

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**Appeal from the Court of Appeals  
(Owens, P.J. and Markey, J. and Murray, JJ.)**

PRESERVE THE DUNES, INC., a Michigan  
not for profit corporation,

Plaintiff-Respondent,

v

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

Defendants-Petitioners.

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Supreme Court Nos. 122611, 122612

Court of Appeals No. 231728

Berrien County Circuit Court

Case No. 98-3789-CE-S

**ORAL ARGUMENT REQUESTED**

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**AMICUS CURIAE BRIEF OF THE MICHIGAN AGGREGATES  
ASSOCIATION IN SUPPORT OF PETITIONER TECHNISAND'S  
BRIEF ON APPEAL**

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## **BASIS OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to MCR 7.302(F)(1) and its Order of March 25, 2003, granting Defendant-Appellant TechniSand, Inc.'s Application for Leave to Appeal. TechniSand appeals from an Opinion of the Michigan Court of Appeals dated October 4, 2002 (*Preserve the Dunes, Inc v Dep't of Env'tl Quality*, No 231728 (Mich Ct App Oct 4, 2002), attached as Exhibit A, hereinafter "Opinion" or "Op").

## STATEMENT OF RELIEF SOUGHT

The Michigan Aggregates Association (“MAA”) files this amicus brief in support of Appellant TechniSand, Inc.’s Brief on Appeal, which seeks reversal of the Michigan Court of Appeals’ Opinion in *Preserve the Dunes, Inc v Dep’t of Envil Quality*, No 231728 (Mich Ct App Oct 4, 2002). In the Opinion, the Court of Appeals held that an agency’s authority to issue an environmental permit may be challenged in perpetuity, regardless of how much time elapses between the permit’s issuance and the subsequent judicial challenge. The MAA asks this Court to reverse the decision of the Court of Appeals, and reinstate the judgment of the Circuit Court, which correctly held that there is a time limitation on a plaintiff’s ability to challenge the issuance of an environmental permit. Alternatively, the MAA respectfully requests that this Court peremptorily reverse the Court of Appeals decision.

## QUESTION PRESENTED FOR REVIEW

**1. May the Michigan Department of Environmental Quality's authority to issue a permit be challenged in perpetuity, regardless of how much time elapses between the permit's issuance and the subsequent judicial challenge?**

The Court of Appeals answered: Yes

The trial court answered: No

The MAA answers: No

## STATEMENT OF PROCEEDINGS AND FACTS

### *The Michigan Aggregates Association*

The Michigan Aggregates Association (MAA) is a non-profit trade association founded in 1960 by a group of conscientious and environmentally concerned aggregate producers. The Association's goal is to protect and promote the interest, growth, and welfare of the Michigan aggregates industry. MAA membership has grown to include not only crushed stone and sand and gravel products, but many industrial and recycled material producers, as well as suppliers of equipment and other goods needed to produce mineral products required by every citizen of Michigan.

### *The Impact of Aggregates on Michigan's Economy*

One hundred ten million tons of mineral aggregates were sold from Michigan sources in 2001, produced from about 325 surface mines located throughout the State. Aggregate mining takes place in every single county in Michigan, and the industry employs over 6000 people in Michigan, at an average yearly wage in excess of \$30,000.<sup>1</sup> Thousands more Michigan citizens are indirectly employed to service the industry, including equipment repair contractors, truckers, longshoremen and boat crews, and the like. Michigan is currently ranked second in the nation in the production of total aggregate tonnage.<sup>2</sup>

