STATE OF MICHIGAN

IN THE 2ND CIRCUIT COURT – BERRIEN COUNTY

PRESERVE THE DUNES, INC.,
a Michigan Not For Profit
Corporation,

Appellant,

vs. File No. 06-2848-AA-M

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, Hon. Paul L. Maloney

Appellee.

______________________________________/

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APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction of this appeal pursuant to the Revised Judicature Act ("RJA"), MCLA 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103 which provide for an appeal to the circuit court from an agency decision. Appellant appeals the Michigan Department of Environmental Quality's January 18, 2006 decision to issue a renewal permit to TechniSand, Inc., allowing TechniSand, Inc. to continue mining in a critical dune area in violation of Michigan statutory law. *See Record on Appeal* pgs. 152-157.

This Court reviews an agency decision under MCLA 600.631 to determine whether the agency's decision, findings, rulings and orders were authorized by law. *See Michigan Waste Systems v Dept of Natural Resources*, 147 Mich App 729, 736; 383 NW2d 112 (1986). An agency's action in issuing a permit is unlawful and reversible by this Court when the permit "is [issued] in violation of a statute, [issued] in excess of the statutory authority or jurisdiction of the agency, [issued] upon unlawful procedure resulting in material prejudice to a party, [or] is arbitrary or capricious." *Id.*

STATEMENT OF QUESTIONS INVOLVED

1. Did the Michigan Department of Environmental Quality have the statutory authority to issue the January 18, 2006 Nadeau Site Permit Renewal to TechniSand, Inc., allowing TechniSand, Inc. to continue mining in a critical dune area when TechniSand, Inc. was not in compliance with MCLA 324.63702(1)?

The Michigan Department of Environmental Quality said, "Yes."

Appellant says "No."

INTRODUCTION OF PARTIES

The Appellant Preserve the Dunes, Inc. ("PTD" or "Appellant"), is a Michigan Not For Profit Corporation. Its corporate purpose is to promote environmental awareness and to protect the natural resources of this state from pollution, impairment or destruction. As part of its general mission, and because sand dunes are an important natural resource, PTD and its members actively advocate the protection of sand dunes within Michigan.

The Appellee Michigan Department of Environmental Quality ("MDEQ") is an agency of the State of Michigan charged with, among other things, regulation of sand dune mining activities and enforcement of state laws regulating sand dune mining. Under § 63704 of Part 637 of the Michigan Natural Resources and Environmental Protection Act ("NREPA"), MCLA 324.63704, sand dune mining within Great Lakes sand dune areas is prohibited without a permit issued by Defendant MDEQ.

TechniSand, Inc. ("TechniSand"), who intervened in this matter,[1] was incorporated in the State of Delaware in July 1991. Upon Appellant's information and belief, it is authorized to do business in the State of Michigan and conducts systematic commercial sand mining operations within Great Lakes dune areas in Michigan under permits issued by the MDEQ.

STATEMENT OF FACTS

This appeal involves property located in Hagar Township, Berrien County, Michigan, commonly known as the "Nadeau Site." The Nadeau Site contains critical and non-critical dune areas as that term is defined under NREPA Part 353, MCLA 324.35301. PTD seeks appellate review of the MDEQ's January 18, 2006 decision to issue Permit No. TS-NS-107-A2 ("Nadeau Site Permit Renewal") to TechniSand. *See Record on Appeal* pgs. 152-157. The original

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[1] PTD and MDEQ allowed TechniSand to intervene by consent. *See Exhibit A*.

amended permit ("Nadeau Site Permit"), which the MDEQ issued on November 24, 1996, improperly allowed TechniSand to expand mining operations from a non-critical dune area to a critical dune area at the Nadeau Site. As a result, TechniSand's mining activity is not in compliance with the provisions of the Sand Dune Mining Act and the MDEQ was without legal authority under MCLA 324.63708 to issue the Nadeau Site Permit Renewal on January 18, 2006.

a. Statutory Scheme

Part 637 of NREPA, MCLA 324.63701 *et seq*., the Sand Dune Mining Act ("SDMA"), regulates sand dune mining activities within Great Lakes sand dune areas. Pursuant to section 63701(k), all sand dunes within two (2) miles of the ordinary high water mark of a Great Lake are subject to the regulations of the SDMA. *See* MCLA 324.63701(k). Section 63704 of the SDMA prohibits a person or operator from mining sand in a Great Lakes sand dune area without first obtaining a permit for such activity from the MDEQ. *See* MCLA 324.63704.

