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4 UNITED STATES DISTRICT COURT
5
6 FOR THE EASTERN DISTRICT OF CALIFORNIA

7
8 COALITION FOR A SUSTAINABLE
DELTA, et al.

9 Plaintiffs,

10 v.

11 UNITED STATES FISH AND
12 WILDLIFE SERVICE, et al.,

13 Defendants.
14

1:09-CV-480 OWW GSA

MEMORANDUM DECISION AND
ORDER GRANTING FEDERAL
DEFENDANTS' MOTION FOR
SEVERENCE (DOC. 79)

15 I. INTRODUCTION

16 Plaintiffs, Coalition for a Sustainable Delta and
17 Kern County Water Agency, filed a second amended
18 complaint ("SAC") on July 23, 2009, Doc. 75, advancing
19 six groups of claims:

- 20
- 21 • Claims 1-5 against the U.S. Fish & Wildlife Service
22 ("FWS"). These claims challenge FWS's December 15,
23 2008 Biological Opinion ("2008 BiOp") for Coordinated
24 Operations of the Central Valley Project and State
25 Water Project under the Endangered Species Act
26 ("ESA") and the Administrative Procedure Act ("APA").
27 SAC ¶¶ 75-127. These claims were consolidated with
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- 1 claims from related cases challenging the 2008 BiOp
2 in the Delta Smelt Consolidated Cases, 1:09-cv-00407.
- 3 • Claims 6-7 against the U.S. Environmental Protection
4 Agency ("EPA"). These claims allege that EPA
5 registered 16 active pesticide ingredients under the
6 Federal Insecticide, Fungicide, and Rodenticide Act
7 ("FIFRA") in violation of the ESA. SAC ¶¶ 128-58.
 - 8 • Claims 8-10 against the Maritime Administration
9 ("MARAD"). These claims allege ESA violations
10 relating to MARAD's alleged maintenance of National
11 Defense Reserve Fleet vessels at Suisun Bay and the
12 preparation of a management plan for disposal of non-
13 retention vessels. SAC ¶¶ 155-76.
 - 14 • Claims 11-13 against FWS. These claims allege ESA
15 violations relating to FWS's provision of funding to
16 the California Department of Fish and Game under the
17 Federal Aid in Sport Fish Restoration Act. SAC ¶¶
18 177-95
 - 19 • Claims 14-16 against the Federal Emergency Management
20 Agency ("FEMA"). These claims allege ESA violations
21 relating to FEMA's administration of the National
22 Flood Insurance Program in the Sacramento-San Joaquin
23 Delta. SAC ¶¶ 196-221.
 - 24 • Claims 17-18 against the U.S. Army Corps of Engineers
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1 ("Corps") and FWS. These claims allege ESA and APA
2 violations by the Corps and FWS relating dredging
3 activities at the Port of Stockton. SAC ¶¶ 222-40.

4 On August 14, 2009, Federal Defendants moved to sever
5 and dismiss, without prejudice, Claims 6-7 against EPA,
6 Claims 8-10 against MARAD, and claims 14-16 against FEMA
7 from the remaining claims against FWS and the Corps
8 pursuant to Fed. R. Civ. P. 20(a) and 21. Plaintiffs
9 opposed on September 14, 2009, Doc. 87, and Defendants
10 replied on September 25, 2009, Doc. 91.

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12 The Corps and FWS separately moved to dismiss Claims
13 11-13 and 17-18 for lack of subject matter jurisdiction
14 Doc. 82. That motion was set for hearing on November 23,
15 2009. However, on October 27, 2009, the parties
16 stipulated to the dismissal of Claims 11-13 and 17-18.
17 Doc. 96. FWS and the Corps also withdrew their motion to
18 dismiss Claims 11-13 and 17-18, as those claims are no
19 longer part of this litigation. See Doc. 97. The
20 parties stipulated to the dismissal of Plaintiffs' claims
21 against EPA in Counts 6-7 of the SAC relating to 13 of
22 the 16 challenged pesticide registration decisions, as
23 well as part of Plaintiffs' claims relating to one
24 additional pesticide registration decision. See Doc. 96.

