
**STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Docket No. Ken-25-465

BARBARA FRAUMENI and A. MICHAEL FRAUMENI,

Petitioners-Appellants,

v.

**DEPARTMENT OF ENVIRONMENTAL PROTECTION and
MTN SAND & GRAVEL,**

Respondents-Appellees.

**BRIEF OF PETITIONERS-APPELLANTS BARBARA FRAUMENI
and A. MICHAEL FRAUMENI**

**APPEAL OF ENTRY OF ORDER ON PETITIONERS' RULE 80C APPEAL
BY KENNEBEC COUNTY SUPERIOR COURT**

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I. PETITIONERS' STATEMENT OF THE FACTS AND PROCEDURAL HISTORY OF THE CASE.

A. Introduction.

This appeal asks the Court to review the Maine Department of Environmental Protection's decision to approve and deem "complete" MTN Sand & Gravel's Notice of Intent to Comply ("NOITC") for operation of a quarry in Dresden, Maine, and to declare that the State statute governing "performance standards" for quarries means what it plainly states: that a quarry may not be located "in an area listed pursuant to the Natural Areas Program, Title 12, section 544." 38 M.R.S. § 490-Z(1). Instead, under Section 490-Z(1), the Maine Department of Environmental Protection ("MDEP") may only allow quarry excavation to occur under Section 490-Z(1) "as long as a permit is obtained pursuant to article 5-A," which is the Maine Natural Resources Protection Act ("NRPA"). *Id.*

In this case, MDEP admits that the affected area at issue—the land in Dresden that MTN Sand & Gravel intends to blast and excavate as part of its proposed quarry operations—is located within the Kennebec Estuary Focus Area, which is an area of statewide ecological significance as delineated by the Maine Department of Agriculture, Conservation and Forestry's Natural Areas Program. Despite this acknowledgement, MDEP takes the position that MTN Sand & Gravel can operate a quarry within this Focus Area without any review whatsoever under

NRPA. Consistent with that position, MDEP issued a placard authorizing MTN to operate its proposed quarry in the manner and location chosen by MTN Sand & Gravel. If allowed to stand, this placard will allow MTN Sand & Gravel to operate its quarry in direct violation of statutory performance standards which expressly prohibit its operation, and to do so without any substantive NRPA review.

The primary issue in this appeal is one of pure statutory interpretation, including whether MDEP, and subsequently the Superior Court in affirming MDEP's decision, erred in their interpretation of Section 490-Z(1). The plain language of Section 490-Z is contrary to their interpretation. MDEP's decision, and the Superior Court's judgment affirming that decision, should be reversed and this Court should order the Department to vacate MTN's permit.

B. Background Facts and Procedural History.

1. Locations of Properties Within Relevant Protected Areas.

Petitioners A. Michael Fraumeni and Barbara Fraumeni (the "Fraumenis") are the owners of a parcel of real estate located at 770 Middle Road in Dresden, as identified on Dresden Tax Map 7, Lot 49 (the "Fraumeni Property"). (A. 33, 169.)¹ Party-in-Interest MTN Sand & Gravel ("MTN") owns a parcel of real estate located at 778 Middle Road in Dresden, as identified on Dresden Tax Map 7, Lot

¹ Although the Fraumenis cite to provisions of the agreed upon administrative record in support of their factual recitation in this brief, and although parties to an administrative appeal are generally required to defer to factual findings made by administrative agency's that are supported by the administrative record, as argued below MDEP made literally no factual findings in support of its decision, rendering the task of determining which facts are considered settled for purposes of this appeal difficult, if not impossible.

48 and Tax Map 7, Lot 48A (the “MTN Property”), that directly abuts the Fraumeni Property. (A. 30-32.) The MTN Property and the Fraumeni Property are located within an area delineated as a “critical habitat” for the Gulf of Maine Distinct Population Segment of Atlantic salmon, a species listed as endangered under the Endangered Species Act. (A. 171.) Further, both properties abut the Nequasset Brook, which has been identified as a Modeled Rearing Habitat for the endangered Atlantic salmon. (*Id.*) Of particular relevance here, the MTN Property and the Fraumeni Property are also located within the Kennebec Estuary Focus Area, an area of statewide ecological significance as delineated and designated by the Maine Department of Agriculture, Conservation and Forestry’s Natural Areas Program (“MNAP”). (A. 170, 177-85.)

