STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN N. TAYLOR,

Defendant-Appellant.

/

Michigan Supreme Court
No. 145491

Court of Appeals
No. 295275

Kent County Circuit Court
No. 08-11574-AR

63rd District Court
No. R-08-1184-SM

145491

PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

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Now comes the Plaintiff, the People of the State of Michigan, by Assistant Prosecuting Attorney Kimberly M. Manns, and in opposition to the Defendant-Appellant's Application for Leave to Appeal, which appears to contain much the same arguments presented to the Court of Appeals, hereby incorporates the arguments set forth in Plaintiff-Appellee's Brief on Appeal filed in the Court of Appeals, a copy of which is attached. The ordering of the issues appears to be the same; however, the People's response to defendant's first two issues – A & B – is found within the People's issue I.

For the reasons stated in the attached brief, the People respectfully request that Defendant's application for leave to appeal be DENIED.

Respectfully submitted,

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Dated: October 9, 2012

By: 
Kimberly M. Manns (P 67127)
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BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The People accept that this matter is before the Court pursuant to the Michigan Supreme Court's order of October 26, 2010, remanding the case to this Court as on leave granted.

STATEMENT OF QUESTIONS PRESENTED

I. **THE JURY SAW PICTURES OF THE AREA IN QUESTION SHOWING STANDING WATER AND WETLAND VEGETATION AND HEARD TESTIMONY FROM PROSECUTION AND DEFENSE EXPERT WITNESSES THAT THE CATTAILS SHOWN ARE OBLIGATE PLANTS, GROWING ONLY IN WETLAND AREAS 99% OF THE TIME. THE NATIONAL WETLAND INVENTORY SOILS MAP, ADMITTED WITH DEFENSE COUNSEL'S APPROVAL, LISTS THE AREA AS A WETLAND, AND THERE WAS EXPERT TESTIMONY IDENTIFYING THE AREA AS A WETLAND FROM AERIAL PHOTOS, WHICH WERE ALSO ADMITTED WITH DEFENSE COUNSEL'S APPROVAL. FINALLY, A DAILY REPORT BY DEFENDANT'S ENGINEER WAS ADMITTED FOLLOWING TESTIMONY THAT IT WAS MADE IN THE REGULAR COURSE OF BUSINESS. THEREFORE, DID THE PROSECUTION'S PROPERLY ADMITTED EVIDENCE SUPPORT THE JURY'S THAT THE AREA WAS A WETLAND?**

The Trial Court did not answer this specific question.
Defendant-Appellant answers, "No."
Plaintiff-Appellee answers, "Yes."

II. **HAS DEFENDANT WAIVED HIS ARGUMENT CONCERNING THE DEFINITION OF "CONTIGUOUS" PROMULGATED BY THE DEQ BY AFFIRMATIVELY STATING TO THE CIRCUIT COURT, SITTING AS THE APPELLATE COURT IN THIS CASE, THAT HE WAS NOT MAKING SUCH AN ARGUMENT?**

The Trial Court and Appellate Court were not asked this question.
Defendant-Appellant answers, "No."
Plaintiff-Appellee answers, "Yes."

III. **DID THE TRIAL COURT CORRECTLY INSTRUCT THE JURY THAT WHERE SURFACE WATER WOULD NATURALLY FLOW BETWEEN A WETLAND AND STREAM AND REACH THAT STREAM, THE COLLECTION OF THAT SURFACE WATER INTO A DRAIN LEADING TO THE SAME STREAM IS NOT A DEFENSE?**

The Trial Court answered, "Yes."
Respondent-Appellant answers, "No."
Petitioner-Appellee answers, "Yes."

IV. **THE PLAIN LANGUAGE OF RULES 281.921(1)(B)(III) AND THEN RULE 281.924(4) SETS FORTH A PROCEDURE BY WHICH A LANDOWNER MAY CHALLENGE THE EXISTENCE OF A GROUND OR SURFACE WATER CONNECTION. DEFENDANT FAILED TO FOLLOW THAT PROCEDURE; THEREFORE, DID THE TRIAL COURT CORRECTLY LIMIT THE EVIDENCE AT TRIAL?**

The Trial Court answered, "Yes."
Respondent-Appellant answers, "No."
Petitioner-Appellee answers, "Yes."

V. **DID DEFENDANT WAIVE HIS CLAIM THAT THE TRIAL COURT ERRED IN OMITTING *MENS REA* AS AN ELEMENT BY AFFIRMATIVELY ARGUING THAT *MENS REA* WAS NOT AN ELEMENT IN THESE CRIMES DURING THE OBJECTION TO TESTIMONY REGARDING DEFENDANT'S INTENT NOT TO EVER SEEK A PERMIT? REGARDLESS OF THE EVIDENCE ADMITTED SHOWING DEFENDANT'S KNOWLEDGE THAT THE AREA WAS A WETLAND, ARE THE CRIMES OF WHICH DEFENDANT WAS CONVICTED STRICT LIABILITY CRIMES?**

The Trial Court did not answer the waiver question.
Respondent-Appellant answers, "No."
Petitioner-Appellee answers, "Yes."

VI. THE WETLAND PROTECTION PART (WPP) OF THE MICHIGAN NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (NREPA) SPECIFICALLY SEPARATES "SOIL" FROM "MINERALS." DID THE TRIAL COURT CORRECTLY FIND THAT THE DEFINITION OF "MINERAL" DOES NOT THEN INCLUDE "SOIL" SO THAT THE EXEMPTION OF MCL 324.30305(4)(A) REGARDING EXCAVATION FOR MINERAL OR SAND MINING IS INAPPLICABLE TO THIS CASE?

The Trial Court answered, "Yes."
Respondent-Appellant answers, "No."
Petitioner-Appellee answers, "Yes."

VII. DID THE TRIAL COURT APPLY THE PLAIN LANGUAGE OF THE STATUTES IN QUESTION IN WAYS ENTIRELY FORESEEABLE SO THAT THERE WAS NO RETROACTIVE APPLICATION INVOLVED IN THIS CASE?

The Trial Court answered, "Yes."

Respondent-Appellant answers, "No."

Petitioner-Appellee answers, "Yes.

STATEMENT OF FACTS

Defendant Alan N. Taylor was charged with depositing or permitting the placing of fill material in a wetland without a permit, MCL 324.30304(a), constructing, operating, or maintaining any use or development in a wetland without a permit, MCL 324.30304(c), and draining surface water from a wetland without a permit, MCL 324.30304(d), following the construction of a parking lot extension over a wetland area on his business property. Following a jury trial, defendant was convicted of the first two counts but acquitted of the draining count (Tr V, 122-123). On October 15, 2008, the district court sentenced defendant to pay fines and costs of $8,500; however that sentence has been stayed pending the present appeal (District Court Register of Actions). Defendant appealed his convictions to the circuit court on November 4, 2008. Oral arguments were heard August 28, 2009, and the circuit court affirmed defendant's conviction by written opinion.

Defendant failed a delayed application for leave to appeal to this Court on December 1, 2009, which this Court denied on April 21, 2010, for "lack of merit in the grounds presented." Defendant subsequently filed an application for leave to appeal the case to the Michigan Supreme Court, which remanded the case to this Court on October 26, 2010, for consideration as on leave granted.

Facts relevant[1] to each issue will be discussed within the argument sections.

[1] The People note that, although at times interesting, the background information concerning the nature of defendant's business provided in defendant's brief is not relevant to the issues at hand and, further, do not appear to be part of, and lacked citation to, the district court record.

