STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal from the Court of Appeals
(Wilder, PJ and Hoekstra and Boorrello, JJ)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

ALAN N. TAYLOR,

Defendant/Appellant.

______________________________/

S. Ct. Docket No. 141166
Court of Appeals No. 295275
Cir. Court Case No. 08-011574-AR
DC Docket No. R-08-1184-SM

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DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

I. FACTS AND PROCEEDINGS 2

A. Statement of Facts 2

B. Statement of Proceedings 4

II. ARGUMENT 8

A. The Trial Court's Instruction Significantly Altered Rule 281.921(1)(b)(ii)'s Definition of "Contiguous." 9

1. The Words "Contiguous" And "Direct Surface Water Connection" Have Generally-Accepted Meanings. 9

a. "Contiguous" 9
b. Surface Water 13
c. Connection 17
d. "Direct" 17

2. The Trial Court's Instructions Did Not Follow The Plain Meaning Of The Rule's Key Word. 19

B. Even If Correct, A Retroactive Application To This Case Of The Trial Court's Interpretation Of Rule 281.921(1)(b)(ii) Would Violate Due Process 21

III. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Bloomfield Twp v *Oakland Cnty Clerk*, 253 Mich App 1, 45; 654 NW2d 610 (2002) 11

Consumers Power Co v Lansing Board of Water and Light, 200 Mich App 73, 76; 508 NW2d 680 (1993) 10

Croucher v Wooster, 271 Mich 337, 345; 260 NW 739 (1935) 10

Douglas v *VanDerHeide*, unpublished opinion issued by Court of Appeals on November 18, 2010 (Docket No. 292948) 11

Hawlay v *Snider*, 346 Mich 181, 185; 77 NW2d 754 (1956) 9

Houghton Cnty Board of Supervisors v Blacker, 92 Mich 638; 52 NW 951 (1892) 11, 12

Lansing Mayor v *PSC*, 470 Mich 154, 157-158; 680 NW2d 840 (2004) 9

Maki v *East Tawas*, 385 Mich 151, 159 (1971) 19

People v *Doyle*, 451 Mich 93, 101; 586 NW2d 745 (1996) 21

People v *Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1977) 9

People v *Thompson,* 477 Mich 146, 151; 730 NW2d 708 (2007) 9

Shay v *Aldrich*, 487 Mich 648; 790 Mich 629 (2010) 19

Stenson v Secretary of State, 308 Mich 48, 56; 13 NW2d 202 (1944) 11, 12

USF&G v MCCA (on reh), 484 Mich 1, 14; 773 NW2d 243 (2009) 11

Vestal v *Little Rock*, 54 Ark 321, 15 SW 891 10

Statutes

MCL 24.203(6) 16, 20

MCL 24.203(7) 16

MCL 24.203(a) 21

MCL 324.21303(m) 13

MCL 324.30301(1)(m)(i) 1, 12, 20

MCL 324.3031(a)(1) 20

MCL 324.30311(2)(h) 11

MCL 324.30311a(1) 16

MCL 324.3112a(9)(c) 13

MCL 324.51103(1) 11

MCL 824.30301(1)(m)(i) 1

Other Authorities

23 *Am Jur 2d*, §254, p 241 10

48 *Am J1st Spec A* § 119 10

A Dictionary of Modern Legal Usage (1990 ed) 10

Ballentine's Law Dictionary (2010 ed) 10, 13, 18

Black's Law Dictionary (8th ed) 10, 13, 18

Merriam Webster's Collegiate Dictionary (11th ed) 17

Merriam Webster's Collegiate Dictionary (1993 ed) 9, 17

The American Heritage Dictionary (1991 ed) 9, 17

The Oxford Dictionaries Online (http://oxforddictionaries.com/us) 9, 13, 17

Thompson on Real Property (1962 ed), §3056, p 646 10

Webster's New Collegiate Dictionary (1973 ed), p 929 11

Words & Phrases (2007 ed), pp 257-276 ..... 10, 11

Rules

R 285.640.1(aa) 14

R 299.2304(j) 14

R 299.4105(p) 15

R 299.9107(gg) 15

R 323.1044(u) 15

R 323.2203(g) 15

R 323.2402(eee) 15

R 325.1605(5) 15

R 560.401(ii) 15

Rule 281.921(1)(b) 4, 8, 13

Rule 281.921(1)(b)(ii) 17, 19, 20, 21

Rule 281.921(1)(b)(iii) 1

Rule 339.22101(j) 18

By an order entered on May 3, 2013, this Court directed its Clerk to schedule oral argument on whether the Court should grant, or take other action on or in response to, Mr. Taylor's application for leave to appeal the May 22, 2012, judgment in this case by the Court of Appeals, and the Court directed the parties to submit supplemental briefs addressing two interrelated questions:

> "[1] [W]hether the trial court's jury instructions expanded the definition of 'contiguous' beyond the reasonable scope of MCL 324.30301(1)(m)(i) and *Mich Admin Code*, R[ule] 281.921(1)(b)(ii), and [2], if so, whether that expansion constituted an unforeseeable judicial enlargement of a criminal statute that deprived the defendant of due process[?]" 493 Mich 1015 (2013).

