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B.J. Carney Indus., Inc. v. United States Envtl. Protection Agency, 192 F.3d 917 (9th Cir. 1999)

Sara Franklin

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was "merely speculative" that any judicial review and decision on the matter would redress the injury to the Department.

The court reasoned that the Department's concern that further fish entrainment studies might be required was valid; however, the "reopener" clauses in the licenses provided for just such a concern. The court reasoned that should it become necessary, under the "reopener" clauses, FERC could impose additional requirements such as fish entrainment and other alternative fish protection devices. Thus, the court concluded that any injury to the Department from the failure to explicitly require mandatory fish entrainment studies in the license provisions was not redressable. The "reopener" clauses provided protection to prevent the realization of the Department's speculative injury. The court, therefore, dismissed the Department's challenge for lack of standing.

Lucinda K. Henriksen

NINTH CIRCUIT

B.J. Carney Indus., Inc. v. United States Envtl. Protection Agency, 192 F.3d 917 (9th Cir. 1999) (holding Carney's appeal untimely because Carney filed it more than thirty days after the Administrative Law Judge's order assessing a civil penalty).

B.J. Carney Industries, Inc. ("Carney") operated a wood pole treating company. Water from the company flowed into Sandpoint, Idaho's publicly owned treatment works ("POTW"). The United States Environmental Protection Agency ("EPA"), pursuant to Sandpoint's National Pollutant Discharge Elimination System permit, required Sandpoint to issue industrial waste acceptance ("IWA") forms to Sandpoint's industrial POTW users like Carney.

In November 1985, the EPA wrote Carney and declared: (1) that Carney's discharge to the Sandpoint POTW violated pretreatment standards because the discharge contained PCP and diesel grade oil; and (2) that the EPA would defer to Sandpoint's pretreatment standards enforcement program. On January 9, 1987, Sandpoint issued Carney an IWA allowing small amounts of PCP discharge. Carney contacted the EPA regarding the EPA's conclusion that Carney's discharge violated the EPA's pretreatment standards. Furthermore, Carney stated that Sandpoint and Carney's IWA was more consonant with sensible environmental policy. Consequently, the EPA reasserted that Carney's discharge to the Sandpoint POTW violated the EPA's "no discharge standard," even though Sandpoint had given Carney an IWA permitting such discharge. The EPA, again, stated that it would defer to Sandpoint's enforcement authority and inform Sandpoint of the situation. Carney's IWA allowing PCP discharge expired May 29, 1990. Shortly thereafter, Sandpoint issued Carney an IWA permitting no discharge of PCP. On July 16, 1990, Carney closed its plant

and cleaned up the site.

The EPA filed a complaint seeking a civil penalty assessment for Carney's previous years of noncompliance. The Administrative Law Judge ("ALJ") found that Carney had violated the pretreatment standards, assessed a $9000 gravity-based penalty, and disallowed the EPA to recover Carney's economic benefits from its violations.

Both the EPA and Carney appealed to the Environmental Appeals Board ("Board"). The Board affirmed the ALJ's ruling, but remanded the case solely for: (1) a determination regarding Carney's obtained economic benefits amount during the limitations period; and (2) a penalty recalculation accordingly. A different ALJ concluded on remand that the economic benefit and gravity-based penalties sum surpassed the maximum statutory penalty of $125,000; therefore, the ALJ assessed Carney with a $125,000 civil penalty. The ALJ's penalty order was issued on January 5, 1998. Carney appealed the ALJ order seventy days later, on March 16, 1998. The EPA moved for dismissal, arguing that the appeal was untimely.

The EPA argued that a federal court had no jurisdiction to hear the appeal because the statute of limitations had run. The Clean Water Act ("CWA") provided that a civil penalty assessment appeal to a federal court of appeals had to be filed within the thirty-day period, beginning on the date the civil penalty order was issued.

Carney maintained that the ALJ's initial decision became an appealable order by the Board forty-five days after the ALJ issued the order, relying on the Code of Federal Regulations ("CFR"). The CFR provided that a presiding officer's initial decision became final forty-five days after service unless an appeal was taken to the Board or the Board chose to review *sua sponte*. Carney also argued that the CWA authorized only the EPA Administrator to assess civil penalties, and the Administrator had delegated that power to the Board, as opposed to the ALJs; accordingly, the ALJ lacked the authority to issue a civil penalty order under the CWA.

The court noted that the CFR expressly empowered an ALJ with the authority to make an initial decision with a recommended civil penalty assessment. The court asserted that Congress might have desired to devise an opportunity, via the CWA, where parties could bypass the administrative process and obtain immediate review by a federal court of appeals. The court concluded that it did not posses the authority to override Congress' policy decisions when the statutory language was clear. Therefore, the court held that Carney's appeal was untimely.

One judge dissented to the majority's opinion. This dissent contended that nothing required the court to interpret the ALJ's decision as a civil penalty order as soon as it was dispensed. Even though the Administrator had delegated ALJs with the authority to issue all necessary orders, that fact did not force the court to perceive the ALJ's initial decision as a matured civil penalty order. The dissent reasoned that the CFR language pertaining to the presiding office's initial decision's development into the Board's final order within forty-five days after its service upon the parties without further proceedings buttressed the view that the ALJ's initial

decision was not the final agency decision. Criticizing the majority's rigid construction of the words "final" and "issued," the dissent declared that Congress could not have intended for such a statutory interpretation. In the dissent's opinion, the law could have been construed to require a notice of appeal filing within thirty days following an ALJ's final decision. The dissent would have held that Carney's appeal was timely.

Sara Franklin

Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999)
(holding that the Clean Water Act did not require municipalities to strictly comply with state water-quality standards when applying for storm water discharge permits).

In 1992 and 1993, five Arizona cities submitted applications for National Pollutant Discharge Elimination System ("NPDES") permits to discharge storm water. The permits did not attempt compliance with Arizona's water-quality standards. Defenders of Wildlife ("Defenders") objected, arguing that the permits should strictly comply with state standards. The Environmental Protection Agency ("EPA") required the cities to implement a Storm Water Management Program, which included numerous environmental controls, such as storm water detention and retention basins and infiltration ponds. The program also incorporated a system to eliminate illegal discharges. After inclusion of these practices, the EPA determined that the permits complied with state water-quality standards, and, in February 1997, issued final NPDES permits to the cities.

The Defenders requested a hearing, raising the legal question of whether the Clean Water Act ("CWA") required strict numeric limitations to ensure compliance with state water-quality standards. In June 1997, the EPA denied the request; the Defenders petitioned for review with the Environmental Appeals Board ("Board"). The Board also denied the petition. Thus, the Defenders moved for reconsideration and, upon denial of this motion, appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit held that, based upon statutory interpretation and congressional intent, the CWA did not require municipalities to strictly comply with state water-quality standards regarding storm water discharges. In reaching this decision, the court utilized a two-step approach to review an administrative agency's interpretation of a statute. Under the first step, the court used traditional tools of statutory construction to decide whether Congress had expressed its intent clearly. If Congress left a gap in the statute for the administrative agency to fill, then in step two, the court was required to uphold the agency's decision unless it was "arbitrary, capricious or manifestly contrary to the statute."

The court first noted that the CWA prohibited discharge of any pollutant into navigable waters. However, an entity could obtain an NPDES permit, allowing the entity to discharge some pollutants. Under