ARGUMENT

I. THE PROSECUTION'S PROPERLY ADMITTED EVIDENCE SUPPORTED THE JURY'S FINDING THAT THE AREA WAS A WETLAND.

Standard of Review: Defendant has restructured his issues in the present brief from that in his delayed application to begin with an argument concerning the admission of several exhibits into evidence, which segues into an argument that the remaining evidence was insufficient to support the jury's finding that the area in question was a wetland (Defendant's Brief, 16-25). Generally, the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003). "A court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). "Because an abuse of discretion standard contemplates that there may be more than a single correct outcome, there is no abuse of discretion where the evidentiary question is a close one." *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428, lv den 485 Mich 933 (2009).

The People agree that, after initially agreeing to the admission into evidence of the challenged daily report (Tr II, 56), defense counsel later objected to the admission of the report, arguing that the statement within the report attributable to someone other than the author constituted hearsay (Tr II, 81-82). Therefore, that particular issue is preserved for review and the abuse of discretion standard applies. *Katt, supra,* 468 Mich at 278.

The People disagree with defendant's argument that he has not waived his claim of error concerning the admission of the National Wetland Inventory (NWI) map or the aerial

photographs (Defendant's Brief, 21 fn 13).[2] When the People moved to admit the NWI map, the trial court inquired as to whether there was any objection, and defense counsel stated, "No objection, your Honor. This is a governmental document that is readily available to the public and is used by most wetlands consultants including the DEQ" (Tr I, 149). When the People moved to admit the challenged aerial photograph, defense counsel stated, "Your Honor, we've seen this photograph before. I think it's a matter of public record. I have no objection to its admission" (Tr I, 100). Defense counsel did not simply fail to object to the admission of these exhibits, he affirmatively agreed with their admission; therefore, these particular issues have been waived. *People v Carter,* 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Furthermore, even if this Court disagrees that defense counsel waived these issues, they are at least unpreserved by objection below and, therefore, appellate review would be for plain error affecting substantial rights. Under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the

[2] Defendant relies on *Baker v Wayne County Bd of Rd Comm'rs,* 185 Mich App 82, 86-87; 460 NW2d 566 (1990), and *Miller v Hensley,* 244 Mich App 528, 532, fn 2; 624 NW2d 582 (2001), in arguing that these issues are preserved. In *Baker, supra,* this Court's finding against waiver was based on the fact that the trial court's decision regarding the issue was supported by a prior decision of this Court, later vacated, that was the only decision on point at the time. In *Miller,* this Court's finding against waiver was based on the fact that defense counsel had already objected to the admission of opinion testimony from a police officer, such testimony found to be substantially the same as the testimony of the second officer. What neither case supports is the idea that a defense counsel can object to the admission of one piece of evidence based upon hearsay and then affirmatively agree to the admission of other dissimilar pieces of evidence without waiver occurring. "Counsel may not harbor error as an appellate parachute." *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000) (citation omitted).

outcome of the lower court proceedings, and it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

Moreover, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L.Ed.2d 508 (1993).

Discussion: Defendant argues that all of the prosecution's evidence that the land in question contained a bog, swamp or marsh was admitted in error and that such error was not harmless (Defendant's Brief, 16-22) (This discussion is in response to defendant's issues VII (A). Defendant's arguments lack merit. As noted above, two of the three exhibits which defendant argues were admitted in error were admitted with the approval of his counsel; any claims of error concerning their admission have been waived.[3] *Carter, supra.* Furthermore, the challenged daily report was properly admitted after it was identified by the author as a business record. Finally, in arguing that these exhibits were the only evidence supporting the jury's finding that the area fit the definition of wetland as defined by MCL 324.30301(p), defendant ignores the expert testimony that supports that finding.

[3] Throughout this appellate process, Defendant has repeatedly argued in reply briefs that the People have conceded an argument if a direct response has not been made concerning it. Within the present brief, the People have endeavored to address those issues necessary to the resolution of this case. If, however, a particular issue or sub-issue has not been specifically addressed, the People affirmatively state that said issue is not conceded and defendant's burden of demonstrating that error prejudicial to his case has occurred is not thereby met.

MCL 324.30301(p) of the Wetland Protection Part (WPP) of the Michigan Natural Resources and Environmental Protection Act (NREPA) provides in relevant part:

> "Wetland" means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh ....[4]

Defendant argues that the trial court abused its discretion by allowing the admission of a daily report kept by Michael Jones, an engineering technician, after a site visit on June 14, 2006 (Defendant's Brief, 19-20). At trial, two individuals testified from the engineering consulting firm that provided some inspection services to defendant related to the building of the parking lot. Michael Williams, President and Director of Engineering at Williams and Beck, Inc., testified that the firm's employees are advised to make their daily reports accurate as they are a record of what the company did, saw, and told a client, and that daily reports are completed as soon as possible after an actual site inspection (Tr I, 220). Michael Jones, an engineering technician for Williams and Beck, Inc., identified one of his daily reports completed after a site visit on June 14, 2006, in which he wrote that Steve [Gladu] told Jones that he had recently found an old record showing the area to be an old swamp back filled and that Williams had explained to him "that had been visually obvious when he first visited and the reason he'd recommended proper sub-drain, under drain, and an engineer's approval prior to any backfill which did not take place" (Tr II, 52, 54-57).

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[4] MCL 324.30301(p) also requires that a wetland be either "contiguous" to a body of water, river or stream, or fit within two other categories concerning non-contiguous wetlands before satisfying the statutory definition of a wetland that is regulated by MCL 324.30304; however, defendant has limited the current issue to that part of the definition noted above.

The daily report written by Jones was admitted as a business record, initially without objection (Tr II, 56). MRE 803(6) provides, in relevant part, that the following is not excluded by the hearsay rule:

> *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinion, or diagnoses made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the court of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Jones testified that the daily report was designed to accurately reflect what transpired during the visit and that he created one every time he visited the property (Tr II, 54). Jones identified the daily report in question and that it was written on June 15, 2006, based on his memory of a visit and discussion that took place the day before, on June 14, 2006 (Tr II, 55). The testimony of both Williams and Jones referenced above supported the trial court's finding that the daily report written by Jones during the course of his employment with the firm and after one of his visits to the land in question, was a record kept in the normal course of business.

Defendant argues that the statements by Gladu and Williams noted within the report are inadmissible hearsay. The People disagree. Both the statement attributed to Gladu, that the area was an "old swamp back filled" and the statement attributed to Williams, that the same had been visually obvious when he first visited, were arguably admissible as non-hearsay because they were not admitted for the truth of the matter asserted – that the area was in fact a swamp back filled – but to show that the statements were made. MRE 801(c). Williams was not happy that

he had been subpoenaed by the prosecution to testify against his client and struggled to testify in the best way possible for defendant (Tr II, 195-196, 199, 206-207, 217). Williams testified that he saw no swamp or bog or marsh in the area (Tr II, 245). The he made a contrary statement – that it was apparent to him that the area had been a swamp – at a prior date impeached his testimony. Gladu's statement within the report was simply proof that defendant was on notice of a possible problem with the area in question.

Even if this Court disagrees and finds that the daily report was admitted in error, the error was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). A defendant pursuing a claim of preserved, nonconstitutional error has the burden of establishing a miscarriage of justice under a "more probable than not" standard. *Id.* at 495. In light of the other evidence admitted (and cited below) demonstrating that the land in question was a wetland as defined by the statute, defendant is unable to show that it is more probable than not that any error in the admission of the report was outcome determinative.

