STATEMENT OF FACTS

A. COURSE OF PROCEEDINGS AND DISPOSITION OF CASE BELOW

The Plaintiff filed this lawsuit on July 1, 1998. The lawsuit was filed under the Michigan Environmental Protection Act, MCLA 324.1701 et seq; MSA 13A.1701 et seq (MEPA) and challenged a permit issued by the DEQ on November 25, 1996 which allowed TechniSand to expand non-critical dune mining into a critical dune area adjacent to its non-critical sand mining operation.

On July 31, 1998, the DEQ filed a Motion for Summary Disposition and on August 5, 1998, TechniSand filed a similar Motion. Both Motions asserted that the only method available to the Plaintiff's for challenging the disputed permit was a claim for judicial review under Section 631 of the RJA (MCLA 600.631). Because the Michigan Court Rules [MCR 7.104(a)] require such a lawsuit to be filed within 21 days of final agency action, the Defendants asserted that the Plaintiff's lawsuit was untimely. The Defendants also asserted that the Plaintiff's original Complaint failed to state a cause of action under the MEPA.

Thereafter, Plaintiff filed a First Amended Complaint on August 7, 1998.

A hearing was held on Defendants' Motions on October 26, 1998, at the conclusion of which Trial Judge Peterson ruled that the Plaintiff's lawsuit was not time barred. He determined that the MEPA created an independent cause of action and noted that the legislature had not provided for a statute of limitations in MEPA lawsuits. He, therefore, denied the Defendants' Motions. An order to that effect was entered on November 24, 1998.

After initial discovery was completed Plaintiff filed a Motion asserting that the Defendant DEQ was without legal authority to issue an amended mining permit to TechniSand because TechniSand did not qualify under MCLA 324.63702(b); MSA 13A.63702(b) for an exemption from the statutory prohibition against mining critical dunes, and that by issuing an invalid permit

the DEQ committed an act which threatened the destruction of a unique, irreplaceable and fragile natural resource in violation of the MEPA. The Plaintiff requested that a permanent injunction be issued based on the Court's declaration of rights.

Plaintiffs Motion was argued on May 24, 1999. At the conclusion of the hearing Trial Court Judge Schofield (who had succeeded the retired Judge Peterson) ruled (in contradiction of Judge Peterson's earlier ruling) that the portion of Plaintiff's lawsuit challenging the issuance of the mining permit was time barred because it was not filed within the time limits for challenging administrative decisions, which the Court assumed was 90 days. The Court also ruled that TechniSand qualified for an exemption to the statutory prohibition against critical dune mining. The Judge therefore denied Plaintiff's Motion for Summary Disposition and instead granted partial summary disposition to Defendants. He allowed the case to proceed on the remaining MEPA claims. An order was duly entered on August 2, 1999.

The Plaintiff petitioned for leave to appeal from Judge Schofield's Order. On December 7, 1999, the Court of Appeals denied the Plaintiff's application for leave to appeal and the case thereafter proceeded to trial before Judge Paul L. Maloney, who had replaced Judge Schofield in the Civil Division of the Berrien County Trial Court. Evidence and testimony was received over the course of five (5) days, from March 14 to March 22, 2000. Closing oral arguments were submitted on May 12, 2000, and on November 30, 2000, Judge Maloney issued a written decision in which he concluded that although the Plaintiff had proved a prima facie case that the Defendants' proposed conduct violated MEPA, the Defendants had successfully rebutted the Plaintiff's prima facie case. A judgment of no cause of action was thus entered on December 13, 2000. Plaintiff thereafter filed a timely claim of appeal.

B. Facts

1. Lake Michigan Sand Dunes are geologically unique and irreplaceable.

The western shoreline of Michigan's lower peninsula from the Indiana border northward to the Straits contains sand dune formations found nowhere else on earth. They were formed as a result of a series of unique geological events connected with the last ice age and they depict a special moment in Michigan's geologic history (Tr. P. 118). As the glaciers retreated northward they left behind what are now known as the Great Lakes. The extensive belt of sand dunes along Michigan's west coast was formed mostly during intervals of lowering lake levels which occurred periodically during certain geologic stages. Sands that had accumulated along the shores were exposed to now dry beaches. The prevailing westerly winds, fetching across Lake Michigan, then winnowed, lifted, bounced and heaped the course grains onto the adjacent upland (Tr. P. 102-110; Ex. 29). The sand dune formations of western Michigan are a non-renewable resource which, if lost, cannot be replaced in the scope of human history (Tr. P. 121).

2. The legislation has acted to protect sand dunes.

In 1976 the legislature enacted a law for the study, protection, management and reclamation of Great Lakes sand dunes. The statute was known as the Sand Dune Protection and Mining Act (Act 222 of the Public Acts of 1976). It authorized the DNR's Geological and Survey Division (GSD) to regulate and oversee sand dune mining activities in order to insure the protection of the State's sand dune formations. The 1976 legislation required operators who wished to mine sand from within a Great Lakes sand dune area to obtain a permit from the DNR.

In June of 1989 the statute was amended to expand the regulatory authority of the DNR (now DEQ) to monitor and control all proposed activities within designated sand dune areas. The amendment also identified certain areas within Great Lakes Sand Dune areas as "critical

dune areas" and provided additional restrictions on the use or activities within critical dunes. The legislature made a specific finding that:

> "(a) The critical dune areas of this state are unique, irreplaceable, and fragile resource that provides significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural and ecological benefits to the people of this state and to the people from other states and countries who visit this recourse.
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> * * *
>
> (c) The benefits derived from the alteration, industrial, residential, commercial, agricultural, sivi-cultural, and 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 generations is assured." MCLA 324.35302; MSA 13A.35302.

That same 1989 legislation also prohibited future mining in critical dune areas with but two exceptions which will be discussed later.

3. <u>TechniSand did not own or operate sand mining facilities at the time of the 1989 amendments</u>.

Since at least the early 1980's the prior owner, Manley Brothers of Indiana, Inc., possessed a permit issued by the DNR (now DEQ) to mine sand from approximately 26.5 acres of non-critical dunes located in the eastern parcel of the property located in Hagar Township commonly referred to as the "Nadeau Site". The Nadeau Site lies within a Great Lakes sand dune area and is subject to the protections and regulations contained in Part 637 and Part 353 of the Natural Resources and Environmental Protection Act (MCLA 324.63701 et seq; MSA 13A.63701 et seq and MCLA 324.35301 et seq; MSA 13A.35301 et seq). The western parcel of the Nadeau Site contains critical dune areas, as defined in §35301(b) of Part 353 of the Natural Resources and Environmental Protection Act. The eastern parcel of the Nadeau Site contains non-critical dunes. (TechniSand's Admission #7.)[1]

[1] The record of TechniSand's and DEQ's admissions is contained in Exhibit 1 to the Appendices

TechniSand was incorporated in the State of Delaware on July 12, 1991. The company applied to the Michigan Department of Commerce for a certificate of authority to transact business in Michigan on July 22, 1991, and it received such authority on July 26, 1991. (TechniSand's Admissions #1, 2, and 3.)

On July 31, 1991, TechniSand purchased from Manley Brothers of Indiana, Inc., the Nadeau Site. (TechniSand's Admission #4.) The land deeded to TechniSand was only part of the transaction. The transaction was the acquisition by Fairmont Minerals, Ltd. Of Chardon, Ohio, from Hepworth, PLC of Sheffield, England, of most of the assets of Hepworth's subsidiary, Hepworth Minerals and Chemicals, Inc. of Chesterton, Indiana. TechniSand is a wholly-owned subsidiary of Fairmont Minerals, and was evidently formed to take over the acquired part of the sand mining assets of Hepworth. See Department of Justice Release, 7/26/91, Exhibit E to TechniSand's opposition to Plaintiff's Application for Leave to Appeal. In 1992 Manley's sand mining permit (No. TS-NS-107) was transferred to TechniSand, as the current owner of the Nadeau Site. The permit allows the company to mine non-critical dunes in the eastern parcel of the Nadeau Site. (TechniSand's Admission #9 and DEQ's Admission #3.)