NREPA further regulates the use of critical dune areas within Great Lakes dune areas. *See* MCLA 324.35301 *et seq*. In section 35301(c), critical dune areas are defined as those geographic areas designated in the atlas of critical dune areas prepared by the MDEQ in February of 1989. *See* MCLA 324.35301(c).

In section 35302, the legislature has made the following specific findings:

> (a) The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provides significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource.
>
> (b) Local units of government should have the opportunity to exercise the primary role in protecting and managing critical dune areas in accordance with this part.

> (c) The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and residential use of critical dune areas shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured. *See* MCLA 324.35302.

As part of the legislative scheme to protect critical dunes and effectuate the intent of the statutes, section 63702 of the SDMA prohibits the MDEQ from issuing a sand dune mining permit within a critical dune area. *See* MCLA 324.63702(1). There are only two exceptions to this otherwise blanket prohibition against mining critical dunes. They are:

> (a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.
>
> (b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit.

An operator is defined in section 63701(j) of the SDMA as: "[a]n owner or lessee of mineral rights or any other person engaged in or preparing to engage in sand dune mining activities with respect to mineral rights within a sand dune area." MCLA 324.63701(j). TechniSand is an operator as that term is defined in section 63701(j) of the SDMA. Therefore, in order to mine in a critical dune area, TechniSand must meet one of the two exceptions contained in section 63702(1).[2]

b. TechniSand's Prior History with Respect to the Nadeau Site

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[2] TechniSand has previously admitted to the MDEQ that it does qualify for the exception contained in MCLA 324.63702(1)(b). *See* December 29, 2005 letter from TechniSand to MDEQ, attached to the *Record on Appeal* as pgs. 9-11.("MCL §324.63702(1)(b) is inapplicable because TechniSand is not seeking to amend the permit.").

On July 31, 1991, TechniSand purchased the Nadeau Site from Manley Brothers of Indiana, Inc. ("Manley Brothers"). The Nadeau Site lies within a Great Lakes sand dune area and is subject to the protections and regulations contained in the SDMA. A portion of the western parcel of the Nadeau Site contains critical dune areas, as defined in section 35301(b). *See* MCLA 324.35301(b). The eastern parcel of the Nadeau Site contains non-critical dunes.

Since at least 1983, Manley Brothers possessed a permit issued by the Department of Natural Resources ("DNR") to mine sand from approximately 26.5 acres of non-critical dunes located in the eastern parcel of the Nadeau Site. After TechniSand purchased the Nadeau Site in 1991, the DEQ transferred Manley Brothers' mining permit to TechniSand and TechniSand continued mining in the non-critical dune areas of the Nadeau Site.

In 1994, TechniSand applied to the DNR for an amendment of the permit. The application requested permission to mine approximately 126.5 acres located in the western parcel of the Nadeau Site. The proposal was to extend mining from a non-critical sand dune area into a critical dune area, to remove seven million (7,000,000) tons of sand from surface operations and nine hundred fifty thousand (950,000) tons of sand from sub-surface operations on 70.54 acres of the 126.5 acre site, the creation of two lakes of 9.8 and 13.7 acres, and the relocation of threatened species of flora. TechniSand requested the permit amendment to extend mining into a critical dune area as an exception to the prohibition against mining critical dune areas contained in MCLA 324.63702(1). The DNR denied TechniSand's request, explaining that TechniSand did not meet the eligibility requirements of MCLA 324.63702(1) because it acquired the property it sought to mine after July 5, 1989.

In 1996 TechniSand once again applied for an amendment of the permit, repeating its request for permission to mine in critical dune areas of the Nadeau Site. This time, however,

TechniSand made application to the MDEQ and not the DNR because the jurisdiction for sand dune mining was transferred to the MDEQ in 1995.

On November 24, 1996, despite the fact that TechniSand's request to the MDEQ was identical to the request it made to the DNR in 1994 and which the DNR denied, the MDEQ issued the requested amended permit to TechniSand allowing it to expand its mining operations into critical dune areas at the Nadeau Site.

c. Prior Litigation

In July 1998, Appellant sued the MDEQ and TechniSand under the Michigan Environmental Protection Act, MCLA 324.1701 *et seq*. ("MEPA"), alleging that the MDEQ violated MEPA when it issued the Nadeau Site Permit allowing TechniSand to expand mining operations into critical dune areas. As part of that case, PTD alleged that TechniSand was ineligible for the Nadeau Site Permit because it did not meet either of the two exceptions for mining in critical dune areas contained in MCLA 324.63702 and, as a result, the MDEQ violated the SDMA by issuing TechniSand a permit to mine in a critical dune area.

