

April 17, 2020

Mark C. Draper, Chair
Board of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

Re: Notice of Appeal and Request for Public Hearing – Denial of Water Quality Certification, Ellsworth Hydroelectric Project, #L-13256-33-L-N

Dear Chair Draper:

By this letter, Black Bear Hydro Partners, LLC (“Black Bear”) hereby appeals the denial of its request for water quality certification pursuant to Section 401 of the Clean Water Act (“WQC”) regarding the Ellsworth Hydroelectric Project located on the Union River in the towns of Ellsworth, Mariaville, Waltham, and Fletchers Landing, Maine, (the “Project”) issued by the Department of Environmental Protection (“DEP” or the “Department”) on March 19, 2020 (the “WQC Denial”). The WQC Denial is attached hereto as **Exhibit 1**.

In the WQC Denial, the Department concluded that the Project “will not result in all waters affected by the Project being suitable for all designated uses and meeting all other applicable water quality standards.”¹ Specifically, DEP found as follows:

1. Leonard Lake does not meet the dissolved oxygen (DO) standards applicable to Class B waters;² and
2. Generally due to the Project’s impact on the benthic macroinvertebrate community, Graham Lake and the Union River (between Graham Lake Dam and Leonard Lake) will not meet all applicable habitat and aquatic life standards.³

Black Bear appeals the WQC Denial on the following grounds: (1) the Department’s requirement that Leonard Lake meet Class B numeric standards rather than GPA standards is not supported by Maine law or the DEP’s course of conduct and is therefore incorrect, arbitrary and capricious, and (2) the Department’s finding that Graham Lake and the Union River (below Graham Lake Dam and Leonard Lake) will not meet applicable habitat and aquatic life criteria are not based on due consideration of all data, does not consider all information provided to the Department or the proposed operating conditions of the Project, and therefore is incorrect,

¹ Exhibit 1 at 47.

² Exhibit 1, Section 6(I) at 49.

³ Exhibit 1, Sections 6(D) at 47-48 and (G) at 48-49.

arbitrary and capricious. Black Bear respectfully requests a public hearing on these important issues.

I. Background

The Project is located on the Union River in the towns of Ellsworth, Mariaville, Waltham, and Fletchers Landing, Hancock County, Maine, and consists of the Ellsworth Dam (that forms the Leonard Lake riverine impoundment) and Graham Lake Dam (that forms the Graham Lake storage reservoir). Graham Lake has a surface area of 10,000 acres and Leonard Lake has a surface area of 90 acres. The Project has been licensed by the Federal Energy Regulatory Commission (“FERC”) since 1977 (FERC Project No. P-2727). See Black Bear’s application for WQC submitted March 21, 2019 and supplemented on January 31, 2020 (the “Application”), attached hereto as **Exhibit 2**.

The initial FERC license was issued on April 12, 1977 and expired on December 31, 1987. FERC subsequently issued a license to operate the Project on December 28, 1987 that expired on December 31, 2017. Black Bear applied to FERC for relicensing of the Project on December 30, 2015.⁴ Black Bear has continued to operate the Project under an annual FERC license.

II. Aggrieved Party Status

An aggrieved person may appeal to the Board of Environmental Protection (“Board”) for review of a licensing decision by the DEP Commissioner. See 06-096 CMR 2 § 24(B)(1). “Aggrieved person” means “any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision.” *Id.* at § 1(B). Black Bear meets this aggrieved party definition as (1) it is the Applicant; (2) its WQC Application has been denied, and (3) the WQC Denial will have a significant impact on Black Bear as, without receipt of a WQC from the State, Black Bear will not be in a position to obtain a new FERC license.

III. Basis for the Appeal

A. DEP Erred in Denying the WQC on the Grounds that the Project Would Not Meet Applicable Water Quality Standards

The Department erred in concluding that Black Bear has not established that the Project would not cause or contribute to the failure of Leonard Lake or the Union River (between Graham Lake Dam and Leonard Lake) to meet applicable water quality standards.

⁴ Exhibit 2, Attachment 5.

