



May 26, 2026

VIA REGULAR AND ELECTRONIC MAIL

Ms. Laura Paye
Hydropower Coordinator
Bureau of Land Resources
17 State House Station,
Augusta, Maine 04333-00017

RE: Comments on Draft Water Quality Certification for Brookfield Renewable Energy Group, Black Bear Hydro Partners LLC's, *DEP Application #L-13256-33-M-N, Ellsworth Hydroelectric Project*, Application for §401 State Water Quality Certification, (FERC Docket P-2727) (a re-application of a previously denied WQC).

Dear Ms. Paye:

On behalf of the Downeast Salmon Federation ("DSF"), please accept these comments for inclusion into the record for the Maine Department of Environmental Protection's ("MDEP") Draft Water Quality Certificate ("WQC") issued in connection with the latest re-submitted application ("Re-application") of Black Bear Hydro Partners, LLC ("Applicant" or "Brookfield"¹) to receive a water quality certification ("WQC") for its Union River hydropower project (Applicant's Ellsworth and Graham Lake dams collectively, "the Project").

As stated in DSF's September 15, 2025 Comments to the Re-application, DSF has a direct interest in this certification process. The issuance of a WQC, as part of the FERC re-licensing for this project, will directly affect each of our members' aesthetic and recreational use of the Union River, and our interest in restoring the fisheries and enhancing the biodiversity of the river. Specifically, DSF has also identified a specific individual DSF member, who among other members, is and will suffer a particularized injury should the Re-application be approved as applied for or with conditions that do not satisfactorily address environmental, fisheries and other concerns DSF has documented throughout 2 (two) Brookfield Applications.² As DSF has also previously stated, DSF's staff and members collectively have decades of experience working to understand, improve, and protect the conservation, scenic, recreational, biodiversity, fisheries and quality of water resources in Maine and the part of the state impacted by this Project.

Historical Perspective

¹ Black Bear Hydro Partners, LLC is a wholly owned subsidiary of Brookfield Renewable Partners. Brookfield is a publicly traded limited partnership that, through its various direct and indirect subsidiaries, owns and operates over thirty hydropower projects in Maine as well as thousands of other hydropower projects worldwide.

² See DSF's September 15, 2025 Comments and November 6, 2019 Comments attached in their entirety as Attachment A to the September 15 filing.

Collectively the stakeholders of this process are now over 6 (six) years into attempting, within the state WQC process, to address the concerns DSF and others have set out in detail with respect to the environmental impacts of the continued operation of Brookfield's Ellsworth and Graham Lake dams and what conditions a WQC must have to permit Brookfield to operate a licensed dam in compliance with state water quality standards. During that time, annual fish kills, ongoing dissolved oxygen ("DO") non-compliance, and documented extreme drawdown and turbidity events, have occurred and to some extent continue to occur with material negative effects on water and habitat quality. Safe, timely and effective passage for known indigenous species, mandated by law, has not occurred. Stabilization of flows and water levels for Graham Lake remain an issue with only Brookfield's vague assurance (coupled with numerous exceptions) that the new flow regime in the Re-application will address the drawdown effects affecting landowners and other stakeholders in the Project Area.

DSF previously detailed some of the material changes that had occurred during the litigation delay. These changes continue to support the concerns DSF has asserted as well as the underlying reasoning in the Draft WQC denial and included:

1. The presence of American Shad continues to be verified in the Project Area, including by Applicant's own data.
2. New data, modeling and performance standards on indigenous species, including American Shad, have been developed.
3. DEP has issued its upstream 2024 Green Lake WQC, which validated both the historical presence of American Shad and other indigenous species and the current existence of meaningful amounts of habitat available to support these species were access to this habitat made available through fish passage at the Ellsworth dam.
4. MDMR, in August 2025, has provided MDEP with extensive Comments to the Re-application which provide for a comprehensive five-year indigenous fishway prescription (that includes specific provisions for the American Shad).³

Brookfield's actions and responses to the first WQC denial was about a five year litigation path which resulted in confirmation that the riverine impoundment above Ellsworth dam referred to as Leonard Lake was still in fact Class B. Meaning they remain out of compliance and in violation of state water quality standards on DO there. There has been, to DSF's knowledge, no new testing or data to address the many numerical and narrative water quality standards that have been detailed by DEP and others.

