IN RE BOROUGH OF RIDGWAY, PENNSYLVANIA

CWA Appeal No. 95-2

REMAND ORDER

Decided May 30, 1996

Syllabus

The U.S. Environmental Protection Agency, Region III, filed two separate Clean Water Act administrative enforcement actions against the Borough of Ridgway, Pennsylvania, the first in July 1994 and the second in January 1995. Each action sought penalties based on alleged violations of discharge limitations in Ridgway's National Pollutant Discharge Elimination System permit, including the limitations governing carbonaceous biochemical oxygen demand ($CBOD_5$) and total suspended solids (TSS). In the first action, the violations charged were alleged to have occurred during January, February, March, and April 1994; in the second action, the violations charged were alleged to have occurred during May, June, July, and August 1994. Each action was filed as a Class I administrative penalty action under Clean Water Act § 309(g)(2)(A), and in each action the penalty proposed to be assessed was less than the $25,000 statutory maximum penalty that EPA is authorized to assess through the Class I procedures. When aggregated, however, the penalties proposed to be assessed against Ridgway in the two actions exceeded $25,000. Ridgway objected that, as a matter of law, the Region's two actions against it arose from a single "transaction" that could not be arbitrarily subdivided for purposes of satisfying the Class I penalty cap. Ridgway argued that the second action filed against it produced a violation of the cap and should therefore be dismissed.

On cross-motions for summary determination and for accelerated recommended decision filed in the second action, the Presiding Officer agreed with Ridgway and recommended that the Region's second complaint be withdrawn with prejudice. He opined that a permittee's continuous noncompliance with a particular discharge limitation, such as a limitation governing $CBOD_5$ or TSS, represents a single "transaction" and gives rise to a single enforcement "cause of action" embracing all violations of that limitation from the initial failure to comply until compliance is actually achieved. He further opined that if EPA brings a penalty action charging violations of a kind that are still ongoing at the time the action is commenced, EPA is precluded from later bringing a second penalty action based on the same kind of violation. For those reasons, the Presiding Officer concluded, EPA was precluded from bringing a second penalty action against Ridgway, in January 1995, based on the same kinds of ($CBOD_5$ and TSS) violations previously alleged in the Region's July 1994 action. On July 6, 1995, the Regional Administrator accepted the Presiding Officer's recommendation and ordered that the second complaint against Ridgway be withdrawn with prejudice. The Environmental Appeals Board undertook sua sponte review of the Regional Administrator's order.

Held: The reasons stated by the Regional Administrator did not adequately support an order requiring withdrawal of the second complaint against Ridgway. Specifically, the Regional Administrator's analysis failed to distinguish between two different kinds of constraints on EPA's enforcement authority: (1) the doctrine of res judicata, and (2) the Clean Water Act's $25,000 Class I penalty cap.

The Regional Administrator relied on the doctrine of res judicata as grounds for dismissal of the second complaint. Res judicata, however, only precludes the assertion in subsequent litigation of claims that were or could have been brought in a prior action between the same parties that has already been reduced to judgment. Because the Region's first enforcement action against Ridgway has not produced a final judgment, the claims asserted in the Region's second action cannot possibly be barred by res judicata principles. The Regional Administrator's res judicata analysis is also flawed because many of the violations alleged in the Region's second action had not yet occurred at the time the first action against Ridgway was commenced; such violations could not possibly have formed the basis for a penalty claim in the first action, and therefore their assertion in a second action cannot be barred by res judicata principles.

The Regional Administrator may also have implicitly concluded that, by filing its second complaint, the Region violated the Clean Water Act's Class I administrative penalty cap. If so, however, neither that conclusion nor the factual findings that would support it were explicitly stated. Because whatever findings and conclusions the Regional Administrator may have reached in regard to that issue are not evident from the existing record, the Board reinstates the second complaint and remands for further proceedings to determine whether the Region's maintenance of the second action would be consistent with the Class I penalty cap.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

This administrative penalty action arises under section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), and is before the Environmental Appeals Board pursuant to section 28.29 of the Proposed Non-APA, Consolidated Rules of Practice for the Administrative Assessment of Civil Penalties (56 Fed. Reg. 29,995, 30,033 (1991)).[1] By order dated July 19, 1995, the Board suspended and undertook to review, sua sponte, the "Final Decision and Order of Withdrawal" issued in this matter by the Regional Administrator for U.S. EPA Region III. Based on its review, the Board concludes that the Regional Administrator's decision to withdraw the complaint filed against respondent, the Borough of Ridgway, Pennsylvania (Ridgway), was premised on an incorrect application of the doctrine of res judicata. The Board therefore remands this matter to the Regional Administrator for reinstatement of the complaint and for further proceedings consistent with the discussion herein.

[1] The proposed Part 28 Rules of Practice are currently being implemented as guidance in Class I administrative penalty actions commenced under Clean Water Act § 309(g), 33 U.S.C. § 1319(g). Section 28.29 of the proposed rules authorizes the Administrator to suspend implementation of the Regional Administrator's final order in a contested or default action and to review, sua sponte, "its conclusions of law or its sufficiency pursuant to § 28.28(a)(3)." *See infra* note 6. The Administrator has delegated that authority to the Environmental Appeals Board. EPA Delegation of Authority 2-51 (Jan. 24, 1992).

