

**STATE OF MICHIGAN  
SECOND JUDICIAL CIRCUIT  
BERRIEN COUNTY TRIAL COURT  
CIVIL DIVISION**

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

Plaintiff

vs.

MICHIGAN DEPARTMENT OF  
ENVIRONMENTAL QUALITY and  
TECHNISAND, INC., a Delaware  
Corporation,

Defendants.

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FILE NO. 99-3789 CE M

OPINION OF THE COURT and  
JUDGMENT OF THE COURT

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## SUMMARY

Plaintiff Preserve The Dunes filed this Suit under the Michigan Environmental Protection Act<sup>1</sup> seeking; *inter alia*, injunctive relief to prohibit sand mining in a critical dune area. A permit issued by defendant Michigan Department of Environmental Quality (DEQ) had authorized the sand mining. Defendant Technisand, a major supplier of industrial sand, started the application process years earlier, culminating in the issuance of a permit on November 25, 1996. The court heard testimony over seven days and personally visited the Site<sup>2</sup>, accompanied by representatives of all parties. The Site is located in Hagar Township, Berrien County, Michigan.

The site, one mile landward of Lake Michigan, is approximately 126.5 acres in size and contains therein 71 acres of Critical Dunes Area as defined by Michigan statute<sup>3</sup>. This critical dune area acreage represents one tenth of one percent (0.1%) of the statewide total. Interstate Highway 196 runs along the western border of the site. Indeed, this site is the only critical dune area containing elevated dunes east of I-196. Accordingly, this case does not involve sand mining immediately adjacent to Lake Michigan or the alteration of an esthetically pleasing environment such as Warren Dunes State Park in Bridgman, Michigan. The site at issue in this case is separated from Lake Michigan by I-196, Blue Star Highway, a large number of residences and county roadways. In addition, based on the evidence before the court, this Site is the last acreage within critical dune areas in the entire state in which sand mining could be authorized by the DEQ. Therefore, regardless of this court's ruling as to this site, there will be no additional sand dune mining in critical dune areas of Michigan without a change in the law.

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<sup>1</sup>MCL 324-1701 et seq. referred to in this Opinion as MEPA.

<sup>2</sup>The site of the proposed sand mining is referenced as the "Taube Road site", the "expansion site", or simply the "site" in this opinion.

<sup>3</sup> See MCL 324.35301(c).

"Virtually all human activity can be found to adversely impact natural resources in some way or the other." *West Michigan Environmental Action Council v. Natural Resources Commission*, 405 Mich 741, 760 (1979). Since this 1979 Supreme Court decision, Michigan courts have recognized that everyday life in modern society imposes burdens on the otherwise pristine environment of our state. MEPA prohibits impairment or destruction of Michigan natural resources. The question for this court is whether the environmental impact of the sand dune mining allowed by the DEQ-issued permit rises to the level of impairment or destruction of natural resourced. See *Action Council, supra*, at 760.

After hearing the proofs, the court concludes that plaintiff sustained its burden of proof for purposes of withstanding a motion for directed verdict. However, the defendants have effectively and conclusively rebutted the evidence presented in plaintiff's case. Defendant established that any adverse impact on the natural resources which will result from the sand mining will not rise to the level of impairment or destruction of natural resources within the meaning of MEPA.<sup>4</sup> In this regard, this court makes clear that it is mindful of the teaching of *Nemeth v. Abonmarche Development, Inc*, 457 Mich 16 (1998) and has followed that precedent in rendering this opinion. While the ultimate judgment of this court, based on the facts and applying the law, is that the defendant has rebutted the *prima facie* case of the plaintiff, there has been no deference to the administrative decision or expertise of the DEQ and the court has conducted the independent, *de novo* determination required by *West Michigan Environmental Action Council V. Natural Resources Commission*, 105 Mich 741, 7-92 (1979) and *Nemeth, supra*, at 34.

The Court will summarize the exhibits and witness testimony that played a key part in the court's decision. Second, a detailed review of the applicable law will follow. Third, application of the law to the facts leads the court to the conclusion outlined above.

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<sup>4</sup> This of course assumes that Technisand will abide by the conditions of the permit by limiting the mining on the site as outlined and reclaiming the site as mandated by the Reclamation Plan. (Exhibit 22) The court notes that plaintiff did not challenge the sufficiency of the Reclamation Plan, did not assert that the Reclamation Plan will not be effectuated and did not claim that Technisand does not have the ability to effectuate the Plan.

## **FINDINGS OF FACT**

Plaintiff is a Not For Profit Corporation incorporated in Michigan.

Defendant Technisand, incorporated in Delaware, is the largest supplier of industrial sand to foundries of the automobile industry, the number one economic activity in the state of Michigan. One of the largest employers in Michigan, Daimler Chrysler, purchases all of its foundry sand from defendant's southwestern Michigan sites. Likewise, General Motors Corporation uses defendant's dune sand in its mid-west grey metal foundries. The qualities of Lake Michigan dune sand make it uniquely useful for manufacture of castings for engine blocks, brakes, and other components of automobiles. See testimony Of Messrs. Okell, Fodo, and Fallon. Use of dune sand results in the creation of quality automobile parts, that minimize potential safety defects of critical components of an automobile. (See testimony of Mr. Stahl relating to avoidance of field failures of automobiles as a result of defective engine block.)

