STATE OF 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 RESPONDENT-APPELLEE MTN SAND & GRAVEL

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

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellee MTN Sand & Gravel ("Appellee" or "MTN") is the owner of real property at 778 Middle Road in Dresden, Maine, identified in the Town of Dresden's tax maps as Map 7, Lot 48 and Map 7, Lot 48A (the "Property"). (A. 31, 38-42, 43.)[1] MTN previously received approval from the Town of Dresden's Planning Board for operation of a quarry under the Town's Land Use Development Ordinance and Site Plan Review standards.[2] The instant proceeding stems from MTN seeking regulatory authority from the Maine Department of Environmental Protection ("MDEP" or "Department") for operation of a quarry on the Property (the "Project") in accordance with the notice provisions and performance standards set forth in 38 M.R.S. §§ 490-Y and 490-Z.

On January 30, 2024, MTN requested a "pre-filing" meeting with the MDEP to discuss its anticipated submission of a Notice of Intent to Comply ("NOITC") for the Project in accordance with 38 M.R.S. § 490-Y. (A. 13.) On February 5, 2024, in advance of its submission of the NOITC, MTN provided notice of the NOITC to be filed with the MDEP to Appellants, Barbara and Michael Fraumeni

[1] As used herein, "(A. __.)" refers to the applicable page(s) of the Appendix filed with the Court.

[2] As shown by the record, which includes materials provided by MTN to the MDEP as part of its NOITC, MTN previously obtained a conditional use permit ("CUP") and Site Plan Review approval from the Planning Board on January 10, 2024. (A. 60-162.) The Planning Board's issuance of a CUP was subsequently appealed to the Town's Board of Appeals and then to the Lincoln County Superior Court under Rule 80B.

("Appellants"), and other abutters and interested parties via certified mail, in accordance with the statute. (A. 45-56.)

MTN filed its NOITC for the Project with the Department on February 12, 2024 for the first ten (10) acres of what will likely be a multi-phased quarry.[3] (A. 28-162, 186-187.)[4] MTN's NOITC included the following exhibits:

- Exhibit 1 - USGS Map, Site Plan, Wetland of Special Significance ("WOSS") Determination Letter, and Excerpts from the Town of Dresden's Comprehensive Plan Showing the Town's Land Use Districts and Known Archeological Sites and Sensitive Areas; (A. 31-37)
- Exhibit 2 - Final Site Plan and Site Plan Review and Conditional Use Approval Decision of the Town as well as Application and Supplemental Materials; (A. 61-164.)
- Exhibit 3 - Deeds for the Properties (Map 7, Lots 48 & 48-A) and Town Tax Map; (A. 38-42.)
- Exhibit 4 - List of abutters to the Project, Letters to abutters, the Town of Dresden, and the Maine Historic Preservation Commission (with receipts of certified mailing); (A. 44-56.) and
- Exhibit 5 - Certificate of Good Standing for MTN. (A. 57.)

[3] Appellants spend considerable time discussing an earlier NOITC that was submitted by MTN. This earlier NOITC is not before the Court on the instant appeal, as MTN voluntarily surrendered the earlier placard issued by the Department because its first NOITC did not notify abutters in accordance with the statute. (A. 163-64.) The February 12, 2024 NOITC and the March 28, 2024 letter and placard issued by the MDEP are at issue in this proceeding.

[4] Appellants claim that Appellant MTN sought to proceed with a fifty-acre quarry. Appellants Brief at 8. Although MTN anticipated that the Project may span several phases, MTN's NOITC only sought regulatory approval from the MDEP for the first ten (10) acre phase of the Project, consistent with Maine law. (A. 45-54.) (letters to abutters, the Town of Dresden, and the Maine Historic Preservation Commission); (A. 186-187) (March 7, 2024 Response by MTN to February 12, 2024 Comments of Appellants to the MDEP).

Habitat maps published by the Maine Department of Inland Fisheries and Wildlife ("MDIFW"), which were included in MTN's NOITC, demonstrate that, other than some forested wetlands, the Project site does not implicate any significant wildlife habitat, rare, threatened, or endangered animals, rare plant or natural communities, rare/exemplary natural communities/ecosystems, aquatic species and habitats, aquifers, or other protected natural resources. (A. 34-35, 126-132, 149-160.)

MTN's Site Plan, which accompanied the NOITC, identified the location of the initial road access, the approximate location of initial stockpile of materials, and identified setbacks exceeding the Department's performance standards. (A. 32-33.)

On February 12, 2024, Appellants submitted comments to the MDEP, in which they requested, among other things, that the Department consult with other agencies, reject MTN's NOITC, and require MTN to submit an application under the Natural Resources Protection Act ("NRPA") ("February 12 Comments"). (A. 168-185.)

On the same day that the NOITC was submitted, the Department consulted with the Maine Natural Areas Program ("MNAP"), a division of the Maine Department of Agriculture, Conservation and Forestry, in order to obtain guidance

on whether the Project was located in an area "listed" under 12 M.R.S. § 544, and therefore required a NRPA under 38 M.R.S. § 490-Z(1). (A. 210.)