I. *BACKGROUND*

Ridgway operates a sewage treatment plant that discharges to the Clarion River under a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit.[2] The facility received its initial NPDES permit in 1985, and that permit was most recently reissued, by the Commonwealth of Pennsylvania, in 1993. The permit is enforceable both by the State and by EPA. *See, e.g.*, Clean Water Act § 309(g)(1)(A) (authorizing EPA to assess a civil penalty for violation of a State-issued NPDES permit).

In July 1994, Region III's Water Management Division issued an administrative complaint alleging that Ridgway had violated its NPDES permit by discharging pollutants in excess of permit limits between January 1994 and April 1994. Specifically, the complaint alleged daily violations pertaining to Carbonaceous Biochemical Oxygen Demand ($CBOD_5$) throughout January, February, March, and April of 1994; daily violations pertaining to Total Suspended Solids throughout January, February, March, and April of 1994; and a single violation pertaining to effluent pH during March 1994.[3] The complaint proposed to assess a "Class I" administrative penalty against Ridgway in the amount of $24,800. Ridgway filed a response to the complaint pursuant to section 28.20 of the proposed Part 28 rules, and a Regional official, Benjamin Kalkstein, was designated as the Presiding Officer to adjudicate the matter. The action initiated by the Region's July 1994 complaint remains pending before Presiding Officer Kalkstein.

The dispute that is now before us had its origin in the Region's decision in July 1994 to institute a Class I administrative penalty action against Ridgway rather than a Class II action. Clean Water Act § 309(g) establishes two different classes of administrative penalties,[4] and the two classes of penalties are governed by two different sets of adjudication procedures. A *Class II* penalty, which can range as high as $125,000, can be imposed only after an opportunity is provided for a "hearing on the record" under the standards of the Administrative

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[2] Under the Clean Water Act, pollutant discharges to waters of the United States, like the Ridgway sewage treatment facility's discharge to the Clarion River, are unlawful except to the extent authorized by permit. CWA § 301(a). The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. *Id.* § 402.

[3] For purposes of this decision only, the Board will assume that the violations occurred as alleged.

[4] In addition, the Clean Water Act provides for a judicial civil action for penalties of up to $25,000 per day for each violation. CWA § 309(d), 33 U.S.C. § 1319(d).

Procedure Act (5 U.S.C. § 554), as implemented by EPA regulations at 40 C.F.R. Part 22. *See* CWA § 309(g)(2)(B). A *Class I* penalty is statutorily limited as follows: "The amount of a class I civil penalty * * * may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000." CWA § 309(g)(2)(A). In assessing a Class I penalty, the Agency must provide the respondent with "a reasonable opportunity to be heard and to present evidence" (*id.*), but, unlike Class II proceedings, Class I penalty actions are not subject to the APA-derived procedures in Part 22. As previously noted, Class I adjudications under the Clean Water Act are currently governed by the procedures in EPA's proposed 40 C.F.R. Part 28.

The Region's July 1994 complaint, in proposing a penalty of $24,800, thus proposed a penalty very near the upper limit of the range of penalties that can be assessed through the Part 28 procedures. Had the Region wished to assess a penalty in excess of $25,000, it would have had to institute either a civil judicial action under section 309(d) or a Class II administrative penalty action, in which Ridgway would have been entitled to an adjudication of its liability by an administrative law judge under Part 22.

The controversy now before the Board arose when, in January 1995, the Region filed a second complaint (Docket No. CWA-III-141) for Class I penalties against Ridgway. The 1995 complaint was based on daily violations of Ridgway's NPDES permit that allegedly occurred during May, June, July, and August 1994. Specifically, the second complaint alleged daily violations pertaining to $CBOD_5$ throughout May, June, and July of 1994; and daily violations pertaining to Total Suspended Solids throughout May, June, July, and August 1994. The second complaint proposed to assess a Class I penalty against Ridgway in the amount of $21,500.

In its answer to the Region's second complaint, Ridgway asserted, among other things, that the Region was attempting to circumvent the $25,000 statutory limitation applicable to Class I penalty actions, by filing two separate Class I actions that, in combination, sought total penalties in excess of $25,000. According to Ridgway, the Region "consciously and intentionally bifurcated its enforcement actions" in order to proceed under the Class I (non-APA) rules, rather than filing a single Class II penalty action that would be subject to the rules in 40 C.F.R. Part 22. Answer at 11. This matter was also referred to Benjamin Kalkstein, the Presiding Officer hearing the first action.

In an April 7, 1995, motion for summary determination and for an

accelerated recommended decision, the Region responded to Ridgway's argument by denying any attempt to manipulate penalty amounts so as to deprive Ridgway of an Administrative Procedure Act hearing under Part 22. The Region explained that it had chosen to examine Ridgway's compliance with its NPDES permit at four-month intervals, and to determine, at those intervals, whether further enforcement action was warranted. The Region argued that other possible enforcement strategies — for example, filing a new enforcement action for each month based on the discharge monitoring report (DMR) submitted to the Region for that particular month,[5] or taking no enforcement action while amassing evidence of violations so numerous as to justify referral to the Justice Department for a judicial filing — would have been impracticable and/or an inefficient use of Agency resources. The Region further argued that its choice among alternative enforcement strategies is, in any event, a discretionary matter.

