

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

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

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF QUESTIONS PRESENTED iv

STATEMENT OF FACTS1

ARGUMENT.....5

 I. Where surface waters stemming immediately from a wetland seasonally or intermittently connect with a river, stream, inland lake or pond, there is a direct surface water connection between the wetland and the body of water satisfying the definition of contiguous and requiring regulation of that wetland. Therefore, the trial court did not expand the definition of contiguous beyond the scope of the statute and administrative rule where the court instructed the jury that the movement of surface water through a drain was no defense where the surface water would naturally flow between the wetland and stream.....5

 II. The trial court’s instruction regarding direct surface water connection was a more narrow definition that what is required of the statute; therefore, any unforeseen judicial action was to defendant’s possible benefit and not a violation of due process17

RELIEF REQUESTED18

INDEX OF AUTHORITIES

Cases

<i>City of Romulus v Michigan Dept of Environmental Quality</i> , 260 Mich App 54; 678 NW2d 444 (2003).....	6, 7
<i>Danse Corp v City of Madison Heights</i> , 466 Mich 175; 644 NW2d 721 (2002)	8
<i>Fenmode Inc v Aetna Casualty & Surety Co of Hartford Conn</i> , 303 Mich 188; 6 NW2d 479 (1942).....	11, 13
<i>Malcolm v City of East Detroit</i> , 437 Mich 132; 468 NW2d 479 (1991)	10
<i>People v Dempster</i> , 396 Mich 700; 242 NW2d 381 (1976)	17
<i>People v Doyle</i> , 451 Mich 93; 545 NW2d 627 (1996)	17
<i>People v Kowalski</i> , 489 Mich 488; 803 NW2d 200 (2011).....	5
<i>People v Peltola</i> , 489 Mich 174; 803 NW2d 140 (2011)	6, 7
<i>People v Taylor</i> , 493 Mich 1015; 829 NW2d 870 (2013)	4, 5
<i>People v Taylor</i> , unpublished opinion per curiam of the Court of Appeals, decided May 22, 2012 (Docket No. 295275).....	4
<i>People v Wilder</i> , 485 Mich 35; 780 NW2d 265 (2010)	17
<i>Robinson v Detroit</i> , 462 Mich 439; 613 NW2d 307 (2000)	7, 9

Statutes

MCL 324.30301	7, 18
MCL 324.30301(1)(m).....	4, 5, 7
MCL 324.30302	11
MCL 324.30304	3, 8
MCL 324.30319	8

Other Authorities

Merriam-Webster Dictionary. Merriam-Webster.com website: <http://www.merriam-webster.com/dictionary/>.....9

Rules

R 281.921..... passim

Treatises

2A Sands, Sutherland Statutory Construction (4th ed).....10

STATEMENT OF QUESTIONS PRESENTED

I. WHERE SURFACE WATERS STEMMING IMMEDIATELY FROM A WETLAND SEASONALLY OR INTERMITTENTLY CONNECT WITH A RIVER, STREAM, INLAND LAKE OR POND, THERE IS A DIRECT SURFACE WATER CONNECTION BETWEEN THE WETLAND AND THE BODY OF WATER SATISFYING THE DEFINITION OF CONTIGUOUS AND REQUIRING REGULATION OF THAT WETLAND. THEREFORE, DID THE TRIAL COURT EXPAND THE DEFINITION OF CONTIGUOUS BEYOND THE SCOPE OF THE STATUTE AND ADMINISTRATIVE RULE WHERE THE COURT INSTRUCTED THE JURY THAT THE MOVEMENT OF SURFACE WATER THROUGH A DRAIN WAS NO DEFENSE WHERE THE SURFACE WATER WOULD NATURALLY FLOW BETWEEN THE WETLAND AND STREAM?

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

II. WHERE THE TRIAL COURT'S INSTRUCTION REGARDING DIRECT SURFACE WATER CONNECTION WAS A MORE NARROW DEFINITION THAT WHAT IS REQUIRED OF THE STATUTE AND OF POSSIBLE BENEFIT TO DEFENDANT, DID THE INSTRUCTION DEPRIVE DEFENDANT OF DUE PROCESS?