The DEQ is the department of State of Michigan responsible for regulating sand dune mining according to state law.

The dunes of Michigan formed after the glaciers of the last ice age moved north. Organic materials remaining after the movement of the glaciers together with processes of erosion, wind, and wave action of Lake Michigan created a sorting effect of sand into sizes and partially rounded the sand grains. During the retreat of Lake Michigan about 8,000 years ago wind blew sand, depositing it on what is now the eastern shore of Lake Michigan. See Dr. Farrand's testimony. Indeed, Dr. Farrand testified that these formations exist no where else on earth. While Dr. Farrand assigned great geological significance to the dune features because of their unique character, he also assigned significance to these areas regardless of the amount of human activity that had already impacted on the dune areas. For example, he found geological significance in areas where parking lots, interstate highways, and housing developments had been constructed in critical dune areas. In short, Dr. Farrand seemed to assign geological significance with too broad a stroke. Taken to its most extreme, Dr. Farrand's view would stifle virtually all

development of Michigan. See Dr. Farrand's testimony on cross-examination that all types of geological formations on Exhibit 10A had significance worthy of environmental protection. For example, Dr. Farrand found "environmentally significant" escars and drumlinds.

Sand is a natural resource. There is approximately 2-3 million tons of sand in the critical dune area of the site. This critical dune area is the only critical dune area east of I-196 in Michigan. Indeed the highway is constructed on top of dunes. See Dr. Farrand's testimony. The existence of the highway does not affect the designation of that portion of the site as a critical dune area. However, it does sever the microclimate west of the highway from the East Side of the highway. See testimony of Dr. Goff. In addition to sand, other natural resources are found in the critical dune areas such as flora and fauna.

On November 25, 1996, after several years of deliberation and significant negotiation with Technisand regarding reduction of the environmental impact of Technisand's planned mining at the site, the DEQ issued Technisand an amended permit (Joint Exhibit, hereinafter "JE" 17) to mine 71 acres of the 126.5 acre expansion site. See Exhibit 2. The amended permit authorizes mining according to a mining and reclamation plan (Exhibit 22), including mining in the critical dune area. See Exhibits 1, 2, 5, 6, and 7. Cells 5, 6, and 7 of the plan are in the Critical dune area. See Plate 13, Exhibit 21. The expansion site is immediately adjacent to the so-called Nadeau Site, a tract of land with an existing permit which had been in force at the time of defendant's application for the expansion site permit since 1983 or earlier. See Exhibit 2. Technisand's original permit application was in 1994. Indeed Technisand prepared two separate environmental impact statements (EIS) required by statute, MCL 324.63704 (2) (b). Exhibits 19 and 21. MCL 324.63701(g) defines the "environmental elements" that must be addressed in an EIS. The Court finds that the Exhibit 21 complied with the statute as to subjects covered and the completeness of the report. See MCL 324.63705. The record before this court explains in exhaustive detail that in order to foster protection of the resources on the site Technisand made extensive amendments to the original application before the DEQ issued the permit in November 1996. See testimony of Roger Whitener.

Among other requirements of the permit, Technisand has granted DEQ a permanent conservation easement at the most northeasterly portion of the site immediately adjacent to Wetland "C." That conservation easement, stipulating that the highest crests of the dune will remain, and the restrictions of the Mining Plan and Reclamation Plan will adequately protect and prevent impairment of Wetland "C" in this Court's opinion. In addition, the distance created by the conservation easement and the permitted mining from Wetland "C" and/or the distance from the threatened plants referenced below, will not have such measurable effect on the water table of the site as to implicate the MEPA standard.

The terms of the permit require an Endangered Species Act permit to protect threatened and special concern species of plants<sup>5</sup> found on the site in order to mine in cells 8 and 9.<sup>6</sup> The court accepts Dr. Goff's testimony that the permitting requirements of the Endangered Species Act will adequately protect the threatened plants. Mining below the water table will be allowed only if Technisand obtains a permit pursuant to the Inland Lakes and Streams Act (MCL 324. 30101 et seq.) for the construction of two lakes, necessary components of the reclamation plan.<sup>7</sup>

The court finds that there are three plant species of potential significance on the site (albeit outside the critical dune area) *Juncus scirpoides* (hereinafter ,*Juncus*), *Ludwigia alternefolia* (hereinafter *Ludwigia*) and *Rexus virginica* (hereinafter *Rexus*). These plants are known as coastal plain disjuncts because the typical range for such plants is the Atlantic Coastal Plain east of the Appalachian Mountains. During the plaintiff's case in chief, Dr. Barbara Madsen, Adjunct Professor at the University of Michigan Biological Station, testified.<sup>8</sup> She classified *Juncus* and *Ludwigia* as threatened. However, *Ludwigia* was removed from the threatened list in March 1999, apparently unbeknownst to Dr. Madsen. Now, *Ludwigia* and *Rexus* are listed as special concern species. In this lawsuit, the court finds the record barren of justification for protection of special concern species otherwise

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<sup>5</sup> *Juncus scirpoides*, *Ludwigia alternefolia*, *Rexus virginica*

<sup>6</sup> Cells 8 and 9 of the mining plan are not in the critical dune area.