On April 25, 1995, Ridgway cross-moved for summary determination and for an accelerated recommended decision. In its motion, Ridgway argued that the timing of the Region's two administrative complaints, the penalty amounts claimed, and the nature of the alleged violations combined to suggest a deliberate abuse of the Region's statutory authority to impose penalties through non-APA hearing procedures. Specifically, as to timing, Ridgway stated that its May 1994 DMR had been mailed to the Region on or about June 8, 1994, well before the Region filed its first Class I complaint on July 14 of that year; the July 1994 complaint did not, however, allege any violations based on the excessive $CBOD_5$ and TSS discharges reported by Ridgway in its May 1994 DMR. Noting that the penalty proposed in the first complaint was $24,800, or only $200 less than the statutory maximum, Ridgway argued that Region III must deliberately have refrained from including any allegations pertaining to May 1994 in the initial complaint, solely in order to channel Ridgway into a Class I forum under the Part 28 procedural rules.

Moreover, Ridgway claimed that it had been constructing modifications to its sewage treatment plant throughout the period of the violations alleged in both complaints, and that the Region knew, with absolute certainty, that the facility's excessive TSS and $CBOD_5$ discharges would be corrected only upon completion of that construc-

[5] All NPDES permits require the permittee to monitor its own effluent for compliance with permit limitations and to report the results of such monitoring, at specified intervals, on a standard form known as a Discharge Monitoring Report or "DMR." *See* 40 C.F.R. §§ 122.41, 122.48. It is evident from the record that Ridgway was filing such reports with Region III on a monthly basis during the period of the violations alleged in the Region's two enforcement actions.

tion project. Thus, according to Ridgway, as of July 14, 1994 the Region knew or should have known (1) that Ridgway's discharge had failed to comply with permit limits governing $CBOD_5$ and TSS during May 1994, and (2) that the same kinds of violations would continue to occur for the foreseeable future, until the completion of an ongoing facility modification. With access to that information, the Region had nonetheless chosen to address the Ridgway facility's noncompliant discharge in the context of a Class I penalty action subject to a $25,000 penalty cap. Having made that choice, the Region should now be required to abide by the jurisdictional limitations of the forum it had chosen. For these reasons, the filing of the Region's second complaint — which, in its practical effect, raised the proposed penalty against Ridgway from $24,800 to $46,300 for a single course of violative conduct — represented an improper use of the Class I procedure, and the second complaint should therefore be dismissed.

The Region, in a responsive memorandum, acknowledged that it had probably received Ridgway's May 1994 DMR on or about June 16, 1994. But the Region denied having intentionally disregarded the May DMR during its preparation of its first complaint against Ridgway:

> EPA was examining the trend of improvement (or lack thereof) in Respondent's effluent violations over four-month periods. Thus, as of July 14, 1994 [the date of the first complaint], no decision had been rendered as to what, if any enforcement action, would be taken with respect to the May 1994 violations. Moreover, counsel for Complainant submits that the actual date of filing of the first complaint is not relevant, but should be viewed as a function of the cumbersome internal approval process imposed by EPA upon such documents. EPA would have been perfectly within the realm of its enforcement discretion to file sequential penalty actions for each month's violations on a monthly basis. In fact, the approach adopted by EPA conserved the resources expended by the [Presiding Officer] as well as Respondent and the Agency.

Complainant's Response to Second Motion for Summary Determination at pp. 3-4.

The Presiding Officer heard oral argument on the parties' cross-motions for summary determination on June 19, 1995, and granted Ridgway's motion in an order dated June 29, 1995. Consistent with this order, in a July 3, 1995 recommended decision, the Presiding

Officer recommended to the Regional Administrator that the second of the two complaints against Ridgway be ordered withdrawn with prejudice. The Presiding Officer concluded that Ridgway's continuous and uninterrupted pollutant discharges in excess of permit limits gave rise to one, and only one, enforcement "cause of action." Because the Region chose, in its initial complaint, to pursue that cause of action only as to violations committed through April of 1994, the institution of a second action addressing subsequent violations of the same permit provisions constituted impermissible "claim splitting," and the second action was therefore barred under the doctrine of res judicata. The Regional Administrator agreed with the Presiding Officer's recommendation and, in a Final Decision and Order dated July 6, 1995, ordered the second action (Docket No. CWA-III-141) withdrawn with prejudice.

This Board suspended implementation of the Regional Administrator's Final Decision and undertook, sua sponte, to review the decision pursuant to proposed 40 C.F.R. § 28.29. The Board heard oral argument on September 27, 1995, and now issues this decision. For the reasons discussed below, the Board concludes that the Regional Administrator's order to withdraw the second complaint based on res judicata grounds was erroneous. However, the Board further concludes that upon remand of this matter to the Regional Administrator, he should determine whether Ridgway has raised a sufficient claim of abuse of the Class I process to warrant an inquiry along the lines discussed *infra* in Section II.B.2 of this decision.

