STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. KEN-23-491

BLACK BEAR HYDRO PARTNERS, LLC
Petitioner-Appellant

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION, et al.
Respondents-Appellees

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF RESPONDENTS-APPELLEES MAINE BOARD OF ENVIRONMENTAL PROTECTION and MELANIE LOYZIM, AS COMMISSIONER OF THE MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

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INTRODUCTION

Appellant Black Bear Hydro LLC ("Black Bear") appeals from an Order of the Superior Court (Kennebec County, *Murphy, J.*) denying its M.R. Civ. P. 80C petition. Black Bear's Rule 80C petition ("Petition") challenges the June 3, 2021 decision ("Decision") by the Maine Board of Environmental Protection ("Board") affirming the denial of Black Bear's application for Water Quality Certification ("WQC") for the Ellsworth Hydroelectric Project ("Project") by the Commissioner of the Department of Environmental Protection ("Department" or "DEP").[1] The Petition challenges only one of three separate and independent reasons for the denial of Black Bear's application for WQC for the Project—the portion of the Decision based on the classification of Leonard Lake, an impoundment of the Union River immediately upstream of the tidewater. Black Bear argues that the Board should have applied Class GPA rather than more stringent Class B water quality standards to Leonard Lake for that portion of the Project. This argument is unconvincing for several reasons.

First, Black Bear's failure to challenge the two other independent grounds for the denial of its WQC application is fatal to its appeal. Regardless of how this Court may ultimately resolve the dispute over the classification of Leonard

[1] In its Rule 80C Petition, Black Bear named as respondents both the Board and Melanie Loyzim, DEP Commissioner.

Lake, the overall outcome with respect to the challenged Board Decision will inevitably be the same – affirmance of the Decision based on at least the other two unchallenged reasons for denying Black Bear's application for WQC for the Project.

Nevertheless, the Board's determination that 38 M.R.S. § 467(18)(A)(1) (2024) classifies the entire stretch of the Union River from the outlet of Graham Lake to the tidewater as Class B waters—including Leonard Lake—is supported by the plain statutory language and bolstered by the geographical context and legislative history. Because Leonard Lake is impounded by a dam located immediately at the tidewater, it necessarily falls within section 467(18)(A)(1)'s delineated geographic boundary for Class B waters (the outlet of Graham Lake to the tidewater)—a fact that Black Bear does not dispute. In this way, and as the Superior Court correctly held, Leonard Lake is "specifically" provided for by section 467 and thus subject to Class B standards. The Board's interpretation of Leonard Lake's classification is also supported by the legislative history and reflects the varying ways that the Legislature has delineated and classified river segments in section 467. At best, Black Bear offers a possible alternative statutory interpretation; but this alternative (and less persuasive) interpretation does not satisfy its burden of showing that the statutes administered by the Department plainly compel a contrary result.

This Court should affirm the Board's Decision, including its interpretation of the proper classification of Leonard Lake, which is correct based on the plain meaning of the statutory language, and is in any event reasonable and entitled to deference.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Project. Black Bear owns and operates the Project, which is located on the Union River in the towns of Ellsworth, Mariaville, Watham, and Fletchers Landing, and is licensed by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act. Appendix ("A.") 30; Administrative Record ("A.R.") 54. The Project includes two dams on the Union River, the Graham Lake Dam and Ellsworth Dam, and their respective impoundments, Graham Lake and Leonard Lake. *Id*. The Ellsworth Dam operates in run-of-river mode, was completed in 1907, and creates a small, freshwater riverine impoundment (Leonard Lake). A. 68; A.R. 6. The Ellsworth Dam serves as a physical barrier separating the freshwater portions of the Union River from the tidewater. *Id*. The Project's upper dam, Graham Lake Dam, forms a larger freshwater impoundment (Graham Lake) and was constructed in 1924 as a storage reservoir. A. 31; A.R. 55.

The Project was initially licensed by FERC in 1977 and relicensed by FERC in 1987. A. 69; A.R. 7. The 1987 FERC license expired in 2018, and Black

Bear has continued to operate the Project under annually renewed FERC licenses. *Id*.