4. The DEQ granted TechniSand a permit to mine a critical dune area adjacent to its non-critical dune property.

In 1994 TechniSand applied to the DNR for an amendment of its Nadeau Site sand mining permit. The application requested permission to mine approximately 126.5 acres located in the western parcel of the Nadeau Site. The proposal (known variously as the "Taube Road Expansion" or the "Nadeau Site Expansion") was to extend mining from a non-critical sand dune area into a critical dune area, to remove 7,000,000 tons of sand from surface operations and 950,000 tons of sand from sub-surface operations on 70.45 acres of the 126.5 acre site. The

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of Plaintiff's Motion for Summary Disposition filed with the Trial Court on March 19, 1999.

company also proposed to create two lakes of 9.8 and 13.7 acres respectively and to relocate threatened species of flora. (TechniSand's Admissions # 14 and 15; DEQ's Admission #5.)

Although mining of critical dunes had been statutorily prohibited for some five (5) years prior to TechniSand's application for an amended permit, the application was premised on an assumption that TechniSand was exempt under §63702(1)(b) from the prohibition against critical dune minings since it was a permit holder seeking to expand mining operations into adjacent property.

On April 20, 1995, the DNR denied TechniSand's application for an amended permit. The reason cited in the DNR's denial was that TechniSand, having acquired the property after July 5, 1989, was not "eligible to the exception under §2(B) of Act 222" from the statutory prohibition against critical sand dune mining.[2] (TechniSand's Admission #16; DEQ's Admission #8.)

On October 1, 1995, the Governor issued Executive Order 1995-18 which created the Department of Environmental Quality and which transferred environmental regulatory authority from the DNR to the DEQ. On April 1, 1996, the DEQ sent TechniSand a letter indicating that "since April of 1995 there have been many changes in State government and the DNR/DEQ in particular. Some of these changes coupled with additional information that TechniSand has apparently supplied to the Michigan Attorney General's office are instrumental in the GSD's ability to proceed with the review of your amendment requests". The letter went on to request that TechniSand submit modifications to its environmental impact statement and progressive cell unit mining and reclamation plan in order to "expedite" the processing of the amended mining permit application. (TechniSand's Admission #17.)

[2] The section is now codified as MCLA 324.63702(1)(b); MSA 13A.63702(1)(b).

The amended documents were submitted by TechniSand to the DEQ on May 20, 1996. The environmental impact statement as submitted by TechniSand contained a statement of "unavoidable adverse impacts" that acknowledged that the proposed mining operation would significantly impair the environment in the Taube Road expansion and permanently destroy a critical dune.

> "**6.0 Unavoidable Adverse Impacts**
>
> The proposed project will greatly alter the physical, biological, and geological characteristics of approximately 76.9 acres, or 61% of the Taube Road Expansion of the Nadeau site.
>
> **The proposed project will result in the removal of a portion of the existing vegetation, topsoil, and topographic features.** This will temporarily eliminate the existing floral and faunal habitat in these areas. Once reclamation is complete, some ecological components will be restored and others, not previously present, will be added. **However, the nature of the resulting environment will be different for hundreds of years.** Removal of vegetation could also potentially result in a temporary increase of on-site erosion and the blowing of sand. The habitat at a few locations for two threatened species listed by the State of Michigan will be impacted by the proposed operations.
>
> The proposed project could also result in both a gradual and immediate impact to the animals living on site. While smaller, less mobile species may not survive, larger mammals would temporarily relocate to other on or off-site locations. Birds, because of their greater mobility, may relocate greater distances from the site.
>
> **The aesthetic quality of the property will also be impacted because a large percentage of the critical dune will be removed, forever changing the most dominant physical attribute of the site.** In addition, noise levels emanating from the site, including transportation of material from the site by haul trucks, will intermittently elevate noise levels and could impact the quiet, rural atmosphere that currently exists in the area." (Ex. 21, P. 73)

Nevertheless, on November 25, 1996, the DEQ issued to TechniSand an amended mining permit allowing the company to mine and remove sand from within the critical dune area at the Nadeau

Site. (TechniSand's Admissions #18 and #19.) It is this permit, and the proposed mining plan thereunder, that Plaintiff challenges in this lawsuit.

At issue in this case is a portion of the Site (the "critical dune area") that is part of a larger critical dune area established pursuant to statute and regulation. TechniSand's progressive cell unit mining and reclamation plan (Jt. Ex. 22) calls for mining in a maximum of three cells at one time at the Taube Road Site. Cell 1 is the existing, unreclaimed sand mining operation at the Site. Cells 2, 3 and 4 are on flatter topography. Cells 5, 6 and 7 are within the Critical dune area. Cells 8 and 9, on flatter topography, require additional permits from the state relating to certain species of plants before mining may commence. The permit requires TechniSand to create a conservation easement that prohibits mining on the northern tip of the Critical dune area. The permit reduces the statutorily required 200-foot setback to 50 feet along the northwest side of the Site adjoining I-196.

5. <u>Critical dune areas of the state are natural resources</u>.

The DEQ acknowledged that the critical dune areas of the state, taken together, are a natural resource (Tr. P. 91). Critical dune areas are unusually high, spectacular dunes, parallel to the coast (Tr. P. 124). Critical dune areas are defined, in part, by their height in comparison with the surrounding lands (Tr. P. 133). There are about 70,000 acres of critical dunes in Michigan (Tr. P. 149). In comparison with all dune sand in Michigan, this is a small fraction (Tr. P. 164). Compared with all sand in Michigan, this is an even smaller fraction (Tr. P. 164).

MCLA 324.63703; MSA 13A.63703 requires intensive studies and inventories of sand dune areas, including alternatives to sand dune mining. These studies are DEQ Exhibits 27 and 28, and Joint Exhibits 30, 31 and 24. The 1996 Michigan State University reevaluation of the state's critical dune areas recommended no reduction in the 70,000 acres of critical dune areas;

the critical dune area at the Site was recommended to remain in the state's critical dune area (Tr. P. 580).

6. <u>Sand is a natural resource</u>.

The state acknowledges that sand is a natural resource (Tr. P. 91). Witnesses for all parties testified that sand, and in particular the sand in the critical dune area on the Site, is a natural resource (Tr. P. 584, 768). The trial court found sand to be a natural resource (Opinion at P. 4).

7. <u>Description of the critical dune area at the Taube Road Expansion Site</u>.

The critical dune area at the Site has been designated for protection under various statutes since 1978. The critical dune area was designated pursuant to the Sand Dune Protection and Management Act by Administrative Rule R 281.402, adopted by the DNR on August 17, 1978 (in one of 13 designated sand dune areas, Tr. P. 814). The critical dune area was designated as a barrier dune within the meaning of the Sand Dune Protection and Management Act in the DNR publication of Barrier Dune Formation Areas (circa 1979-1981). Jt. Ex. 23, fifth page. The DNR's Land and Water Management Division identified the critical dune area as a critical dune area in the Atlas of Critical Dunes (February 1989, reprinted February 1993). Jt. Ex. 25, P. 5. The Atlas was adopted by the legislature (Tr. P. 923). The DEQ Geological Survey Division identified the critical dune area at the Site as a critical dune area in its publication entitled Designated and Critical Sand Dune Areas (April 1996). Jt. Ex. 26, P. 5. Its status as part of a critical dune area remains unchanged to this day.