2. MTN’s First Quarry Placard Attempt.

MTN first filed a Notice of Intent to Comply (“NOITC”), in accordance with 38 M.R.S. § 490-Y, with MDEP on April 5, 2023, thereby signaling its intent to excavate and develop a quarry greater than one-acre in size at the MTN Property. (Rule 80C Administrative Record (“AR”) 3-5.) On June 29, 2023, MDEP determined that MTN’s initial NOITC was “complete” and issued a placard to MTN, which authorized MTN to excavate the quarry subject to the performance standards in 38 M.R.S. § 490-Z. (AR 11.) However, based on their assertion that the NOITC was submitted to MDEP without proper notice to abutting property

owners, in violation of 38 M.R.S. § 490-Y, the Fraumenis challenged the placard issued to MTN by filing a Rule 80C petition in the Lincoln County Superior Court on November 30, 2023. (*See Fraumeni v. Maine Dept. of Env. Protection, et al.*, Docket No. WISCSC-AP-2023-12 (“*Fraumeni v. DEP I*”). MTN agreed to surrender its placard to MDEP, which it did on January 3, 2024. (AR 11.) MDEP accepted the surrender of MTN’s placard on January 10, 2024. (AR 11-12.) The parties then agreed to dismiss the pending appeal. *See Fraumeni v. DEP I*.

3. MTN’s Second Quarry Placard Attempt.

On January 30, 2024, MTN requested a “pre-filing” meeting with MDEP to discuss its anticipated resubmission of a NOITC. (AR 13.) MTN then filed a second NOITC with MDEP, dated February 5, 2024, on or about February 12, 2024. (A. 28-162.) In doing so, MTN attested that it intended to comply with the relevant performance standards governing quarries. (A. 59) As part of its February NOITC, MTN sought to proceed with the first phase of a five-phase, fifty-acre quarry. (A. 31.) The NOITC submitted to MDEP on February 12, 2024, is the operative NOITC in this pending appeal.

On February 5, 2024, in advance of its submission of the NOITC, MTN provided notice to the Fraumenis of the NOITC to be filed with MDEP. (A. 46.) On February 12, 2024, the Fraumenis submitted a comment letter to MDEP, articulating numerous issues that they assert exist with respect to the size, location,

and appropriate permitting connected with MTN's proposed quarry. (A. 168-85.) Among other things, the Fraumenis alerted MDEP to the fact that MTN's NOITC sought to develop a quarry in a designated MNAP Focus Area. (A. 168-70.) The Fraumenis requested that MDEP require MTN to proceed under the NRPA permitting process that would require MTN to prove that its quarry complies with statutory performance standards, rather than allowing MTN to simply submit a NOITC along with assurances that it would comply with the statutory performance standards, but without any proof that such has occurred or will occur. (A. 173.)

As stated in the Fraumenis' comment letter, by allowing MTN to proceed under the NOITC process in a MNAP area, any placard issued by MDEP "would immediately place MTN in violation of the relevant performance standards set forth in section 490-Z(1), even before any development or excavation of the 'affected land' occurs." (*Id.*) The Fraumenis attached to their comment letter information from MNAP about the Kennebec Estuary Focus Area. (A. 177-85.)

Also on February 12, after receipt of the Fraumenis' comment letter, Erich Kluck of MDEP asked Lisa St. Hilaire, an information manager from MNAP, if the location of MTN's proposed quarry was "within the MNAP?" (A. 210.) On February 13, 2024, Mr. Kluck informed Ms. St. Hilaire that, in his view, "[a] determination of any MNAP areas that might be impacted and any buffers" were necessary "to determine if the quarry can be permitted." (*Id.*)

By way of a March 1, 2024 internal memo from Ms. Hilaire to Mr. Kluck, Ms. St. Hilaire expressed her opinion that there were no known “rare botanical features” at the project site, but noted that the information in the memo was “not a substitute for on-site surveys.” (A. 212.) She recommended that MDEP “have the site inventoried by a qualified field biologist to ensure that no undocumented rare features are inadvertently harmed.” (*Id.*) Ms. St. Hilaire further noted that “in the absence of a specific field investigation, [MNAP] cannot provide a definitive statement on the presence or absence of unusual natural features at the site.” (*Id.*)

The administrative record includes no documentation that an on-site survey was ever conducted by a qualified field biologist. In a later March 25, 2024, email, Ms. St. Hilaire informed Michael Clark of MDEP that “Focus Areas are intended as a planning tool – they are not regulatory by themselves.” (A. 209.) Ms. St. Hilaire did not provide any basis, statutory or otherwise, for this opinion. (*Id.*)

