

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

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

Plaintiff,

vs.

Hon. Paul L. Maloney

No. 98-3789-CE-M

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

Defendants.

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**PLAINTIFF'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

PLAINTIFF'S PROPOSED FINDINGS OF FACT

Introduction

1. This action concerns a proposal by defendant TechniSand to mine an area in Hagar Township, Berrien County, known as the Taube Road Expansion Site ("Site") purchased by TechniSand in 1991. Defendant Michigan Department of Environmental Quality ("DEQ") issued an amended permit to TechniSand in 1996 (Joint Exhibit 17) to allow such mining.

2. 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. Plaintiff Preserve the Dunes, Inc., a Michigan non-profit corporation, brought this action pursuant to the Michigan Environmental Protection Act, MCL 324.1701 *et seq* (MEPA), seeking to enjoin TechniSand from mining within the Critical Dune Area on the Site and to declare the permit issued by the DEQ void as to mining within the Critical Dune Area.

3. TechniSand's progressive cell unit mining and reclamation plan (Joint Exhibit 22) calls for mining in a maximum of three cells at one time. 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.

Lake Michigan sand dunes, formed between 5000 and 4000 years ago, are geologically unique and irreplaceable.

4. The sand dunes along the eastern shore of Lake Michigan were formed by glacial processes that began about 20,000 years ago. Rising and falling levels in Lake Michigan, together with eroding sediments blown inland by prevailing westerly winds, created what we now call critical dunes between 5000 and 4000 years ago. Farrand, 3/14/00, 11:25-11:33; see

Joint Exhibit 29, page 13 (bulletin written by Prof. Farrand for the Michigan Department of Natural Resources, “The Glacial Lakes around Michigan”); see also Joint Exhibit 10A (Quaternary map of Michigan); Goff, 3/17/00, 10:33.

5. The dunes were formed by two processes: wave action turned the sand and sorted it by grain size, and the wind picked up the sand and abraded grain against grain into rounded and uniform sand grains. Farrand, 3/14/00, 11:38.

6. Sand dunes like those on the eastern shore of Lake Michigan are found nowhere else in the world. Farrand, 3/14/00, 11:34. Lake Michigan sand dunes depict a special, even unique moment in the geologic history of Michigan. Farrand, 3/14/00, 11:45; 13:49 (cross-exam). Lake Michigan sand dunes have unique geologic value. Farrand, 3/14/00, 11:50.

7. If the Lake Michigan sand dunes are lost, they cannot be replaced; they are a non-renewable feature. Farrand, 3/14/00, 11:51.

Critical dune areas of the state are natural resources.

8. The DEQ acknowledges that the critical dune areas of the state, taken together, are a natural resource. 3/14/00, 10:49 (opening statement).

9. Critical dune areas are unusually high, spectacular dunes, parallel to the coast. Farrand, 3/14/00, 13:19. Critical dune areas are defined, in part, by their height in comparison with the surrounding lands. Farrand, 3/14/00, 13:33.

10. There are about 70,000 acres of critical dunes in Michigan. Farrand, 3/14/00, 13:54. In comparison with all dune sand in Michigan, this is a small fraction. Farrand, 3/14/00, 14:13. Compared with all sand in Michigan, this is an even smaller fraction. Farrand, 3/14/00, 14:14.

11. MCL 324.63703 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.

12. 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, including the Critical Dune

Area at the Site. Stipulation of TechniSand counsel, 3/16/00, 12:23.

13. Species overlap in dune areas is an appropriate consideration in designating those areas as critical dune areas because the overlap is a significant ecological feature. Collins, 3/16/00, 12:40. See also Goff, 3/17/00, 13:23.

Sand is a natural resource.

14. The state acknowledges that sand is a natural resource. 3/14/00, 10:50 (opening statement).

15. Witnesses for all parties testified that sand, and in particular the sand in the Critical Dune Area on the Site, is a natural resource. Collins, 3/16/00, 12:30; Goff, 3/17/00, 14:55.

16. Sand in dune areas and adjacent non-dune areas are geologically and mineralogically identical. Farrand, 3/14/00, 11:49; Okell, 3/15/00, 14:48.

Description of the Critical Dune Area at the Taube Road expansion site

17. 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, Whitener, 3/21/00, 9:04). 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). Joint Exhibit 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 (Feb. 1989, reprinted Feb.1993). Joint Exhibit 25, page 5. The Atlas was adopted by the legislature. Whitener, 3/21/00, 13:50. The DEQ Geological Survey Division identified the Critical Dune Area as a critical dune area in its publication entitled Designated and Critical Sand Dune Areas (April 1996). Joint Exhibit 26, page 5. Its status as part of a critical dune area remains unchanged to this day.

