

consists of the Graham Lake Dam and the Ellsworth Dam along with their respective impoundments, Graham Lake and Leonard Lake. *Id*

Black Bear operates the Ellsworth Hydroelectric Project under a license issued by the Federal Energy Regulatory Commission (“FERC”) and is currently in the process of relicensing the project with FERC. *Id*. The project’s last long-term FERC license was issued in 1987 and expired in 2018. R. 55. Black Bear has since been operating the project pursuant to an interim annual license as it seeks the regulatory approvals needed to secure a long-term license. R. 55.

Among the required approvals is a certification from the Department of Environmental Protection (“DEP”) that the project’s activities will comply with Maine water quality standards. *Id*. Pursuant to the Clean Water Act, applicants for a federal license for activities that may result in discharge into navigable waters, such as Black Bear’s operation of the project, must obtain a certification that the activity will comply with state water quality standards. 33 U.S.C.S. § 1341(1).

On March 21, 2019, Black Bear filed the water quality certification application that is the subject of the present 80C appeal. R. 1, 55. The Commissioner of DEP denied its application on March 19, 2020, making separate findings with respect to Leonard Lake, the Union River below Graham Lake Dam, and Graham Lake. *See* R. 1-50. For Leonard Lake, the Commissioner determined that the waterbody was rated Class B—not Class GPA—and as such, failed to meet Class B dissolved oxygen standards. R. 47-49. For the Union River below Graham Lake Dam and Graham Lake, the Commissioner found that Black Bear failed to demonstrate that these waterbodies would meet the applicable habitat and aquatic life criteria. *Id*.

Black Bear timely appealed the Commissioner's order denying its application to the Board. In addition to challenging the Commissioner’s findings with respect to the Union River

and Graham Lake, Black Bear also challenged the Commissioner's determination that Leonard Lake should be treated as a Class B waterbody. R. 59. As relevant here, Black Bear argued that Leonard Lake is Class GPA as a matter of law, and therefore, it need not comply with the dissolved oxygen standards associated with a Class B rating. R. 78-81.

By order dated June 3, 2021, the Board issued a final decision rejecting Black Bear's arguments and affirming the Commissioner's decision denying Black Bear's application for water quality certification. The Board concluded that:

[Black Bear] failed to demonstrate that the Union River immediately downstream of the Graham Lake Dam will meet the Class B aquatic life standards under the proposed operation of the Project, including a 5.7-foot drawdown of Graham Lake.

[Black Bear] failed to demonstrate that Graham Lake will meet the Class C aquatic life and habitat standards, as provided in 38 M.R.S. § 464(9-A)(D), under the proposed operation of the Project, and, therefore, failed to demonstrate that Graham Lake will meet the Class GPA designated use of habitat for fish and other aquatic life under the proposed operation of the Project, including a 5.7-foot drawdown of Graham Lake.

The Leonard Lake impoundment within the Union River is Class B and [Black Bear] failed to demonstrate that this section of the Union River will meet the applicable Class B dissolved oxygen standard.

R. 81.

Black Bear thereafter filed a Petition for Review of Final Agency Action and Independent Claim for Relief. Count I of the Petition sought Rule 80C review of the Agency's determination that Leonard Lake is a Class B waterbody; Black Bear did not challenge the Agency's findings with respect to Graham Lake and the Union River immediately downstream of Graham Lake Dam. The independent claim, Count II, sought a judicial declaration that the agency was equitably estopped from requiring Black Bear to demonstrate Leonard Lake's compliance with Class B water quality standards.

On motion of the Board and Downeast Salmon Federation (“DSF”),¹ the Court dismissed the independent claim for declaratory judgment. The Court, however, permitted Black Bear to proceed on its Rule 80C claim regarding Leonard Lake’s classification, notwithstanding the Board’s and DSF’s challenges on standing and justiciability grounds.² The sole issue on appeal is whether the Agency correctly classified Leonard Lake as a Class B waterbody. The parties appear to agree that because Black Bear challenges only one of the several independent grounds that justified the Board’s denial of Black Bear’s application, a full reversal or remand to the Agency would not be appropriate. Rather, Black Bear concedes that should it prevail, the appropriate form of relief would be modification of the Board’s order pursuant to 5 M.R.S. § 11007(4)(C) to designate Leonard Lake as a Class GPA waterbody. *See* Pet’r’s Reply Br. 7.

