

## *Court of Appeals is “Critical” of MDEQ Dune Mining Permit*

The Michigan Court of Appeals has held that the Michigan Department of Environmental Quality (MDEQ) exceeded its authority under the Sand Dune Mining Act when it issued a permit to allow Technisand, Inc. (Technisand) to mine sand from a critical dune area.

Technisand is engaged in the business of supplying industrial sand to various manufacturing industries. In 1991, Technisand purchased property in Berrien County that contained sand dunes. In 1992, Technisand acquired the sand mining permit that had been owned by the seller of the property. The permit only allowed mining in “non-critical” dune areas on the site.

In 1994, Technisand applied to the Michigan Department of Natural Resources (MDNR) for the permit to be expanded to include an additional 126.5 acres of the site. After the expansion, Technisand planned to remove 7 million tons of sand from the surface and 950,000 tons of sand from the sub-surface, and Technisand proposed to create two lakes and to relocate threatened plant species. In the process, however, most of a “critical” dune area would be removed. MDNR denied Technisand’s request, citing the statutory prohibition against mining in critical dune areas (detailed below).

In 1996, after most environmental regulatory authority in Michigan had been transferred from MDNR to MDEQ, MDEQ informed Technisand that changes in state government, along with “additional information” that had come to light, had prompted MDEQ to reconsider Technisand’s permit request. Technisand submitted a revised application that was approved by MDEQ with no reference to the statutory prohibition against mining in critical dune areas.

A group of local citizens formed an organization called Preserve the Dunes, Inc. and filed suit against Technisand and MDEQ, claiming that the permit was illegal under M.C.L. §324.63702(1), which provides that:

the department shall not issue a sand dune mining permit within a critical dune area...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.

According to Preserve the Dunes, this section established that MDEQ could not allow Technisand to mine the critical dune areas unless Technisand met one of the two enumerated exceptions. Preserve the Dunes argued that Technisand did not meet these exceptions because they apply only to the original “operator” of an existing sand dune mining operation. In other words, even if the permit was issued before July 5, 1989 or the adjacent land in question was owned before that date, the exceptions apply only if the original permit holder or owner is the same person that is applying for a permit under the exceptions. Therefore, because Technisand did not obtain the land and permit until 1991 and 1992, respectively, it does not qualify for these exceptions to the ban on mining in critical dune areas.

Although M.C.L. §324.63702(1) and its counterpart statutory sections do not provide for a private right of action, Preserve the Dunes challenged the permit under the Michigan Environmental Protection Act (MEPA), which allows private parties to file suit against any person, including State agencies, “for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.” In addition to

its statutory argument that MDEQ lacked the authority to issue the permit, Preserve the Dunes claimed that MDEQ's action, even if authorized by statute, violated MEPA because it would "destroy a unique, irreplaceable, and fragile natural resource" of the state.

MDEQ and Technisand argued in rebuttal that Preserve the Dunes' lawsuit was time-barred because it was brought too long after the permit had been issued, citing the Revised Judicature Act's 21-day limitation on such challenges. Alternatively, they argued that Technisand did meet the statutory exceptions, and, therefore, MDEQ was authorized to issue the permit. They also asserted that the permit would not result in destruction of natural resources, and, thus, Preserve the Dunes did not state a proper claim under MEPA.

On a motion for judgment before trial, the trial court dismissed Preserve the Dunes' claim based on M.C.L. §324.63702(1), holding that it was time-barred. The court also held alternatively, that Technisand met one of the statutory exceptions because those exceptions are "operation," not "operator," based, and Technisand had purchased a mining "operation" that existed before July 5, 1989. At trial, the court also ruled in favor of MDEQ and Technisand on the issue of whether the permit violated MEPA because it would destroy natural resources. Applying the factors set forth in *Portage v. Kalamazoo Co. Rd. Comm.*, the court found that the damage caused by Technisand's mining would not rise to the level of harm contemplated by MEPA, citing the fact that the dunes at issue made up only one-tenth of one percent of Michigan's critical dune areas. Preserve the Dunes appealed.

## **MEPA STANDARD**

The Appeals court started by determining the standard by which it would judge whether MDEQ and Technisand's actions would harm the environment. The court observed that the *Portage* factors that were utilized by the trial court might be appropriate in some circumstances,

but not where a statute specifically covered the activities at issue. The court cited M.C.L. §324.1702, which provides that:

if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:

- (a) Determine the validity, applicability, and reasonableness of the standard.
- (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

The court interpreted this to mean that a court must consider applicable environmental statutes and cannot allow activities that would violate those statutes:

only if the applicable standard is deficient, may the court adopt a different, higher standard.... The court may not substitute a weaker standard and certainly may not completely ignore an appropriate standard or procedure.... There will not always be an existing, applicable standard, in which case, the court may simply apply the general “umbrella” standard under MEPA prohibiting the impairment, destruction, or pollution of a natural resource. However, in this case, . . . the Legislature entered the arena, and prohibited mining in critical dune areas except under two specifically laid out circumstances. The Legislature’s prohibition is not merely a “nicety” nor is it merely “procedural.” Accordingly, [M.C.L. §324.63702(1)] provides the standard and procedure for mining in critical dune areas in this MEPA action.