During trial, Robert Day of the Land and Water Management Division of the Michigan Department of Environmental Quality (MDEQ) testified as an expert in wetland identification, determination, delineation, and aerial interpretation involving wetlands (Tr I, 70-74). Day testified that he had contacted defendant's business, Hart Enterprises, on May 23, 2006, after receiving an anonymous tip from a citizen from Sparta concerned that wetlands were being filled on defendant's business property; the person was worried about the possible flooding impact it could have on nearby Nash Creek (Tr I, 74). Day spoke with Steve Gladu from Hart that day; Gladu told Day about a parking lot construction on the property that had progressed to having fill material and gravel deposited and that an asphalt layer would be added in about two weeks (Tr I, 76). Day went out to the property the following day, May 24, 2006 (Tr I, 76). Day testified that

he observed wetland plants submerged in water at the parking lot site and informed Gladu that there could be a problem but he would need to do further investigation and research (Tr I, 77). Day had identified cattails growing on the property and explained that cattails are an obligate wetland plant, meaning that they only grow in wetlands (Tr I, 77-78). Several pictures taken by Day that day were admitted into evidence that show the fill material brought in for the parking lot as well as standing water, reed canary grass – a wetland grass – and cattails growing (Tr I, 79, 81-82). Day further explained that wetland areas fall somewhere between lakes/ponds and non-wetland areas which have no standing water for any amount of time; wetlands are wet or dry depending on the season but one can still identify a wetland during a dry season by things like the type of vegetation growing there (Tr I, 83-84). Plants like cattails only grow in wetlands (Tr I, 84). Day identified an aerial photograph taken from the Kent County regional geographical information system (REGIS) database that he had considered and testified that he had also reviewed information from the National Wetland Inventory Soils Map in making his initial determination that the area in question was a wetland (Tr I, 92-94). He then called and spoke with defendant about the matter in mid-June (Tr I, 97). Day explained to defendant that there appeared to be a violation and defendant disagreed, stating that the area was just a "vernal pond" that would hold water two or three weeks in the spring and then dry out (Tr I, 97-98). Day explained that a vernal pond is a type of wetland (Tr I, 98). Day identified a copy of the Kent County REGIS aerial photograph with an overlay of the wetlands that also identified the area as a swamp or marsh (Tr I, 100, 102). Day testified that not only does the Kent County REGIS map show the area as a wetland but he confirmed that by looking on site (Tr I, 104).

Day identified pictures of the property taken in July 2006 which showed the soil close to ponding, i.e., water pooling in areas, along with more reed canary grass and cattails (Tr I, 109-

111). Day testified that he was appalled that asphalt had been put down after notification was given that there was a problem (Tr I, 113). Day identified pictures of the property taken in March 2007 that showed a ditch going up to the bottom of the wetland but it was apparent in the picture that there had been standing water in there based on the way the vegetation was growing and with a predominance of cattails in some areas (Tr I, 127, 130-131). A group of MDEQ experts executed a search warrant on the property on October 25, 2007 (Tr I, 107-108). The jury also saw pictures from August 2007, February 2008, April 2008 and June 2008, showing various alterations (ditch, mowing of the vegetation, plowing during the winter) that were made to the area (Tr I, 126, 132-135, 139-146). The jury also saw pictures of Rogers Drain, the stream that runs along the east side of the property and eventually empties into Nash Creek, the Rogue River, the Grand River, and Lake Michigan (Tr I, 146-147). Day identified a copy of the National Wetlands Inventory map showing a wetland in that area of the same shape of the wetland showed on the aerial photo from the Kent County REGIS (Tr I, 148-150). Day testified that he knows that this is a wetland based on his personal observation and the plants he saw growing there as well as from the county map and national inventory (Tr I, 153).

Chad Fizzell, an expert in remote sensing from the MDEQ, testified that he performed an aerial photograph review of the site (Tr II, 120, 122, 124). Fizzell testified that he obtained an aerial photo of the area and interpreted the photo to determine the presence or absence of wetland – he noted wetland in the area in question (Tr II, 127). Fizzell pointed out the area of standing water, which shows up as dark because it absorbs most of the visible spectrum, and the white flecks, which denotes emergent vegetation such as cattails (Tr II, 128). Fizzell testified that given his responsibilities for performing the state's wetland inventory as well as helping with an effort to update the National Wetlands Inventory, he had been interpreting wetlands from aerial

photography for the better part of 4-5 years and the area has all the hallmarks of an open-water emergent wetland (Tr II, 129).

Todd Losee, a wetlands specialist with the MDEQ, testified as an expert in wetland identification (Tr II, 162-163). Losee was part of a group of MDEQ staff who executed the search warrant on defendant's property in October 2007 (Tr II, 164). Losee described the wetland area as disturbed at that time and testified that he identified a mix of reed canary grass and cattails on the site – mowed but still identifiable (Tr II, 165-167). Losee described photos taken at that time showing signs of hydrology (water) as well as wetland vegetations and patches of bare soil where there had been water standing for such a period that plant growth was inhibited (Tr II, 169). Losee explained that a wetland can exist in all kinds of soil depending on different factors in the landscape and that when identifying wetlands one looks at vegetation as a primary criterion as well as hydrology; Losee viewed pictures from over a time period at the site and identified cattails, which he explained grow in wetlands 99% of the time, and reed canary grass, which grow in wetlands 67-99% of the time (Tr II, 170-183).

Michael Williams, of Williams and Beck, Inc., also testified that there were a number of suggestions given to defendant regarding the need for a subsurface drainage system, thickness of the fill material, and need for proper engineering that defendant did not follow (Tr I, 218-219). Williams viewed one of the admitted pictures and identified reed canary grass and cattails; he explained that cattails are an obligate plant which means they always grow in wetland areas (Tr I, 226). Two employees from the Village of Sparta, Miles Ring and Randy Carter, testified that at some point in the mid 1990's, they and other village workers had attempted to dig a trench to divert water from defendant's property that was flooding into a chamber by the water tower in which valves and electronics for the tower were located (Tr II, 243-249; Tr III, 31, 34). Both

men testified that defendant had come out to their location and told them that it was his "wetland" and they were not to drain it (Tr II, 249; Tr III, 11, 34). Carter, the water superintendant for the Village of Sparta, further testified that in the course of his 15 years with the village, the area had always been a wet area, that every once in a while you would see a crane or frogs, a couple geese for a while, and that he had seen cattails there with blooms, i.e., heads on them in the area in question (Tr III, 31, 33, 45-46).

Even defendant's independent environmental consultant, Timothy Bureau, who had worked at the Department of National Resources (DNR) for 9 years in wetland protection, testified that there is a wetland on defendant's property although he disagreed with the delineation of the DEQ's experts on its shape or configuration (Tr IV, 171-178). During cross-examination, Bureau was shown pictures of the property in May and July 2006 and admitted that he never saw that portion of the property in the condition in the pictures and agreed, based on the plants and the water, that it looks like a wetland (Tr IV, 146, 150-151). The property looks much different than it did in the 2006 pictures and Bureau agreed that it could be because of human intervention (Tr IV, 162). Bureau further agreed that he consults the National Wetlands Inventory and aerial photographs and agreed that a site listed on the NWI map as a wetland would pique his interest when doing wetland delineation (Tr IV, 150).[5]

[5] In fact, defendant's expert took offense when the prosecution opined that his testimony was that the NWI is not accurate or that the Kent County REGIS is incorrect stating, "That is absolutely a false statement" (Tr IV, 167). The witness later explained, "The statement I objected to, your Honor, was when he said I testified that the NWI map in this case was inaccurate. I never testified to that. I did not" (Tr IV, 168). Defendant argues that the trial court erred in restricting further testimony challenging the accuracy of the NWI (Defendant's brief, 22-25; issue VII (B)); however, it appears from the record that his expert did not find the NWI inaccurate and defense counsel was attempting to discuss a different exhibit, not admitted into evidence, concerning a wetlands inventory for Kent County – apart from the NWI (Tr IV, 179-180).