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26 Plaintiffs' lawsuit now consists of the following
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1 claims:

- 2 • Claims 1-5 challenging FWS's 2008 BiOp (SAC ¶¶ 75-
3 127). These claims have been consolidated with
4 related claims in the Delta Smelt Consolidated Cases,
5 1:09-cv-00407.
- 6 • Claims 6-7 challenging EPA's registration of three
7 active pesticide ingredients (propanil, SAC ¶148;
8 cypermethrin, SAC ¶152; and permethrin based on the
9 alleged effects on listed salmonids only, SAC ¶153).
10 These claims are related to another pending lawsuit,
11 *Center for Biological Diversity v. EPA*, 3:07-cv-02794
12 (N.D. Cal. filed May 30, 2007) ("CBD"). That case
13 involves a challenge to EPA's registration or re-
14 registration of 74 pesticide active ingredients, and
15 their alleged effects on eleven listed species,
16 including delta smelt.
- 17 • Claims 8-10 against MARAD (SAC ¶¶ 155-76). These
18 claims are related to another pending case, *Arc
19 Ecology v. MARAD*, 2:07-cv-02320 GEB GGH (E.D. Cal.
20 filed Oct. 29, 2007). *Arc Ecology* is a challenge to
21 MARAD's maintenance and disposal plan for the non-
22 retention of vessels in Suisun Bay under the National
23 Environmental Policy Act ("NEPA"), the Resource
24 Conservation and Recovery Act ("RCRA"), California's
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1 Hazardous Waste Control Law, and the Clean Water Act
2 ("CWA"), but not the ESA.

- 3 • Claims 14-16 against FEMA (SAC ¶¶ 196-221).

4 See Doc. 96.

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6 **II. STANDARD OF REVIEW**

7 The joinder of claims against multiple defendants in
8 a single action is governed by Federal Rule of Civil
9 Procedure 20(a), which provides that "persons ... may be
10 joined in one action as defendants if":

11 (A) any right to relief is asserted against them
12 jointly, severally, or in the alternative with
13 respect to or arising out of the same
14 transactions or occurrences; and

15 (B) any question of law or fact common to all
16 defendants will arise in the action.

17 Fed. R. Civ. P. 20(a)(2) (emphasis added). The permissive
18 joinder rule "is to be construed liberally in order to
19 promote trial convenience and to expedite the final
20 determination of disputes, thereby preventing multiple
21 lawsuits." *League to Save Lake Tahoe v. Tahoe Reg'l*
22 *Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1997). The
23 purpose of Rule 20(a) is to address the "broadest
24 possible scope of action consistent with fairness to the
25 parties; joinder of claims, parties and remedies is
26 strongly encouraged." *United Mine Workers of Am. v.*
27 *Gibbs*, 383 U.S. 715, 724 (1966).

1 “The first of these, the common question test, is
2 usually easy to satisfy.” *Bridgeport Music, Inc. v. 11C*
3 *Music*, 202 F.R.D. 229, 231 (M.D. Tenn. 2001) (citing 4
4 James Wm. Moore et al., *Moore’s Federal Practice*, ¶20.04
5 (3d ed. 1999)). “The transactional test, however, is
6 more forbidding. It requires that, to be joined, parties
7 must assert rights, or have rights asserted against them,
8 that arise from related activities—a transaction or an
9 occurrence or a series thereof.” *Id.* (internal citations
10 omitted). Because this test “does not lend itself to
11 bright line rules, it generally requires a case by case
12 analysis.” *Id.*

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14 If the test for permissive joinder is not satisfied,
15 a court, in its discretion, may sever the misjoined
16 parties, so long as no substantial right will be
17 prejudiced by the severance. *Coughlin v. Rogers*, 130
18 F.3d 1348, 1350 (9th Cir. 1997). In such a case the
19 court can generally dismiss all but the first named
20 plaintiff without prejudice to the institution of new,
21 separate lawsuits by the dropped plaintiffs “against some
22 or all of the present defendants based on the claims or
23 claims attempted to be set forth in the present
24 complaint.” *Id.*

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III. ANALYSIS.