18. 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. Farrand, 3/14/00, 11:41. The height of the Critical Dune Area from toe to crest is about 75 feet. Collins, 3/16/00, 12:05.
19. The Critical Dune Area is separated from the remainder of the critical dune areas nearer Lake Michigan by interstate 196. The highway rides on top of the dunes and does not cut through them. Farrand, 3/14/00, 11:44, 13:34. This separation does not affect the Critical Dune Area's status as part of a larger critical dune area. Collins, 3/16/00, 12:30.
20. The Site is ecologically significant because of the unusual mix of southern species at the northern edge of their range and northern species at the southern edge of their range. Madsen, 3/14/00, 15:00; Collins, 3/16/00, 9:23.
21. The Critical Dune Area acts as a water retention device. Harrington, 3/15/00, 8:59. See plaintiff's exhibit 86 (Harrington drawing of void spaces). Collins, 3/16/00, 9:39, 10:04, 12:56.
22. There are about 2-3 million tons of sand in the Critical Dune Area. Okell, 3/15/00, 14:52.
23. 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. See, e.g., Farrand, 3/14/00, 11:43; Collins, 3/16/00, 10:48; Goff, 3/17/00, 10:56, 14:25. See also stipulation of TechniSand counsel, 3/16/00, 12:23.
24. The Critical Dune Area has value in its conserved state. Goff, 3/17/00, 14:56.

Threatened species of plants and species of special concern exist at the Site because of the Site's microclimate and unique environmental features.

25. Plant species are threatened if they are rare, and if they become more rare, are classified as endangered. Madsen, 3/14/00, 14:24.
26. Plant species are of "special concern" if they are rare but not quite as rare as threatened species. Madsen, 3/14/00, 14:24.
27. Three species that are either threatened or are of special concern exist at the Site,

Juncus scirpoides, *Ludwigia alternefolia* and *Rexus virginica* (the “Special Plants”). Madsen, 3/14/00, 14:45. The Special Plants are annuals or short-lived perennials. Madsen, 3/14/00, 14:44.

28. The Special Plants exist in four hollows to the east of the Dune. Madsen, 3/14/00, 14:39, 14:43; Collins, 3/16/00, 9:12-9:14. Some of the hollows have taken hundreds if not thousands of years to form. Collins, 3/16/00, 9:09, 9:15. These species are likely not confined to these four areas of the Site. Goff, 3/17/00, 13:52.

29. The Special Plants are what are known as coastal plain disjuncts, because their typical range is on the Atlantic Coastal Plain (east of the Appalachian Mountains). Madsen, 3/14/00, 14:29; Goff, 3/17/00, 13:31. Southwest Michigan, including Berrien County and Hagar Township, has a concentration of coastal plain disjuncts. Madsen, 3/14/00, 14:30. Coastal plain disjuncts occur in southwest Michigan because of glaciation, sandy habitats and fluctuating water tables. Madsen, 3/14/00, 14:31. This is a generally accepted theory of botany. Madsen, 3/14/00, 15:36.

30. The Special Plants persist because of open canopy conditions and fluctuating water tables. Madsen, 3/14/00, 14:48; Collins, 3/16/00, 9:08. The existence of the Special Plants at the Site confirms the existence of fluctuating water tables. *Id.* Fluctuations are of water at or near the surface. Madsen, 3/14/00, 14:49.

31. The Special Plants have been isolated in this area for thousands of years. Madsen, 3/14/00, 15:04.

32. Plants in narrow ranges are faithful indicators of environmental conditions. Madsen, 3/14/00, 15:45.

33. The Special Plants are natural resources, that is, naturally occurring features or organisms. Madsen, 3/14/00, 14:57; Collins, 3/16/00, 12:30.

Adverse consequences of the proposed mining plan.

34. 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. Okell,

3/15/00, 14:30.

35. If the mining proceeds as planned, the Critical Dune Area will be gone. Farrand, 3/14/00, 11:51. The mining will destroy part of the Critical Dune Area massif. Collins, 3/16/00, 11:42. The mining will reduce the height of the Critical Dune Area by about 60 feet. Collins, 3/16/00, 12:05.

