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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  
28

- 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  
25          26          27          28

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.

11  
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.

5  
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, occurrence, or series of  
15 transactions or occurrences; and

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

18 Fed. R. Civ. P. 20(a)(2) (emphasis added). The permissive  
19 joinder rule "is to be construed liberally in order to  
20 promote trial convenience and to expedite the final  
21 determination of disputes, thereby preventing multiple  
22 lawsuits." *League to Save Lake Tahoe v. Tahoe Reg'l*  
23 *Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1997). The  
24 purpose of Rule 20(a) is to address the "broadest  
25 possible scope of action consistent with fairness to the  
26 parties; joinder of claims, parties and remedies is  
27 strongly encouraged." *United Mine Workers of Am. v.*  
28 *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.*

13  
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.*

1 III. ANALYSIS.

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

15 At the heart of Plaintiffs' argument for joinder is  
16 the undisputed proposition that a "long list of  
17 stressors" affect the delta smelt. See 2008 Smelt BiOp  
18 at 189, 203. Plaintiffs maintain, therefore, that all of  
19 the claims joined in this suit are "logically related"  
20 because they "all relate[] to the decline of the delta  
21 smelt and harm to its designated critical habitat, all  
22 involve violations of the [ESA], and share questions of  
23 both law and fact in common, and all would result in  
24 consultation with [FWS]," if resolved in Plaintiffs'  
25 favor. Doc. 87 at 2.  
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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:  
26      
27      
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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[o]se out of the same series of  
28 transactions or occurrences," a racially discriminatory  
workplace. *Id.* at 1333-34.<sup>1</sup>

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<sup>1</sup> 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.<sup>2</sup> 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 <sup>2</sup> 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.  
11

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.  
10

11  
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 not 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.  
23  
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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.  
11

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.<sup>3</sup> 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 <sup>3</sup> *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  
27  
28

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.

6  
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.

22  
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  
27  
28

1 related administrative burdens.

2  
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.  
13

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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