On March 1, 2024, Ms. Lisa St. Hilaire, Information Manager at the MNAP, responded to the Department, stating that, although the Kennebec Estuary Focus Area ("Focus Area") generally falls under the program, "the MNAP features that are included in the Kennebec Estuary Focus Area are all *relatively far from the parcel.*" (A. 208.) (emphasis added). Ms. St. Hilaire further explained: "Focus Areas are *intended as a planning tool-they are not regulatory by themselves*, though there may be features within the Focus Area that are regulated or otherwise commented on in [MNAP's] environmental review process." (*Id.*) (emphasis added). Ms. St. Hilaire also provided a memorandum to the MDEP, which stated:

> I have searched the Maine Natural Areas Program's Biological and Conservation Data System files for rare or unique botanical features in the vicinity of the proposed site in response to your request received February 12, 2024 for our agency's comments on the project.
>
> According to our current information, there are no rare botanical features that will be disturbed within the project site. The nearest mapped botanical feature is a Freshwater Tidal Marsh along the Eastern River, approximately 750-feet west of Middle Road. MNAP typically recommends an undisturbed and vegetated buffer of 250-feet around this habitat type. Additionally, MNAP recommends undisturbed and vegetated buffers of 75-feet along any ephemeral, intermittent, or perennial streams on the property that flow to the Eastern River.
>
> This finding is available and appropriate for preparation and review of environmental assessments, but it is not a substitute for on-site surveys. Comprehensive field surveys do not exist for all natural areas in Maine, and in the absence of a specific field investigation, the Maine Natural Areas Program cannot provide a definitive statement on the presence or absence of unusual natural features at this site. You may want to have the site inventoried by a qualified field biologist to ensure that no undocumented rare features are inadvertently harmed. The Maine Natural Areas Program is continuously working to achieve a more comprehensive database of exemplary natural features in Maine. We welcome the contribution of any information collected if a site survey is performed.

> Thank you for using the Maine Natural Areas Program in the environmental review process. Please do not hesitate to contact our office if you have further questions about the Natural Areas Program or about rare or unique botanical features at this site.

(A. 212.)

On March 22, 2024, the MDEP also consulted with the MDIFW, the agency responsible for mapping areas of protected natural resources and significant wildlife habitat. (A. 217 – 224.) *See* 38 M.R.S. § 480-B ("'Significant wildlife habitat' means: A. *The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife*…") (emphasis added).

In its response, the MDIFW deferred to the MDEP with regard to the allowable buffer between quarry activities and wetlands on the Project site. (A. 225.) The MDIFW also recommended a 100 foot riparian buffer along the easternmost piece of the Property, which was close to Nequasset brook, but found that there did not appear to be any other affected streams in the area.[5] (*Id.*)

On March 7, 2024, MTN submitted a Response to the Appellants' February 12 Comments in which MTN clarified that the NOITC did not seek regulatory approval for a fifty (50) acre quarry ("March 7 Response"). (A. 186-187.) MTN's March 7 Response explained why NRPA approval was not required, because the Project site did not impact any significant wildlife habitat, including critical habitat

[5] THE MDIFW also made certain recommendations to minimize impacts upon bats during the maternity season and recommended no tree cutting from May 15th through August 15th. (A. 225.)

of the Atlantic salmon, and did not adversely affect any other sensitive plant or animal habitats or other protected natural resources. (A. 187-202.)

On March 8, 2024, the Appellants submitted another filing, replying to MTN's March 7 Response and reiterating their prior requests for additional studies and permitting. (A. 203-207.)

On March 28, 2024, the Department sent MTN a letter in which it found that MTN's NOITC was "complete" ("March 28 Letter") and issued a placard ("GPID # 955") to MTN for operation of its quarry, subject to the performance standards of 38 M.R.S. § 490-Z ("Placard"). (A. 26-27.) On April 2, 2024, the MDEP's Mining Coordinator, Michael Clark also sent a letter to the parties in which he explained the Department's reasons for issuing the Placard, summarized the MDEP's consultation with other agencies, including MNAP, and explained why no NRPA permit was required ("April 2 Letter"). (A. 227-229.)

Appellants sought a stay of the MDEP's issuance of the Placard pursuant to 5 M.R.S. § 11004 (2025), which was denied by the MDEP on September 26, 2024. (A. 230-235.)

Appellants filed their Petition for Review and for Declaratory Action ("Petition for Review") on May 1, 2024. (A. 3, 18-25.) The MDEP filed a certified record on September 11, 2024. (A. 4.) The Appellants filed their brief on October 21, 2024. (*Id.*) By agreement of the parties and by leave of Court the MDEP filed a

corrected certified record on November 20, 2024. (*Id.*) On November 26, 2024, Appellants filed an Amended Brief which corrected references based on the corrected record. (*Id.*) On this same date, the MDEP and Appellee MTN filed their respective Respondent Briefs. (*Id.*) Appellants filed a Reply Brief on December 11, 2024. The Court issued its Order on Appellants' Petition for Review on September 17, 2025 ("September 17 Order"), in which the Court denied the Petition for Review, affirmed the MDEP's issuance of the Placard for the Project, and dismissed the Appellants' declaratory judgment petition. (A. 6-17.)

The instant appeal followed.

ISSUES PRESENTED FOR REVIEW

1. Did the Appellants waive arguments relating to the alleged insufficiency of the MDEP's record or factual findings supporting its decision to find MTN's NOITC complete and issue a Placard for the Project, because Appellants failed to raise or preserve these issues at the MDEP level and also failed to present such arguments in the Superior Court?

2. Even if Appellants had not waived such arguments, was the MDEP's issuance of a Placard for the Project, upon finding MTN's NOITC as complete in the March 28 Letter, supported by the record and did it comply with statutory requirements?

3. Did the Superior Court appropriately find that the MDEP properly exercised discretion in interpreting an ambiguity presented in 38 M.R.S. § 490-Z(1), namely, that the Project was not located "… in an area *listed* pursuant to the [MNAP]" where the Project does not impact significant wildlife habitat or other type of protected natural resources within the broad region known as the Focus Area, as found by the MDEP after consulting with relevant agencies including the MNAP and the MDIFW?