On March 7, 2024, amid MDEP’s internal review of the NOITC and its communications with MNAP, MTN submitted a response to the Fraumenis’ comment letter. (A. 186-202.) In its response, MTN agreed that Section 490-Z(1)’s statutory language prohibited a quarry in a listed MNAP area “unless [MDEP] has granted permits under Article 5-A of Title 38, pertaining to NRPA.” (A. 190.) MTN also provided a map to MDEP with its response letter, which clearly showed that the MTN Property and proposed quarry were located within the Kennebec

Estuary Focus Area. (A. 198.) Nonetheless, MTN argued that the location of the proposed quarry “will not impact any significant wildlife habitat or protected natural resource” and “does not implicate Section 544.” (A. 190-91.) On March 8, 2024, the Fraumenis submitted a reply letter to MDEP stating, again, that MTN’s proposed quarry was subject to NRPA permitting and requesting that MDEP review the quarry under the NRPA standards. (A. 203, 206-07.)

Ultimately, on March 28, 2024, MDEP determined that MTN’s NOITC was “complete” and issued a placard, with permit number GPID # 955, to MTN for operation of its intended quarry, subject to the performance standards of 38 M.R.S. § 490-Z. (A. 26-27.) Nothing in the placard itself, or the letter from MDEP accompanying the placard, provides any substantive explanation of the basis for MDEP’s decision, whether by way of factual findings or the rationale supporting any legal conclusions made with such factual findings as background. (*Id.*)

In a letter from Michael Clark at MDEP, dated April 2, 2024, to the Fraumenis, Mr. Clark opined that “[t]here are only two options for Department action when an NOITC has been filed. The Department can accept the NOITC as complete, or it can notify the owner or operator of the proposed quarry that it is incomplete.” (A. 227.) As to the location of MTN’s proposed quarry within the designated Focus Area, Mr. Clark repeated MNAP’s opinion that the Kennebec Estuary Focus Area “is a planning tool that is not regulatory in nature” and that a

quarry located “in a focus area is not a disqualifying fact.” (A. 228.) Thus, as postulated by Mr. Clark, MDEP determined that MTN’s NOITC “was complete in this regard.” (*Id.*) In his specific discussion of NRPA permitting under Section 490-Z(1), Mr. Clark does not reference or discuss the statutory language stating that a quarry may not be located “in an area listed pursuant to the Natural Areas Program, Title 12, section 544.” (*Id.*)

In denying the Fraumenis’ subsequent request for a stay of its decision, MDEP’s Commissioner, Melanie Loyzim, evidently for the first time, expressed an opinion related to the matters at hand, stating that MDEP’s “acceptance of an NOITC is not a judgment on the potential of a proposed project; it is simply an acceptance of the filing as complete.” (A. 230, 233.) Despite the unambiguous language of Section 490-Z(1), Ms. Loyzim also expressed an opinion that “[t]he existence of a Focus Area established by MNAP does not require an NRPA permit from [MDEP].” (A. 234.)

4. The Fraumenis’ Rule 80C Appeal.

The Fraumenis, pursuant to 5 M.R.S. § 11001 and M.R. Civ. P. 80C, timely filed their Petition for Review of Agency Action and for Declaratory Judgment dated April 26, 2024 and received by the Kennebec County Superior Court on May 1, 2024. (A. 3, 18-25.) The Superior Court, in its Order on Petition for Review of Agency Action and for Declaratory Judgment, docketed September 17, 2025,

denied the Fraumenis' Petition for Review and affirmed MDEP's issuance to MTN of a placard authorizing its quarry.² (A. 3, 6-17.) The Fraumenis timely filed a Notice of Appeal on October 14, 2025. (A. 5.)

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

- A. DID THE SUPERIOR COURT ERR IN AFFIRMING MDEP'S DECISION TO AWARD A PERMIT FOR MTN'S QUARRY IN THE ABSENCE OF ANY WRITTEN FACTUAL FINDINGS OR LEGAL CONCLUSIONS IN SUPPORT OF MDEP'S DECISION?**

- B. DID THE SUPERIOR COURT ERR IN AFFIRMING MDEP'S DECISION TO AWARD A PERMIT FOR MTN'S QUARRY BASED ON MDEP'S DETERMINATION THAT MTN'S NOTICE OF INTENT TO COMPLY WAS "COMPLETE" DESPITE ITS FACIAL VIOLATION OF 38 M.R.S. § 490-Z BY VIRTUE OF MTN'S PROPERTY BEING LISTED PURSUANT TO THE NATURAL AREAS PROGRAM?**