II. *DISCUSSION*

A. *Scope of Review*

Under the proposed Part 28 rules, the Board is authorized to review the Regional Administrator's decision and order in a Class I penalty matter only for legal error and for compliance with the requirements of proposed § 28.28(a)(3).[6] The Board is bound by the Regional Administrator's factual determinations. *See* proposed 40 C.F.R. § 28.29(c) ("The Regional Administrator's findings of fact are * * * not subject to review by the Administrator."). After reviewing the Regional Administrator's decision and order, the Board may "amend its conclusions of law, withdraw the order, remand the order for

[6] Proposed 40 C.F.R. § 28.28(a)(3) itemizes certain matters that the Regional Administrators are expected to include in their final decisions in Class I penalty matters — for example, factual findings sufficient to establish jurisdiction, statements regarding the availability of judicial review, and the like.

appropriate action by the Regional Administrator, or * * * allow the order to issue unchanged." Proposed 40 C.F.R. § 28.29.

B. *The Merits*

As we understand the Regional Administrator's decision, his rejection of the second complaint against Ridgway was based on a theory of compulsory joinder of claims that the Regional Administrator derived from the doctrine of res judicata. Thus, his decision concludes that where two actions are pending between the same parties, the later-filed action should be dismissed if the matters alleged in both actions can be viewed, according to a res judicata analysis, as parts of a single "claim":

> [W]hen consecutively-filed DMRs show a clear pattern of continuing noncompliance, the discrete violations merge into a larger claim, indicative of a larger problem. If Complainant chooses to pursue a limited number of discrete violations in one case, knowing that there are other, closely related violations that could be brought in the same action, he will lose the right to pursue the latter violations.

Final Decision at 4. The Regional Administrator's reliance on res judicata principles is evident from his references to the "merger" of "closely related violations" into a "larger claim," and most unmistakably from his reference to unasserted violations that "could be brought" in the complainant's first action.

The Regional Administrator did not, we recognize, employ the term "res judicata" in his final decision, nor does that term appear in the Presiding Officer's recommended decision to withdraw the Region's second complaint against Ridgway. Rather, the Presiding Officer's recommended decision, and the final decision of the Regional Administrator that is before us for review, refer only to a prohibition against "claim-splitting" as grounds for dismissal of the second complaint. *See* Final Decision at 3 ("Under the 'claim- splitting' doctrine, the entire claim should have been brought in a single case, not in sequentially-filed complaints.").

However, the Presiding Officer made clear, in his June 29, 1995 order granting Ridgway's motion for summary determination, that his references to "claim splitting" were to be understood as invoking the rules of res judicata (claim preclusion) that actually determine whether related claims should be joined in a single action and that

define the consequences of a litigant's failure to do so. Thus, the Presiding Officer's reasons for recommending withdrawal of the second complaint appear in a section of his June 29 order titled "Preclusion," and his discussion includes the statement that "[t]he 'claim-splitting' and 'claim-preclusion' doctrines would preclude the initiation of a new action involving causes of action that could or should have been brought with a pending action." Order on Motions for Summary Determination and Accelerated Recommended Decision at 16. Indeed, to the extent that a prohibition against "claim splitting" has any meaning, it "is simply another name for [the claim preclusion aspect of] res judicata." *Prisco v. State of New York*, No. 91 Civ. 3990 (RLC), 1992 U.S. Dist. Lexis 5273 at *12 (S.D.N.Y. 1992). *See also Haphey v. Linn County*, 924 F.2d 1512, 1517 (9th Cir. 1991) ("[T]he rule against splitting a cause of action has no teeth to it apart from the doctrine of claim preclusion. A plaintiff may split his cause of action in an initial suit and this initial suit may be reduced to judgment without infirmity. In a subsequent suit, however, the plaintiff is prevented by the doctrine of claim preclusion from raising any item of damage or ground of recovery that was a 'part' of the first cause of action."), *vacated in part on other grounds*, 953 F.2d 549 (9th Cir. 1992) (en banc).[7]

For the reasons set forth in Section B.1, *infra,* we conclude that the Regional Administrator's application of res judicata principles was incorrect and that his order to withdraw the second complaint on that basis was erroneous. That conclusion does not, however, dispose of Ridgway's contention that successive Class I penalty actions claiming aggregate penalties in excess of $25,000 are, at least in some circumstances, inconsistent with the Clean Water Act's administrative enforcement framework.

With respect to that issue, we think it clear that the Class I penalty cap is intended to impose a limit on EPA's otherwise considerable discretion in choosing among the enforcement mechanisms estab-

[7] The Presiding Officer's references to "claim splitting" also appear to reflect a judgment about the proper application of the Clean Water Act's Class I penalty cap — though it is far from clear that the Presiding Officer actually intended to rely on the penalty cap in support of his decision. Ridgway's counsel has, in any event, sought to employ the term "claim splitting" in some such alternative sense, as in his statement that EPA enforcement staff "took their cause of action, split it in two," because "[t]here's no discovery rights under Class One." Transcript of September 27, 1995 Oral Argument, at 31. The implication of that statement is not that the Region's second action was barred by res judicata, but that the Region was using Class I procedures to limit Ridgway's opportunity for discovery in what should really have been a Class II case. In the interest of clarity, throughout the remainder of this opinion we will avoid the ambiguous term "claim splitting," and will refer to the two analytically distinct issues arising from the Region's second enforcement action as (1) res judicata and (2) the penalty cap.

