn,  
15 among others, entitled “Developing a high taxonomic resolution food web model to assess the  
16 functional role of forage fish in the California Current ecosystem,” which was cited in comments  
17 submitted to the Council, a body of which NMFS is a voting member, while NMFS was  
18 developing the Rule (the “Koehn Study”).

19 On June 21, 2017, the Magistrate Judge granted Plaintiff’s Motion to Complete as to the  
20 2015 Trawl Survey and the Finfish Report, but denied Plaintiff’s Motion to Complete as to the  
21 Koehn Study. *See* Original Order at \*8.

22 On June 3, 2017, Defendants filed the instant Motion for Relief from Nondispositive  
23 Pretrial Order of Magistrate Judge. *See* Mot. Defendants challenge the inclusion of the 2015  
24 Trawl Survey and the Finfish Report in the administrative record. *See* Mot. On July 18, 2017,  
25 Plaintiff filed an opposition, ECF No. 45 (“Opp’n”), and on July 20, 2017, Defendants filed a  
26 reply, ECF No. 46 (“Reply”).

1 **II. LEGAL STANDARD**

2 **A. Review of a Non-Dispositive Pretrial Decision by a Magistrate Judge**

3 The district court may designate any non-dispositive pretrial matter to be determined by a  
4 magistrate judge, whose ruling on the matter will be modified or set aside only if “clearly  
5 erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). A magistrate  
6 judge’s factual determinations are reviewed for clear error, which allows the district court to  
7 overturn them only if the court reaches a “definite and firm conviction that a mistake has been  
8 committed.” *Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010). In addition, a  
9 magistrate judge’s legal conclusions are reviewed de novo to determine whether they are contrary  
10 to law. *Id.*

11 **B. Completeness of the Administrative Record**

12 Review under the APA generally is restricted to the administrative record. *See, e.g., Ariz.*  
13 *Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (“The  
14 reviewing court may not substitute reasons for agency action that are not in the record.”); 5 U.S.C.  
15 § 706 (“[T]he court shall review the whole record or those parts of it cited by a party . . .”).

16 In APA cases the administrative record is “the whole record,” which “consists of all  
17 documents and materials directly or indirectly considered by agency decision-makers and includes  
18 evidence contrary to the agency’s position.” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555  
19 (9th Cir. 1989). Thus, the administrative record includes materials beyond those on which the  
20 administrative agency relied. *See Coalition v. Whitman*, 227 F. Supp. 2d 134, 139 (D.D.C. 2002)  
21 (stating that an agency may not exclude information on the grounds that it did not rely on the  
22 excluded information in reaching a final decision where there was evidence that the administrative  
23 agency reviewed that information).

24 ““An agency’s designation and certification of the administrative record is treated like  
25 other established administrative procedures, and thus entitled to a presumption of administrative  
26 regularity.”” *Gill v. Dep’t of Justice*, 2015 WL 9258075, at \*5 (N.D. Cal. Dec. 18, 2015) (quoting  
27 *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) (citations omitted)). To rebut

1 this “presumption of completeness” of the administrative record, the plaintiff must show “clear  
2 evidence” that the record is not complete by “identify[ing] reasonable, non-speculative grounds  
3 for the belief that . . . documents were considered by the agency and not included in the record.”  
4 *Id.* (citations omitted). Alternatively, the presumption of completeness may be rebutted where the  
5 agency applied the wrong standard for compiling the record. *See id.* at \*6 (“The application of an  
6 incorrect standard constitutes ‘reasonable, non-speculative grounds for the belief that the  
7 documents were considered by the agency and not included in the record.’” (citation omitted)).

8 **III. DISCUSSION**

9 As noted above, in the instant motion, Defendants challenge the Magistrate Judge’s  
10 determination that the 2015 Trawl Survey and the Finfish Report should be included in the  
11 administrative record. The Court first addresses the Finfish Report and then addresses the 2015  
12 Trawl Survey.

13 **A. The Finfish Report**

14 Although Defendants do not contest that the Magistrate Judge’s finding that the Finfish  
15 Report meets the “directly or indirectly considered by agency decision-makers” standard for  
16 inclusion in the administrative record, *Thompson*, 885 F.2d at 555, Defendants nonetheless argue  
17 that the presumption of completeness of the administrative record was not rebutted and that the  
18 Finfish Report should not be included in the administrative record. The Magistrate Judge held that  
19 the presumption of completeness was rebutted because (1) Defendants did not cite the standard  
20 that was used to assemble the administrative record, and (2) Defendants failed to include the  
21 Finfish Report and the 2015 Trawl Survey in the administrative record, both of which “were  
22 directly or indirectly considered by the agency in formulating the [Catch] Rule.” Original Order at  
23 \*3.