³ On August 8, 2025 the Maine Department of Marine Resources ("MDMR") submitted extensive and well-reasoned comments on Brookfield's Re-application (the "2025 MDMR Comments"). The consequences of delay are discussed in extensively in the context of MDMR's fishway prescription and the need for a five-year time frame to implement fish passage.

Instead, in response to well-reasoned comments from MDMR in this Re-application Brookfield commented in opposition, implying MDMR had no legal authority to impose more restrictive fisheries conditions than already prescribed by federal agencies,⁴ a position at odds with current law. Not *once*, has Brookfield approached the collective stakeholders to open a dialog for the purpose of coming to some sort of agreement that would resolve the various concerns or provide alternative paths for Brookfield.

Despite this operational backdrop and Brookfield's approach DFS urged DEP to approve Brookfield's Re-application with conditions, if adopted would address many of the issues that plague this operation.

DSF is now in possession of DEP's well-reasoned, extensive and legally supportable Draft Water Quality Certificate which denies for a second time the Brookfield's WQC Re-application.

Observations on DEP's Choice of WQC Denial versus Approval with Conditions.

1. WQC Approval with Conditions.

The primary benefit of an approval with enforceable conditions is that it gives the dam owner/operator a pathway forward that, if agreed upon by the owner/operator both allows for continued, licensed operation of the dam and remedies for non-compliance thus also addressing stakeholder concerns. The main disadvantage is that the owner/operator may contest the conditions through a well-known state administrative and judicial appeals process. This will cause further delays, continued non-compliance, and without FERC intervention, a potentially endless cycle of WQC re-applications depending on the outcome.

To potentially avoid this outcome, DSF proposed in its September 25, 2025 Comments the following conditions in connection with WQC approval:

1. The continuing need for immediate adequate, volitional upstream and downstream fish passage that will accommodate the American Shad⁵ and other indigenous species.⁶
2. Other WQC conditions that ensure the attainment of Class B DO standards upstream of Ellsworth Dam;

⁴ Brookfield 2025 Comments at __.

⁵ It is worth stating again that even if it could be argued that the *other* indigenous species MDMR discusses in its 2025 Comments are adequately addressed by the NOAA/USFW fishway prescription or in FERC's July, 2019 final EA, the omission of *any* federal analysis or provision for American Shad means that under the federal fishway prescription and the final EA, there is simply no accommodation for this known, specific indigenous species. This underscores the need for safe, timely, and effective volitional fish passage for this species and the DEP/MDMR obligation to ensure such passage be installed immediately.

⁶ DSF September 25, 2025 comments at __. The specifics included a phased, well known approach utilizing a fish counter.

- a. Applicant must immediately implement and install a suitable aeration system⁷ in Leonard Lake, approved by MDEP and demonstrated to bring the Project into compliance with Maine Water Quality standards, including Class B DO standards.
 - b. To ensure that the operations continue to attain compliance with Class B standards, Applicant must also develop a DO Compliance Plan (“DOCP”) within one year of license issuance in consultation with MDEP and file it with the Commission for approval. The DOCP will describe the methods Applicant will employ to ensure dissolved oxygen levels in Leonard Lake, immediately upstream of Ellsworth Dam comply with Maine State Water Quality Numeric DO Standards for Class B waters.
 - c. During high temperature, low dissolved oxygen periods in the summer, Applicant must implement some additional method - e.g. additional direct injection or turbine venting, to maintain DO compliance levels if the aeration system alone cannot.
 - d. The methods used by Applicant to meet the dissolved oxygen standard in Leonard Lake will apply best management practices that will not increase water temperatures beyond the ambient water temperature from Graham Lake inflow or in reach immediately below Ellsworth Dam to prevent triggering water quality antidegradation issues.
 - e. If air or oxygen injections are used to meet Water Quality Standards, compressed air or oxygen will be used, not ambient air for injections since ambient air temperatures in the summer can be much higher than the water temperature.⁸
3. Other WQC conditions that ensure continuous compliance with Applicant’s proposed Graham Lake water level regime;
- a. Applicant shall convene an annual meeting with, at a minimum, the Maine Department of Inland Fisheries and Wildlife (“MDIFW”), MDEP, United States Fish and Wildlife Service (“USFWS”), and interested persons no later