1. ***DEP's requirement that Leonard Lake meet Class B numeric standards for dissolved oxygen ("DO") rather than GPA standards is not supported by Maine law or the DEP's course of conduct and is therefore incorrect, arbitrary and capricious.***

As discussed below, historically and throughout the entirety of the relicensing process, the Department has considered Leonard Lake to be a Class GPA waterbody. Yet, in the WQC Denial DEP claims that Leonard Lake is a Class B water, because the Department now considers it to be part of the Union River pursuant to 38 M.R.S. §467(18)(A)(1).

Unlike Class B waters, Class GPA waters are not subject to DO numeric water quality standards. Instead, Class GPA waters "must have a stable or decreasing trophic state." 38 M.R.S. § 465-A(1)(B). The trophic state, i.e., the algal biomass, for Class GPA waters "must be described ... based on measures of the chlorophyll 'a' content, Secchi disk transparency, total phosphorus content and other appropriate criteria." *Id.* Further, hydropower impoundments classified as GPA must satisfy Class C aquatic life requirements. 38 M.R.S. § 464(9-A)(D) and 38 M.R.S. § 465(4)(C).

Maine Water Classification Statutory Framework

The system for classification of Maine surface waters is set forth in 38 M.R.S. §§ 464-470. Section 465 specifies four standards for fresh surface waters that are not classified as great ponds – Class AA, A, B, and C. Each major river basin and its associated water quality classification is listed in 38 M.R.S. § 467. (Minor drainages and their classifications are listed in 38 M.R.S. § 468.)

There is no statutory provision comparable to sections 467 and 468 that lists all state GPA waters. Section 465-A sets forth the standards for classification of lakes and ponds. While, as stated in section 465-A(1), "Class GPA is the *sole* classification ... of great ponds" (emphasis added), as provided in the introductory paragraph of section 465-A, "impoundments 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." (Emphasis added.) In other words, great ponds are classified as GPA waters unless specifically provided otherwise in sections 467 or 468.

Classification of Leonard Lake

Leonard Lake, an impoundment of 90 acres, clearly meets the definition of "great ponds" set forth in 38 M.R.S. § 480-B(5) – "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." Thus, Leonard Lake is a GPA water, unless otherwise specifically described in section 467 or 468.

As indicated in the following examples, there are numerous instances in section 467 where impoundments are stated as being included in a river classification:

- Subsection 467(1)(A) provides: “Androscoggin River, main stem, *including all impoundments.*”
- Subsection 467(4)(A) regarding the Kennebec River main stem states as follows: “(6) From its confluence with the Dead River to the confluence with Wyman Lake, *including all impoundments – Class A*” ... (8) From the confluence with the Williams impoundment to the Route 201A bridge in Anson-Madison, *including all impoundments – Class A*” ... (9) From the Route 201A bridge in Anson-Madison to the Fairfield Skowhegan boundary, *including all impoundments – Class B.*”
- Subsection 467(15)(C) regarding the Aroostook River Drainage states as follows: “(c) From Sheridan Dam to its confluence with Presque Isle Stream, *including all impoundments – Class C.*”

(Emphasis added.) Similarly, section 467 also includes provisions that specifically exclude certain impoundments, tributaries, and segments from a river reach classification. See subsections 467(4)(A)(10-A); 467(6-A)(B)(13); 467(9)(B)(2); and 467(14)(A)(3). Clearly, the Legislature knows how to specifically include or exclude impoundments when designating classifications of river segments.

The Union River, a major river basin, is classified in subsection 467(18) in pertinent part as follows:

18. Union River Basin.

A. Union River, main stem.

(1) From the outlet of Graham Lake to tidewater – Class B.⁵

Nothing in subsection 467(18)(A)(1) specifically provides that Leonard Lake is a Class B water or that the Leonard Lake impoundment is included in the classification of the Union River main stem. Certainly, the Maine Legislature was capable of specifically including Leonard Lake in subsection 467(18) had it wished to do so.

