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B.J. Carney Indus. Inc. v. United States Envtl. Protection Agency, No. 98-70315, 1999 WL 739575 (9th Cir. Sept. 23, 1999)

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B.J. Carney Indus. Inc. v. United States Envtl. Protection Agency, No. 98-70315, 1999 WL 739575 (9th Cir. Sept. 23, 1999) (holding that the plaintiff's appeal of a class II civil penalty under the Clean Water Act filed more than thirty days after Administrative Law Judge issued civil penalty order was untimely).

From 1982 to 1990, B. J. Carney Industries ("Carney") operated a wood pole treating facility. Water from the facility flowed into Sandpoint, Idaho's publicly owned treatment works ("POTW"). Sandpoint issued industrial waste acceptance ("IWA") forms to the industry users, like Carney, pursuant to its National Pollution Discharge Elimination System permit. Sandpoint received pretreatment authority.

In 1985, the Environmental Protection Agency ("EPA") notified Carney, in writing, that its discharge to Sandpoint's POTW violated the pretreatment standards because the discharges contained pentachlorophenol ("PCP") and diesel grade oil. The EPA indicated, however, that it would defer to Sandpoint's enforcement of pretreatment standards. Subsequently, in January 1987, Sandpoint issued Carney an IWA permitting Carney to discharge small amounts of PCP.

Carney challenged the EPA's determination that its discharge violated the applicable pretreatment standards. In response, the EPA reasserted that Carney's discharge to the Sandpoint POTW violated the pretreatment standard allowing no discharges even though Sandpoint had issued Carney an IWA allowing the discharge. In its response, the EPA, again, deferred to Sandpoint's enforcement authority, but indicated it would contact the city regarding its concerns.

Carney's IWA, permitting PCP discharges, remained in effect until May 29, 1990. Subsequently, Sandpoint issued Carney a new IWA allowing no PCP discharges. In July 1990, Carney closed its plant and voluntarily cleaned up the site. The EPA, apparently unaware that Carney had closed its plant, filed an administrative complaint against Carney. Upon learning of the plant closure, the EPA amended the complaint seeking a civil penalty for the previous years of noncompliance.

After a hearing, the Administrative Law Judge ("ALJ") found Carney violated pretreatment standards and assessed a $9,000 penalty. The ALJ, however, refused to allow EPA to recover Carney's economic benefit. Both parties appealed to the Environmental Appeals Board ("Board"). The Board affirmed the findings of liability and the penalty assessment, but rejected Carney's equitable estoppel defense regarding EPA's ability to recover Carney's economic benefit from the violations. Thus, the Board remanded the case. On remand, a different ALJ, who factored in both an economic benefit penalty and a gravity–based penalty, assessed the maximum allowable civil penalty of $125,000 against Carney.

The ALJ entered the civil penalty order on January 5, 1998. Carney filed its appeal in federal court seventy days later on March 16, 1998. The issue on appeal was whether Carney had filed a timely appeal to the ALJ's civil penalty order.

The court looked to the statutory language of the Clean Water Act ("CWA"). The CWA provided that a party may challenge a civil penalty assessment in a federal court of appeals by filing a notice of appeal within thirty days from the date the court issued the civil penalty order. The CWA also provided that an order became final thirty days after the date of issuance unless a party filed a petition for judicial review. Once an order became final, the Attorney General could bring a civil action to collect the penalty.

By statute, the Board had forty–five days within which it could elect to review *sua sponte* a presiding officer's initial decision before it became final. Thus, Carney argued that the ALJ's order was merely an initial decision which became an appealable order issued by the Board only after forty–five days elapsed following issuance by the ALJ. Carney also argued that only the EPA Administrator had the power to assess penalties and that the Administrator had delegated that power to the Board, not ALJs.

The court rejected both of Carney's arguments. First, the court found that the Administrator could delegate to ALJs the authority to issue all necessary orders, and that the ALJs were expressly empowered by statute to issue initial decisions with recommended civil penalty assessments. The court stated that a penalty assessment was presumably an initial decision because a party could seek review with the Board or the Board could choose to review the decision *sua sponte.* The court further explained that parties could bypass the agency process, however, and seek immediate review by a federal court of appeals. Second, the court found that the plain language of the CWA failed to indicate that an ALJ's order assessing a civil penalty did not constitute a civil penalty order from which appeal had to be taken within thirty days. Thus, the court concluded that the ALJ's order constituted a civil penalty order and had to be appealed within thirty days.

The court held that Carney's appeal of the civil penalty order filed more than thirty days after issuance by the ALJ was untimely. Thus, the court dismissed the case.

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Defenders of Wildlife v. Browner, No. 98-71080, 1999 WL 717721 (9th Cir. Sept. 15, 1999) (holding that municipal storm–sewer discharges are not subject to a Clean Water Act provision requiring that certain discharges must comply with state water quality standards).

The Environmental Protection Agency ("EPA") issued storm–sewer