"MCL 324.30301(1)(m)(i)" defines a regulated "wetland" as "land" with certain characteristics "which is . . . contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.[1] Nowhere, however, does the WPP/NREPA[2] define "contiguous." It is "R[ule] 281.921(1)(b)(ii)" which does that; it says that "[a] seasonal or intermittent direct surface water connection..." renders a wetland contiguous. The trial court's jury instruction defined such a connection to include water which originates on the surface and thereafter gets to a stream, etc., even if it does so underground by means of manmade drains and pipes, so long as it would have gotten there across the surface "in its normal state."

Therefore, the questions posed by this Court are, did the trial court, by telling the jury that surface water moved into and through buried pipes is still "a direct surface water connection" merely explain or clarify MCL 824.30301(1)(m)(i) and Rule 281.921(1)(b)(iii), or did the trial court significantly alter the statute and/or the rule. The trial court could do only the

[1] At the time of the construction at issue in this prosecution, the WPP/NREPA's definition of "wetland" was found in MCL 324.30301(1)(p)(i). In 2012, that portion of the statute was renumbered MCL 324.30301(1)(m)(i). The text was not changed.

former and only if the explanation or clarification was foreseeable. Doing the latter would be inappropriate judicial ukase. This is Mr. Taylor's supplemental brief respectfully showing why the latter occurred.

I. FACTS AND PROCEEDINGS

This brief begins with a synopsis of the trial evidence about the flow, or lack of flow, and the circumstances of any flow, of water from the supposed HEI wetland. Analyzing law in light of particular facts provides a very useful, educating focus by keeping that analysis real not an abstraction.

A. Statement of Facts

As created by nature the land in Sparta, MI, owned by HEI which the MDEQ alleges is a regulated wetland sits at the bottom of a sizeable natural depression or bowl. "Wetlands typically are more [*sic*] lower in the topographic position" (Vol II, p 167, lines 22-23). The depression is approximately 2.5 feet deep. Therefore, a lot of water must accumulate on and around the alleged wetland before it can overflow the edge of the bowl and move onto and downhill on the surface land leading to the Rogers Drain (Vol II, p 111, lines 20-25).

Until the late 1980s, such movement was possible, but "highly unlikely" under normal conditions (Vol II, p 112, lines 9-20; Vol IV, p 190, lines 14-15; p 194, lines 10-11; p 199, lines 17-19). Only "a very large frequency storm" could produce enough rain sufficient to fill and eventually overflow the bowl (Vol IV, p 199, lines 7-10). Save such an event, which was rare, the water evaporated or slowly soaked into the ground (Vol II, p 184, lines 7-14).

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[2] This brief will use the same abbreviations used by Mr. Taylor in his application for leave to appeal, and all references herein to the trial record court will also be the same as in that application.

Now, however, and for the last several years, long before HEI expanded its employee parking lot, no water from the supposed wetland moves, or has moved, overland to the Rogers Drain (Vol I, p 250, lines 7-10; Vol II, p 9, lines 22-24; Vol III, p 235, lines 20-25). Years ago, the land between the supposed wetland and that drain was "disturbed." An industrial park was developed in the 1980's and 1990's. Buildings belonging to others and a gas utility pipeline were added (Vol I, p 245, lines 2-6), and, then, in 1987-1988 HEI's facility and initial employee parking lot were constructed. Obviously, that construction affected the topography. It flattened some of the land and raised some of it (Vol 1, p 244, lines 8-13; p 250, lines 7-10). There was no claim at trial, let alone any evidence, that any of that construction violated the WPP/NREPA.

The only evidence at trial about what now becomes of any water in the supposed wetland was that most of it evaporates, some drains into the underlying soil, and any remainder, which can't be much, empties into a storm drain which had been built by the Village of Sparta (Vol I, p 106, lines 16-17; p 245, lines 24-25) and, maybe, moves from there to the Rogers Drain through several hundred feet of underground pipe (Vol I, p 147, lines 16-18; Vol II, p 195, line 23; Vol IV, p 121, lines 15-21). Anything less than a 1,000 or so gallons at a time would seep out of joints in the underground pipes and never make it to the Rogers Drain (Vol III, p 267, lines 13-25, p 268, lines 1-4).

The trial court "d[i]dn't have any disagreement" with the following summary by Mr. Taylor's trial counsel of the route of travel of any water which makes it out of the wetland and its surrounding bowl:

> ". . . [T]he water has to rise to an overflowing level to start with -- and this testimony to that effect -- and then it has to dump into a manhole, and then from that manhole it drops another six or seven feet, and then it runs through a tube, and then it drops again in another tube that's on a much greater slope to get down into this

ditch [the Rogers Drain] that the testimony said he was required to dredge 12 feet deep. . ." (Vol V, p 7, lines 13-20).

The MDEQ took the position at trial that, because it originated on the surface, any water from the supposed wetland which makes its way into the storm drain and, then, moves through that drain to the Rogers Drain is still surface water, although, once in the storm drain, it is exclusively "subsurface" (Vol II, p 193, lines 14-24). Mr. Taylor's experts testified that surface water which moves or is moved underground by pipes and, then, travels underground loses its character as surface water (Vol I, p 260, lines 7-10; Vol III, p 219, lines 12-15; p 261, lines 22-25; Vol IV, p 120, lines 6-14; p 122, lines 11-25; p 123, line 1-8; p 129, lines 6-10). In its instructions, the trial court would adopt the MDEQ position.

