

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-

BLACK BEAR HYDRO
PARTNERS, LLC

Petitioner,

v.

MELANIE LOYZIM,
COMMISSIONER OF THE MAINE
DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Respondent.

PETITION FOR REVIEW OF FINAL
AGENCY ACTION

Black Bear Hydro Partners, LLC (“Black Bear”) appeals, pursuant to Rule 80C and 5 M.R.S. § 11002, the June 4, 2026 order of the Commissioner of the Maine Department of Environmental Protection (“DEP” or the “Department”) denying Black Bear’s application for water quality certification for the Ellsworth Hydroelectric Project in Ellsworth, Maine. The order from which Black Bear appeals is attached to this Petition as **Exhibit A**.

PARTIES & JURISDICTION

1. Black Bear Hydro Partners, LLC, is a Delaware limited liability company that owns an interest in, holds the license to, and operates the Ellsworth Hydroelectric Project, located on the Union River in the towns of Ellsworth, Mariaville, Waltham, and Fletchers Landing in Hancock County. The Ellsworth Hydroelectric Project includes two

dams, the Graham Lake dam and the Ellsworth dam, that generate an annual output of 32,910 MWh of clean, renewable electricity.

2. Melanie Loyzim is the Commissioner of DEP. She issued the order denying water quality certification that Black Bear is appealing. The Commissioner is the chief administrative officer of the DEP and is responsible for all administrative duties of the Department, including issuance of water quality certifications. 38 M.R.S. § 342.

3. This petition seeks review of the Commissioner's order denying Black Bear's application for water quality certification. Black Bear is aggrieved by the Commissioner's order and is appealing under 38 M.R.S. § 346 and 5 M.R.S. § 11002, both of which give the Superior Court jurisdiction over this Rule 80C appeal.

4. Kennebec County is the appropriate venue because the Commissioner has her principal office in Augusta. *See* 5 M.R.S. § 11002.

BACKGROUND

5. The Ellsworth Hydroelectric Project consists of the Graham Lake dam and the Ellsworth dam and their respective impoundments, Graham Lake and Lake Leonard. Graham Lake is a roughly 10,000-acre impoundment that is more than 13 miles long and the center of a sizeable shorefront community. Lake Leonard is a 90-acre impoundment approximately four miles downstream from Graham Lake formed by the Ellsworth dam near downtown Ellsworth.

6. Black Bear operates the Ellsworth Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission ("FERC"). The Project's last long-term FERC license was issued in 1987 and expired in 2018. Black Bear has been operating the Project on an annual license ever since while it proceeds with relicensing the Project at FERC. As part of this process Black Bear is required by Section 401 of the

federal Clean Water Act to obtain a certification from DEP that its activities will comply with Maine water quality standards.

7. Black Bear applied for water quality certification in 2018; in 2019 it withdrew its first application and filed a new one.

8. In 2020 the Commissioner's predecessor denied Black Bear's application, and in 2021 the Board of Environmental Protection upheld the Commission's denial. Black Bear's Rule 80C appeal to the Superior Court was denied in 2023.

9. Black Bear then appealed to the Law Court, which in 2025 dismissed the appeal as nonjusticiable because Black Bear was challenging just one of the three independent grounds the Board gave for its decision, the determination that Leonard Lake should be classified as a Class B waterbody rather than Class GPA. The other two grounds for the denial had to do with the impact of the Project on benthic macroinvertebrate life in Graham Lake and in the Union River below Graham Lake.

10. On June 18, 2025, Black Bear filed the new water quality certification application that is the focus of this petition. This new application, prepared in consultation with Department staff, updated Black Bear's relicensing proposal to address the specific issues the Department had identified as problematic in previous orders.

11. To address the aquatic life issues in Graham Lake as well as concerns expressed by shoreline residents, Black Bear's revised proposal included a significant year-round reduction in the drawdowns of Graham Lake, a change that is designed to meet the Department's long-standing "3/4 wetted width" rebuttable presumption. According to this presumption, limiting impoundment drawdowns to 3/4 of the wetted area is presumed to meet applicable aquatic life standards.