⁷ As previously stated, there are known engineering options that may allow Black Bear to successfully operate the Project *and* comply with Maine’s water quality laws, including installation of a “deep gate” in the Ellsworth Dam spillway to allow the discharge of poorly oxygenated water in the impoundment during the summer months, or installing of an “in-stream aerator” or oxygen injection system (as Applicant appears to propose) to add DO to the portions of the impoundment waters that are poorly oxygenated. Furthermore, if Black Bear concludes it is simply not possible to operate the Project and achieve compliance with Class B DO requirements, both state and federal law contemplate such a possibility and provide a remedy that will allow the Project to continue. Black Bear can pursue the legal process known as “use attainability analysis.” This process, established by the Legislature and the Clean Water Act, enable Black Bear to request that the Legislature “downgrade” the classification of Leonard Lake after Black Bear conducts a BEP-supervised use attainability analysis (UAA) and demonstrates that attainment of Class B is not possible. *See* 38 M.R.S.A. § 464(2), (2-A). To DSF’s knowledge there have been no discussions or proposals in this regard.

⁸ DSF September 25, 2025 Comments at ___.

than the first of April to review its reservoir refill strategy taking into consideration its winter reservoir drawdown regime, long-range spring and summer precipitation predictions; with consideration of how its water management plan will meet the late spring refill requirement of reaching the proposed minimum flow regime or higher and be protective of upstream and downstream Union River watershed environmental resources including a stabilized lake level for Graham Lake.⁹

4. Other conditions and structural modifications as recommended by DSF and MDMR.¹⁰

These proposed conditions were intended to provide a legally supportable pathway forward for both Brookfield and the stakeholders in this Project to reach one of perhaps several mutually satisfactory outcomes that would address the legitimate concerns of the stakeholders and Brookfield's continued operation of the dams. It would also, assuming these conditions are acceptable to Brookfield, derail the possibility of endless litigation delay. As set forth below, DEP concluded denial of the WQC Re-application was its preferred approach and DSF is also informed that MDMR does not intend to further comment on the Re-application.

2. WQC Denial.

WQC Denial, as DEP has set forth in its Draft WQC, prevents the owner/operator from obtaining its federal FERC license to operate. That outcome presents the dam owner/operator with the prospect of dam surrender and removal. The primary disadvantage is potential litigation by the owner/operator to avoid this fate, and, as before, continuing delay, continued non-compliance, and without FERC intervention, a potentially endless cycle of WQC re-application depending on the outcome.

Notably in both cases there is potential for the unconscionable delays DSF has witnessed in this FERC relicensing and WQC process. Disturbingly, the tone of Brookfield's comments to date suggest that litigation over fisheries and perhaps other issues remains a very real possibility.

DSF takes no issue with the details of DEP's well thought out and legally supportable Denial, *except* for there being no explicit acknowledgement that in the case of known indigenous species, volitional fish passage is *immediately* required.¹¹ DSF's issue with the proposed five year timetable is that from historical experience (*see e.g.* the 2004 Saco River Settlement Agreement fishway prescriptions and current timeframe extensions) even abbreviated fishway prescriptions can be delayed well beyond their initial objectives and here the delays have already

⁹ DSF September 25, 2025 Comments at ____.

¹⁰ See generally MDMR Comments at _____. DSF September 25, 2025 Comments at _____.

¹¹As stated in earlier comments regarding the timing of passage implementation, "Agency decisions (beginning with the Presumpscot certifications in 2003) have granted delays to dam owners in constructing fish passage for indigenous species at dams that lack such passage if a *rational, fisheries-based reason existed for granting a delay.*" (emphasis supplied). Here there continues to be no rational, fisheries-based reason to delaying implementation of volitional passage, and Brookfield has not offered any justification for further delay.

been unconscionable.

Here, as DSF has previously stated – “although MDEP has the discretion to determine the timing of when fish passage for indigenous sea-run shad must occur, there is no rational basis, nor has any been offered, for departing from past MDEP precedents and not ordering the Applicant to immediately design, install and then operate upstream passage for shad at the Ellsworth Dam. DSF’s proposal involves a phased (based on a counter), and measured approach to ensure minimal fish passage requirements are met in a timely way. MDEP has no choice for passage of the American Shad at the Union: it is indigenous (uncontested), it is present (uncontested), the federal prescriptions do not address it (uncontested) and there is no evidence whatsoever that the federal fish passage prescription is or will be effective for achieving safe, timely and effective upstream and downstream volitional passage for shad. MDEP, by state water quality laws and precedent, must exercise its fish passage authority and require upstream and downstream volitional fish passage for the American Shad at the Ellsworth and Graham Lake Dams.”¹² As such, DSF continues to request that DEP consistently apply **and enforce Maine’s water quality criteria** -- and the precedents contained in its previous certifications -- to the Union River.