Black Bear's WQC application and the Commissioner's denial. As referenced above, FERC issues federal licenses to construct and operate hydroelectric dams under the Federal Power Act. In addition, Section 401 of the federal Clean Water Act ("CWA") requires an applicant for a federal license for an activity that may result in a discharge to navigable waters of the United States (such as Black Bear's operation of the Project) to obtain a state water quality certification ("WQC") that the activity will comply with applicable state water quality standards. 33 U.S.C. § 1341(a)(1). The Department is the state agency responsible for reviewing applications for WQC and issuing WQCs in Maine. 38 M.R.S. § 635-B (2024). Conditions in WQCs issued by the Department become mandatory components of FERC licenses under Section 401 of the CWA. *Alcoa Power Generating Inc. v. FERC*, 642 F.3d 963, 971 (D.C. Cir. 2011) (citing 33 U.S.C. § 1341(a)(1), (d)). FERC may not issue a license for the construction or operation of a hydroelectric dam unless the state agency (here, the DEP) has either approved an application for WQC or waived its WQC authority. 33 U.S.C. § 1341(a)(1).[2]

[2] Pursuant to 23 U.S.C. § 1341(a)(1) a State must "act" on a request for certification within one year of receiving it, or else its certification authority "shall be waived with respect to an… application" for a "Federal license or permit."

Black Bear filed its application for WQC for the Project with the Department on March 21, 2019. A. 31; A.R. 55, 5486. By Order dated March 19, 2020, DEP denied Black Bear's application for WQC for three separate and independent reasons, each relating to the Project's failure to meet state water quality standards. A. 1; A.R. 1. First, DEP found that the Class GPA waters of Graham Lake above the Graham Lake Dam would not meet narrative classification standards for the designated use of habitat for fish and other aquatic life due to the impact of the proposed annual drawdown on the lake's benthic macroinvertebrate community. Second, DEP found that the stretch of the Union River below Graham Lake Dam (but upstream of the Leonard Lake impoundment created by the Ellsworth Dam at the tidewater) does not meet narrative classification standards for Class B waters. Third, DEP found that Leonard Lake, a Class B riverine impoundment, does not meet the Class B numeric water quality standard for dissolved oxygen ("DO"). A. 109-112; A.R. 47-50.

The Board appeal and Decision affirming the WQC application denial. Black Bear timely appealed the Commissioner's WQC denial to the Board. A.R. 6970. In that administrative appeal, Black Bear argued that each of the Commissioner's three sets of findings and conclusions independently supporting the WQC denial were flawed. *Id*. On June 3, 2021, the Board heard

argument on the appeal and issued the Decision denying Black Bear's administrative appeal. *Id*.

In its Decision, the Board fully considered and rejected each of Black Bear's arguments challenging the DEP's three separate grounds for denial of its application for WQC. A. 37-43 (Union River below Graham Lake Dam – Aquatic Life and Habitat); A. 43-53 (Graham Lake – Aquatic Life and Habitat); A. 53-57 (Union River (Leonard Lake) – Classification and Dissolved Oxygen). The Board's Decision affirming the DEP's denial of Black Bear's WQC application, which is based on three independent reasons, is the final agency action on appeal. *See Champlain Wind, LLC v. Bd. of Env't. Prot.*, 2015 ME 156, ¶ 14, 129 A.2d 279.[3]

The Rule 80C Appeal. On July 6, 2021, Black Bear timely appealed the Board's Decision to Superior Court. Black Bear's Rule 80C Petition contained two counts: Count I was its appeal of the Board's final agency action; and Count II was a claim for declaratory judgment. A. 25-26.

In its Rule 80C Petition, Black Bear challenged only one of the Decision's three separate and independent grounds for affirming the denial of Black Bear's application for WQC—the classification of Leonard Lake pursuant to 38 M.R.S.

[3] Accordingly, Appellees-Respondents are collectively referred to herein as the "Board."

§ 467(18)(A)(1). A. 21, 25. Specifically, Black Bear argues that the Board incorrectly determined that Leonard Lake is subject to and must meet Class B riverine standards rather than Class GPA standards, which are less stringent than Class B standards with respect to DO.

The Board moved to dismiss both Counts I and II for lack of justiciability and also, with respect to Count II, for failing to state a cognizable cause of action and based on the Maine Administrative Procedure Act's ("MAPA") exclusivity doctrine. *See* Board's Mot. to Dismiss, filed August 9, 2021. Downeast Salmon Federation ("DSF"), which participated in the proceeding before the Board and was granted leave to intervene by the Superior Court, also moved to dismiss Counts I and II for similar reasons. *See* DSF's Mot. to Dismiss, filed August 25, 2021. On November 22, 2022, the Superior Court dismissed Count II but denied the motions to dismiss with respect to Count I, determining that Black Bear's Rule 80C appeal was justiciable. A. 3; *see* Sup. Ct. (*Cashman, J*.) Decision on Mot. Dismiss.