24 With respect to the Finfish Report, the Court finds that the presumption of completeness  
25 has been rebutted under the Magistrate Judge’s second theory, and thus the Court need not reach  
26 the Magistrate Judge’s first theory. Despite Defendants’ argument that the Finfish Report should  
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1 not be included in the administrative record because the presumption of completeness has not been  
2 rebutted, Defendants do not dispute the Magistrate Judge’s finding that the Finfish Report should  
3 have been included in the administrative record under the “directly or indirectly considered by  
4 agency decision-makers” standard for inclusion in the administrative record. *Thompson*, 885 F.2d  
5 at 555. Defendants’ failure to contest this finding is effectively a concession that the Finfish  
6 Report was considered by “agency decision-makers” and thus should have been included in the  
7 administrative record. Thus, the Magistrate Judge’s finding that the Finfish Report was “directly  
8 or indirectly considered by the decision-maker” constitutes “reasonable, non-speculative grounds  
9 for the belief that . . . documents were considered by the agency and not included in the record,”  
10 and thus the presumption of completeness is rebutted. *Gill*, 2015 WL 9258075 at \*5 (internal  
11 quotation marks omitted).

12 Accordingly, the Court DENIES Defendants’ Motion as to the Finfish Report.

13 **B. 2015 Trawl Survey**

14 As to the 2015 Trawl Survey, Defendants argue that the 2015 Trawl Survey does not meet  
15 the “directly or indirectly considered by agency decision-makers” standard for inclusion in the  
16 administrative record, *Thompson*, 885 F.2d at 555, and that the presumption of completeness of  
17 the administrative record was not rebutted. If the 2015 Trawl Survey satisfies the *Thompson*  
18 standard for inclusion in the administrative record, that is, if the 2015 Trawl Survey was “directly  
19 or indirectly considered” by a NMFS decisionmaker, Defendants’ arguments fail. *See Gill*, 2015  
20 WL 9258075 at \*5 (finding presumption of completeness rebutted where Plaintiff has “identif[ied]  
21 reasonable, non-speculative grounds for the belief that . . . documents were considered by the  
22 agency and not included in the record”).

23 The Magistrate Judge held that *Thompson* has been satisfied for two independent reasons.  
24 First, the Magistrate Judge held that NMFS scientists analyzed the 2015 Trawl Survey data, and  
25 that it was not “sensible to distinguish between materials considered by NMFS’s ‘scientific staff’  
26 and materials before the individual NMFS employees responsible for developing the [Catch]

1 Rule.” Original Order at \*4. Second, the Magistrate Judge found that the record contained “direct  
2 evidence that NMFS decision-makers directly or indirectly considered the [2015 Trawl Survey]  
3 Materials.” *Id.*

4 The Court finds that the Magistrate Judge’s finding that NMFS decisionmakers directly or  
5 indirectly considered the 2015 Trawl Survey data and analysis did not constitute “clear error.” *See*  
6 *Perry*, 268 F.R.D. at 348 (holding that a Magistrate Judge’s factual finding on nondispositive  
7 pretrial matters shall be only overturned for “clear error,” that is, where the reviewing court has  
8 “definite and firm conviction that a mistake has been committed”). The Court reaches this  
9 conclusion for the following reasons:

10 First, the Catch Rule’s entry in the Federal Register explicitly states that “NMFS  
11 considered the 2015 Trawl Survey data. NMFS is currently analyzing some of the data described  
12 above about [the central subpopulation of northern anchovy] and, based on the recommendations  
13 from this workshop, is scheduled to provide an assessment of the available information on the  
14 stock in the fall of 2016.” 81 Fed. Reg. at 74311. Thus, the Federal Register itself stated that  
15 NMFS considered the 2015 Trawl Survey data and expected a report on the data in fall of 2016.

16 Second, the administrative record states that NMFS decisionmakers considered the 2015  
17 Trawl Survey data. Scientific staff from the NMFS Southwest Science Center (“NMFS Science  
18 Center”) presented information on this data at a May 2016 NMFS workshop. At the workshop,  
19 the NMFS Science Center staff announced that “unlike previous years, the wider distribution of  
20 anchovy in the survey area in 2015 made it possible to generate an abundance estimate for  
21 northern anchovy, but the estimate was not available for the workshop.” AR 159 at 2782.