<sup>7</sup> The court took no testimony on the subject of the construction of the lakes and the permitting process pursuant to the inland Lakes and Streams Act.

<sup>8</sup> Her curriculum vita is part of the record as Exhibit 55

unprotected by law. Accordingly, *Juncus* is the only species of threatened plants on the site. The court accepts the testimony of Dr. Goff and rejects the testimony of Dr. Madsen in regard to protection of *Juncus*. That is, the court finds consistent with Dr. Goff's testimony that the permitting process for threatened plant species will provide adequate protection of *Juncus* within the meaning of MEPA.

At the outset it must be observed that Dr. Madsen's specialty of interest and concentration in her professional career is research on peatlands and not of coastal dunes. Secondly, Dr. Madsen had not studied the site to any significant degree at all. Indeed, her testimony was largely based on her review of the EIS and as to coastal disjunct species was largely based upon the publications of Dr. A.A. Reznicek, the expert who performed Technisand's study that formulated the basis of the EIS in this case on plant issues.

In addition, Dr. Madsen described the site as containing species of flora existing at the northern and southern end of their ranges. That is, Dr. Madsen found plant species of southern distribution on the site that would be at the northern end of the range in which the species could survive. An example offered was Tulip trees. Hemlock trees were found on the site, which according to Dr. Madsen's testimony are a species of northern distribution at its southern edge on this site. Accordingly, Dr. Madsen opined that the site was "ecologically significant." She further opined that removal of a major portion of the dune would modify the climate at the site, including changes in the water table during mining which would adversely affect the threatened and special concern plants. She opined on the ultimate issue indicating that it was "more likely than not" that the mining would harm the environment at the site.

While Dr. Madsen's testimony during plaintiff's case in chief was sufficient for plaintiff's to withstand a motion for directed verdict, ultimately the court finds her testimony unpersuasive on critical points. First, it is clear that Dr. Madsen's field of concentration is not dune botany, but rather the study of peatlands. Her lack of knowledge of the removal of *Ludwigia* from the threatened list some 12 months before the commencement of trial significantly undermined her persuasiveness as a witness.

Finally, the species given as examples of her thesis concerning the mix of species at the edges of their range are common elsewhere in Michigan, for example, tulip trees and hemlock trees. She seemed unaware that the highest crest at the site would remain. The significance of that point is that cells 8 and 9, the cells containing the threatened and special concern plants, are nearly immediately to the east of the dune formation that will remain pursuant to the conservation easement. This fact undermines her opinion testimony on the climatic effects of the mining, at least as to the threatened or special concern plants. In sum, the court find that the testimony of Mr. Peter Collins and Dr. Goff outlined below is persuasive and more than rebuts the testimony offered by plaintiff through Dr. Madsen.

Peter Collins, whose significant credentials were set forth in his oral testimony, prepared the EIS (Exhibit 21). He has deep Michigan experience in preparation of sand dune mining environmental impact statements. He has personally viewed many of the critical dune areas of the state and found the Taube Road site to be unexceptional and not stellar in comparison to other critical dune areas. Both Mr. Collins and Dr. Goff found this site typical and unexceptional as to flora in comparison with most of the approximately 71,000 acres of critical dune area of the state. I accept this testimony.

During his testimony, Mr. Collins persuasively rebutted the testimony of Dr. Madsen and Mr. Timothy Harrington. Dr. Madsen's opinion testimony was in significant part grounded in her view that removal of the dune would result in large fluctuations of the water table that would adversely affect the threatened or special concern plants. On this subject, Timothy Harrington, a geotechnical engineer (C.V. at Exhibit 54) testified that removal of the dune in the critical dune area would cause massive changes in the hydrology of the site. He asserted that excess water would be stored on surface features of the site because the removal of the dune would destroy a reservoir for water, which now allows gradual release of water to the low-lying areas. Without the dune, Harrington asserted, the water would not be retarded and would flow faster (although those precise figures were never offered). Mr. Collins successfully rebutted this testimony.

First as to Mr. Harrington's opinion, the Court accepts the testimony of Mr. Collins that the physical features of the site do not support Harrington's opinion. The ground water contour study conducted for the EIS undermines the factual predicate of Mr. Harrington's opinion. If as Mr. Harrington offered that the dune holds 5-10' of water when it is saturated with water, the ground water contour study, specifically at N.W, 7 on Plate 6 (after page 22 of the EIS) would show same. However, it does not. The court accepts Mr. Collins testimony of "striking conformity" of the water table on the site. Also, the Court accepts the testimony of Mr. Collins that the removal of the dune will not have an environmentally significant affect on the water table except at limited discrete times because of removal of vegetation during mining. However the court finds removal of the dune will have insignificant measurable effect on the water table. Accordingly, Dr. Madsen and Mr. Harrington's testimony was effectively and conclusively rebutted.

