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## S.D. Warren Co. v. Maine Dep't of Env'tl. Prot., No. AP-03-70, 2004 Me. Super. LEXIS 115 (Me. Super. Ct. May 4, 2004)

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noted that Walker Lands and the State were the only parties involved in the lawsuit at trial and no other persons or private entities were involved. Further, the court found no direct evidence in the record of any direct violation by State officials or State departments attempting to invade Walker Lands' property. Consequently, no justiciable controversy between Walker Lands and the State or the public-at-large existed. Thus, the trial court improperly issued a permanent injunction against both the State's use of the property and the public's-at-large use of the property; accordingly, the court reversed the permanent injunction. In doing so, the court noted trespass actions are the proper vehicle for the landowner to use in order to prevent the exploitation of his/her property for recreational purposes.

Finally, the state argued that the trial judge erred by unilaterally converting its motion for a suspensive appeal into a devolutive appeal. Specifically, the trial judge marked out the word suspensive and wrote in devolutive on the draft order the State submitted. The court concluded that under the Louisiana Code of Civil Procedure, the trial judge retained discretion to convert the motion.

In conclusion, the court affirmed the trial court's ruling that Walker Lands owned Gassoway Lake and the surrounding lands; reversed the trial court's grant of a permanent injunction; and remanded the matter to the trial court for the calculation of trial court costs, assessed equally against the parties.

*Benjamin M. Petre*

## MAINE

**S.D. Warren Co. v. Maine Dep't of Envtl. Prot., No. AP-03-70, 2004 Me. Super. LEXIS 115 (Me. Super. Ct. May 4, 2004)** (holding that license renewal for hydroelectric dams required certification subject to water quality certification pursuant to the Clean Water Act).

S.D. Warren Company ("Warren") owned and operated the Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa hydroelectric generating dam projects ("Projects") on the Presumpscot River. The Projects provided electricity to Warren's paper mill. When the Projects' operating licenses lapsed, Warren filed for renewal. Along with his application for continued operations, he also requested certification. In April 2003 the Department of Environmental Protection ("DEP") approved the applications and granted certification subject to several conditions. Warren appealed the order to the Maine Board of Environmental Protection ("BEP"). The BEP subsequently denied his appeal.

On appeal to the Superior Court of Maine, Warren contended the BEP erred by requiring the Projects to pass water quality certification under the Clean Water Act ("CWA"). The CWA requires any application for a federal permit or license for an activity that may result in a

discharge is subject to certification. A discharge is any addition to the water source, despite the nonexistence of pollutants. The court held that because the Projects rerouted the natural flow of the river, this constituted a discharge subject to certification under the CWA.

The relevant water quality certification required the Projects maintain seasonally varied minimum flows, install eel and fish passage, and develop and implement a recreational facility enhancement plan. Warren argued these requirements were void, stating the BEP could not impose conditions to enhance the aquatic habitat. Further, Warren contended as long as some part of the water supported the designated uses, the Projects met the standards.

The BEP previously ruled increased flows in the bypass reach assure the waters could support all indigenous aquatic species. The court upheld BEP's conclusion, reasoning there was ample evidence that DEP had the authority to restore expired fish species and increase the populations of existing species. Thus, the BEP's conclusions regarding minimum flows were not in error. Further, the BEP found that installation of upstream and downstream passage for fish and eels ensured the waterways remained suitable for fishing and habitat since the dams at each Project affected both upstream eel migration and downstream fish and eel passage. The court upheld this finding as sufficiently supported by the record. The court also upheld the BEP's finding with respect to recreational facilities. The relevant state statute dictated that this water should remain suitable for recreation. The Projects eliminated the opportunity for fishing and prevented access to many areas of the river. Consequently, the court concluded Warren was required to implement a recreational facility enhancement plan pursuant to the BEP's ruling.

Warren also asserted the imposition of these conditions violated Maine's antidegradation policy by reducing the Projects' average annual generation rates from 40.5 to 34.5 million kWh. The court held this reduction was not enough to violate the antidegradation policy.

Next, Warren claimed the BEP's reliance on the Bureau of Land and Water Quality's Hydropower Project Flow and Water Level Policy ("Water Level Policy"), absent proper rulemaking procedures, was inappropriate. The BEP found, and the court agreed, the DEP relied on a mere presumption as to the flow needed to meet aquatic life and habitat standards. Because this presumption was rebuttable, it did not carry the force and effect of law, and was therefore an acceptable standard for guidance.

Warren also claimed the BEP erred in its interpretation of the instantaneous dissolved oxygen criterion. Warren argued the standard should have been a calculation based on a daily average, not an instantaneous measurement. In determining the intent of the legislature, the court first looked to the plain meaning of the statute and then to the legislative history. The court determined that reading the statute

as requiring an average was unreasonable. If oxygen levels dropped below minimum for any length of time, there would not be enough oxygen in the water to sustain fish. Therefore, the BEP correctly interpreted the criterion as a matter of law.

Finally, Warren argued the BEP's re-opener provisions were void. This argument failed because the court concluded the provisions were necessary to ensure the state's water quality standards. Further, the provisions allowed Warren notice and a hearing, as well as an opportunity to appeal. Thus, the court held the BEP correctly included the re-opener provisions.

In summary, the Superior Court of Maine affirmed the decisions of the BEP because the evidence in the record was consistent with their judgment.

*Jennifer Suh*

## MICHIGAN

**City of Brighton v. Township of Hamburg, 677 N.W.2d 349 (Mich. Ct. App. 2004)** (affirming that the Michigan National Resources and Environmental Protection Act preempted a township ordinance regulating permissible wastewater discharge levels into state waterways).

The city of Brighton ("Brighton") applied to the Michigan Department of Environmental Quality ("DEQ") to expand its discharge permit for its wastewater treatment plant. The township of Hamburg ("Hamburg") filed an objection to Brighton's request with DEQ. The referee in the administrative hearing held in favor of Brighton. DEQ then issued Brighton a revised National Pollution Discharge Elimination Permit ("NPDEP"). However, to prevent the expansion of Brighton's wastewater treatment plant, Hamburg subsequently passed an ordinance that imposed more stringent restrictions on wastewater discharges than the restrictions imposed by NPDEP. Brighton filed suit in the Livingston Circuit Court, contending Michigan's National Resources and Environmental Protection Act ("NREPA") preempted Hamburg's ordinance. The trial court granted Brighton's motion for summary disposition on the grounds that NREPA preempted Hamburg's ordinance. Hamburg appealed to the Michigan Court of Appeals. On appeal, the court affirmed the preemption ruling.

To review the trial court's preemption ruling, the court applied the principles articulated in *People v. Llewellyn*. *Llewellyn* established a two-part test for determining whether state law precludes a municipality from enacting an ordinance. Pursuant to *Llewellyn*, state law preempts a local ordinance if: (1) the ordinance is in direct conflict with the state statutory scheme; or (2) the state statutory scheme occupies the field of regulation that the municipality seeks to enter, even where there is no direct conflict between the two regulatory schemes. The court found the second part of the *Llewellyn* test applicable, and there-