STANDARD OF REVIEW

Judicial review of administrative agency decisions is “deferential and limited.” *Friends of Lincoln Lakes v. Bd. of Env’tl. Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128. The Court is not permitted to overturn an agency’s decision “unless it: violates the Constitution or statutes; exceeds the agency’s authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or error of law; or is unsupported by the evidence in the record.” *Kroger v. Dep’t of Env’tl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566.

¹ The Court granted DSF’s motion to intervene by order dated July 8, 2022.

² After the administrative record was filed, Black Bear moved to modify the record on the grounds that it was over-inclusive. As a basis for its motion, Black Bear argued that it was not notified that certain challenged materials would be considered by the Agency in rendering a decision on its application. The Court denied the motion to modify but indicated that Black Bear could raise its constitutional challenges to the Agency’s undisclosed consideration of the materials as part of its briefing on the merits. Black Bear does not assert these constitutional challenges in its merits brief.

In conducting its review of an agency decision, the Court “do[es] not substitute [its] judgment for that of the agency and will ‘affirm findings of fact if they are supported by substantial evidence in the record.’” *Anglez Behavioral Health Servs. v. Dep’t of Health & Human Servs* , 2020 ME 26, ¶ 12, 226 A.3d 762. “[I]nstead, [the Court] will vacate an agency’s factual findings ‘only if there is no competent evidence in the record to support’ the findings.” *Id.* The party seeking to vacate an agency decision bears the burden of persuasion on appeal. *Anderson v. Me. Pub. Emp. Ret. Sys.*, 2009 ME 134, ¶ 3, 985 A.2d 501.

Moreover, where—as here—the Board acted as a fact-finder and reviewed the substantive issues de novo, it is the Board’s order that is the operative decision for purposes of this Court’s review. *Concerned Citizens to Save Roxbury v. Bd. of Env’t Prot.*, 2011 ME 39, ¶ 17, 15 A.3d 1263; 38 M.R.S. § 341-D(4).

DISCUSSION

The Legislature has established a water classification program designed to protect water quality in Maine. 38 M.R.S. § 464(1). To that end, the Legislature has divided Maine’s waters into categories and within those categories, has assigned class ratings to the various types of waterbodies identified. 38 M.R.S. § 464, *et seq.* Water quality standards vary depending on the class rating assigned to the waterbody. *See id.*

Leonard Lake is an artificially formed impoundment of the Union River. R.54. Title 38 M.R.S. § 465-A states 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.” There is no dispute that Leonard Lake fits within the definition of a “great pond,”³ for which the

³ “Great ponds” are defined as “any inland bodies of water which in a natural state have a surface area in excess of 10 acres and any inland bodies of water artificially formed or increased which have a surface area in excess of 30 acres.” 38 M.R.S. § 480-B(5).

“default” classification is Class GPA. Rather, the issue on appeal is whether a Class B designation was “specifically provided” in Section 467. 38 M.R.S. § 465-A.

Section 467, which governs the classification of “major river basins,” identifies 18 large river basins in Maine and assigns riverine classifications on a segment-by-segment basis. *See* 38 M.R.S. § 467. One of those major river basins is the Union River Basin, where Leonard Lake is situated. *Id.* Section 467(18)(A)(1) states:

18. Union River Basin.

A. Union River, main stem.

(1) From the outlet of Graham Lake to tidewater—Class B.

38 M.R.S. § 467(18)(A)(1). Leonard Lake is geographically located between the outlet of Graham Lake and “tidewater,” i.e., at or just below the Ellsworth Dam. *See* R. 54.

Based on Section 467(18)(A)(1), the Board concluded that Leonard Lake was a Class B waterbody. R. 78-80. The Board reasoned that the Legislature had “specifically provided” for that heightened classification, as Leonard Lake was situated within the geographic area described in Section 467(18)(A)(1), and there was no language suggesting that Leonard Lake was excluded from the Class B rating that was assigned to the area. *See id.*

Black Bear challenges this interpretation on appeal, arguing that the “specifically provided” language in Section 465-A required more. To “specifically provide[.]” for a riverine classification other than the Class GPA default, Black Bear asserts, a provision in Section 467 must identify the impoundment by name or at the very least, affirmatively include impoundments in the segment of river subject to classification. *See* Pet’r’s Br. 4-6; Pet’r’s Reply 6-7.