The jury was presented with expert testimony identifying the area in question as a wetland, including the testimony of defendant's own expert (Tr I, 153; Tr II, 127-129, 167-172; Tr IV, 171-178). Testimony from both sides instructed them that cattails are obligate plants which grow in wetlands 99% of the time and that reed canary grass grows in wetlands 67-99% of the time (Tr I, 78, 226; Tr II, 173-174; Tr IV, 146-147). Furthermore, cattails were viewed in pictures covering May 2006 through July 2008 giving evidence that despite defendant's actions of filling the area and mowing, the vegetation was still coming back each year (Tr I, 178-179, 182). Losee also testified that he did not see flowering cattails when he was there but the area had been mowed; another possibility was that it could be a hybrid cattail that flowers less then normal but such a determination is difficult without the flowers (Tr II, 213-215). Randy Carter, the Water Superintendant for the Village of Sparta testified that he *had* seen blooming cattails – with heads – in that area (Tr III, 46). The jury was given evidence explaining why the cattails were shown without having flowered in the pictures presented to them – manipulation of the landscape (mowing, plowing, etc) by defendant and his employees, or perhaps a hybrid species – and obviously accepted those explanations.

At trial, defense counsel made a point of asking certain witnesses what their definition of the terms "bog," "swamp," and "marsh," and whether they had viewed such a bog, swamp, or marsh on the property in question then argued below that, since these witnesses did not see what they commonly refer to as a bog, swamp, or marsh there, the prosecution had failed to present sufficient evidence of the location being a wetland. On appeal, the People cited to *People v Kozak,* unpublished opinion per curiam of the Court of Appeals, issued June 19, 2008 (Docket No. 272945), wherein a panel of this Court noted that it was not required to show the use of these terms by others to describe the property. Specifically, the panel stated:

> [I]t is immaterial that the words "bog," "swamp," or "marsh" were not explicitly used to describe the property. Furthermore, this is the only rational conclusion that can be drawn from the statute. The phrase "commonly referred to as a bog, swamp, or marsh" as used in the state to refer back to "land" is clearly intended to facilitate the ordinary reader's understanding of the *kind of* land involved. The Legislature did not intend it to mandate an inquiry into how a particular parcel of property is generally referred to in the community. [*Kozak, supra,* 2; emphasis in original, a copy of which is attached to this brief.]

Although an unpublished opinion of the Court of Appeals is not binding authority, it does represent how one panel dealt with a similar issue and, further, it was the only opinion the People located concerning such an argument. Regardless, the jury heard testimony that wetlands have wet and dry seasons, that the property in question held cattails and wetland grasses, saw pictures of the wetland in the wet season of May 2006, and heard testimony that the area was listed as a swamp or marsh on the Kent County REGIS map – an aerial photo with the Kent County wetlands information overlay on top – admitted, with defense counsel's approval, as PX 4 (Tr I 77-79, 81-84, 100, 102; Tr II, 165-167). Defendant himself referred to the area as his "wetland" and "vernal pond" – a type of wetland (Tr I, 97-98; Tr II, 249; Tr III, 11, 34). Williams, defendant's engineer during the construction process, testified that he became involved in the project because of concern of soft wet areas after a piece of equipment got stuck in the mud. Williams talked about soft wet areas, discovered by the firm, that vibrated when trucks crossed them (Tr I, 213-214). Therefore, the jury heard evidence demonstrating that the area held water at a frequency and duration necessary to support, under normal circumstances, the wetland vegetation repeatedly identified by expert testimony as cattails and canary reed grass – the type of land that holds water, that has soft wet spots to the point that equipment was sinking down into it. Furthermore, as noted above, and contrary to defendant's assertion in his brief (Defendant's Brief, 17), the jury heard evidence of the land's condition in 2006, not simply years earlier. All

of this evidence supports the jury's finding that the area in question was a wetland in 2006 before defendant altered it to build his parking lot. Any error in admitting the daily report as part of that evidence was harmless. *Lukity, supra.*

II. DEFENDANT WAS WAIVED HIS ARGUMENT CONCERNING THE DEFINITION OF "CONTIGUOUS" PROMULGATED BY THE DEQ BY AFFIRMATIVELY STATING TO THE CIRCUIT COURT, SITTING AS THE APPELLATE COURT IN THIS CASE, THAT HE WAS NOT MAKING SUCH AN ARGUMENT.

Standard of Review: During oral argument in Circuit Court on appeal, defendant noted that the statute does not define the term "contiguous" but, rather, the MDEQ adopted one, then stated:

> But my point is this: *And again, we're not making the argument, but I'm trying to clear the decks here, of what's not being made.* It's okay for the legislature to authorize an administrative agency to flesh out by formally adopted regulation, not guidance document, but formally adopted regulation, of statutes. ....
>
> ***
>
> *But we didn't make that argument.* We noted in the footnote, but we didn't make it, so I'm not going to drop it on anybody right now, except to point out that it's there and *it's not being made.* [August 28, 2009 Oral Argument, 11-12; emphasis added.]

Defendant made clear on appeal what arguments were *not* being made and this was one of them. Not only did trial counsel not make this argument so that the trial court could render a decision, appellate counsel specifically abandoned this argument so the appellate court likewise did not consider this issue. Defendant intentionally abandoned this argument; therefore, this issue has been waived. *Carter, supra*, 462 Mich at 214-215.

Discussion: Defendant argues that the definition of "contiguous" that appears within R 281.921(1)(b) is invalid (Defendant's brief, 26-29; issue VII(C)). As noted above, this issue has been waived. Regardless, the issue is without merit where even the usual and customary meaning of the word includes "nearby" despite defendant's argument to the contrary.

The People maintain that this issue was specifically abandoned by counsel during his appeal of right to the Circuit Court as quoted above. Regardless, even if this Court disagrees and, further, finds that the definition is unconstitutional or otherwise invalid, a new trial is not required. If the statute were left without the definition as promulgated by the MDEQ, the common meaning of the word "contiguous" includes "touching in contact ... being in close proximity without touching; near...." Random House Webster's College Dictionary (1997).[6] Contrary to defendant's assertion, "Nearby, which is all the prosecution proved ..." (Defendant's Brief, 29), is contiguous. [Further discussion regarding this rule and definition are discussed in Issue IV, *infra.*]

III. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY THAT WHERE SURFACE WATER WOULD NATURALLY FLOW BETWEEN A WETLAND AND STREAM AND REACH THAT STREAM, THE COLLECTION OF THAT SURFACE WATER INTO A DRAIN LEADING TO THE SAME STREAM IS NOT A DEFENSE.

Standard of Review: This Court reviews claims of instructional error de novo, reading the instructions as a whole to determine whether error requiring reversal occurred. *People v*

[6] This definition was quoted by another panel of this Court in *City/Village of Douglas v Von Der Heide,* unpublished opinion per curiam of the Court of Appeals, decided November 18, 2010 (Docket No. 292948), p 4 (attached).