SUMMARY OF ARGUMENT

Judicial review of administrative agency decisions under M.R. Civ. P. 80C is "deferential and limited." *Passadumkeag Mtn. Friends v. Bd. of Env't Prot.*, 2014 ME 116, ¶12, 102 A.3d 1181, 1185. This court must uphold an agency's decision "unless it: violates the Constitution or statutes; exceeds the agency's authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; is affected by bias or an error of law; or is unsupported by the evidence in the record." *Kroeger v. Dep't of Env't. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566, 569; *see also* 5 M.R.S. § 11007(4)(C) (2025). The party seeking to vacate an agency decision has the burden of persuasion on appeal. *Anderson v. Maine Pub. Emps. Ret. Sys.*, 2009 ME 134, ¶ 3, 985 A.2d 501, 503.

Appellants failed to preserve any arguments that the Department's issuance of a Placard for the Project in accordance with 38 M.R.S. § 490-Y was unsupported or inconsistent with statutory requirements. However, to the extent that these arguments were not previously waived, Appellants have failed to meet their burden of persuasion in demonstrating that the MDEP's issuance of the Placard was arbitrary, without record support, or that there was any error of law or abuse of discretion by the MDEP. The Department's issuance of the Placard was in keeping with the process by which applicants must notice and certify

compliance with performance standards for operation of a quarry under 38 M.R.S. §§ 490-Y and 490-Z.

"An agency's interpretation of an ambiguous statute it administers is reviewed with great deference and will be upheld unless the statute plainly compels a contrary result." *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 2014 ME 56, ¶ 18, 90 A.3d 451, 458.

Appellants have also failed to demonstrate any error or abuse of discretion on the part of the MDEP concerning its interpretation of 38 M.R.S. § 490-Z(1), which is ambiguous as to whether an area is "listed" for the purpose of MNAP and 12 M.R.S. § 544. Review under NRPA is only required when an area is "listed" as a protected natural resource by MNAP.

In this case, the MDEP appropriately found after consultation with MNAP that 38 M.R.S. § 490-Z(1) did not require that the Project obtain a NRPA permit. As found by MNAP and as supported by the record, although the Project site is located in the broad region known as the Focus Area, any protected features, significant wildlife habitat or other protected natural resources in the Focus Area are relatively far from the parcel.

For this reason, the MDEP's interpretation of "listed" for the purpose of 38 M.R.S. § 490-Z(1) was reasonable and the Department appropriately found that MTN's NOITC was complete.

ARGUMENT

I. APPELLANTS FAILED TO PRESERVE ARGUMENTS BEFORE THE MDEP CONCERNING THE ALLEGED INSUFFICIENCY OF WRITTEN FINDINGS OR RECORD SUPPORT FOR THE MDEP'S ISSUANCE OF THE PLACARD AND THE MARCH 28 LETTER FINDING THE NOITC TO BE COMPLETE AND, THUS, HAVE WAIVED THESE ARGUMENTS ON APPEAL.

It is well-settled law that parties to an administrative proceeding must raise any objections they may have before the administrative agency in order properly preserve the issue for appeal. *Berry v. Bd. of Tr., Me. State Ret. Sys.*, 663 A.2d 14, 18 (Me. 1995). Indeed, "[n]o principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue." *Fitch v. Doe*, 2005 ME 39, 27, 869 A.2d 722.

The above rule exists because it is essential to orderly appellate practice:

> This prudential rule is premised on the doctrine of exhaustion of administrative remedies, and reflects simple fairness to those who are engaged in the tasks of administration, and to the litigants, and ensures that the agency and not the courts has the first opportunity to pass upon the claims of the litigants.

Berry, 663 A.2d at 18-19 (Me. 1995) (quotation marks and citations omitted); *see also Off. of the Pub. Advoc. v. Pub. Utils. Comm'n*, 2023 ME 77, ¶ 28, 306 A.3d 633, 641-42 (concluding that an argument by the Maine Office of Public Advocate that alleged the Maine Public Utilities Commission ("MPUC") failed to adequately create an evidentiary record was waived since it was not first raised to the MPUC.

The obligation of a party to preserve issues and arguments in an administrative proceeding exists regardless of whether the challenge is based on the need for fact-finding by the agency. As the Court has found:

> Thus, the rule requiring that an issue be raised before the administrative agency in order for it to be preserved on appeal is not specifically based on a need for factfinding. Rather, it is based on '[s]imple fairness to those who are engaged in the tasks of administration, and to litigants,' and ensures that the agency and not the courts has the first opportunity to pass upon the claims of the litigants.

New England Whitewater Ctr. v. Dep't of Inland Fisheries & Wildlife, 550 A.2d 56, 60 (Me. 1988) (internal citations omitted).

At no time before the instant appeal did Appellants argue that the MDEP's issuance of the Placard and finding in the March 28 Letter that MTN's NOITC was "complete" was unsupported by adequate written findings or without record support. Because Appellants failed to preserve these arguments, they are waived.

II. EVEN IF APPELLANTS HAD NOT WAIVED ARGUMENTS, THE RECORD ADEQUATELY SUPPORTS THE MDEP'S FINDINGS IN THE MARCH 28 LETTER, AND THE MDEP DID NOT ERR IN FINDING MTN'S NOITC TO BE "COMPLETE."

A. No Written Findings Are Required by the MDEP Under the Notice Provisions for NOITCs.

The NOITC that is the subject matter of this action was filed by MTN on February 12, 2024, pursuant to the performance standards for quarries set forth in 38 M.R.S. § 490-Y. (A. 27-162.)

This statutory provision does not require express findings by the MDEP, similar to the manner in which other petitions or applications for various

permitting under Title 38 are handled. Quarries up to ten (10) acres may operate pursuant to notice by the operator that must include, among other things, affirmations that performance standards will be met.

Unlike other areas of oversight by the MDEP that involve in-depth and lengthy procedures on applications for various permits, including the Department's review of evidence based on a list of criteria followed by a written decision on the merits of the application, the NOITC and performance standards process for quarries up to ten (10) acres is intended to be an expedited path.