B. Statement of Proceedings

Before trial began, the prosecutor told the trial court that, because "contiguous" is a "very nebulous" term (Vol I, p 8, lines 9-10; p 17, lines 19-20), he would be "proceeding on three theories of what contiguous is: a ground or surface water connection, under subsection one [of Rule 281.921(1)(b)]; . . . an intermittent ground or surface water connection, under subsection two; and also that it [the alleged wetland] is within 500 feet of a high water mark of a stream" (Vol I, p 18, lines 12-16). In one regard, the prosecutor misspoke. The rule's definitions (i) and (ii) of contiguous do not mention ground water, just surface water.

The prosecutor's opening statement to the jury discussed only the third "theory." But, the trial proofs discussed the second theory at length. In fact, that theory, or definition, was the dominant subject of examination and cross-examination. Each witness called by the prosecution was asked more about a direct surface water connection than any other subject. Several defense witnesses were also quizzed at length on the subject. After its initial mention, the first theory

was abandoned. No proofs about it were presented by the prosecution, and no argument about it was allowed either.

At the conclusion of the prosecution's proofs, defense counsel moved for a directed verdict. He argued, first, "[T]here's no evidence of [a] groundwater connection, and the only evidence of [a] surface water connection is a storm drain" (Vol III, p 49, lines 22-25; p 50, line 1), which "[is] not a surface water connection" (Vol III, p 62, lines 19-20). Then, defense counsel got more specific:

> "Our position was that hinges on the word direct, Your Honor. Certainly there is no direct connection. First off, the water has to get seasonally high for it to even spillover, and then when it spills over into this catch basin, it has to drop down, I think approximately six feet, before it hits the drain. And then it goes across, and it's above the surface of the -- of the -- Rogers Drain when it gets there. So there's nothing -- no direct connection anywhere. And that's -- that's our position, that that does not constitute a direct -- whether it's intermittent or not -- it's not a direct connection. . . ." (Vol III, p 63, lines 6-17).

The trial court denied the motion. It ruled that, although "[t]here's no real help in here [presumably, in the statute and the administrative rule]:"

> ". . . [I]t would seem to me just by putting it in a tube that it probably doesn't change the nature. If it originates on the surface and the runoff would be on the surface, just because they put it in a tube I wouldn't think that that would change the nature if it originates on the surface and we're not talking about something that goes down in the ground later. . . And as to the fact that it flows down and collects, and then apparently gets into the tube and then flows down, ends up in the creek my feeling would be they've got enough evidence probably to get to the jury on that one" (Vol III, p 64, lines 12-24).

Even after prevailing on Mr. Taylor's motion, the prosecutor continued to argue. Specifically, he quoted an expansive definition of "surface water connection" found in a recently-issued MDEQ Guidance Document, which definition would later become the heart of the trial court's instruction about "direct surface water connection":

"It says 'surface water is also any waters found at or above the ground surface, directed from the ground surface into or through any natural or manmade ditches, swales, pipes, culverts, or tiles that ultimately connects [to other surface waters]" (Vol III, p 68, lines 17-21).

Later, after the proofs had closed, there was a lengthy discussion between the trial court and both trial counsel about how to define "direct surface water connection." The prosecutor urged the court "to instruct the jury that surface water means any water that would, under normal, natural circumstances, be surface water" (Vol V, p 3, lines 15-21). Unspecified internet research was cited in support of the proposed instruction (*Id.*, lines 16-17).

Mr. Taylor's trial counsel renewed with greater specificity a request he had made earlier for a different instruction:

> "I'm not disagreeing on that [that jury must be told 'what surface water means']. But I do want to make the distinction just for the record of how I think this works, and that is that not talking about the conveyance of the water when you talk about surface water that the water originates as water on the surface. So I don't disagree with you that the characterization of the water doesn't change. I do disagree with you that -- that the type of structure, drain system, that we have here is not a surface water feature. The conveyance is not a surface water feature. And I think that's the distinction I would like made" (Vol V, p 6, lines 6-16).
>
> ***
>
> It would tell me that we no longer have -- and there is another operative word in there that we don't want to forget, and that's the word direct. It says a direct surface water connection. Now, this certainly -- going into this drain isn't a direct connection" (Vol V, p 7, lines 8-12).

Right after counsels' argument, the trial court indicated that it planned to instruct along the lines urged by the prosecution, which it eventually did. Then, closing arguments were made, and thereafter, the jury was instructed as follows about what does and does not constitute "a direct surface water connection":

"The second thing the prosecutor must prove beyond a reasonable doubt for the DEQ to have jurisdiction is that this is a regulated wetland, because there are wetlands, and you've heard testimony that the DEQ cannot regulate. One of the things -- or the thing that the prosecutor has alleged allowed the DEQ to regulate this wetland is that [the] wetland is contiguous to an inland stream. And so the second element is the prosecutor must prove beyond a reasonable doubt, after the wetland if it has been proven beyond a reasonable doubt is established, that this wetland is regulated because it's contiguous to an inland stream.

The word contiguous is defined for our case as either of two things that the prosecutor has alleged: That one, this wetland is a seasonal or intermittent direct or -- or has a seasonal or intermittent direct surface water connection to the stream in question. . . .

Now, surface water in this particular part or element of the Count, one, is defined in my opinion as water that in its natural state flows on the crust of the earth as opposed to water which flows -- is trapped underground between layers of soil and is commonly called, aquifer. So surface water is on the top in its normal state -- and the prosecutor has to prove that -- that there is intermittent or seasonal surface water.

