

Via FedEx and Electronic Mail

January 11, 2006

Mr. 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. Response to TechniSand's Comments on 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"), this letter responds to James H. Geary's December 29, 2005 letter to the Michigan Department of Environmental Quality ("MDEQ") on behalf of TechniSand, Inc. ("TechniSand") (the "TechniSand Letter"). The TechniSand Letter responds to PTD's comments¹ on the proposed renewal of the above-referenced Permit, which would allow TechniSand to mine in a critical dune area under the Sand Dune Mining Act, M.C.L. §§ 324.63701 *et seq.* ("Part 637"). A copy of the TechniSand Letter is enclosed.

Essentially, the TechniSand Letter claims that: (1) the Michigan Supreme Court has already held that TechniSand qualifies for a Part 637 permit and, therefore, MDEQ is bound by the doctrine of *res judicata* and must renew the Permit; and (2) TechniSand, in fact, qualifies for one of the exceptions to the ban on mining in critical dune areas under Part 637.

As is discussed below, however, TechniSand seriously misconstrues both the holding of the Michigan Supreme Court in *Preserve the Dunes, Inc. v. Michigan Department of Environmental Quality*, 471 Mich. 508 (2004) ("*Preserve the Dunes*"), and PTD's Comments. Contrary to TechniSand's assertions: (1) the Michigan Supreme Court did not decide that TechniSand is entitled to a Part 637 permit; (2) the doctrine of *res judicata* does not apply to this matter; and (3) TechniSand does not qualify for either exception to Part 637's ban on mining in critical dune areas set forth in Part 637 section 63702. Accordingly, PTD reiterates its position that MDEQ must deny TechniSand's application for a renewed Part 637 Permit.

¹ PTD Comments on TechniSand Sand Dune Mining Permit Renewal, dated December 16, 2005 ("PTD Comments").

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I. The Michigan Supreme Court Did Not Determine That TechniSand Was Eligible For A Permit Under Either Exception To The Prohibition Against Mining In Critical Dune Areas Provided In M.C.L. § 324.63702.

TechniSand asserts that PTD's Comments ask MDEQ to "overrule the decision of the Michigan Supreme Court" in the *Preserve the Dunes* case. TechniSand Letter at 1. This incorrect claim appears calculated to mislead MDEQ into believing that the Supreme Court previously ruled that TechniSand is entitled to renewal of the Permit when, in fact, it has not.

In *Preserve the Dunes*, PTD challenged MDEQ's issuance in 1996 of an amended permit that allowed TechniSand to mine in a critical dune area. 471 Mich. at 519-520, 522. The Michigan Court of Appeals ruled in PTD's favor on the merits, holding that TechniSand did not qualify for the permit under either of the section 63702 exceptions. However, the Supreme Court reversed, holding that PTD's claim was time-barred because it was filed too late. *Id.* Contrary to TechniSand's claim, the Court made no decision on PTD's claim that TechniSand did not qualify for the Permit under an exception or otherwise – rather, the Court reached its decision solely on the basis of timeliness.

Needless to say, PTD does not request that MDEQ overrule the Supreme Court by finding that PTD's challenge to the 1996 amended permit was, in fact, timely. Such a request, of course, would be absurd. Rather, PTD asks MDEQ to reject TechniSand's currently pending Permit renewal application on the basis that TechniSand does not qualify for a permit under either of the exceptions to the ban on mining in critical dune areas found in M.C.L. § 324.63702. The Supreme Court did not touch this issue at all.

TechniSand also misleadingly applies the Supreme Court's comment that "[t]he dissent's regime would render the permitting process a useless exercise" to PTD's Part 637 challenge. TechniSand Letter at 1 (*quoting Preserve the Dunes*, 471 Mich. at 523). In fact, the Supreme Court was referring to PTD's challenge to the amended permit under the Michigan Environmental Protection Act, M.C.L. §§ 324.1701 *et seq.* ("MEPA"):

We do not believe the Legislature intended *MEPA* to destabilize the state's permitting system in this manner . . . [u]nder the dissent's view, *MEPA* would authorize a challenge at any time to flaws in the permitting process . . . *MEPA* nowhere strips the permitting process of finality.

471 Mich. at 522-523 (emphasis added).

This is not the argument "now made by PTD." TechniSand Letter at 1.

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II. The Question of Whether MDEQ May Renew the Permit Is Not Barred By Res Judicata.

TechniSand's assertion that the doctrine of *res judicata* requires MDEQ to renew the Permit under Part 637 is clearly erroneous. There are three prerequisites to the application of *res judicata*, all of which must be satisfied, but which are not satisfied here:

There must have been a prior decision on the merits; the issues must have been resolved in the first case, either because they were actually litigated or because they might have been presented in the first action; and both actions must be between the same parties or their privies.

Sloan v. City of Madison Heights, 425 Mich. 288, 295 (1986).²

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. *Ozark v. Kais*, 184 Mich. App. 302, 307-308 (1990). As noted, the Supreme Court held only that PTD's challenge to the prior permit renewal under Part 637 was barred by the statute of limitations. Therefore, there was no decision on the merits and *res judicata* does not apply.

III. MDEQ May Not Renew The Permit Because It Does Not Fall Under Either Exception To The Ban On Mining In Critical Dune Areas In M.C.L. § 324.63702.

As stated in PTD's Comments, MDEQ may not renew a permit to mine in a critical dune area if the applicant does not qualify for the permit under one of the exceptions to Part 637's ban on mining in such areas. See PTD Comments at 1-2. M.C.L. § 324.63702(1)(a) provides an exception to the ban on mining in critical dune areas where "[t]he 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." (emphasis added).

TechniSand's assertion that it "plainly comes within" the section 63702(1)(a) exception is erroneous. In its opinion that was later reversed by the Supreme Court on timeliness grounds, the Michigan Court of Appeals held that section 63702(1)(a) requires the operator to have held the permit in question before July 5, 1989:

MCL 324.63702 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.

² The burden of proving the applicability of the doctrine is on the party asserting it – in this case, TechniSand. See *Sloan*, 425 Mich. at 295.

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Preserve the Dunes, Inc. v. Department of Environmental Quality, 253 Mich. App. 263, 304 (2002) (emphasis added).³

TechniSand obtained the Permit, which originally allowed the company to mine only noncritical dunes, in 1992. Therefore, for the same reasons expressed by the Court of Appeals and in PTD's Comments, MDEQ lacks the authority to renew the Permit now.⁴

IV. Conclusion.

MDEQ should not allow TechniSand to distract it from the relevant question in the current Part 637 permit renewal process: whether TechniSand qualifies under Part 637 for a renewed Permit to mine in a critical dune area on the basis that it held a permit to mine in a critical dune area prior to July 5, 1989. Indisputably, it did not. For the foregoing reasons, PTD repeats its request that MDEQ deny renewal of the Permit. PTD further requests that MDEQ notify PTD of its decision as soon as it becomes final.

Thank you for your consideration of this response to the TechniSand Letter.

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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³ Notwithstanding the Supreme Court's reversal on timeliness grounds, PTD believes that the Court of Appeals correctly interpreted and applied the section 63702(1) exceptions.

⁴ TechniSand acknowledges that its requested Permit renewal does not come within the exception found in section 63702(1)(b). TechniSand Letter at 3. See also PTD Comments at 2-3. TechniSand also asserts that "PTD has not argued that TechniSand has not met the criteria and standards applicable to a renewal." TechniSand Letter at 3. To the contrary, PTD clearly pointed out that TechniSand has not complied with the criteria and standards for obtaining a renewal found in M.C.L. § 324.63708(1). PTD Comments at 3-4.

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