Finally, Mr. Collins opined that the mining would produce no impairment of natural resources that he understands as a change that affects and reduces ecological functions specifically, he offered that removal of the dune sand was not ecologically significant. He opined that the environment would be altered in certain ways, such as the diminution of the dune massif by the removal of sand, but that the critical dune area as a resource would not be impaired or destroyed. The court accepts this testimony as true.

Dr. Frederick Goff testified on behalf of the DEQ. His credentials in the specific disciplines related to this case are considerable. His concentration of study is plant ecology, the study of distribution and characteristics of plants of the ecosystem in relation to environments. In addition, Dr. Goff has extensive experience in the study of dune environments in general and Michigan dunes in particular. (See Dr. Goff's exhaustive recitation in his testimony, starting at approximately 9:52 a.m. on March 17, 2000). In sum, the court finds Dr. Goff highly qualified in the subject science disciplines areas necessary for a determination of this case. In addition, his repeated visits to the site provided valuable factual development of his testimony based upon personal observation and his expertise, rather than speculation or reliance on hearsay information.

In exhibits 8 and 9, Dr. Goff identified a dune ecosystem, continuous with the South Haven, Hagar, Covert areas designated by the DEQ. (DEQ Exhibit 5) Two subsystems exist within this ecosystem. Specifically, higher dune relief, steeper slopes and less forest, characterize a shoreline sub-system. The shoreline dune sub-system does not cross I-196 because of human development. Immediately adjacent thereto, away from Lake Michigan, an inland dune sub-system exists. There is little, if any, genetic exchange between these two sub-systems due largely to I-196. The Court accepts Dr. Goff's findings and opinion that there are no species of environmental significance at the outermost extent of their range on the site. The court accepts Dr. Goff's explanation that if indeed species at the southern extent of their range were found on the site, one would find such species only on the northern slope of the elevated dune. Such was not the case here, thereby indicating the high likelihood that they occur to the south. The court accepts this opinion as consistent with good science and common sense. Dr. Goff testified that the plants on the site generally, and specifically in the critical dune area, are not exceptional, but rather are typical of critical dune areas in the state. The court accepts this testimony.

Second, the Court accepts Dr. Goff's testimony that the two southern coastal disjunct species occur on the site because of the ameliorating influence of the lake and not the dunes environment. His explanation of the habitat requirements of *Juncus* and *Ludwigia* persuade the court, in the absence of actual studies which do not exist, that these two plants likely exist throughout Southwest Michigan and not merely at this site or just in sand dune environments here.

In certain circumstances, dune configurations can be of ecological significance. While it is unclear whether such configurations were considered in the original determination of critical dune areas (see Exhibit 26), the court concurs with Dr. Goff's opinion that the Taube Road site dune features do not rise to the level of ecological criticality. The court credits Dr. Goff's opinion that the inland dune ecosystem will not be significantly affected by the mining as permitted. Likewise, the provisions of the mining permit protect plants, animals, soils, water and air. In sum, the adverse impact on the environment caused by the

mining as permitted will not rise to the level of impairment or destruction within the meaning of MEPA.

During the trial, the Court inquired as to the reasons for diversion from the statutory requirement of 200' setbacks for mining areas from the property lines. This inquiry related to the 50' setback established along I-196. Plaintiff produced no evidence as to the negative ramifications for the environment, other than more sand will be taken, if the setback remains at 50'. The statute does allow for exceptions to the 200' setback requirement, See MCL 324.63706(c). In essence, the statute allows DEQ to permit a lesser setback if the activity of sand dune mining is "compatible with the adjacent existing use." The adjacent existing use here is the interstate highway. Recognizing my authority to mandate a greater distance than 50' and the appellate court's instruction to write the common law of environmental protection, the court declines to require more than the 50' setback. The court so rules due to the absence of any proofs offered on this discrete subject and that the existing adjacent use is the interstate highway. While the statute contains a broad grant of power to the judiciary, the standards of the statute axe a limitation as well. See *PBB, infra*.

#### **THE APPLICABLE LAW**

At the 1962 general election Michigan voters adopted the following provision of what would become the 1963 Michigan Constitution:

The conservation and development of the natural resources of this state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of this state from pollution, impairment, and destruction. Article IV, Section 52 of the 1963 Michigan Constitution

In 1970, MEPA was enacted by the legislature as the fulfillment of that constitutional mandate. See *State Highway Comm. v. VanderKloot*, 392 Mich 159, 178-179, 182 (1974). *VanderKloot* also held that MEPA was a source of substantive environmental law. See *VanderKloot, supra*, at 184. MEPA provides standing to the Attorney General or

any citizen to initiate a declaratory judgment action or an action for equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from the pollution, impairment, or destruction. MCLA 324-1701(1). The principles of burden of proof and weight of the evidence generally applicable to civil actions in the circuit courts pertain to MEPA actions. See MCL 324.1703. Plaintiff must first establish a prima facie case by a preponderance of the evidence that the conduct of the defendant has impaired or destroyed or is likely to impair or destroy the air, water, or other natural resource or the public trust in those resources. The defendants may rebut the prima facie showing by the submission of evidence to the contrary. See MCL, 324.1703. The trial court's role in adjudicating a MEPA case is breathtaking in its scope given the guidance of *Ray v. Mason County Drain Commissioner*, 393 Mich 294, 306-7(1975).