This appeal asks the Court to interpret 38 M.R.S. §§ 465-A and 467. The “cardinal rule” of statutory interpretation is to give effect to the intention of the Legislature. *Cobb v. Bd. of Counseling Professionals Licensure*, 2006 ME 48, ¶ 11, 896 A.2d 271. Legislative intent is discerned “from the plain meaning of the statute and the context of the statutory scheme.” *Id.*

“All words in a statute are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed.” *Id.*

Where, as here, the Court is tasked with interpreting “a statute that an administrative agency administers and that is within its area of expertise, [the] scope of review is to determine first whether the statute is ambiguous.” *Id.* ¶ 13. “Ambiguity exists when a statute ‘is reasonably susceptible to different interpretations.’” *Roderick v. State*, 2013 ME 34, ¶ 12, 79 A.3d 368. If the statute is unambiguous, the Court does not defer to the agency’s construction but rather “interpret[s] the statute according to its plain language.” *Cobb*, 2006 ME 48, ¶ 13, 896 A.2d 271. If the statute is ambiguous, the Court will “defer to the agency’s interpretation, and [] affirm the agency’s interpretation unless it is unreasonable.” *Id.*

Here, the dispute appears to center on the meaning of “specifically provided” in the context of Section 465-A, which, as noted, states that “[i]mpoundments of rivers that are defined as great ponds . . . are classified as GPA or as *specifically provided* in sections 467 and 468.” 38 M.R.S. § 465-A (emphasis added). The Legislature does not define the phrase “specifically provided,” but as the Board recognized below, common dictionary definitions aid the Court’s analysis. *State Tax Assessor v. MCI Communications Services, Inc.*, 2017 ME 119, ¶ 14, 164 A.3d 952 (“In construing a statutory term that is undefined in the statute itself, our primary obligation is to determine its plain meaning. We often rely on the definitions provided in dictionaries in making this determination.”). The term “specific” is commonly defined to mean “[o]f, relating to, or designating a particular or defined thing; explicit.” *Black’s Law Dictionary* 1406 (7th ed. 1999). By using the term “specifically” in this context, the Court believes that the Legislature intended that the default GPA classification apply unless Section 467 or 468 contains language of a particular and definite character that classifies the waterbody differently—a

standard seemingly satisfied by language identifying the impoundment by name or by language defining the geographic area in which it sits.

The phrase “specifically provided” should not be reviewed in isolation, however. Thus, like the parties, the Court looks to Section 467 for further clues as to the intended meaning of the phrase. *Conservation Law Found., Inc. v. Dep't of Env'tl. Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551 (“A particular statute is not reviewed in isolation but in the context of the statutory and regulatory scheme”).

In various places throughout Section 467, the Legislature addresses the classification of impoundments and great ponds that are situated in Maine’s major river basins. Section 467 is inconsistent in its approach to assigning these waterbodies a riverine classification. In some instances, classifications are assigned by name. *See, e.g.*, 38 M.R.S. § 467(13)(A)(3) (“Woodland Lake impoundment—Class C”). In other instances, classifications are assigned based on a geographically defined area, with affirmative language indicating that impoundments are included in the classification. *See, e.g., id.* § 467(4)(A)(6) (“Kennebec River, main stem. . . . from its confluence with the Dead River to the confluence with Wyman Lake, *including all impoundments—Class A*” (emphasis added)); *id.* § 467(12)(A)(6) (“Saco River, main stem. . . . [f]rom its confluence with the Little Ossipee River to the West Buxton Dam, *including all impoundments—Class A*” (emphasis added)). These examples would seem to support Black Bear's contention that the “specificity” requirement is not satisfied unless impoundments or great ponds are affirmatively singled out for classification in Section 467.