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

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 23, 2006, Robert Day of the Michigan Department of Environmental Quality (MDEQ) received an anonymous tip from a concerned citizen that wetlands were being filled on defendant Alan Taylor's business property, known as Hart Enterprises. The citizen was concerned about the flooding impact along nearby Nash Creek (Tr I, 74). Day spoke with Steve Gladu from Hart Enterprises 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 what appeared to be a stream – Rogers Drain¹ – adjacent to the wetland (Tr I, 77, 89). Day informed Gladu that there could be a problem but that he would need to do further investigation and research (Tr I, 77). After further investigation, Day determined that the area was a regulated wetland and spoke with defendant in June 2006 about the parking lot and what appeared to be a violation of the Wetlands Protection Act (Tr I, 97).² Defendant disagreed that Rogers Drain was a stream or that the area was a wetland, calling the area a “vernal pond” that would hold water in the spring but then dry out (Tr I, 97-98). At trial, Day explained that a vernal pond is a type of wetland (Tr I, 98).

¹ Rogers Drain flows north to Nash Creek, which is a major creek that runs through the Village of Sparta before emptying into the Rogue River; the Rogue River empties in the Grand River, which then connects to Lake Michigan (Tr I, 91-92; 147).

² Day was appalled that the asphalt had been put down *after* his initial notification that the area appeared to be a wetland, and that he would conduct further research then contact them (Tr I, 77, 113).

After the conversation, defendant denied Day further access to the property. Day visited neighboring properties multiple times, including June/July 2006 and March 2007, to try to determine the size of the violation and to continue his observations of the wetland (Tr I, 98-100, 107-108). Before October 2007, Day and Luis Saldavia from the MDEQ met with defendant and one of his associates; also included in the meeting were Senator Wayne Kuipers, one of the Senator's aides, two individuals from the Michigan Economic Development Corporation, and defendant's consultant Timothy Bureau (Tr I, 115-116). Day told defendant during that meeting that there was a way for defendant to expand his business and also protect the functions and values of the wetland; he could apply for a permit, which would allow defendant's expansion into the wetland in one location while he built a wetland to replace it in a different location (Tr I, 116-117). Defendant indicated that he had no intention of applying for a permit and that he would rather spend \$100,000 in court than to do so (Tr I, 117).

Ultimately, the MDEQ obtained a search warrant to continue their investigation and executed the search in October 2007 (Tr I, 107-108, 120). Along with Day, a group of individuals from the MDEQ conducted the search, including James Sallee, a MDEQ soils expert; Matthew Occhipinti, a MDEQ flood plain engineer; Chad Fizzell, a MDEQ geographical information aerial photograph expert; Chuck Dodgers, a MDEQ employee; and Todd Losee, a MDEQ wetlands ecology specialist (Tr I, 107; Tr II, 95, 101, 120, 163-164). Their findings only further cemented the MDEQ's conclusion that the area in question is a regulated wetland. In December 2007, Kimberly Fish, the Assistant Division Chief for the Land and Water Management Division of the MDEQ, along with her supervisor, Elizabeth Brown, and Brown's supervisor, Jim Seigo, the Deputy Director of the MDEQ, met with defendant (Tr II, 84, 86). Defendant showed them the property and explained his intent to continue to expand his business,

both the building and the parking lot, and eventually place fill over the remaining area (Tr II, 87). Fish told defendant that the MDEQ believed the area was regulated, that permits would be required to do the development and explained the application process at which point defendant informed her that he had no intention of ever applying for a permit (Tr II, 88).

Thereafter, 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 the 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 trial court sentenced defendant to pay fines and costs of \$8,500 and to “restore the wetlands to as closely as possible to the same condition they were in before the violations” but the trial court did not require that the wetlands be restored under the parking lot, instead the court ordered that wetlands of the same size lost be created in an acceptable location on the property (Sentencing, 20-21). Defendant’s sentence has been stayed pending the present appeal (District Court Register of Actions).

Defendant appealed his convictions to the Kent County Circuit Court on November 4, 2008. Oral arguments were heard August 28, 2009, and the circuit court affirmed defendant’s convictions by written opinion (attached to Defendant’s Application as appendix B).