The MDEP reviews an NOITC filing solely for completeness and compliance with the form provided by the Department; it does not substantively evaluate the information contained within the form. 38 M.R.S. § 490-Y (2025) ("If the department determines that a notice filed under this section is not complete, the department must notify the owner or operator no later than 45 days after receiving the notice.").

An NOITC must include the following:

1. The owner or operator's name, address, and phone number;
2. A map and site plan;
3. A parcel description;
4. A document showing legal interest in the property;
5. Information on abutters;
6. A certification that the quarry will be operated in compliance with the performance standards; and
7. The appropriate fee.

38 M.R.S. § 490-Y (2025). The Appellants do not assert that MTN's NOITC did not meet these requirements.[6]

By definition, the NOITC relies upon "notice" provided by the operator, a certification that the operator will meet the performance standards, followed by subsequent compliance inspections by the Department and, ultimately, enforcement if a project is found to be non-compliant.

In the April 2 Letter, Mr. Clark explained the MDEP's limited purview based on the statutory scheme governing NOITCs, stating:

> By way of background, the process for an NOITC is limited by the Performance Standards for Quarries, 38 M.R.S § 490-Y. Pursuant to the statute, upon receiving the postal receipt for a certified mail delivery of its NOITC to the Department, the owner or operator of the proposed quarry may commence operation of the quarry. There 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.* If the Department takes no action, the owner or operator may proceed. Any comments received from the public or the, and addressed some of the specific reasons why no further permitting was required by the MDEP.

(A. 227.) (emphasis added).

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[6] The statute also requires:

> A notice filed under this section must be complete, submitted on forms approved by the department and mailed to the municipality where the quarry is located, the department, the Maine Historic Preservation Commission and each abutting property owner. The notice that is mailed to the municipality and each abutting property owner must be sent by certified mail at least 7 days before the notice of intent to comply is filed with the regulator. The notice that is mailed to the department must be sent by certified mail, return receipt requested. Upon receiving the postal receipt, the owner or operator may commence operation of the quarry.

38 M.R.S. § 490-Y (2025). In accordance with these provisions, MTN sent a copy of the NOITC to the Maine Historic Preservation Commission, the Town of Dresden, and each abutter on February 5, 2024, seven days before filing the NOITC with the MDEP. (A. 45 – 56.) Appellants acknowledge receiving the NOITC. (Blue Br. at 8.)

While citing some cases arising from appellate review of decisions made by municipal Code Enforcement Officer ("CEOs") and a couple of general provisions from the MAPA, Appellants assert that the MDEP was required to articulate written findings and conclusions in support of its determination that MTN's NOITC was complete under 38 M.R.S. § 490-Y. (Blue Br. at 22, n. 3.) Appellants' arguments fail to take into account the unique regulatory structure for quarries, which is distinct from the ordinary process for obtaining licenses or permits under the MAPA.

As the Superior Court noted in its order, the legislative history of 38 M.R.S. § 490-Y demonstrates that the regulatory process for quarries was intended to be streamlined:

> Section 490-Y was originally adopted in 1996 as part of an effort to streamline gravel pit operation. See P.L. 1995, ch. 700, § 35. Proponents of the bill emphasized how, although DEP would continue to regulate gravel pits, the bill was ultimately an effort to get rid of "useless and needless regulations" and "speed [the excavation] process up." 6 Legis. Rec. H-1963 (2d Reg. Sess. 1996). Opponents of the bill highlighted its relaxation of regulations, and particularly the diminished role of the MDEP in the permitting process, as a primary reason for their dissent. E.g., 6 Legis. Rec. H-1961, H-1964 (2d Reg. Sess. 1996).

(A. 14-15.)

Simply put, in spite of vocal opponents voicing concerns over the diminished role of the MDEP, the Maine Legislature chose regulate the operation of quarries through notice and performance standards instead of the more robust application process that is customary for other permits issued by the MDEP.

B. Various Cases Relied Upon by Appellants in the Municipal Context are Inapposite and Factually Distinguishable.

Importantly, the cases relied upon by Appellants arising from the municipal review context are inapposite and fail to articulate the appropriate standard.

Appellants first rely upon *LaMarre v. Town of China*, 2021 ME 45, 259 A.3d 764. *LaMarre* is not a Rule 80C case, but rather involved a Rule 80B legal challenge of a decision of the Town of China's CEO that issued an after-the-fact permit for the placement of a trailer on a lot. *Id.* ¶¶ 1-2. Abutters to the property challenged the CEO's issuance of the permit on the grounds that the trailer did not constitute a "recreational vehicle" under the town's land use ordinance. *Id.* ¶ 2. On appeal, the sole documents included in the record supporting the CEO's decision to issue the after-the-fact permit were the permit application and a photograph of the trailer. *Id.* ¶ 9. The Court concluded that the absence of any evidence or information in support of the CEO's actions to rescind the prior notice of violation and issue an after-the-fact permit one week later negated meaningful judicial review. *Id.* ¶¶ 8-9. The Court stated:

> The after-the-fact permit was issued pursuant to an application that includes evidentiary material, such as a photograph of the trailer. This material cannot provide a reviewable record for the recission, however, because the CEO's decision rescinding the notice of violation was issued a week *before* that permit application was even filed. The recission decision itself simply states that the rescission is "due to new information that [the CEO] discovered when meeting with the Namers on 8-7-18 and more carefully investigating facts and Ordinance requirements. There is no identification of what this "new information" was, or what other material the CEO reviewed in his investigation of the facts. This is not sufficient to provide a record for appellate review.

> *In sum, because there appears to be no CEO decision with findings of fact tethered to a reviewable record*, we must remand.

Id. ¶¶ 9-10 (internal citations omitted) (emphasis original).

Unlike *LaMarre*, the MDEP's finding that MTN's NOITC was complete was tethered to a reviewable record, including, MTN's NOITC and supplemental materials consisting of *over one hundred pages*. *LaMarre* therefore is inapposite.