Federal Defendants move to sever from the 2008 OCAP BiOp claims (Claims 1-5), the remaining portions of Claims 6 and 7 against the EPA's registration of certain pesticide active ingredients, Claims 8-10 against MARAD concerning maintenance and disposal of vessels at Suisun Bay, and Claims 14-16 challenging FEMA's administration of the National Flood Insurance Program in the Delta. Doc. 79. Federal Defendants argue (1) that these claims do not arise out of the same transaction or occurrence as the BiOp claims, (2) joinder does not promote convenience or efficiency, and (3) the misjoined claims should be dismissed without prejudice. *Id.*

At the heart of Plaintiffs' argument for joinder is the undisputed proposition that a "long list of stressors" affect the delta smelt. See 2008 Smelt BiOp at 189, 203. Plaintiffs maintain, therefore, that all of the claims joined in this suit are "logically related" because they "all relate[] to the decline of the delta smelt and harm to its designated critical habitat, all involve violations of the [ESA], and share questions of both law and fact in common, and all would result in consultation with [FWS]," if resolved in Plaintiffs' favor. Doc. 87 at 2.

1 **A. Do All of the Claims Arise Out of the Same**
2 **Transaction Or Occurrence?**

3 The first requirement of permissive joinder is that
4 any joined claims "aris[e] out of the same transaction,
5 occurrence, or series of transactions or occurrences."
6 Fed. R. Civ. P. 21(a)(2). The Ninth Circuit defines the
7 term "transaction or occurrence" to mean "similarity in
8 the factual background of a claim." *Bautista v. Los*
9 *Angeles County*, 216 F.3d 837, 842-43 (9th Cir.
10 2000) (citing *Coughlin*, 130 F.3d at 1350). Claims that
11 "'arise out of a systematic pattern of events' arise from
12 the same transaction or occurrence." *Id.* Plaintiffs
13 assert that the various claims against Federal Defendants
14 arise out of the same transaction or occurrence because
15 "the thrust of [each] claim ... is that each of the
16 federal agency's actions or approvals has contributed to
17 the decline of the delta smelt." Doc. 87 at 2.

18 The caselaw provides some guidance. In *Coughlin*, for
19 example, 49 plaintiffs alleged that the Immigration and
20 Naturalization Service ("INS") unreasonably delayed
21 plaintiffs' separate applications and petitions in
22 violation of the APA and the U.S. Constitution. 130 F.3d
23 at 1349. The Ninth Circuit affirmed the district court's
24 conclusion that the claims did not satisfy the "same
25 transaction" requirement:
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1 The first prong, the "same transaction"
2 requirement, refers to similarity in the factual
3 background of a claim. In this case, the basic
4 connection among all the claims is the alleged
5 procedural problem of delay. However, the mere
6 allegation of general delay is not enough to
7 create a common transaction or occurrence. Each
8 Plaintiff has waited a different length of time,
9 suffering a different duration of alleged delay.
10 Furthermore, the delay is disputed in some
11 instances and varies from case to case. And,
12 most importantly, there may be numerous reasons
13 for the alleged delay. Therefore, the existence
14 of a common allegation of delay, in and of
15 itself, does not suffice to create a common
16 transaction or occurrence.

17 *Id.* at 1350.

18 In contrast, in *Bautista*, where each member of a
19 large group of plaintiffs lost his or her job at the same
20 time due to the same merger, the claims arose from the
21 same transaction or occurrence; i.e., the merger that
22 caused jobs to be lost. 216 F.3d at 843. Similarly, in
23 *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th
24 Cir. 1974), on which Plaintiffs rely, claims brought by
25 ten plaintiffs alleging they had been injured by a
26 company-wide policy designed to discriminate against
27 African Americans "ar[ose] out of the same series of
28 transactions or occurrences," a racially discriminatory
workplace. *Id.* at 1333-34.¹

¹ Plaintiffs emphasize that *Mosely* applied a "logical relationship" test to Rule 20(a) permissive joinder. *Mosely*, an Eighth Circuit case, looked to Supreme Court's interpretation of "transaction or occurrence" in the related context of Rule 13 (counterclaims). *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926), held that "'Transaction' is a word of flexible meaning. It may