The Court of Appeals considered this case as on leave granted pursuant to an October 26, 2010 order from this Court. Oral arguments were heard on November 9, 2011, and the Court of Appeals affirmed defendant’s convictions on May 22, 2012. *People v Taylor*, unpublished

opinion per curiam of the Court of Appeals, decided May 22, 2012 (Docket No. 295275) (attached to Defendant's Application as appendix A).

In an Order dated May 3, 2013, this Court directed the Clerk to schedule oral argument on whether to grant the application or take other action and, further, directed the parties to submit supplemental briefs addressing "whether 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 281.921(1)(b)(ii), and, if so, whether that expansion constituted an unforeseeable judicial enlargement of a criminal statute that deprived the defendant of due process." *People v Taylor*, 493 Mich 1015; 829 NW2d 870 (2013).

Further necessary facts will be discussed within the argument section.

ARGUMENT

I. WHERE SURFACE WATERS STEMMING IMMEDIATELY FROM A WETLAND SEASONALLY OR INTERMITTENTLY CONNECT WITH A RIVER, STREAM, INLAND LAKE OR POND, THERE IS A DIRECT SURFACE WATER CONNECTION BETWEEN THE WETLAND AND THE BODY OF WATER SATISFYING THE DEFINITION OF CONTIGUOUS AND REQUIRING REGULATION OF THAT WETLAND. THEREFORE, THE TRIAL COURT DID NOT EXPAND THE DEFINITION OF CONTIGUOUS BEYOND THE SCOPE OF THE STATUTE AND ADMINISTRATIVE RULE WHERE THE COURT INSTRUCTED THE JURY THAT THE MOVEMENT OF SURFACE WATER THROUGH A DRAIN WAS NO DEFENSE WHERE THE SURFACE WATER WOULD NATURALLY FLOW BETWEEN THE WETLAND AND STREAM.

Standard of Review

This Court has directed the parties to address “whether 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 281.921(1)(b)(ii), and, if so, whether that expansion constituted an unforeseeable judicial enlargement of a criminal statute that deprived the defendant of due process.” *People v Taylor*, 493 Mich 1015; 829 NW2d 870 (2013). This Court reviews claims of instructional error de novo, reading the instructions as a whole to determine whether error requiring reversal occurred. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011), reh den 490 Mich 868 (2011). 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. *Id.* at 501-502.

This issue involves the interpretation of a statute and an administrative rule. Issues of statutory interpretation are reviewed de novo, *People v Peltola*, 489 Mich 174, 178; 803 NW2d 140 (2011), as are issues involving the interpretation of administrative rules, *City of Romulus v Michigan Dept of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003).

Argument Summary

One way in which a wetland can be “contiguous” to a stream is when there is a “direct surface water connection” to the stream, even when such connection is only seasonal or intermittent. The common definition of “direct” includes “stemming immediately from a source” meaning that, at times, the surface waters of a wetland would flow immediately from the wetland to the stream. A man-made ditch draining the surface water into a pipe before it reaches the stream is a direct surface water connection where such waters immediately, albeit intermittently, flow to the stream from the wetland. Indeed, the statute does not specify that the connection must be a natural one. Nevertheless, the trial court 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, i.e., naturally. Arguably, these instructions were a more narrow reading of the definition than was intended by the statute and administrative rule, not an expansion. Therefore, the trial court’s instructions requiring a natural surface water connection did not expand the definition of “contiguous” beyond a reasonable scope of the statute and administrative rule.

Legal Principles

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Peltola, supra*, 489 Mich at 181; *City of Romulus, supra* at 65. The most reliable indicator of that intent is the words used and this Court interprets “those words in light of their ordinary meaning and their context within the statute and read[s] them harmoniously to give effect to the statute as a whole.” *Peltola, supra*. Where a word has not acquired a unique legal meaning, it is appropriate to consult a dictionary for its common definition. *Robinson v Detroit*, 462 Mich 439, 456 n 13; 613 NW2d 307 (2000) (internal citations omitted). These “[p]rinciples of statutory interpretation [also] apply to the construction of administrative rules.” *City of Romulus, supra*, 260 Mich App at 65 (internal citation omitted).

Relevant Statutory and Administrative Rule Language

MCL 324.30301(1)(m)³ 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, and which is any of the following:

- (i) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.⁴

³ MCL 324.30301 has been amended, resulting in the definition of “wetland” being found now in MCL 324.30301(1)(m) rather than MCL 324.30301(p); both parties have cited to the (p) in earlier filings.