The Superior Court's denial of Black Bear's Rule 80C Appeal. Thereafter, the parties filed their Rule 80C merits briefs. By Order dated November 17, 2023, the Superior Court (*Murphy, J*.) denied Black Bear's Rule 80C appeal and affirmed the Board's Decision denying Black Bear's application for WQC. A. 16. The court held that the Board's interpretation of the classification statutes,

which applied Class B rather than Class GPA standards to Leonard Lake, was reasonable and consistent with the Legislature's stated goal in enacting the water quality classification program – of "protect[ing] the quality of [surface] waters" in Maine. A. 15. In so holding, the trial court observed that, by using the term "specifically" in 38 M.R.S. § 465-A (2024), the Legislature intended a GPA classification to apply unless sections 467 or 468 contained other "language of a particular and definite character that classifies the water differently – a standard seemingly satisfied by language identifying the impoundment by name *or by language defining the geographic area in which it sits*." A. 13 (emphasis added). As the Superior Court emphasized, the Legislature did not attempt to "geographically define around" Leonard Lake, as it did with lakes and impoundments referenced elsewhere in section 467, and there is no dispute that Leonard Lake is situated within section 467(18)(A)(1)'s delineated area between Graham Lake and the tidewater. A. 15. Ultimately, the Superior Court found "no reason to second guess the Board's decision to consistently apply a Class B rating to all waters within those legislatively defined boundaries" and "no suggestion that the Board's interpretation is contrary to the Legislature's intent." *Id*. Black Bear timely appealed that Superior Court decision to this Court.

STATEMENT OF THE ISSUE

I. DID THE BOARD REASONABLY AND CORRECTLY INTERPRET 38 M.R.S. § 467(18)(A)(1) AS SPECIFICALLY ENCOMPASSING AND CLASSIFYING LEONARD LAKE AS CLASS B WATERS?

SUMMARY OF THE ARGUMENT

The Board reasonably and correctly interpreted 38 M.R.S. § 467(18)(A)(1) as specifically encompassing and classifying the entire stretch of the Union River from the outlet of Graham Lake to the tidewater (including Leonard Lake) as Class B waters. The Board's interpretation is supported by the plain language of the classification statutes and bolstered by the particular geographical context. In short, because Leonard Lake is impounded by a dam at the tidewater and falls within the precisely defined geographic boundaries set forth in section 467(18)(A)(1), it is "specifically provided" for in section 467 and subject to Class B water quality standards. A. 116.

The Board's plain-language interpretation of the classification statutes administered by the Department is also reasonable and reflects the legislative intent and overarching goals of the State's water classification program. Conversely, Black Bear's interpretation—that a waterbody can be "specifically provided" for in section 467 *only* if it is expressly named—stretches the limits of the plain statutory language, ignores statutory and geographical context, and

as applied here, would run counter to the goals of the State's water classification program. At most, Black Bear advocates for a different interpretation, but fails to carry its burden of showing that the Board's interpretation is unreasonable or that the provisions of the classification statutes at issue plainly compel a contrary result.[4]

Accordingly, the Court should affirm the Board's Decision, including its interpretation of the proper classification of Leonard Lake.

ARGUMENT

I. THE BOARD REASONABLY AND CORRECTLY INTERPRETED 38 M.R.S. § 467(18)(A)(1) AS SPECIFICALLY ENCOMPASSING AND CLASSIFYING LEONARD LAKE AS CLASS B WATERS.

This Court directly reviews the Board's Decision for errors of law, factual findings not supported by substantial record evidence, or abuse of discretion. 5 M.R.S. § 11007(4) (2024); *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74; *Concerned Citizens to Save Roxbury v. Bd. of Env't Prot.*, 2011 ME 39, ¶ 17, 15 A.3d 1263.

In cases turning on statutory interpretation, courts will "effectuate the plain language" of the statute. *Rich v. Dep't of Marine Res.*, 2010 ME 41, ¶ 7, 994

[4] As discussed in further detail below see *Infra* Section D at footnote 7, the parties agree that the Court should address the third, purely legal issue regarding the classification of Leonard Lake for purposes of efficiency and regulatory clarity—especially given, as Black Bear has acknowledged, *see* Black Bear Opp. to Mot. Dismiss 2, the near certainty that it will be submitting a new WQC application for those same Project waters in the future.

A.2d 815. In interpreting a statute, the goal of courts "is to give effect to the Legislature's intent in enacting the statute." *Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2019 ME 90, ¶ 20, 209 A.3d 116 (*quoting Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 19, 107 A.3d 621). Moreover, "[t]he fundamental rule in statutory construction is that words must be given their plain meaning." *Paradis v. Webber Hosp.*, 409 A.2d 672, 675 (Me. 1979). Legislative intent can be discerned "from the plain meaning of the statute and the context of the statutory scheme." *Cobb v. Bd. of Counseling Professionals Licensure*, 2006 ME 48, ¶ 11, 896 A.2d 271. To that end, if the statutory language is unambiguous, the Court will construe the statute in accordance with its plain meaning in the context of the whole statutory scheme. *Harrington v. State,* 2014 ME 88, ¶ 5, 96 A.3d 696. Although it is unnecessary to consider legislative history when the plain language elucidates the Legislature's intent, the Court may look at whether legislative history "supports the intent stated in the plain language." *Narowetz v. Bd. of Dental Practice*, 2021 ME 46, ¶ 26, 259 A.3d 771 (quotation marks omitted).