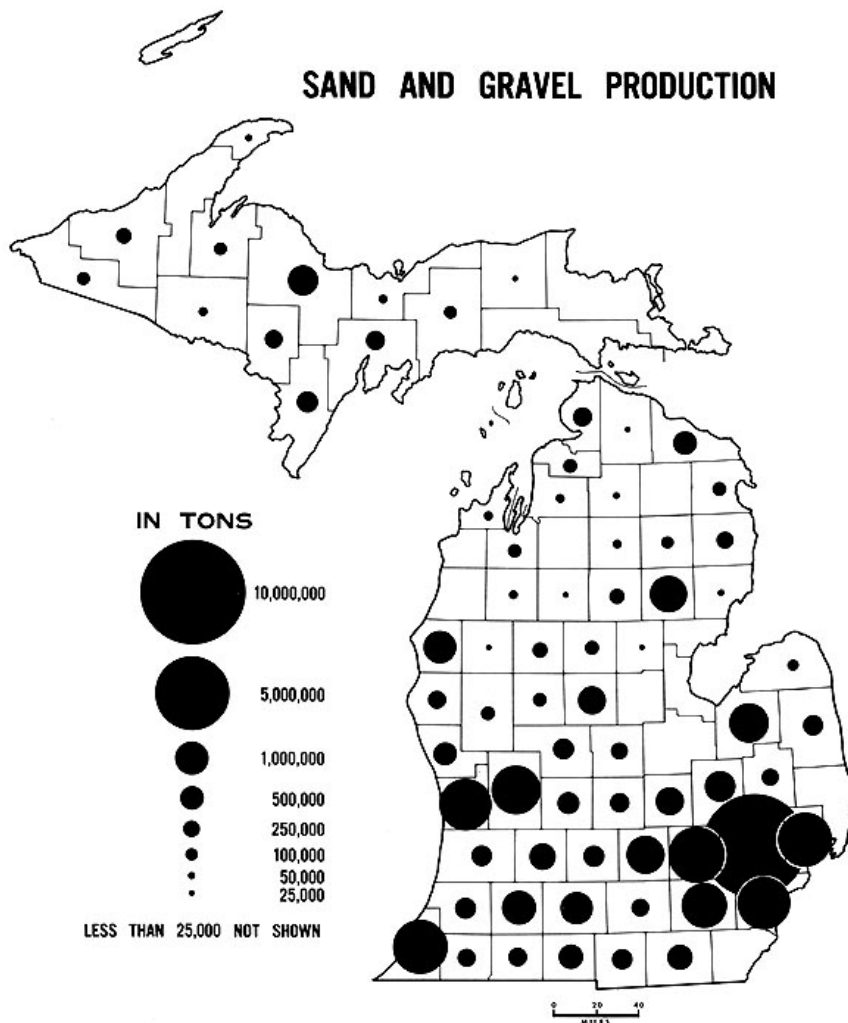
Construction aggregates make up significant portions of the asphalt that paves Michigan roads, and of the concrete used in numerous construction applications. Construction of one mile of four-lane interstate highway requires 85,000 tons of aggregate; the average six room

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<sup>1</sup> [Http://www.miagg.org/Facts@20&%20Figures.html](http://www.miagg.org/Facts@20&%20Figures.html).

<sup>2</sup> [Http://www.geo.msu.edu/geo333/sand&gravel.html](http://www.geo.msu.edu/geo333/sand&gravel.html).

house requires 90 tons.<sup>3</sup> And because limestone and sand are critical components in the manufacturing of glass and steel, aggregates mining is vital to Michigan's auto industry, as explained more fully in TechniSand's Application for Leave. In fact, an average of 11 tons of aggregate is required annually for each and every resident in the State of Michigan.<sup>4</sup> The map below indicates that outside of the Detroit area, West Michigan (the site of the permit underlying this litigation) is the largest producer of aggregates in the State:<sup>5</sup>



<sup>3</sup> [Http://www.geo.msu.edu/geo333/sand&gravel.html](http://www.geo.msu.edu/geo333/sand&gravel.html).  
<sup>4</sup> [Http://www.miagg.org/Facts@20&20%Figures.html](http://www.miagg.org/Facts@20&20%Figures.html).  
<sup>5</sup> [Http://www.geo.msu.edu/geo333/sand&gravel.html](http://www.geo.msu.edu/geo333/sand&gravel.html).

Overall, Michigan's direct and indirect annual economic gain from the entire mining industry (in 1998 figures) is approximately \$18.9 billion.<sup>6</sup>

Relevant Facts and Proceedings Below

As TechniSand explains in its Brief, the MDEQ issued an amended permit to TechniSand on November 25, 1996. Plaintiff Preserve the Dunes, Inc. did not file its lawsuit challenging the MDEQ's issuance of the permit until July 1, 1998, some 19 months later.

The Court of Appeals noted correctly in its Opinion that:

the general rule is that a litigant seeking judicial review of a decision by an administrative agency [such as the issuance of a permit] has three potential avenues of relief: (1) the review prescribed in the statute applicable to the particular agency; (2) an appeal pursuant to the RJA and Const 1963, art 6, sec 28; or (3) the method of review provided by the APA.