In a published opinion, *Preserve the Dunes, Inc v Dept of Environmental Quality*, 253 Mich App 263 (2002) (hereinafter "*Preserve the Dunes I*"), the Michigan Court of Appeals ruled in PTD's favor on its MEPA claim against the MDEQ and TechniSand. In so ruling, the court concluded "that TechniSand did not qualify for an exception to the prohibition on sand dune mining in critical dune areas under MCLA 324.63702. Accordingly, the DEQ was not authorized to amend the permit to allow TechniSand to mine in critical dune areas." *Id*. at 291.

On appeal, the Michigan Supreme Court (in a 4 to 3 decision) reversed the Court of Appeals and remanded the case. *Preserve the Dunes, Inc v Dept of Environmental Quality*, 471 Mich 508 (2004) (hereinafter "*Preserve the Dunes II*"). In so doing, the Supreme Court held that

"MEPA affords no basis for judicial review of agency decisions under MCL 324.63702(1) because that inquiry is outside the purview of MEPA." *Id.* at 524. Because Plaintiff brought its challenge of the MDEQ's MCLA 324.63702(1) decision more than nineteen months after the MDEQ issued TechniSand the permit to mine in critical dune areas (and since MEPA could not be used to review the MDEQ's decision), the Supreme Court held that Plaintiff's challenge to the MDEQ's MCLA 324.63702(1) decision was time barred under either the RJA or the Administrative Procedures Act ("APA"). *See id.* In its ruling, the Supreme Court informed PTD that review of an agency decision, such as the decision to issue the Nadeau Site Permit Renewal by the MDEQ, may be had in any one of three ways:

> In general, judicial review of an administrative decision is available under the following statutory schemes: (1) the review process prescribed in the statute applicable to the particular agency, (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 *et seq.*

Importantly, because the Supreme Court reached its decision on procedural statute of limitations grounds, nothing in the Supreme Court's ruling overruled the Court of Appeals' substantive factual determination "that TechniSand did not qualify for an exception to the prohibition on sand dune mining in critical dune areas under MCL § 324.63702. Accordingly, the DEQ was not authorized to amend the permit to allow TechniSand to mine in critical dune areas." *Preserve the Dunes I*, 253 Mich at 291.

d. TechniSand's Application to Renew the Nadeau Site Permit

A sand dune mining permit issued by the MDEQ is valid for only five years. *See* MCLA 324.63708(1). The SDMA provides a holder of a sand dune mining permit an opportunity to apply for renewal of that permit at the end of the five year period:

> (1) A sand dune mining permit issued by the department is valid for not more than 5 years. A sand dune mining permit shall be renewed if the sand dune mining activities have been carried out in compliance with this part, the rules promulgated under this part, and the conditions of the sand dune mining permit issued by the department. MCLA 324.63708(1).

The language of MCLA 324.63708 makes it clear that renewal of a sand dune mining permit is not automatic—an operator must be in compliance with the SDMA to obtain a renewal permit.

On November 4, 2005, TechniSand submitted an application to the MDEQ seeking issuance of a renewed Nadeau Site Permit pursuant to MCLA 324.63708. The MDEQ notified PTD of TechniSand's application and allowed PTD to participate in the renewal permit process by accepting and considering comments from attorneys representing PTD.[3] *See Record on Appeal* pgs. 1-4 and 12-15.

Despite TechniSand's ineligibility to mine in a critical sand dune area under MCLA 324.63702(1) (as confirmed by the Court of Appeals in *Preserve the Dunes I*), the MDEQ issued the Nadeau Site Permit Renewal on January 18, 2006. This action by the MDEQ violated statutory law and/or exceed the scope of the MDEQ's statutory authority because TechniSand did not (and still does not) qualify to mine critical dune areas at the Nadeau Site under either of the two exceptions contained in MCLA 324.63702(1). By virtue of mining in a critical dune area without first complying with MCLA 324.63702(1), TechniSand's mining activities are in violation of the SDMA; therefore, the MDEQ lacks the statutory authority under MCLA 324.63708 to issue the Nadeau Site Permit Renewal to TechniSand. On February 7, 2006, PTD filed a timely Claim of Appeal with respect to the MDEQ's decision to issue the Nadeau Site Permit Renewal. *See Exhibit B*.