While issues of statutory construction are typically questions of law subject to de novo review, "[w]hen a dispute involves an agency's interpretation of a statute it administers," the agency's interpretation "is entitled to great deference" so long as it is reasonable. *FPL Energy Me. Hydro*

LLC v. Dep't of Env't Prot., 2007 ME 97, ¶ 11, 926 A.2d 1197 (internal quotation marks omitted). Specifically, "[w]hen reviewing an agency's interpretation of a statute that it administers, [the Court] defer[s] to the agency's construction unless the statute plainly compels a contrary result." *Passadumkeag Mountain Friends v. Bd. of Env't Prot.*, 2014 ME 116, ¶ 12, 102 A.3d 1181; *see also Murphy v. Bd. of Env't Prot.*, 615 A.2d 255, 259 (Me. 1992) (deferring to the Board's and DEP's interpretations because they were not "plainly contrary to the statute's language and purpose"); *S.D. Warren Co. v. Bd. of Env't Prot.*, 2005 ME 27, ¶ 29, 868 A.2d 210 (explaining, "[i]t does not matter whether an alternative interpretation would also have been reasonable, only that the interpretation adopted by the [Board] was not unreasonable, unjust or unlawful").

As the party seeking to vacate the Board's Decision, Black Bear bears the burden of persuasion on appeal. *Somerset Cnty. v. Dep't of Corr.*, 2016 ME 33, ¶ 14, 133 A.3d 1006.

A. The Board's interpretation that Leonard Lake is subject to Class B standards is supported by the plain language of 38 M.R.S. §§ 467(18)(A)(1) and 465-A and relevant geographical and statutory context.

The relevant statutory language here is found in 38 M.R.S. § 467(18)(A)(1) and 38 M.R.S. § 465-A. That language is unambiguous with respect to Leonard Lake, which is impounded by a dam at the tidewater, and

should be construed based on its plain meaning in the statutory context. *See Harrington*, 2014 ME 88, ¶ 5, 96 A.3d 696. Because Leonard Lake falls squarely within section 467(18)(A)(1)'s clearly delineated geographic boundary for Class B waters (the outlet of Graham Lake to the tidewater)—a fact that Black Bear does not dispute—it is specifically provided for by section 467 and subject to Class B water quality standards. A. 116.

As the Decision correctly notes, A. 53-54; A.R. 77-78, and the Superior Court recognized, A. 10-12, Leonard Lake's classification involves the interplay between section 467(18)(A)(1) and other law within Maine's water classification system, 38 M.R.S. §§ 464-470, including 38 M.R.S. § 465-A. Specifically, section 465-A provides in pertinent part 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." In turn, Title 38, section 480-B (2024) defines a great pond 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." Leonard Lake is an artificially formed impoundment of the Union River in excess of 30 acres, and thus falls within section 480-B's definition of great pond. 38 M.R.S. § 480-B. Accordingly, pursuant to 38 M.R.S. § 465-A,

Leonard Lake is classified "as GPA *or as specifically provided* in sections 467 and 468."

The Board correctly determined that the plain language of section 467(18) specifically provides that Leonard Lake is Class B. A. 56; A.R. 80. The Board notes that the dictionary definition of "specifically" is, in part, "with precision," and explains that the wording of section 467(18)(A)(1) encompasses Leonard Lake with such precision. A. 55; A.R. 79. Section 467(18) provides, in relevant part:

> **18**. **Union River Basin.**
>
> A. Union River, main stem
>
> (1) From the outlet of Graham Lake to tidewater – Class B.

As the Superior Court acknowledged, Black Bear does not dispute that Leonard Lake is situated on the Union River between "the outlet of Graham Lake" and the "tidewater"—the "geographic features that mark the outer limits of the Class B riverine area." A. 15. And as emphasized by the Board's Decision, the Ellsworth Dam not only impounds Leonard Lake, but from a geographical standpoint "also serves to separate the impoundment of Union River waters from the tidewater." A. 56; A.R. 80. Leonard Lake thus plainly and *specifically* falls within section 467(18)(A)(1)'s expressly demarcated boundaries (*i.e.*,

between the outlet of Graham Lake and the tidewater), which unambiguously classifies Leonard Lake as Class B.