1 Federal Defendants' also rely on *Golden Scorpio Corp.*
2 *v. Steel Horse Bar & Grill*, 596 F. Supp. 2d 1282, 1285
3 (D. Ariz. 2009), which held that claims alleging multiple
4 defendants infringed upon a trademark were improperly
5 joined under Rule 20(a) because the circumstances of each
6 infringement were different. Despite the fact that the
7 same trademark was involved, misjoinder existed because
8 the claims of unlawful activity against one defendant
9 were "separate and distinct from the allegedly improper
10 acts of any of the other defendants." *Id.* Similarly, in
11 *Movie Systems Inc. v. Abel*, 99 F.R.D. 129 (D.C. Minn.
12 1983), a distributor of television programs filed 18
13 similarly worded complaints, each naming approximately
14 100 defendants, for a total of almost 1,800 defendants
15 accused of pirating its television programming. The
16 claims were severed because "[t]here is no claim that the
17 alleged pirating ... was done other than independently by
18 each of the 1795 defendants." *Id.* at 130.

21 Plaintiffs attempt to distinguish *Golden Scorpio*,
22 *Movie Systems*, and a similar unpublished case, *In Re*

23
24 comprehend a series of many occurrences, depending not so
25 much upon the immediateness of their connection as upon
26 their logical relationship." *Mosley* reasoned that "[t]he
27 analogous interpretation of the terms as used in Rule 20
28 would permit all reasonably related claims for relief by
or against different parties to be tried in a single
proceeding." *Id.* at 1333. Plaintiffs point to no
analogous cases that have found any "logical" or
"reasonable" relationship between claims such as those in
the SAC.

1 *DIRECTV, Inc.*, 2004 WL 2645971 (N.D. Cal. July 6, 2004),
2 on the ground that these claims concerned torts or
3 alleged violations of statutory rights "such that only
4 concerted action by Defendants ... would satisfy the
5 logical relation standard." *Id.* at 16. In contrast,
6 Plaintiffs argue, the SAC alleges "each Defendant's
7 action is contributing to the decline of the delta smelt
8 and the ecological health of the Delta itself."

9
10 Plaintiffs' suggestion is that claims may meet the
11 "transaction or occurrence" requirement merely because
12 each, distinct federal action adversely impacts the delta
13 smelt. As in *Coughlin*, where a "basic connection"
14 between the claims was insufficient, each allegedly
15 unlawful agency action affecting the smelt is largely
16 distinct from the others. Claims 1-5 concern FWS's
17 evaluation of the coordinated operation of the Central
18 Valley Project ("CVP") and State Water Project ("SWP"),
19 one of the most complex water storage and delivery
20 systems in the world.
21

22 Claims 6-7 challenge the registration of pesticides
23 for use in the Delta region, each of which has complex
24 chemical interactions with the environment. The effect
25 of pesticides used in the Delta has no relationship to
26 coordinated Project operations. It may have a negative
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1 effect on the smelt, but whether this was inadequately
2 considered in the BiOp (or in the context of MARAD or
3 FEMA's challenged decisions) is entirely determinable
4 without examining the efficacy of the registration.

5 Claims 8-10 address the storage and disposal of ships
6 within the Delta, a type of agency action claimed to
7 result in discharges of toxic rust, paint, and other
8 substances. Another case is addressing the lawfulness of
9 the ship retentions and disposals. Resolution of the
10 Consolidated Delta Smelt Cases does not depend on the
11 lawfulness of EPA's, FEMA's, or MARAD's actions. Rather,
12 it depends on whether FWS failed to evaluate the effects
13 of such actions on the smelt as related to the Projects'
14 coordinated operations, if such evidence exists in the
15 Smelt BiOp administrative record.

16 Claims 14-16 concern administration of the National
17 Flood Insurance Program, which implicates land use and
18 development issues in and around the Delta, yet another,
19 entirely different subject matter from Project
20 operations. Although these claims share the "basic
21 connection" that each federal action occurs in the delta
22 watershed and causes adverse impacts to the delta smelt
23 in some way, the agency actions themselves are distinct
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1 from coordinated Project operations.² Such land use and
2 development effects can be considered without deciding
3 whether the actions can lawfully continue.