Thus, the court held that the requirements of M.C.L. §324.63702(1), which limited mining in critical dune areas to two specific circumstances, would be the applicable standard for Preserve the Dunes’ MEPA claim.

### **TIMELINESS OF THE CLAIM**

When the trial court had dismissed one of Preserve the Dunes’ claims as being time-barred, it had done so on the basis that the claim was a “purely procedural” challenge requesting review of an administrative permit decision, which carried a 90-day statute of limitations under the Administrative Procedures Act. The court treated this as separate from the MEPA claim.

The appeals court agreed with Preserve the Dunes that this characterization was erroneous, and that the entirety of Preserve the Dunes' challenge to the permit decision was one claim under MEPA. Noting that the trial court had not cited any authorities to support its decision, the appeals court cited precedent establishing that permits could be challenged under MEPA, and, therefore, there were no grounds for the trial court to separate the permit challenge from Preserve the Dunes' other arguments concerning environmental damage.

Furthermore, because all claims arose under MEPA, the administrative hearing process and its 90-day limitation were not fatal to Preserve the Dunes' claims. MEPA provides that "[i]f administrative, licensing, or other proceedings are required or available to determine the legality of the [agency's] conduct, the court *may* direct the parties to seek relief in such proceedings." (Emphasis added.) The court noted that the "word 'may' designates discretion," and, therefore, administrative procedures, and their corresponding statutes of limitations, would apply only if the court decided to invoke them: "a MEPA litigant is not required to exhaust administrative remedies before seeking judicial review." Additionally, the court can invoke such administrative proceedings only where they are "required or available." The administrative challenge procedure was not "available" to Preserve the Dunes because the 90-day period for challenging the permit had expired. Thus, the court held that the trial court had erred in invoking the administrative limitations period.

The statutes that did govern Preserve the Dunes' claims, MEPA and the relevant standard for MEPA in this case, M.C.L. §324.63702(1), contained no limitation provisions. Therefore, the court held that Preserve the Dunes' claims were not time-barred.

**PROPRIETY OF THE MINING PERMIT UNDER M.C.L. §324.63702(1)**

Because the MEPA standard in this case was M.C.L. §324.63702(1), the court next turned to that provision to determine whether Technisand's permit was properly issued under one of the exceptions set forth in that provision. As mentioned above, MDEQ and Technisand had generally argued that Technisand was "grandfathered" in under subsection (b) of the statute because the permit Technisand purchased had been in existence before July 5, 1989, even though Technisand had not purchased the permit until after that date. More specifically, they argued that the term "operator" in the statute did not relate to a person, which would require the person applying for the permit today to be the same person who held the permit on July 5, 1989. Instead, they claimed, the word "operator" related to operations, meaning that the mining operation that is the subject of the permit request must be the same one that existed on July 5, 1989. The trial court accepted this argument.

The appeals court disagreed for several reasons. First, the court pointed to the definition of "operator," which refers to an "owner," "lessee," or "person." Second, the court noted that the statute in question uses the term "operation" in other sections, but not in M.C.L. §324.63702(1), indicating that "operation" and "operator" do not mean the same thing. Third, the court explained that:

if the privilege of expansion into critical dune areas were tied to "operations" as opposed to "operators," there would be no limit to who could obtain amendments...each new permit owner could point back to the date upon which the very first operation at the site commenced and could successfully argue that theirs was simply a continuance. This approach completely overlooks the ownership focus of the definition of "operator" and disregards the idea that existing owners were "grandfathered in" based on their reliance on the state of the old law, and the right to mine in critical dune areas.

Thus, the term "operator" meant person, not operation, and Technisand did not qualify for the exception because it was not the same person who held the permit on July 5, 1989.

MDEQ had also argued that Technisand qualified under subsection (a) of the statute, which allows a person to “renew or amend” a permit that was issued before July 5, 1989. The trial court had rejected this argument, and the appeals court agreed that subsection (a) did not apply to the situation at hand. While renewals or amendments were generally covered under subsection (a), the court explained, the specific situation of amendment to include an adjacent area was covered under subsection (b). Thus, to read subsection (a) to cover the situation addressed by subsection (b) would render subsection (b) superfluous. Additionally, the court observed that to read the statute in the way suggested by MDEQ would result in MDEQ having power to “amend” any permit to include critical dune areas, effectively destroying the general prohibition against mining such areas, which would be an “absurd result.”

Because Technisand did not meet either of the statutory exceptions to the prohibition against mining in critical dune areas, the court held that MDEQ’s authorization of mining in such areas was improper, and Preserve the Dunes was entitled to judgment in its favor.

*Preserve the Dunes, Inc v Department of Environmental Quality and Technisand, Inc*, No. 231728 (Mich App October 4, 2002).

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