Appellants' reliance upon *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, 169 A.3d 396, is similarly unavailing. In that matter, an abutter brought a Rule 80B challenge of a CEO's issuance of a building permit for construction of "accessory structures" on the property. *Id.* ¶ 3. Although Bond's permit application included a site plan that proposed the two structures and described how these structures would increase the number of bedrooms on the property, this Court found that "[t]he application contain[ed] *no other information* regarding Bond's proposed use for the structures." *Id.* (emphasis added). The Court found that this absence of record information coupled with a single word stamped on the building permit, "APPROVED," was insufficient to constitute written findings for which meaningful judicial review could be undertaken:

> Here, in granting Bond's application for a building permit, the CEO made no factual findings. *The only evidence of the CEO's decision in the record is a copy of Bond's building permit application bearing a stamp that reads "APPROVED"* on the first page. *Using this scant record* to review the CEO's decision would necessarily require us to improperly imply the findings and the grounds upon which he based his decision. Further, *the absence from the record of the CEO's factual findings* is particularly problematic here, *where Bond's eligibility for a permit depends in large part on his proposed use of the structures, which is a fact-intensive inquiry.* Therefore, the CEO's decision is insufficient to allow for meaningful appellate review.

Id. ¶ 10 (internal citations omitted) (emphasis added).

Unlike the permits in *LaMarre* and *Appletree,* which involved the decisions of municipal CEOs that were found to have no record support on inquiries that were fact intensive, the information presented in MTN's NOITC consisted of *over one hundred pages* of materials, which not only met the explicit substantive requirements of 38 M.R.S. § 490-Y, but also demonstrated factual support for findings that that the Project would not impact any "land … located in, on or over a significant wildlife habitat or other type of protected natural resource…" as required by 38 M.R.S. § 490-Z(1). (A. 28-162.) This information was more than adequate to support the MDEP's findings that MTN's NOITC was complete.

C. Appellants' Reliance Upon Certain Provisions of the Maine Administrative Procedures Act and Cases Applicable to Final Agency Action Ignore the Unique Statutory Scheme Under Which Quarries are Regulated.

Although MTN would generally agree that an agency's decision in granting a permit or license should be supported by factual and legal findings, nothing in the MAPA or the cases relied upon by Appellants address the unique statutory scheme adopted by the Legislature for regulation of quarries up to ten (10) acres.

While selectively citing some provisions of the MAPA, Appellants assert that any decision relating to an "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," and which was not the subject of an

adjudicatory proceeding, must "be made in writing and shall be made only on the basis of evidence relevant to the case." (Blue Br. at 18); *citing* 5 M.R.S. §§ 8002(6) and 10005 (2025). Appellants fail to consider the specific statutory framework governing the regulation of quarries under 38 M.R.S. §§ 490-Y and 490-Z.

When construing statutes, this Court seeks to harmonize rather than interpret provisions in a manner that would create an "absurd, illogical or inconsistent result." *See, e.g., Wood v. Dep't of Inland Fisheries & Wildlife*, 2023 ME 61, ¶14, 302 A.3d 18, 26; *citing Jackson Lumber & Millwork Co. v. Rockwell Homes, LLC*, 2022 ME 4, ¶ 10, 266 A.3d 288, 292 ("In interpreting a statute, we look to its plain meaning, reading its language in harmony with the entire statutory scheme in which it appears, and interpret the statutory language 'to avoid absurd, illogical or inconsistent results.'"). Under Appellants' interpretation, a driver's license, a fishing license, or a hunting license, which undoubtedly are an exercise of the State's police powers and are not subject to an adjudicatory proceeding, would require written findings. Such an interpretation would obviously lead to an absurd result.

This Court has also held, "[a]s a general rule of statutory construction, a specific provision will control a more general provision 'unless it appears that the legislature intended to make the general act controlling.'" *Michalowski v. Bd. of Licensure*, 2012 ME 134, ¶ 22, 58 A.3d 1074, 1080; *citing Butler v. Killoran*, 1998

ME 147, ¶ 11, 714 A.2d 129, 133-34. The Court in *Butler* laid out the following maxim for statutory interpretation:

> [W]here one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

Butler, 1998 ME 147, ¶ 11, 714 A.2d 129.

Because the Maine Legislature purposefully enacted the notice and performance standards provisions under Title 38 to "streamline" the regulatory process for quarries, *supra* at 21, and because this regulatory structure is the more specific substantive law at issue, the notice and performance standards provisions under 38 M.R.S. §§ 490-Y and 490-Z for operation of quarries up to ten (10) acres supersede the general framework for licensing under the MAPA.[7]

Finally, Appellants assert that written findings in support of an agency's decision must be made by the decision-maker, here the MDEP. (Blue Br. at 21); *citing Carroll v. Town of Rockport*, 2003 ME 135, ¶ 28, 837 A.2d 148, 156.

[7] Appellants cite various cases involving the Court's review of agency action and fact-findings in various contexts. (Blue Br. at 16, 19); *citing McPherson Timberlands v. Unemployment Ins. Comm'n*, 1998 ME 177, ¶ 6, 714 A.2d 818 (involving the question of whether a timber management company was an employer under the ABC test for the purposes of Maine's unemployment compensation statutes); *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 2013 ME 76, ¶ 10, 73 A.3d 1061 (involving the question of whether a construction company was an employer under the ABC test for purposes of Maine's unemployment compensation statutes); *Cumberland Farms N., Inc. v. Me. Milk Comm'n*, 234 A.2d 818, 820 (Me. 1967) (involving a remand to the Maine Milk Commission for specific reasons justifying the prices to be charged for various milk products). None of these cases are analogous to the instant case. Although they may address agency fact-finding in the general sense, they do not address the unique regulatory framework applicable to quarries under 38 M.R.S. §§ 490-Y and 490-Z, which allow for quarry operations to commence upon notice and certification by an applicant of compliance with performance standards.