McKinney, 258 Mich App 157, 162; 670 NW2d 254 (2003). Even if jury instructions were somewhat imperfect, reversal is not required if the instructions fairly presented the issues to be tried and were sufficient to protect the rights of the defendant. *People v Davis,* 199 Mich App 502, 515; 503 NW2d 457 (1993).

Discussion: Defendant argues that the trial court erred in instructing the jury regarding a "seasonal or intermittent direct surface water or groundwater connection" (Defendant's Brief, 32-35; issue VII (D). This argument lacks merit. The trial court appropriately instructed the jury that it would be a defense to defendant's charged offenses if the surface water would not have reached the stream without the assistance of man-made culverts or drains.

One way in which the prosecution could prove that the wetland in question was contiguous to the nearby stream, Rogers Drain, and thus subject to the regulations in MCL 324.30304, was to prove that there existed between the wetland and the stream a "seasonable or intermittent direct surface water connection ...." R 281.921(1)(b)(ii). During a motion for directed verdict, defendant argued that there is no direct connection to the stream because the water has to spill over into a catch basin and then drops down approximately six feet before hitting a drain that then connects with the stream (Tr III, 63). The prosecutor noted that defendant's exhibit D, a guidance document from the MDEQ, explained that "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" (Tr III, 68). Although without the force of law, the guidance document represents the MDEQ's interpretation of that rule and a "Court will generally defer to the construction of the statute or administrative rule given by the agency charged with administering it." *City of Romulus v Michigan Dept of Environmental Quality,* 260 Mich App 54, 65; 678

NW2d 444 (2003). Regardless, the circuit court correctly noted on appeal that the trial court judge essentially disregarded the guidance document and used a plain and ordinary meaning of "direct connection" when instructing the jury.

The trial court offered the parties the opportunity to suggest an instruction regarding the definition of surface water related to the alternative definition of contiguous in R 281.921(1)(b)(ii) – "seasonal or intermittent direct surface water connection" (Tr IV, 265). The following day, defense counsel indicated that he did not find anything that would be helpful regarding the definition (Tr V, 3). The prosecution suggested that the jury be instructed that "surface water means any water that would, under normal, natural circumstances, be surface water" (Tr V, 3). After further prompting by the trial court for some input, defense counsel reiterated his belief that water going into the drain before reaching the stream (Rogers Drain) is not a "direct" connection noting that it not only redirects the water but also collects it (Tr V, 7-8). The trial court then suggested that it instruct the jury "if the tube concentrates the normal flow of water to the point where it gets to the creek and it would not have in a natural form, that is something they can consider as to whether or not they have a direct connection, or if the tube redirects water that naturally does not flow into the creak to the creak, if they find that it's not been established beyond a reasonable doubt that the surface water would in fact go to the creek, I think that that is a defense, too" (Tr V, 9).

Ultimately, the trial court instructed the jury in part as quoted in defendant's brief, 32; however the trial court further explained:

> First element they've got to prove is that this is a wetland - - and I've given you a definition of wetland. 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 and the stream*, and then I just threw in the fact that now we've got some tubes in there, drains and culverts, 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. [Tr V, 81-82.]

The jury was instructed that in its natural state the water must have a direct connection with the stream meaning that it would have reached the stream regardless of any manmade structure. If, however, it only now reaches that stream because of the manmade structure, then it is not a direct connection and is not contiguous. This is an accurate statement of the law.[7] If surface water would have a seasonal or intermittent *direct* connection to a nearby body of water naturally, then the fact that it now reaches that same body of water through a drain or culvert does not alter the fact that a direct connection naturally exists. If it would not have that direct connection without the aid of manmade structures, then it does not fit within the definition.

Defendant also argues that even if this instruction is correct, there was no evidence that supported the jury's finding that the direct connection exists (Defendant's Brief, 35). As the People noted on appeal to the Circuit Court, Michael Williams, the engineer from Williams and Beck hired by defendant, testified that surface water from the area would have gone into Roger's Drain and Nash Creek naturally but that the construction on the land altered that (Tr I, 250).

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[7] Furthermore, to accept defendant's argument means that any defendant wishing to fill or construct on what would otherwise be a regulated wetland can elude enforcement simply by redirecting the surface water into a tube, culvert, or ditch before it reaches a nearby stream or other body of water because, in defendant's argument, that would exclude it from being a "direct" connection.

Williams further claimed that this construction in 1997 is what actually created the wetland but had no initial answer to the prosecution's following question concerning the fact that the National Wetlands Inventory done in the early 80's shows a wetland already in that area with practically the exact same contours as the current one (Tr I, 251). Todd Losee added to the testimony that if the pipe was not there, the surface water would nevertheless travel by surface to the stream (Tr II, 238-239). Defense witness Gary Voogt, an engineer who had been the village engineer, testified that originally the water from the area in question would have had a surface water connection with Rogers Drain (Tr III, 261). Therefore, contrary to defendant's assertion, the evidence of a natural direct connection between the wetland and Rogers Drain that was provided to the jury was greater than the "probably" evidence he cited.

IV. THE PLAIN LANGUAGE OF RULES 281.921(1)(B)(III) AND THEN RULE 281.924(4) SETS FORTH A PROCEDURE BY WHICH A LANDOWNER MAY CHALLENGE THE EXISTENCE OF A GROUND OR SURFACE WATER CONNECTION. DEFENDANT FAILED TO FOLLOW THAT PROCEDURE; THEREFORE, THE TRIAL COURT CORRECTLY LIMITED THE EVIDENCE AT TRIAL.

Standard of Review: Defendant's issue involves the interpretation of an administrative rule. Along with issues of statutory interpretation, issues involving the interpretation of administrative rules are reviewed de novo. *City of Romulus, supra,* 260 Mich App at 64.

Discussion: Defendant argues that the trial court erred in excluding defendant's evidence regarding a surface or groundwater connection from the wetland to the nearby stream. This argument lacks merit where defendant failed to follow the proper procedure and make a request,

as required by the plain language of the applicable rule, that the department determine whether such a connection exists. [This issue corresponds with defendant's issue VII (E).]

As first discussed in Issue I, the definition of "wetland" is provided by MCL 324.30301(p). Pursuant to the statute, "wetland" means "land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh ...." The definition goes on to require that the land also be either (*i*) "contiguous" to a Great Lake, Lake St. Clair, an inland lake or pond, or a river or stream, or fit into one of two (*ii* or *iii*) non-contiguous categories, which are not applicable to the present case. Therefore, if the wetland at issue was not contiguous to Rogers Drain, it would not be a wetland subject to MCL 324.30304, which prohibits defendant's activities of filling and constructing on the area without a permit. The term "contiguous" is defined by an administrative rule, R 281.921(1)(b).

Pursuant to MCL 324.30319(1), the Michigan Department of Environmental Quality (MDEQ) "shall promulgate and enforce rules to implement" the WPP. Such rules, properly promulgated and adopted pursuant to statutory authority, have the force and effect of law. *Danse Corp v City of Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002). R 281.921(1)(b) defined "contiguous" in relevant part as follows:

> (b) "Contiguous" means any of the following:
>
> (i) A permanent surface water connection or other direct physical contact with an inland lake or pone, a river or stream, one of the Great Lakes, or Lake St. Clair.
>
> (ii) A seasonal or intermittent direct surface water connection to an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair.
>
> (iii) A wetland is partially or entirely located within 500 feet of the ordinary high water mark of an inland lake or pond or a river or stream ... *unless it is*

determined by the department, pursuant to R 281.924(4)[8]*, that there is no surface water or groundwater connection to these waters.*[9] [Emphasis added.]