36. Mining the Critical Dune Area will alter the microclimate downwind of the Critical Dune Area in which the Special Plants exists by changing snow retention patterns, wind patterns and surface water levels, Madsen, 3/14/00, 15:08, 15:10, 15:45 (cross-exam), and surface runoff, Goff, 3/17/00.

37. Mining the Critical Dune Area will more likely than not impair or destroy the habitat of the Special Plants. Madsen, 3/14/00, 15:11. Equivocal testimony of Peter Collins to the contrary is not of greater weight. Collins, 3/15/00, 15:27, 3/16/00, 9:18. Preclusion of mining in cells 8 and 9 does not afford adequate protection for the botanical resources on the Site. Goff, 3/17/00, 13:53.

38. Removal of the Critical Dune Area will change the hydrology of the Site by removing the mechanism of the Critical Dune Area to store water, Harrington, 3/15/00, 9:06, and make groundwater fluctuations more extreme. *Id*, 9:22.

39. Removal of the Critical Dune Area will have a long-lasting effect on the mix of plant species for decades, Collins, 3/16/00, 9:35, and for at least 50-60 years. *Id*, 9:36.

40. All witnesses agreed with the conclusions on page 73 of the EIS. Farrand, 3/14/00, 14:06; Collins, 3/17/00, 9:27-9:28; Goff, 3/17/00, 15:21; Whitener, 3/21/00, 14:06; Fallon, 3/21/00 (deposition 2:27). These conclusions say:

“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 larger 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.” (Emphasis added)

41. The DEQ issued the permit, while cognizant of the standards of MCL 324.63709, notwithstanding the conclusions of the EIS regarding unavoidable adverse impacts to the Critical Dune Area. Whitener, 3/21/00, 14:10-14:13.

42. TechniSand’s witnesses agreed that mining will 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. Collins, 3/16/00, 12:31-12:32.

43. The mining is described by Peter Collins as an “alteration” of the environment. Collins, 3/16/00, 11:44. The Court assigns little weight to testimony of defendants’ witnesses who suggest that mining the Critical Dune Area will not impair the critical dune areas of the state. See, e.g., Collins, 3/17/00, 9:15.

44. 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. Fodo, 3/22/00. 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, pages 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.

45. If mining is completed as permitted, TechniSand will not leave the Critical Dune Area on the Site better than the Critical Dune Area already existing on the Site.

Alternatives exist to the proposed mining plan.

46. The environmental impact statement describes TechniSand's available alternatives to the proposed mining. Joint Exhibit 21, pages 36-37. These alternatives include no action, reduction of mining, expansion of mining, selling land for recreational use, selling land for residential development and using alternative mining techniques.

47. All six alternatives are likely to be able to be put into effect successfully. Collins, 3/17/00, 8:58. These alternatives are feasible. Fallon, 3/21/00 (deposition 2:55).

48. The alternatives of reducing the mining, recreational use and residential use are prudent alternatives, under some circumstances. Collins, 3/17/00, 9:02.

49. TechniSand intends to mine cells 2-4 at the Site (the non-Dune areas), even though producing such sand will involve more processing. Okell, 3/15/00, 14:50. See Fallon, 3/21/00 (deposition 2:57); Fodo, 3/22/00, 11:17. TechniSand will lose approximately 60% of volume of the sand processed in cells 2-4. Okell, 3/15/00, 14:57. Cells 2-4 have less than one million tons. Okell, 3/15/00, 15:01.

50. Even if TechniSand limits the scope of mining at the Site to cells 2, 3 and 4, TechniSand will still earn profits of at least 20% of the anticipated profits it would make if mining the entire Site were allowed. Fallon, 3/21/00 (deposition 2:58). See also Fodo, 3/22/00.

51. TechniSand has one to two years of dune sand reserves and expects to have available other sites to supply its customers. Fodo, 3/22/00, 13:43. TechniSand has 25 years of reserves at its Wexford County site. Fodo, 3/22/00.

Alternatives exist to the use of dune sand for the foundry industry.

52. Dune sand is used by the foundry industry.

53. Certain portions of the foundry industry, including Ford Motor Company, use non-dune sand for foundry operations for automobile engine castings. Graham, 3/15/00 (deposition 3/8/00, 9:18); Okell, 3/15/00, 14:08. Ford's policy since the 1970s has been to use non-dune sand in its casting operations. *Id.*

54. Ford Motor Company switched from dune sand to non-dune sand with modest process changes and some modest initial cost increases, but converted to use of non-dune sand within one year and showed that the quality of the castings was no different using non-dune sand. Graham, 3/15/00 (deposition, 3/8/00, 9:19-9:20); see Stahl, 3/22/00, 10:26.