III. SUMMARY OF THE ARGUMENT.

This appeal is, as a threshold matter, about whether MDEP satisfied its requirement, codified in both the Administrative Procedure Act and the Freedom of Access Act, and emphasized by this Court, to make explicit written findings of fact sufficient to support conclusions of law underlying its issuance of MTN's permit. This Court has repeatedly explained the importance of this requirement in decisions arising out of a wide variety of municipal and state agency permitting

² In addition to denying the Fraumenis' Rule 80C appeal, the Superior Court dismissed the Fraumenis' claim seeking relief in the form of a declaratory judgment. (A. 15-17.) The Fraumenis do not herein appeal from the dismissal of their declaratory judgment claim.

appeals for good reason. Absent such findings, courts are forced into the inappropriate position of independently combing through the administrative record to determine whether, as a primary decision maker, they would have reached the same permitting result reached by the permitting agency rather than, as is their proper role, reviewing findings and conclusions authorized by the municipal decision makers themselves to determine whether they are supported by the evidence and are consistent with a correct application of the law to the facts.

In this case, MDEP simply issued a placard memorializing its ultimate legal conclusion that MTN's quarry had been permitted in accord with 38 M.R.S. § 490-Y. It made no written findings articulating which facts it found, what record evidence it relied upon in making those findings, or explaining why it believed the application of 38 M.R.S. § 490-Y to the record facts warranted granting MTN's permit. Any statements individual agency officials made expressing their opinions on those subjects are legal nullities as they are not memorialized in written findings and conclusions authorized by MDEP as an agency, nor did they even purport to constitute the written decision granting MTN's permit. This matter must be remanded to MDEP to issue written findings and conclusions such as to facilitate a meaningful judicial review that is impossible under the current state of the record.

On substance, the MDEP officials' apparent rationale in granting MTN's permit is flawed and, if taken as the official MDEP "decision," should be vacated

and reversed. Specifically, the performance standards for quarries dictated by 38 M.R.S. § 490-Z, which MDEP was bound to apply in reviewing MTN's quarry permit application, provide, with exceptions not applicable here, that such a permit cannot be issued if the land on which the quarry will be located is "listed pursuant to the Natural Areas Program." MTN's land is, in fact, listed by the Natural Areas Program as part of the Kennebec Estuary Focus Area. MDEP's decision, if it can properly be characterized as such, to issue MTN's permit despite this was pure legal error requiring that MTN's permit be vacated.

This Court should reverse the Superior Court's decision and remand this matter to the Superior Court with instructions to vacate MDEP's decision and to enter judgment in favor of the Fraumenis on their Rule 80C Appeal. At minimum, this matter must be remanded to MDEP with instructions to issue a new decision supported by proper written findings of fact and conclusions of law.

IV. LEGAL ARGUMENT.

A. THE SUPERIOR COURT ERRED IN AFFIRMING MDEP'S DECISION TO AWARD A PERMIT FOR MTN'S QUARRY IN THE ABSENCE OF ANY WRITTEN FACTUAL FINDINGS OR LEGAL CONCLUSIONS SUPPORTING MDEP'S DECISION.

1. Standard of Review.

When, as here, the Superior Court has reviewed the decision of a state administrative agency pursuant to M.R. Civ. P. 80C "in an intermediate appellate capacity," this Court "review[s] directly the original decision of the fact-finding

agency, without deference to the ruling on the intermediate appeal by the court from which the appeal is taken.” *Anderson v. Maine Pub. Employees Ret. Sys.*, 2009 ME 134, ¶ 2, 985 A.2d 501. As a result, MDEP’s March 28, 2024 determination that MTN’s NOITC was complete, and the placard issued by MDEP in line with that determination, is the decision under review by this Court.

The Court has authority to reverse a final agency decision pursuant to the Administrative Procedure Act if the agency’s findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
 - (2) In excess of the statutory authority of the agency;
 - (3) Made upon unlawful procedure;
 - (4) Affected by bias or error of law;
 - (5) Unsupported by substantial evidence on the whole record;
- or
- (6) Arbitrary or capricious or characterized by abuse of discretion.

5 M.R.S. § 11007(4)(C). In applying these provisions, the Court is charged with “determining whether the [agency] correctly applied the law and whether its fact findings are supported by competent evidence.” *McPherson Timberlands v. Unemployment Ins. Comm'n*, 1998 ME 177, ¶ 6, 714 A.2d 818.