The Legislature spoke as precisely as the subject matter allowed and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality. The act allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to take into consideration changes in technology which the Legislature at the time of the act's passage could not hope to foresee. See *Ray, supra*.

The Supreme Court has recently affirmed that the "basic import of *Ray* has not changed." See *Nemeth v. Abonmarche*, 457 Mich 16, 25 (1998). Proper application of MEPA's impairment standard requires a statewide perspective. *Thomas Twp. v. Sexton Corp.*, 173 Mich App 507, 517 (1988), citing *Kimberly H1225 Neighborhood Ass'n v. Dion*, 114 Mich App 495, at 507 (1982). Other cases appear to permit consideration of perspective more limited in scope. See *Portage, infra*. In the exercise of its authority under the case law, this court has not confined itself to one option or the other.

*Ray* requires trial courts to prepare detailed findings of fact on the following issues:

- 1) Has plaintiff established a prima facie case that the defendant's conduct has or is likely to pollute, impair

or destroy the air, water, or other natural resources or how he has failed to.

- 2) Has defendant rebutted plaintiff's *prima facie* case with evidence to the contrary, or how he has failed to.
- 3) Has defendant established an affirmative defense that "there is no feasible and prudent alternative ... and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction", or has defendant failed to do so.

Actual environmental damage does not establish the limit of plaintiff's potential proofs. Evidence of probable damage to the environment may also be proffered. See *Ray, supra*, at 309. Defendant's evidence, as to its quality and quantity, will necessarily vary with the nature of plaintiff's proofs. See *Ray, supra*, at 311, MEPA does not contemplate a balancing of disadvantages against advantages of the defendant's proposed action. *Portage v., Kalamazoo City Road Comm*, 136 Mich App 276, 282 (1984). In a MEPA case the crucial issue is whether the threatened impact on the environment rises to the level of impairment or destruction of natural resources so as to justify judicial intervention. See *Ray, supra*, and *Western Michigan Environmental Action Council v. Natural Resources Comm.* 405 Mich 741, 760 (1979). A court may not enjoin conduct that does not rise to the level of an impairment or destruction proscribed by MEPA. *Committee for Sensible Land Use v. Garfield Twp.*, 124 Mich App 559, 564 (1983). Absent a finding that the conduct of the defendant has or is likely to pollute, impair, or destroy, the court may not fashion a relief thought preferable by the judiciary. The standard of MEPA is a limitation as well as a grant of power. See *Oscoda Chapter of PBR Action Committee, Inc. v. Dept of Natural Resources*, 403 Mich 215, 231-33 (1978).

That said, in *Nemeth v. Abonmarche Development, Inc.*, 457 Mich 16 (1998), the Michigan Supreme Court clearly reaffirmed the trial judge's responsibility to independently determine the existence of actual or likely pollution, impairment, or destruction. See *Nemeth, supra*, at 34. Conversely, the court must eschew judicial intervention, in appropriate cases, if existence of actual or likely pollution, impairment or destruction of the environment within the meaning of the statute has not been shown. *PBB, supra*.

The legal framework of this case is not confined to MEPA, indeed, other portions of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 et seq, must be analyzed to render a decision in this case. Specifically, the court must consider those portions of NREPA commonly referred to as the Sand Dune Protection and Management Act (MCL 324. 35301 et seq.) and the Sand Dune Mining Act (MCL 324.63701 et seq.). The parties argue strenuously regarding the interface of the provisions and how they affect the instant case. Accordingly, a review of the standards of judicial interpretation of statutes is necessary and a specific analysis of the above cited statutes is required.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the legislature. *Frankenmuth Mutual Ins Co. v. Marlette Homes, Inc.* 456 Mich 511, 515 (1998). Statutory provisions must be read in the context of the entire statute and interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce a harmonious whole, *Weems v. Chrysler Corp*, 448 Mich 679, 699-700 (1995). The primary role of statutory construction is to determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and object sought to be accomplished. Inconsistencies should be reconciled if possible. *Gross v. General Motors Corp.* 448 Mich 147, 158-159, 164 (1995). Where a statute is clear and unambiguous, judicial construction is precluded. *Mino v. McCarthy*, 209 Mich App 302, 304 (1995)

Since the enactment of MEPA, the Michigan legislature has passed many statutes that address specific subject areas and activities of environmental concern including—most importantly for this case—sand dune mining and sand dune protection and management. It is important to highlight that MEPA no longer covers the entire field of environmental protection in the sense that, in 1970, MEPA was the “last word” from the legislature. Indeed, some legislative actions sought to curb perceived excesses of prior statutes. See 1989 PA 147 and the Legislative analysis of HB 4756 (ultimately 1994 PA 215). These legislative enactments, like MEPA, all sought singly and collectively to execute the mandate of Article 4, Section 52 of the Michigan Constitution regarding the “conservation and development

of the natural resources of this state in the interest of the health, safety, and general welfare of the People." Pursuant to the case law, the court must give effect, if possible, to all these enactments. See *Weems, supra*. The Michigan Supreme Court has recognized that all human activity can be found to adversely impact natural resources in some way or other. *Environmental Council, supra*, at 760. Recognizing that reality, the legislature acted post-MEPA to foster protection of the environment but also to speak with its authority on issues related to the use of natural resources for the general welfare of the people.