Conclusion

It is well settled under the Clean Water Act that DEP has the legal authority to (1) deny the application, (2) approve the application, or (3) approve the application with conditions. DSF further asserts that it is similarly well settled that DEP may impose such fisheries conditions, and flow regimes it may deem suitable for water quality compliance in connection with an a WQC approval. Here, for all the reasons well stated within the draft, the Draft WQC denies Brookfield’s second attempt at water quality certification. It is unclear where, if left unchanged, this denial will leave the resolution of critical issues DSF and others have raised, particularly with regarding indigenous species and ongoing water quality non-compliance, and that uncertainty is a concern.

Although it remains DSF’s hope that this DEP action will set the stage for meaningful discussions with Brookfield as to what mutually agreeable pathways going forward might be available, and although DSF supports the underlying reasoning and rationale behind the DEP denial, it remains to be seen whether and to what extent Brookfield chooses to the take opportunity or alternatively continues its litigious approach which will only foster further delay and a worsening of conditions.

DSF understands that enforcement of violations of FERC licensed operations rests in large part with FERC. What appears less clear is the extent of state enforcement when specific water quality standards and laws are being continually violated by the licensee or during the relicensing process. DSF asserts that DEP has enforcement authority, independent of FERC to enforce its own state law. It would also seem reasonable that DEP notify FERC of ongoing state law violations and open a dialogue as to how best to bring the licensee back into compliance, perhaps with a cooperative state/federal memorandum of understanding or similar means so that

¹² DSF September 15, 2025 Comments at ___.

during the interim time of relicensing and appeal there are no ongoing violations of state law.¹³ Accordingly, in the interim, as a matter of state water quality enforcement and compliance – unless and until Brookfield makes clear its intentions with respect to this Water Quality Certification and its continued operations - DSF requests that DEP consult with FERC and impose the following interim conditions as state law compliance enforcement measures:

(1) Absent a rational basis for further delay, requiring immediate upstream and downstream volitional passage for indigenous American shad from the Applicant or at least consistent with the 2025 MDMR five-year fishway design and implementation schedule prescription recommendations.

(2) Absent any assurances of future or interim compliance with numerical DO and macroinvertebrates, that DEP require conditions to ensure that aeration measures are installed to demonstrate periodically the attainment of Class B DO standards in Leonard Lake.

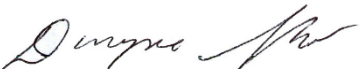
(3) In the event DEP issues a certification with terms and conditions that can ensure these existing water quality violations are corrected, that these terms and conditions also include (i) at a minimum annual multi-agency and stakeholder involvement in the event Brookfield deviates from its proposed water drawdown range for Graham Lake; (ii) the installation of a plunge pool at the base of Ellsworth Dam; and (iii) consistent effectiveness measures and testing to provide reasonable assurances of future compliance.

Brookfield has thus far shown no material interest in complying with state water quality standards or fisheries law and the delay due to appellate litigation has been egregious – allowing Brookfield to continue to operate while knowingly violating state law. Absent a WQC with strong, enforceable conditions, Brookfield’s actions to date, including a reluctance to engage with stakeholders, is forcing a more strident state law enforcement approach so that in the event of further delay - steps can at least be taken on an interim basis by DEP to bring Brookfield into compliance until the exact terms of the WQC can be agreed upon.

DSF has and will continue to support an outcome at Ellsworth that resolves its environmental and fisheries concerns as well as the concerns of other stakeholders and is committed to finding alternatives that provide mutually agreeable, legally defensible and environmentally sustainable outcomes.

¹³ DSF notes that the recent appellate litigation occurred with 2 (two) known DO violations that were uncontested by Brookfield at court. That would be in addition to possible macroinvertebrate and DO non-compliance elsewhere in the Project Area as well as the aforementioned Shad passage volitional issues.

Respectfully submitted by the undersigned this 25th day of May 2026.

By:  _____

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