The fact that Leonard Lake is not specified in subsection 467(18) is not surprising. Many Maine impoundments and waterbodies have been classified by DEP as GPA waters even though they are located in reaches of major river basins with a higher classification and yet those impoundments have not been specifically noted as exceptions in section 467. The following are examples:

- The Brassua Lake impoundment located in the Moose River main stem between the outlet of Long Pond and its confluence with Moosehead Lake has been classified by DEP as GPA.⁶ This stretch of the Moose River main stem is identified as Class A in subsection 467(4)(F) but Brassua Lake is not identified as an exception in this subsection.

⁵ The current water classification for the Union River was adopted in 1990 amendments. See 1990 Pub. L. Ch. 764.

⁶ DEP July 25, 2007 Letter (providing comments on the Pre-Application Document) at 5. See **Exhibit 3**.

- Caucomogomoc Lake and Canada Falls Lake form a storage project on the West Branch tributaries of the Penobscot River (the Storage Project). The relevant reach of the West Branch tributaries is identified in subsection 467(7)(C)(2) as Class A with no identification of or exception for the Storage Project. Nonetheless, the Department identified the Storage Project as GPA in a December 1, 2004 WQC for this project.⁷
- The Upper Dam Development at Mooselookmeguntic Lake, located in the Androscoggin River Upper Drainage, is identified by the Department as a GPA water in its July 24, 2001 WQC,⁸ while subsections 467(1)(C)(1) and (2) define the waters that are inclusive of this project, *i.e.*, the Cupsuptic River and its tributaries and the Kennebago River and its tributaries (except for the dam at Kennebago Falls) as Class AA. Again, there is no exception language for this development in subsections 467(1)(C)(1) and (2) nor was the development identified.

Further, specifically regarding hydropower project water quality approval criteria, 38 M.R.S § 636(8)(A) provides:

The department *shall* reclassify the waters of the proposed impoundment to Class GPA if the department finds:

- (1) There is a reasonable likelihood that the proposed impoundment will thermally stratify;
- (2) The proposed impoundment will exceed 30 acres in surface area;
- (3) The proposed impoundment will not have any upstream direct discharges except cooling water; and
- (4) The proposed impoundment will not violate section 464, subsection 4, paragraph F [Maine's antidegradation policy].

(Emphasis added.)

The Leonard Lake impoundment meets all the above criteria. As acknowledged in the WQC Denial, Leonard Lake has 90 acres of surface area, thermally stratifies and does not violate the antidegradation policy.⁹ In addition, based on its operations, Leonard Lake has no upstream direct discharges.

The fact that an impoundment may be located on a stretch of river that is classified in section 467 as Class B, does not mean that it must be assumed to be of that same class if section

⁷ Great Lakes Hydro America, LLC, GLHA Storage Project, L-19665-32-G-N; 19666-32G-N; 19667-G-N; 19668-32-G-N, Water Quality Certification, December 1, 2004 at 13. See **Exhibit 4**.

⁸ FPL energy Maine Hydro LLC, Upper and Middle Dam Storage Project, Water Quality Certification, L-20204-32-B-N; L-2025-32-B-N (Corrected Order), July 25, 2001 at 6. See **Exhibit 5**.

⁹ Exhibit 1 at 12, 15, 45-46.

467 is silent as to whether it is included or excluded. Indeed, as the above GPA examples indicate, the converse is commonplace. Moreover, as indicated by the hydropower approval criteria in 38 M.R.S § 636(8)(A), Leonard Lake is precisely the type of waterbody that the Legislature indicated should be classified GPA. In sum, as a great pond, Leonard Lake is a GPA water and nothing in Section 467 specifically provides otherwise.

DEP Course of Conduct

It is unclear why the Department now insists that Leonard Lake is a Class B water. As shown in Attachment A to **Exhibit 7**,¹⁰ which consists of screen shots of the Department-maintained GIS database taken on March 18, 2020, since 1986 (when Maine significantly revised its classification system), the Department has consistently classified Leonard Lake as Class GPA, *i.e.*, in 1987, 1989, 1990, 1999, 2003, 2009, 2012, and 2020.