Indeed, if the Legislature had *not* wanted to include the Leonard Lake impoundment in that Class B segment, it could have described the segment as ending further upstream on the Union River rather than specifically calling out the "tidewater" as the terminus of the segment.[5] Because the Ellsworth Dam is located at the tidewater, the Legislature's choice of the tidewater as the terminus necessarily includes all of Leonard Lake in the Class B segment. A. 116. Accordingly, the Board correctly determined that section 467(18)(A)(1) "specifically provides for a Class B riverine classification of Leonard Lake as a Class B water body," A. 55; A.R. 79, and the Board's plain language interpretation of the classification statutes that it is charged with administering should be upheld.

The statutory and geographical context are especially illuminating here and also support the Board's Decision and plain language interpretation. When

[5] Notably, the Legislature has chosen to classify waters in this way on the stretch of Union River at issue here by defining around Graham Lake. 38 M.R.S. § 467(18)(A). *See also e.g*. 38 M.R.S.A. § 467(4)(F)(1)(b)-(c) (classifying Attean Pond as Class GPA by excluding it from surrounding segments of river defined and assigned classification); 38 M.R.S. § 467(4)(F)(1)(d)-(e) (same for Long Pond); Section 467(6) (same for Estes Lake); Section 467(7)(B)(1)(a)-(b) (same for Grand Lake Mattagamon); Section 467(7)(14)(A)(2)-(3) (same for Stevens Pond, Trues Pond, and Sennebec Pond); Section 467(9)(A)(1)-(1-A) (same for Dundee Pond); Section 467(15)(B)(2)(a)-(b)(same for Chamberlain Lake, Long Lake, and Third Musquacook Lake); Section 467(15)(D)(1)(a)-(c) (same for St. Froid Lake and Eagle Lake).

considering the statutory framework and the ways river segments have been classified, the Board determined, A. 55; A.R. 79, and Black Bear acknowledges, Blue Br. 10-13, that the Legislature has taken a varied approach when excluding or including lakes, ponds, and impoundments from riverine classifications in section 467. For example, some portions of section 467 use language such as "excluding all impoundments" or "including all impoundments" when classifying a particular river stretch, while others define around specific areas by using language such as "to the confluence with" and "from the outlet of." A. 15, 55-56; A.R. 79-80. *See e.g*., 38 M.R.S. § 467(6)(A)(2) & (3) (2024) (defining around Estes Lake as follows: "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.") The Board and the Superior Court thus correctly determined "there is no prescribed method of 'specifically' providing for a riverine classification," and that "each river basin and segment thereof should be analyzed individually to determine its classification." A. 9, 55-56; A.R. 79-80.

The Board further reasoned that this is "especially important when, as here, the specific geography plays an active role in the analysis." *Id*. Indeed, to ignore geographical context—such as the Ellsworth Dam's physical separation of the fresh Union River waters in Leonard Lake from the tidewater—when

interpreting a statute like section 467(18)(A)(1) that describes specific geographical classification boundaries, would be to ignore express statutory language, context, and ultimately legislative intent. *Town of Embden v. Madison Water Dist.*, 713 A.2d 328, 330 (Me. 1998) (*quoting Inhabitants of Whiting v. Inhabitants of Lubec*, 121 Me. 121, 126 (1922)) ("Reasoning and judgment, not the mere bald literalness of statutory phrasing, must guide and control…."); *Dickau v. Vt. Mut. Ins. Co*. 2014 ME 158, ¶ 22, 107 A.3d 621 (courts reject interpretations rendering language mere surplusage*); See also See Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (a literal construction of statutory words "without regard to the object in view… has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish.").

As discussed in further detailed below, *see infra* Section C, Black Bear asks this Court to turn a blind eye to the words that come after "specifically provided" in section 465-A by arguing that "[t]he question before the court is not how to construe section 467; it is how to construe section 465-A." Blue Br. 7. This argument falls short for several reasons. First, it represents a departure from Black Bear's position before the Superior Court where it correctly recognized the inextricable link between sections 465-A and 467 by stating, "[t]he question of Lake Leonard's classification boils down to whether Section

467 "specifically provide[s]" that it is Class B." *See* Black Bear Rule 80C Reply Br. at 2. And second, this new distinction between sections 465-A and 467 asks the Court to read the phrase "specifically provided" as detached and isolated from the words and cross-references that immediately follow it. Blue Br. 7.

But the central goal of statutory interpretation—to determine legislative intent—cannot be realized here by ignoring words in the statute. *Packgen, Inc*., 2019 ME 90, ¶ 20, 209 A.3d 116. To divine legislative intent, it would be impossible to determine whether a classification is "specifically provided" for in sections 467 or 468 without understanding how the Legislature chose to specifically provide for classifications in sections 467 and 468.