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[3] The MDEQ also accepted and considered comments from local residents.

LEGAL ARGUMENT

I. PRESERVE THE DUNES HAS STANDING TO CHALLENGE THE MDEQ'S DECISION TO RENEW TECHNISAND'S NADEAU SITE PERMIT

According to Michigan precedent, a potential plaintiff has standing to seek relief from the courts when it can allege, at a minimum, three elements:

> First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'' Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608, 628-29; 684 NW2d 800 (2004).

In the context of this appeal, PTD meets the above-referenced standing requirements in two ways, one on substantive grounds and one on procedural grounds.

a. Nonprofit Organizations such as PTD have Standing to Bring an Appeal in the Interest of its Members.

As a preliminary matter, and as a theme that will continue to run throughout this Brief, PTD would like to point out to this Court that MEPA does not apply to this appeal. PTD does not allege any MEPA violation, or any harm under section 324.1701(1) of MEPA.[4] PTD is challenging the MDEQ's decision by way of the Revised Judicature Act, MCL 600.631. In cases involving environmental issues, plaintiffs/appellants can have standing independent of, and without reference to, section 324.1701(1) of MEPA. *See National Wildlife*, 471 Mich at 632; 684 NW2d 800 ("we hold that plaintiffs have standing without regard to MCL 324.1701[.]").

[4] A MEPA violation is contingent upon a finding of harm to the environment; this appeal has nothing to do with MEPA. Once PTD establishes standing, harm becomes irrelevant. PTD is challenging the statutory authority of the MDEQ to issue the Nadeau Site Permit Renewal, not whether the Nadeau Site Permit Renewal creates harm to the environment under MEPA.

PTD is a nonprofit organization with members who reside in close proximity to the Nadeau Site area and whose interest in the aesthetic and recreational values of the Nadeau Site and the surrounding area will be lessened by the mining allowed by the Nadeau Site Permit Renewal. Michigan recognizes the rule that "'environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be **lessened**'[5] by the challenged activity.'" *Id.* at 629; 684 NW2d 800 (quoting *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 183 (2000)) (emphasis added). At this stage of the process, PTD has submitted four affidavits to this Court from its members showing the requisite injury in fact.[6] *See Exhibit C*. In addition, the record on appeal (as transmitted to this Court by the MDEQ) shows several letters from PTD members to the MDEQ requesting that it not issue the Nadeau Site Permit Renewal. These affidavits and letters are sufficient to allow PTD to bring an action in the interest of its members so affected. *See Id.* ("[n]onprofit organizations . . . have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs."). Since PTD's members' injury (lessened enjoyment) is directly traceable to the mining and proposed continued mining of the Nadeau Site by TechniSand, a ruling by this Court invalidating

[5] "Lessened" is a standard which simply means "less enjoyable than before." The fact that an individual's use or enjoyment of the area is lessened meets the requirement that the individual has an actual or imminent injury in fact. Under this standing analysis, there is no need to show the type of harm one would have to put forth to sustain a MEPA claim.

[6] According to the *National Wildlife* court, a plaintiff need only aver "general factual allegations" as to the injury that will result from the threatened conduct. *See id.* at 631; 684 NW2d 800. Once a defendant brings a motion for summary disposition on the standing question, then the plaintiff must offer further support by way of affidavit or otherwise to defeat the defendant's motion. *See id.* By providing these affidavits now, when no motion or argument as to standing is pending, PTD is providing this Court with **more** evidence as to standing than the law requires.

the MDEQ's action in issuing the Nadeau Site Permit Renewal will adequately redress the injury of which PTD and its members complain.

In short, under the holding of *National Wildlife*, PTD has standing to bring this appeal and this Court has authority to redress its injuries.

b. Even if the Standing Rules of National Wildlife do not Apply, by Allowing PTD to Participate in the Renewal Permit Process, the MDEQ Waived any Right it may have had to Raise Standing as an Issue.

As stated earlier, the MDEQ notified PTD of TechniSand's application to renew the expiring Nadeau Site Permit and fully allowed PTD to participate in the renewal permit process by accepting and considering comments/arguments from PTD's counsel. In fact, in a Brief filed by the MDEQ with this Court in a companion case,[7] the MDEQ acknowledges its decision to allow PTD's participation in the renewal permit process:

> Part 637 does not provide for a contested case hearing to challenge a permit decision. But, the Department has authority to promulgate rules pursuant to MCL 324.63713; it notified [PTD] of [TechniSand's] application, and [PTD] participated in the application review process (See, attachments to original Complaint). **In such circumstances, a circuit court appeal is available under MCL 600.631**[.] *See Exhibit D* (emphasis added).