### **PART 353 OF NREPA**

1976 PA 222 codified the initial version of the Sand Dune Protection and Management Act. The present codification of those provisions is Part 353 of NREPA, MCL 324. 35301 *et seq.* In its first legislative action in the specific arena of sand dunes, the legislature passed PA 222 "to provide for study, protection, management, and reclamation of Great Lakes sand dunes, to prescribe powers and duties of the department of natural resources ... " See title of Public Act 222. Section 2 provided statutory definitions of "sand dune mining" and "sand dune area". In addition, the statute called for the department by July 1, 1977, to study and inventory Great Lakes sand dune areas, including "recommendations for the protection and management of sand dune areas **for uses other than sand mining.** (Emphasis supplied), see section 3(f) of Public Act 222 of 1976. The subsequent sections of that act outlined the process for issuance of a sand dune mining permit, then utilizing a broad definition of sand dune mining. See Section 2 (I). Therefore, as of 1976, the then Department of Natural Resources had the obligation to issue sand dune mining permits but only if the sand dune mining operation would not have an "irreparable harmful effect on the environment." See Section 9 of Public Act 222. No direct provision for local units of government involvement in the permitting process existed as of 1976.

Thirteen years later, the legislature revisited the existing statute. (Then MCL 281-651 *et seq.*) Public Act 146 of 1989 amended then existing law in significant ways. First the title of Public Act added as follows in pertinent part, "An act to provide for the study, protection, management, regulation, and reclamation of sand dune areas

*and critical dune areas, to prescribe the powers and duties of ... local units of government; to provide for the Issuance of permits, local zoning, and a model zoning plan regulating critical dune area uses..." emphasis supplied.*

...

In 1989, the legislature for the first time made legislative findings related to critical dune areas in section 1a of PA 146. (Now section 324.35302) As passed by the legislature, the following findings were codified:

- (a) The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide 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 the 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 act.
- (c) The benefits derived from the alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational 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 generation is assured.

Public Act 146 codified for the first time the term "critical dune area" as well as a definition of "Use" See MCL 324.35301 (e) and (j). Significantly, the statute clearly and definitively excludes sand dune mining as a "Use" within the meaning of the statute as passed in 1989. See now MCL 324.35301(j).

1994 Public Act 215 revisited the statute once again. In §9, the legislature amended the circumstances under which department could not issue a sand dune mining permit. In that provision the legislature struck the "irreparable harm" language of the 1976 version and inserted a statutory reference to MEPA, thereby specifically incorporating MEPA criteria into the Department's permitting process for the first time. That provision is now codified at MCL 324.63709. Later that year, the legislature passed the omnibus NREPA legislation (1994 Public Act 451). In the omnibus legislation, the sand dune mining permitting provisions and requirements were grouped into Part 637 of NREPA. The predecessor provisions related to sand dune

management and protection, a mission primarily for local government, see MCL 324.35302(b), were grouped into Part 353.

**Part 637 of NREPA**

Part 637 as presently codified represents the confluence of many statutory provisions passed at various times since 1970, Part 637 contains statutory definitions including "sand dune area" which specifically incorporates by reference in this part the definition of "critical dune areas" defined in part 353. "Sand Dune Mining" means the removal of sand from sand dune areas for commercial or industrial purposes, or both..." "Sand Dune Area" means that area designated by the department that includes those geomorphic features composed primarily of sand... and that lies within 2 miles of the ordinary high water mark on a Great Lake as defined in §32502, and includes critical dune areas as defined in part 353." The language "use of critical dune areas" has a discrete meaning in part 353 that is not transposed into part 637.

Section 63702 outlines under what circumstances the department may issue a permit. MCL 324,63702 provides in pertinent part:

- (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 (MCL 324.35301 et seq.) after July 5, 1989, except under either of the following circumstances'
  - (d) The operator holds a sand dune mining permit 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.

The specific requirements of the EIS are contained in MCL 324.63705. Plaintiff does not attack the sufficiency of the requirements of the EIS to "cover the field" of possible environmental factors necessary for consideration by this court. Recognizing that plaintiff need not so assert to sustain its cause of action here, the court, having reviewed the entire record, does not find any such deficiencies. Other standards for the permitting process

are also contained in Part 637, including the incorporation of MEPA as noted above. MCL 324.63709.