“Questions of law are subject to de novo review.” *Doe v. Dep't of Health & Human Servs.*, 2018 ME 164, ¶ 11, 198 A.3d 782. Of particular importance here, “[t]he interpretation of a statute is a legal issue that this Court reviews de novo.” *See Thurston v. Galvin*, 2014 ME 76, ¶ 13, 94 A.3d 16.

The Court’s “primary purpose in interpreting a statute is to give effect to the intent of the Legislature.” *Dickey v. Vermette*, 2008 ME 179, ¶ 5, 960 A.2d 1178 (quotation marks omitted). To do so, the Court “first look[s] to the statute’s plain meaning and construe[s] the language to avoid absurd, illogical, or inconsistent results.” *Savage v. Maine Pretrial Servs., Inc.*, 2013 ME 9, ¶ 7, 58 A.3d 1138 (quotation marks omitted). “All words in a statute are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed.” *Cobb v. Bd. of Counseling Pros. Licensure*, 2006 ME 48, ¶ 11, 896 A.2d 271.

“If the statute is unambiguous,” the Court “[does] not defer to the agency’s construction, but [will] interpret the statute according to its plain language.” *Id.* ¶ 13. Additionally, in the Court’s review of an agency’s action, an action is considered arbitrary or capricious when it is “willful and unreasoning and without consideration of facts or circumstances.” *Kroeger v. Dep’t of Env’t Prot.*, 2005 ME 50, ¶ 8, 870 A.2d 566 (quotation marks omitted).

2. The Placard Issued by MDEP to MTN Provides No Adequate Findings or Conclusions Sufficient to Support Adequate Judicial Review of MDEP’s Administrative Decision Making.

A threshold issue that bears discussion is that MDEP’s decision issuing a placard to MTN is entirely devoid of any non-conclusory findings or conclusions. This lack of written findings and conclusions sufficient to render MDEP’s decision amenable to adequate judicial review violates black letter law repeatedly

articulated and emphasized by this Court.

Although 38 M.R.S. § 490-Y does not explicitly frame it as such, there can be no question but that the authorization MDEP provided to MTN to run its quarry when it deemed MTN's NOITC "complete" constituted the issuance of a license within the meaning of how that term is used in the Administrative Procedure Act. *See* 5 M.R.S. § 8002(6) (defining the term "License" as including "the whole or any part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law which represents an exercise of the state's regulatory or police powers.") The Administrative Procedure Act requires that "[a]ny licensing decision not involving an adjudicatory proceeding," such as occurred here, "shall be made in writing and shall be made only on the basis of evidence relevant to the case." 5 M.R.S. § 10005. The Freedom of Access Act additionally requires as follows: "Every agency shall make a written record of every decision involving the conditional approval or denial of an application, license, certificate or any other type of permit. The agency shall set forth in the record the reason or reasons for its decision and make finding of the fact, in writing, sufficient to appraise the applicant and any interested member of the public of the basis for the decision." 1 M.R.S. § 407(1).

This Court has long been clear that "[I]t is an indispensable prerequisite to effective judicial review that an agency's decision set forth the findings of basic

fact as well as the conclusions of ultimate fact and conclusions of law derived therefrom.” *Narowetz v. Board of Dental Practice*, 2021 ME 46, ¶ 17, 259 A.3d 771 (quoting *Gashgai v. Bd. of Registration in Med.*, 390 A.2d 1080, 1085 (Me. 1978)) (alteration in original). It is insufficient to reference “the parties’ positions” or to reiterate “evidence presented by the parties” as a “substitute for findings.” *See id.*

While an agency “must at least state [in its decision] the ultimate facts which are essential to an administrative determination” in order for its findings to pass muster, it is insufficient for an agency to state “[t]he ultimate facts alone” in support of its decision. *Id.* ¶ 18. The agency must go further than rendering a “finding solely in terms of the statute, or the statement of a conclusion, without a finding of the basic or underlying facts on which the administrative agency deems such ultimate fact or conclusion to rest” and doing so “is, as a general proposition, regarded as insufficient to support a[n agency’s] determination.” *Id.* (quoting *Cumberland Farms N., Inc. v. Me. Milk Comm’n*, 234 A.2d 818, 820 (Me. 1967)). “[I]f an agency fails to make adequate findings of fact, the Court may remand for findings that would permit meaningful judicial review.” *Sinclair Builders, Inc. v. Unemployment Ins. Com’n*, 2013 ME 76, ¶ 10, 73 A.3d 1061 (quoting *Nancy W. Bayley, Inc. v. Me. Emp’t Sec. Comm’n*, 472 A.2d 1374, 1377 (Me.1984)).