4 Plaintiffs suggest an alternative reason why
5 permissive joinder is appropriate here, arguing that FWS
6 "as the common consulting agency" has an obligation to
7 "address the underlying nexus of stressors on the Delta
8 ecosystem." It is undisputed that a wide variety of
9 "stressors" affect the delta smelt and its critical
10 habitat. For the purposes of this motion, it is presumed
11 true that each of the challenged government actions
12 (i.e., EPA's pesticide approvals, MARAD's maintenance and
13 disposal of vessels at Suisun Bay, and FEMA's
14 administration of the National Flood Insurance Program in
15 the Delta), operate as stressors to the delta smelt.

16 Plaintiffs are correct that, under the ESA, Federal
17 Defendants are obligated to consider the effects of any
18 proposed federal action in light of the environmental
19 baseline, 16 U.S.C. § 1536; 50 C.F.R. § 402.02, and that
20 any past and current federal actions form part of the
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24 ² Plaintiffs attempt to distinguish *Coughlin* on the
25 ground that joinder was not permitted there because the
26 general allegations of delay were insufficient. Here, in
27 contrast, the SAC specifically alleges how each
28 challenged federal action contributes to the decline of
the smelt. But, specificity was not the central issue in
Coughlin. Rather, the focus was on the differing
circumstances underlying each alleged defendant's
situation. See 130 F.3d at 1350.

1 environmental baseline, 50 C.F.R. § 402.02 ("The
2 environmental baseline includes the past and present
3 impacts of all Federal, State, or private actions and
4 other human activities in the action area."). FWS must
5 evaluate individual federal action under the ESA in light
6 of the environmental baseline, which analysis must
7 consider all stressors impacting the delta smelt. It is
8 also true that a body of scientific literature points
9 toward a "new paradigm" in which the Delta should be
10 understood and managed as an integrated system.
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12 Undoubtedly, in understanding and evaluating each
13 individual activity, all others must be considered.
14 Nevertheless, each activity is separate and distinct, and
15 plaintiffs point to no statute, regulation, guidance, or
16 other source of legal authority that required FWS to do
17 more than consider the environmental baseline and all
18 then-existing conditions that jeopardized the delta smelt
19 and adversely affected its critical habitat. FWS, as the
20 consulting agency under the ESA, does not "manage" the
21 complained-of activities. The ESA only requires that FWS
22 evaluate the impacts on listed species of the each
23 particular federal action in light of other, known
24 stressors. Each activity is a separate transaction or
25 occurrence that must be evaluated in light of the others.
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1 The district court's holding in *Preserve Our Island*
2 *v. U.S. Army Corps of Eng'rs*, 2009 WL 2511953 (W.D. Wash.
3 Aug. 13, 2009), does not require FWS to manage all
4 stressors on a particular species in a coordinated
5 manner. Plaintiffs in *Preserve Our Island* alleged that
6 the issuance of a permit by the Corps for the
7 construction of a facility on the shore of an island in
8 Puget Sound violated NEPA and the ESA. After finding the
9 ESA and NEPA reviews of the project insufficient on
10 numerous grounds, the district court concluded:
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12 Which raindrop caused the flood?" With those
13 closing words (and due credit to the author),
14 plaintiffs at oral argument expressed the
15 central issue here. No single project or human
16 activity has caused the depletion of the salmon
17 runs, the near-extinction of the SR Orca, or the
18 general degradation of the marine environment of
19 Puget Sound. Yet every project has the potential
20 to incrementally increase the burden upon the
21 species and the Sound. Human development will
22 always have some impact on the surrounding
23 environment. The Court fully recognizes the
24 desirability and economic necessity of
25 industrial progress in order for a community to
26 flourish. However, under the National
27 Environmental Policy Act and the Endangered
28 Species Act, it is the federal agencies'
obligation to ensure that this progress does not
cause irreversible harm to the environment.
Thus, NEPA provides a mandate to the agencies
"to consider every significant aspect of the
environmental impact of a proposed action", and
"to inform the public that it has indeed
considered environmental concerns in its
decisionmaking process." *Baltimore Gas & Elec.*
Co. v. Natural Res. Def. Council, Inc., 462 U.S.
87, 97 (1983). It is then this Court's role to
ensure that the agencies have taken that

1 requisite "hard look" at the environmental
2 consequences for the proposed project. *Metcalf*
3 *v. Daley*, 214 F.3d [1135,] 1141 [(9th Cir.
4 2000)]. Having reviewed the record, the Court
finds that hard look at environmental
consequences lacking.