Plaintiff argues forcefully that the legislative findings in MCL 324.35302 (a) through (c) provide standards to guide the exercise of the court's power in this case. With one exception, the court rejects that assertion. Legislative findings are entitled to due consideration of this court as pronouncements of a policy-making branch of government. And the court *will* give subsection (a) of this section due weight. However, plaintiff misreads the effect of subsections (b) and (c). Those subsections speak to local government's role in the protection of the dunes and under what circumstances local government may allow alteration ... and the recreational use of critical dune areas." See Subsection (c). The word "use" in subsection (c) cannot speak to the DEQ in rendering permitting decisions, for the word "use" in part 353 **definitively does not include sand dune mining**. See MCL 324-35301(j). In addition, the remaining sections Of Part 353 all speak to issues related to local government zoning authority.

Statutes must not be read so as to produce an absurd result. *Franges v. General Motors*, 404 Mich 590, 612 (1979). Clearly, an absurd result would be reached if MEPA and the Sand Dune Mining Act (Part 637) were declared to bar sand dune mining as defined (i.e. removal [permanently] of sand for commercial or industrial purposes). If removal of dune sand were conclusively a violation of MEPA, then Part 637 would be read out of the statutes. Clearly the legislature has recognized that sand dune mining results in the permanent removal of dune sand. See MCL 324, 63701(1). By exempting sand dune mining from the definition of "use" in Part 353 (MCL 324.35301(j)), and yet in the succeeding section, declaring that critical dune areas are irreplaceable, it is clear that the legislature contemplated sand dune mining in critical dune areas under the umbrella of MEPA. See *Nemeth, supra*, and *Kimberly, supra*. The calculus for the court's *de novo* determination must include the notion that sand as a natural resource in a critical dune area will be removed, but that fact is not dispositive in and of itself to preclude mining. Indeed, plaintiff concedes that permanent removal of sand is not a *per se* violation of MEPA. See Page 15 of Plaintiff's submission of Proposed Findings of Fact and Conclusions of Law.

Recognizing that MEPA does not impose specific requirements or standards, but rather provides *de novo* review to determine any impairment or destruction of natural resources, the court refers in part to the so-called "*Portage factors*." *Nemeth, supra*, at 35. This court using standards appropriate to the particular violation must evaluate each alleged MEPA violation. *Nemeth, supra*, at 35. In addition, the so-called *Portage factors* may be used when appropriate in assessing whether the activity in this case violates MEPA. *Nemeth, supra*, at 35. See *Portage v. Kalamazoo Co. Rd. Comm*, 136 Mich App 276 (1984). The court does find them partially instructive in the instant inquiry. See *Nemeth, supra*, at 35.

*Portage v. Kalamazoo Cty Road Commission* outlined a four factors for a trial court's consideration. This court recognizes that the *Portage factors* are neither mandatory for consideration, *Nemeth, supra*, nor exclusive. Focusing on the dune sand in the critical dune area, as a natural resource, subject to the strictures of MEPA, it is clear that the dune sand of Michigan is present in finite quantities, although not rare, and is unique in the context of its geologic historical significance in Michigan. Also, the sand itself, if removed for industrial purposes, cannot be replaced. However, a finding that mining of sand per se results in a MEPA violation because of its permanent removal would read the Sand Dune Mining portion of NREPA off the books. Accordingly, additional elements must be reviewed. That is, what MEPA implications arise for this natural resource and others due to the mining permit allowance of mining in a critical dune area, as defined. Indeed, the court must examine the total picture of natural resources on the site.

71 acres of this site is located in a critical dune area as defined. Critical dune areas, as a whole in the state of Michigan are a resource under MEPA's umbrella of protection. As part of all critical dune areas in Michigan, this subject 71 acres is one tenth of one percent (0.1%) of the entire state's resource. In addition, as already stated, this is the last site in Michigan under current law which is eligible for the issuance of a sand dune mining permit in a critical dune area. Accordingly the mining of this 71 acres will not implicate a scarce or even soon-to-be scarce resource. Indeed, under current law, the critical dune resource of our state has absolute protection from further mining henceforth. Under these

circumstances, this court cannot conclude that the critical dune areas as a whole in this state will be destroyed or impaired within the meaning of MEPA. That said, the remaining question is whether other, natural resources on the site will be implicated so as to rise to the level of impairment or destruction of a natural resource.

Will the proposed mining have any significant consequential effect on other natural resources, such as flora and fauna? Additionally, do esthetic considerations, although not determinative (see *Portage*, supra, at 282), impact the inquiry?

Flora and Fauna are natural resources falling under the protection of MEPA. Indeed, the court took significant testimony regarding the existence of threatened and special concern plant species.