lished in the Clean Water Act. Thus, we do not accept Region III's claim of absolute discretion to utilize, without regard to the circumstances of the particular violations at issue, a series of smaller administrative penalty actions in lieu of a single larger action. Rather, if the Regional Administrator finds that EPA's institution of multiple Class I actions against a respondent represents an attempt to deny a Class II hearing to which the respondent is properly entitled, the Regional Administrator may direct that one or more of those actions be withdrawn so as to reduce the Region's aggregate penalty claim to an amount that will not exceed $25,000. At that point, if the Region wishes to seek additional penalties based on the violations alleged in the withdrawn complaint or complaints, the Region may do so only if the enforcement proceedings that are still pending are reconfigured in one of the ways described later in this opinion. The basis for our conclusions, and a suggested framework for further proceedings on remand, are set forth in the discussion that follows.

1. *Res Judicata*

Initially, we conclude that the Regional Administrator committed two fundamental errors in his application of res judicata principles. First, the Regional Administrator erred by applying res judicata in the absence of any prior adjudication of Ridgway's Clean Water Act penalty liability; res judicata principles come into play only after litigation between the parties has resulted in a final judgment. Second, the Regional Administrator erred by applying res judicata to preclude the assertion, in a second action, of claims based on conduct that had not yet occurred as of the time the first action was filed.

In the absence of a final judgment resulting from the Region's first enforcement action against Ridgway, res judicata simply could not apply to bar the initiation of a second action. "Application of the claim preclusive aspect of the res judicata doctrine requires a showing * * * that there has been * * * a final judgment on the merits in a prior suit." *United States v. Athlone Industries*, 746 F.2d 977, 983 (3d Cir. 1984). The *Restatement (Second) of Judgments*, on which the Presiding Officer sought to rely, clearly states that "[t]he rules of res judicata are applicable only when a final judgment is rendered." *Restatement (Second) of Judgments* § 13, at 132. *See also id.* Comment a ("The rules of res judicata state when a judgment in one action is to be carried over to a second action and given a conclusive effect there * * *."); *International Harvester Co. v. Occupational Safety & Health Review Comm'n*, 628 F.2d 982, 984-85 (7th Cir. 1980) (preclusion of a second administrative enforcement action by a prior administrative action presupposes a final agency resolution of the first action equivalent to a

civil "judgment on the merits"; such preclusion can occur only after the agency "resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"[8]); and *see generally* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4404 (1981). The Regional Administrator and the Presiding Officer, by focusing their analysis exclusively on the scope of a "claim" under the Clean Water Act, overlooked the fact that the Region's "claim" against Ridgway — whatever it might consist of — had not yet been adjudicated,[9] and that res judicata does not apply in the absence of a final judgment.[10]

The foregoing considerations are enough to require that the Regional Administrator's final decision be withdrawn and the matter remanded. It might be useful, however, if we were briefly to address a second kind of error that appears to have affected the Regional Administrator's res judicata analysis. Specifically, the Regional Administrator failed to consider the fact that the Region's second action was based on new conduct by Ridgway, much of which allegedly occurred after the Region filed its first action. Instead, the Regional Administrator treated the Region's second action as if it were merely based on new consequences of the same conduct by Ridgway already alleged in the first action. As a result, the Regional Administrator erroneously held that the Region should have included, in its first complaint, claims based on pollutant discharges that had not yet occurred when the first complaint was filed — and ultimately held

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[8] The formulation quoted in the text is derived from *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), which states:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Id. at 422 (quoted in *International Harvester*, 628 F.2d at 984). *See also Restatement (Second) of Judgments* § 83(1) ("[A] *valid and final adjudicative determination* by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.") (emphasis added).

[9] Indeed, the litigation to which the Regional Administrator's decision would accord preclusive effect is still pending before the Presiding Officer.

[10] The *Restatement* would interpret "finality" less rigorously in the context of collateral estoppel (issue preclusion), and would require only that a previous adjudication of the relevant issue be "sufficiently firm to be accorded conclusive effect." *Restatement (Second) of Judgments* § 13. Actual finality would be required, however, in the context of claim preclusion, with which we are concerned in the present case. *Id.* In any event, even if a "firm" adjudication of Ridgway's Clean Water Act liability were sufficient for claim preclusion purposes, no such adjudication has occurred.

that the Region was precluded from asserting those claims in a subsequent action.