The rationale behind requiring an agency to articulate its findings in the

manner described above is to respect the distinction between the agency's role, as the initial decision maker, and the judiciary's role, being charged only with reviewing that decision rather than substituting its judgment for that of the agency. *See, e.g.* 5 M.R.S. § 11007(3) (“The court may not substitute its judgment for that of the agency on questions of fact”)

In this case, the entirety of the actual license issued by MDEP is a placard that, in relevant part, states nothing more than the ultimate legal conclusion that MTN's proposed “excavation has been permitted pursuant to the Performance Standards for Quarries (38 M.R.S. Section 490-Y) administered by the Bureau of Land Resources, Department of Environmental Protection” (A. 27.)

Even assuming that the letter from a MDEP official accompanying that placard when sent to MTN can be considered part of MDEP's decision, which is unlikely, that letter provides no further material explanation of which facts underlie the decision to issue the placard. In relevant part, that letter states only as follows: “The Department received and reviewed the . . . NOITC . . . and determined that it's complete. As such, I have enclosed a placard that states your quarry is licensed and subject to the Performance Standards for Quarries, 38 M.R.S. §490-Z” (A. 26.)

The above said, neither the letter accompanying the placard, which is nothing more than correspondence from a single MDEP official, nor any of the

multiple other examples of e-mails, other forms of correspondence, or memoranda contained in the Rule 80C administrative record, constitute factual findings or legal conclusions of MDEP as an agency. Just as in the municipal administrative review process, the decision under review must be confined to “a statement of the decision-maker’s findings, not the views of individual members of the decision-making agency” See *Carroll v. Town of Rockport*, 2003 ME 135, ¶ 28, 837 A.2d 148.

Nothing in MDEP’s decision attempts, much less succeeds, at doing anything more than stating the tautological conclusion that MTN’s placard was issued because statutory requirements were purportedly met. The placard does not purport to explain what facts were being relied upon in reaching that conclusion, nor even to explain how the law was being applied to those purported facts. Put a different way, the placard, at most, evinces MDEP’s statement of the ultimate fact found or conclusion made, articulated solely in terms of the statute MDEP was tasked with applying. Such a decision plainly violates this Court’s instructions for how administrative decision making must occur in order to allow for meaningful

judicial review.³ See *Narowetz*, 2021 ME 46, ¶¶ 17-18, 259 A.3d 771.

Based on the above, this matter should be remanded to MDEP to adopt factual findings and conclusions sufficient to allow for meaningful judicial review of its decision to authorize MTN’s quarry.

B. THE SUPERIOR COURT ERRED IN AFFIRMING MDEP’S DECISION TO AWARD A PERMIT FOR MTN’S QUARRY BASED ON MDEP’S DETERMINATION THAT MTN’S NOTICE OF INTENT TO COMPLY WAS “COMPLETE” DESPITE ITS FACIAL VIOLATION OF 38 M.R.S. § 490-Z BY VIRTUE OF MTN’S PROPERTY BEING LISTED PURSUANT TO THE NATURAL AREAS PROGRAM.

1. Statutory Framework.

The relevant statutory provisions governing the operation and excavation of quarries is contained in Title 38, Chapter 3, Subchapter 1, Article 8-A. These statutory sections “appl[y] to any quarry, including reclaimed and unreclaimed areas, if the quarry is more than one acre in size, the total excavated area including

³ Although an appeal from the review of a municipal decision pursuant to M.R. Civ. P. 80B, rather than, as here, the review of a state agency decision pursuant to M.R. Civ. P. 80C, *LaMarre v. Town of China*, 2021 ME 45, 259 A.3d 764 provides an instructive analogous situation to the one presented here. In that case, a local code enforcement officer’s issuance of a permit providing only that the applicant was authorized to carry out the activity sought under the permit, but omitting any “findings of fact or conclusions of law” was deemed “insufficient to allow for meaningful appellate review.” *Id.* ¶ 7 (quotation marks omitted). This Court has, in fact, repeatedly held that just because the operative decision maker in a municipal permitting context is a code enforcement officer or some other official who would not normally be expected to include factual findings and conclusions of law with a decision, that does not free those officials, if they are the ones tasked with issuing operative decisions reviewable by the courts, from engaging in that task. See, e.g. *id.*, *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 12 n. 6, 169 A.3d 396 (notwithstanding that “municipal ordinances governing a CEO’s review of and action on a permit application may not provide a mechanism for creating a record adequate for appellate review . . . the CEO’s decision [was] the operative one, so the Town bore the responsibility for creating a record of the CEO’s findings and conclusions . . .”). That mandate applies here. The Court should clarify that MDEP is required to articulate adequate factual findings and conclusions supporting quarry permitting decisions under 38 M.R.S. § 490-Y just like towns are required to do so when their code enforcement officers are tasked with making operative decisions subject to judicial review.