55. Dune sand is not required to make castings for the automobile industry. Graham, 3/15/00 (deposition, 3/8/00, 9:52). If Ford can use non-dune sand for its castings, other foundries are able to do so as well. *Id.*

56. TechniSand sells inland, non-dune sand to Ford for its casting operations from TechniSand's Wexford County site. Okell, 3/15/00, 14:43; Fallon, 3/21/00 (deposition 2:39); Chapman, 3/22/00, 9:04.

The laches defense

57. TechniSand forecasts 6-10 years from initial investigation to actual mining a site in Michigan. Okell, 3/15/00, 14:39. TechniSand began its investigation of the Site in the early 1990s. Okell, 3/15/00, 14:38.

58. TechniSand voluntarily did not mine the Site during the pendency of this action. Fodo, 3/22/00, 13:35.

59. Plaintiff's delay in suing 18 months after issuance of the permit did not prejudice TechniSand because the delay did not alter TechniSand's mining schedule.

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

Standard of review under MEPA

1. *Ray v Mason County Drain Comm'r*, 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.

2. The standard of review for the court under MEPA in this action is whether the defendants' conduct impairs or destroys natural resources. The court here need not review pollution control standards pursuant to MEPA, MCL 324.1701(2), because pollution control standards are not at issue in this action.

3. 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.

4. The permit is not conditional for purposes of this action. For purposes of MEPA review by this Court, no additional permits are required from the state for TechniSand to begin mining cells 2, 3 and 4, or cells 5, 6 and 7 (in the Critical Dune Area). *Wortelboer v Benzie County*, 212 Mich App 208 (1995), and *Committee for Sensible Land Use v Garfield Township*, 124 Mich App 559 (1983), do not apply.

5. Plaintiff's burden does not include showing that the legislative criteria for establishment of critical dune areas are inadequate under MEPA, contrary to the state's argument. 3/14/00, 10:48.

6. The test under MEPA is not whether the proposed mining will impair or destroy the critical dune areas of the state, as a whole (see state's opening statement, 3/14/00, 10:50; Collins, 3/17/00, 9:15; Goff, 3/17/00, 15:36). This test is the discredited *Portage* test. See *Nemeth v Abonmarche Development*, 457 Mich 16, 31-35 (1998), distinguishing and limiting *City of Portage v Kalamazoo County Road Comm'n*, 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).

7. Permanent removal of sand is not a *per se* violation of MEPA. If this were so, then trial courts would be stripped of their discretion to determine, on a case-by-case basis, whether challenged conduct violates MEPA. *Nemeth*, at 35.

Relationship of MEPA, Part 637 and Part 353

8. MEPA standards are incorporated in Part 637, specifically MCL 324.63709, 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.”

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. DEQ opening statement, 3/14/00, 10:37-10:39. *WMEAC* at 753-754. The DEQ improperly determined, upon review of the EIS, Joint Exhibit 21, that the proposed mining at the Site would not impair or destroy natural resources.

9. Part 637 prohibits mining in all critical dune areas of the state after 1989, except for the two narrow exceptions contained in MCL 324.63702:

“Section 63702. (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 after July 5, 1989, except under either of the following circumstances:*

(a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criterion 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 the rights to mine dune sand in the land for which the operator seeks an amended permit.*”

(Emphasis added.) The legislature adopted these exceptions in order to save Part 637 from a challenge that the mining prohibition causes a taking of private property without just compensa-

tion.

10. MEPA incorporates Part 637, which provides standards to guide the exercise of the court's discretion in determining whether defendants' conduct violates MEPA. The exceptions to the mining prohibition in MCL 324.63702(1) do not preclude judicial review under MEPA.

11. 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 MCL 324.35302(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, the legislature in section 35302 established a threshold of significance for dune areas by the designation of critical dune areas. See *Whitener*, 3/21/00, 13:41.

12. The definition of "use" in MCL 324.35301(j) as excluding sand dune mining does not alter the legislative direction found in section 35302 that critical dune areas are to be pro-

tected for the benefit of present and future generations. The term “alteration” in MCL 324.35302(c) includes sand dune mining, which is regulated by Part 637. Part 353, on the other hand, establishes zoning controls for uses in critical dune areas other than sand dune mining.