By allowing PTD to fully participate in the Nadeau Site Permit Renewal process, the MDEQ has waived any defense to this appeal based on standing. *See City of Novi v Mirage Development, Inc*, 2005 WL 387666 *6 (Mich App 2005) ("[d]efendant, however, has waived the standing issue pertaining to Mirage because defendant stipulated to Mirage's intervention, and assented to Mirage's right to intervene. Defendant cannot stipulate to a matter and then claim on appeal that the result was error.") (internal citations omitted); *see also McGill v Scottsdale Ins Co*, 2002 WL

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[7] PTD, in order to preserve its rights to pursue declaratory and injunctive relief, filed a Complaint in Berrien County Circuit Court, on February 7, 2006, File No. 06-2849-CZ-M. The MDEQ filed a Motion for Summary Disposition and Brief in Support in that action.

867738 (Mich App 2002) (a stipulation as to a party's participation by way of declaratory judgment action estops any defense based on standing).

The MDEQ's actions in this matter preclude it from raising standing as a defense. This waiver and/or estoppel applies to the entire doctrine of standing. If PTD did not have a justiciable interest in the MDEQ's renewal process for the Nadeau Site Permit, it should not have allowed PTD to participate, but by allowing PTD's participation, and by expressly acknowledging the fact that a circuit court appeal is available to PTD under MCL 600.631,[8] the MDEQ has forever waived any defense based on standing.

II. COLLATERAL ESTOPPEL DOES NOT BAR PRESERVE THE DUNES' APPEAL

Collateral estoppel, or "issue preclusion" as it is sometimes called, "precludes the relitigation of claims and thus prevent[s] 'vexation, confusion, chaos and the ineffective use of the judicial resources.'" *National City Bank of Michigan/Illinois v Employees Life Co Mutual*, 2002 WL 1308638 *2 (Mich App 2002) (quoting *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994)). For collateral estoppel to apply, all the following three elements must be present in the subsequent lawsuit:

> (1) '**a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment**'; (2) **'the same parties must have had a full [and fair] opportunity to litigate the issue'**; and (3) 'there must be mutuality of estoppel.' '[M]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, '[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been

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[8] In *Preserve the Dunes II*, the Supreme Court also expressly acknowledged that an appeal pursuant to MCL 600.631 provided PTD with an avenue to review the MDEQ's decision regarding the permitting process. *See Preserve the Dunes II*, 471 Mich 508, 519 ("[i]n general, judicial review of an administrative decision is available under the following statutory schemes: . . . (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103[.]").

> bound by it, had it gone against him.' *Monat v State Farm Ins Co*, 469 Mich 679, 682-83; 677 NW2d 843 (2004) (citations omitted) (emphasis added).

For the reasons stated below, neither the MDEQ nor TechniSand may use collateral estoppel as a shield against PTD's present appeal.

a. The Supreme Court did not Determine Whether TechniSand was Eligible to Receive the Original Nadeau Site Permit.

In *Preserve the Dunes II*, the Supreme Court ruled against PTD because it found PTD's challenge to the MDEQ's act of granting the Nadeau Site Permit to be time-barred under the Revised Judicature Act or the Administrative Procedures Act. *Id.* at 520; 684 NW2d 847 ("[w]e need not decide here whether PTD's challenge to the DEQ's permit decision is governed by the RJA or the APA because the challenge is time-barred under either statute. PTD brought this action nineteen months after the DEQ's decision to grant TechniSand's application for an amended permit, which far exceeds the sixty-day period allowed by the APA, MCL 24.304(1), and the twenty-one-day period provided by MCR 7.101(B)(1), which governs appeals under MCL 600.631 of the RJA pursuant to MCR 7.104(A)."). In so deciding, the Supreme Court expressly held that "DEQ determinations of permit eligibility under §§ 63702(1) and 63704(2) are **unrelated to whether the applicant's proposed activities on the property violate MEPA**." *Id.* at 519; 684 NW2d 847 (emphasis added).