The version of R 281.924 applicable by stipulation to the offenses charged in this case included subsection (4), which stated,

> *Upon the request of a person who owns or leases a parcel of property or his or her agent*, the department shall determine if there is no surface or groundwater connection that meets the definition of "contiguous" under R 281.921(1)(b)(iii). The department shall make the determination in writing and shall provide the determination to the person making the request within a reasonable period of time after receipt of the request.

"Principles of statutory interpretation apply to the construction of administrative rules." *City of Romulus, supra,* 260 Mich App at 65 (internal citation omitted). The primary goal is to ascertain and give effect to the intent of the drafter and, if the language is unambiguous, the drafter is presumed to have intended the meaning expressed and the rule must be enforced as written. *Schumacher, supra,* 276 Mich App at 168; *City of Romulus, supra* at 65.

R 281.921(1)(b)(iii) plainly states that a wetland is contiguous to a stream if it is within 500 feet of that stream unless the department, i.e., MDEQ, has made a determination that there is no surface or groundwater connection. Pursuant to the plain language of then applicable R 281.924(4), the only time the MDEQ was required to make such a determination was when requested by the owner of the property or his agent to do so. Therefore, according to the plain language of R 281.921(1)(b)(iii), the wetland in question is "contiguous" if it is within 500 feet of Rogers Drain unless defendant had requested the department to make a further determination

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[8] R 281.921(1)(b)(iii) was corrected in 2008 to reference now R 281.924(5); however, at the time of trial, the rule referenced R 281.924(4), which had been renumbered R 281.924(5) effective December 1, 2006. The parties stipulated during trial to a change in the offense dates in order to accommodate the amendment of the rule.

[9] R 281.921(1)(b) also contains a subsection (iv), which is inapplicable to the present case.

regarding any surface or groundwater connection and the department thereafter found that none existed.

Defendant did not request any such determination by the MDEQ.[10] Instead, defendant attempted to introduce expert testimony and other evidence relating to surface and/or groundwater connections during his trial. Indeed the need for the rule's requirement that the department make the initial determination upon the request of the landowner is exemplified by defendant's trial. On the first day of trial, the prosecution was given what amounted to 252 pages of scientific data by defense counsel concerning this issue (Tr III, 81-82, 138) and, when confronted with the question of whether or not the rule allowed the introduction of this evidence where defendant did not follow the procedure outlined in the rule, the trial court noted the difficulty resulting from defendant not following the procedure and then attempting to admit at trial substantial information regarding whether a surface/ground water connection exists (Tr III, 129-130). There were a number of discussions regarding this issue before and during trial and the trial court did question whether the MDEQ would be required to make the determination regarding a surface or groundwater connection regardless of any request from the owner (Tr III, 51-61). The court noted that this was a criminal case and the prosecutor used an analogy of the requirement to file a notice of an alibi witness in an armed robbery case and the ability of the

[10] Defendant's argument that he did not have the right or ability to request the determination ignores the evidence presented demonstrating that defendant was in control. There was never any real argument below that defendant was somehow not responsible because he was only an officer or employee of his own company. Furthermore, defendant himself made sure the MDEQ knew who was in control but refusing to apply for a permit and, instead, telling a MDEQ employee that "his intent was to hire a PR firm, mount a publication relations campaign against the department, against the regulations, and that he had no intention of ever applying for a permit, that he would rather take it up through the court system and through a public relations campaign" (Tr II, 88).

court to exclude such evidence if the defendant failed to follow that procedure. Likewise, where defendant failed to make the request as required by the rule that the MDEQ make a determination as to a surface or groundwater connection, he gives up his right to argue at trial that such a connection does not exist (Tr III, 85). Specifically, the trial court found:

> So ... I think the way the rules are set up - - and they have a purpose, that is making sure both sides know what was done, what the results were so if it goes to court we don't have all kinds of new and extensive information being proffered and one side or the other not seeing it before the Court, I think you have to follow that particular procedure, and, consequently, that if you don't, that information that your own tests give is not admissible and, frankly, if you don't follow procedure, I don't think you can get into that as a defense .... [Tr III, 130.]

Furthermore, had defendant followed this procedure and been dissatisfied with the MDEQ's determination on the matter, the Legislature has provided a method of review. MCL 324.30319. The authority of the court to set aside a decision by the DEQ is limited to situations such as the department's decision not being supported by competent, material and substantial evidence on the whole, being an abuse of discretion, in violation of the constitution or statute, etc. MCL 24.306. The Legislature's adopted standard of review is reasonable given the expert knowledge necessary to make a proper determination. The department determines, at the request of the owner or agent, only whether a wetland may be exempt for technical reasons from the statutory prohibitions. The jury still determines whether or not the land is a regulated wetland.

As noted above, the trial court applied the plain language of rule 281.921(1)(b)(iii) and then rule 281.924(4) in limiting defendant's evidence regarding a surface or groundwater connection between the wetland in question and Rogers Drain. That plain language requires that a land owner or his agent request that the MDEQ make a determination as to whether such a connection exists; absent such a request, the department need not make the determination. The

resolution of this issue did not involve a non-binding guideline but, rather, the plain language of two rules that are binding as a matter of law. *Danse Corp, supra,* 466 Mich at 181.

Defendant argues that R 281.921(1)(b)(iii) creates an unconstitutional presumption. The People disagree; R 281.921(1)(b)(iii) is simply part of the legal definition of "contiguous." The rule requires the prosecution to prove beyond a reasonable doubt that the wetland in the present case is within 500 feet of Rogers Drain and also includes a method by which defendant could have requested that the department make a formal determination concerning the existence of a surface/groundwater connection. As in *People v Pegenau,* 447 Mich 278, 289; 523 NW2d 325 (1994), if anything, the language in R 281.921(1)(b)(iii) provides a possible affirmative defense, not a presumption. In fact, the language of the statute in *Pegenau, supra,* MCL 333.7531, specifically uses the words "presumed" and "presumption" yet our Supreme Court found no such presumption but a possible exemption to the statute. Defendant is lamenting the fact that the rule provides an opportunity for an owner to request a determination by the MDEQ as to whether a surface/groundwater connection exists; an opportunity he chose to forego.

V. DEFENDANT WAIVED HIS CLAIM THAT THE TRIAL COURT ERRED IN OMITTING *MENS REA* AS AN ELEMENT BY AFFIRMATIVELY ARGUING THAT *MENS REA* WAS NOT AN ELEMENT IN THESE CRIMES DURING THE OBJECTION TO TESTIMONY REGARDING DEFENDANT'S INTENT NOT TO EVER SEEK A PERMIT. REGARDLESS, THE CRIMES OF WHICH DEFENDANT WAS CONVICTED ARE STRICT LIABILITY CRIMES, AND THERE WAS, IN ANY EVENT, EVIDENCE ADMITTED SHOWING DEFENDANT KNEW WELL BEFORE THE CONSTRUCTION OF THE PARKING LOT THAT THE AREA WAS A WETLAND.

Standard of Review: Defendant did not request an instruction on *mens rea* and also affirmatively argued during the trial that *mens rea* is not an element of the crimes with which he was charged, agreed with the trial court that these are strict liability crimes, and when asked by the trial court whether he had any objections to the instructions as given, replied, "No" (Tr II, 89; Tr IV, 283; Tr V, 103). Expressions of satisfaction with the trial court's instructions constitute a waiver of any instructional error, *Carter, supra,* 462 Mich at 215. This issue has been waived.

