

S.O.S. DUNES NEWS



Save Our Sand Dunes

S.O.S. DUNES NEWS IS PUBLISHED INTERMITTENTLY BY PRESERVE THE DUNES, INC.

VOL. 6 NO. 3 DECEMBER 2003

NEWS ITEMS

SUPREME COURT HEARING

On October 10 the Michigan Supreme Court heard oral arguments in our suit against the Michigan Department of Environmental Quality and TechniSand. The *Herald-Palladium* printed the following article on that day's page one. It contains an excellent history of the proceedings in our suit. The article is reprinted below with permission.

We have also reprinted an article from the October issue of *The North Woods Call*. See page 3. It expresses concerns about the Michigan Supreme Court's intentions in deciding to review our case and another that involves the National Wildlife Federation.

SUPREME COURT HEARS ARGUMENTS IN SAND MINING CASE

By SCOTT AIKEN
H-P Staff Writer

LANSING - A state agency violated the law when it issued a permit in 1996 to mine sand in a critical dune area of Hagar Township, a lawyer for a citizens group told the Michigan Supreme Court on Thursday.

The Department of Environmental Quality had no authority to grant a permit to TechniSand Inc. because the company did not qualify, Chicago attorney Phil Neal said.

"It's just as though TechniSand started mining without a permit," Neal said during oral arguments in a case that could decide the fate of dunes on a 126.5-acre parcel of dune-

land.

"The permit they issued is an empty piece of paper," said Neal, who represents Preserve the Dunes, a citizens group trying to block the mining.

Lawyers for Bridgman-based TechniSand and the DEQ, who want the Supreme Court to overturn an appeals court ruling that invalidated the permit, argued that Preserve the Dunes missed the deadline to challenge the permit.

The group did not exist when the clock ran out on the period for administrative challenges, said Assistant Attorney General James Piggush, representing the DEQ.

Piggush also argued it would be "a stretch" to make the pollution standards of the Michigan Environmental Protection Act apply to the sand mining case.

Oral arguments lasted about an hour, but a decision in the case could be months away. Attorneys in the case have asked for an expedited ruling.

TechniSand's lawyer, James Geary of Kalamazoo, urged the court to resolve the case in the company's favor without sending it back to the appeals court for further proceedings.

"They will be out of business if you remand this to the court of appeals," Geary said.

TechniSand mines and processes sand for sale to industrial customers. The product is used in molds for metal part casting by the auto industry, for glass and other products.

Geary suggested that the company, which has been embroiled in a legal battle over the mining proposal since Preserve the Dunes filed suit in 1998,

may not survive the proceedings.

"TechniSand could win the case and lose the war if it's dragged out too long," he said.

Preserve the Dunes' lawsuit alleged that the proposed mining violated state sand dune protection laws and MEPA because it would impair or destroy a natural resource.

The lawsuit claimed that the state's Sand Dune Mining Act banned mining in critical dune areas after July 5, 1989. The law allowed two exceptions, and Preserve the Dunes said TechniSand did not qualify for either.

The property, known as the Nadeau Site Expansion, is east of Interstate 196 and north of Taube Road in northwestern Hagar Township. Critical dunes, areas of special environmental concern that are defined on state topographical maps, make up 71 acres of the planned mining area.

TechniSand, owned by Fairmont Minerals, Chardon, Ohio, wants to take away most of a 75-foot-high dune and remove sand from below the water table, creating two small lakes.

The property is near TechniSand's Nadeau Pit mining area west of I-196 in

Van Buren County's Covert Township. That site is nearly mined out, officials say.

The case went to trial in 2000. On a pretrial motion, Preserve the Dunes' challenge to the permit was dismissed, leaving only the MEPA claim. After hearing testimony over six days, Berrien Chief Trial Judge Paul Maloney ruled in favor of TechniSand and the DEQ. The court heard expert testimony about dune ecosystems, plant and

animal life on the property, potential effects on the water table and other matters.

Preserve the Dunes appealed.

In October 2002, a three-member appeals court panel reversed the trial court decision, finding that the DEQ should not have issued a mining permit.

The appeals panel said TechniSand did not qualify for a permit because it did not meet criteria for an exemption to a general prohibition on critical dune mining. The court did not address Preserve the Dunes' claim that the permit would violate MEPA.

An exception to the prohibition on critical dune mining may be granted when a mine operator seeks to renew or amend a permit that was issued earlier.

The second exception allows a mining permit amendment to include land that is adjacent to property the operator is already permitted to mine. The operator must have owned the land for which the amended permit is being sought, or rights to mine dune sand on it, before July 5, 1989.

TechniSand was incorporated in 1991, two years after the date set in the statute. The company bought the assets of Manley Brothers of Indiana, a mining company. Manley had a permit to mine sand from property in Hagar Township called the Nadeau Site.

In 1994, TechniSand applied for an amended permit to extend operations onto the adjoining 126.5-acre Nadeau Site Expansion, which includes critical dune areas.