Now, in this case there has been testimony that -- that man has put in either drains or culverts to in fact enclose all or some of this water. If there is a man-made drain or culvert in this particular case, if this water in its normal state without that is under the definition of surface water that would be normally flows on the surface between the wetland and the creek and it does so intermittently or seasonably, then that element has been established even if man puts in a culvert, or a drain and collects that surface water even if it runs under the ground in the culvert that doesn't change the nature from surface water to subsurface water or whatever the definition is when you're talking about water naturally trapped under the ground by dirt or clay. So basically I told you that putting in drains or culverts doesn't change the nature of the water if it is originally surface water. But there are a couple of things you have to consider that would be defenses if in fact man puts in a drain or culvert. If the drain or culvert collects surface water from the wetland and in its normal state there is not enough water therefore the wetland to get all the way to the stream, that is, it either gets in the ground or evaporates before it gets to the stream, if -- because they collect this all in some sort of tube and that gives it enough, one, water or prevents it from evaporating and it gets to the stream, that -- that would be a defense.

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> If in its natural state it doesn't get the stream but you put in a culvert or a tube of cement and you collect more water from the -- the wetland than in that tube and it doesn't -- isn't able to evaporate and by that method you get into the stream, that doesn't count. You have to figure out as in its natural state whether it would normally get to the stream. If they put a culvert in there and collect more water so it gets there now but wouldn't in its natural state, then it's not contiguous under this definition.
>
> Second thing is, if in its natural state the water does not go to the stream but goes someplace else and man changes it -- the place it goes by putting in a tube so it goes to the stream, then it's not contiguous either under this definition. (Vol V, p 78, lines 14-25; pp 79-80; p 81, lines 1-20).

After asking the jury, "So how confused are you?" (Vol V, p 81, line 20), the court concluded, at least on the subject of contiguous defined as "a direct surface water connection":

> Second, the prosecutor has to prove beyond a reasonable doubt that this is a regulated wetland, but what it means is the second, is they have to prove it's contiguous to the stream here. And by contiguous one of the ways they're saying it's contiguous is it has—this wetland normally has a surface flow of water that in its normal state gets from the wetland to the stream that they're complaining—or saying is where the wetland drains, in its normal state it gets there. At some time during the year you have surface water between the wetland and the stream. It can be intermittent or seasonal. But at some time there is a direct connection by surface water between the wetland the stream, and then I just threw in the fact that now we've got some tubes in there, drains and culvers, which still is surface water, as I understand it, but if in its natural state the water doesn't have a direct connection between the wetland and the stream and now because it's in a tube it either collects more or it doesn't evaporate and it makes it through the tube but it wouldn't make it naturally, that's not contiguous. Or if the tube misdirects it or redirects it from another place to the stream and there's a redirection by the tube, that's not contiguous. (Vol V, p 82, lines 2-25).

II. ARGUMENT

Because the WPP/NREPA does not define the word "contiguous," nor does Rule 281.921(1)(b) anywhere define its phrase "direct surface water connection," those several terms

are to be applied using their common meaning, which means "according to their generally-accepted meaning," *Hawlay* v *Snider*, 346 Mich 181, 185; 77 NW2d 754 (1956), unless they have a technical meaning or are a term of art, *People* v *Thompson,* 477 Mich 146, 151; 730 NW2d 708 (2007), or have acquired "a unique meaning of common law," *People* v *Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1977).[3]

A. <u>The Trial Court's Instruction Significantly Altered Rule 281.921(1)(b)(ii)'s Definition of "Contiguous."</u>

1. The Words "Contiguous" And "Direct Surface Water Connection" Have Generally-Accepted Meanings.

Ordinarily, invoking the common and generally-accepted meaning of terms found in statutes and rules bespeaks a conclusion that the pertinent statute or rule does not use technical terms, or previously-defined terms. In this case, generally-accepted applies "with a vengeance" so to speak. Lay, and legal dictionaries, technical terms, and previous judicial expositions all say the same thing.

a. "Contiguous"

Demonstrating the common understanding of the word "contiguous" is the appearance of the same definition in multiple dictionaries, both standard and legal. For example:

> *Merriam Webster's Collegiate Dictionary* (1993 ed), p 250: "**1** : being in actual contact : touching along a boundary or at a point **2** of angles : ADJACENT 2 **3** : next or near in time or sequence **4** : touching or connected throughout an unbroken sequence."
>
> *The American Heritage Dictionary* (1991 ed), p 316: "**1.** Sharing an edge or boundary; touching. **2.** Nearby; neighboring; adjacent. **3.** Adjacent in time; immediately preceding or following."
>
> *The Oxford Dictionaries Online* (<u>http://oxforddictionaries.com/us</u>). "sharing a common border; touching: the 48 contiguous states next

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3 These principles apply to both statutes and administrative regulations. *Lansing Mayor* v *PSC*, 470 Mich 154, 157-158; 680 NW2d 840 (2004).

or together in sequence: five hundred contiguous dictionary entries."

Black's Law Dictionary (8th ed), p 338: "**1.** Touching at a point or along a boundary; ADJOINING. **2.** Near in time or sequence; successive."