Discussion: Defendant argues that the trial court and/or statute impermissibly excluded knowledge or *mens rea* from the crimes of which defendant has been convicted and that the trial court erred in not instructing the jury on *mens rea* (Defendant's Brief, 39-45). As noted above and explained further below, defendant has waived this issue. Regardless, defendant's argument lacks merit. MCL 324.30304 represents permissible regulation of natural resources, the violation of which is a strict liability crime. Furthermore, evidence was provided to the jury demonstrating defendant's knowledge long before his violations that the area in question is a wetland.

During trial, Kimberly Fish, the Assistant Division Chief for the Land and Water Management Division of the MDEQ testified about a meeting she attended in December 2007 at defendant's business that included several staff members of the MDEQ (Tr II, 84-86). Fish

explained that defendant showed them the property in question and told them that he intended to continue to expand his business, both the building and the parking lot, and "that his eventual intent was to place fill over the remaining area and expand his parking lot into that area" (Tr II, 87). At that time, the MDEQ staff explained to defendant that the department believed the area was regulated and that permits would be required to do the work he had already completed and also for any additional work he intended in the future; they also explained the printed application process (Tr II, 87). Defendant in turn indicated that "his intent was to hire a PR firm, mount a publication relations campaign against the department, against the regulations, and that he had no intention of ever applying for a permit, that he would rather take it up through the court system and through a public relations campaign" (Tr II, 88). When the prosecutor then inquired as to whether defendant indicated how much money he was willing to invest in a PR campaign, defense counsel objected and the trial court sustained the objection stating that the amount of money is not relevant (Tr II, 88-89). Defense counsel then requested to make a further comment, and stated, "I think we need to remember that this is a specific intent [sic] crime; that *the mens rae [sic] question of this kind is not - - not an element* ...." (Tr II, 89; emphasis added). Later, in a discussion regarding jury instructions, the trial court inquired about strict liability nature of the offenses and defense counsel answered, "Under to [sic] wetlands act it's strict liability, yes" (Tr IV, 283). And, finally, after the jury instructions were given, the trial court asked defense counsel whether there were any objections to the instructions as they were given to which defense counsel responded, "No" (Tr V, 103).

In *Carter, supra*, 462 Mich at 214-215, our Michigan Supreme Court discussed the difference between forfeiture of an issue and waiver:

> The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. *People v Carines*, 460 Mich 750, 762-765; 597 NW2d 130 (1999). Counsel may not harbor error as an appellate parachute. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995), quoting *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984). "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v Olano*, 507 US 725, 732-733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).
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> * * *
>
> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.' " *Carines, supra* at 762, n 7; 597 NW2d 130, quoting *Olano, supra* at 733; 113 S Ct 1770. It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." *Id.* "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *United States v Griffin*, 84 F 3d 912, 924 (CA 7, 1996), citing *Olano, supra* at 733-734, 113 S Ct 1770. Mere forfeiture, on the other hand, does not extinguish an "error." *Olano, supra* at 733, 113 S Ct 1770; *Griffin, supra* at 924-926.

As noted again by our Supreme Court in *People v Riley,* 465 Mich 442, 449; 636 NW2d 514 (2001), "When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal."

In the present case, defendant did not simply remain silent, harboring as an issue for appeal his "parachute" involving strict liability and *mens rea.* Defendant affirmatively argued in front of the jury that *mens rea* is not an element of the crimes with which he was charged and, again, affirmatively agreed with the trial court that these are strict liability crimes (Tr II, 89; Tr IV, 283). On appeal he is not then taking up as an issue an argument he failed to make; he is making the opposite argument to this Court than that which he made to the trial court. Accordingly, he has waived this issue. *Carter, supra; Riley, supra.*

Furthermore, even if this Court disagrees and considers the merits of this issue, as did the Circuit Court on appeal, defendant's arguments fail for two reasons: The statute involved is appropriately a strict liability statute and, regardless, the jury heard testimony demonstrating

defendant's knowledge before any construction that the area was a wetland, and his repeated and continued defiance after being given notice of the violations by the MDEQ.

In *Morissette v United States*, 342 US 246, 252-256; 72 S Ct 240; 96 L Ed 288 (1952), the United States Supreme Court recognized a category of "public welfare offenses" as strict liability offenses that "do not fit neatly" into the common-law offenses but stem from the need to regulate society after the Industrial Revolution. The Court explained:

> Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does not grave damage to an offender's reputation. [*Morissette, supra* at 255-256.]

In 2007, our Michigan Court of Appeals relied in part on the *Morissette* decision in determining that another part of the NREPA, MCL 324.16902, involving the disposal of scrap tires at an unlicensed collection site, represents such a "public welfare offense." *People v Schumacher,* 276 Mich App 165, 174-175; 740 NW2d 534 (2007). As noted by the Court in *Schumacher, supra* at 171, the NREPA "is a comprehensive statutory scheme containing numerous parts, all intended to protect the environment and natural resources of this state." Specific to the present case, our Legislature found that "wetland conservation is a matter of state concern since a wetland of 1 county may be affected by acts on a river, lake, stream, or wetland of other counties" and that the "loss of a wetland may deprive the people of the state of some or

all" of specific benefits such as flood and storm control, wildlife habitat, pollution treatment, erosion control, and sources of nutrients in water food cycles. MCL 324.30302. And, as in *Schumacher,* the violation of the statute in question in the present case results in only a misdemeanor conviction[11]. MCL 324.30316(2). Likewise, as with the statute involved in *Schumacher,* nothing in MCL 324.30304, prohibiting the activities in question in this case by stating, "a person shall not do any of the following ...", or in MCL 324.30316, providing the penalty for violations by stating, "[a] person who violates this part ...", depends on a person "knowingly" violating the terms of the statute. As in *Schumacher,* the statute involved in the present case identifies a strict liability "public welfare" offense.

Finally, the People note that even had it been error not to instruct the jury that the prosecution must prove that defendant knew or had reason to know that a wetland existed, defendant is unable to demonstrate that he was prejudiced where the jury heard testimony that defendant himself referred to the area as his "wetland," his "vernal pond," that the MDEQ notified defendant of the problem yet he continued with construction without a permit and, in fact, informed the MDEQ that he never intended to apply for a permit and intended[12] to fill in the

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[11] In contrast, *Liparota v United States,* 471 US 419; 105 S Ct 2084; 85 L Ed 2d 434 (1985) and *Staples v United States,* 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994), both deal with felonies, and the *Staples* Court used this distinction in its decision, without adopting a definitive rule, stating, "In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea.*" *Staples, supra,* 511 US at 618.

[12] Although not stated in the jury's presence, defendant's intent regarding his dealings with the MDEQ and his use of the property in question is perhaps best demonstrated by his reply on the record to the prosecution's plea offer, "I refuse to be subjugated by these kleptocrats" (Tr III, 158).

entire area in the future (Tr I, 76-77, 97; Tr II, 56-57, 87-88, 249; Tr III, 11, 34).[13] Despite the strict liability involved in this statute, ample evidence had been provided to the jury regarding defendant's prior knowledge that the area involved was a wetland.

The People maintain that this issue has been waived. Regardless, it lacks merit where the statute involved is a strict liability public welfare offense and where evidence was admitted demonstrating defendant's knowledge of the area being a wetland.

VI. THE WETLAND PROTECTION PART (WPP) OF THE MICHIGAN NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (NREPA) SPECIFICALLY SEPARATES "SOIL" FROM "MINERALS." THE TRIAL COURT CORRECTLY FOUND THAT THE DEFINITION OF "MINERAL" DOES NOT THEN INCLUDE "SOIL" SO THAT THE EXEMPTION OF MCL 324.30305(4)(A) REGARDING EXCAVATION FOR MINERAL OR SAND MINING IS INAPPLICABLE TO THIS CASE.