The prominent features of the critical dune area at the Site include its height above the local topography and its steep inland east-facing slope (Tr. P. 115). The height of the critical

dune area from toe to crest is about 75 feet (Tr. P. 567). The critical dune area is separated from the remainder of the critical dune areas nearer Lake Michigan by Interstate 1-96. The highway rides on top of the dunes and does not cut through them (Tr. P. 117). This separation does not affect the critical dune area's status as part of a larger critical dune area (Tr. P. 583).

There are about 2-3 million tons of sand in the critical dune area (Tr. P. 422). All witnesses acknowledge that the critical dune area on the Site is within a critical dune area within the meaning of the legislative definition and designation (Tr. P. 115, 534, 682). The critical dune area has value in its conserved state (Tr. P. 769).

8. Adverse consequences of the proposed mining plan.

The permit allows TechniSand to remove the great majority of the critical dune area. The portion of the critical dune area that may not be mined, according to the permit, is the area on the northeast end of the critical dune area within the conservation easement (Tr. P. 407). If the mining proceeds as planned, the critical dune area will be gone (Tr. P. 122, 123). The mining will destroy part of the critical dune area massif (Tr. P. 552). The mining will reduce the height of the critical dune area by about 60 feet (Tr. P. 567). All witnesses agreed with the conclusions on page 73 of the EIS, Jt. Ex. 21 (Tr. P. 122, 582, 785, 932). These conclusions are quoted infra at P. 8.

The DEQ issued the permit, while cognizant of the standards of MCLA 324.63709; MSA 13A.63709, notwithstanding the conclusions of the EIS regarding unavoidable adverse impacts to the critical dune area (Tr. P. 934-936). TechniSand's witnesses agreed that mining would impair the natural resources of the critical dune area, in the sense that mining will alter and reduce the ecological function of the critical dune area (Tr. P. 585).

The 50-foot setback along I-196 will cause the proposed mining operation to be visible from the highway until a buffer is created at the end of the mining operation (Tr. P. 1115). The principal reason for the 50-foot setback is to allow TechniSand to maximize its profits from mining the critical dune area. EIS, Joint Exhibit 21, pp 46-47, item 2. Maintaining the 200-foot setback will protect the aesthetics of the Site and protect the public's view of critical dune areas of the state while traversing I-196.

9. Trial Court findings.

This action was tried before the court over five days. Following submission of proposed findings of facts and conclusions of law by all parties, the court issued its opinion on November 30, 2000.

The court found that the 71-acre critical dune area at the Taube Road Site is approximately 0.1% of the total statewide critical dune area of approximately 70,000 acres (Opinion, P. 1). Critical dunes are unique in the world (P. 3). Sand is a natural resource (P. 4). However, the court found that the Taube Road Site is unexceptional compared to other dune sites (P. 7). The dune features at the Site do not rise to the level "ecological criticality" (P. 9). The inland dune ecosystem, of which the Taube Road Site is a part, will not be as significantly affected by the proposed mining (id). The proposed mining, if permitted, will not rise to the level of impairment or destruction within the meaning of MEPA (P. 9-10).

The court further found that the legislature contemplated sand dune mining in critical dune areas (P. 17). At the Taube Road Site, sand is a natural resource in the Critical dune area that will be removed (id). However, mining of the 71-acre area will not implicate scarce resources (P. 18). Critical dune areas as a whole in the state will not be destroyed or impaired (P. 19). Removal of vegetation, topsoil, and topographic features do not rise to the level of

impairment or destruction under MEPA (P. 20). The destruction of esthetic features are not significant to show impairment, compared to other "majestic dune formations" (P. 20).

Based on these findings the Trial Court concluded that although Appellant had established a prima facia case under MEPA, Appellees had successfully rebutted the prima facia case. It therefore entered a final judgment of no cause of action.

ARGUMENT

I. TECHNISAND IS NOT ENTITLED TO A PERMIT TO MINE THE TAUBE ROAD CRITICAL DUNE AREA AND PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The facts relating to the question of whether TechniSand was eligible for a permit to mine a critical dune area are not disputed. The question is one solely of law. Therefore, it is to be reviewed de novo. Jackson v Thompson McCully Co., L.L.C., 239 Mich App 482, 487 (2000).

The Trial Court erroneously held that TechniSand was eligible for a permit to mine a critical dune area, notwithstanding the fact that TechniSand was not the owner of the land prior to July 5, l989. Contrary to the court's holding, the statute clearly forbids an entity that was not the owner on July 5, 1989 of a critical dune area that was not included in a permit on that date to mine sand in such a critical dune area. Plaintiff was entitled to judgment in its favor on this ground as a matter of law.

The trial court supported its conclusion on alternative grounds, both of which were incorrect. First, it held that the plaintiff was precluded from challenging the validity of TechniSand's permit because plaintiff had not sought judicial review of the DEQ's issuance of the permit within the time provided for such review. Second, the court held that even if plaintiff

were allowed to challenge the validity of the permit, the challenge must fail because the permit was validly issued pursuant to Section (l)(b) of the statute (Section 63702). (Oral ruling of Schofield, J., May 24, l999.) (As we discuss later, the court correctly rejected the DEQ's contention that the permit was justified under section (l)(a) of the statute.)

A. Plaintiff is entitled to challenge the validity of the permit in this action.

The Trial Court held that what it referred to as plaintiff's "procedural" challenge to the DEQ's granting of the amended permit to TechniSand was not timely. (Plaintiff's challenge to the validity of the permit was not a "procedural" challenge at all, but a challenge to the DEQ's authority to issue any such permit. First Amended Complaint, pars. 19, 20.) The court said it did not "believe that MEPA allows an unlimited time period for procedural challenges to administrative action that impacts the environment." In reaching that conclusion the court evidently proceeded on the premise that any challenge to administrative action raised in a MEPA action is to be treated as if it were asking for "judicial review" of the administrative action, and is therefore barred if not brought within the time allowed for direct judicial review of the administrative decision, which the court assumed was 90 days.

The Court's reasoning was incorrect and was directly contrary to the decision of the Michigan Supreme Court in West Michigan Environmental Action Council v. Natural Resources Commission, 405 Mich. 74l (l979) (hereafter "WMEAC v DNR"). That case was a MEPA action in which the plaintiff sought to enjoin the drilling of certain oil wells pursuant to permits issued by the DNR. The Court held that the validity of the permits was properly in issue in the MEPA action. Reversing the trial court, it found that the permits had the effect of allowing drilling that would impair the natural resources of the state and were therefore invalid. The court permanently enjoined drilling pursuant to the permits.

There was no suggestion in the WMEAC opinion that the proceeding was a judicial review proceeding or that the plaintiffs should have sought direct judicial review. The Court noted that MEPA's sponsor had stated that "under the new statute, courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary or capricious conduct." (Emphasis added.) Consistent with that purpose, and wholly inconsistent with the idea of "judicial review," the Court treated the case as one to be decided without any deference to the administrative agency's views. It reversed the trial court for according deference to the DNR's conclusion that the proposed drilling would not violate the MEPA standard, stating that the trial judge "erred in failing to exercise his own totally independent judgment."

Although the plaintiff in that case had sought unsuccessfully to intervene in the proceedings before the administrative agency (the agency rejected the motion as premature), there was no suggestion in the Court's opinion that the plaintiff was required to intervene as a condition of challenging the permits in an action under MEPA. Any such requirement would have been inconsistent with the Court's ruling that the issues were to be decided on a "totally independent" basis.