adjacent parcels under a common owner or operator is more than one acre in size or underground production blasting is proposed.” 38 M.R.S. § 490-X. A person seeking to operate a quarry must submit to MDEP a “Notice of intent to comply” form, which must include, among other things, a “statement signed and dated by the owner or operator certifying that the quarry will be operated in compliance with [Article 8-A.]” *Id.* § 490-Y.

The relevant “performance standards” with which a quarry operator must comply are provided by 38 M.R.S. §490-Z. As relevant here, “[a]ffected land may not be located in, on or over a significant wildlife habitat or other type of protected natural resource, as defined in section 480-B, **or in an area listed pursuant to the Natural Areas Program, Title 12, section 544.**” 38 M.R.S. § 490-Z(1) (emphasis added). The phrase “affected land” is defined as “all reclaimed and unreclaimed land, land that has or will have the overburden removed, land on which stumps, spoil or other solid waste has or will be deposited and storage areas or other land, except natural buffer strips, that will be or has been used in connection with a quarry.” *Id.* § 490-W(1). Under section 490-Z, Maine DEP “may allow excavation to occur under this section as long as a permit is obtained pursuant to [the Natural Resources Protection Act, 38 M.R.S. § 480-A, *et seq.*]”

MNAP, referenced in 38 M.R.S. § 490-Z(1), is a program that “is established within the Department of Agriculture, Conservation and Forestry” and

is tasked with certain defined statutory functions. 12 M.R.S. § 544. These include that MNAP

shall conduct an ongoing, statewide inventory of the State's *natural areas*, including, but not limited to, rare plants, animals, natural communities and ecosystems or other geological, hydrological, natural historical, scenic or other similar features, and may conduct investigations related to the population, habitat needs, limiting factors and other biological and ecological data to support the mandates of the Natural Areas Program or other cooperating agencies.

12 M.R.S. § 544(3)(A) (emphasis added). Moreover, MNAP is required to “maintain a biological and conservation database that must contain data from inventories and other data sources and other relevant biological, ecological or other information about natural features described in paragraph A and about ecologically significant sites that harbor these features.” *Id.* § 544(3)(B).

The phrase “area,” as defined under 12 M.R.S. § 544, is separated out into definitions covering both “critical area[s]” and “natural area[s].” 12 M.R.S. § 544(2)(B), (D). A “critical area” is defined as “any natural area documented by the Natural Areas Program that is conserved or protected in its natural condition through voluntary action.” *Id.* § 544(2)(B). In contrast, a “natural area” is defined as follows:

any area of land or water, or both land and water, whether publicly or privately owned, that retains or has reestablished its natural character, though it need not be completely natural and undisturbed, and ***that supports, harbors or otherwise contains endangered, threatened or rare plants, animals and native ecological systems, or rare or unique geological, hydrological, natural historical, scenic or***

other similar features of scientific and educational value benefiting the citizens of the State.

Id. § 544(2)(D) (emphasis added).

The Legislature’s decision to require NRPA review is essentially unique to quarry projects. Statutory references to MNAP are few, and specific citations to any “area” listed pursuant to 12 M.R.S. § 544 are fewer still. Notably, the Legislature’s directive is that projects located “in an area listed pursuant to the Natural Areas Program, Title 12, section 544” are limited to only two types of development projects: gravel pits and quarries. *See* 38 M.R.S. § 490-D(1); 38 M.R.S. § 490-Z(1). To be sure, the Legislature has afforded additional protections under MNAP for other activities besides quarries and gravel pits, but when it has done so it has generally applied more specific statutory language that describes the particular plant or species it seeks to protect. *See* 38 M.R.S. § 480-U(2)(A) (protections for wetlands that contain “endangered or threatened plant species as defined in Title 12, section 544”); 38 M.R.S. § 480-X(5) (protections for wetlands that contain “a natural community that is imperiled (S2) or critically imperiled (S1), as defined by the Natural Areas Program pursuant to Title 12, section 544”); 38 M.R.S. § 480-Y(2)(C) (same). Thus, Section 490-Z(1) is only one of two statutes that offers protection to an “area” designated by MNAP.