(Op at 19 (Ex A) (citations omitted).) Under potential avenue number three, the APA, a plaintiff has 60 days in which to file a challenge to the agency action. MCL 24.304(1). Under potential avenue number two, the RJA, a plaintiff has 21 days in which to file a challenge to the agency action. MCL 600.631; MCR 7.104(A); MCR 7.101(B)(1)(A). Potential avenue number one in this case, part 637 of the Sand Dune Mining Act ("SDMA"), MCL 324.63701 *et seq.*, does not have a specific review procedure. In sum, anyone who wanted to challenge the MDEQ's issuance of the TechniSand permit had, at most, until January 24, 1997 to do so. And once the applicable appeal period had expired, TechniSand had the right to expend money and expand its operations in reliance on the permit it received.

When Plaintiff sought to file its lawsuit on July 1, 1998, the APA and the RJA procedurally barred Plaintiff from doing so. In an attempt to circumvent the applicable

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<sup>6</sup> [Http://www.nma.org/pdf/states\\_00/mi2000.PDF](http://www.nma.org/pdf/states_00/mi2000.PDF).

limitations period, Plaintiff instead filed suit under MEPA, alleging (1) the MDEQ was without legal authority to issue the permit and (2) TechniSand’s mining in the critical area of the Nadeau site will destroy a natural resource. (Op at 3 (Ex A).) Unsurprisingly, Judge Schofield below ruled that the portion of Plaintiff’s complaint challenging the permit’s issuance was time barred, because MEPA is not a tool that can be used to make an end run around otherwise applicable administrative limitation periods:

On “issues involving the administrative proceedings involving the granting of the permit,” . . . MEPA does not allow for an “unlimited time period” for procedural challenges to administrative actions that affect the environment and that it was “too late now to argue about whether the [DEQ] had authority under the statute to allow an operator to extend mining from a non-critical dune area to an adjacent critical dune area or whether the [DEQ] had authority under the statute to grant a permit to Defendant even though it was not the operator with a permit to mine an adjacent site on July 5, 1989.”

(*Id.* at 4, citing opinion of Judge Schofield (emphasis added).) Judge Schofield further concluded that Plaintiff’s direct MEPA claim was independent from “any administrative appeal rights,” and that claim proceeded to trial. (*Id.*)

Plaintiff lost the direct MEPA challenge at trial and appealed. In reviewing Judge Schofield’s first ruling—that Plaintiff’s administrative appeal was barred—the Court of Appeals took a completely different approach. The Court looked at MEPA, noted the lack of any express statute of limitations, and concluded there is no limitations period for a MEPA action. (Op at 20 (Ex A).) Reasoning that MEPA was an appropriate vehicle to review the procedural validity of the permit’s issuance as well as the permitted activity’s environmental impact, the Court of Appeals further held that so long as a plaintiff couches a cause of action under MEPA, the plaintiff can challenge the issuance of any environmental permit, “without reference to when an agency issued the permit.” (*Id.* (emphasis added).) This holding reversed the sound judgment of

the circuit court, and it opened up the possibility that every single permit the MDEQ has ever issued may be challenged on procedural grounds, no matter how old, so long as a plaintiff wraps the challenge up in a MEPA claim. The MAA respectfully submits that the holding is clear error.

### STANDARD OF REVIEW

This Court's review of statutory interpretation is *de novo*. *Graves v American Acceptance Mort Corp*, 467 Mich 308; 652 NW2d 221, 222-223 (2002) (citing *Smith v Globe Life Ins Co*, 460 Mich 446, 458; 597 NW2d 28 (1999)).

### ARGUMENT

**This Court should reverse the Court of Appeals' decision that MEPA can be used to circumvent limitation periods applicable to administrative procedural questions.**

The Court of Appeals concluded, in no uncertain terms, that the propriety of the MDEQ's issuing of an environmental permit may be challenged in perpetuity, regardless of how much time has elapsed between the permit's issuance and the filing of a lawsuit:

[a]n agency's authority to issue a permit may be challenged under MEPA so long as impairment or destruction of a natural resource is likely or actually occurring without reference to when an agency issued the permit through which the impairment or destruction is occurring.