The status of Leonard Lake's classification has been discussed with the Department over the course of the Project's relicensing. The Department's opinion that Leonard Lake should be evaluated as a Class GPA waterbody was stated in correspondence dated February 21, 2013 which provided comments on Black Bear's Pre-Application Document as well as requested Impoundment Trophic State Studies for both Graham Lake and Lake Leonard.¹¹ Further, in a meeting held on June 16, 2015, DEP indicated that its determination that Leonard Lake is GPA was confirmed by an Assistant Attorney General.¹² This determination was presented in the Draft License Application filed with FERC on July 10, 2015¹³ and has consistently been maintained, including in the Final License Application filed on December 30, 2015¹⁴ as well as the FERC Draft Environmental Assessment dated November 2018¹⁵ and the FERC Final Environmental Assessment dated July 2019¹⁶ – to which DEP did not object. Significantly, Black Bear filed the Application, as well as a prior WQC application filed on April 9, 2018, with each application maintaining that Leonard Lake is a GPA waterway. No correspondence, save for the WQC Denial indicated any objection by the Department to the GPA designation for Leonard Lake, made any attempt to otherwise change it to Class B, or advised Black Bear there was any potential concern regarding non-attainment of Class B standards for DO for Leonard Lake waters.

Further, as it did with Graham Lake (which the Department agrees is a GPA waterbody) DEP required Black Bear to conduct a trophic state analysis of Leonard Lake pursuant to the requirements of 06-096 Chapter 581(6)(C). While, in a footnote to the WQC Denial, the Department acknowledges that Chapter 581(6)(C) applies to Class GPA waters and does not

¹⁰ Affidavit of Kelly A. Maloney. See **Exhibit 6**.

¹¹ Letter from Kathy Davis Howatt, Hydropower Coordinator, Maine Department of Environmental Protection to Ms. Kimberly D. Bose, Secretary, FERC, February 21, 2013 at 2. See **Exhibit 7**.

¹² Affidavit of Frank H. Dunlap. See **Exhibit 8**.

¹³ Draft License Application, July 10, 2015 at E-4-22 and E-4-29. See **Exhibit 9**.

¹⁴ Exhibit 2, Attachment 5.

¹⁵ FERC Draft Environmental Assessment dated November 2018 at 46. See **Exhibit 10**.

¹⁶ FERC Final Environmental Assessment dated July 2019 at 49. See **Exhibit 11**.

even mention non-GPA impoundments, DEP claims it had required a trophic state analysis, “based on the Department’s professional expertise and judgment” and the “size and nature” of Leonard Lake and that “no other trophic analysis for such non-GPA waters is expressly provided for by the Department’s rules.”¹⁷ This statement is inconsistent with the Department’s February 21, 2013 correspondence requesting trophic studies during the relicensing process and stating that Lake Leonard is a GPA water.¹⁸

Even assuming *arguendo* that Leonard Lake was reclassified in section 467(18) as Class B, it is not clear that this was done appropriately, given that the operation of the Project has not changed in over 40 years. Any DO conditions currently being experienced would have been present throughout the life of the Project, and, therefore, it should never have been reclassified as Class B. Black Bear has repeatedly asked the Department for the information it used to classify Leonard Lake as Class B, and, having received none, made a formal public records request for all documents and information related to the classification of Leonard Lake on March 17, 2020. As of this date, no documents have been received by Black Bear in response to that request.

In sum, the Department’s conclusion that Leonard Lake is a Class B water is not supported by section 467(18) or the DEP’s prior statements and course of conduct. Therefore, the Department’s effort to impose DO standards on Leonard Lake is arbitrary and capricious.

2. *The Department’s findings that Graham Lake and the Union River (between Graham Lake Dam and Leonard Lake) would not meet their respective standards, do not duly consider all information provided to the Department, are not reflective of the proposed operating conditions in Black Bear’s Application and, therefore, are arbitrary and capricious.*

a. *DEP Should Have Determined that Graham Lake Would Meet Applicable Standards*

The Department concluded that the Project’s operations, as proposed do not meet Class GPA standards for habitat and aquatic life in Graham Lake because “the habitat in Graham Lake cannot be characterized as natural.”¹⁹ The Department’s conclusion was based on Black Bear’s benthic macroinvertebrate (BMI) studies.