Contrary to the Regional Administrator's analysis, a litigant is not required, and indeed is generally not permitted, to assert speculative claims based on conduct that has not yet occurred, and res judicata principles therefore do not require joinder of claims based on such conduct. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955) (res judicata does not extinguish claims that could not have been sued upon in prior litigation); *see also International Harvester Co.*, 628 F.2d at 985-86 (continuing violations of a single administrative regulation give rise to multiple enforcement causes of action); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 915 (7th Cir. 1993) (under a res judicata analysis, "plaintiffs need not amend their filings to include issues that arise after the original suit is filed") (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4409 (1981)); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) ("[W]e do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation."). Thus Region III cannot possibly be held, by filing a complaint on July 14, 1994, to have forfeited its authority to penalize Ridgway for NPDES permit violations that Ridgway had not yet committed, or had not yet reported to the Region, as of July 14, 1994.[11]

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[11] The Presiding Officer, in recommending a more expansive rule of preclusion, cited *Alyeska Pipeline Service Co. v. United States*, 688 F.2d 765 (Ct. Cl. 1982). The *Alyeska* court rejected, as have all other courts, the contention that a final judgment between two parties bars subsequent litigation based on similar conduct occurring after the entry of judgment. *Alyeska* did suggest, however, that claims arising between the date of the complaint and the date of judgment may be extinguished by res judicata once judgment is entered; the court thus imposed, in effect, a duty to amend one's complaint to include related claims when and as they mature. The Court of Claims appears to be alone in recognizing any such duty:

> Most cases assume that an action need include only the portions of the claim due at the time of commencing that action. The Court of Claims, however, appears to follow a rule that requires a plaintiff to amend to add later maturing claims. The difficulty presented by this alternative lies in identifying a suitable stopping point. Substantial disruption could result from forced amendment at any time after significant discovery has been accomplished, and it is hard to justify any test relating to the progress of discovery or other pretrial events so clear that plaintiffs could afford to apply it without seeking explicit judicial guidance. Perhaps the best rule would be that claims for damages need include only matters arising before the commencement of suit, while claims for declaratory or injunctive

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The principal case cited by the Presiding Officer, *Supporters to Oppose Pollution Inc. v. Heritage Group*, 973 F.2d 1320 (7th Cir. 1992), actually illustrates the error that affected his analysis. In *Supporters*, res judicata was applied to preclude a second action based on new consequences of conduct that occurred before the first action was commenced. In the first action, the plaintiff successfully sued a landfill operator under RCRA, but was unable to state a claim against a second entity — the Heritage Group — that the plaintiff attempted to add as a defendant in that action. When the landfill operator went out of business, having closed the offending landfill but having failed to clean it up, the same plaintiff filed a second action against the Heritage Group, relying on a modestly different theory of liability than the one rejected in the prior litigation. Specifically, although no new wastes were being deposited at the landfill in question, the second action alleged that there remained a risk of ground water contamination due to continuing migration from the landfill of previously deposited wastes.

The court held those allegations insufficient to state a new "claim" against Heritage. Heritage was not alleged to have engaged in any new conduct violative of RCRA since the first action was filed. Although the violations already litigated were continuing to generate further consequences in the form of additional environmental harm, no new conduct by the defendant was alleged. Accordingly, the plaintiff could have presented its alternative theory of liability against Heritage in the first action, and was precluded from doing so in a subsequent lawsuit:

> Traditional principles of preclusion allow additional litigation if some new wrong occurs. [Plaintiff] contends that ongoing releases are new wrongs. Yet ongoing releases were known at the time of the initial suit; they were the principal basis of the claim. That the size of the release is better known now than then takes us nowhere; new evidence of injury differs from a new

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> relief that intrinsically deal with conduct persisting through trial or into the future should embrace all matters arising prior to the close of trial or even judgment.

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4409, at 76-77. Among the cases rejecting an *Alyeska*-type duty to amend, and endorsing the contrary rule described in the Wright, Miller & Cooper treatise, are *Green v. Illinois Dep't of Transportation*, 609 F. Supp. 1021 (N.D. Ill. 1985); *United Food & Commercial Workers Local 100-A v. City Foods, Inc.*, 878 F. Supp. 122 (N.D. Ill. 1995); *Doe, supra*, 985 F.2d at 915; and *In re Gain Electronics Corp.*, 138 Bankr. 464 (Bankr. D.N.J. 1992).

> wrong. Additional knowledge about the loss from a tort does not authorize new suits. There is no new wrongful conduct by Heritage after the conclusion of [the first action]. [Plaintiff] relies on *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327 (1955), but that case involved new conduct and so is beside the point.

Supporters, 973 F.2d at 1326 (citations omitted).[12] In this case, in sharp contrast, the allegations of the Region's second complaint are based on "new wrongful conduct" by Ridgway: The first complaint alleges that Ridgway discharged pollutants in violation of permit limits during one four-month period, whereas the second complaint alleges that Ridgway discharged pollutants in violation of permit limits during a different, non-overlapping four-month period. Each complaint seeks only to redress violations alleged to have occurred within the time frame covered by that complaint. The principles discussed in *Supporters* in no way suggest that the Region's second action was barred by res judicata, and the Regional Administrator erred by so holding.