(Op at 20 (Ex A) (emphasis added).) In effect, the Court of Appeals' decision suddenly allows plaintiffs to challenge any permit proceeding in which the MDEQ has ever engaged. The ruling thus opens a Pandora's Box of environmental litigation, in which the only certainties are an increase in litigation, and a decrease in business investment in the State, as business owners look elsewhere for the certainty they demand in permitting.

Wholly aside from the business community and the impact of the Court of Appeals' ruling on State coffers and private pocketbooks, the decision is detrimental to every

Michigan citizen because this case involves a permit for sand mining. The cars that Michigan citizens drive, the roads on which they travel, and even the windshields through which they view the road all rely on Michigan's sand mining industry. As this Court noted in *Silva v Ada Twp*, 416 Mich 153; 330 NW2d 663 (1982), "natural resources can only be extracted from the place where they are located and found . . . . Preventing the extraction of those natural resources harms the interest of the public as well as those of the property owner by making natural resources more expensive." *Id.* at 159; 330 NW2d 663 (emphasis added); accord *Certain-Teed Products Corp v Paris Tp*, 351 Mich 434, 464-465; 88 NW2d 805 (1958) (noting that "the public policy of the State is calculated to encourage both manufacturing and mining" and that there is public interest "in the encouragement of full employment and vigorous industry"). Allowing the Court of Appeals' decision to stand would violate this public policy in favor of minerals extraction, and it would unnecessarily harm the public interest.

**I. The Court of Appeals wrongly concluded that there is no limitations period on a plaintiff's ability to challenge an environmental permit.**

The Court of Appeals erred when it concluded that a plaintiff may challenge in perpetuity the MDEQ's authority to issue an environmental permit, regardless of when the permit was issued. As the Court itself recognized, Michigan's Legislature has enacted time limitations for the challenges of any agency action. Those limits fall into three categories: (1) the specific time limitation specified in the applicable statute; (2) the 60-day limit specified in the APA; and (3) the 21-day limit specified by the RJA. (Op at 19 (Ex A).) Under no circumstances should an administrative agency's decision to issue a permit be challenged outside one of these three time periods. Plaintiff's lawsuit here did not fall within any applicable limitations period. Accordingly, it is barred, as the Circuit Court held. In reaching the opposite

conclusion, the Court of Appeals incorrectly concluded that MEPA is a proper vehicle for making procedural challenges to a permit's issuance.

**A. The Court of Appeals failed to recognize the difference between an administrative act and alleged harmful conduct that violates MEPA.**

MEPA is a conduct-regulating statute that directs courts to determine whether a defendant's operational actions impair natural resources:

Upon completion of proceedings described in [MCL 324.1704], the court shall adjudicate the impact of the defendant's conduct on the air, water, or other natural resources, and on the public trust in these resources, in accordance with this part.

MCL 324.1704(3) (emphasis added). In fact, a MEPA plaintiff's *prima facie* case requires proof "that the conduct of the defendant has polluted, impaired, or destroyed." MCL 324.1703 (emphasis added). As a result, if a permit holder's operations impair natural resources in violation of MEPA, that action can be enjoined, regardless of a permit's facial validity. Conversely, if the operations do not impair natural resources (as the trial court found here), then there is no MEPA claim at all.

The line that Michigan's Legislature created in MEPA, between the permit issuing process and the subsequent, substantive operational conduct, is affirmed in the standard of judicial review. Review of operational actions under MEPA is *de novo*. See, e.g., *West Michigan Environmental Action Council v NRC*, 405 Mich 741, 749-750; 275 NW2d 538 (1979). But a court can only set aside an administrative action if the action violates Michigan's Constitution or a statute, or if the action is the result of substantial and material errors of law. MCL 24.306(1)(a), (f); *Barker Bros Const v Bureau of Safety & Regulation*, 212 Mich App 132, 141; 536 NW2d 845 (1995) (noting that circuit court review of an administrative agency's decision is necessarily limited).

Plaintiff in this case had its day in court on a substantive MEPA claim, which alleged that TechniSand's mining would impair natural resources. Plaintiff lost its MEPA claim at trial, and that loss is not the subject of this appeal. (Op at 4, 26 (Ex A).) The MAA does not contend that plaintiffs should be barred from asking the courts to take a "fresh look" at a contemplated project's environmental consequences. But that has always been Michigan law (and the law of most other states), and companies looking to do business here must take the calculated risk that their investment dollars will survive such an environmental challenge. TechniSand took that risk, and its actions were vindicated when it won a substantive MEPA trial.

