

Via FedEx and Electronic Mail

December 16, 2005

Harold R. Fitch
Director, Office of Geological Survey
Michigan Department of Environmental Quality
P.O. Box 30256
Lansing, MI 48909-7756

Re: *Preserve the Dunes, Inc. Comments on TechniSand, Inc. Sand Dune Mining Permit Renewal, Permit No. TS-NS-107-A2 (Nadeau Site)(Permit)*

Dear Mr. Fitch:

On behalf of Preserve the Dunes, Inc. ("PTD"), the following comments are submitted to the Michigan Department of Environmental Quality Office of Geological Survey ("MDEQ") on the proposed issuance of a renewal of TechniSand, Inc.'s ("TechniSand") Permit.

As discussed in further detail below, MDEQ may not renew TechniSand's Permit because: (1) the renewal does not fit into either of the limited exceptions to the ban on mining in critical dune areas; and (2) TechniSand's mining activities have not been carried out in compliance with Part 637.

I. MDEQ Must Consider Whether TechniSand's Permit May Be Renewed Under M.C.L. § 324.63702.

Section 63702(1) of the Sand Dune Mining Act, M.C.L. §§ 324.63701 *et seq.* ("Part 637"), prohibits MDEQ from issuing a permit which allows mining in a critical dune area unless the operator fits within one of two exceptions:

(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.

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(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.

M.C.L. § 324.63702(1) (emphasis added). The plain language of section 63702(1)(a) makes clear that “issuing” a sand dune mining permit includes renewals.¹ Therefore, MDEQ must determine whether an exception applies when considering TechniSand’s requested renewal.

II. MDEQ May Not Renew TechniSand’s Permit Because It Does Not Come Within Either Exception To The Prohibition Against Mining In Critical Dune Areas Provided In M.C.L. § 324.63702.

TechniSand’s Permit renewal is not authorized under either exception to the prohibition against mining in critical dune areas provided in M.C.L. § 324.63702(1). Accordingly, MDEQ must deny renewal of TechniSand’s Permit.

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, Inc. v. Department of Environmental Quality*, 253 Mich. App. 263, 278 (2002).² “[W]hen a party seeks to mine in a critical dune area, it must first fall within one of the exceptions set forth in M.C.L. § 324.63702. . . . If M.C.L. § 63702 is not satisfied, then mining in a critical dune area is prohibited.” *Id.* at 278-79.

TechniSand obtained its Permit, which originally allowed the company to mine only noncritical dunes, in 1992. *See Preserve the Dunes*, 253 Mich. App. at 267. 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,” MDEQ lacked

¹ If the term “issue” as used in section 63702(1) were interpreted to not include renewals, it would render the exception for certain renewals in section 63702(1)(a) meaningless. “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).

² Attached hereto as Exhibit A, and incorporated herein by reference. The Michigan Supreme Court held on appeal that PTD’s challenge to MDEQ’s issuance of an amended permit to TechniSand in 1996 was barred by the statute of limitations. *See Preserve the Dunes, Inc. v. Michigan Department of Environmental Quality*, 471 Mich. 508, 519-520 (2004). Because the Court of Appeals correctly interpreted the Part 637, we cite its opinion herein. Furthermore, the proposed Permit renewal is a separate and independent agency action from the 1996 amendment, and is not subject to the Supreme Court’s determination that PTD’s challenge to MDEQ’s earlier action was untimely.

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the authority to amend TechniSand's Permit in 1996, allowing TechniSand to mine in a critical dune area, and lacks the authority to renew TechniSand's Permit now. *Id.* at 304.

In *Preserve the Dunes*, the Michigan Court of Appeals characterized as "disingenuous" MDEQ's argument that section 63702(1)(a) allows an amended permit to be granted to the successor (TechniSand) to an operator who held the original permit before July 5, 1989.³ *Id.* at 306. In the context of section 63702(1)(b), the court also rejected TechniSand's argument that the term "operator" should be interpreted to mean "operations." The court disagreed with TechniSand's assertion 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. *See id.* at 309-12, 314. The court found that "the Legislature meant to 'grandfather in' operators, not operations." *Id.* at 309-10. The same logic would apply to the term "operator" as used in section 63702(a). The Michigan Supreme Court apparently agrees. *See Preserve the Dunes*, 471 Mich. at 514-15 ("If an operator does not 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).

TechniSand's requested renewal is also not authorized by 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. M.C.L. § 324.63702(1)(b); *Preserve the Dunes*, 253 Mich. App. at 308.

Therefore, because TechniSand does not qualify for either exception to the ban on mining in critical sand dune areas, the renewal must be denied.

III. TechniSand Is Not Entitled To A Renewal Under M.C.L. § 324.63708 Because Its Sand Dune Mining Activities Have Not Been Carried Out In Compliance With Part 637.

Part 637 expressly provides that "a sand dune mining permit issued by the department is valid *for not more than 5 years.*" M.C.L. § 324.63708(1) (emphasis added). "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 conditions of the sand dune mining permit issued by the department." *Id.* (emphasis added). As discussed above, because TechniSand's permit renewal does not come within either of the exceptions to the Part 637 ban on mining in critical dune areas, and because TechniSand has been mining in a critical dune area, TechniSand cannot be considered to have carried out its mining in compliance with Part 637.

³ Although the instant matter involves a renewal rather than an amendment, based on the plain statutory language, the same analysis applies. *See* M.C.L. § 324.63702(1)(a) ("[MDEQ] shall not issue a sand dune mining permit within a critical dune area . . . except under either of the following circumstances: (1) The operator seeks to *renew or amend* a sand dune mining permit . . .") (emphasis added).

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TechniSand is not entitled to a renewal and could not have justifiably relied on obtaining one.⁴ Part 637 clearly provides that renewal of a sand dune mining permit is not automatic or guaranteed. *See* M.C.L. § 63708(1). Furthermore, TechniSand has been on notice that its Permit violates section 63702(1) since 1995, when the Michigan Department of Natural Resources, on advice of the Michigan Attorney General, informed TechniSand that it was not eligible for an exception to the ban on mining critical sand dune areas because it acquired the property it sought to mine after July 5, 1989. *See Preserve the Dunes*, 253 Mich. App. at 268. The Michigan Court of Appeals clearly stated its opinion that TechniSand was prohibited from mining in critical dune areas, and noted that MDEQ's decision to grant TechniSand's 1996 permit amendment remains unexplained. *Id.* at 268-69, 304-16. The dissent in the Michigan Supreme Court's decision on appeal characterized MDEQ's action as an "unexplained and illegal about-face on TechniSand's critical dune mining permit" and an "unprincipled decision to permit illegal mining of critical dunes." *Preserve the Dunes*, 471 Mich. 508, 525-26 (Kelly, J., dissenting).

For the foregoing reasons, PTD requests that MDEQ deny renewal of TechniSand's Permit. PTD further requests that you notify us of your decision as soon as it becomes final.

Thank you for your consideration of these comments.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

Kenneth C. Gold

Enc.

c: Steven Wilson (w/enc. via e-mail to wilsonse@michigan.gov)
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⁴ TechniSand's reliance, justified or not, would not trump Part 637's ban (subject to limited exceptions not applicable here) on mining in critical dune areas. M.C.L. § 324.63702(1).