2. *The Class I Penalty Cap*

Although res judicata principles do not require EPA to combine a multiplicity of Clean Water Act violations in a single enforcement action, the Agency must exercise its Clean Water Act administrative penalty authority in a manner consistent with the Act. As previously noted, the Act distinguishes between Class I and Class II penalty actions based on the magnitude of EPA's civil penalty claim, and the number of violations combined in a single action will sometimes tip the balance between a Class I penalty and a Class II penalty. Violations that continue to occur during the pendency of a Class I penalty action can give rise to some difficult issues where, as in this case, the respondent's aggregate penalty exposure (based on violations alleged in the original Class I action and subsequent violations of the same permit limits) eventually exceeds the $25,000 Class I penalty cap. Under those circumstances, the Agency's interest in prompt and effective Clean Water Act enforcement may be at odds with the respondent's interest in having access, to the extent afforded by statute, to an APA "hearing on the record" under Part 22 to contest

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[12] *See also United States v. Athlone Industries*, 746 F.2d 977, 984 (3d Cir. 1984) (in determining whether two complaints reflect the same "cause of action" for res judicata purposes, the primary focus is on "whether the acts complained of [are] the same, whether the material facts alleged in each suit [are] the same and whether the witnesses and documentation required to prove such allegations [are] the same").

the imposition of the penalty.[13] The present case requires us to address those potentially conflicting interests.

Both Ridgway and the Region find support for their preferred resolution in the text and structure of Clean Water Act § 309. Ridgway simply points to the greater procedural protections that Congress explicitly provided for larger administrative penalty actions. To allow the Region to bring a series of small enforcement actions under non-APA procedures would, Ridgway argues, effectively nullify the congressional determination that greater potential liability should be accompanied by a higher level of procedural formality.

Region III, for its part, points to the varied array of enforcement mechanisms made available in section 309 — including Class I administrative penalty actions, Class II administrative penalty actions, and judicial penalty and injunctive actions — as evidence that Congress sought to confer a high degree of flexibility and of "prosecutorial" discretion in the Clean Water Act enforcement context. Based on that understanding of the statutory purpose, the Region argues that it must be afforded a very wide latitude in determining how many violations to address in any given enforcement action, what remedies to seek, and what enforcement mechanism to use. By undermining the finality of those determinations we would, according to the Region, force Agency enforcement staff to maximize (perhaps unnecessarily or even counterproductively) both the number of violations alleged in an initial enforcement action and the scope of the relief requested in such an action; a comprehensive initial complaint would be needed to assure EPA's ability to address all of a permittee's violations, but to require such comprehensiveness would, the Region argues, be incon-

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[13] In their rulings in this matter, the Presiding Officer and the Regional Administrator did not explicitly discuss Ridgway's claimed entitlement to an APA hearing. Their predominant concern, instead, seems to have arisen from Ridgway's suggestion that the Region's use of two separate complaints (where one Class II complaint would arguably have sufficed) represented a form of "harassment." *See* Ridgway's Memorandum in Support of Motion for Summary Determination at 7-8. That claim does not, however, furnish an adequate basis for dismissal of the second action against Ridgway. Courts have occasionally used the term "harassment" (or "duplicative prosecution") to refer to a particular kind of due process concern arising when a governmental entity, having failed to secure a desired remedy in one litigation setting, proceeds to file multiple additional actions based on the very same conduct, in disregard of the res judicata or collateral estoppel effect of the previous adjudication. *See, e.g., Facchiano v. United States Dep't of Labor*, 859 F.2d 1163, 1168 (3d Cir. 1988), *cert. denied*, 490 U.S. 1097 (1989) (court may intervene where "an agency's malicious prosecution and disregard for the principles of preclusion amount to a violation of a party's due process"). Because the complaints against Ridgway are not "duplicative" and the fundamental prerequisites for applying the preclusion doctrines are not met in this case, EPA's failure to apply those doctrines cannot constitute "harassment."

sistent with the enforcement flexibility intended by the 1987 Water Quality Act amendments. The Region therefore claims, in substance, that its decision whether to file a Class I action or a Class II action should not be open to challenge under any circumstances.

The Region buttresses that contention with a number of compelling practical observations. Among other things, the Region points out that there are valid and laudable reasons for filing a Class I action — such as to encourage Clean Water Act compliance without resorting to a large penalty claim — that may be difficult to discern in hindsight. It is also a simple matter for a respondent to claim, in hindsight, that a particular kind of violation was likely to continue without interruption, whereas the Region, without the benefit of hindsight, might well have concluded at the relevant time that a Class I penalty action would cause the violations to stop. Even where a violation cannot be immediately remedied, a Class I action may provide sufficient impetus towards moving the respondent to compliance so as to make any further enforcement action unnecessary. It would be anomalous and inappropriate, the Region contends, to allow a respondent such as Ridgway to cite its own continuing noncompliance as a basis for challenging the legitimacy of a regulatory agency's discretionary enforcement decisions.