The Supreme Court made its determination on procedural, not substantive grounds. Once the Supreme Court failed to rule on the merits of the argument (i.e., whether TechniSand qualified to receive the Nadeau Site Permit under either of the two exceptions in MCLA 324.63702) and instead ruled PTD's action was time-barred, the central question, whether TechniSand was eligible under either exception provided in MCLA 324.63702(1), **went undecided by the Supreme Court**. In fact, the only court that actually directly decided the

question at issue in this appeal, the Court of Appeals in *Preserve the Dunes I*, conclusively ruled that TechniSand was not eligible to receive, and the MDEQ was without authority to issue, the Nadeau Site Permit. *See Preserve the Dunes I*, 253 Mich App at 316.("[w]e also conclude that TechniSand did not qualify for an exception to the prohibition on sand dune mining in critical dune areas under MCL § 324.63702. Accordingly, the DEQ was not authorized to amend the permit to allow TechniSand to mine in critical dune areas."). In order to disturb this factual determination made by the *Preserve the Dunes I* court, the *Preserve the Dunes II* court would have had to undertake a full analysis of the proper interpretation of section 63702(1) and determine, based on that analysis, that TechniSand qualified for one of the two exceptions contained therein. The Supreme Court in *Preserve the Dunes II* engaged in no such analysis, deciding instead that the statute of limitations barred the action; therefore, the factual determination by the Court of Appeals in *Preserve the Dunes I*, that TechniSand does not qualify for either exception contained in section 63702(1) remains good law and the law of this case. Indeed, that factual determination itself (that TechniSand **does not** qualify for either of the exceptions contained in MCLA 324.63702(1)) is properly regarded as creating collateral estoppel on that issue in PTD's favor. *See McCoy v Cooke*, 165 Mich App 662, 667; 419 NW2d 44 (1988) (holding that a plaintiff in a subsequent action may use collateral estoppel offensively to prevent relitigation of an issue already decided in a prior proceeding).

Based on the foregoing, collateral estoppel does not bar PTD from now asserting that TechniSand was ineligible to receive the Nadeau Site Permit Renewal because it did not qualify for either exception contained in MCLA 324.63702.

b. The Question of Injury to the Environment is Irrelevant to PTD's MCLA 600.631 Appeal; Therefore, the Doctrine of Collateral Estoppel does not bar PTD's Appeal.

When a party seeks to invoke the doctrine of collateral estoppel, the issues involved in the prior and subsequent litigation "'**must be identical and not merely similar**.'" *Horn v Dept of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996) (quoting *Eaton Co Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994)) (emphasis added). As stated herein, in this MCLA 600.631 appeal, PTD is not claiming a MEPA injury and is not pursuing a MEPA claim. In *Preserve the Dunes II*, the Supreme Court remanded a portion of the case it did not dismiss on timeliness grounds to the Court of Appeals for a determination whether TechniSand's conduct violated MEPA.[9] *See Id.* at 525; 684 NW2d 847. On remand; after reviewing the trial court's findings, the Court of Appeals found that the harm to the environment alleged by PTD did not rise to the level of an actionable violation of MEPA. *See Preserve the Dunes, Inc v Dept of Environmental Quality*, 264 Mich App 257; 690 NW2d 487 (2004) (hereinafter "*Preserve the Dunes III*").

As the Supreme Court held in *Preserve the Dunes II*, the issue involved in this appeal, **permit eligibility**, has absolutely nothing to do with MEPA.[10] PTD is not challenging whether TechniSand's mining activities at the Nadeau Site cause harm to the environment, **it is challenging whether the MDEQ had statutory authority to issue the Nadeau Site Permit Renewal on January 18, 2006**. The issues between PTD's MCLA 600.631 Appeal and the *Preserve the Dunes III* court's determination that TechniSand's mining in the critical dune area of the Nadeau Site caused no harm to the environment under MEPA, are not even similar, never mind identical, as required for collateral estoppel to apply.

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[9] Namely, whether TechniSand's conduct violated the MEPA standard incorporated into the SDMA under section 63709. This remand did not deal with the validity of the Nadeau Site Permit, it only dealt with the issue of TechniSand's conduct as it related to MEPA.

[10] "DEQ determinations of permit eligibility under §§ 63702(1) and 63704(2) are **unrelated to whether the applicant's proposed activities on the property violate MEPA**." *Id.* at 519; 684 NW2d 847 (emphasis added).

Because MEPA does not apply in any way to PTD's MCLA 600.631 appeal, the issue of harm to the environment caused by TechniSand's mining of the critical dune area of the Nadeau Site is irrelevant and does not bar PTD's appeal in this matter under the doctrine of collateral estoppel.