Ballentine's Law Dictionary (2010 ed); (www.lexis.com): "Literally, in actual contact, an actual touching. One parcel of land is 'contiguous' to another parcel of land when the two parcels are not separated by outside land. See Vestal v Little Rock, 54 Ark 321, 15 SW 891. Appearing in statutes, the term is construed at times somewhat differently, depending upon the context and subject matter of the entire statute. 50 Am J1st Stat. § 288. In its popular sense, and as used in local improvement acts, the word means in actual or close contact; touching; adjacent; or near. 48 Am J1st Spec A § 119....A building 25 feet from another building is not 'contiguous' to it within the meaning of the provision in a fire insurance policy as to the erection of the building contiguous to that insured."

Garner, *A Dictionary of Modern Legal Usage* (1990 ed); (www.lexis.com): "Contiguous means, not merely 'close to' or 'near' but 'adjacent.' It is commonly misused in the phrase *the forty-eight **contiguous** states,* which is illogical, inasmuch as only a few states can be ***contiguous*** to one another.

Treatises also define "contiguous" as meaning "in actual contact or touching," *Thompson on Real Property* (1962 ed), §3056, p 646, or "abutting," 23 *Am Jur 2d*, §254, p 241. So does case law around the country. See 9 *Words & Phrases* (2007 ed), pp 257-276. Most significantly, so does Michigan case law. In *Croucher v Wooster*, 271 Mich 337, 345; 260 NW 739 (1935), this Court held, first, that the conveyance of a parcel of land bordering a highway which is contiguous to a lake conveys riparian rights, and that a highway is "contiguous" to water if there is "no land intervening" between an edge of the road and the lake.

Similarly, in *Consumers Power Co v Lansing Board of Water and Light*, 200 Mich App 73, 76; 508 NW2d 680 (1993), the Court of Appeals held that a township and a city were "contiguous" because they shared a common corner, satisfying the common meaning of

contiguous as "touching; in contact." See also *Bloomfield Twp* v *Oakland Cnty Clerk*, 253 Mich App 1, 45; 654 NW2d 610 (2002); and *Douglas* v *VanDerHeide*, unpublished opinion issued by Court of Appeals on November 18, 2010 (Docket No. 292948). And, a LEXIS search identifies 654 decisions by this Court and the Court of Appeals which use the word contiguous, without endeavoring to define it, to describe things (and frequently pieces of land) that are touching or in contact.

Only once has this Court held that contiguous does not mean touching. In *Houghton Cnty Board of Supervisors v Blacker*, 92 Mich 638; 52 NW 951 (1892), the Court held that Isle Royal and Keweenaw County, even though miles apart could be placed in one legislative district, even though such districts "shall consist of convenient and contiguous territory." Finding "contiguous" to require touching would have, explained this Court in *Stenson v Secretary of State*, 308 Mich 48, 56; 13 NW2d 202 (1944), made "reapportionment of representation suited to changing conditions . . . wholly impossible." The few cases elsewhere reading contiguous to not require touching involved similarly unique circumstances. *Words & Phrases*, *supra*.

Finally, the Legislature concurs in MCL 324.51103(1), "contiguous" is defined (for purposes of determining eligibility of tax incentives for commercial forests) to mean "land that touches at any point." And, when evaluating a wetlands permit application, "proximity," which means "close" or "very near," *Webster's New Collegiate Dictionary* (1973 ed), p 929, is to be considered, said the Legislature in MCL 324.30311(2)(h). The definition of "wetland", on the other hand, uses only the word "contiguous." The use of different words typically means that each has a different meaning, *USF&G v MCCA* (on reh), 484 Mich 1, 14; 773 NW2d 243 (2009), i.e., that, in the WPP/NREPA, "contiguous" does not mean in "proximity."

In sum, only once has the word "contiguous" been defined here in Michigan as inclusive of lands that did not touch each other, *Blacker, supra*, and that definition was later noted to be unique and not to be used in other situations. *Stenson, supra.* Otherwise, the courts of this State, and the Legislature, when they have actually defined the word "contiguous," have consistently used "touching" or "in actual contact." There is, therefore, no principled basis to not give "contiguous" in MCL 324.30301(1)(m)(i) its common meaning of "touching" or "in actual contact."

In sum, the word "contiguous" in MCL 324.30301(1)(m)(i) requires concluding that, to be subject to regulation by this State, the "land" which is a wetland must touch or be in contact with the Great Lakes or Lake St. Claire, an inland lake or pond, or a river or stream. That water from the wetland may get to that other body of water does not render it contiguous, not unless the wetland itself touches that other body of water. Contiguity results because two pieces of land touch each other. In this case, there was, everyone agrees, roughly 400 feet of non-wetland between the supposed wetland and the Rogers Drain. Therefore, defining contiguity to be satisfied because water traveled that distance ignores the statute, which requires touching of land to land, rendering Rule 281.921(1)(b)(ii) invalid.

But, even if this Court considers the invalidity of the rule off the table, so to speak, the generally-accepted meaning of "contiguous" as touching or in contact with has a bearing on what is "a direct surface water connection." Only water which stays on the surface for its trip to the Rogers Drain and is enough to stretch from the supposed wetland to there. Then, but only then, the supposed wetland and the drain can credibly be said to be in contact with each other. Once the water moves underground into pipes, they are separated. Hence, the use of the words "direct.