But there is language in Section 467 that points to an opposite conclusion. In several places, the Legislature *expressly excludes* impoundments and great ponds that fall within the geographic area being classified. *See id.* § 467(4)(A)(10-A) (“Kennebec River, main stem

...[f]rom the Shawmut Dam to its confluence with Messalonskee Stream, *excluding all impoundments—Class B*” (emphasis added)); *id.* § 467(9)(B)(2) (“Crooked River and its tributaries, except as otherwise provided, *excluding existing impoundments—Class AA.*” (emphasis added)); *id.* § 467(14)(A)(3) (“St. George River, main stem . . . [f]rom the outlet of Sennebec Pond to Route 90, *excluding segments that are great ponds—Class A*” (emphasis added)). These provisions tend to suggest that for purposes of classification, a defined area is inclusive of impoundments and great ponds unless there is statutory language suggesting otherwise. Accordingly, there is also statutory basis for the Board's interpretation: A provision “specifically provide[s]” for a riverine classification when it describes the geographic area in which the impoundment falls, without excluding the impoundment.

Given Section 467's inconsistent treatment of impoundments and great ponds combined with the absence of a legislative definition, the Court concludes that the phrase “specifically provided” is ambiguous. The Court will therefore defer to the Board’s interpretation unless it is unreasonable. *Cobb*, 2006 ME 48, ¶ 13, 896 A.2d 271.

The Board concluded that “[Section] 467(18)(A)(1) specifically provides for a riverine classification of Leonard Lake as a Class B water body.” R. 79. This interpretation passes the reasonableness test. In keeping with the statutory framework, the Board determined that there was no singular “prescribed method of ‘specifically’ providing for a riverine classification,” and therefore, conducted an “individual[ized]” analysis of the language in Section 467(18)(A)(1). R.79-80. Because Leonard Lake was positioned within the geographic parameters described in Section 467(18)(A)(1)—and in the absence of language indicating an intent to exclude Leonard Lake from the riverine classification that spanned this area—the Board concluded that Section

467(18)(A)(1) “specifically provided” for Leonard Lake’s status as a Class B waterbody. As noted above, the Board’s interpretation finds support in the statutory text.

Moreover, Black Bear does not dispute that Leonard Lake is situated between “the outlet of Graham Lake” and “tidewater”—the geographic features that mark the outer limits of the Class B riverine area. *See* R. 54,7 9-80. The Court finds no reason to second guess the Board’s decision to consistently apply a Class B rating to all waters within these legislatively defined boundaries. As the Board correctly observed, the Legislature did not attempt to “geographically define around” Leonard Lake, as it did with lakes and impoundments referenced elsewhere in Section 467. *Cf.* 38 M.R.S. § 467(6)(A)(2) (defining around Estes Lake by using the following language: “From a point located 0.5 mile above Mill Street in Springvale *to its confluence with* Estes Lake—Class C. . . . *From the outlet of* Estes Lake to tidewater—Class B.” (emphasis added)). Nor is there any express language excluding Leonard Lake from the Class B area that spans from the “outlet of Graham Lake” to “tidewater.” *Cf.* 38 M.R.S. § 467(4)(A)(10-A) (“Kennebec River, main stem . . . [f]rom the Shawmut Dam to its confluence with Messalonskee Stream, *excluding all impoundments*—Class B” (emphasis added)). The Court therefore finds no suggestion that the Board’s interpretation is contrary to the Legislature’s intent.⁴

Finally, in light of the Legislature’s stated purpose in enacting the water classification program—“protect[ing] the quality of [surface] waters” in Maine—the Court concludes that the

⁴ Black Bear attaches various materials to its brief, which, according to Black Bear, indicate that the Agency has treated other impoundments/great ponds as Class GPA waterbodies, even though they sit within the various stretches of river described in Section 467. The Court declines to consider these materials as they do not appear in the administrative record, nor were they the subject of a prior motion to modify the record pursuant to 5 M.R.S. § 11006 and M.R. Civ. P. 80C(f).

Board acted reasonably in resolving the above-noted ambiguity in favor of a classification that afforded greater protection to Leonard Lake's waters. 38 M.R.S. § 464(1).

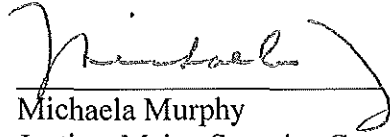
CONCLUSION

The entry is:

Black Bear's Rule 80C appeal is DENIED, and the Agency's decision denying Black Bear's application for water quality certification is AFFIRMED.

The Clerk may note this Order on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Date: November 17, 2023


Michaela Murphy
Justice, Maine Superior Court