Moreover, Black Bear's new artificially-segmented approach runs afoul of other bedrock rules of statutory interpretation, namely: plain language must be construed in the context of the statute as a whole, *Harrington,* 2014 ME 88, ¶ 5, 96 A.3d 696, and that courts reject plain language interpretations that render language as "mere surplusage." *State v. Dubois Livestock, Inc.*, 2017 ME 223, ¶¶ 6, 8, 174 A.3d 308.

In sum, the plain language of 38 M.R.S. §§ 465-A and 467(18)(A)(1), considered together with the relevant geographical and statutory context, supports the Board's interpretation that the Leonard Lake portion of the Union

River is Class B subject to riverine DO criteria, rather than the less stringent Class GPA standard.

B. The legislative history also supports the Board's plain language interpretation.

"[A]lthough it is unnecessary to look at the legislative history because the plain language elucidates the Legislature's intent," the legislative history here also "supports the intent stated in the plain language." *Narowetz*, 2021 ME 46, ¶ 26, 259 A.3d 771 (quotation marks omitted).

The legislative history of section 467 and the goals of the State's water classification laws further support the Board's interpretation. As the Board observed, "the language and [] geographic indicators suggest that at one time, the Legislature intended the impoundment and waters immediately upstream to be subject to more lenient but still riverine Class C standards subject to dissolved oxygen standards. But those portions, in conformance with the goals of the classification system, have been united into a single Class B standard downstream of Graham Lake to tidewater." A. 56; A.R. 80. The legislative history bears this out and reflects an intent to upgrade the riverine classification of Leonard Lake to Class B in 1990, rather than downgrade it to Class GPA, which does not include a DO requirement.

Before 1990, the mainstem of the Union River was separated into two segments consisting of two riverine (not GPA) classifications: (1) from the outlet of Graham Lake to the Route 1A bridge in Ellsworth Falls – Class B; and (2) from the Route 1A bridge in Ellsworth Falls to tidewater – Class C. *See* P.L. 1985, ch. 698, § 15; A.R. 10304, 10440, 10453. In 1990, the Legislature revised the classification of the mainstem stretch from the outlet of graham Lake Dam to the tidewater (*i.e.*, to the Ellsworth Dam impounding Leonard Lake) to upgrade that entire stretch of water to Class B. P.L. 1990, ch. 764, § 19; A.R. 10472. The Legislature's retention of the word "tidewater" in that revision included Leonard Lake in the Class B upgrade because the impoundment starts at the tidewater. Nothing in the history reflects any intent to exclude Leonard Lake from the Class C to Class B riverine upgrade, or conversely, to downgrade the Union River immediately upstream from the Ellsworth Dam/tidewater from a riverine classification to a lake (GPA) standard that would no longer have any DO criteria. A. 60; A.R. 80, A.R. 10310.

Indeed, because both Class B and C standards contain express DO criteria, while Class GPA standards do not, *compare* 38 M.R.S. §§ 465(3)(B) & (4)(B) (2024) with 38 M.R.S. § 465-A, Black Bear's argument that this stretch of the Union River was somehow downgraded in 1990 to Class GPA, rather than upgraded to Class B, would be inconsistent with the forward-looking goals of

Maine's water classification system and the federal Clean Water Act. *See* 38 M.R.S. § 464(1) (2024) (classification system promotes State's protection and enhancement of water quality); 33 U.S.C. 1251(1) (outlining goals of restoring and maintaining waters). The Superior Court acknowledged this very point, concluding that the "Board acted reasonably in resolving… ambiguity in favor of a classification that afforded greater protection to Leonard Lake's waters." A. 16.

Thus, the legislative history supports the Board's plain language interpretation.

C. The Board's interpretation is also reasonable and entitled to deference.

This Court generally defers to an agency's interpretations of statutes that it administers, and an agency's interpretation is upheld unless the statute plainly compels a contrary interpretation. *Friends of Boundary Mountains v. Land Use Regul. Comm'n*, 2012 ME 53, ¶ 6, 40 A.3d 947. When an agency is interpreting a natural resource law that it is expressly tasked with enforcing and interpreting, "the agency's interpretation must be given special deference." *Conservation Law Found. v. Dep't of Env't Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551; *see also Murphy,* 615 A.2d 255, 259 (Me. 1992). Thus, the Board's reasonable interpretation of the classification provisions is entitled to deference here.