⁴ The definition also includes 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 not defined by the statute but by an administrative rule, R 281.921(1)(b).⁵

R 281.921(1)(b) defines "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 pond, 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(5), that there is no surface water or groundwater connection to these waters.⁶ [Emphasis added.]

At issue in the present case is the meaning of "direct surface water connection" as it is used in the definition of "contiguous." 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 – Rogers Drain (Tr III, 63). The rule does not define the word "direct" used in (b)(ii) and, while "surface water" has been defined in case law, what would

⁵ 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).

⁶ R 281.921(1)(b) also contains a subsection (iv), which is inapplicable to the present case.

constitute a “direct” connection has no special legal meaning. Therefore, it is appropriate to consult a dictionary for the common meaning of the word “direct.” *Robinson v Detroit, supra*.

Dictionary Definition of “Direct”

Merriam-Webster’s Dictionary defines “direct” in its adjective form as follows:

1 : having or being motion in the general planetary direction from west to east : not retrograde

2a : *stemming immediately from a source* <direct result> b : being or passing in a straight line of descent from parent to offspring : lineal <direct ancestor> c : having no compromising or impairing element <a direct insult>

3a : proceeding from one point to another in time or space without deviation or interruption : straight <a direct line> b : proceeding by the shortest way <the direct route>

4: natural, straightforward <a direct manner>

5a : marked by absence of an intervening agency, instrumentality, or influence <making direct observations of nature> b : effected by the action of the people or the electorate and not by representatives <direct democracy> c : consisting of or reproducing the exact words of a speaker or writer <a direct quotation>

6: characterized by close logical, causal, or consequential relationship <direct evidence>

7: capable of dyeing without the aid of a mordant [“direct.” *Merriam-Webster Dictionary*. Retrieved June 13, 2013, from Merriam-Webster.com website: <http://www.merriam-webster.com/dictionary/direct>. Emphasis added.]

“Stemming immediately from a source” is the most relevant definition

Given the Legislative purpose in enacting the Natural Resources and Environmental Protection Act (NREPA) and the specific Legislative findings related to the Wetland Protection Act (WPA) portion of the NREPA, “stemming immediately from a source” is the most

appropriate common definition of “direct” to apply to the language of R 281.921(1)(b)(ii). The preamble to the Natural Resources and Environmental Protection Act (NREPA) states:

AN ACT to protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to protect the people's right to hunt and fish; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, assessments, and donations; to provide certain appropriations; to prescribe penalties and provide remedies; and to repeal acts and parts of acts.

“Although the preamble is not to be considered authority for construing an act, it is useful for interpreting its purpose and scope.” *Malcolm v City of East Detroit*, 437 Mich 132, 143; 468 NW2d 479 (1991), citing 2A Sands, Sutherland Statutory Construction (4th ed), § 47.04, pp 126-128. 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.

In enacting the WPA portion of NREPA, the Legislature specifically found in relevant part that:

- (a) 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.
- (b) A loss of a wetland may deprive the people of the state of some or all of the following benefits to be derived from the wetland:
 - (i) Flood and storm control by the hydrologic absorption and storage capacity of the wetland.
 - (ii) Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.
 - (iii) Protection of subsurface water resources and provision of valuable watersheds and recharging ground water supplies.

(iv) Pollution treatment by serving as a biological and chemical oxidation basin.

(v) Erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

(vi) Sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish. [MCL 324.30302(1).]

As recognized by our Legislature and highlighted during the trial in this case, the statutes and regulations regarding wetland protection are necessary because what one person does on his or her property to affect water quality affects the rest of the public (MCL 324.30302(1)(a); Tr I, 85). A wetland along a river or stream acts as a sponge to absorb flood waters and release them slowly; in the present case, the wetland is next to a stream and will collect rain water, i.e., surface water, and release it slowly into the ground or through evaporation, which helps with flooding (Tr I, 86). As this Court has stated in the past, “surface waters are commonly understood to be waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence.” *Fenmode Inc v Aetna Casualty & Surety Co of Hartford Conn*, 303 Mich 188, 192; 6 NW2d 479 (1942). Such waters only lose their character as surface waters by “percolation, evaporation or by reaching some definite watercourse or substantial body of water in which they are accustomed to and do flow with other waters.” *Id.*

