

Howard & Howard

law for business

direct dial: 616.382.9707

James H. Geary

email: JHG@h2law.com

Board Certified Civil Trial Advocate

December 29, 2005

Mr. Harold R. Fitch

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

Via Facsimile and E-mail

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

Dear Mr. Fitch:

On July 30, 2004, the Michigan Supreme Court held, with respect to the permit TechniSand seeks now to renew: "TechniSand is lawfully entitled to mine sand dunes in Michigan according to the DEQ permit." 471 Mich 508, 521-522; 684 NW2d 477 (2004). Preserve the Dunes ("PTD") opposes renewal of that permit, claiming that TechniSand was not lawfully entitled to mine sand dunes in Michigan according to the DEQ permit.

In a December 16, 2005, letter, Kenneth C. Gold of Honigman Miller Schwartz and Cohn LLP, (the "Honigman Letter"), received by the MDEQ on December 27, 2005, and by TechniSand on December 28, 2005, argued that that because TechniSand has been mining in a critical dune area, it cannot be considered to have carried out its mining in compliance with Part 637, i.e. lawfully. PTD is asking the Department to overrule the decision of the Michigan Supreme Court in a case brought by PTD and won by the Department and TechniSand.

The Supreme Court's opinion rejected the argument now made by PTD that TechniSand was ineligible for the permit, saying, "The time for challenging TechniSand's eligibility for a permit is long past." 471 Mich at 521. The Court rejected the dissent's argument, repeated in the Honigman Letter, saying: "The dissent's regime would render the permitting process a useless exercise. It would cripple economic expansion in Michigan and probably lead to disinvestment. No one would invest money to obtain a permit that is subject to endless collateral attacks."

PTD's objection to renewal of the permit is a renewal of its seemingly endless collateral attack on the MDEQ's decision of November 25, 1996, approving the *amended* permit for

TechniSand for which renewal is now sought. It is trying to do what the Supreme Court said it cannot do.

The question of whether the amended permit was lawfully issued to TechniSand has been decided for all time by the Michigan Supreme Court. That decision cannot be revisited. It is barred by the doctrine of *res judicata*. "The doctrine of *res judicata* was judicially created to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Both Michigan and the federal system have adopted a broad approach to the application of *res judicata*. As we have stated:

In Michigan, the doctrine of *res judicata* applies, except in special cases, in a subsequent action between the same parties and 'not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the same time.'" *Pierson Sand & Gravel, Inc v Keeler Brass Co* 460 Mich 372,380: 596 NW2d 153 (1999) (Citations omitted).

PTD's opposition to the application for *renewal* is premised on the rejected argument that TechniSand was not eligible for the permit in the first place. The Supreme Court squarely decided that the permit for which renewal is sought is valid and that TechniSand is entitled to mine under it. By recognizing the permit as valid, the Michigan Supreme Court precluded objections to the renewal of the permit based on an argument that TechniSand was not lawfully entitled to operate under the permit as amended, and, therefore, is ineligible to have it renewed.

The Supreme Court *reversed* the Michigan Court of Appeal's opinion reported at 253 Mich App 263; NW2d 263 (2002), cited by the Honigman Letter, saying "[W]e reverse the decision of the Court of Appeals and remand to that Court for expedited review of the remaining issues of plaintiff Preserve the Dunes (PTD)." 471 Mich at 511. The Supreme Court remanded "the case to the Court of Appeals to review the circuit court's findings that TechniSand's mining conduct does not violate MEPA, and direct to the Court of Appeals to expedite its review." 471 Mich. at 525. On remand, the Court of Appeals held that the circuit judge was correct in finding that TechniSand's mining under the permit did not violate MEPA. The Supreme Court did not reverse *part* of the Court of Appeals decision. It reversed "the decision of the Court of Appeals." Because the time for objecting to TechniSand's eligibility for the amended permit was "long past," it held that "the only issue properly before us is whether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit under the sand dune mining act..." 471 Mich at 511. The time for determining TechniSand's eligibility for the permit was "long since past" when

PTD sued and, *ipso facto*, when the Court of Appeals rendered its decision. The issue is not now properly before the Department.

TechniSand does not now seek amendment of the permit it holds, i.e., the permit that was declared in a final judgment of the Supreme Court to be valid. It seeks to *renew* the permit. MCL §324.63702(1)(a) specifically and unambiguously provides for renewal of “a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to *a renewal*...”(emphasis added). PTD has not argued that TechniSand has not met the criteria and standards applicable to a renewal. TechniSand plainly comes within the first of the two exceptions to the prohibition of mining in a critical dune area. Analysis of the second exception is unnecessary and unwarranted. MCL §324.63702(1)(b) is inapplicable because TechniSand is not seeking to *amend* the permit. It is only seeking to renew it.

The Honigman Letter says that TechniSand “could not have justifiably relied on obtaining” a renewal because, according to PTD, TechniSand’s mining under the permit was not lawful. This is an argument that the Supreme Court’s decision meant nothing and could not be relied upon upon. TechniSand was entitled to rely on the Supreme Court’s determination that its eligibility for the permit could not be challenged and that its mining under the permit was lawful. The Department is *obliged* to rely on and follow the Supreme Court’s judgment.

PTD’s attempt to resurrect ancient arguments, rejected by the Supreme Court, by relying on an overruled decision of the Court of Appeals and the dissent of the Supreme Court is unmerited. TechniSand requests that the objections of PTD to the renewal be rejected and that the permit be renewed.

Sincerely,

HOWARD & HOWARD ATTORNEYS, P.C.

James H. Geary

cc: Joe Fodo
Kenneth C. Gold