The instant case is an even clearer case for going behind the administrative agency's decision. In the WMEAC case the validity of the permits was challenged because of their effects, not because the DNR lacked authority to issue any such permits. It would be one thing to insist on the "judicial review" route if the question were merely one of procedural error by the administrative agency, or even a question on which the agency has some substantive discretion. It is quite another thing to do so where, as here, the agency totally lacked authority to issue the permit being relied on. Nothing the agency could have done, procedurally or otherwise, could

have made the agency's action lawful. If MEPA ever calls for an independent judicial ruling on the validity of a permit, as the WMEAC case holds, it does so in this case.

The rule adopted by the trial court is one that would drastically curtail the effectiveness of MEPA. MEPA was intended to provide the widest possible opportunity for courts to identify and enjoin activities that threaten the destruction or impairment of the state's natural resources and environment, by allowing not only the attorney general but "any person" to maintain an action for that purpose. As the Michigan Supreme Court said in Eyde v Michigan, 393 Mich 453, 454 (1975):

> "The EPA is significant legislation which gives the private citizen a sizable share of the initiative for environmental law enforcement. The act creates an independent cause of action, granting standing to private individuals to maintain actions in the Circuit Court for declaratory and other relief against anyone for the protection of Michigan's environment."

The case held that plaintiffs were entitled to an injunction barring sewer construction that adversely affected the environment, notwithstanding that the issues could have been raised in a previous condemnation proceeding. The court said, "There is no statutory duty that requires citizens to intervene in condemnation proceedings to assert their rights under the EPA or be barred forever from raising them." The same reasoning applies to administrative proceedings.

If the trial court's ruling were upheld, it would have the effect of adding a provision to MEPA saying "but no person may question the validity of any permit if more than 90 days have elapsed since the permit was issued." That would be the equivalent of amending MEPA to say: "Where forbidden harm to the environment is or will be caused by issuance of an illegal permit, such harm may be prevented only if some person seeks judicial review of the issuance of the permit within 90 days. Otherwise the recipient of the permit shall have a vested right to cause the forbidden harm to the environment." It seems obvious that the legislature could have had no

intention to grant anyone a permanent right to destroy protected natural resources whenever an administrative agency has exceeded its powers.

Prior to the trial court's ruling, a different judge of the circuit court had made exactly the opposite ruling, denying the defendants' motions for summary disposition based on the contention that the complaint was untimely. Oral ruling of October 26, l998 (Peterson, J.). In ruling on the motions the court stated:

> "It seems to me . . . that had the legislature intended a time line under the Michigan Environmental Protection Act, they would have stated one. . . . Now, it would seem that the legislature intentionally did not put a statute of limitations . . . a time limit in the Michigan Environmental Protection Act. Because suppose some agency granted somebody a permit to do some thing. And that activity was conducted perfectly properly for a period of time. And then it was realized that there was, or could be, serious damage to our environment . . .The parties that were aggrieved or perceived themselves to be injured should be able to then race to the nearest court for some type of relief."

Judge Peterson's ruling was correct and Judge Schofield's contrary subsequent ruling was erroneous. Plaintiff was entitled to challenge TechniSand's permit in this MEPA action.

Moreover, the question, properly speaking, is not whether plaintiff may "challenge" TechniSand's permit but whether TechniSand has a valid defense for proposed conduct on its part that is otherwise expressly forbidden by the statute. The statute forbids TechniSand to engage in its proposed mining without a permit. It was TechniSand's burden to overcome what is a clear-cut prima facie violation of the Sand Dune Mining statute and of MEPA. This it could do only by establishing that it had a lawful permit. (Obviously the statute could not be satisfied merely by offering a piece of paper called "permit." When the statute says it is unlawful to mine without a permit, it plainly means a lawful permit. Any other meaning would be absurd.) TechniSand did not, and cannot, establish such a defense because on the undisputed facts it is not and never has been eligible for a permit to mine in the Taube Road Expansion.

B. TechniSand is not entitled to a permit to mine a critical dune area.

1. The permit is not authorized by subsection (b) of the exceptions to the prohibition on mining critical dunes.

Sand dune mining in Michigan is governed by the Sand Dune Mining Act**Error! Bookmark not defined.**. Part 637 of the Natural Resources and Environmental Protection Act (NREPA). The statute prohibits sand dune mining without a permit. It provides:

> "After July l, l977, a person or operator shall not engage in sand dune mining within Great Lakes sand dune areas without first obtaining a permit for that purpose from the department." MCLA 324.63704(1), MSA 13A.63704(1).

The statute, as amended in 1989, further provides:

> "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, l989, 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." MCLA 324.63702(1)(b), MSA 13A.63702(1)(b). (Emphasis added.)

The first exception applies where mining in a critical dune area was already allowed on July 5, l989 under a then-existing permit. The exception enables such permits to be renewed.

The second exception allows new critical dune areas to be mined, but only under narrow circumstances, namely, where (l) the area is adjacent to an area covered by permit and (2) the adjacent area containing the critical dune was owned by the operator prior to July 5, l989.

The legislative purpose behind these exceptions is apparent. The legislature was adopting a new prohibition, intended to bring a halt to mining of Michigan's critical dune areas.

Making the prohibition retroactive, however, would have inflicted hardship on property owners who had bought property relying on its availability for sand mining (and might have raised "taking" objections). The exceptions were designed to obviate the retroactive effects of the prohibition on incumbent property owners. Dispensation was extended to owners who were already mining critical dune areas and to those who owned as-yet-unmined critical dune property adjacent to an existing mine. Presumably the reason for the latter exception was that the adjacent location of the property showed that it had probably been bought in reliance on its availability for mining. But no exception was needed for subsequent purchasers because the prohibition would not be retroactive as to them.

It is clear, based on the undisputed facts of this case, that TechniSand cannot qualify for either exception. It does not qualify for the first exception because the permit for the Nadeau Site did not include the Taube Road Extension. (We discuss the first exception more fully later.) It does not qualify for the second exception because it did not own the critical dune area on July 5, 1989. In fact, TechniSand was not even in existence on July 5, l989. It was not incorporated until two years later, on July 12, l99l. It did not own the property until July 3l, 1991, when it acquired it by a deed conveying the land from Manley Bros. of Indiana to TechniSand. (TechniSand Admission #4).[3]

TechniSand not only fails to come within the language of the exception; it is also clearly outside the manifest purpose of the statute. The prohibition enacted by the legislature in l989 had been in effect a full two years before TechniSand's owners made their investment. TechniSand's owners bought the property in full awareness of the prohibition on new mining of

[3] As noted earlier, the transaction between Manley Brothers and TechniSand was part of the acquisition by Fairmont Minerals of most of Hepworth Minerals' assets.

critical dune areas and of the fact that the exception by its terms did not apply to TechniSand. If those purchasers did not know what the law was, they should have known. But it is safe to assume that they did know. As TechniSand's vice-president of operations, Mr. Fodo, acknowledged at trial, TechniSand took the property "with its eyes wide open as to legal implications." Tr. 1127. It could not have relied on pre-1989 law. TechniSand's owners were informed, sophisticated buyers. The price paid for the Manley property must be assumed to have reflected the fact that the express terms of the l989 legislation barred a new owner from including the critical dune in any expansion of the Nadeau Site.