Appellants assert that the April 2 Letter by Michael Clark did not constitute a final decision from which judicial review could be taken because it was an expression by Mr. Clark, as an individual, rather than a decision of the MDEP. Appellants' criticism once again misses the mark. In *Carroll*, this Court found that the written account in board meeting minutes kept by the secretary of the Town of Rockland Board of Appeals of "the reasons given by some, but not all, of the Board members for their votes on various issues" did not constitute written findings. *Id.* ¶ 31.

Unlike in *Carroll*, the present case is not a municipal decision relating to the terms of a subdivision ordinance under which certain detailed findings must be made for the granting of a waiver. Rather, the present case involves the unique regulatory paradigm of the MDEP for regulation of quarries up to ten (10) acres under 38 M.R.S. §§ 490-Y and 490-Z. As noted above, and as found by the legislative history cited by the Superior Court, the statute at issue was enacted in order to streamline the regulatory process surrounding quarries. For this reason, while the April 2 Letter included a courtesy explanation for the MDEP's actions, it was not required. The only finding required by 38 M.R.S. § 490-Y was whether MTN's NOITC was complete. The MDEP made this finding in its March 28 Letter that accompanied the Placard. (A. 26.)

D. The Appellants' Reliance Upon *Gashgai* and its Progeny is Misplaced as These Cases Involve the Requirement for Written Findings and Record Support in the Context of Disciplinary Actions, Not Permitting Decisions.

The Appellants' reliance upon *Narowetz v. Bd. of Dental Practice*, 2021 ME 46, 259 A.3d 771 and *Gashgai v. Bd. of Reg. in Med.*, 390 A.2d 1079 (Me. 1978) are also misplaced. Neither *Narowetz* nor *Gashgai* involve the question of whether an agency's granting of a permit for a land use activity was supported by adequate findings or record support. Rather, both of these cases addressed what evidence and record support licensing boards must rely upon when sanctioning or disciplining an individual for unprofessional conduct. *Narowetz*, 2021 ME 46, ¶¶ 1, 13-14 and *Gashgai*, 390 A.2d at 1081, 1083-84. For this simple reason, Court's findings in *Narowetz* and *Gashgai* are inapplicable here.

III. THE MDEP COMMITTED NO ERROR WHEN IT INTERPRETED 38 M.R.S. § 490-Z(1) SO AS NOT TO REQUIRE A PERMIT UNDER THE NATURAL RESOURCE PROTECTION ACT, BECAUSE THE QUARRY WAS NOT LOCATED IN AN AREA "LISTED" PURSUANT TO THE MNAP AND DID NOT IMPACT ANY SIGNIFICANT WILDLIFE HABITAT OR OTHER TYPE OF PROTECTED NATURAL RESOURCES.

A. The MDEP Did Not Err by Interpreting the Meaning of an Area "Listed Pursuant to the Maine Natural Areas Program" and 38 M.R.S. § 490-Z(1).

As stated above, in determining whether an agency has exceeded its discretion in interpreting a statute, the Court "begin[s] with the statutory terms to determine whether they are ambiguous." *Corinth Pellets, LLC v. Arch Specialty Ins. Co.*, 2021 ME 10, ¶ 36, 246 A.3d 586, 593. "Statutory language is considered ambiguous if it is reasonably susceptible to different interpretations." *Bocko v.*

Univ. of Me. Sys., 2024 ME 8, ¶ 12, 308 A.3d 203. If the statutory language is clear, the court applies it exactly as written. *Guardianship of Sanders*, 2016 ME 99, ¶ 9, 143 A.3d 795.

By contrast, an agency's interpretation of an ambiguous statute within its expertise will be upheld "as long as the interpretation is reasonable and as long as the statute does not compel a contrary interpretation." *Corinth Pellets, LLC*, 2021 ME 10, ¶ 36, 246 A.3d 586; *see also Cent. Me. Power Co.*, 2014 ME 56, ¶ 18, 90 A.3d 451 ("An agency's interpretation of an ambiguous statute it administers is reviewed with great deference and will be upheld unless the statute plainly compels a contrary result.").

In the context of the present case, the meaning of "listed" as used under 38 M.R.S. § 490-Z(1) is ambiguous because it is susceptible of different interpretations. Specifically, subsection 1 of Section 490-Z provides:

> **1. Significant wildlife habitat and other protected areas.** Affected 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.* The department may allow excavation to occur under this section as long as a permit is obtained pursuant to article 5-A. Permit requirements for certain excavations in, on or over high and moderate value inland waterfowl and wading bird habitat are also governed by section 480-GG.

38 M.R.S. § 490-Z(1) (2025) (emphasis added).

Appellants argue that "listed" means any piece of land located in the broad region known as the Focus Area. Such an interpretation, while seemingly consistent with the meaning of Section 490-Z(1), would lead to an absurd outcome.

The Focus Area spans many townships along the Kennebec River, including Gardiner, Pittston, Dresden, Bowdoinham, Woolwich, Bath, Westport Island, Arrowsic, Georgetown, Phippsburg, Edgcomb, and Wiscasset, covering many square miles. (A. 177.)

Under Appellants' interpretation, NRPA approval would be required for quarries throughout virtually entire townships even though much of the land in these towns may not impact any significant wildlife habitat or other protected natural resources. Given the statutory scheme of Section 490-Z(1), which seeks to protect "affected land" that is *"in, on or over* a significant wildlife habitat or other type of protected natural resource", the Court should reject Appellants' interpretation which would be an absurd construction. 38 M.R.S. § 490-Z (2025) (emphasis added); *see Wood,* 2023 ME 61, ¶14, 302 A.3d 18; *Jackson Lumber*, 2022 ME 4, ¶ 10, 266 A.3d 288.

