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## American Canoe Ass'n v. United States Env'tl. Protection Agency, 54 F.Supp.2d 621 (E.D. Va. 1999)

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**American Canoe Ass'n v. United States Env'tl. Protection Agency, 54 F.Supp.2d 621 (E.D. Va. 1999)** (overruling intervenor defendant's objection to a settlement between plaintiffs and United States Environmental Protection Agency concerning establishment of total maximum daily loads of pollutants for Virginia waters).

Plaintiffs, the American Canoe Association and the American Littoral Society, alleged that the United States Environmental Protection Agency ("EPA") had failed to perform duties imposed by a variety of federal legislation, including the Clean Water Act ("CWA"). Plaintiffs' allegations specifically involved the EPA's failure to establish total maximum daily loads ("TMDLs") of pollutants for Virginia waters. Plaintiffs argued that CWA required Virginia to submit TMDLs for its waters to the EPA by June 26, 1979. However, Virginia made no such submissions to the EPA and the EPA did not establish any TMDLs for any Virginia waters. In support of their allegations, plaintiffs relied on a previous decision where the court determined that Virginia's lack of submissions to the EPA was tantamount to constructive submissions that no TMDLs were necessary. However, the court in that case stated that the EPA was still required to approve or disapprove Virginia's constructive submissions.

The district court permitted Virginia Association of Municipal Wastewater Agencies ("VAMWA") to intervene as defendant. The parties began a settlement process, mediated by a magistrate judge of the same division. Plaintiffs and EPA agreed upon a settlement of all the issues involved and submitted the proposed consent decree to the court. The settlement specified an eleven-year schedule for establishing TMDLs for Virginia waters; VAMWA, as intervenor defendant, objected to the settlement claiming that the EPA had no authority to enter into an established schedule without the consultation of Virginia due to the lack of a judicial finding of constructive submission. In addition, VAMWA argued that should Virginia fail to meet the establishment schedule agreed to in the settlement, EPA lacked authority to establish TMDLs in Virginia's place. The court overruled intervenor defendant's objection and affirmed the settlement.

The court first stated the standard of review for settlements. First, the settlement must not be illegal, collusive, or otherwise against public policy. Second, the settlement must be adequate, and reasonable. The court acknowledged a presumption in favor of encouraging settlements. The court buttressed the presumption with the conclusion that the parties' expertise put them in the best position to craft remedies involving complex problems. Therefore, the court gave considerable weight to the judgment of the EPA.

In affirming the settlement, the court found that VAMWA's concern that no finding of constructive submission existed was valid. Despite the absence of such a finding, the court held that EPA had the authority to create a schedule for the establishment of TMDLs. The

court interpreted the CWA as creating a cooperative process between the EPA and states for the establishment of TMDLs. The court declared that Virginia had in fact participated in establishing the TMDL schedule as it had previously issued a Memorandum of Understanding ("MOU"). The Virginia MOU detailed goal dates for the development of TMDLs for state waters. In comparing the MOU with the settlement, the court determined that the two schedules were consistent; the settlement merely refined a schedule implied by the MOU. As a result, Virginia had clearly participated in establishment of TMDL deadlines.

In addition, a liberal interpretation of the CWA by the court indicated that it is within EPA's authority to establish a TMDL when the state has refused to act for an extended period of time. The court regarded a state's failure to comply with the schedule as a constructive submission that no TMDLs are necessary, consequently allowing the EPA to establish the appropriate TMDL. If this were not the case, the court concluded that a state's mere refusal to submit a TMDL could render the CWA dead. This would clearly produce an absurd result. Therefore, the court held that EPA did possess the authority to enter into an agreement concerning the establishment of TMDLs and the settlement between plaintiffs and EPA was not illegal.

The court also determined that the settlement was reasonable and adequate. First, the settlement gave Virginia primary authority to establish TMDLs. However, the default to the EPA in absence of state actions ensured the establishment of TMDLs consistent with the purpose and requirements of the CWA. In addition, the process outlined by the settlement required public notice and opportunity for public comment. The court concluded that the settlement agreement provided a reasonable approach to fulfilling the requirements of the CWA with due authority given to both Virginia and the EPA. Therefore, the court granted the motion to enter the consent decree.

*Sarah E. McCutcheon*

**Waste Action Project v. Clark County, 45 F.Supp.2d 1049 (W.D. Wash. 1999)** (holding that county's failure to timely obtain NPDES storm water permit violated Clean Water Act).

Clark County owns and operates a municipal storm sewer system that discharges stormwater runoff. The discharges contained copper, lead, and zinc exceeding legal limits. Clark County submitted part I of an application for a National Pollutant Discharge Elimination System ("NPDES") permit to the Department of Ecology ("Department") in June 1997. The Department then extended the deadline for filing the application's part II until October 1998.

Waste Action Project ("WAP") and Clark County Natural Resources Council ("CCNRC") are two non-profit citizen groups dedicated to the preservation, protection, and enhancement of the