By way of background, 38 M.R.S. § 465-A provides that the habitat of Class GPA waters... must be characterized as “natural.” If a storage impoundment cannot meet the definition of “natural,” pursuant to 38 M.R.S. § 464(9-A)(D), the attainment standard defaults to Class C, recognizing that “(d)ischarges to Class C waters may cause some changes to aquatic life, except that the receiving waters must be of sufficient quality to support all species of fish

¹⁷ Exhibit 1 at 12, FN 8.

¹⁸ See Exhibit 7.

¹⁹ Exhibit 1 at 21.

indigenous to the receiving waters and maintain the structure and function of the resident biological community.” 38 M.R.S. § Section 465(4)(C).

In order to assess whether a hydropower impoundment is attaining the fish and aquatic life designated use, the “structure and function” of the impoundment’s “resident biological community” is compared to that of another waterbody. DEP interprets the governing statutes as requiring a “natural lake” baseline reference community for an impoundment, rather than another similar impoundment. As such, DEP’s use of a Class GPA “natural lake” baseline as the reference community in determining whether subject impoundments meet Class C criteria predisposes DEP to determinations of non-attainment for hydropower-related water storage facilities/reservoirs.

In its 2019 BMI study, Black Bear sampled the shallow, littoral BMI community in Graham Lake to assess the resident community.²⁰ Black Bear compared the community in Graham Lake to the community in Attean Pond, a natural, unregulated lake in western Maine. Attean Pond, while not in the same watershed as Graham Lake, has similar littoral habitats and its water is similarly colored. Because Attean Pond is a natural unregulated lake, its littoral community is classified as natural.²¹ Therefore, even if there are differences in the Graham Lake community, the issue is whether the community structure and function of the Graham Lake and Attean pond are similarly maintained.

The 2019 sampling results show the Graham Lake community as rich in distinct taxa (types or organisms). Organisms sensitive to environmental stress were present in the Graham Lake communities, in some cases abundantly so. Overall, the Graham Lake community was dominated by common and ubiquitous lake organisms. Comparisons of community metrics from Graham Lake to the unregulated Attean Pond show differences from the Graham Lake communities. However, even with those differences, the structure and function of the community in Graham Lake is still maintained.

DEP’s interpretation of Black Bear’s comparative waterbody analysis has simply confirmed that Graham Lake is a great pond that cannot meet the definition of “natural” because DEP requires Black Bear to compare Graham Lake’s “structure and function” of the BMI community to that of a “natural” lake (*i.e.*, Attean Pond). However, DEP has not confirmed whether Graham Lake would then meet the default Class C standards. It is unclear why DEP cannot then use its “professional judgement” to determine attainment of Class C standards for GPA waterways. The WQC Denial simply asserts that to be the case without explanation.

²⁰ See Exhibit 1, supplement dated January 30, 2019.

²¹ Brassua Hydroelectric Project Macroinvertebrate Survey, Initial Study Report (Normandeu February 2009). See **Exhibit 12**. Please note that the cover page incorrectly states 2008, while the footer of the text pages correctly states 2009.) This report was previously submitted to DEP in connection with the Brassua Dam Project and is referenced in the Application. See Exhibit 2, Supplement, 2019 Graham Lake Macroinvertebrate Community Study, Ellsworth Maine (Leeper, January 30, 2020) at 2 and 5.

b. DEP Should Have Determined that the Union River Would Meet Applicable Standards

In its WQC Denial, the Department found that the habitat downstream of Graham Lake Dam has a diminished capacity to support the aquatic life expected to exist there and, hence, is impaired, based on BMI studies conducted by Black Bear in 2014, 2015, and 2019 and analyzed by the Department using a linear discriminant model that showed that the Union River at the outlet of Graham Lake Dam did not meet Class C standards.²²