12. The new drawdown restriction was also expected to address the Department's concerns about the benthic macroinvertebrate communities below the Graham Lake dam. The Department uses these communities as an indirect surrogate for measuring the attainment of aquatic life standards. In prior orders the Department had theorized that macroinvertebrate data suggesting non-attainment was linked to impoundment drawdowns; if true, limiting drawdowns was expected to reduce sedimentation events and thus improve conditions for macroinvertebrates.

13. Although Black Bear continued to maintain that Leonard Lake is Class GPA, the revised application also included a Water Quality Enhancement program for Lake Leonard to address the Department's concerns about dissolved oxygen levels in this segment. The program, to be developed in consultation with the Department, would have potentially included the installation, operation, and maintenance of an oxygen injection (or comparable) system to enhance dissolved oxygen concentrations within the impoundment.

14. If Black Bear does not obtain a water quality certification for the Ellsworth Hydroelectric Project, it will no longer be able to operate the Project to generate electricity. The likely ultimate result would be the decommissioning, and possible removal, of the Graham Lake and Ellsworth dams.

15. The decommissioning of these dams would be damaging at a time when American energy independence is a priority and existing local generation such as hydropower is indispensable to keeping energy affordable and reliable. Decommissioning would also be damaging now as the threat of climate change has come into focus and renewable sources of energy such as hydropower are necessary to meet Maine's carbon reduction goals.

16. The decommissioning of these dams would also be contrary to the Legislature’s decree that “the surface waters of the State constitute a valuable indigenous and renewable energy resource; and that hydropower development utilizing these waters is unique in its benefits and impacts to the natural environment, and makes a significant contribution to the general welfare of the citizens of the State.” 38 M.R.S. § 631.

17. The decommissioning or removal of Graham Lake dam would also have the likely result of causing Graham Lake to recede significantly or disappear altogether, which would be catastrophic for the lake’s large year-round community, and for wildlife native to Graham Lake, including its robust alewife fishery.

The Commissioner’s order denying water quality certification

18. On June 4, 2026, the Commissioner of DEP denied Black Bear’s water quality certification application for the Ellsworth Hydroelectric Project on three grounds: the failure of Leonard Lake to meet what the Commissioner believed were applicable dissolved oxygen standards; impacts on the benthic macroinvertebrate community in the Union River below the Graham Lake dam; and concerns about fish passage at the dams. The concerns about fish passage are brand new, having never before been raised by the Commissioner or the Maine Department of Marine Resources in the now over a decade-long relicensing process.

19. Black Bear is timely appealing the Commissioner’s decision.

COUNT I Rule 80C appeal of final agency action

20. Black Bear repeats the preceding allegations.

21. The Commissioner's June 4, 2026 denial of water quality certification for the Ellsworth Hydroelectric Project is final agency action.

22. The Commissioner's reasons for denying certification are not supported by the law or the evidence

23. **First**, the Commissioner denied certification because Black Bear "has not demonstrated . . . that the Class B Leonard Lake riverine impoundment meets, and under proposed operations would meet, all applicable DO [dissolved oxygen] measurement standards and other requirements." The Commissioner erred in holding Leonard Lake to Class B dissolved oxygen standards because it is designated by statute as Class GPA.

24. Leonard Lake is a "great pond" under Maine statute because it is an "inland bod[y] of water artificially formed or increased which [has] a surface area in excess of 30 acres." 38 M.R.S. § 480-B.

25. Maine's statutory water classification program says that "[i]mpoundments of rivers that are defined as great ponds pursuant to section 480-B are classified as GPA or as specifically provided in sections 467 and 468." 38 M.R.S. § 465-A. Sections 467 and 468 do not specifically provide for Leonard Lake to be something other than Class GPA. It is therefore Class GPA. Class GPA waters do not have dissolved oxygen requirements.