The MDEP's interpretation of "listed" was more reasonable and recognized that, although a given piece of property may fall within the broad region known as the Focus Area, such land may not constitute an area "listed" under MNAP's program if the land did not contain any significant wildlife habitat or other type of protected natural resource. This interpretation of "listed" reads MNAP's mission set forth in 12 M.R.S. § 544 in harmony with the intent of the performance standards for quarries set forth in Section 490-Z(1).

As the Superior Court found:

> While the Focus Area designation is surely a listing made by MNAP as an agency, it does not follow that a Focus Area, without further action, is listed pursuant to § 544. See 38 M.R.S. § 490-Z(1)… Even if a particular location may fall within the definition of a "natural area" under § 544(2)(D) and be listed by MNAP for some purpose, it does not follow that such area is listed on MNAP's "statewide inventory of the State's natural areas" or in either of its databases. 12 M.R.S. § 544(3)(A); *see also* 12 M.R.S. § 544(3)(B), (F).

(A. 12-13.) (internal citations omitted).

B. The MDEP Acted Within its Discretion and Relied Upon Substantial Evidence in the Record When, After Consulting With Appropriate Agencies, it Found MTN's Project Would Not Implicate Significant Wildlife Habitat or Other Protected Natural Resources and found MTN's NOITC to be Complete.

Under Title 38, NRPA approval is required for quarries if the affected land either is located in, on, or over: (1) a significant wildlife habitat, (2) a protected natural resource as defined in Section 480-B, or (3) an area "*listed* pursuant to the Natural Areas Program, Title 12, section 544…" 38 M.R.S. § 490-Z(1) (emphasis added). None of these protected areas are implicated, as shown by substantial evidence in the record. (A. 34-35, 126-132, 149-160.)

Consultation with the MNAP

The MDEP consulted with MNAP to determine whether MTN's Project implicated any significant/sensitive wildlife habitat or other protected natural resources and, thus, was in an area "listed" under 12 M.R.S. § 544 and 38 M.R.S. §

490-Z(1).[8, 9] (A. 208-216.) The email exchange between Mr. Kluck and Ms. St. Hilaire demonstrates that, although the Focus Area may fall under MNAP's program in a general sense, it does not follow that every parcel of land in the Focus Area is "listed" for the purpose of the statute. As Ms. St. Hilaire stated, features in the Focus Area are "*relatively far from the* [Project] *parcel*." (A. 213.) (emphasis added). Ms. St. Hilaire also explained: "Focus Areas are *intended as a planning tool-they are not regulatory by themselves*, though there may be features within the Focus Area that are regulated or otherwise commented on in [MNAP's] environmental review process." *Id.* (emphasis added). Ms. St. Hilaire also included a memorandum along with her email in which she stated that there were no rare botanical features that would be disturbed in the Project site, stating:

> *According to our current information, there are no rare botanical features that will be disturbed within the project site. The nearest mapped botanical feature is a Freshwater Tidal Marsh along the Eastern River, approximately 750-feet west of Middle Road. MNAP typically recommends an undisturbed and vegetated buffer of 250-feet around this habitat type. Additionally, MNAP recommends undisturbed and vegetated buffers of 75-feet along any ephemeral, intermittent, or perennial streams on the property that flow to the Eastern River.*

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[8] Appellants have mischaracterized actions of the MDEP. The Appellants claim in their comments the MDEP on February 12, 2024 and March 8, 2024 in response to the NOITC and in their Petition for Review that "*no State or Federal agencies had been consulted about the proposed quarry*…" (A. 20-21.) (emphasis added). The record reflects that the MDEP appropriately consulted with agencies, including, the MNAP as well as the MDIFW. (A. 213-220.) MNAP is the state agency charged with identifying whether affected land is "located in, on or over a significant wildlife habitat or other type of protected natural resource … or in an area listed pursuant to the Natural Areas Program." 12 M.R.S. § 544. The MDIFW is the state agency responsible for determining and mapping areas of protected natural resources and significant wildlife habitat. 38 M.R.S. § 480-B ("'Significant wildlife habitat' means: A. *The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife*…") (emphasis added).

[9] The MDEP's consultation with MNAP is evidenced by Mr. Erich Kluck's email to Ms. Lisa St. Hilaire on February 12, 2024 and Ms. Hilaire's responsive email and memo dated March 1, 2024. (A. 208-212.)

(A. 212.) (emphasis added).

Ms. St. Hilaire's conclusion that the Project site was not an area "listed" under 12 M.R.S. § 544 and 38 M.R.S. § 490-Z(1) and did not impact any significant wildlife habitat or protected natural resources was also consistent with maps and other information provided by MTN in its NOITC. (A. 34-35, 126-132, 149-160.)

Appellants criticize the MDEP for not requiring an on-site review, as had been suggested by MNAP, and even claim that there is "no documentation" that an on-site survey was ever conducted by a qualified field biologist. (Blue Br. at 10.) This claim is without merit. Although it was not provided to the MNAP as part of the MDEP's consultation, and therefore MNAP had no knowledge of it, the record demonstrates that a certified wetland scientist (i.e., Alexander Finamore of Mainely Soils, LLC) performed a wetland delineation of approximately fifteen acres of the Property and concluded that there were no wetlands of special significance ("WOSS") in the study area. (A. 34-35). Even if Mainely Soils had not conducted any wetland study, the MDEP's decision not to require any further on-site studies would not be arbitrary. As the Superior Court appropriately found, MNAP's suggestion of an on-site survey was just that – a suggestion – and did not constitute "willful and unreasoning and without consideration of the facts or circumstances." (A. 15.)

Furthermore, no on-site studies were necessary because the record was clear based on the MDIFW's published maps that the Project site did not implicate any: (1) significant wildlife habitat, (2) rare, threatened, or endangered animals, (3) rare plant or natural communities, (4) rare/exemplary natural communities/ecosystems, (5) aquatic species and habitats, (6) aquifers, or (7) other protected natural resources. (A. 34-35, 126-132, 149-160.)