In the 2019 BMI study, Black Bear found that the community was dominated by filter-feeding caddisflies but that sensitive stoneflies were absent. The filter-feeder dominance points to organic enrichment (more suspended food) that allows them to flourish. This is a common phenomenon downstream of lake outlets and impoundments and is why the regulations provide that professional judgement can be used to raise a finding by one class at sites downstream of lake outlets. 06-096 Chapter 579, Section G. Apparently, it is the absence of stoneflies that resulted in the Department's model returning a score of Non-Attainment for any water quality class. At sites downstream of lake outlets such as the Union River, however, community modelling will generally show attainment of Class C standards even if very few stoneflies are present. If two stoneflies were present in the Black Bear samples, the model would be expected to indicate that the Union River attained Class C standards. Professional judgment (because the site is downstream of a lake outlet) would then be used to raise the finding to the river's statutory Class B.

c. Allegations by DEP that Black Bear failed to submit certain reports and data are incorrect.

In the WQC Denial, the Department makes the following statements with regard to its evaluation of Graham Lake (Section 4(B)(3) at 18-19) and the Union River (between Graham Lake and Leonard Lake) (Section 4(B)(5) at 20-21):

The Applicant submitted its 2019 [BMI] study report but *did not submit the underlying data* to the Department. The Applicant also *did not submit the report or data associated with Attean Pond*

The Applicant *did not submit the data it collected in 2019* to the Department, limiting the Department's ability to evaluate the conclusions of the report and prevent the Department from attempting to use its linear discriminant model to assess whether the data support a finding that the aquatic life and habitat standard is met. Further, *the Applicant did not provide the Attean Pond study* used as a baseline or scientifically explain the rationale for its selection as a baseline. This also limited the Department's ability to meaningfully review the conclusion reached by the Applicant in its 2019 [BMI] report. Ex. 1 at 20-21.

²² Exhibit 1 at 25.

(Emphasis added.)

The foregoing statements are incorrect. In fact, Black Bear sent the above described reports and data to the Department.²³ The following summarizes these transmittals:

Union River -

- Union River BMI data – submitted to DEP via email on December 19, 2019 (for DEP’s linear discriminant model).
- Union River BMI Study Report – submitted to DEP via email on January 31, 2020 (DEP’s linear discriminant model report included in Appendix).

Graham Lake –

- Graham Lake BMI Study Report (Leeper) – submitted to DEP via email on January 31, 2020. (BMI data tables included in Appendix; summary of Normandeau 2009 Attean Pond report is included in document text).²⁴
- Graham Lake BMI Study data – submitted to DEP via email on March 10, 2020.

Attean Pond –

- Attean Pond/Brassua Lake BMI Comparison Study Report – submitted to DEP as part of the Brassua relicensing Initial Study Report on February 5, 2009 (BMI data tables included in Appendix).²⁵
- Attean Pond BMI Study data – submitted to DEP via email on March 10, 2020.

The “Attean Pond Study” referenced by DEP, is the Normandeau 2009 report that was submitted to DEP on February 5, 2009 in connection with the Brassua Dam Project.²⁶ It has been referenced in numerous other reports to DEP, including in the Application’s January 31, 2020 supplement.²⁷ Thus, for DEP to assert now that the Department did not have that report is, to say the least, surprising.

d. The effect of proposed operating conditions was not considered by the Department.

The BMI sampling events were conducted under current operating conditions and are not reflective of conditions under Black Bear’s proposed operating conditions as stated in its March 21, 2019 application for Water Quality Certification. Under current license conditions, Black

²³ See Exhibit 13.

²⁴ See Exhibit 2, Supplement, 2019 Graham Lake Macroinvertebrate Community Study, Ellsworth Maine (Leeper, January 30, 2020) at 5.

²⁵ Id.

²⁶ See Exhibit 12. The February 9, 2009 letter from FPL Energy to FERC shows DEP as copied. The Normandeau report is referenced at Volume II, Section II (Initial Study Reports) as the “Macroinvertebrate Study.”

²⁷ See FN 21 and Exhibit 12.