26. The Commissioner's order incorrectly asserts that "[i]n its current WQC application, Black Bear Hydro no longer disputes that Leonard Lake is a Class B riverine impoundment." Order at 12. To the contrary, Black Bear's application acknowledges that "MDEP currently considers Lake Leonard as Class B waters," but makes clear that "Black Bear continues to believe that Lake Leonard should be classified as GPA

waters” In recognizing that the Commissioner considers Leonard Lake to be Class B and trying to convince her that it satisfied Class B requirements, Black Bear did not waive its right to appeal the Commissioner’s ruling on the correct classification of the lake—an issue on which the Commissioner and the Board have previously ruled, but which the Law Court has yet to address.

27. Even if the Commissioner is correct about Leonard Lake’s classification, her finding with respect to its dissolved oxygen levels is arbitrary and capricious because it is based on a few isolated test results that, under any reasonable scientific framework, could not be expected to reflect the dissolved oxygen content of the water body as a whole.

28. The **second** ground the Commissioner gave for the denial was that Black Bear “has not demonstrated that the Union River below the Graham Lake dam and before Leonard Lake meet the narrative classification standards for Class B waters” because of “the impact on the benthic macroinvertebrate community from water discharged at the Graham Lake dam.” Order at 67. Because there is no evidence in the record that the discharge from Graham Lake dam is impacting the downstream benthic macroinvertebrate community one way or another, the Commissioner exceeded her authority under the Clean Water Act by relying on macroinvertebrate studies to deny certification. While the Commissioner may, as part of the certification process, consider how the project and its discharge impact downstream aquatic life, she cannot deny certification based on a determination that aquatic life in the project vicinity has not reached a certain threshold without evidence that the project itself is responsible for the non-attainment.

29. Denial on this ground was also unwarranted because, while the Commissioner cited concerns about the benthic macroinvertebrate community as a reason for denial, the Department provided no evidence that project discharges were actually causing an impairment of that community. Macroinvertebrate data are used as an indirect surrogate to determine conformance with statutory aquatic life standards. The data are fed into a model the output of which Department staff then interpret as “attainment” or “non-attainment.” Neither the input data nor the model output by themselves can tell us what might be causing attainment or non-attainment. In the absence of clear evidence of causation—too much or little water, intermittent water, etc.—an applicant must rely on guidance from Department staff as to an appropriate cure.

30. In its 2020 denial, Department staff theorized that the habitat downstream of the Graham Lake dam had a diminished capacity to support aquatic life as a result of turbidity caused by the impoundment drawdown. The reduced drawdown Black Bear proposed directly addresses the only theory of the case ever offered by the Department for the issues it sees with the benthic macroinvertebrate community.

31. The Department has not provided any evidence that project operations are adversely affecting macroinvertebrates below Graham Lake dam, and Black Bear is unaware of any model that could demonstrate that any change in project operations will enhance the benthic macroinvertebrate community. The Department’s denial was therefore arbitrary, capricious and an abuse of discretion.

32. The Commissioner’s **third** ground for denying certification was her finding that “the Project does not support safe, timely, and effective upstream and downstream fish passage at either Project dam to support all species of fish indigenous

to the receiving waters and to maintain the structure and function of the resident biological community.” Order at 68. This finding was based on the Commissioner’s wholesale adoption of the Department of Marine Resources’ conclusions around fish passage for the Project. It was an error of law: while the Commissioner does have authority to regulate the Project and its discharge under Section 401 of the Clean Water Act, she does not have the authority under federal law to deny certification based on how many fish can swim past the Project in a set amount of time, a criterion that is independent of the project and its discharge.

33. The Commissioner’s third ground for denying certification was also an error of law because the Commissioner adopted the DMR’s fishways prescriptions that were themselves illegally created outside of the process mandated by 12 M.R.S. § 12760. State law requires DMR, alongside multiple other state agencies, to hold an adjudicatory proceeding that involves Black Bear and other interested parties before it can decide that a fishway should be constructed at Black Bear’s dam or design any aspect of this fishway.

RELIEF REQUESTED

Black Bear Hydro Partners, LLC, requests that this Court:

- (A) reverse the Commissioner’s decision denying water quality certification for the Ellsworth Hydroelectric Project;
- (B) declare that Leonard Lake is Class GPA as a matter of law;
- (C) remand this matter to the Commissioner for proceedings consistent with this Court’s opinion.



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