III. THE DOCTRINE OF RES JUDICATA DOES NOT BAR PRESERVE THE DUNES' APPEAL

The doctrine of *res judicata* operates as a bar to a second action when:

> (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first action, and (3) both actions involve the same parties or their privies. *Sewell v Clean Cut Management*, 463 Mich 569, 575; 621 NW2d 222 (2001).[11]

Under Michigan law, *res judicata* does not apply to an action dismissed on the basis of the statute of limitations, because that is a dismissal on a technical, procedural ground and not on the merits. *See Ozark v. Kais*, 184 Mich. App. 302, 307-308 (1990); *see also Washington v Sinai Hospital of Greater Detroit*, 2005 WL 3234665 *1 (Mich App 2005) ("complaint was not barred by res judicata because a grant of summary disposition on the grounds that the statute of limitations has expired does not constitute an adjudication on the merits of a cause of action.").

As noted previously, in *Preserve the Dunes II*, the Supreme Court held only that PTD's challenge to the issuance of the Nadeau Site Permit was time-barred by the applicable statute of limitations—the doctrine of *res judicata* simply does not apply to PTD's current timely appeal.

IV. THE MDEQ HAD NO AUTHORITY TO ISSUE THE JANUARY 18, 2006 NADEAU SITE PERMIT RENEWAL TO TECHNISAND BECAUSE TECHNISAND WAS NOT IN COMPLIANCE WITH THE ACT

Section 63702(1) of the SDMA prohibits MDEQ from issuing a permit which allows mining in a critical dune area unless the operator fits within one of two exceptions:

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[11] The burden of proving the applicability of the doctrine is on the party asserting it – in this case, the MDEQ. *See Sloan v City of Madison Heights*, 425 Mich. 288, 295 (1986).

> (1) **Notwithstanding any other provision of this part**, the department **shall not issue** a sand dune mining permit **within a critical dune area** as defined in part 353 after July 5, 1989, **except** under either of the following circumstances:
>
> (a) The **operator** seeks to **renew or amend** a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.
>
> (b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit. MCL 324.63702(1) (emphasis added).

The plain language of section 63702(1)(a) makes clear that the act of "issuing" a sand dune mining permit includes issuing renewal permits. Furthermore, use of the phrase "notwithstanding[12] any other provision of this part" to lead off section 63702 indicates **that the provisions of section 63702 dealing with permits (including renewals) in critical dune areas, takes precedence over all other provisions of the SDMA**. Because section 63702 trumps all other provisions of the SDMA, compliance with section 63702 must be determined first, before compliance with any other section of the SDMA even matters. Therefore, MDEQ must **first** determine whether TechniSand (or any other renewal applicant) qualifies for one of the stated exceptions applies **before** even considering TechniSand's requested renewal.

a. The MDEQ was Without Legal Authority to Renew the Nadeau Site Permit Because TechniSand Does not Meet the Requirements of MCL 324.63708.

Issuance of sand dune mining permit renewals are governed by MCL 324.63708, which provides:

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[12] "When construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory." *Karpinski v. St. John Hosp-Macomb Center Corp.*, 238 Mich. App. 539, 543 (1999).

> (1) A sand dune mining permit issued by the department is valid for not more than 5 years. A sand dune mining permit shall be renewed **if** the sand dune mining activities have been carried out **in compliance with this part**, the rules promulgated under this part, and the conditions of the sand dune mining permit issued by the department. MCLA 324.63708 (emphasis added).

As discussed herein, because TechniSand does not qualify for either of the exceptions contained in section 63702(1), the Nadeau Site Permit previously issued to TechniSand in 1996 violates the statutory scheme contained in the SDMA. Since TechniSand has been mining in a critical dune area, but is doing so without proper statutory authority, TechniSand cannot be considered to have carried out its mining in compliance with the provisions of the SDMA. To phrase the issue another way, one who **is in violation of a statutory provision** of the SDMA (as TechniSand's mining in the critical dune area of the Nadeau Site is with respect to section 63702(1)) by very definition, **is not carrying out sand dune mining activities in compliance** with the SDMA.

b. The MDEQ was Without Legal Authority to Renew the Nadeau Site Permit Because TechniSand Does Not Qualify for Either Exception to the Prohibition Against Mining in Critical Dune Areas Provided in MCL 324.63702.