Consultation with the MDIFW

The MDIFW is the agency responsible for determining and mapping areas of protected natural resources and significant wildlife habitat. 38 M.R.S. § 480-B (2025) ("'Significant wildlife habitat' means: A. *The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife*…") (emphasis added).[10] On March 22, 2024, Mr. Kluck sent an email along with the site location map and site plan of the proposed quarry to Mr. John Perry, Environmental Review Coordinator for the MDIFW, in order to ascertain whether the MTN's Project impacted any significant wildlife habitats. (A. 217 – 224.)[11] On March 27, 2024, Mr. Perry sent a responsive email which stated:

[10] Section 480-B defines a "protected natural resources" as "coastal sand dune systems, coastal wetlands, significant wildlife habitat, fragile mountain areas, freshwater wetlands, community public water system primary protection areas, great ponds or rivers, streams or brooks." 38 M.R.S. § 480-B (8). Other than some forested wetlands, none of these other features are implicated by MTN's Projects site based on the record. (A. 34-35, 126-132, 149-160.)

[11] The MDEP's consultation with the MDIFW is evidenced by Mr. Erich Kluck's email to Mr. John Perry, Environmental Review Coordinator for the MDIFW, dated March 22, 2024, and Mr. Perry's responsive email of March 27, 2024. (A. 217-225.)

> On the fisheries side of things, we recommend a 100-foot intact riparian buffer along the back edge that's near Nequasset Brook. There do not appear to be any other streams in the area, but that recommendation would apply to any other streams, if present. Regarding wildlife, the only RTE species which are likely in the area would be one or more species of bats--of our eight bat species, four are listed as either Threatened or Endangered, and the other four are Species of Special Concern. We have very recently begun to recommend a tree clearing timing restriction for larger projects, of which this would apply, as follows:
>
> - To minimize impacts to bats during the bat maternity season, we recommend no tree clearing from May 15 through August 15. Alternatively, the applicant can elect to conduct acoustic surveys within the project area, conducted by qualified bat biologists experienced with acoustic survey methodology and following MDIFW's most recent survey protocol. The lack of acoustic detection of listed bats would allow for clearing during the bat maternity season per MDIFW current guidelines.
>
> Regarding the several wetlands depicted on the map, we'll defer to what is allowable under the mining rules but our recommendation is to avoid/minimize as much as possible.

(A. 225.)

These findings by Mr. Perry were consistent with maps and other materials provided by MTN along with its NOITC that demonstrated that no significant wildlife habitats or other protected natural resources would be impacted by the Project, which included:

- Stormwater PBR and supporting materials (A. 107 – 113, 118-19.);
- Aquifer maps showing the Project site was not located near any aquifer (A. 127-28.);
- Habitat map showing that, with the exception of certain forested wetlands, the Project implicated no tidal wading bird habitat, shorebird habitat, significant vernal pools, deer wintering areas, roseate tern, piping plover, or least tern nesting areas, Atlantic salmon spawning or rearing habitat, wild brook trout habitat, rare plants and natural communities or other natural communities, or ETSC animal habitat buffers) (A. 129.);
- Water resource & riparian habitats map showing no sensitive resources in the Project site other than the forested wetlands previously identified (A. 130.);
- High value plant & animal habitats map showing no sensitive habitats in the Project site area (A. 131.);
- Habitat Maps produced by MTN using the State of Maine's Habitat Maps Interactive Viewer along with overlays depicting natural resources, significant wildlife habitats, plants and natural communities (A. 149 – 154.);

- U.S. Fish & Wildlife Service publication defining critical habitat for Altantic salmon, (A. 155 – 160.); and
- March 7 Response to Appellants' February 12, 2024 Comments to the MDEP, responding to allegations relating to wetlands, the Altantic salmon, significant wildlife habitat or other plant and animal species, along with supporting documentation (A. 193 – 199).

With regard to the MDIFW's recommendation of maintaining a "100-foot intact riparian buffer along the back edge that's near Nequasset Brook," MTN's NOITC went above and beyond this requirement. As noted in the March 7 Response and shown on the site plan, MTN's first ten (10) acre phase of the quarry, "at its closest points, is located more than 3,500 feet from the Nequasset Brook and at least 1,500 feet from the Eastern River." (A. 188 – 189) (emphasis original); (A. 32-33.) MTN's setbacks, thus, far exceeded the 100 foot buffer recommended by the MDIFW.[12] Further, even assuming that MTN was to expand the quarry at some time in the future beyond the initial phase into subsequent ten (10) acre phases, as is permitted by State law, the site plan demonstrates that the quarry excavation would never come close to encroaching the MDIFW's recommended 100 foot buffer. (A. 32-33.)

Because the record supported the MDEP's finding that the Project will not implicate any significant wildlife habitat or other protected natural resources, the MDEP did not err in rejecting Appellants' request for review under the NRPA and

[12] This buffer also far exceeds the MNAP's recommendation of a 75 foot buffer along any ephemeral, intermittent, or perennial streams on the property that flow into the eastern river. (A. 212.)

in granting MTN a Placard for the Project upon finding that MTN's NOITC was complete, as set forth in the March 28 Letter.

IV. CONCLUSION

For the foregoing reasons, Appellee MTN Sand & Gravel respectfully requests that the Court affirm the MDEP's findings set forth in the March 28 Letter and the Placard issued for MTN's quarry Project and reject Appellants' procedural and substantive arguments as either waived or without merit.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin J. Smith, hereby certify that on this 20th day of March, 2026, I caused two (2) copies of the foregoing Brief of Appellee, MTN Sand & Gravel, to be served on the following counsel for Appellants and Appellee by First-Class Mail, postage prepaid, and also provided a courtesy copy by electronic mail:

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