This Court has consistently deferred to the Board's reasonable interpretation of statutes it administers in the context of other WQC-related proceedings, and this Court should not depart from such well-established precedent here. *See S.D. Warren Co.*., 2005 ME 27, ¶¶ 1, 5, 7, 31, 868 A.2d 210 (granting deference to Board's interpretation of federal CWA in WQC proceedings based on the rationale that the Board has greater experience and expertise with environmental matters and statutes); *FPL Energy Maine Hydro LLC,* 2007 ME 97, ¶¶ 1, 24, 39, 42-43, 926 A.2d 1197 (granting deference to Board's reasonable interpretations of water quality standards and related provisions in WQC proceeding); *Watts v. Bd. of Env't. Prot*., 2014 ME 91, ¶¶ 8-10, 12-13, 97 A.3d 115 (the Board did not err in interpreting 38 M.R.S. § 465 and approving WQC*); Save Our Sebasticook, Inc. v. Bd. of Env't Prot*., 2007 ME 102, ¶¶ 11, 13, 30-35, 928 A.2d 736.

In light of that caselaw, Black Bear does not contend that the Board's interpretation, which looks at specific geographic indicators, is unreasonable or should not receive deference. Black Bear offers no argument whatsoever regarding the reasonableness of the Board's interpretation or how its own interpretation would better advance the goals of the State's water classification system—namely, to "restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters." 38

M.R.S. § 464(1).[6] Nor does Black Bear argue that the statutory language at issue "plainly compels a contrary result."

At best, in arguing that Leonard Lake is not "specifically provided" for by section 467 (because it is not expressly named and thus allegely subject to less stringent Class GPA standards), Black Bear espouses a potential alternative interpretation of sections 465-A and 467(18)(A)(1). However, merely offering a (less persuasive) alternative reading of these Department-administered statutes is insufficient to show they "plainly compel a contrary result" or that the Board's interpretation in the Decision is unreasonable. *See Murphy*, 615 A.2d 255, 259 (Me. 1992) (deferring to the Board and DEP's interpretations as they are not "plainly contrary to the statute's language and purpose."); *S.D. Warren Co*., 2005 ME 27, ¶ 29, 868 A.2d 210 ("it does not matter whether an alternative interpretation would also have been reasonable, only that the interpretation adopted by the BEP was not unreasonable, unjust or unlawful.")

Black Bear's arguments regarding section 465-A highlight that it cannot be read in any meaninful way, absent a consideration of how waters are

[6] Black Bear appears to agree with the Board on the definition of "specifically," Blue Br. 8 (noting the dictionary definition to be, in part, "precise"), but then concludes, without support, that a body of water cannot be precisely provided for in section 467 through the use of geographic boundaries. Instead, it claims that waters within those boundaries must be expressly named. Blue Br. 8 ("[t]he great pond must be identified in section 467 explicitly, by name or other unmistakable specific reference.") This argument would add new requirements and language (*i.e*., "explicitly named") that are not found in the statute.

"specifically provided" in section 467. At one point, Black Bear appears to argue that section 465-A unambiguously requires waters to be expressly named in statute to be "specifically provided." Blue Br. 7 ("[t]here is nothing ambiguous about what "specifically provided" means"). But later concedes that the inquiry cannot stop there when attempting to determine Leonard Lake's classification, by claiming ambiguity in different ways in which bodies of water are "specifically provided" for in section 467. *See* Blue Br. 10 ("section 467 is inconsistent, and thus ambiguous…."); (impoundments are expressly included "no fewer than 21 times in section 467"); Blue Br. 13 ("two other times section 467 classifies an impoundment…by specifically naming it"); Blue Br. 14 ("in 4 places section 467…expressly exclud[es] impoundments from the classification of a stretch of river.") Thus, Black Bear's arguments that offer an artificially segmented reading of the statute fold in on themselves. As the Board and Superior Court explained, there is no singular "prescribed method of specifically providing for a riverine classification." A. 14.

Finally, Black Bear's argument that the Board's reading of the statute would render the word "specifically" mere surplusage misses the mark. Blue Br. 18. To the contrary, the Board's interpretation of "specifically" acknowledges the various ways in which the Legislature has classified bodies of water in section 467 with precision. The Board's interpretation gives full

meaning to the word "specifically" in a manner that is consistent with statutory and geographical context, the legislative history of section 467(18)(A)(1), and the legislative intent and overarching purpose of the water classification system.

The Board's interpretation of section 467(18)(A)(1) is straightforward. The statute classifies with precision a specific geographical area between the outlet of Graham Lake and the tidewater as Class B. Leonard Lake falls within that stretch because it is impounded by the Ellsworth Dam located at the tidewater; therefore, Leonard Lake is subject to Class B standards. This interpretation reasonably focuses on the particular language and context of the Union River basin classification statute at issue, which reflects the geography of Leonard Lake and its adjacent proximity to the "tidewater."