The DEQ had no difficulty in concluding that TechniSand was ineligible for the subsection (b) exception when TechniSand first applied for an amended permit allowing it to mine the Nadeau Site Expansion. The agency (then called the Department of Natural Resources) informed TechniSand that the Attorney General had been consulted and had advised it that "TechniSand is a new legal entity and acquired the properties in question after July 5, l989, and are not eligible for the exception under Section 2b of Act No. 22." Therefore, said the agency, it would not issue the requested permit, but TechniSand could resubmit its application "with the Critical Dunes removed." (TechniSand Admission #16). Although the DEQ did issue the permit later, it did not repudiate the prior conclusion that TechniSand could not come within subsection (b). Indeed, it offered essentially no explanation for its change of position. See its letter of April l, l996, discussed infra.

Notwithstanding the plain language of subsection (b), the trial court concluded that the exception applied to TechniSand. The court gave a confusing set of explanations for that conclusion, none of which is tenable.

First, the court stated correctly that the statute allows granting an amended permit to extend mining from a noncritical dune area to an adjacent critical dune area "as long as the operation was in existence on July 5, l989, and the adjacent site . . . was owned by that operator at that time." [Opinion of Schofield, J., 5/24/99, Tr.5. Emphasis added.] This was a correct paraphrase of the statute; it is clear that the term "operator" in the subsection can only refer to the operator who was operating the mine prior to July 5, l989 and who owned the adjacent land at that time. The statute could not have intended to protect a pre-July 5, 1989 owner of "adjacent property" who was not also "the operator" at that time, because such a non-operator owner would presumably not have acquired the property for mining, and therefore would not be within the legislature's purpose of protecting expected uses.

Having made that correct statement, however, the court went on to "further conclude" that TechniSand was entitled to the permit "even though it was not the operator with a permit to mine an adjacent site on July 5, l989." [Ibid. Emphasis added.] That startling conclusion – exactly contrary to what the court had just said was the meaning of subsection(b) – was justified, according to the court, because "the purpose of the statute was to grandfather in operations, not operators."

The court's "explanation" is impossible to reconcile with the terms of the statute. The exceptions did allow existing operations to continue, but plainly drew a line at the expansion of existing operations when such expansion involved critical dune areas. The limitation, clearly set forth in subsection (b), was to confine such an expansion to existing operators with existing ownership of an adjacent critical dune area. Had the legislature meant to give the privilege of such expansion to "operations" (whatever that term might include) it would not have used a test

of ownership, since an "operation" cannot be an owner. An owner is a natural person or other legal entity, which is how the statute defines "operator." The statute says:

> "Operator" means an owner or lessee of mineral rights or any other person engaged in or preparing to engage in sand dune mining activities with mineral rights within a sand dune area. MCLA 324.63701(j), MSA 13A.63701(j).

The use of the term "operator" was essential to the function of subsection (b) and was intentional. Further, if the privilege of expansion into critical dune areas were attached to "operations" there would be no limit to the duration of the opportunity to mine a critical dune, and no limit to the number of persons to whom that opportunity could be extended. Such a result would defeat the obvious objective of the legislature to put an early end to the destruction of critical dunes.

The disastrous effect of the court's free-wheeling interpretation of the statute is demonstrated by the facts of this case. The mining plan under the permit TechniSand acquired from its predecessor authorized the removal of 50,000 tons of sand, in a noncritical dune area. The amended permit that the DEQ granted, covering the critical dune area in the Nadeau Site Expansion, authorized the removal of almost 8 million tons of sand! [Affidavit of R. Whitener P. 2, Ex. 6 to DEQ Answer to Application for Leave to Appeal.] It strains credulity to believe that the legislature could have considered such a plan to be merely a continuation of the "operation" that existed before TechniSand took over. Even if the legislature had chosen to allow all existing "operations" to continue, a proposal to mine 160 times as much sand as the previous operator would hardly have been thought by a reasonable legislature to be the "same operation." (Significantly, the statute contains no definition of the term "operation," itself a telling flaw in the trial court's reasoning.)

As a further attempted justification for its conclusion, the trial court observed that if TechniSand had bought the stock of Manley Bros. it would have come within the exemption. The assumption is incorrect, because even if TechniSand had bought stock (and thus the legal title to the expansion land had remained unchanged) TechniSand would nevertheless have been a different operator, (as the trial court itself acknowledged) since the subsidiary would have been controlled by a different parent company, with different senior management, different capital resources and different corporate policies. But the point is irrelevant anyway, since TechniSand did not acquire stock. It might equally well be said that if TechniSand had bought the assets before July 5, l989 it would have qualified for the exception. But that, too, is irrelevant. Statutes are to be applied to the facts as they exist, not to "what-ifs" that might call for a different result. Change in ownership was a critical fact in the legislative scheme because it spelled the difference between owners who could claim reliance on prior law and those who could not.[4]

Finally, by way of further justification for disregarding the terms of subsection (b), the trial court observed that in some other contexts the law treats an asset purchaser as the "successor" to the asset seller, such as "for collective bargaining purposes or unemployment comp purposes." There is no analogy, however. What the court's suggestion overlooks is that such "successor" treatment, where recognized, is for the purpose of imposing the predecessor's liabilities on the successor entity, not for conferring a benefit to which the putative "successor" would not otherwise be entitled. See, e.g., Turner v Bituminous Casualty Co., 397 Mich. 406

[4] Furthermore, it is far from clear that even if TechniSand's parent had bought the stock of Hepworth or Manley Bros., instead of having title to the land conveyed to TechniSand, the statute should be construed as if there were no change of "ownership." There would have been a total change in the beneficial ownership, notwithstanding preservation of the corporate shell. If the trial court were correct, it would be easy to circumvent the statute simply by transferring title into a corporate entity immediately before a sale. Nothing compels eviscerating the statute by disregarding substance for form.

(1976) (product liability imposed on successor). The purpose of such liability is to effectuate a public

policy of preserving benefits for third parties who have relied on the enterprise.[5]

Here the considerations of public policy are exactly the opposite. The beneficiary to be protected is the public, whose interest is served by confining the privilege of mining critical dunes to the entities the legislature has specified. It is well-recognized that the separateness of a corporate entity is almost never disregarded for the purpose of conferring a benefit on a different corporation, especially in "grandfather" situations. See Alabama Power Co. v TVA, 948 F. Supp. 1010, 1024-25 (N.D. Ala. 1996); Central Mortgage Co. v Commonwealth Insurance Dept., 514 A.2d 956, 958 (Pa. 1986); In re Beck Industries, 479 Fed. 410, 418 (2d Cir. 1973).

In sum, none of the reasons or justifications given by the trial court for ignoring the plain language of subsection (b) can withstand analysis. The court's conclusion was contrary to the language of the statute, contrary to the manifest purpose of the statute to protect reasonable expectations, and contrary to the only identified position taken by the Attorney General of Michigan and to the position taken initially by the DEQ itself. The decision confers a windfall benefit on TechniSand, which acquired the property with full knowledge of the legislative prohibition. The decision converts a "grandfather" exception into an exception for a "grandfather and all his descendants and assigns," rendering useless the legislature's provisions designed to bring an end to the mining of critical dunes. The legislature could not have intended any such interpretation of subsection (b).

2. The trial court correctly rejected subsection (a) as authorizing the permit granted to TechniSand.

[5] Even where the successor theory of liability is invoked, it normally requires, among other things, that the selling corporation be defunct – i.e. that all its assets have been transferred and that it has ceased operations and dissolved. See Turner v Bituminous Casualty Co., supra, 397 Mich 406, 419. That was not the case with TechniSand's acquisition of the Manley Brothers property. TechniSand's parent, Fairmont Minerals, did not acquire all the assets of Manley Bros.' parent, Hepworth, and Hepworth did not cease doing business. Indeed, the very purpose of the Antitrust Division's blocking of the original purchase proposal was to keep the seller alive as a competitor. See Department of Justice Release, 7/26/91.