Bear may fluctuate Graham Lake 10.8 feet, from elevations 93.4 to 104.2 msl. Under Black Bear's proposed operating conditions, Graham Lake fluctuations would be limited to 5.7 feet, from elevations 98.5 to 104.2 msl. Although the restricted drawdown would be expected to benefit BMI communities, in its denial the Department evidently did not attempt to account for the reasonably foreseeable benefits of Black Bear's proposal.

An important benefit of reducing the drawdown in Graham Lake is to reduce the amount of turbidity in Graham Lake as well as downstream of the Union River. As FERC noted in its July 29, 2019 Final Environmental Assessment, "settling sediment reduces the quality of cobble and gravel substrate in lotic and lentic habitats by filling in the interstitial spaces, which reduces the quality of macroinvertebrate habitat In turn, the reduction in habitat quality can reduce the abundance of macroinvertebrates and alter the species composition of the macroinvertebrate community."²⁸

FERC further analyzed the potential benefits to macroinvertebrates of Brookfield's proposed drawdown:

The alternative [5.7-foot] operating range that Black Bear Hydro included in its WQC application would protect 8.4 times the littoral habitat than the existing 10.8-foot operating range Allowing a greater percentage of the littoral zone to remain permanently wetted would provide three important benefits for fish and other aquatic organisms. First, it would increase the amount of juvenile, adult, and foraging habitat available to fish on a more consistent basis. *Second, additional persistent aquatic habitat availability could enhance populations of macroinvertebrates*, a valuable food source for fish. Third, a larger and more stable littoral zone would allow existing beds of aquatic vegetation, which are currently rare in Graham Lake . . . to expand over time and also allow new areas to be colonized by aquatic vegetation. *Submerged aquatic vegetation provides habitat for aquatic macroinvertebrates and fish . . . stabilizes sediments, reduces resuspension of sediment, and reduces turbidity . . . which could further increase the depth of Graham Lake's littoral zone.*²⁹

(Emphasis added.)

Given that the BMI communities were relatively close to attainment under existing conditions, it was unreasonable, a poor exercise of professional judgment, and arbitrary and capricious for the Department not to have considered the likely benefits to those communities of Black Bear's proposal to limit its drawdown operating range. Further, the Department is fully able to condition a WQC to require monitoring measures to ensure that future environmental measures result in attainment of water quality criteria.

²⁸ FERC Final Environmental Assessment July 2019 at 89. See Exhibit 11.

²⁹ FERC Final Environmental Assessment July 2019 at 102. See Exhibit 11.

IV. Existing Record/Supplemental Evidence

A list of the exhibits to this Appeal is provided in **Attachment A**. These exhibits largely consists of correspondence with the Department, State of Maine GIS mapping data maintained by DEP, materials in the FERC docket and other publicly available information. As of this writing, Black Bear has not been able to determine whether any of the documents listed in Attachment A constitute supplemental evidence. While a representative of Black Bear would otherwise have had an opportunity to review DEP's files on this matter, on March 18, 2020, the Department announced that, due to the threat of COVID-19, it would close its offices to the public effective March 19, 2020.³⁰ Further, while Black Bear made a request for public records concerning the classification of Leonard Lake on March 17, 2020, DEP has acknowledged but not completed its response to this request. Thus, it has not been possible for Black Bear to determine the scope of the administrative record that the Department relied upon in making the WQC Denial determination or the extent to which DEP reviewed or relied upon much of the information contained in the FERC docket related to the relicensing of the Project. Therefore, as a precaution, Black Bear, is requesting that all documents listed in Attachment A be considered, if applicable, supplemental evidence, as well as incorporating by reference as supplemental evidence the entirety of the documents that are present in the FERC docket.

To the extent the documents in Attachment A constitute supplemental evidence, such supplemental evidence meets the criteria of Chapter 2 of the Department's Rules concerning administrative matters, including appeals of Commissioner License Decisions, 06-096 CMR Section 24(D), in that these records are relevant and material. Pursuant to Section 24(d)(2)(a), the person seeking to supplement the Department's administrative record must have shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time. Many, if not all of the documents referenced in this Appeal were available to the Department as part of the FERC relicensing process in addition to the WQC application process. Because the WQC Denial was issued on March 19, 2020, the submittal of any documents referenced in this Appeal that are not in the existing administrative record should be considered timely, as it would be unreasonable for Black Bear to have identified and submitted those documents in less than 30 days, especially given that DEP's files could not be made available under current conditions and it is (at best) unclear what records constituted the entirety of the Department's files on, or the administrative record for, this matter.