5 *Id.* at *20.

6 This general language from *Preserve Our Island* does
7 not establish the review standard Plaintiffs seek.
8 *Preserve Our Island* did not address the issue of joinder,
9 nor does it suggest that the hard look at the agency
10 action subsumes other federal actions that impact the
11 species, but are not the subject of the BiOp. Likewise,
12 *Preserve Our Island* did not involve multiple federal
13 actions or address any other issue presented here. What
14 *Preserve Our Island* stands for is that FWS must take a
15 hard look at the coordinated CVP-SWP operations changes
16 and their impact on listed species. The additional
17 complained of actions may well be within the
18 environmental baseline and subject to close scrutiny and
19 analysis, but requests for relief regarding these other
20 actions are not reasonably part of the relief sought in
21 the Consolidated Delta Smelt Cases, to invalidate the
22 BiOp and to cause it to be reissued by FWS.

23 The claims against EPA, MARAD, and FEMA are not part
24 of the same transaction or occurrence as the coordinated
25 Project operations in the Consolidated Delta Smelt Cases.
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1 Each action agency is separately charged with a duty to
2 ensure its own actions do not jeopardize the delta smelt
3 and/or its critical habitat. Other than requiring
4 evaluation of impacts of other federal agency action in
5 defining an accurate and comprehensive environmental
6 baseline, the law does not require joinder in the same
7 case of all federal actions that operate as stressors
8 upon the smelt to decide if such actions are unlawful or
9 should be abated.
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12 B. Do the Claims Involve the Same Questions of Law or
13 Fact?

14 "[T]he mere fact that all Plaintiffs' claims arise
15 under the same general law does not necessarily establish
16 a common question of law or fact." *Coughlin*, 130 F.3d
17 1351. Where claims require significant "individualized
18 attention," they do not involve "common questions of law
19 or fact." *Id.* Each set of claims in the SAC alleges
20 unrelated actions by different agencies that have
21 different effects: pesticides, vessel storage, flood
22 insurance, etc. Although the claims share some factual
23 connection in that each federal action is alleged to have
24 contributed to the decline of the delta smelt,
25 determining and potentially remedying the lawfulness of
26 each agency action will require review of vastly
27 divergent information and consequences, which do no have
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1 common factual or legal issues. The claims do not
2 involve common questions of law or fact.

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4 C. Would Severance Prejudice a Substantial Right?

5 Where the test for permissive joinder is not
6 satisfied, a court may, in its discretion, sever the
7 misjoined parties as long as no substantial right would
8 be prejudiced by the severance. See Fed. R. Civ. P. 21;
9 *Coughlin*, 130 F.3d at 1350. Plaintiffs do not have a
10 right to force the Federal Defendants to take action
11 against all the alleged stressors on the Delta smelt in a
12 single lawsuit, given the resulting complexity,
13 dissimilarities, and delay that will attend such
14 litigation. Plaintiffs have not established that
15 severance will prejudice any of their substantial rights
16 as each alleged stressor can be examined in the
17 Consolidated Delta Smelt Cases to determine their
18 separate and combined effect on the species and its
19 habitat, if the evidence to do so is in the record.
20 Continued joinder of other agency action claims may
21 unduly complicate and delay the smelt cases, which the
22 parties have sought to expedite.
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26 D. Would Joinder Serve the Purposes of Convenience
and/or Efficiency?