The state Department of Natural Resources in 1995 rejected the application, saying the company did not qualify under the Sand Dune Mining Act.

Later that year, then-Gov. John Engler split the DNR into two parts. The new Department of Environmental Quality invited TechniSand to reapply, citing "many changes in state government."

TechniSand reapplied and DEQ issued a permit in November 1996.

Arguing before the Supreme Court, Geary said the case breaks into two parts, a challenge to the administrative decision to issue a permit, and a chal-

lenge to TechniSand's conduct.

Responding to a question, Geary said he believes the appeals court went wrong by "supplanting" MEPA for other state laws setting time limits for challenges to administrative decisions.

Preserve the Dunes maintains that the claim under MEPA was correct because the Sand Dune Mining Act does not include a procedure for the public to challenge permit decisions.

"It's a MEPA case through and through," Neal said.

Explaining further, he said the case is not about the process of granting a permit, arguing that under the law the DEQ had no authority to issue a permit.

TechniSand continues to argue that it qualifies for the permit because it held a permit to mine adjoining property.

[Reprinted with permission from the *Herald-Paladium*, October 10, 2003]

POLLUTERS BID TO TOPPLE LANDMARK ENVIRONMENTAL LAW

by DAVE DEMPSEY
Michigan Environmental Council

The Michigan Supreme Court is bracing to do some dirty work on behalf of polluters. The court has in its gun sights on the 33-year-old throbbing heart of green law in this state: the Michigan Environmental Protection Act, also known as MEPA.

Born of public outrage about gross pollution in the 1960s, MEPA was the first significant accomplishment of the modern Michigan environmental movement. Organized by the West Michigan Environmental Action Council, citizens turned out in force at public hearings in 1970 demanding the enactment of the statute.

The core of the act is a simple provision empowering any citizen of the state to go to court "for the protection of the air, water, and other natural resources from pollution, impairment, or destruction." In effect, MEPA has deputized anyone who could afford a lawyer to act when the government can't or won't.

Industry has never liked MEPA. It

scuttled a long-standing old boys' arrangement between polluters and government officials, who often looked the other way when violations occurred and gave violators forever to comply with legal standards.

An analysis by the state Chamber of Commerce when the bill was pending in 1970 declared, "This proposed act would create a serious threat to the operation and growth of business and industry ... a complete bar to the current method of voluntary and workable cooperation between industry and government ..."

At a time of civil strife over the Vietnam War, race relations and pollution, supporters of the law saw MEPA as an environmental bill of rights, making the system responsive again to citizen views. Said Roger Conner, "We must exhaust every effort to see that a citizen has the right - if his life-support system is being destroyed - to go to court rather than into the streets."

MEPA has proven neither the ogre that industry feared nor the powerful tool that citizen advocates hoped. A relatively small number of citizens have the money to hire attorneys to bring cases. Still, the symbol MEPA provides - and the looming threat that it represents to outrageous conduct by polluters and government officials - has critical value in checking pollution.

Which is exactly why the four right-wing justices on the Michigan Supreme Court want to gut it. Justices Clifford Taylor, Robert Young, Maura Corrigan and Stephen Markman - all originally appointed to judgeships by former Governor and hatchet man John Engler - are poised to strike down the essence of MEPA in one of two cases the court will hear this coming term.

One is a fight waged by citizens over a decision by the state Department of Environmental Quality to authorize 126.5 acres of destructive sand dune mining along Lake Michigan. [PTD'S suit against the Department of Environmental Quality and TechniSand, Inc. *Ed's note.*] Another involves litigation by the National Wildlife Federation over 79 acres of Upper Peninsula wetlands destroyed by Cleveland Cliffs, Inc.

In both cases, the Michigan Court of Appeals has ruled in favor of citizen

claims under MEPA. In both cases, the Supreme Court majority has signaled its intention to consider whether the Legislature in 1970 had the authority to grand citizens standing to sue in the first place.

The radical four apparently intend to deploy a theory advanced by right-wing U.S. Supreme Court Justice Antonin Scalia that laws like MEPA violate the separation of powers doctrine. (Scalia must have forgotten about that doctrine when he organized a court majority to intervene in the 2000 presidential election on behalf of George W. Bush.)

The industry interests that have bankrolled the increasingly expensive campaigns of Michigan Supreme Court candidates will be pleased by the actions of the radical four. They paid for the court and expect results.

The beauty of the extreme right-wing strategy is that it doesn't depend on messy legislative actions, which generate new coverage and expose pollution's allies. Instead, it works in arenas that attract less media attention and require the interpretation of experts.

If the Michigan Supreme Court acts as expected, after all, MEPA will still be on the books – it just won't mean anything.

[Reprinted with permission from the *North Woods Call*, October 2003, 00509 Turkey Run Road, Charlevoix, MI 49720]

THE SUIT — WHAT'S NEXT

We do not expect a ruling from the Supreme Court until January at the earliest. Nor do we expect the court to rule that PTD does not have standing as the previous article suggests might happen.