V. Evidence to be Presented

Black Bear anticipates presenting evidence on the history of water classification of Leonard Lake as GPA by the Department and technical information regarding studies conducted for assessment of the BMI communities in Graham Lake and the Union River (between Graham Lake and Leonard Lake).

³⁰ "DEP limits public walk-in access to offices," March 18, 2020. See **Exhibit 14**.

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The evidence will be in the form of documents in the record and supplemental evidence presented (including the exhibits referenced herein), testimony of subject matter experts and witnesses relative to the issues identified above, demonstrative exhibits based upon information in the record or supplemental evidence, and other information relevant to the issues presented.

VI. Remedy

For the reasons articulated above, Black Bear requests that the Board:

- A. Accept jurisdiction over this appeal and hold a public hearing on the issues raised in the appeal.
- B. Withdraw the WQC Denial and issue a WQC finding that (1) Leonard Lake meets the applicable GPA water quality standards and (2) the Union River between Graham Lake and Leonard Lake meets applicable aquatic life and habitat criteria.

Black Bear looks forward to pursuing this appeal. That being said, in the event the Department seeks to pursue an alternative dispute resolution approach pursuant to the Chapter 2 rules to resolve the issues raised in this appeal, Black Bear would consider entering into such a process. Black Bear reserves all rights available to it under state and federal law, including pursuit of any claims Black Bear may have before FERC with respect to the WQC Denial.

Please contact me should you have any questions.

Very truly yours,



Sharon G. Newman

SGN:bh

Attachments (16)

cc: Gerald Reid, Commissioner, DEP (w/encl.)
Kimberly D. Bose, FERC (w/out encl.)

ATTACHMENT A

Exhibit List Black Bear Appeal of WQC Denial

1. Denial of Water Quality Certification, dated March 19, 2020.
2. Application for Water Quality Certification, dated March 21, 2019, and Supplemental Materials to Application, submitted January 31, 2020.
3. July 25, 2007 Letter from Dana Murch, Maine Dept. of Environmental Protection, to Frank Dunlap, re FLP Energy Maine Hydro LLC, Comments on Pre-Application Document and Study Requests.
4. Great Lakes Hydro America, LLC GLHA Storage Project, L-19665-32-G-N; 19666-32-G-N; 19667-G-N; 19668-32-G-N, Water Quality Certification, December 1, 2004.
5. FPL Energy Maine Hydro LLC, Upper and Middle Dam Storage Project, Water Quality Certification, L-20204-32-B-N; L-2025-32-B-N (Corrected Order), July 25, 2001.
6. Affidavit of Kelly A. Maloney, dated April 16, 2020.
7. Letter from Kathy Davis Howatt, Hydropower Coordinator, Maine Dept. of Environmental Protection to Ms. Kimberly Bose, Secretary, FERC, February 21, 2013.
8. Affidavit of Frank H. Dunlap, dated April 16, 2020.
9. FERC Draft License Application, FERC No. 2727 dated July 10, 2015.
10. FERC Draft Environmental Assessment dated November 2018.
11. FERC Final Environmental Assessment dated July 2019.
12. Brassua Hydroelectric Project (FERC No. 2615) Macroinvertebrate Survey, Initial Study Report, Normandeau Association, February, 2009.
13. E-mail from Paul Leeper dated December 19, 2019 re Union River Bug Data; E-mail from Paul Leeper dated March 10, 2020 re Graham Lake Bug Data; e-mail from Paul Leeper dated March 10, 2020 re Attean Pond Bug Data; Letter to Kimberly Bose dated February 5, 2009 re Brassua Initial Study Report; E-mail from Kelly Malone to DEP dated January 31, 2020 re Ellsworth Final BMI Reports.
14. DEP limits public walk-in access to offices.