. .connection" along with "surface water" in Rule 281.921(1)(b)(ii), and a need to interpret and apply those words strictly.

b. Surface Water

The words, "surface water," although not defined anywhere for purposes of Rule 281.921(1)(b), have regularly been defined elsewhere, in common parlance, technically, and legally, to exclude water which is underground, without regard for how it got underground. For example, starting again with dictionaries:

- The United States Geological Survey, Water Science Glossary of Terms (http://ga.water.usgs.gov/edu/dictionary.html) defines surface water as "water that is on the earth's surface, such as in a stream, river, lake or reservoir.
- The Oxford Dictionaries Online (http://oxforddictionaries.com/us) defines surface water as "1. Water that collects on the surface of the ground. 2. (Also surface waters) the top layer of a body of water: the surface water of a pond or lake.
- *Black's Law Dictionary* (8th ed) (p 1622) defines surface water as "water lying on the surface of the earth, but not forming part of a water course or lake.
- *Ballentine's Law Dictionary* (2010 ed) (www.lexis.com) defines surface water as "water derived from falling rain or melting snow, or rising to the surface in springs, and diffused over the surface of the ground. Inclusive of flow water severed from the main current and spreading out over lower ground."

As is the situation with the word "contiguous," a couple of Michigan statutes define "surface water." They are:

- MCL 324.21303(m): "Surface water" [to] mean[s] all of the following, but does not include groundwater or an enclosed sewer, other utility line, storm water retention basin, or drainage ditch:
  - (i) The Great Lakes and their connecting waters.
  - (ii) All inland lakes.
  - (iii) Rivers.
  - (iv) Streams.
  - (v) Impoundments.
- MCL 324.3112a(9)(c): "Surface water" means all of the following, but does not include drainage ways and ponds used solely for wastewater conveyance, treatment, or control:

(i) The Great Lakes and their connecting waters.
(ii) Inland lakes.
(iii) Rivers.
(iv) Streams.
(v) Impoundments.
(vi) Open drains.
(vii) Other surface bodies of water.

Everything listed in those two statutes are uncovered, meaning that the water in them is not underground. More significantly, one of the statutes excludes from "surface water" "enclosed" sewers, storm water retention devices, and drainage ditches. Granted, neither of those definitions are in the WPP/NREPA, but both are not only in the NREPA of which the WPP is one key part, they are in parts of the NREPA which deal with water pollution, among other things. According to the MDEQ's proofs at trial in this case, one of the principal reasons the State protects wetlands is because of their help cleansing pollution. Therefore, while not binding, how the Legislature chose to define "surface water" for that purpose is pertinent to how those words should be defined for purposes of implementing the WPP/NREPA.

Finally, "surface water" has often, and consistently, although not for purposes of the definition of "contiguous," been defined administratively to be water "that rests or flows on the surface," that is "exposed to the atmosphere," or which is "open," all words incompatible with underground water, even if it started on the surface. Specifically:

- R 285.640.1(aa): "Surface water" means a body of water that has its top surface exposed to the atmosphere and includes lakes, ponds, or water holes that cover an area greater than 0.25 acres and streams, rivers, or waterways that maintain a flow year-round. "Surface water" does not include waterways with intermittent flow.

- R 299.2304(j): "Surface water" means a body of water, and the associated sediments, which has a top surface that is exposed to the atmosphere and which is not solely for wastewater conveyance, treatment, or control. Surface water may be any of the following:
  (i) A Great Lake or its connecting waters.
  (ii) An inland lake or pond.
  (iii) A river or stream, including intermittent streams.
  (iv) An impoundment.

(v) An open drain.
(vi) A wetland.

- R 299.4105(p): "Surface water" means a body of water that has its top surface exposed to the atmosphere and includes a flowing body, a pond, or a lake, except for drainageways and ponds that are used solely for wastewater conveyance, treatment, or control.

- R 299.9107(gg): "Surface water" means a body of water whose top surface is exposed to the atmosphere and includes the Great Lakes, their connecting waters, all inland lakes and ponds, rivers and streams, impoundments, open drains, and other watercourses, except for drainage ways and ponds used solely for wastewater conveyance, treatment, or control.

- R 323.1044(u): "Surface waters of the state" means all of the following, but does not include drainage ways and ponds used solely for wastewater conveyance, treatment, or control:
  (i) The Great Lakes and their connecting waters.
  (ii) All inland lakes.
  (iii) Rivers.
  (iv) Streams.
  (v) Impoundments.
  (vi) Open drains.
  (vii) Wetlands.
  (viii) Other surface bodies of water within the confines of the state.

- R 325.1605(5): "Surface water" means water that rests or flows on the surface of the ground.

- R 323.2203(g): "Surface water" means all waters of the state excluding groundwater, but does not include drainageways and ponds used solely for wastewater conveyance, treatment, or control.

- R 323.2402(eee): "Surface water" means any of the following:
  (i) Lakes.
  (ii) Rivers.
  (iii) Streams.
  (iv) Wetlands.
  (v) All other watercourses.
  (vi) Waters within the jurisdiction of this state.
  (vii) The Great Lakes bordering this state.

- R 560.401(ii): "Surface water" means any of the following:
  (i) The Great Lakes and their connecting waterways.
  (ii) Inland lakes.
  (iii) Rivers.
  (iv) Streams.

(v) Impoundments.
(vi) Perennial open drains.
(vii) Any other watercourses within the jurisdiction of the state as defined in section 3101 of Act No. 451 of the Public Acts of 1994, as amended, being '324.3101 of the Michigan Compiled Laws.