In the trial court, the DEQ argued that the validity of the permit it had granted to TechniSand could be upheld under subsection (a) of the exception, although the DEQ had made no reference to subsection(a) when it granted the permit. The trial court rejected that contention, saying, "If the defendants are relying on 1A, the Court's ruling is that that reliance is misplaced." [Tr. of May 24, 1999 p.11.]

The court's ruling on this point was correct. The only reasonable construction of the statute is that subsection (a) applies to the amendment or renewal of a permit that already includes the critical dune area in question, while subsection (b) applies whenever the permit-holder seeks to expand the permit to include "adjacent land" that contains a critical dune area.

Subsections (a) and (b) obviously must be read together, both because of their juxtaposition in a single section of the statute and because of the general principle that statutes in pari materia must be read in harmony with one another. Bearing that principle in mind, it is useful to recapitulate the provisions. Section 63702(1) provides that the DEQ "shall not issue a permit" within a critical dune area except under either of two 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 . . . for which the operator seeks an amended permit.

Both subsections contemplate "amending" existing permits but subsection (a) also contemplates "renewal" of a permit (presumably, where no amendment is needed). Subsection (b), however, deals with a particular type of amendment – namely, where it is sought to amend the permit to include "adjacent land." Subsection (b), therefore, is the applicable subsection

whenever the application seeks to include "adjacent land." Subsection (b) qualifies subsection (a). It would be senseless to say that an application seeking to include "adjacent land" could be granted under subsection (a), ignoring the important limitation on such applications that subsection (b) imposes. To do so would be simply to write subsection (b) out of the statute. It would also mean that the DEQ could grant an amended permit whether the additional land was "adjacent" or not and regardless of when the land was acquired. The result would be that the DEQ's "amending" power would entirely swallow up the prohibition on mining of critical dune areas. All that would be necessary to allow mining in a critical dune area would be for the applicant to have or obtain from someone else a mining permit issued before July 5, 1989, and ask the DEQ to amend it to include a critical dune area. That is in essence what the DEQ did for TechniSand in 1996.

Having written to TechniSand in April 1995 that TechniSand did not qualify under subsection (b) and should resubmit its application "with the Critical Dunes removed," the agency one year later advised TechniSand as follows:

> Since April of l995 there have been many changes in state government and the DNR/DEQ in particular. Some of these changes coupled with additional information that TechniSand has apparently supplied to the Michigan Attorney General's office are instrumental in the GSD's ability to proceed with the review of your amendment request. (TechniSand Admission #17).

There was no reference to any changed information about when TechniSand acquired the land in question and no reference to either subsection (b) or subsection (a). The DEQ subsequently issued the permit for the Nadeau Site Expansion, with no explanation of how TechniSand qualified for an exception from the prohibition against mining in critical dune areas.

Although the trial court erred in holding that TechniSand qualified under subsection (b), it was clearly correct in rejecting the DEQ's belated suggestion that the permit could be justified under subsection (a).

C. The applicable statutory standard forbids TechniSand to mine the Nadeau Site Expansion and plaintiff is therefore entitled to an injunction.

Since TechniSand has no valid permit to mine in the Nadeau Site Expansion, and cannot qualify for such a permit under the statute, plaintiff was entitled as a matter of law to judgment in its favor prohibiting TechniSand from engaging in any mining in that area.

The legislature has provided in the Sand Dune Mining Act the applicable standard for applying MEPA to the mining of critical dune areas, just as the Soil Erosion and Soil Conservation Act was held to provide the controlling standard for applying MEPA to soil-erosion activities. Nemeth v Abonmarche Development, Inc., 457 Mich 16 (1998) (violation of SESCA was prima facie violation of MEPA). The standard prescribed by the Sand Dune Mining Act is that (l) no one may engage in sand dune mining without a permit from the DEQ (MCLA 324.63704, MSA 13A.63704), and (2) the department is forbidden to issue a permit for mining in a critical dune area unless it is either (a) a renewal of a previously issued permit that included the critical dune area in question, or (b) an amendment of a previously issued permit to include "adjacent land" that was owned by the operator on July 5, 1989. (MCLA 324.63702, MSA 13A.63702). TechniSand's permit satisfies neither condition. The statute therefore explicitly forbids TechniSand to engage in sand dune mining of the Taube Road Extension of the Nadeau Site.

The trial court had no discretion under the statute to relax that standard. Unlike the SESCA violation considered by the Michigan Supreme Court in the Nemeth case, supra, this is a

case where the statutory standard - i.e. the standard set by the Sand Dune Mining Act--leaves no room for a court to determine whether the activity in question has the requisite adverse effect on natural resources specified by MEPA.

In the Nemeth case, the violation of SESCA was that the defendant had failed to file a soil erosion control plan prior to the issuance of the permits, but SESCA did not forbid the type of activity the defendant was engaged in. The Michigan Supreme Court therefore held that the plaintiff had established a prima facie violation and that the trial court was entitled on remand to consider whether the prima facie violation of MEPA had been rebutted by proof that the defendant's activities had resulted in "neither pollution, impairment, nor destruction, nor the likelihood thereof, in spite of proof of the SESCA violation." 457 Mich at 36.

In contrast, the standard prescribed by the Sand Dune Mining Act is that there shall be no mining in a critical dune area when the exceptions do not apply. That standard itself determines that the activity constitutes "pollution, impairment, or destruction" for purposes of MEPA. Although a court is empowered under MEPA to determine that an "agency's standard falls short of the substantive requirements of MEPA" (Nemeth, 457 Mich at 34) MEPA clearly does not entitle a court to relax a legislatively determined substantive standard and substitute a standard less protective of the state's natural resources.

The trial court's finding, after trial, that the defendants had rebutted the plaintiff's prima facie case assumed, of course, that the prior ruling denying plaintiff's motion for summary disposition was correct. For the reasons set forth above, the latter ruling must be reversed. Accordingly, the finding that defendants had rebutted plaintiff's prima facie case must also be reversed. In view of the prohibition in the Sand Dune Mining Act, the only way the defendants could have rebutted the prima facie violation of MEPA would have been by proving facts that

brought TechniSand within one of the exceptions to the prohibition. However, the undisputed facts made such proof impossible, and plaintiff has therefore conclusively shown a violation of MEPA.

The order denying plaintiff's motion for summary disposition should be reversed, the trial court's finding that defendants have rebutted plaintiff's prima facie case should be set aside, and judgment should be entered permanently enjoining TechniSand from engaging in sand dune mining in the Taube Road Extension of the Nadeau Site.

II. THE JUDGMENT MUST BE REVERSED FOR THE ADDITIONAL REASON THAT THE TRIAL COURT'S DETERMINATION THAT TECHNISAND'S PROPOSED MINING DOES NOT VIOLATE MEPA WAS BASED ON AN ERRONEOUS LEGAL STANDARD.

A. Standard of Review.

In MEPA actions, this court reviews questions of law de novo. Jackson v Thompson-McCully Co., L.L.C., 239 Mich App 482,487 (2000). This court reviews the trial court's finding of fact under the clearly erroneous standard. People v Thenghkam, 240 Mich App 29, 43-47 (2000); Tuttle v Dep't of State Highways, 397 Mich 44, 46 (1976).

B. The Trial Court erroneously ignored the legislature's carefully defined standard for sand dune mining in critical dune areas.