TechniSand's Nadeau Site Permit Renewal is not authorized under either exception to the prohibition against mining critical dune areas provided in MCL 324.63702(1). Accordingly, the MDEQ was without legal authority to issue the January 18, 2006 Nadeau Site Permit Renewal to TechniSand.

As the Michigan Court of Appeals has recognized, "M.C.L. 324.63702 is most logically interpreted as a prohibition of mining in critical dune areas with two exceptions." *Preserve the Dunes I*, 253 Mich. App. at 278.[13] "[W]hen a party seeks to mine in a critical dune area, it must

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[13] Because the Court of Appeals correctly interpreted the Part 637, PTD cites its opinion herein. Furthermore, the MDEQ's issuance of the Nadeau Site Permit Renewal is a separate and

first fall within one of the exceptions set forth in MCL 324.63702. . . . If MCL 63702 is not satisfied, then mining in a critical dune area is prohibited." *Id.* at 278-79.

TechniSand obtained its original permit, which allowed the company to mine only noncritical dunes, in 1992. S*ee id*. at 267. According to the *Preserve the Dunes I* court, because section 63702 "cannot reasonably be interpreted to 'grandfather in' parties who did not own a permit to mine in a critical dune area before July 5, 1989, and who did not own land adjacent to a critical dune area and a permit to mine in the noncritical dune area before July 5, 1989," the MDEQ lacked the authority to issue the Nadeau Site Permit in 1996, allowing TechniSand to mine in a critical dune area, and, therefore, lacks the authority to issue the Nadeau Site Permit Renewal in 2006. *Id*. at 304.

The *Preserve the Dunes I* court characterized as "disingenuous" the MDEQ's argument that section 63702(1)(a) allows an amended permit to be granted to the successor (TechniSand) of an operator who held the original permit before July 5, 1989. *Id.* at 306. In the context of section 63702(1)(b), the *Preserve the Dunes I* court also rejected TechniSand's argument that the term "operator" should be interpreted to mean "operations." Disagreeing with TechniSand's proposition that, as long as a particular sand mining operation existed before July 5, 1989, whether the land is currently owned by the original permittee or a successor is immaterial for purposes of the exceptions provided in section 63702, the court found that "the Legislature meant to 'grandfather in' operators, not operations." *Id.* at 309-10. By logical extension, the same rule would apply to the term "operator" as used in section 63702(a). The Michigan Supreme Court agrees. S*ee Preserve the Dunes II*, 471 Mich. at 514-15 ("If an *operator* does not

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independent agency action from the 1996 amendment, and is not subject to the Supreme Court's determination (on statute of limitations grounds) that PTD's challenge to MDEQ's earlier action was untimely.

fall within one of the[] limited exceptions to the Part 637 ban on mining in critical dunes areas, the inquiry [into whether MDEQ may authorize mining] ends.") (emphasis added).

Finally, TechniSand also does not qualify for the exception found in section 63702(1)(b), because that exception applies only to permit amendments sought to include adjacent land that contains a critical dune area that the permit holder owned before July 5, 1989. MCL 324.63702(1)(b); *Preserve the Dunes I*, 253 Mich. App. at 308; *see also* December 29, 2005 letter from TechniSand to MDEQ, attached to the *Record on Appeal* as pgs. 9-11.("MCL §324.63702(1)(b) is inapplicable because TechniSand is not seeking to amend the permit.").

Therefore, because the "notwithstanding" language of section 63702 mandates that the MDEQ **first** determine whether TechniSand qualifies for an exception to the ban on mining in critical sand dune areas **before** considering a renewal request, **and** because TechniSand does not qualify for either exception to the ban on mining in critical sand dune areas contained in section 63702, the MDEQ was without statutory authority to issue the January 18, 2006 Nadeau Site Permit Renewal to TechniSand.

RELIEF

Based upon the foregoing PTD respectfully requests that this Court grant the following relief:

1. Overturn the MDEQ's January 18, 2006 decision to issue the Nadeau Site Permit Renewal to TechniSand;

2. Invalidate the Nadeau Site Permit Renewal;

3. Find TechniSand ineligible to mine, and permanently enjoin TechniSand from mining, in the critical dune area of the Nadeau Site because TechniSand does not qualify for either of the exceptions contained in MCLA 324.63702(1);

4. Award PTD costs and fees, including reasonable attorney fees; and

5. Award such other relief as this Court deems equitable and just.

Respectfully submitted,

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