Plaintiff's procedural challenge to the MDEQ's issuance of the permit under MCL 324.63702 is another matter. Certainly, it is the permit holder's burden to satisfy the requirements of the permitting process and convince the MDEQ to issue a permit. But once the MDEQ has issued a permit and the administrative appeal period has expired, the permit holder has the right to start investing substantial time and resources in reliance on the validity of the permit's issuance. Again, if the underlying permitted actions violate MEPA as a substantive matter, that challenge can be brought at any time. The Michigan Legislature did not intend, however, to place a company's investment at risk indefinitely on the off chance that the MDEQ erred as a matter of procedure, especially where, as here, a court has concluded there is no environmental issue that constitutes a MEPA violation.

The cases on which the Court of Appeal relied do not support the result the Court of Appeals reached in this case. In *West Michigan Environmental Action Council v NRC*, 405 Mich 741, 749-750; 275 NW2d 538 (1979), the MEPA challenge involved the underlying conduct of the permit holder, not the procedures themselves that led to the permit's issuance. *Id.* at 752. Similarly, in *Nemeth v Abonmarche Development*, 457 Mich 16; 576 NW2d 641 (1998),

this Court focused on the fact “that the developers’ activities violated the MEPA by either polluting, impairing, destroying air, water, or other natural resources, or were likely to do so.” *Id.* at 20; 576 NW2d 641 (emphasis added). This Court enjoined the *Nemeth* defendants, not because the defendants were ineligible for permits they held, but because their projects’ soil erosion was a substantive MEPA violation. *Id.* at 35-36 (“The trial court carefully evaluated plaintiffs’ claim and found that plaintiffs met their burden of proving by a preponderance of evidence that defendants’ actions would result in actual or likely pollution, impairment, or destruction of a natural resource in violation of the MEPA.”).

At bottom, the Court of Appeals allowed the Plaintiff to use MEPA as a “super-judicial review” of the MDEQ’s decision to issue TechniSand’s permit. That super review gives no deference to the agency’s decisions, and it imposes no time limit by which challenges must take place. If the Legislature had mandated such review in MEPA, this would be a different case. The Legislature did not. Accordingly, the Court of Appeals must be reversed.

**B. The Court of Appeals misinterpreted MCL 324.1701(2).**

The Court of Appeal erred in concluding that MEPA was a proper vehicle to challenge the MDEQ’s technical decision to amend TechniSand’s permit, because MDEQ’s decision has absolutely nothing to do with the question of whether “the conduct of [TechniSand] has polluted, impaired, or destroyed” natural resources. MCL 324.1703. The Court of Appeals also erred in its interpretation of MCL 324.1701(2), which specifies when a plaintiff is entitled to MEPA relief, and what form such relief might take.

Section 324.1701 states that where an alleged violation of an environmental statute or permit will result in the pollution, impairment, or destruction of natural resources, the court may, if there is a standard for pollution or for an antipollution device or antipollution

procedure, determine the validity, applicability, and reasonableness of the standard and, if the court finds a standard to be deficient, direct the adoption of a new standard specified by the court:

(1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

(2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:

(a) Determine the validity, applicability, and reasonableness of the standard.

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

MCL 324.1701 (emphasis added). The Court of Appeals recited this section and concluded that MCL 324.63702, which describes the circumstances under which a mining permit may be granted, was the appropriate “procedure” for allowing mining in critical dune areas. (Op at 10 (Ex A).) The Court then determined that TechniSand did not satisfy the procedure. But the Court’s use of MCL 324.1701(2) has no relation to that provision’s plain meaning.

The word “procedure” in MCL 324.1701(2) is modified by the word “antipollution,” i.e., “if there is a standard [1] *for* pollution or [2] *for* an antipollution device or procedure, . . . the court may [determine the validity, applicability, and reasonableness of the standard and specify its own standard].” Accordingly, a court’s power is limited to determining the validity, applicability, or reasonableness of (1) pollution standards, (2) antipollution standards, or (3) antipollution procedures. But MCL 324.63702 does not fit in any of these

categories; it is a technical provision that specifies when the grant of a mining permit is appropriate.