Questions and statements by the justices during the hearing did create concern with how they might rule. Justice Taylor suggested that industry might cease to invest in the state if a permit were issued and then later rescinded. Our response was that in this case the original permit was unlawfully issued and was worthless.

Such dooms-day predictions are made by the sand dune miners over and over again. When the sand dune protection act was originally enacted in 1978, sand mining companies and foundries forecast the end of the automobile industry in Michigan.

TechniSand has stated numerous times that they will be forced out of business if they are not permitted to immediately mine the Nadeau Site.

On the other hand they have also told the supreme court that the Court of Appeals injunction prohibiting mining of the critical dunes on the Nadeau Site, has reduced their profit margin from 25% to 14%. Most companies would boast about such profitability.

Let's hope the Supreme Court is not fooled by this bogus argument, but enforces the law as it is clearly written and clearly intended by the legislature.

STUDENTS SUPPORT PTD

The Ecology Club of Buchanan High School has joined PTD. Seniors Chad Followay and John Wetzell are co-chairs of the club. The faculty sponsor is Al Whitfield. The group is planning environmental activities for Arbor Day and Earth Day. The club also sponsors a paper recycling program.

FALL DUNE WALK

Over 40 persons attended the PTD beach walk on Sunday, September 21.



Chuck Nelson, Director of Sarett Nature Center gave a terrific tour — even surpassing his tour from last year.

In response to the number of persons who have attended or expressed interested in this and previous dune walks, we will be announcing several more for next year.

DIGITAL PROJECTOR NEEDED

PTD needs a digital projector for making PowerPoint presentations and showing digital slides at public meetings.

If you or your business have a projector that has been replaced with a

Please return this response form to support the goals of Preserve the Dunes.

We need to tell elected officials and government employees how many residents and property owners support these efforts. This measure of support is critical to successfully protecting the dunes and restricting sand dune mining. Only your name and address are necessary.

If you can also contribute financially, the funds are needed to continue our struggle to preserve the dunes through distribution of information, keeping our state representatives and local officials informed, and ensuring that the laws protecting sand dunes are enforced.

Preserve the Dunes, Inc. — Response Form

Mail the completed form to Preserve the Dunes, Inc., Post Office Box 581, Riverside, MI 49084-0581

I want to preserve the dunes of southwest Michigan and am concerned about the expansion of sand dune mining.

Name(s)		
Home Address		Michigan Address (if different)
City, State, Zip		City, State, Zip
Telephone 1	Telephone 2	Telephone
Fax	eMail	Fax

Annual Membership Form

In addition, enroll me(us) as a member for 2004 <input type="checkbox"/> Individual (\$6) <input type="checkbox"/> Family (\$10) I have also included a contribution in the amount of \$	Please contact me to work on the following committees: <input type="checkbox"/> Legal Affairs <input type="checkbox"/> Finance/Fund Raising <input type="checkbox"/> Newsletter <input type="checkbox"/> Public Hearings <input type="checkbox"/> Memberships	Membership dues underwrite the expense of keeping members informed about efforts to preserve the dunes and to monitor sand mining activities in Berrien, Van Buren and Allegan counties. <u>Checks should be made payable to Preserve the Dunes, Inc.</u> , which has 501(c)3 status. <i>Contributions are tax deductible.</i>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

newer model, we could make good use of your outdated one. The donation, as with all donations to PTD, is tax deductible. Contact Charles Davis at cfd3@daac.com or 269-208-1711.

FUNDING STILL URGENTLY NEEDED

We need your financial support to continue this fight and to secure the victory.

There will continue to be the need for monitoring permit applications and ongoing sand dune mining. These require time. They require vigilance. But they also cost money. *Please renew*

your membership and make a financial contribution to these efforts.

E-MAIL ADDRESS UPDATES

PTD maintains an eMail list. It is used to distribute PTD notices and news bulletins to members and supporters.

If you have an eMail address and are not getting PTD eMail, please send your current eMail address to sosdunes@daac.com.

BOARD FOR 2003-2004 SELECTED

The following members have been elected to the board of directors of PTD: Hugh V. Anderson (Treasurer), Georgia Boerma (Vice President),

Robert Brickman, Steve Brickman, Laurie Crane, Charles F. Davis, III (President), Marshall Eisenberg, Hub Erickson, Bernard Kelley, Don Moore (Secretary), Stuart Nathan, Nancy Owen, Susan Pritzker, Marilyn Rendell, Mary Stephenson and Gerard Thomas.



"Those dunes are to the Midwest what the Grand Canyon is to Arizona and the Yosemite to California. They constitute a signature of time and eternity; once lost, the loss would be irrevocable."

Carl Sandburg

PRESORTED
FIRST CLASS
US POSTAGE PAID
LAKE MICHIGAN MAILERS
49009

ADDRESS SERVICE REQUESTED

Preserve the Dunes, Inc.
P. O. Box 581
Riverside, MI 49084-0581