Standard of Review: Issues of statutory interpretation are reviewed de novo. *Schumacher, supra,* 276 Mich App at 168.

Discussion: Defendant argues that the trial court, and circuit court on appeal, erred in finding that the term "mineral," as used in MCL 324.30305(4)(a), does not include topsoil. This argument lacks merit. Beyond the trial court's consideration of a definition of mineral used in another part of the NREPA and an attorney general's opinion, the Wetlands Protection Part (WPP) also treats soil and minerals as separate substances. The trial court, therefore, correctly

[13] Defendant notes as evidence that he did not know of a wetland on his property that a wetlands assessment was completed by a neighbor purportedly showing a wetland stopping short of his property (Defendant's Brief, 45). A review of the record shows that Mr. Bradford was a prior owner of the property and that he specifically requested the assessment for the land to the south, and did not ask for a determination, of the land in question (Tr IV, 203, 231).

concluded that the term "mineral" does not include topsoil. [This issue corresponds with defendant's issue VII (G).]

MCL 324.30304 prohibits certain activities if done without a permit or other authorization under the WPP of the NREPA. However, the WPP notes an exemption from regulation where a wetland has been created incidentally as a result of certain activities. Specifically, MCL 324.30305(4) states in relevant part: "A wetland that is incidentally created as a result of 1 or more of the following activities is not subject to regulation under this part: (a) Excavation for mineral or sand mining, if the area was not a wetland before excavation. ..."

At trial, defendant sought to admit testimony that topsoil had been excavated from the area in question in the past, changing it from a non-wetland to a wetland (Tr IV, 54-84). Defendant argued that a dictionary definition of "mineral" includes topsoil (Tr IV, 56-57). The prosecutor responded that soil was excluded from the first definition given in the dictionary and, further, quoted for the trial court language from a guidance document from the MDEQ Land and Water Management Division that gives a specific definition of mineral or sand mining in relation to this statute - "for purposes of this subsection, mineral or sand mining refers to commercial extraction of coal, gypsum, stone, gravel, metallic ore, material minded for its metallic content or sand from natural deposits. Mineral or sand mining does not include extraction of clay, soil, marble, or peat" (Tr IV, 58-60). As noted above, although the guidance document does not have the force of law, it does represent the MDEQ's interpretation of the statute and a "Court will generally defer to the construction of the statute or administrative rule given by the agency charged with administering it." *City of Romulus,* 260 Mich App 65.

The prosecutor also provided the trial court with an attorney general's opinion involving a separate part of the NREPA that deals with soil erosion and sedimentation control in which the

attorney general opined that topsoil was not included in the definition of "mineral" so as to exclude its excavation from regulation under that part. See Mich Op Atty Gen Opinion No. 6937 (Issued April 7, 1997), attached to this brief for the Court's review. MCL 324.63101(g) defines "mineral" as being "any substance to be excavated from the natural deposits on or in the earth for commercial, industrial, or construction purposes, including gypsum, limestone, dolostone, sandstone, shale, metallic mineral, or other solid materials. However, mineral does not include clay, gravel, marl, peat" or particular categories of sand or non-ferrous metallic mineral.[14] The attorney general noted that the exception from regulation for mining should be narrowly constructed and opined that topsoil was more akin to the excluded items of clay, gravel, marl, peat, and sand than to an inorganic substance. The trial court accepted the definition of mineral in MCL 324.63101(g) as well as the reasoning of the attorney general's opinion in finding that the excavation of topsoil does not fit within the language of MCL 324.30305(4)(a) (Tr IV, 79-81).

Defendant argued on appeal that it was error for the trial court to consider the definition provided in MCL 324.63101(g) because it is not with the wetland protection part of the NREPA; however, our Supreme Court has instructed:

> Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other. [*State Treasurer v Schuster,* 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Michigan Bell*, 374 Mich 543, 558; 132 NW2d 660 (1965).]

[14] It appears that MCL 324.63101 was amended in 2004 to include additional substances in the definition than those when the statute was interpreted by the attorney general; however, the amendment did not change any language that would alter the reasoning of the attorney general's opinion. See statutory language within the attorney general's opinion, pg 2.

As noted by our Court of Appeals, the "NREPA is a comprehensive statutory scheme containing numerous parts, all intended to protect the environment and natural resources of this state. *Schumacher, supra,* 276 Mich App 171. Therefore, the statutes are in pari materia and it was appropriate for the trial court to consider the definition of "mineral" in another part of the NREPA in making its determination as to whether "mineral" includes "topsoil."

Regardless, most importantly, the People noted on appeal further support for the trial court's finding in the WPP itself. The Circuit Court on appeal agreed and found that the plain language of the WPP supports the trial court's decision. In at least two sections of the WPP, the Legislature specifically listed soil and minerals as separate, distinct substances. MCL 324.30304 includes as a prohibited activity, "(b) Dredge, remove, or permit the removal of soil or minerals from a wetland." Furthermore, MCL 324.30316(4) provides that in ordering the restoration of a wetland, such "restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals." The word "or" is generally used in a statute to express an alternative or to provide a choice between two or more things. *Township of Yankee Springs v Fox,* 264 Mich App 604, 608; 692 NW2d 728 (2004). The Legislature demonstrated in the WPP that it considered "soil," "minerals," and "sand," to be separate substances and that it would specifically include "soil" where intended; therefore, its exclusion of "soil" from MCL 324.30305(4)(a) and inclusion of only "mineral" or "sand" mining further supports the trial court's finding that topsoil is not included in the plain meaning of "mineral" as used in the WPP.

VII. THE TRIAL COURT APPLIED THE PLAIN LANGUAGE OF THE STATUTES IN QUESTION IN WAYS ENTIRELY FORESEEABLE; THERE WAS NO RETROACTIVE APPLICATION INVOLVED IN THIS CASE.

Standard of Review: Defendant's final argument that the trial court's rulings represent a first time interpretation of a statute that cannot be applied to him in the present case is a question of law, which is reviewed de novo. *Schumacher, supra,* 276 Mich App 168.

Discussion: Defendant argues that the trial court's rulings, even if correct, represent a first-time interpretation of the statutes involved so that none of these interpretations can be applied to his present case (Defendant's Brief, 49-53 – issue VII (H)). This argument lacks merit. Defendant's reliance on *People v Marshall,* 362 Mich 170; 106 NW2d 842 (1961) is misplaced. *Marshall, supra* at 173-174, concerned an attempt by the prosecution to extend a theory of manslaughter "born out of necessity" to permit the conviction of an owner of a vehicle who lends his vehicle to a drunk driver who is then involved in a fatal accident. In contrast, as explained during the discussions of Issues I-VI, the present case involves the application of the plain language of statutes in the WPP and related administrative rules to defendant's actions; such application is entirely foreseeable. *People v Doyle,* 451 Mich 93, 103-104; 545 NW2d 627 (1996). Defendant's citation to *People v Dempster,* 396 Mich 700; 242 NW2d 381 (1976) does not alter the language of *Doyle, supra.* The fact that this was a case involving a statute with which the trial court had little to no experience and, so, took time in ensuring the provisions were applied correctly does not equate to the statutes and administrative rules being ambiguous. In each issue, defendant has either waived his claim of error or the issue is resolved by the application of the plain language of the statutes and rules. In either case, reversal is not required or appropriate.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the convictions and sentence entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

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Dated: April 4, 2011

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