13. Part 637 is one expression of the state’s paramount concern for the protection the natural resources of critical dune areas. Designation of critical dune areas is an expression of the state’s paramount interest in protecting its natural resources. See Collins, 3/16/00, 12:37.

14. Legislative adoption of the DEQ’s designation of critical dune areas (see MCL 324.35301(c)) is consistent with the reasonable requirements of the public health, safety and welfare. See Collins, 3/16/00, 12:37.

Plaintiff proved its prima facie case; defendants failed to rebut.

15. In view of the unanimity of witnesses that page 73 of TechniSand’s EIS accurately describes the adverse environmental effects that will occur on the Site if the proposed mining goes forward, plaintiff has proved its prima facie case under MEPA.

16. MEPA protects the majestic features of the Critical Dune Area at the Site because it is part of the significant geologic history of this part of the state. See Farrand, 3/14/00, 13:48. The sand in the Critical Dune Area is a natural resource. *Nemeth* at 34; *Whittaker & Gooding Co v Scio Township*, 117 Mich App 18, 21 (1982).

17. Alteration of the environment by mining the Critical Dune Area rises to the level of impairment or destruction of natural resources. *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich 741, 760 (1979), cited in *Nemeth* at 32.

18. Efforts by defendants’ witnesses to minimize the geologic and geomorphic features of the Critical Dune Area are given little weight, e.g., Collins, 3/16/00, 8:51, in view of the legislative findings in Part 353. See TechniSand Exhibit 88 (Collins comparison). As a TechniSand witness testified, the Critical Dune Area is not a “stepchild” of the larger critical dune areas. Collins, 3/16/00, 10:49. The Critical Dune Area on the Site is not a “tidbit” attached to the critical dune areas of the state. See Collins, 3/16/00, 11:43.

19. Prohibition of mining the Critical Dune Area at the Site would not cause a taking of private property without just compensation, because TechniSand would still realize a profit. *K*

& K Construction, Inc v Department of Natural Resources, 456 Mich 570, 587 (1998):

While the commercial value of the land may have been reduced by the restrictions placed on it by the WPA [Wetlands Protection Act], it was not rendered worthless or economically idle.

TechniSand may not segment the site to claim that its inability to mine a portion of it (the Critical Dune Area) causes a taking. *Id* at 578.

20. MEPA protects threatened species and species of special concern because they are rare, even though they are not endangered.

Defendants have failed to prove the affirmative defense.

21. An alternative is “feasible” when it is “likely to work out or be put into effect successfully”. *Wayne County Health Dep’t v Olsonite Corp*, 79 Mich App 668, 702 (1977) (emphasis in original). An alternative which is prohibitively expensive is not feasible. However, standards may be economically feasible even though they may be financially burdensome and affect profit margins adversely. Economic feasibility does not guarantee continued existence of individual defendants. 79 Mich App at 704.

22. Consideration of a “prudent alternative” does not require a comprehensive balancing of competing interests. *Olsonite*, 79 Mich App at 705. An alternative is prudent unless there are “truly unusual factors” or costs reach “extraordinary magnitudes”. *Id*, quoting *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 411 (1971).

23. Defendants have failed to prove their affirmative defense that TechniSand lacks feasible and prudent alternatives to the proposed mining of the Critical Dune Area, because mining can occur in cells 2,3 and 4. Such mining is likely to succeed, there are no truly unusual factors and costs do not reach extraordinary magnitudes.

24. Defendant DEQ has failed to prove its affirmative defense that it had no feasible and prudent alternative to issuing the permit in light of asserted detrimental impact on the Michigan foundry industry, because foundries use dune sand obtained from outside critical dune areas and inland, non-dune sand. There is an abundant supply of both types of sand far exceeding the supply of sand in the state’s critical dune areas. Ford Motor Company has shown that the use of non-dune sand for foundry operations to be successful, and Ford found no truly unusual factors

nor extraordinary costs in implementing this alternative.

25. Defendants have failed to show that their conduct, or proposed 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. MCL 324.1703(1). The legislature has determined that critical dune areas of the state are of paramount concern. Preservation of the features of critical dune areas is consistent with the legislature's determination of the public welfare. See *Berman v Parker*, 348 US 26; 75 S Ct 98; 99 L Ed 27 (1954):

“The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”

PLAINTIFF'S PROPOSED INJUNCTIVE ORDER

This Court issues a permanent injunction enjoining and restraining defendant TechniSand from mining or in any way altering the formation of the Critical Dune Area at the Taube Road Expansion Site.

Respectfully submitted,
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