First, as to the existence of animals on the site, the court reviewed the EIS and the asserted adverse environmental impacts of the proposed mining, found on page 73. The Court took little testimony of consequence during the trial as to the affect on fauna at the site. As described, the Court finds relevant that no fauna species that is rare, unique, endangered was found on the site. Second, the Court accepts the assertions of the EIS that smaller, less mobile species may not survive at this site and that larger mammals will relocate. The court also accepts the report's assertion that birds will easily adapt. These minimal adverse impacts simply do not, in the court's view, rise to the level of impairment or destruction within the meaning of MEPA. There is no evidence that the population of small, less mobile species will even approach scarcity if the mining occurs. Recognizing the goal of intervention before a resource becomes scarce, see *Nemeth*, supra, at 34, the record does not convince this court that these specific impacts merit MEPA intervention. See *Nemeth*, supra, at 32.

This opinion has previously extensively reviewed the testimony taken from several witnesses concerning the mining's affect on flora. As indicated above, the Court finds the defendant's witnesses on these issues persuasive to the point of conclusively rebutting that portion of plaintiff's case relating to flora. First, the court accepts defendants' assertion that the permitting process will effectively preserve the threatened species, *Juncus*,

found on the site. Second, the Court rejects for the reasons already articulated plaintiff's assertion that the site contained unique floral attributes because of the existence of plants of northern distribution at the southern extent of their range and vice versa. Dr. Goff's testimony was simply more persuasive to this Court. Third, the mining project will remove portions of vegetation, topsoil, and some topographic features. The Court accepts the testimony of Dr. Goff that no unique or rare plants will be impacted by the mining project. In addition, once reclamation is complete, some ecological components will be restored and others added. The removal of the vegetation, topsoil, and topographic features, while adverse, do not rise to the level of impairment or destruction within the meaning of MEPA. Such removal will be temporary as to the vegetation, and topsoil and reclamation efforts will, in the court's judgment be sufficient to insure that the site's plant resources will not rise to the level of impairment or destruction within the meaning of MEPA. Accordingly, intervention by this Court is not warranted.

The EIS also identifies esthetic impacts due to the removal of a large percentage of the high dune. The Court notes that esthetic considerations alone are not determinative of significant environmental impact. See *Portage, supra*, at 282. Plaintiff asserts impairment or destruction will occur because of the removal of the dune, which will thereby deprive an unidentified populace from enjoying its features. On this point, the court notes that the site is private property, along an interstate highway, well inland from Lake Michigan. The high dune has already been scarred from logging and other human activity conducted in prior years. An additional important point for the factbound analysis of this case, which MEPA requires, is that these features cannot be enjoyed by anyone absent permission from the private property owners. If those driving on I-196 seek to partake of the formation's features, a significant portion of the high dune will remain visible.

On this last point, this Court's response to plaintiff's argument might be entirely different if this site was in close proximity to Lake Michigan, such as majestic dune formations referenced in testimony by Mr. Collins and other witnesses. However, the Court has viewed this site personally. It is not "majestic" as an average citizen might view a uniquely beautiful site. While plaintiff's preference to leave this privately held property in present

condition is strongly held, this court's determination cannot be grounded in such a preference as valid as it may be. Rather, this court must apply the facts as found to the policy choices of the legislature as found in statute and case law adjudicated by the Michigan appellate courts. Indeed, caselaw dictates that this court has no authority to fashion relief perhaps thought preferable. See PBB, *supra*, at 231. MEPA does not prohibit any and all development of Michigan's natural resources. Plaintiff does not propound a specific standard for the court's evaluation of esthetics. Michigan case law does instruct that preservation of social and cultural environment is not protected by MEPA. See *Poletown Neighborhood Council v. City of Detroit*, 410 Mich 616 (1981). In some critical dune areas a site may be so pleasing that the esthetic quality of the site is a prime factor for consideration by a trial court in a MEPA analysis. See Mr. Collins testimony. The private property site at issue here is not such a parcel. From the court's walking of the site and with I-196 traffic nearby, it is much too late in this site's history over the years and the existing use of adjacent land (i.e. 1-196) for the court to conclude that it has esthetic quality, unprotected by the conditions of the permit, which could rise to the level of a MEPA violation. See *Environmental Council, supra*. Again, while mining the site will have some negative adverse esthetic impact, the court finds from review of all the facts and circumstances that this adverse impact does not rise to the level of impairment or destruction within MEPA.

Finally, the EIS references increased noise levels. The court took no in court testimony on this subject. The very sparse state of the record on this subject cannot support a finding of environmental impairment within the meaning of MEPA. Clearly, judicial intervention grounded on this element of the EIS is not warranted.

Having found that the defendants have rebutted the plaintiff's *prima facie* case it is unnecessary to address the statutory affirmative defenses propounded by the defendants in their pleadings. See MCL 324.1703(1).

However, the court does find as a matter of law that the defendant failed to prove the defense of laches. The court finds that the Technisand had no change in condition coupled with the lapse of time between the issuance of the permit by the DEQ and the initiation of this lawsuit that

would satisfy the requirements of the defense of laches.  
See *Sedger v. Kinnco, Inc.* 177 Mich App 69, 73 (1988).

Accordingly a judgment of no cause of action in favor of  
defendants Technisand and Department of Environmental  
Quality and against Plaintiff Preserve the Dunes is  
entered. IT IS SO ORDERED.

Date: **11/30/00**

Paul L. Maloney  
Berrien County Trial Judge