22 Third, Joshua Lindsay—“the lead NMFS staff member who prepared” the Catch Rule—  
23 attended the May 2016 workshop. ECF No. 36-1 ¶ 4. In a declaration, Lindsay states that he  
24 determined that “[i]t was clear that this [2015 Trawl Survey] abundance estimate would, at a  
25 minimum, be limited to a measure of anchovy in the geographical area of the survey.” *Id.* ¶ 7.  
26 Moreover, Lindsay states that “although the acoustic trawl data had potential for providing  
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1 information on the abundance of the central subpopulation of northern anchovy, the data and  
2 calculation methods used required further review before any abundance estimate could be relied  
3 upon.” *Id.* Lindsay thus considered and rejected the 2015 Trawl Survey data for use in the Catch  
4 Rule. *See Forest Guardians v. Kempthorne*, 2008 WL 11337359, at \*3 (S.D. Cal. Apr. 1, 2008)  
5 (holding that the administrative record “includes information that is both favorable and  
6 unfavorable. Agencies can not cherry pick information that supports a decision and fail to reveal  
7 information that contradicts it. . . .” (citations omitted)).

8 Fourth, Lindsay was aware in September 2016 of the work performed by NMFS Science  
9 Center staff on anchovy abundance. AR 184. In a September 16, 2016 email from Lindsay to  
10 another NMFS staff member, Lindsay discusses the methods that would provide “the best idea of  
11 trends in anchovy abundance” and indicates a familiarity with “the work the [NMFS Science  
12 Center] is doing on anchovy.” AR 186. This evidence in the administrative record shows that  
13 Lindsay remained updated on the NMFS Science Center’s analysis of anchovy data in September  
14 2016.

15 Finally, Defendants previously represented to the Magistrate Judge and to this Court that  
16 an analysis of anchovy abundance based on the 2015 Trawl Survey data had not begun until mid-  
17 October 2016. In a correction submitted in support of the instant motion, Defendants concede that  
18 this representation was not correct. ECF No. 42-1 ¶ 4. Specifically, in their correction,  
19 Defendants concede that a draft estimate of anchovy abundance based on the 2015 Trawl Survey  
20 data was written in June 2016, and the NMFS Science Center performed “work and internal  
21 review of the document” in August 2016. *Id.* The Catch Rule was finally approved by NMFS on  
22 September 30, 2016, and published in the Federal Register on October 26, 2016. The fact that an  
23 analysis of the 2015 Trawl Survey data existed long before the September 30, 2016 final approval  
24 of the NMFS rule makes it likely that NMFS decisionmakers such as Lindsay, who remained  
25 updated on the NMFS Science Center’s analysis of anchovy data in September 2016, considered  
26 the draft report. Moreover, this incorrect representation to the Court may constitute an



1   impropriety in the process of formulating the administrative record, which may create an  
2   appearance of irregularity, which would support the rebuttal of the presumption of completeness.  
3   *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993)  
4   (holding that “impropriety in the process” of formulating the administrative record “creates an  
5   appearance of irregularity which the agency must then show to be harmless.”).

6           In sum, the fact that the Federal Register itself states that NMFS was analyzing the 2015  
7   Trawl Survey data; the fact that the 2015 Trawl Survey data was considered and rejected for use in  
8   the development of the Catch Rule; the fact that a report was expected in the fall of 2016; and the  
9   fact that Lindsay, the lead staff member addressing the Catch Rule, remained updated on the  
10   NMFS Science Center’s anchovy population analyses is sufficient evidence that NMFS  
11   decisionmakers directly or indirectly considered the 2015 Trawl Survey data and June 2016  
12   analysis. At the very least, the Court finds that the Magistrate Judge did not clearly err by finding  
13   that NMFS decisionmakers directly or indirectly considered these materials and that the  
14   presumption of completeness was rebutted. As noted above, a magistrate judge’s factual  
15   determinations are reviewed for clear error, which allows the district court to overturn them only if  
16   the court reaches a “definite and firm conviction that a mistake has been committed.” *Perry*, 268  
17   F.R.D. at 348. Based on the evidence in the record, the Court has no such firm conviction.

18           Accordingly, the Court DENIES Defendants’ motion as to the 2015 Trawl Survey.

19   **IV. CONCLUSION**

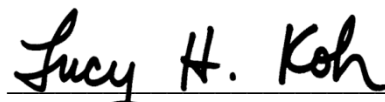
20           For the foregoing reasons, the Court DENIES Defendants’ Motion for Relief from  
21   Nondispositive Pretrial Order of Magistrate Judge.

22   **IT IS SO ORDERED.**

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24   Dated: August 15, 2017

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LUCY H. KOH  
United States District Judge

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