27 Maintaining all of the alleged claims in one lawsuit
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1 will be unwieldy. The docket in an APA or ESA lawsuit
2 challenging a single agency action is always complex,
3 sometimes consists of hundreds, if not thousands of
4 entries. Joining four separate, and different, agency
5 actions in a single case will make it unduly burdensome
6 to keep track of relevant filings, motions, and
7 deadlines. Even if these claims had met the test for
8 permissive joinder, keeping the cases separate is
9 preferable for effective case management and
10 administrative efficiency.
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12 Plaintiffs are incorrect that all four claims will
13 involve a single administrative record and/or related
14 discovery. As a general rule, judicial review of agency
15 action is limited to the "whole record or those of it
16 cited by a party." 5 U.S.C. § 706.³ Each separate
17 agency action will have a separate administrative record.
18 Although there may be some overlap if similar information
19 about the smelt was before each agency at the time of its
20 decision (or non-decision), each record will include
21 extensive, unique, unrelated information about the
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24 ³ *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1034
25 (9th Cir. 2005), held that the APA's "final agency
26 action" requirement did not apply to cases brought under
27 the ESA's citizen suit provision because that provision
28 contains its own waiver of sovereign immunity. *Washington Toxics* does not address the scope and standard
of review, which is undisputably governed by the APA. *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193
(9th Cir. 1988) .

1 different agency action in question. Moreover, if
2 discovery is available at all, it is unlikely to be
3 extensive, as extra-record evidence is discouraged in
4 administrative review cases. *Southwest Center for*
5 *Biological Diversity v. United States Forest Service*, 100
6 F.3d 1443, 1450 (9th Cir. 1996).

8 E. Should the Misjoined Claims Be Severed and Allowed to
9 Proceed Separately or Should they be Dismissed
10 Without Prejudice?

11 Rule 21(a) provides that misjoinder is "not a ground
12 for dismissing an action." Fed. R. Civ. P. 21. "On
13 motion or on its own, the court may at any time, on just
14 terms, add or drop a party. The court may also sever any
15 claim against a party." *Id.*; see also *DirectTV, Inc. v.*
16 *Leto*, 467 F.3d 842, 845 (3d Cir. 2006) (upon a finding of
17 misjoinder, a court "has two remedial options: (1)
18 misjoined parties may be dropped 'on such terms as are
19 just'; or (2) any claims against misjoined parties 'may
20 be severed and proceeded with separately.'").

21 Here, Federal Defendants suggest that the appropriate
22 course of action is dismissal of all claims against all
23 Defendants, except the first one named in the caption to
24 the Complaint. This is an accepted practice under Rule
25 21. See *DirectTV v. Armellino*, 216 F.R.D. 240, 241
26 (E.D.N.Y. 2003) (dismissing without prejudice all claims
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1 against all but the first named defendant). Federal
2 Defendants argue dismissal without prejudice is
3 appropriate here "because this case is at the very early
4 stages of litigation and no substantive prejudice would
5 result...." Doc. 79 at 10.

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7 Here, dismissal would be wasteful of the parties' and
8 judicial resources. The SAC has been filed and served,
9 and judicial resources have been invested into reviewing
10 the claims against all defendants. It is more reasonable
11 to permit each set of claims to proceed as a separate
12 lawsuit, all of which can be managed in a coordinated
13 proceeding. The claims against FWS regarding the OCAP
14 BiOp have already been consolidated with the other delta
15 smelt cases. The claims against EPA, MARAD, and FEMA
16 shall be severed and assigned three new case numbers.
17 Because there are linkages between the claims, the three
18 new cases will be coordinated for case management
19 purposes and a single scheduling conference will be held
20 in all three cases with a view to achieving judicial
21 efficiency and economy.

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23 Plaintiffs' request to delay decision on severance
24 until there is further factual development in these cases
25 is DENIED, as doing so will permit the filing of multiple
26 administrative records under one docket and trigger
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1 related administrative burdens.

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3 **IV. CONCLUSION**

4 For the reasons set forth above, Federal Defendants'
5 motion to sever is GRANTED. The claims against FWS
6 regarding the OCAP BiOp shall be fully consolidated with
7 the other delta smelt cases for all purposes including
8 trial, while the claims against EPA, MARAD, and FEMA will
9 be severed and assigned three new, consecutive case
10 numbers. The three new cases will be coordinated for
11 case management purposes, and the captions shall indicate
12 that each is coordinated with the others.
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14
15 SO ORDERED

16 Dated: November 17, 2009

17 /s/ Oliver W. Wanger

18 Oliver W. Wanger

19 United States District Judge
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