To best control the water quality in an area, wetlands should be regulated where surface waters stemming immediately from that wetland connect to an inland lake, pond, river or stream. In such cases, the quality of the water coming from the wetland will have an immediate impact on the larger system. For instance, where the water on defendant’s property is not allowed to remain in the wetland for the time it takes to purify the water before any overflow connects to Rogers Drain, then the water that ends up in Rogers Drain is more polluted (Tr II, 193-194).

Furthermore, in such cases, the ability of the wetland to slow surface waters and allow for absorption and evaporation can greatly affect the likelihood and severity of flooding. In contrast, where a wetland is free-standing, i.e., without a surface water connection, or where that connection is so far removed that it is unclear whether the wetland's surface waters flow into a particular lake or stream, then those waters do not stem immediately from the wetland and there is no direct surface water connection.

Defendant's argument below was that there can be no direct surface water connection because the addition of a catch basin, drain, or culvert necessarily changes any direct connection to an indirect connection (Defendant's Application for Leave to Appeal, 33-34). While the addition of a drain or culvert may alter the route of the surface waters, such alteration may be the shortest way – another definition of “direct” – as opposed to a long winding natural flow over the landscape. The addition of a drain or culvert does not “compromise or impair” the surface water connection. Indeed, where surface water only reaches a lake or stream because of a drain or culvert, it may create a direct surface water connection. Even where surface waters from a wetland *only* reach a particular stream or lake because of a drain or culvert, where those waters stem immediately from that wetland and connect seasonally or intermittently with the stream or lake, those waters can greatly impact the water quality of the larger body of water; that the connection is man-made rather than natural does not safeguard the surrounding land from pollution if that wetland is destroyed. To accept defendant's argument that a direct surface water connection requires surface water running straight to a lake or stream without any change in course by man-made implements in today's world of necessary drains and culverts – necessary because we require unimpeded travel throughout our state – would defeat the overall purpose of the act. To escape prosecution for wetlands violations, a defendant need only alter the course of

the surface waters on his property; under defendant's interpretation, such alteration changes the direct connection to an indirect connection.

It is important to ensure that the surface waters connecting to a lake, river, or stream stem immediately from the wetland in question so that regulation can have the best impact on the quality of our waters and environment. The use of the "stemming immediately from a source" definition of "direct" best accomplishes the purpose of the NREPA and WPA where the waters that would reach the larger system from the wetland are the same whether traveling over land or through a drain. The surface waters do not lose their character by traveling underground. *Fenmode Inc, supra*. In contrast, where a defendant can escape regulation and destroy wetlands by simply diverting the route of the surface water on his property, the intent and purpose of the NREPA is largely defeated.

Application to the Present Case

When determining how to instruct the jury regarding the alternative definition of contiguous in R 281.921(1)(b)(ii) – "seasonal or intermittent direct surface water connection" – the trial court offered the parties the opportunity to suggest a definition for "surface water" (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 creek to the creek, 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 relevant part as follows:

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 *has a seasonal or intermittent direct surface water connection to the stream in question*. Seasonal or intermittent means it doesn't have to be there all the time but that at some time during the year *there must be a direct surface water connection between the wetland and the stream*. That's one definition of contiguous that the - - if the prosecutor establishes beyond a reasonable doubt that would require any placing of fill to be - - you'd have to get a permit from the DEQ to do it. So first thing the prosecutor has to prove the wetland; second, that this wetland is regulated because it's contiguous to the stream in question, meaning that it has a seasonal or intermittent direct surface water connection to the stream.

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, I think 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 seasonally, 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 ground in the culvert that doesn't change the nature from surface water to subsurface water or whatever the definition is where you're talking about water naturally trapped under the ground by dirt or clay. So basically I've 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 there for 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.

If in its natural state it doesn't get to 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 it to 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.

.... 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, 79-82.]

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 man-made structure. If, however, it only now reaches that stream because of the man-made structure, then it is not a direct connection and is not contiguous. Under the definition of "direct" submitted above

using the common definition of direct as “stemming immediately from a source,” the trial court’s instruction was not an expansion of the definition of “contiguous” at all but, rather, a more narrow definition than required.