The Legislature knew how to define around impoundments, and it did not do so here. The Board's focused and segment-specific interpretation of the statutory language is entirely reasonable, especially considering the variety of approaches used to include or exclude waters in Maine's classification system. It is entitled to deference by this Court. Accordingly, even if this Court were to find the relevant statutory langauge ambiguous, it should uphold the Board's interpretation as the statutue does not plainly compel a contrary result and the

Board's interpretation is reasonable. *Murphy v. Bd. of Env't Prot.*, 615 A.2d 255, 259 (Me. 1992).

D. The Board's Decision denying Black Bear's application for WQC for the Project should be affirmed regardless of how the Court resolves the dispute over the proper classification of Leonard Lake.

Regardless of how the Court resolves the dispute over the classification of Leonard Lake, the Decision should be affirmed because the final agency action challenged by Black Bear is the Board's Decision denying its application for WQC for the Project, and the Decision is based on three separate and independent reasons. A. 19, 23, 57; *see also FPL Energy Maine Hydro LLC*, 2007 ME 97, ¶¶ 7-8, 16, 926 A.2d 1197 (involving judicial appeals of a WQC denial by the Board). The agency determination on appeal is not limited to just the third basis for denying Black Bear's application for WQC involving the statutory classification of Leonard Lake. Rather, each of the three reasons for denying Black Bear's application for WQC cited by the DEP and affirmed by the Board was (and is), standing alone, sufficient to deny Black Bear's application for WQC for the Project.[7] Here, Black Bear does not challenge the first two independent

[7] Given the Superior Court's denial of the Board's Motion to Dismiss (which order has not been appealed by any party here), the amount of time (approximately 3.5 years) and the resources expended by the parties and Superior Court since then, and the goals of M.R. Civ. P. 1, "to secure the just, speedy and inexpensive determination of every action" the Board at this point welcomes a merits resolution of the dispute over the classification of Leonard

reasons for denial of its application for WQC as set forth in the Decision. A. 37-53, A.R. 61-77.

Thus, even if this Court were to agree with Black Bear that Leonard Lake is a Class GPA rather than a Class B waterbody pursuant to 38 M.R.S. § 467(18)(A)(1), the Court should affirm the Decision based on the two reasons not challenged by Black Bear. *See, e.g., Baker v. Trevathan*, 2018 Ark. App. 135, 2018 WL 989259 (2018); *Schweitzer Basin Water Company v. Schweitzer Fire District*, 163 Idaho 186, 408 P.3d 1258 (2017); *Jones v. Miller*, 2017 Ark. 190, 520 S.W.3d 253 (2017); *see also* 5 Am. Jur. 2d *Appellate Review* § 718 (where a separate and independent ground from the one appealed supports the decision below and is not challenged on appeal, the appellate court should affirm the decision below).

If the Court were to conclude that Leonard Lake is a Class GPA rather than a Class B waterbody pursuant to 38 M.R.S. § 467(18)(A)(1), it should modify the Board's Decision on that issue only pursuant to 5 M.R.S. § 11007(4)(C)(4),

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Lake. Such an approach would be consistent with this Court's precedent. *See e.g. Hurricane Island Found. v. Town of Vinalhaven*, 2023 ME 33, ¶¶ 13-14, 295 A.3d 147 (noting that remand to the Superior Court was not necessary as it would result in duplicative work, serve no purpose, unjustifiably elevate form over substance, waste judicial resources as well as those of the parties, and run contrary to the basic purpose of the Maine Rules of Civil Procedure); *Labonta v. City of Waterville*, 528 A.2d 1262, 1263-64 (Me. 1987), 528 A.2d at 1264 (same). Resolving the Leonard Lake classification dispute now would be an efficient use of resources and would provide certainty and regulatory clarity for purposes of any future WQC applications submitted to the Department by Black Bear or others.

and otherwise deny Black Bear's appeal of the Decision in light of the other two unchallenged reasons for denial of its application for WQC. [8]

CONCLUSION

For the reasons above, this Court should affirm the Board's Decision.

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Respectfully submitted,

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[8] Under no circumstances should this Court consider a remand. A remand would serve no purpose given the purely legal nature of the third Leonard Lake classification issue; the Board would have nothing to do. Moreover, a remand may have unintended consequences, in that it may raise questions of WQC waiver given that any Board action on remand would necessarily occur beyond the one-year deadline for WQC established by the CWA. *See* 33 U.S.C. § 1341(a); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 26th day of April 2024, I mailed two copies of the Appellees' Brief to the parties listed below, by United States Mail, first class, postage prepaid, addressed as follows:

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