Only MDEQ Guidance Document 303-08-01,[4] issued on April 18, 2006, just before HEI's expansion of its employee parking lot had begun and had been reported to the MDEQ, purports to define "surface water" differently:

> Surface water is also any waters found at or above the ground surface directed from the ground surface into or through any natural or manmade ditches, swales, pipes, culverts, or tiles that ultimately connect to other surface waters. Furthermore, this water remains surface water while in the pipe, culvert, tile, or other subsurface system. However, water that percolates into the soil prior to entering an underground system (e.g., agricultural field tile) should not be considered surface water.
>
> A seasonal or intermittent direct surface water connection occurs when water flows between a wetland and an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair, at any season or at repeated intervals over time. This connection can occur at repeated intervals within the same year or over many years due to various factors including snowmelt, small and large rain events, and other climatic conditions. This connection may include surface water within pipes, culverts, ditches, and other manmade structures of any length. It may also include overland flow, such as occurs during an annual flood event.

Those clarifications are of no monument, however. Guidelines, in general, "do[] not bind any other person" than the issuing agency, MCL 24.203(6), now MCL 24.203(7); and MDEQ guidance documents, in particular, "are not legally binding on the public or the regulated community and shall not be cited by the [D]epartment for compliance and enforcement purposes." MCL 324.30311a(1).

It follows that a guideline or guidance cannot revise the meaning of a generally-accepted term. Hence, absent a different, plain legislative definition, the words "surface water" mean

water on the surface of the earth, not water several feet down below the surface, no matter where it originated and how it became subterranean. At a minimum, as will be discussed later, neither can be a reason to foresee a jury instruction which departs from such a meaning.

c. Connection

There is more, however, to Rule 281.921(1)(b)(ii)'s definition of "contiguous" than a requirement of surface water, either seasonal or intermittent. There must be a "connection" of that surface water to an inland lake, stream, etc. Multiple dictionaries define "connection" to mean "the act of connecting" or "the state of being connected," which, in turn means "becoming joined." *Merriam Webster's Collegiate Dictionary* (11th ed), p 264, or being "linked." *The American Heritage Dictionary* (1991 ed), p 311; and *The Oxford Dictionaries Online.* See also Garner *Dictionary of Modern Legal Usage* (1990 ed), (www.lexis.com).

d. "Direct"

But, not any or every joining or linking of surface water, however defined, is a sufficient connection for purposes of Rule 281.921(1)(b)(ii)'s definition of "contiguous." That connection must be "direct." Again, multiple dictionaries, both lay and legal, demonstrate a consensus on the meaning of that word. Specifically:

- *Merriam Webster's Collegiate Dictionary* (1993 ed), p 328: 2 a : stemming immediately from a source <~ result> b : being or passing in a straight line of descent from parent to offspring : LINEAL <~ ancestor> c : having no compromising or impairing element <~ insult> 3 a : proceeding from one point to another in time or space without deviation or interruption : STRAIGHT b : proceeding by the shortest way <the ~ route> 4 : NATURAL, STRAIGHTFORWARD <~ manner> 5 a : marked by absence of intervening agency, instrumentality, or influence b : effected by the action of the people or the electorate and not by representatives <~ democracy> . . . 6 : characterized by close logical, causal, or consequential relationship <~ evidence>

[4] A copy is attached hereto as Exhibit F. Attached to the application which this brief supplements are Exhibits A-E.

- Oxford Dictionaries Online (http://oxforddictionaries.com/us): 1 extending or moving from one place to another by the shortest way without changing direction or stopping: *there was no direct flight that day* . . . 2 without intervening factors or intermediaries: *the complications are a direct result of bacteria spreading* • (of light or heat) proceeding from a source without being reflected or blocked: *ferns like a bright position out of direct sunlight* • (of genealogy) proceeding in continuous succession from parent to child. • (of a quotation) taken from someone's words without being changed. • (of taxation) levied on income or profits rather than on goods or services. • complete (used for emphasis): *nonviolence is the direct opposite of compulsion* 3 (of a person or their behavior) going straight to the point; frank. • (of evidence or proof) bearing immediately and unambiguously upon the facts at issue: *there is no direct evidence that officials accepted bribes*

- *The American Heritage Dictionary* (1991), p 400: 1. Proceeding or lying in a straight course or line. 2. Straightforward or candid in manner. 3. Without intervening persons, conditions, or agencies; immediate: *direct sunlight*; *a direct answer*. 5. Of unbroken descent; lineal. . . 7. Lacking compromising or mitigating elements; absolute: *direct opposites*. 8. *Math.* Varying in the same manner as another quantity, esp. increasing if another quantity increases or decreasing if it decreases. . . .

- *Black's Law Dictionary* (8th ed), p 491: **1.** (Of a thing) straight; undeviating <a direct line>. **2.** (Of a thing or a person) straightforward <a direct manner> <direct instructions>. **3.** Free from extraneous influence; immediate <direct injury>. **4.** Of or relating to passing in a straight line of descent, as distinguished from a collateral line <a direct descendant> <a direct ancestor>. . . .

- *Ballentine's Law Dictionary* (2010 ed), (www.lexis.com): Immediate or proximate as distinguished from remote.

While many statutes use the words "direct" in defining other terms, no Michigan statute defines that adjective. Similarly, while many administrative rules use the word "direct" in defining other terms, and several rules define phrases that include the word "direct," no Michigan rule, save one, defines the adjective "direct" on its own. Those lacks of definition are, however, themselves significant. It strongly suggests a universal belief in a common meaning. Put another way, the Legislature sees no need to define a word with a generally-accepted meaning. Finally Rule 339.22101(j) confirms the generally-accepted meaning of "direct." It defines "directly" as "in a direct way marked by the absence of any intervention, instrumentality,

or influence; not concealed, not disguised. In sum, therefore, there is, again, no principled basis to not conclude that another component of Rule 281.921(1)(b)(ii)'s definition of "contiguous," the word "direct," has a common, generally-accepted meaning.