A correct instruction would have been that the prosecution must prove beyond a reasonable doubt that there is a seasonal or intermittent direct surface water connection with the stream. “Seasonal or intermittent” meaning that it need not be permanent but at some point during the year, there is a direct surface water connection. “Surface water” meaning waters commonly understood to be on the surface of the ground, usually created by rain or snow, lost only to percolation, i.e., absorption into the ground, evaporation or by reaching a watercourse or substantial body of water. “Direct” meaning that the waters reaching the stream must be surface waters stemming immediately from the wetland in question. If, for instance, the prosecution does not prove that the surface waters stemming from the wetland connect to the stream, but, rather, are diverted elsewhere or simply never reach the stream, there is no direct surface water connection. Likewise, if the waters reaching the stream do not originate from the wetland, there is no direct connection.

Instead, the trial court, recognizing defendant’s argument that the collection of the surface water in the drain before flowing to the stream is not a direct connection, instructed the jury that if the surface water would not have a seasonal or intermittent direct connection to a nearby body of water naturally, without the aid of man-made structures, then it does not fit within the definition. In short, any error in the instruction was to defendant’s possible benefit, not detriment.

II. THE TRIAL COURT'S INSTRUCTION REGARDING DIRECT SURFACE WATER CONNECTION WAS A MORE NARROW DEFINITION THAT WHAT IS REQUIRED OF THE STATUTE; THEREFORE, ANY UNFORESEEN JUDICIAL ACTION WAS TO DEFENDANT'S POSSIBLE BENEFIT AND NOT A VIOLATION OF DUE PROCESS.

Standard of Review

Whether a defendant was deprived of due process is a constitutional question, which this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

Legal Principles

In *People v Doyle*, 451 Mich 93, 99-100; 545 NW2d 627 (1996), this Court noted that, while the Ex Post Facto Clause does not apply directly to the judiciary, ex post facto principles apply to the judiciary by analogy through the Due Process Clauses of the Fifth and Fourteenth Amendments. Because “an unforeseeable *judicial enlargement* of a criminal statute, applied retroactively, operates precisely like an *ex post facto law*,” a “retroactive application of an *unforeseeable* interpretation of a criminal statute, if detrimental to a defendant, generally violates the Due Process Clause.” *Id.* at 100 (emphasis in original; internal citations omitted). Where a judicial decision involves the interpretation of an *ambiguous* criminal statute, application of that statute retroactively would violate due process. *Id.* at 112, citing *People v Dempster*, 396 Mich 700; 242 NW2d 381 (1976). In contrast, where a judicial decision is based on the plain language of a statute, as enacted by the Legislature, such a decision is not “unforeseeable” and does not deprive a defendant of due process. *Id.* at 104, 113.

Application to the Present Case

As argued above, the trial court's instruction concerning the definition of "contiguous" did not expand that definition beyond the reasonable scope of MCL 324.30301(1)(m)(i) and Mich Admin Code, R 281.921(1)(b)(ii). The trial court instructed the jury that one way in which the prosecution could prove that the wetland in question is a regulated wetland is to prove that it has a seasonable or intermittent direct surface water connection with Rogers Drain (Tr V, 79). In interpreting the language "direct surface water connection," the common dictionary definition of "direct" most relevant to the use of the word in the rule is "stemming immediately from a source." This interpretation is based on the plain language of the administrative rule; therefore, it is not an expansion of the definition of "contiguous" at all.

Although the trial court's later explanation of "direct surface water connection" does not follow the above interpretation, the instruction given recognized defendant's argument that the wetland should not be found to be contiguous if the surface waters from the wetland only reached the stream because they drop and accumulate in a catch basin and drain. The trial court thereafter instructed the jury that they should only find that the wetland was contiguous under this portion of the rule if the surface waters would *naturally* have reached the stream without any man-made structure (Tr V, 80-82). The statute and rule do not require that the connection be a natural one. The trial court's instruction was a more narrow reading of the statute, not an expansion. Thus, any error in the instruction was to the possible benefit of defendant and did not deprive him of due process.

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: June 14, 2013

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