We believe that Congress did indeed, in the 1987 amendments, intend to enable EPA to respond flexibly and efficiently to Clean Water Act violations, and we agree that the Region is entitled to flexibility in its choice of an enforcement action to the fullest extent consistent with the statute. However, it is clear from the statutory text that the Region's discretion in this regard is not unconstrained. As the Region itself concedes, the 1987 Water Quality Act amendments clearly created an administrative enforcement structure offering more procedural safeguards to a respondent faced with a larger penalty claim.[14] EPA must, we conclude, give effect to the congressional policy reflected in the creation of two different Clean Water Act administrative penalty classes governed by two different sets of adjudication procedures, even if doing so means that EPA must occasionally resort to a more time-consuming or resource-intensive set of penalty assessment procedures. That obligation is rooted in the basic principle that "[a] statute must, if possible, be construed in such a fashion that every

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[14] While the Region emphasizes that Class I procedures are sufficient to afford due process (*see, e.g.*, Oral Argument Transcript at 50-51), the Region has also acknowledged that "broader procedural rights are available [to the respondent] under 40 C.F.R. Part 22 than under proposed 40 C.F.R. Part 28." Region's Response to Respondent's Second Motion for Summary Determination at 6.

word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). In order to give "operative effect" to Congress's choice of one adjudication procedure for smaller penalty actions and a different procedure for larger actions, we reject the Region's claim of unlimited authority to institute a series of Class I penalty actions against a single discharger no matter what the circumstances. Rather, the Region's decision must be subject to review, within the context of the Class I process, to ensure that the Region has not instituted a series of Class I actions for the improper purpose of denying the respondent an opportunity for an Administrative Procedure Act hearing.[15]

The question whether the institution of serial Class I actions represents an abuse of the Region's Class I authority is necessarily fact-dependent, and is therefore properly decided by the Regional Administrator, upon the recommendation of the Presiding Officer. If the Presiding Officer concludes that a reasonable claim of abuse has been suggested — based, for example, on a contention that the violations in question were certain to continue and that the Region had made clear its intention to seek additional penalties in the event the violations continued — he or she may undertake such factfinding as may be necessary to resolve that claim. However, if the Presiding Officer chooses to examine such allegations, EPA's decision to proceed under Class I should be regarded as presumptively valid, in light of EPA's generally broad discretion to select from among its enforcement options under the Clean Water Act. The respondent must therefore bear the burden of going forward with facts to support a claim that, when the Region filed the first of multiple Class I actions addressing substantially identical permit violations, the Region was attempting to avoid the Class II hearing process in a circumstance where, as of the date of the initial filing, the Region's penalty claim already exceeded (or was certain to exceed) $25,000. In addition, the Region's decision to proceed under Class I, if challenged, cannot legitimately be judged with the benefit of hindsight, but only on the basis of the information available to the Region at the time of its decision. The Region is therefore entitled to the benefit of any uncertainty that existed at the time of its decision. The Presiding Officer and the Regional Administrator may not overturn a reasonable decision to proceed under Class I simply because, in the exercise of their own independent judgment, they conclude that they would have chosen to proceed under Class II instead. Rather, the Presiding Officer and the

[15] For similar reasons, multiple Class II penalty actions instituted against a single discharger, seeking an aggregate penalty in excess of $125,000, would presumably be subject to examination by an administrative law judge to ensure against a violation of the Class II penalty cap.

Regional Administrator may overturn the enforcement staff's decision to proceed under Class I only where necessary to protect against a clear abuse of the Class I process.

If the Presiding Officer concludes that an abuse of the Agency's Class I penalty authority has occurred, the Presiding Officer may on that basis recommend to the Regional Administrator that one or more of the Class I actions pending against the respondent be withdrawn, thereby reducing the aggregate penalty claim against the respondent to an amount not exceeding the $25,000 statutory cap. In the event that withdrawal is ordered on those grounds, the complainant may request leave to withdraw its remaining Class I action or actions, so as to consolidate all of its penalty claims into a unitary Class II administrative action or into a judicial action under Clean Water Act § 309(d); in the alternative, the complainant may request leave to consolidate all of its penalty claims into a single Class I action, provided that the complainant reduces its total penalty claim to no more than $25,000 in that action.[16]

We emphasize that by acknowledging the possibility of an abuse of the Agency's Class I penalty authority, we do not mean to suggest that such an abuse occurred in this case. Having decided to order the withdrawal of the Region's second action on other grounds, neither the Presiding Officer nor the Regional Administrator in this case undertook a factual inquiry into whether the Region's use of Class I was based on impermissible considerations. Thus, neither the Presiding Officer nor the Regional Administrator made any finding as to whether the Regional enforcement staff refrained from including, in their initial Class I complaint, additional known permit violations substantially identical to violations that were included in that complaint, solely to keep the penalties sought in that action below the Class I penalty cap. Nor did the Presiding Officer or Regional Administrator make any finding of fact with respect to Ridgway's alternative contention (which the Region has denied) that the Regional enforcement staff knew the violations claimed in the initial Class I complaint would continue indefinitely and that they would lead inevitably to additional penalty claims. Therefore, upon reinstatement of the second complaint, the Regional Administrator should determine whether Ridgway

[16] Such a request for leave to withdraw or to amend would be governed by proposed 40 C.F.R. § 28.18. A withdrawal without prejudice or an amendment may be made as of right prior to the filing of a response to the complaint; thereafter, a complaint may be amended or withdrawn without prejudice only by stipulation with the respondent or by permission of the Presiding Officer.

has raised a sufficient claim of abuse of the Class I process to justify an inquiry along the lines discussed in this decision and, if so, proceed in accordance with the discussion herein.

III. *CONCLUSION*

For the reasons stated herein, the Regional Administrator's Final Decision and Order of Withdrawal is vacated and this matter is remanded for further proceedings consistent with this order.

So ordered.