2. The Trial Court's Instructions Did Not Follow The Plain Meaning Of The Rule's Key Word.

Water which originated in that part of a wetland exposed to the atmosphere is surface water while there, but, once it moves underground and into underground pipes and drains, it no longer is surface water. Absent a specific statutory authorization to treat water which is underground as synonymous with water which is above ground would be reminiscent of the whims of Louis Carroll's Humpty-Dumpty as he scornfully chastised Alice, "[W]hen I use a word it means what I choose it to mean – neither more nor less." *Maki* v *East Tawas*, 385 Mich 151, 159 (1971). See also *Shay* v *Aldrich*, 487 Mich 648, 687; 790 Mich 629 (2010) (dissent per Markman, J.).

And, by definition, a storm drain, a holding tank, and pipes running for hundreds of feet cannot be said to be a connection "stemming immediately from a source," "proceeding from one point to another. . .without deviation or interruption," "without intervening factors or intermediaries," or "marked by [the] absence of [and] intervening agency, instrumentality, or influence." Those things are classic examples of intervening instrumentalities. At least, absent an explicit definition saying so, it is not reasonable to treat such a collection of devices to get water from one place to another as "a direct...connection" and, as noted, it is not a surface water connection, no matter what.

Defined expansively as done by the trial court "direct surface water connection" would have nearly unlimited reach, giving the MDEQ jurisdiction broader than anyone would expect. If water which originated on the surface of a wetland, however tiny that wetland, becomes

contiguous and, as such, opens the door to MDEQ regulation, just because that water gets into a drain and then moves through pipes to some body, which could be very distant, every wetland could be made "contiguous" and subject to regulation. Think of surface water getting into a city storm drain and moving miles to say, a river. The requirement of contiguity is a limiting factor, not a broadening factor. In other words, defining "direct surface water connection" as did the trial court, at the prosecutor's urging, opens the structure of MCL 324.30301(1)(m)(i) and the policy decisions by the Legislature that subsection reflects, verifying the error of the prosecutor and the trial court.

That the definition of "surface water" used by the trial court in its instructions comes from an MDEQ guidance document does not save that instruction. As noted earlier, such documents "do[] not bind any other person than the issuing agency." See MCL 24.203(6), and MCL 324.3031(a)(1). Therefore, to rely on an MDEQ guidance document, especially in the face of consistent contrary authority not so restricted, is to defy the Legislative commands just cited. In sum, the trial court's instruction did not just explain, which it could legitimately do, "direct surface water connection." The trial court not only rewrote that definition of "contiguous," it reversed that definition. That has to be reversible error.

To its credit, the trial court attempted to narrow the meaning and impact of "a direct surface water connection" defined as former surface water traversing a great distance underground through a combination of coverts, drains, and the like. As noted above, the trial court added to Rule 281.921(1)(b)(ii), as "clarified" by MDEQ Guidance Document 303-06-01, that the water would have, in its natural state gotten there anyway, unaided by man-made structures. That was, however, classic judicial ukase. Neither the statute nor the rule says anything remotely like that. Salutary though its intention likely was, the trial court could not

properly add such significant strictures to a statute. A court can construe a statute, it cannot rewrite a statute to give it an interpretation nowhere to be found in, or even deduced from, its words.

B. Even If Correct, A Retroactive Application To This Case Of The Trial Court's Interpretation Of Rule 281.921(1)(b)(ii) Would Violate Due Process

Answering the Court's second quotation is easy. If the trial court's instruction on "direct surface water connection" is not deemed a correct interpretation of Rule 281.921(1)(b)(ii) it has to be deemed unforeseeable. Not only was that instruction at odds with the plain meaning of the rule's words, it followed a guideline which itself said it "does not have the force of law" and "does not bind any other person" than the issuing agency. MCL 24.203(a). In light of this Court's appropriate insistence that plain legislature dictates be honored, Mr. Taylor was entitled to expect that Rule 281.921(1)(b)(ii) would be applied as written. A different application must, therefore, be said to have been "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," requiring purely prospective implementation. *People* v *Doyle*, 451 Mich 93, 101; 586 NW2d 745 (1996).

III. CONCLUSION

Plainly, Mr. Taylor's jury was improperly instructed. He is, therefore, for that reason alone entitled to a new trial, at least.

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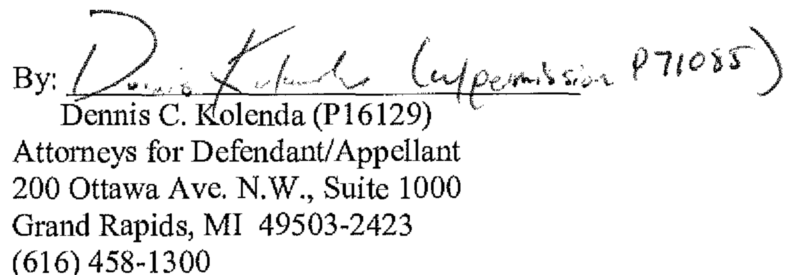

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