Since plaintiff was entitled to summary disposition in its favor, the judgment of the circuit court should be reversed without any need for considering the trial record or the court's findings and conclusions based thereon. Even without the erroneous ruling on plaintiff's motion for summary disposition, however, the trial court's judgment cannot stand because the court employed an erroneous legal standard in addressing the question whether TechniSand's proposed mining of a critical dune area violates MEPA. Use of an erroneous standard by the trial court

is, of course, grounds for reversal. It is the function of this appellate court "to analyze whether the trial court properly determined the appropriate standard by which to evaluate the plaintiffs' claim and the defendants' conduct pursuant to §l701(2)." Nemeth, supra, 457 Mich at 29.

The standard the trial court used was whether the destruction of this particular critical dune was an "impairment or destruction" of a natural resource when compared with the total critical dune areas of the state. The court stated that "Proper application of MEPA's impairment standard requires a statewide perspective" (Opinion at 11) and that "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" (Opinion at 19). The court supported its conclusion by stressing the fact that the 71 acres of critical dune area at the Taube Road Site is only a tenth of one percent of the critical dune areas of the state as a whole. Opinion at 18. In addition the court relied on its appraisal of individual characteristics of this particular dune, including the facts that it "has already been scarred from logging and other human activity," that it is not completely visible from the highway, and that it is not "majestic." Opinion at 20.

The court considered that it was free to make such an appraisal because of a misreading of the applicable statutory provisions. Analyzing the interplay of the several statutory provisions involved, the court stated:

> By exempting sand dune mining from the definition of "use" in Part 353 MCLA 324.35301(j); MSA 13A.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. (Opinion at l7.)

The court's error was its second reference to "critical dune areas" in the above passage. Contrary to the court's statement, the legislature did not leave the mining of "critical dune areas"

to the general standard of MEPA. Instead it provided a very specific standard. That standard, which was quoted by the court on the page immediately preceding the passage quoted above, is the standard that has been discussed extensively in Point I of this brief. Far from leaving the mining of critical dunes to the general umbrella of MEPA, the legislature declared that there shall be no further mining of critical dune areas except in two carefully defined circumstances. Nothing could make it clearer that the statutory standard does not contemplate that each critical dune will be judged on its own merits or in relation to the total acreage of critical dune areas in the state. To the contrary, the statutory standard mandates that, as the term critical itself implies, each and every "critical" dune area is irreplaceable and is to be protected, except as one of the two exceptions applies. The statute leaves no room whatever for the calculus the trial court adopted.

Section 63702 of the statutes relating to sand dune mining performs a dual function. It does deal with permits, specifying the circumstances – and the only circumstances – under which the DEQ may issue a permit for mining a critical dune area. But by doing so it also furnishes the governing standard for future mining of critical dunes in the State of Michigan. That standard implements the general standard of "impairment or destruction" embodied in MEPA. It is the standard the circuit court was required to follow, regardless of TechniSand's possession of a permit.

C. MEPA incorporates the standards of the Sand Dune Mining statute and the Sand Dune Protection and Management statute.

Ray v Mason County Drain Commissioner, 393 Mich 294 (1975), requires trial courts to prepare findings of fact in cases brought under MEPA with regard to each of the following:

> (1) How the plaintiff has 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) How defendant has rebutted plaintiff's prima facie case with evidence to the contrary, or how he has failed to.
>
> (3) How defendant has established as 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 how he has failed to.

Id at 308-309. Plaintiff's evidence in its prima facie case "is not restricted to actual environmental degradation but also encompasses probable damage to the environment as well." Id at 309. Defendant's evidence to rebut plaintiff's evidence "will vary with the type of environmental pollution, impairment or destruction alleged and with the nature and amount of the evidence proffered by the plaintiff." Id at 311. If a defendant:

> seeks to establish an affirmative defense, then the judge must set out those facts which led him to conclude 1) that 'feasible and prudent alternatives' do or do not exist and what the claimed alternatives were and 2) that the defendant's conduct is or is not 'consistent with the promotion of public health, safety and welfare'.

Id at 312-313.

The standard of review for the court under MEPA in this action is whether the defendants' conduct impairs or destroys natural resources. MEPA requires de novo review of administrative action. MEPA requires the court not to defer to determinations made by the DEQ. West Michigan Environmental Action Council v Natural Resources Commission, 405 Mich 741, 752-754 (1979) (WMEAC); Nemeth, infra at 34.

The test under MEPA is not whether the proposed mining will impair or destroy the critical dune areas of the state, as a whole, as proposed by defense witnesses (Tr. P. 633, 788). This test is the discredited Portage test. Nemeth, 457 Mich at 31-35, distinguishing and limiting

City of Portage v Kalamazoo County Road Commission, 136 Mich App 276 (1984). With regard to the Portage factors, the Supreme Court said:

> The MEPA does not require air, water, or other natural resources to be 'scarce' or 'unique' to be protected from actual or likely pollution, impairment, or destruction. Indeed, one of the primary purposes of the MEPA is to protect our natural resources *before* they become 'scarce'.

Nemeth, 457 Mich at 34-35 (emphasis in original).

MEPA standards are incorporated in Part 637, specifically MCLA 324.63709; MSA 13A.63709, which says:

> The Department shall deny a sand dune mining permit if, upon review of the environmental impact statement, it determines that the proposed sand dune mining activity is likely to pollute, impair or destroy the air, water or other natural resources or the public trust in those resources, as provided by Part 17.

Defendant DEQ in this action acknowledged that MEPA imposes a separate duty on the DEQ to determine whether there will be impairment or destruction of natural resources as a result of the proposed mining (Tr. P. 83, 84). See WMEAC at 753-754.

MEPA incorporates Part 353, which provides standards to guide the exercise of the court's discretion in determining whether defendants' conduct violates MEPA. Specifically, MEPA incorporates the legislative findings contained in MCLA 324.35302(a); MSA 13A.35302(a), which states:

> Section 35302. The legislature finds:
>
> (a) The critical dune areas of this State are a unique, irreplaceable, and fragile resource that provides significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural and ecological benefits to the people of this state and to the people from other states and countries who visit this 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 part.

> (c) The benefits derived from *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 generations is assured*." (Emphasis added.)

These findings constitute a legislative determination that the court is compelled to follow in evaluating a MEPA claim concerning critical dune areas of the state. In particular, as defense witnesses agreed, the legislature in Section 35302 established a threshold of significance for dune areas by the designation of critical dune areas (Tr. P. 918).

The definition of "use" in MCLA 324.35301(j); MSA 13A.35301(j) as excluding sand dune mining does not alter the legislative direction found in section 35302 that critical dune areas are to be protected for the benefit of present and future generations. (The term "alteration" in MCLA 324.35302(c); MSA 13A.35302(c), includes sand dune mining, which is regulated by Part 637).

Part 637 is one expression of the state's paramount concern for the protection the natural resources of critical dune areas. Defense witnesses acknowledged that designation of critical dune areas is an expression of the state's paramount interest in protecting its natural resources (Tr. P. 589). Those critical dunes are protected from sand dune mining (with the limited exception noted in the previous section of this brief) pursuant to MCLA 324.63702; MSA 13A.63702. That protective standard is the standard that is appropriate to this action as required by Nemeth, supra, at 35.

D. The trial court erroneously adopted a "statewide perspective" test.

Faced with the uncontraverted evidence that the critical dune area at the Taube Road Site would be impaired by the proposed mining, the court impermissibly trivialized the scope of the impairment by adopting the "statewide perspective" test rejected by the Supreme Court in

Nemeth. The court found that the features of the Taube Road Site dune do not rise to the level of "ecological criticality" (opinion, 9). The court further found that the inland dune ecosystem described by defense witness Goff would not be significantly affected by the mining. The court further found that mining at the Taube Road Site would affect 0.1% of the entire state's resource (opinion, 18). In essence, the court enlarged the "natural resources" involved in the case to find that the mining would impair a trivial, insubstantial amount of the resource and, therefore, would not violate MEPA.