2. MDEP Erred as a Matter of Law in Interpreting and Applying 38 M.R.S. § 490-Z(1).

As shown above, an applicant seeking to operate a quarry “in an area listed pursuant to the Natural Areas Program, Title 12, section 544” is only allowed to proceed with a quarry project following appropriate NRPA permitting. 38 M.R.S. § 490-Z(1). Rather than enforce this legislative mandate, MDEP has taken the position that a Focus Area established by MNAP does *not* require NRPA review and permitting. MDEP’s interpretation is clearly inconsistent with the plain language of Section 490-Z(1).

In support of its position, MDEP, to the extent that statements by individual officials can be taken to be MDEP’s position as an agency in contravention of the arguments presented earlier, maintains that the Kennebec Estuary Focus Area, which MDEP’s official has admitted encompasses the MTN Property, “is a planning tool that is not regulatory in nature” and that the location of MTN’s quarry “in a focus area is not a disqualifying fact.” (A. 228.) This appears to be based upon the information given to MDEP by an MNAP information manager, who informed MDEP that “Focus Areas are intended as a planning tool – they are not regulatory by themselves.” (A. 209.) Yet, it is unclear from the administrative record what basis supports the contention that the Kennebec Estuary Focus Area is a “planning tool.”

Even if there were a basis for the opinion that MNAP provided to MDEP, MDEP’s position that a Focus Area is only a “planning tool” overlooks the plain

language of Section 490-Z(1), which prohibits quarry development in an MNAP “area” without proper NRPA review.

Indeed, the Kennebec Estuary Focus Area is a “natural area,” meaning that it, in part, “supports, harbors or otherwise contains endangered, threatened or rare plants, animals and native ecological systems, or rare or unique geological, hydrological, natural historical, scenic or other similar features of scientific and educational value benefiting the citizens of the State.” 38 M.R.S. § 544(2)(D).

According to information published by MNAP, the Kennebec Estuary Focus Area “contains more than 20 percent of Maine’s tidal marshes, a significant percentage of Maine’s sandy beach and associated dune habitats, and globally rare pitch pine woodland communities.” (A. 177.) Moreover, this particular Focus Area is home to “[n]umerous imperiled species of animals,” “contains some of the state’s best habitat for bald eagles,” and is inhabited by “[m]ore than two dozen rare plant species.” (A. 177-78.) Within the Focus Area, the area surrounding the Eastern River, in particular, is “[w]ell known as a wintering area for bald eagles” and is home to “numerous rare plants and a freshwater tidal marsh.” (A. 179.)

Importantly, the Focus Area provides, among other ecological services, “nutrient export and sediment retention resulting in a rich and productive habitat for aquatic organisms.” (A. 182.)

In short, MDEP erred in its interpretation and application of Section 490-Z(1). The Kennebec Estuary Focus Area is a listed MNAP “area,” (A. 148, 177-85), and, therefore, requires that any quarry activity be subject to NRPA permitting, in accordance with Section 490-Z(1). Whether MNAP deems the Kennebec Estuary Focus Area a “planning tool” is extraneous to what the plain language of Section 490-Z(1) states: a quarry may not be located “in an area listed pursuant to the Natural Areas Program, Title 12, section 544” and is only permitted in a Focus Area “as long as a permit is obtained pursuant to [NRPA].” 38 M.R.S. § 490-Z(1). Thus, even if a Focus Area is deemed a “planning tool,” it nonetheless remains a MNAP “area” subject to the protections of Section 490-Z(1). Accordingly, because MDEP allowed MTN to proceed with an NOITC, without appropriate NRPA review, for its quarry project, MDEP erred in applying the plain language of the governing quarry statute.

CONCLUSION

Ultimately, the parties and the Court are left to speculate as to which facts MDEP credited as true or found important in supporting its determination to issue a placard for MTN to operate its quarry. This matter, therefore, must be remanded back to the Superior Court with instructions to remand to MDEP to issue factual findings and legal conclusions adequate to facilitate meaningful judicial review of the decision MDEP made, rather than substituting its judgment for that of MDEP.

In so doing, and in the interests of efficiency, the Court should make clear that, as long argued by the Fraumenis, any area listed as a designated MNAP Focus Area is an “area listed pursuant to the Natural Areas Program, Title 12, section 544” pursuant to 38 M.R.S. § 490-Z(1).

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