The Court of Appeals has broadened the scope of MCL 324.1701, so that it applies to *any* environmental “procedure,” rather than just “antipollution procedures” (which MCL 324.63702 is not). To reach the Court of Appeals’ conclusion, one has to read each “or” in MCL 324.1701(2) as a disjunctive: “if there is a standard [1] for pollution or [2] for an antipollution device or [3] procedure, . . . the court may [determine validity, applicability, and reasonableness or specify its own standard].” But if this construction had been the Legislature’s intent, common grammar would have dictated the elimination of the first “or” and “for,” so the provision would read as a series: “if there is a standard for [1] pollution, [2] an antipollution device, or [3] a procedure, . . . .” The Legislature did not write the statute that way, but the Court of Appeals nonetheless interpreted the statute as if the Legislature had done so. A plain reading of the language compels the conclusion that only “antipollution . . . procedures” are subject to judicial review.

The sensible construction that the MAA advances accounts for the fact that MCL 324.1701(2) directs a court to specify a *different* standard or procedure if an existing one is deficient. Even the Court of Appeals in its Opinion did not argue that MCL 324.63702 was “deficient” as a standard or procedure; the Court instead concluded that TechniSand did not satisfy MCL 324.63702’s prerequisites. Quite simply, there is no “standard” or “procedure” to reform, because MCL 324.63702 is not a “pollution control,” “antipollution device,” or “antipollution procedure” that a court can rewrite as part of a MEPA action. Accordingly, a Court cannot use the auspices of MEPA to determine the validity, applicability, or reasonableness of MCL 324.63702.

The MAA's sensible construction is consistent with this Court's rulings. As the Court explained in *Nemeth v Abonmarche Development, Inc*, 457 Mich 16; 576 NW2d 641 (1998), MCL 324.1701(2) is a provision for pollution control standards:

MEPA specifically authorizes a court to determine the validity, reasonableness, and applicability of any standard for pollution or pollution control “and to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA.”

*Id.* at 29-30; 576 NW2d 641 (underlined emphasis added). And it is these “pollution control standards” that courts must independently examine for reasonableness “in accordance with the courts' development of the common law of environmental quality.” *Id.* at 35; 576 NW2d 641. Because MCL 324.63702 is not a pollution/antipollution control standard or procedure, it is not subject to a MEPA claim at all. The Court of Appeals' conclusion misreads MEPA, and it ignores this Court's discussion of NEPA in *Nemeth*. The decision should be reversed for this reason as well.

## **II. The Court of Appeals' decision will result in injustice to the MAA and its members, and to other state businesses.**

The practical impact of the Court of Appeals' decision is that any challenge to an administrative decision is blessed with the Holy Grail of eternal life, provided it is couched as a MEPA claim. The result is that no entity trying to comply with Michigan's environmental regulations can ever be certain that it operates with meaningful administrative approval. Such an outcome defeats business plans and expectations, and it ultimately will have a chilling effect on future business investment in Michigan. What rational company would start or expand operations in Michigan under a facially valid permit when that permit is subject to attack on procedural grounds in perpetuity? It makes far more sense to locate in a nearby state where the permit holder will not have to re-litigate the permit's issuance, but will rather face only

substantive environmental challenges to the underlying conduct the permit regulates. The Court of Appeals' decision is bad business and bad public policy. And the Court of Appeals' conclusion does not even follow if MEPA is properly construed as a statute that regulates the environmental effect of mining and manufacturing conduct. It should be reversed.

### **CONCLUSION**

The Court of Appeals has held that the MDEQ's issuance of a permit is subject to procedural challenge in perpetuity. That decision will have far-reaching impact on mining, manufacturing, and industry in Michigan, where companies (and their employees) must be able to rely on the facial validity of their permits to do business. The Court of Appeals' decision does not withstand even a modicum of scrutiny. Accordingly, the Michigan Aggregates Association respectfully requests that this Court either reverse the decision of the Court of Appeals, or peremptorily reverse the Court of Appeals decision. In either case, the Court should reinstate the sound holding of the Circuit Court, which concluded that Plaintiff was barred from bring a procedural challenge to the MDEQ's issuance of TechniSand's permit.

Dated: December 20, 2002

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