The court plainly adopted the statewide perspective test:

> Proper application of MEPA's impairment standard requires a statewide perspective. Thomas Twp. v Sexton Corp., 173 Mich App 507, 517 (1988), citing Kimberly Hills Neighborhood Ass'n v Dion, 114 Mich App 495, at 507 (1982). (Opinion, 11).

The statewide perspective test arising out of Kimberly Hills was criticized by the Supreme Court in Nemeth. After describing Kimberly Hills' analysis of a trial court's inquiry under MEPA, the Supreme Court said:

> Placing a restrictive definition of "natural resource" on the court is not helpful in evaluating a claim under the MEPA. What is *most* significant is determining whether the effect on the environment rises to the level of actual or likely pollution, impairment, or destruction of a natural resource.

Nemeth, 457 Mich at 33 n 7(emphasis in original). Nemeth further found that MEPA plaintiffs "are not required to show that a multitude of a natural resources are affected." Id at 34. The statewide perspective test adopted by the trial court in this action impermissibly placed a restrictive definition on the natural resource by expanding the size of the resource, and, implicitly, required plaintiffs to show that a substantially larger portion of the total critical dune areas in the state be impaired in order to prevail under MEPA. The trial court's test would require the plaintiffs to prove too much, that is, a substantial portion of resources across the

entire state would have to be impaired or destroyed before the effect on the environment rises to the level of actual or likely impairment or destruction of a natural resource.

Indeed, the trial court's finding that the critical dune area at the Taube Road Site is the last acreage in critical dune areas of the entire state in which sand dune mining could be authorized by the DEQ (Opinion at 1) is based on testimony of DEQ witnesses improperly received over plaintiff's objection (Tr. P. 822-825) that the evidence impermissibly inflated plaintiff's case. The trial court, in overruling plaintiff's objection, determined that the relevant natural resource was "the resource throughout the state) (Tr. P. 824). This was error under Nemeth, as the trial court has employed a "restrictive definition" of natural resources.

The statewide perspective test has been disavowed or ignored in decisions from this court subsequent to Kimberly Hills. Highland Recreation Defense Foundation v Natural Resources Commission, 180 Mich App 324, 330-331 (1989); Kent County Road Commission v Hunting, 170 Mich App 222, 233-235 (1988); Rush v Sterner, 143 Mich App 672, 680 n 1 (1985), reaffirmed in City of Portage v Kalamazoo County Road Commission, 136 Mich App 276, 283 n 2 (1984).

The impropriety of using the statewide perspective test is illustrated by comparison to other "small resource" MEPA cases which would never have been heard if the courts uniformly adopted the statewide perspective test: Nemeth (30 acres of Lake Michigan barrier dune sand); WMEAC (local populations of elk, bobcat and bear); Ray (localized wetlands); Trout Unlimited v City of White Cloud, 195 Mich App 343 (1992); 209 Mich App 452 (1995) (trout stream); Attorney General v Balkema, 191 Mich App 201 (1991) (regional marsh); Attorney General v Thomas Solvent Co., 146 Mich App 55 (1985) (local groundwater); Michigan United Conservation Clubs v Anthony, 90 Mich App 99 (1979) (portion of Lake Michigan fish

population); and Wayne County Health Department v Olsonite Corp., 79 Mich App 68 (1977) (local airshed).

Contrary to Nemeth, the trial court below did not determine the effect of the proposed mining on the environment at issue in this case, being the Taube Road Site. All witnesses testified and the trial court agreed that the sand at the Taube Road Site is a natural resource. All witnesses agreed that the critical dune area at the Taube Road Site, without reference to other critical dune areas of the state, is a natural resource. The trial court improperly inflated plaintiffs' case to a larger action that plaintiffs did not bring, and then found that plaintiffs had not proved the court-inflated case. This was clear error under the legal standard applicable to this action and should be reversed by this court.

E. The Trial Court erroneously applied the *Portage* factors.

Nemeth instructs that the factors set forth in Portage, supra, are "not mandatory, exclusive, or dispositive." Nemeth at 37. The Portage factors required a plaintiff to prove that a natural resource was rare or unique and not easily replaceable, that the impairment to the resource would have consequential effects on other natural resources, and that those effects would affect a critical number of other species, plant or animal. Portage at 282. The trial court erroneously adopted the Portage factors in toto (Opinion, 18).

The appropriate standard that the court should have adopted is specified in the Sand Dune Mining Act, Part 637, MCLA 324.63701 et seq; MSA 13A.63701 et seq, and the Sand Dune Protection and Management Act, Part 363, MCLA 324.35301 et seq; MSA 13A.35301 et seq. The legislation has determined that critical dune areas are unique, irreplaceable and fragile. MCLA 324.35302(a); MSA 13A.35302(a). The legislature has determined that critical dune areas are protected from mining, except under very limited circumstances, as shown above.

MCLA 324.63702; MSA 13A.63702. These are the standards the court should have used in evaluating the likely impairment or destruction of the critical dune area at the Taube Road Site. Indeed, DEQ witnesses testified that the legislative findings set forth above constitute a threshold of significance (Tr. P. 918). In view of the legislature demonstrated concern about the critical dune areas of this state, the Portage factors do not apply in cases involving critical dune areas.

Plaintiffs' burden in this action should only have been to show that the critical dune area at the Taube Road Site would be impaired or destroyed in order to prevail. Page 73 of the Environmental Impact Statement (Jt. Ex. 21) conclusively establishes that impairment and destruction. Significantly, the trial court did not once refer to Page 73 in its findings, notwithstanding that defense witnesses agreed with its conclusions (Tr. P. 582, 785, 932). Furthermore, defendants' witnesses agreed that the mining at the Taube Road Site would impair natural resources as defined as a change that affects or reduces ecological functions (Tr. P. 585-586). This testimony is consistent with the definition of "impair" adopted in MUCC v Anthony, supra, 90 Mich App at 105-106, as "to weaken, to make worse, to lessen in power, diminish or relax, or otherwise affect in an injurious manner."

The trial court improperly attached great significance to the comparison between the 71 acres on the Taube Road Site that would be mined and the total amount of critical dunes in the state. As Nemeth instructs, a plaintiff is not required to show that a multitude of natural resources are affected. 457 Mich at 34. Thus, focusing on the environment at issue in this case, plaintiff demonstrated impairment and destruction of the relevant natural resources.

Even under the Portage test, the court found that this site was unique and rare. The trial court's finding that plaintiff failed to prove impairment under the Portage factors are clearly erroneous under the applicable legal standard and contrary to the preponderance of the

evidence. Plaintiff having shown the impairment or destruction of the Taube Road Site by the proposed mining, plaintiff should prevail under MEPA.

RELIEF REQUESTED

Appellant requests that this Court reverse the rulings of the Trial Court both as to Appellant's Motion for Summary Disposition and as to the Trial Court's rulings under MEPA. Appellant further requests that this Court remand the case to the Trial Court for entry of a judgment of summary disposition in favor of Appellant which declares that TechniSand is not eligible for a mining permit within the critical dunes area of the Nadeau Site and which enjoins sand mining within that area. In the alternative, the Appellant requests that this Court remand the case to the Trial Court for entry of a permanent injunction under MEPA prohibiting sand mining within the critical dune area of the Nadeau Site.

Date:

March 21, 2001

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